

# Section 1. - Sources of English Contract Law

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 1 - Contract Law and “Contracts”

Section 1. - Sources of English Contract Law

*Simon Whittaker*

## Contract law

As Sir Joseph Chitty observed, the law affecting commerce can be seen both in:

“... the law of nations [and] those municipal institutions of our own country, which are of a public and general nature, and which form the basis of that commercial intercourse which takes place between individuals”

and in the law:

“... which relates to commerce itself, strictly so called, as contradistinguished from those measures of state policy by which it is secured and protected.”<sup>1</sup>

In the modern law, it remains useful to distinguish between laws which create the legal environment within which parties conclude their contract (which may broadly be termed market regulation) and laws which relate specifically to the conclusion of contracts, their terms, the relative rights and obligations which they create and the remedies which arise on breach (contract law in the narrow and usual sense). The present work is principally concerned with contract law in this usual sense, but on occasion the wider regulatory framework is considered, particularly where the two sets of regulation are closely related.<sup>2</sup>

## The different sources of contract law

- 102 English contract law in this usual sense possesses four legal sources: common law, statute, international convention and (historically) EU law.<sup>3</sup>

### Footnotes

- 1 Sir J. Chitty (the elder, 1776–1841) *A Treatise on the Laws of Commerce and Manufactures and the Contracts Relating Thereto*, 1st edn (1824), Vol.III, p.5. This work preceded the first edition of the present work by Sir Joseph Chitty (the younger, died 1838) which was published in 1826.
- 2 See especially as regards consumer contracts on which see Vol.II, [Ch.40](#) and esp. paras [40-135—40-141](#) (enforcement of consumer information requirements); [40-166—40-222](#) (unfair commercial practices and consumer rights to redress); [40-440—40-451](#) (enforcement of law on unfair contract terms) and see *Whittaker (2017) 133 L.Q.R. 47* esp. at 66–72. See also Vol.II, para.[40-002](#) et seq.; (consumer credit) and para.[36-217](#) et seq. (banking).
- 3 On the sources of English law more generally see J. Bell, “The Sources of Law” in A. Burrows (ed.) *English Private Law*, 2nd edn (2007), Ch.1. In the case of EU law, its importance is as a source of English contract law while the UK was a Member State of the EU and also during the transition (“implementation”) period put in place by the Withdrawal Agreement between the UK and the EU. After this transition period ended on 31 December 2020 at 11.00pm, much of EU law was “retained” in the UK, though often subject to amendment by regulation. On this see below, paras [1-016](#) et seq.

## **(a) - The Common Law of Contract**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 1. - Sources of English Contract Law**

**(a) - The Common Law of Contract**

### **The common law's dominance of the general law**

<sup>103</sup> Writing in 1879 Sir William Anson observed:



“The law of contract so far as its general principles are concerned has been happily free from legislative interference: it is the product of the vigorous common sense of English judges.”<sup>4</sup>

The common law (including equity for this purpose) still provides the fundamental rules governing all aspects of the law applicable to contracts generally: English law has not adopted a contract law code nor a “Contract Act”.

<sup>5</sup>

**U** As a result, the common law governs the nature and definition of a contract (including the requirement of consideration<sup>6</sup>); the grounds of vitiation of contracts (mistake, misrepresentation, duress and undue influence<sup>7</sup>); the contents of contracts (the incorporation and construction of express terms and the finding of implied terms)<sup>8</sup>; the general framework treating illegal contracts and a good number of their examples<sup>9</sup>; performance and the grounds of discharge of contractual obligations<sup>10</sup>; the effects of contracts on third parties (privity of contract)<sup>11</sup> and the remedies available for breach of contract.<sup>12</sup> Within this wider common law picture, equity has had a fairly restrained impact, though it may be seen in the doctrine of undue influence<sup>13</sup> and in examples of

wider relief on the ground of unconscionability,<sup>14</sup> it has supplied the important (if fairly restricted) remedies of specific performance and injunction,<sup>15</sup> and it has allowed promissory and proprietary estoppel to qualify the doctrine of consideration and (sometimes) legislative requirements of formality.<sup>16</sup>

## Rules governing specific contracts

**D** 104 There is a much greater diversity in relation to the modern significance of the common law as regards the rules governing specific contracts as contrasted with the law governing contracts in general. In some contexts, the common law (sometimes supported or corrected by equity) still dominates the law governing the relationships between the contracting parties

<sup>17</sup>

**U** 1 : this is true, *inter alia*, of contracts of agency,<sup>18</sup> contracts of insurance<sup>19</sup> and contracts of suretyship,<sup>20</sup> even though even in these examples the law is sometimes supplemented or corrected by legislation. As will be seen, in other types of contract, the role of the common law has become much diminished, with legislation (whether national, international or EU in origin) becoming increasingly significant, especially as regards the regulation of the consequences of concluding a contract. Finally, in some types of contract, the regulation of the parties' relationship remains all but entirely in the hands of the parties themselves, who may for this purpose use standard contract terms, whether their own or ones drawn from industry practice.<sup>21</sup>

## Footnotes

4 Principles of the English Law of Contract and of Agency in Relation to Contract, 1st edn (1879), Preface.

5 Other common law systems have taken different paths, e.g. the Indian Contract Act of 1872 whose aim was "to bring the Indian Law of Contract, as far as might be, into harmony with the English Law on the same subject": *Patra* (1962) 4 *Journal of the Indian Law Institute* 373 at 394. In the 1960s and early 1970s work on drafting an English contract code was undertaken by the English and Scottish Law Commissions, but was later abandoned: see Law Com. No.1 (1965) 6; Law Com. No.4 (1966) 7; Law Com. No.50 (1972) 3. A draft was published by McGregor as A Contract Code Drawn up on Behalf of the English Law Commission (1993). See *Cartwright* (2009) 17 *Eur. Rev. Private law* 155, 168–169. The modern position of consumer contract law is more arguable as recent legislation has reframed a good deal of the law: see below, para.1-009 and Vol.II, Ch.40. See, however, Burrows, A

Restatement of the English Law of Contract, 2nd edn (2020) and Andrews, Contract Rules —Decoding English Law (2016).

6 Below, para.[1-031](#), and see Chs [4](#) and [6](#).

7 Below, Chs [5](#), [8](#), [9](#) and [10](#) respectively.

8 Below, Chs [15](#) and [16](#) respectively.

9 Below, [Ch.18](#).

10 Below, Chs [24](#) (Performance); [25](#) (Discharge by agreement); [26](#) (Discharge by frustration); [27](#) (Discharge by breach) and [28](#) (Other modes of discharge).

11 Below, Ch.[20](#).

12 Below, Chs [29](#) (Damages) and [30](#) (Action for the agreed sum, specific performance and injunction).

13 Below, para.[10-072](#).

14 Below, para.[10-161](#).

15 Below, Ch.[30](#).

16 Below, paras [6-093](#) et seq., [7-051](#) et seq.

•17 Here, there is an implicit distinction between the law governing the contract itself and the law governing the market context in which the contract is made: see above, para.[1-001](#). For example, the *business* of insurance is highly regulated by legislation, even though the law governing the relative rights of the parties to contracts of insurance remains dominated by the common law.

18 See Ch.[21](#).

19 See Vol.II, [Ch.44](#). In the case of insurance, this position has been qualified by recent legislation: [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) and [Insurance Act 2015](#), on which see Vol.II, paras [44-031](#)—[44-032](#), [44-046](#) et seq.

20 See Vol.II, [Ch.47](#).

21 See, in particular, as regards construction contracts: Vol.II, paras [39-020](#)—[39-024](#).

## **(b) - Statute**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 1. - Sources of English Contract Law**

**(b) - Statute**

### **Increasing importance of statute**

- 105 Statute (and statutory instruments) have become increasingly important in setting the law governing contracts, both in its broad sense of the regulation of markets and in the narrower sense of the law governing the relative rights and obligations of the parties and of third parties.<sup>22</sup> This has manifested itself in two principal ways.

### **General law**

- 106 Some important aspects of the general law of contract have been subject to change by statute, the legislation typically qualifying or supplementing the existing common law position rather than reforming or recasting a particular aspect of contract law systematically. This can be seen as regards the control of exemption clauses and certain related classes of unfair terms,<sup>23</sup> the law of misrepresentation,<sup>24</sup> the law governing the capacity of minors<sup>25</sup> and persons lacking the mental capacity to contract,<sup>26</sup> and the consequences of frustration.<sup>27</sup> Even the [Contracts \(Rights of Third Parties\) Act 1999](#) merely creates a new (if broad and important) exception to the common law doctrine of privity of contract.<sup>28</sup>

## Specific contracts

- 107 Statute has been much more important in the regulation of specific contracts. An old example may be found in the [Statute of Frauds of 1677](#), which imposed various requirements of form on particular types of contract, and while the Statute itself survives only as regards contracts of guarantee,<sup>29</sup> its provisions have had an important effect on the classification of contracts.<sup>30</sup> There were various statutes governing aspects of insurance contracts<sup>31</sup> and bills of sale<sup>32</sup> in the eighteenth and nineteenth centuries and, in the last quarter of the latter, a series of statutes which sought to “codify” the law governing particular types of contract, as in the case of bills of exchange,<sup>33</sup> contracts of partnership<sup>34</sup> and contracts for the sale of goods.<sup>35</sup> In the course of the twentieth century, important legislation was introduced governing, *inter alia*, contracts of tenancy,<sup>36</sup> contracts of employment<sup>37</sup> and contracts of consumer credit.<sup>38</sup>

## Consumer contracts: the earlier approach

- 108 Consumer contracts have long been the object of legislative intervention, with special rules governing exemption clauses,<sup>39</sup> unfair contract terms more generally<sup>40</sup> and aspects of particular types of consumer contract (such as consumer credit,<sup>41</sup> sale of goods,<sup>42</sup> package holiday contracts<sup>43</sup> or timeshare contracts<sup>44</sup>). There have also been information requirements for contracts concluded in certain circumstances (notably “doorstep selling”<sup>45</sup> and “distance contracts”<sup>46</sup>), with accompanying short-lived rights of cancellation for the consumer. Earlier legislation was scattered across a series of legislative instruments (some primary legislation, some secondary) and formed part of and/or overlapped with protective rules which could apply other than for the benefit of consumers.<sup>47</sup> Moreover, the key definitions of the person protected (the consumer) and the other party to the contract (the party acting in the course of business) differed between the various legislative instruments.<sup>48</sup>

## Consumer contracts: recent legislation

- 109 However, over the last decade legislation has sought to address the problems of inconsistency between consumer protection legislation and has also sought to mark a clear separation between legislation governing consumer contracts and legislation governing contracts more generally. The central pillar of this recast legislative framework is the [Consumer Rights Act 2015](#), whose most

important provisions provide for a set of statutory terms governing consumer “goods contracts”, “digital content contracts” and “services contracts” (with sets of special remedies for their breach) and which also provide for the control of unfair terms in all types of consumer contracts.<sup>49</sup> At the same time, the [2015 Act](#) amended earlier, more general, statutes (notably the [Misrepresentation Act 1967](#), the [Unfair Contract Terms Act 1977](#) and the [Sale of Goods Act 1979](#)) so that their provisions do not apply where the provisions of the [2015 Act](#) apply.<sup>50</sup> Moreover, other legislation has reshaped and extended earlier legislative controls so as to place *most* of the information duties on traders in a single set of statutory regulations<sup>51</sup> and to create new rights to redress for certain unfair commercial practices committed by a trader.<sup>52</sup> The overall result is the creation of a distinct and distinctive body of statutory law governing “consumer contracts” paralleling (but separated from) the law applicable more generally, whether statutory or common law.<sup>53</sup> Having said that, however, this body of consumer contract law by no means provides a complete legislative regime governing consumer contracts. First, a good deal of legislation specifically governing consumer contracts remains outside the three main relevant legislative instruments,<sup>54</sup> including the very important [Consumer Credit Act 1974](#)<sup>55</sup> and legislation governing consumer insurance contracts.<sup>56</sup> Secondly, even for those types of contract where the [Consumer Rights Act 2015](#) provides discrete rules (notably governing sales of goods to consumers), wider general legislation still applies to issues *not* regulated by those discrete rules.<sup>57</sup> And, thirdly, many issues arising between parties to a consumer contract (or a would-be consumer contract) are not governed by legislation at all and where this is the case the common law rules (whether applicable to contracts generally or to specific types of contract) apply. These relatively recent patterns of legislation governing consumer contracts are the subject of [Ch.40](#) in Vol.II of the present work.<sup>58</sup>

## Footnotes

- 22 Above, para.1-001 and see *Burrows (2012) 128 L.Q.R. 232.*
- 23 [Unfair Contract Terms Act 1977](#) and see below, paras 17-069 et seq.
- 24 [Misrepresentation Act 1967](#) and see below, paras 9-083—9-094; 9-112—9-118; 9-120—9-122; 9-157—9-161.
- 25 [Minors' Contracts Act 1987](#) and see below, paras 11-061—11-064.
- 26 [Mental Capacity Act 2005 s.7](#) and see para.11-097.
- 27 [Law Reform \(Frustrated Contracts\) Act 1943](#) and see below, paras 26-104—26-107.
- 28 [Contracts \(Rights of Third Parties\) Act 1999](#) and see below, paras 20-091—20-133.
- 29 See Vol.II, paras 47-043—47-062. Its provisions governing contracts for the sale or other disposition of an interest in land were replaced by [s.40 of the Law of Property Act 1925](#), itself replaced by [s.2 of the Law of Property \(Miscellaneous Provisions\) Act 1989](#), on which see below, paras 7-013 et seq. The [1677 Act](#)'s provision governing contracts for the sale of goods ([s.17](#)) was finally abolished by the [Law Reform \(Enforcement of Contracts\) Act 1954 s.4](#) (repealing [Sale of Goods Act 1893 s.4](#)).

- 30 Below, para.[1-054](#).
- 31 Life Assurance Act 1774, on which see Vol.II, paras [44-010](#), [44-014](#).
- 32 Bills of Sale Act 1878 (later amended).
- 33 Bills of Exchange Act 1882, see Vol.II, para.[36-006](#).
- 34 Partnership Act 1890.
- 35 Sale of Goods Act 1893 replaced by the [Sale of Goods Act 1979](#) on which see Vol.II, paras [46-001](#) et seq.
- 36 e.g. [Landlord and Tenant Act 1954](#).
- 37 Notably, Employment of Children Acts 1903 and 1973; Sex Discrimination Act 1975; Employment Protection Act 1975; Equal Pay Act 1970; Race Relations Act 1976. The law of discrimination was brought together in the [Equality Act 2010](#). On employment contracts generally see Vol.II, [Ch.42](#).
- 38 Consumer Credit Act 1974 (as amended by the [Consumer Credit Act 2006](#)): see Vol.II, paras [41-001](#) et seq.
- 39 Unfair Contract Terms Act 1977 ss.3–5, 6(2) and 7(2), 12 (as enacted) on which see below, paras [17-069](#) et seq.
- 40 Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).
- 41 See [Consumer Credit Act 1974](#) and Vol.II, [Ch.41](#).
- 42 See notably, Sale of Goods Act 1979 Pt 5A as inserted by [Sale and Supply of Goods to Consumers Regulations 2002](#) (SI 2002/3045).
- 43 Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) replaced by the Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634) (in force 1 July 2018) on which see Vol.II, paras [40-144](#)–[40-156](#).
- 44 Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) (replacing earlier provisions) on which see Vol.II, paras [40-157](#)–[40-163](#).
- 45 Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (SI 1987/2117).
- 46 Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334); Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) (on which see Vol.II, para.[40-143](#)).
- 47 This was notably the case as regards the [Misrepresentation Act 1967](#) and the [Unfair Contract Terms Act 1977](#).
- 48 A key example was the definition of a person “dealing as consumer” within the meaning of the [Unfair Contract Terms Act 1977](#) and “consumer” within the meaning of the [Unfair Terms in Consumer Contracts Regulations 1999](#): see below, para.[17-072](#).
- 49 See Vol.II, [40-460](#)–[40-592](#). The Consumer Rights Act 2015 Pts 1 and 2 came into force generally on 1 October 2015: see Vol.II, para.[40-241](#).
- 50 For the details see below, paras [17-071](#)–[17-074](#) and Vol.II, paras [40-230](#)–[40-238](#) and [40-472](#)–[40-478](#).
- 51 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) on which see Vol.II, paras [40-062](#) et seq.

- 52 Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) inserting, notably, new Pt 4A Consumers' Rights to Redress in [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#), on which see Vol.II, paras 40-166 et seq.
- 53 On the distinctive features of modern consumer contract law see *Whittaker* (2017) 133 *L.Q.R.* 47.
- 54 Consumer Protection from Unfair Trading Regulations 2008; Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; Consumer Rights Act 2015.
- 55 See Vol.II, Ch.41.
- 56 [Consumer Insurance \(Disclosure and Representations\) Act 2012](#); [Insurance Act 2015](#) and see Vol.II, paras 44-046 et seq.
- 57 See Vol.II, paras 40-473—40-478.
- 58 Vol.II, Ch.40.

## **(c) - International Convention**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 1. - Sources of English Contract Law**

**(c) - International Convention**

**Generally**

- )10 The UK has signed and ratified a number of international conventions which have required it to introduce into English law by statute sets of uniform rules governing aspects of certain types of contract. This can be seen in the case of international carriage of goods and passengers by sea,<sup>59</sup> international carriage by air<sup>60</sup> and international carriage by land.<sup>61</sup> While there is an United Nations Convention on Contracts for the international sale of goods, the UK has yet to ratify it.<sup>62</sup>

**European Convention on Human Rights**

- )11 The “bringing home” of the majority of rights protected by the European Convention on Human Rights and its protocols by the **Human Rights Act 1998** has implications for contract law, which will be discussed in Ch.3.<sup>63</sup>

**Trade and Cooperation Agreement**

)12



On 24 December 2020 the UK and the EU signed a Trade and Cooperation Agreement (TCA) to govern aspects of their relationship after the UK's departure from the EU,<sup>64</sup> some of whose provisions concern contract law.<sup>65</sup> While its provisions do not in themselves create private rights or obligations on persons not party to it,

<sup>66</sup>

 the UK implemented the agreement in domestic law by the [European Union \(Future Relationship\) Act 2020](#). The Act may require courts to give effect to existing domestic law so as to implement aspects of the TCA, as explained later in this chapter.<sup>67</sup>

## Footnotes

- <sup>59</sup> See notably Hague Rules and Hague-Visby Rules (goods) introduced into English law by the [Carriage of Goods by Sea Act 1971](#) (on which see below, para.[17-139](#)); Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (on which see Vol.II, para.[38-064](#)).
- <sup>60</sup> Vol.II, Ch.[37](#) commencing with the Warsaw Convention on International Carriage by Air of 1929.
- <sup>61</sup> Vol.II, para.[38-003](#), paras 38-079 et seq.
- <sup>62</sup> See Vol.II, para.[46-012](#).
- <sup>63</sup> Below, paras [3-099—3-138](#).
- <sup>64</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (24 December 2020).
- <sup>65</sup> See, e.g. Part II, Heading One, Title III Digital Trade and Title VI public procurement.
- <sup>66</sup> TCA art.5 (formerly art.COMPROV.16).
- <sup>67</sup> Below, para.[1-030](#).

## **(i) - The Historical Importance of “European Contract Law” for English Law**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 1. - Sources of English Contract Law**

**(d) - EU Law**

**(i) - The Historical Importance of “European Contract Law” for English Law**

**EU law governing contracts: the Union acquis**

- <sup>113</sup> While the UK was a Member State of the EU,<sup>68</sup> EU law affected the conclusion and the regulation of contracts by English law in a number of ways. As regards the Treaties themselves, one prominent area was the EU law of competition, which has both a general impact on the environment within which contracts are made and which holds certain categories of contract or contract term unlawful.<sup>69</sup> EU legislation (principally in the form of directives) also regulated or required the regulation of aspects of a number of types of contract. Consumer contracts have been an important object of attention of the EU legislator, with directives requiring rules controlling the fairness of most of their standard terms, rules governing aspects of contracts made in certain circumstances (as with “distance contracts” or “off-premises contracts”) and of certain types (sale of goods, consumer credit, time-share and package holidays).<sup>70</sup> Outside the consumer context, directives have required rules governing commercial agency contracts<sup>71</sup> and particular aspects of commercial contracts in general (notably, as regards late payment of commercial debts).<sup>72</sup> The public procurement directives have had a major impact on the process of public contracting within the EU<sup>73</sup>; and a series of employment directives have created or reshaped rights of employees in a number of ways.<sup>74</sup> EU law instruments also had an important impact on international jurisdiction and applicable law in the area of contract law.<sup>75</sup> This catalogue illustrates, however, that EU legislation harmonising contract law has been piecemeal, targeting particular situations or particular aspects

of the rules governing contracts and this characteristic was reflected in its implementation in UK law.

## Towards a “European Contract Law”?

- ¶14 By the late 1990s, there was growing academic interest in the development of a more general “European contract law” kindled in part by the Lando Commission’s Principles of European Contract Law (a set of legal propositions relating to the conclusion, content, performance and non-performance of contracts agreed by a group of European legal scholars<sup>76</sup>) and in part by growing criticism of the “incoherence” of the EC contract law *acquis* which for continental civil lawyers in particular contrasts sharply with the formal completeness of their national private law codifications.<sup>77</sup> Encouraged by the conclusions of the meeting of the European Council at Tampere in 1999<sup>78</sup> and spurred on by a resolution from the EU Parliament in 2000,<sup>79</sup> in 2001 the European Commission issued the first of a series of communications which called for a debate as to the proper way of addressing these criticisms of European contract law and which sought to encourage means of developing its usefulness for the internal market.<sup>80</sup> In 2008, further academic work was published which proposed, *inter alia*, a draft “Common Frame of Reference” for European contract law.<sup>81</sup> There have been two expressions of these discussions.<sup>82</sup> First, some directives of the consumer *acquis* were revised and, of these, some made the subject of “full harmonisation” (meaning that Member States are not permitted to maintain or enact legislation which is *more* protective of consumers).<sup>83</sup> Secondly, the European Commission proposed a more general *optional* “Common European Sales Law”.<sup>84</sup>

## The Proposed Common European Sales Law (CESL)<sup>85</sup>

- ¶15 In 2011 the Commission proposed the enactment of an EU regulation which would have established the availability of a Common European Sales Law for parties to choose to govern cross-border contracts for the sale of goods, supply of “digital content” and related services.<sup>86</sup> The Proposal defined “cross-border contracts” distinctly for contracts between traders (“if the parties have their habitual residence in different countries of which at least one is a Member State”<sup>87</sup>) and contracts between a trader and a consumer (which for consumers replaces habitual residence with “the address indicated by the consumer, the delivery address for goods or the billing address”).<sup>88</sup> The Proposal restricted the availability of the CESL to the case where one of the parties is a trader and the other a consumer and to the case where both parties are traders, but at least one is a small or medium-sized enterprise (SME), a category which the Proposal defined.<sup>89</sup> The CESL set out two broad categories of rules: rules of general contract law governing the conclusion,

validity, contents and interpretation of contracts, damages for breach and interest, restitution on invalidity of contract, and prescription of rights (Pts I to III, VI to VIII CESL respectively) and rules governing the obligations and remedies pertaining to the particular types of contracts to which CESL may apply (Pts IV and Pt V CESL). These rules were prefaced by the setting of three “general principles”: freedom of contract; “good faith and fair dealing”; and co-operation in the performance of obligations.<sup>90</sup> Within its scope, the CESL was intended to create a uniform law, distinct from national laws, as it provided that:

“... [w]here the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules.”<sup>91</sup>

The definition of the scope (and therefore the exclusive regulation reserved for the CESL) was furthered in two ways. First, the recitals to the Proposal explained that certain issues are outside its scope.<sup>92</sup> Secondly, the CESL provided that it was “to be interpreted autonomously and in accordance with its objectives and the principles underlying it”<sup>93</sup> and that

“... [i]ssues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.”<sup>94</sup>

However, the proposal met with considerable criticism and opposition, including challenges to its competence under the Treaty, and in December 2014 it was withdrawn, though the Commission announced its intention of bringing forward a modified proposal “to unleash the potential of e-commerce in the digital Single Market”.<sup>95</sup> Moreover, despite the withdrawal of the earlier proposal, the substantive provisions of the draft Common European Sales law itself (particularly those intended to govern contracts generally) remain of interest as they may be seen as reflecting an emerging “common European law of contract”. This may be significant for the drafting of future more particular EU legislation,<sup>96</sup> and may also be used for the development of autonomous interpretations of undefined concepts in present or future EU legislation in the area of contracts.<sup>97</sup> Its provisions—and especially its three general principles<sup>98</sup>—are also likely to be seen as a basis for the European Court of Justice’s identification and development of “general principles of civil law”.<sup>99</sup> However, as will now be explained, the significance of all this for UK contract law has altered as a result of the changed relevance of the case law of the Court of Justice for the interpretation of UK law that implemented EU law and that was retained after the transitional period after the UK had left the EU.<sup>100</sup>

## Footnotes

- 68 On the impact of the UK’s departure from the EU and the retention of much of EU law see below, paras [1-016](#) et seq.
- 69 Notably, as being an “agreement between undertakings … which may affect trade between Member States and which [has] as [its] object or effect the prevention, restriction or distortion of competition within the internal market”: art.101 TFEU (ex art.81 EC). On this law, see generally Vol.II, [Ch.45](#), esp. paras [45-010](#) et seq.
- 70 Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L95/29; Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] O.J. L144/19; Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31 (the latter two of which were revoked and replaced by Directive 2011/83/EU on consumer rights [2011] O.J. L304/64) (see Vol.II, paras [40-063](#)—[40-068](#)); Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/7 (see Vol.II, paras [40-461](#)—[40-463](#) though repealed and replaced by Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/1 (to be implemented by 1 January 2022, on which see Vol.II, para.[40-464](#)); Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16 (see Vol.II, para.[40-143](#)); Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] O.J. L149/22 (see Vol.II, paras [40-168](#)—[40-173](#)); Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] O.J. L133/66 below, Vol.II, para.[41-011](#); Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/30 (see Vol.II, para.[40-157](#)); Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] O.J. L158/59 itself repealed and replaced by Directive 2015/2302/EU on package travel and linked travel arrangements [2015] O.J. L326/1 as from 1 July 2018 (arts 28 and 29) (see Vol.II, paras [40-144](#) et seq.); Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] O.J. L46/1 (see Vol.II, paras [37-054](#)—[37-072](#)); Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property [2014] O.J. L2014/34 on which see Vol.II, paras [41-003](#) and [41-535](#).
- 71 Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17: see paras [21-020](#)—[21-023](#).
- 72 Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. L48/1 (replacing Directive 2000/35/EC on combating late payment in commercial transactions). The 2011 Directive was implemented in UK law by the [Late Payment of Commercial Debts \(Interest\) Act 1998](#) as amended by [SI 2013/395](#), [SI 2015/1336](#) and [SI 2018/117](#) on which see below, paras [29-291](#)—[29-294](#).

- 73 In 2004 these were placed into the “Legislative package”: Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O.J. L134/114; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] O.J. L134/1. As from 18 April 2016, the two 2004 directives were repealed and replaced by Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] O.J. L94/65 (see esp. art.91) and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] O.J. L94/243 (see esp. art.107), which were supplemented by Directive 2014/23/EU on the award of concession contracts [2014] O.J. L94/1. On these see below, paras [13-057](#)—[13-059](#).
- 74 See Vol.II, Ch.42 esp. paras [42-041](#), [42-115](#), [42-139](#), [42-159](#)—[42-161](#), [42-177](#), [42-184](#), and [42-252](#).
- 75 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1 (the “Brussels I Regulation”), especially arts 5(1) (special jurisdiction in “matters relating to a contract”), 8–14 (matters relating to insurance), 15–17 (jurisdiction over consumer contracts), 18–21 (jurisdiction over individual contracts of employment), 23 (jurisdiction agreements). The Brussels I Regulation was itself replaced as from 10 January 2015 by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”). See also Regulation 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6, on which see below, paras [33-018](#) et seq. For the effect of the UK’s leaving the EU on these private international law instruments see below, para. [1-024](#).
- 76 Formally, the “Commission on European Contract Law”, but often named after Professor O. Lando who chaired it. They are published as Lando and Beale (eds), Principles of European Contract Law Parts I and II (1999); Lando, Clive, Prüm and Zimmermann (eds), Principles of European Contract Law Part III (2003).
- 77 e.g. *Roth* (2002) *10 ERPL* 761.
- 78 Presidency Conclusions, Tampere European Council 15 and 16 October 1999, *SI* 1999/800.
- 79 EP Resolution B5–0228, 0229–0230/2000, p.326 at point 28 (16 March 2000), [2000] O.J. C377/323 (following earlier resolutions in 1989 and 1994 which explicitly concerned the possibility of a codification of substantive private law).
- 80 Communication from the Commission to the Council and the European Parliament on European Contract Law COM(2001) 398 final; Communication from the Commission to the European Parliament and the Council, “A more coherent European Contract Law, An Action Plan” COM(2003) 68 final; European contract law and the revision of the acquis: the way forward COM(2004) 651 final; EU Commission, Green Paper from the Commission on policy option for progress towards a European contract law for consumers and businesses COM(2010) 348 final.

- 81 Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) prepared by the Study Group for a European Civil Code and the Research Group on EC Private Law (Acquis Group) (2010), six volumes.
- 82 See further *Whittaker* (2007) *European Review of Contract Law* 381; *Whittaker* (2009) 125 *L.Q.R.* 616.
- 83 Notably, Directive 2011/83/EU on consumer rights (above, para.1-013).
- 84 Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final. (“CESL Proposal”).
- 85 On the idea of an “optional instrument” for European contract law before the CESL Proposal, see *H. Schulte-Nölke* (2007) *ERCL* 332 especially at 348–349; *Cartwright* (2011) 7 *ERCL* 335. On the proposal itself see The Law Commission and Scottish Law Commission, Advice to the UK Government, An Optional Common European Sales Law: Advantages and Problems (November 2011) available at <https://www.lawcom.gov.uk/project/common-european-sales-law/> [Accessed 1 September 2021]. *Whittaker* (2012) 75 *M.L.R.* 578; Dannemann and Vogenauer (eds) *The Common European Sales Law in Context, Interactions with English and German law* (2013).
- 86 CESL Proposal art.1. The first part of the proposed regulation sets out the framework of the new scheme (here referred to as “CESL Proposal”); the CESL itself is contained in Annex I and is separately numbered (“CESL Proposal, Annex I”).
- 87 CESL Proposal art.4(2).
- 88 CESL Proposal art.4(3).
- 89 CESL Proposal art.7.
- 90 CESL Proposal Annex I arts 1–3 respectively.
- 91 CESL Proposal art.11.
- 92 Notably, CESL Proposal, recitals 27–28. Issues outside the scope of the CESL would be governed by the law applicable as identified by the private international law rules of the forum.
- 93 CESL Proposal Annex I art.4(1).
- 94 CESL Proposal Annex I art.4(2).
- 95 European Commission, Annex 2 to the Commission Work Programme 2015 COM(2014) 910 final, p.12. See also the Communication from the Commission, A Digital Single Market Strategy for Europe 2015 COM(2015) 192 final, pp.4–5. One expression of this strategy may be found in the enactment of Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods etc of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/28 and Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/1, on which see Vol.II, para.40-464.
- 96 cf. the explicit borrowing by Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. L48/1, art.7(1)(a) (as explained by recital 28) of “good faith and fair dealing” from the DCFR (which was an important precursor to the CESL, above, para.1-014).
- 97 See e.g. (before issuing the Proposal) AG Trstenjak’s reference to art.167(3) CESL in the context of the 1993 Directive in *Banco Espanol de Credito, SA v Calderon Camino*

(C-618/10) EU:C:2012:349 para.42. cf. *Masdar (UK) Ltd v EC Commission* (T-333/03) EU:T:2006:348, [2007] 2 All E.R. (Comm) 261 where the Court of First Instance accepted reference to the work of the *Study Group on a European Civil Code* in order to develop a EU law of restitution for unjustified enrichment under art.288 (formerly 215) EC; *Hamilton v Volksbank Filder eG* (412/06) AG Poires Maturo at [24] (referring to time limits for the exercise of a right as being a “principle common to the laws of the Member States” and citing the possible future DCFR). On these predecessors of the CESL, see above, para.1-014.

98 CESL Proposal Annex arts 1–3.

99 Whittaker in K. Boele-Woelki and W. Grosheide (eds) *The Future of European Contract Law*, Essays in Honour of Ewoud Hondius (2007), 333; *Weatherill (2010) 6 European Review of Contract Law* 74; Hesselink, in Leczykiewicz and Weatherill, *The Involvement of EU Law in Private Law Relationships* (2012). e.g. *Hamilton v Volksbank Filder eG* (C-412/06) EU:C:2008:215, [2008] E.C.R. I-2383 at para.42; *Messner v Kruger* (C-489/07) EU:C:2009:502, [2009] E.C.R. I-7315 para.26; *E. Friz GmbH v Carsten von der Heyden* (C-215/08) EU:C:2010:186, [2010] E.C.R. I-2947, paras 48, 49.

100 Below, paras 1-016 et seq.

## **(aa) - Introduction**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 1. - Sources of English Contract Law**

**(d) - EU Law**

**(ii) - The United Kingdom’s Departure from the European Union and “Retained EU Law”**

**(aa) - Introduction**

- <sup>116</sup> After a national referendum held on 23 June 2016 at which a majority voted in favour of the UK leaving the EU, the UK Conservative Government declared its intention to end the UK’s membership of the EU and on 29 March 2017 the then Prime Minister, the Right Hon. Mrs Theresa May MP, set in motion the process of doing so under art.50 of the Treaty of the European Union (TEU). <sup>101</sup> The following paragraphs outline the process by which the UK left the EU, as this explains both the form of the UK legislation which gives this legal effect and also the changing status of EU law in the period 16 July 2016 to 31 December 2020. <sup>102</sup> There are three broad periods. Until the UK left the EU on 31 January 2020, the UK remained a Member State and EU law enjoyed the same status in the UK as it had done before the withdrawal vote. Secondly, under the Withdrawal Agreement concluded between them on 24 January 2020, <sup>103</sup> the UK and the EU agreed that, while the UK should leave the EU on 31 January 2020, there should be a transition period during which in general EU law should still apply in the UK (this period being termed the “implementation period” by the UK legislation). <sup>104</sup> Thirdly, on 31 December 2020 this transition period came to an end, but a good deal of the EU law already applicable in the UK on that date remained applicable as domestic UK law, being termed “retained EU law”. Provision was also made in particular for the amendment of this body of retained EU law and for its future interpretation. <sup>105</sup> At the same time a Trade and Cooperation Agreement concluded by the UK and

the EU came into effect (or provisional effect), being implemented into UK domestic law by the European Union (Future Relationship) Act 2020.<sup>106</sup>

## Footnotes

- 101 The Prime Minister's authority to do so was given by the European Union (Notification of Withdrawal) Act 2017 s.1.
- 102 See further *Whittaker* (2021) 137 *L.Q.R.* 477.
- 103 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (24 January 2020) ("Withdrawal Agreement").
- 104 European Union (Withdrawal Agreement) Act 2020 ("EU (WA) Act 2020") s.39(1) and see below, paras 1-018—1-019.
- 105 Below, paras 1-020—1-029.
- 106 Below, para.1-030.

## **(bb) - The Withdrawal of the UK from the EU and the “Implementation Period”**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 1. - Sources of English Contract Law**

**(d) - EU Law**

**(ii) - The United Kingdom’s Departure from the European Union and “Retained EU Law”**

**(bb) - The Withdrawal of the UK from the EU and the “Implementation Period”**

### **European Union (Withdrawal) Act 2018**

- 117 The European Union (Withdrawal) Act 2018 (“2018 Act”) made provision for the repeal of the European Communities Act 1972 and further provision in connection with the withdrawal of the UK from the EU.<sup>107</sup> The Act made detailed provision for the coming into force of its own provisions,<sup>108</sup> but the intention at the time was that the UK would leave the EU on 29 March 2019 (“exit day”).<sup>109</sup> Mrs May’s government made an agreement with the EU Council on 25 November 2018 relating to the withdrawal of the UK from the EU, but this agreement was not approved by the UK Parliament. The UK and the European Council therefore agreed a first extension (until 12 April 2019 at the latest)<sup>110</sup> and then a second, flexible extension with a cut-off of 31 October 2019. The 2018 Act was therefore amended so as to redefine “exit day” as 31 October 2019 at 11pm.<sup>111</sup> On 24 May 2019 Mrs May announced her resignation as Prime Minister and on 24 July 2019 the Right Hon. Mr Boris Johnson MP became Prime Minister.

## The Withdrawal Agreement between the UK and the EU and the “implementation period”

- 118 The UK Government formed by Mr Johnson agreed a further extension of the withdrawal period with the European Council until 11.00pm on 31 January 2020.<sup>112</sup> The UK Government also concluded a Withdrawal Agreement with the EU under which the UK left the EU from 11.00pm on 31 January 2020 (“exit day” as finally redefined).<sup>113</sup> It was further agreed between the UK and the EU that there would be a transition period running from exit day until 11pm on 31 December 2020 under which EU law would still apply in the UK (with certain exceptions)<sup>114</sup> and:

“... shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.”<sup>115</sup>

This effect was achieved as a matter of UK law by the amendment of the [2018 Act](#) by the [European Union \(Withdrawal Agreement\) Act 2020](#) (“EU (WA) Act 2020”), which refers to the transition period as the “implementation period” (IP) and the date on which it expired as “IP completion day”.<sup>116</sup>

- 119 As a result, the [2020 Act](#) postponed the effect of the [2018 Act](#) until the end of the implementation period (31 December 2020). During that period, therefore, EU law still had effect in the UK.<sup>117</sup> In particular, the [European Communities Act 1972](#) was “saved” for the implementation period<sup>118</sup> and it was provided that both directly applicable EU law and EU-derived domestic legislation which:

“... has effect in the UK as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.”<sup>119</sup>

Moreover, this meant that the EU-derived law to be brought across to form part of UK domestic law as “retained EU law” after the end of the implementation period (as will be explained below<sup>120</sup>) refers to that legislation which was operative immediately before the end of the implementation period (IP completion day) rather than immediately before exit day.<sup>121</sup> On the other hand, this also means that in principle directly applicable EU law coming into force *after* IP completion day does not form part of “retained EU law”; nor is the UK under any obligation to implement any EU Directive made before IP completion day which requires Member States to adopt measures

to implement it with a deadline *after* IP completion day.<sup>122</sup> The latter includes, for example, the EU Directive of 2019 governing certain aspects of the law governing consumer contracts for the sale of goods (and repealing the Consumer Sales Directive 1999<sup>123</sup>) which is not due to be implemented until 1 July 2021<sup>124</sup> and the EU Directive of 2019 on the better enforcement of consumer protection rules which is not due to be implemented until 28 November 2021.

<sup>125</sup>



## Footnotes

- 107 2018 Act s.1 (which repealed the 1972 Act on exit day). The Act was accompanied by Explanatory Notes (“Explanatory Notes to the 2018 Act”).
- 108 See 2018 Act s.25.
- 109 2018 Act s.20(1) “exit day” (as enacted).
- 110 Put into effect in the UK by the European Union (Withdrawal) Act (Exit Day) (Amendment) Regulations 2019 (SI 2019/718).
- 111 European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019 (SI 2019/859) reg.2(2).
- 112 The request by the UK for an extension was mandated by the European Union (Withdrawal) (No. 2) Act 2019.
- 113 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (24 January 2020) (the “Withdrawal Agreement 2020”) art.185.
- 114 Withdrawal Agreement 2020 art.127(1).
- 115 Withdrawal Agreement 2020 art.127(3).
- 116 2018 Act s.1A(6) (as inserted by the EU (WA) Act 2020 s.1) referring for “IP completion day” to the 2020 Act s.39(1)–(5).
- 117 See, e.g. the guidance from the Competition and Markets Authority in CMA, *UK Exit from the EU, Guidance on the Functions of the CMA under the Withdrawal Agreement* (CMA113, 28 January 2020) (“CMA Guidance 2020”), paras 2.15–2.21.
- 118 2018 Act s.1A (as inserted by the EU (WA) Act 2020 s.1) (as in force 31 January 2020). The remainder of s.1A explained and qualified this general position. On IP completion day (i.e. 31 December 2020), s.1A was subject to further amendment by which s.1A(1)–(4) were repealed.
- 119 2018 Act s.1B(2) (as inserted by the EU (WA) Act 2020 s.2) (in force 31 January 2020). The remainder of s.1B explains and qualifies this general position.
- 120 Below, paras 1–21 et seq.
- 121 See below, para.1–21 and CMA Guidance 2020, para.2.19.
- 122 It is submitted that this follows from the Withdrawal Agreement itself, as art.127(3) states that the EU law which generally applies to the UK during the transition “shall produce in

respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States". As a matter of EU law, directives (even if "in force") may not be relied on in national courts until the expiry of the deadline for their implementation by Member States and the principle of conforming does not apply to national legislation if no implementation has been made before the deadline: Prechal, Directives in EC Law, 2nd edn (2005) pp.18–22; Craig and de Búrca, EU Law: Text, Cases and Materials, 7th edn, UK edition (2020) pp.245–246, noting that during the implementation period Member States must nevertheless refrain from adopting any measures liable to compromise seriously the results prescribed by the directive. Under the [2018 Act](#), EU directives themselves (even if enacted and "in force") were not brought into UK law as "retained EU law"; rather, [s.2 of the 2018 Act](#) provides that EU-*derived* domestic legislation forms part of retained EU law. Note also that specific provision is made in [s.8\(4\) of the 2018 Act](#) regarding the power in [s.8\(1\)](#) to amend retained EU law on the ground of its "deficiency", to the effect that: "retained EU law is not deficient merely because it does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after IP completion day".

- 123 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12, on which see Vol.II, paras [40-461—40-463](#).
- 124 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc [2019] O.J. L136/28, art.24.
- 125 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.7.

## **(cc) - EU Contract Law Retained After the End of the Implementation Period**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 1. - Sources of English Contract Law**

**(d) - EU Law**

**(ii) - The United Kingdom’s Departure from the European Union and “Retained EU Law”**

**(cc) - EU Contract Law Retained After the End of the Implementation Period**

- 120 There are a number of aspects to the impact of the departure of the UK from the EU on English contract law after this came into full effect on the completion of the transition (or implementation) period on IP completion day (31 December 2020 at 11.00pm<sup>126</sup>). In this respect, there are three sets of UK legislative sources to which reference should be made. First, there are the terms of the 2018 Act itself (as amended and supplemented by the [EU \(WA\) Act 2020](#)) which sought to give effect to a general policy of the preservation of the EU law applicable in the UK as “retained EU law” while making provision for its amendment in the light of the UK’s leaving the EU.<sup>127</sup> Secondly, there are a considerable number of statutory instruments made under powers in the [2018 Act](#) to amend retained EU law. Thirdly, the UK and the EU agreed the Trade and Cooperation Agreement and the UK enacted the [European Union \(Future Relationship\) Act 2020](#) (“EU (FR) Act 2020”) to make provision for its implementation in the UK. The following paragraphs will note the general approach of the [2018 Act](#) to retaining EU law in the UK and give examples of the changes provided by statutory instruments made under the [2018 Act](#) affecting existing UK legislation governing contracts. They will also note the changed status of the case law of European Court for the interpretation of retained EU law.

## The general preservation of the UK's EU law at the end of the implementation period

- 121 At the end of the implementation period (“IP completion day,” 31 December 2020 at 11.00pm<sup>128</sup>), the saving provisions introduced by the European Union (Withdrawal Agreement) Act 2020 into the European Union (Withdrawal) Act 2018 were themselves deleted with the effect, inter alia, that the repeal of the European Communities Act 1972 took full effect.<sup>129</sup> However, despite this fully effective repeal of the 1972 Act, on IP completion day the 2018 Act in principle retained the EU law applicable in the UK immediately before IP completion day, this body of law being termed “retained EU law” by the 2018 Act.<sup>130</sup> There are, however, two types of qualifications on this position. First, the 2018 Act itself sets out certain exceptions for this purpose.<sup>131</sup> Secondly, the 2018 Act has provided, and still provides, a temporary power in government to make regulations to:

“... prevent, remedy or mitigate—

- (a)any failure of retained EU law to operate effectively, or
- (b)any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU,<sup>132</sup>

and a considerable body of subordinate legislation has been made under this power. Confusingly, the operative provisions of earlier instruments made under this power were expressed as coming into force by reference to “exit day”,<sup>133</sup> but these references have to be read instead as providing that the relevant provisions:

“... come into force immediately before IP completion day, on IP completion day or (as the case may be) at the time concerned after IP completion day.”<sup>134</sup>

Later subordinate legislation made under the 2018 Act is expressed directly as coming into force by reference to IP completion day.<sup>135</sup> Where amendments to legislation may affect contracts, the amending regulations provide that they leave unaffected contracts entered into before IP completion day.<sup>136</sup>

## Examples from the law governing contracts

The [2018 Act](#) distinguishes two categories of legislation which forms part of or which was derived from EU law and which now forms part of “retained EU law”. <sup>137</sup>

<sup>123</sup> First, in principle “EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day”. <sup>138</sup> This provision preserved important UK consumer protection legislation affecting, for example, consumer contracts enacted as secondary legislation under the [European Communities Act 1972](#), <sup>139</sup> as in the case of the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) <sup>140</sup> and the [Consumer Protection from Unfair Trading Regulations 2008](#). <sup>141</sup> This preservation also applied to UK primary legislation enacted for the purpose of implementing EU obligations (such as is contained in the [Consumer Rights Act 2015 Pts 1 and 2](#)). <sup>142</sup> All the above instruments were subject to fairly minor amendment on IP completion day. <sup>143</sup>

<sup>124</sup> Secondly, “[d]irect EU legislation, so far as operative immediately before IP completion day, forms part of domestic law on or after IP completion day”.

<sup>144</sup>

 Such direct EU legislation includes EU regulations

<sup>145</sup>

 and therefore in principle included such instruments as the Brussels Ibis Regulation on international jurisdiction and the recognition of judgments

<sup>146</sup>

 and, more directly affecting contracts, the Rome I Regulation on the law applicable to contractual obligations

<sup>147</sup>

 in the area of private international law, and the Denied Boarding Regulation in the area of consumer protection.

<sup>148</sup>

 However, the actual fate of these three EU Regulations differed considerably. After IP completion day, the Rome I Regulation forms part of retained EU law subject to only fairly minor amendment.

<sup>149</sup>

 On the other hand, while the Denied Boarding Regulation also forms part of retained EU law, it was amended so as to reduce its scope of application so as to reflect the departure of the UK from the EU.

<sup>150</sup>

**U** And the Brussels Ibis Regulation, whose provisions on international jurisdiction and enforcement of judgments rest on the EU legal principle of mutual recognition, was revoked with effect on IP completion day

<sup>151</sup>

**U** and significant consequential amendments were made to the relevant UK primary legislation (notably the [Civil Jurisdiction and Judgments Act 1982](#)) and UK secondary legislation.

<sup>152</sup>

**U** Other EU regulations which are discussed later in this work and which put in place various mechanisms of intra-EU co-operation (such as the Regulation on cooperation in the area of consumer protection

<sup>153</sup>

**U**) or co-ordination (for example, the Regulation on consumer ODR

<sup>154</sup>

**U**) were also revoked on IP completion day.

## The recognition of remaining EU rights and obligations

**D** The [2018 Act](#) made provision to ensure that any remaining EU rights and obligations which were not preserved in the way just explained <sup>155</sup> continue to be recognised and available in domestic law after IP completion day <sup>156</sup>; these include directly effective rights contained in the European Treaties themselves or from EU directives as long as, in the latter case, these rights are of a kind recognised by the European Court or any court or tribunal in the UK in a case decided before IP completion day. <sup>157</sup> This body of rights, etc. therefore also forms part of retained EU law. <sup>158</sup>

## The status of the “principle of the supremacy of EU law”

**D** The [2018 Act](#) provides that “the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day”, <sup>159</sup> although it still applies “so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day”.

<sup>160</sup>

**U** As this recognises, as a matter of EU law, the principle of supremacy has been held to mean that a national court may have an obligation to “disapply” a clear national legal rule where it is incompatible with EU law.<sup>161</sup>

## Interpretation of retained EU law

**D**<sup>127</sup> Provision is made by the [2018 Act](#) (as amended by the [2020 Act](#) and as supplemented by regulations made under a power introduced by it) for the interpretation after IP completion day of retained EU law.

[162](#)

**U** For this purpose a broad distinction is drawn between principles laid down, and decisions made, by UK courts or by the European Court *before* IP completion day; and principles laid down, and decisions made, by the European Court *on or after* IP completion day.

## Case law and general principles of EU law retained on IP completion day

**D**<sup>128</sup> The [2018 Act](#) provides that “retained EU law”

[163](#)

**U** is in principle to be interpreted in accordance with any principles laid down by, and any decisions of UK courts in relation to the EU law retained by the [2018 Act](#) (“retained domestic case law”) and with any principles laid down by, and any decisions of the European Court (“retained EU case law”)

[164](#)

**U** and any retained general principles of EU law,

[165](#)

**U** and, “having regard (among other things) to the limits, immediately before IP completion day, of EU competences”.

[166](#)

**U** The [2018 Act](#) then makes an exception to this general position by providing that “the Supreme Court is not bound by any retained EU case law”,

[167](#)

**U** and that:

“[i]n deciding whether to depart from any retained EU case law, the Supreme Court ... must apply the same test as it would apply in deciding whether to depart from its own case law.”

[168](#)

**U**

This therefore treats “retained EU case law” as “normally binding” but it would allow the Supreme Court to depart from it “when it appears right to do so”.

[169](#)

**U** Moreover, this possibility of departing from retained EU case law was later extended by regulation to the Court of Appeal and certain other appellate courts,

[170](#)

**U** except where there is “post-transition [UK] case law which modifies or applies that retained EU case law and which is binding on the relevant court”.

[171](#)

**U** In deciding whether to depart from any retained EU case law a relevant appellate court:

“... must apply the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court.”

[172](#)

**U**

## EU case law on or after IP completion day

**D** <sup>129</sup> By contrast, the [2018 Act](#) provides that “[a] court or tribunal ... is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court”,  
[173](#)

**U** but in principle it “*may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal*”.

[174](#)

**U** This means that UK courts will not be required even to *consider* case law of the Court of Justice laid down after IP completion day, though they may do so if they think it appropriate.

[175](#)

**U** In this respect, the position differs from the duty of UK courts under the [Human Rights Act 1998 s.2\(1\)](#) which provides that in determining a question which has arisen in connection with a right under the European Convention on Human Rights a court “must take into account any ... judgment, decision, declaration or advisory opinion of the European Court of Human Rights”.

[176](#)



## The Trade and Cooperation Agreement and its implementation in UK domestic law

**D** On 24 December 2020 the UK and the EU agreed the Trade and Cooperation Agreement 2020 (“TCA 2020”)

[177](#)

**U** and the UK Parliament made provision for its implementation into domestic UK law

[178](#)

**U** by the [European Union \(Future Relationship\) Act 2020](#) (“EU (FR) Act 2020”).

[179](#)

**U** In some respects this is effected specifically by the [EU \(FR\) Act 2020](#) itself, but the Act also provides two further more general mechanisms for its implementation.

[180](#)

**U** The first mechanism is that the government is empowered to make regulations to implement the TCA into domestic law, including a power to amend primary legislation (with certain exceptions).

[181](#)

**U** The second is that [s.29\(1\)](#) of the [EU \(FR\) Act 2020](#) provides that:

“Existing domestic law

[182](#)

**U** has effect on and after the relevant day

[183](#)

**U** with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement ... so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”

184

**U**

This therefore provides a residual way by which courts are themselves required to give effect to existing domestic law so as to implement aspects of the TCA. This is a remarkable duty, not least given the length of the TCA itself and the breadth of expression of some of its provisions. As Green LJ has observed:

“The concept of modification is interpreted broadly in [section 37\(1\)](#) to ‘include’ (and therefore is not limited to) amendment, repeal or revocation. [Section 29](#) is capable of achieving any one or more of these effects. This does not lay down a principle of purposive interpretation (such as is found in [section 3 Human Rights Act](#)) but amounts to a generic mechanism to achieve full implementation.”

185

**U**

For the purposes of the present work, there are a number of articles of the TCA which are relevant to contract law, including those governing “digital trade” which concern “measures of a Party affecting trade enabled by electronic means” except audio-visual services.

186

**U** In this area, the commitments of the UK contained in the TCA include ones governing the conclusion of contracts by electronic means

187

**U** and consumer protection.

188

**U** The TCA also contains a title governing public procurement.

189

**U** The relevant provisions in the TCA will be noted later in this work at their proper places.

190

**U**

## Footnotes

- 126 2018 Act s.1A(6) (as inserted by the EU (WA) Act 2020 s.1) referring for “IP completion day” to s.39(1)–(5) of the 2020 Act.
- 127 The powers to make these amendments are contained in the 2018 Act s.8.
- 128 2018 Act s.1A(6) (as inserted by the 2020 Act s.1) referring for “IP completion day” to s.39(1)–(5) of the EU (WA) Act 2020.
- 129 2018 Act s.1 states that “[t]he European Communities Act 1972 is repealed on exit day”; the operative provisions in s.1A(1)–(4) which “saved” the 1972 Act during the transition period were repealed on IP completion day: s.1A(5).
- 130 2018 Act s.6(7) (as amended by the 2020 Act s.26(1)(a), in force for this purpose on 31 January 2020) defines “retained EU law” by reference to “anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of” ss.2, 3, 4 or 6(3) or (6) of the Act, “as that body of law is added to or otherwise modified by or under the Act or by other domestic law from time to time”. These sections of the 2018 Act were brought into force on IP completion day by the European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020 (Commencement, Transitional and Savings Provisions) Regulations 2020 (SI 2020/1622) reg.3. The UK government has created an official list of EU law relevant to the UK as it stood on IP completion day, which is available at <https://webarchive.nationalarchives.gov.uk/eu-exit> [Accessed 1 September 2021]. It should be noted that the Withdrawal Agreement included a Protocol on Ireland/Northern Ireland, which provides for a special position for Northern Ireland after the UK’s withdrawal from the EU, with the effect in particular that a limited set of EU rules related to the Single Market for goods and the Customs Union shall apply to and in the UK in respect of Northern Ireland. These qualifications on the general position will not be addressed here. On “retained EU law” see *Whittaker* (2021) 137 L.Q.R. 477 and *Lipton v BA City Flyer Ltd [2021] EWCA Civ 454* at [53]–[84] (where Green LJ summarised the law governing the retention of EU law as provided by the 2018 Act and the TCA 2020).
- 131 2018 Act s.5 (exceptions provided by the Act itself), e.g. s.5(4) (as amended by the EU (WA) Act 2020 s.25(4)(a)) states that “the Charter of Fundamental Rights is not part of domestic law on or after IP completion day”, though s.5(5) continues that this “does not affect the retention in domestic law on or after IP completion day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)”.
- 132 2018 Act s.8(1). The power exists until 31 December 2022, i.e. two years after IP completion day: 2018 Act s.8(8) as amended by EU (WA) Act 2020 s.27(5). The 2018 Act also makes provision for the longer-term amendment of retained EU law by s.7 and Sch.8.
- 133 E.g. the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.1(3) provides that most of its Parts come into effect on “exit day”.

- 134 2020 Act s.39(1), s.41(4), Sch.5 para.1. Sch.5 makes further provision regarding, in particular, exceptions to be made to this general position.
- 135 e.g. the Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1139) reg.1(2) providing that the Regulations come into force generally on IP completion day.
- 136 e.g. the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) (SI 2018/1326) reg.11 (as amended by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2020](#) (SI 2020/1347) reg.4(8)) provides that “nothing in regulation 3 [which amends the [Consumer Rights Act 2015](#)] or regulation 6(2) [which amends the [Consumer Protection from Unfair Trading Regulations 2008](#)] applies to a contract entered into before IP completion day”.
- 137 2018 Act ss.2 and 3 (as amended by the [EU \(WA\) Act 2020](#) s.25(1) and (2)). See also s.4(1) of the 2018 Act, noted below, para.1-025.
- 138 2018 Act s.2(1) (as amended by the [EU \(WA\) Act 2020](#) s.25(2)). The exceptions to the general position under s.2(1) are set out by s.5 and Sch.1 (as amended): s.2(3).
- 139 This follows from the definition of “EU-derived domestic legislation” in the 2018 Act s.1B(7) as including “any enactment so far as ... passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of [the 1972] Act”. Secondary legislation with the same purposes but made under statutory powers other than those contained in s.2(2) of the 1972 Act was also retained: 2018 Act s.2(2)(b) and see [Explanatory Notes to 2018 Act](#) para.77, which gives as an example of the latter domestic health and safety law implementing EU obligations made under powers in the [Health and Safety at Work etc. Act 1974](#) rather than the [European Communities Act 1972](#).
- 140 SI 2013/3134 which implemented Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 on which see Vol.II, paras 40-063 et seq. The 2013 Regulations were amended on IP completion day by the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) (SI 2018/1326) reg.8 (making modest and merely technical amendments) (the reference to exit day in reg.1(3) must be read as referring to IP completion day: [EU \(WA\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1 and see above, para.1-021).
- 141 The 2008 Regulations (on which see Vol.II, paras 40-166 et seq.) were amended on IP completion day by the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) (SI 2018/1326) reg.6 (making modest amendments), reg.1(3) (the reference to exit day must be read as referring to IP completion day: [EU \(WA\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1 and see above, para.1-021).
- 142 The 2015 Act implemented Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 (principally in Pt 1 Ch.2 of the Act); Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L95/29 (principally in Pt 2 of the Act) and certain aspects of Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 (ss.11(4)-(6), 12; ss.36(3)-(4) and 37; and s.50(3)-(4) of the Act). On this see Vol.II, paras 40-467 et seq. On IP completion day, the 2015 Act was amended: [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) (SI 2018/1326) reg.3 (the reference in reg.1(3) to the coming into force of Pt 3 (which consists of reg.3) on exit day must be read as referring to IP completion day: [EU \(WA\) Act](#)

2020 s.39(1), s.41(4), Sch.5 para.1; see above, para.1-021). The most significant of these amendments concern the 2015 Act ss.32 and 74 which, before their amendment, governed contracts applying the law of a non-EEA State and, as amended, govern “contracts applying law of a country other than the UK”.

143 These amendments are noted in the preceding footnotes.

•144 2018 Act s.3(1) (as amended by the EU (WA) Act 2020 s.25(2)(a)).

•145 2018 Act s.3(2), which defines “direct EU legislation”; s.3(4) provides that s.3 “(a) brings into domestic law any direct EU legislation only in the form of the English language version of that legislation, and (b) does not apply to any such legislation for which there is no such version, but paragraph (a) does not affect the use of the other language versions of that legislation for the purposes of interpreting it”. On the use of other language versions for the purposes of interpretation see Vol.II, para.40-017.

•146 Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] O.J. L351/1.

•147 Regulation 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6, on which see below, paras 33-018 et seq.

•148 Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] O.J. L46/1 on which see Vol.II, paras 37-054—37-072.

•149 Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019/834 reg.10. The reference in reg.1(3) of the 2019 Regulations to their coming into force on exit day in reg.1(3) must be read as referring to IP completion day: EU (WA) Act 2020 s.39(1), s.41(4) and Sch.5 para.1 and see above, para.1-021. On the retained EU law Rome I Regulation see below, paras 33-005 and 33-018 et seq.

•150 Regulation (EC) 261/2004 (Retained EU law) reg.3(1) as amended by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019/278 reg.8(4)(b) (the reference in reg.1(3) to the coming into force of the 2019 Regulations on exit day” (the reference in reg.1(3) to exit day must be read as referring to IP completion day: EU (WA) Act 2020 s.39(1), s.41(4) and Sch.5 para.1 and see above, para.1-021).

•151 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) reg.84 (the reference in the 2019 Regulations reg.1(1) to their coming into force on exit day must be read as referring to IP completion day: EU (WA) Act 2020 s.39(1), s.41(4) and Sch.5 para.1 and see above, para.1-021). The UK had applied to rejoin the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial

matters 2007 (which applies between the EFTA states and the EU and is broadly similar to the Brussels Ibis Regulation), but its doing so requires the consent of all the existing parties and on 28 June 2021 the EU formally communicated its lack of consent to the Depositary of the Convention, the Swiss Federal Council.

- 152 SI 2019/479 Pts 2 and 3. The amendments to the [1982 Act](#) included the insertion of new provisions modelled on the consumer contract and employment contract provisions in the Brussels Ibis Regulation though with revisions consequential on the UK's exit from the EU: [SI 2019/479 reg.26](#) (as amended by the [Civil, Criminal and Family Justice \(Amendment\) \(EU Exit\) Regulations 2020 \(SI 2020/1493\) reg.5\(2\)\(b\)\(i\)](#)) creating new ss.15A–15C, and [15E of the 1982 Act](#). For this purpose, in determining any question as to the meaning or effect of any of these new provisions, “regard is to be had to any relevant principles laid down before IP completion day by the European Court” in connection with the relevant provisions of the Brussels Convention or the Brussels Ibis Regulation: [1982 Act s.15E\(2\)\(a\)](#).
  - 153 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 [2017] O.J. L345/1. The retained EU law 2017 Regulation was revoked on IP completion day by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019/203 reg.8](#), as substituted by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2020/1347 reg.3\(7\)](#) (31 December 2020: substitution came into force immediately before IP completion day as specified in [SI 2020/1347 reg.1\(3\)](#) but cannot take effect until the commencement of [SI 2019/203 reg.8](#) on IP completion day not exit day as specified by the [2020 Act s.39\(1\), s.41\(4\), and Sch.5 para.1\(1\)](#)). See also CMA, Guidance on the Functions of the CMA after the End of the Transition Period (CMA 125, 1 December 2020) paras 5.16 and the Trade and Cooperation Agreement art.DIGIT.13(2) on which see Vol.II, para.[40-138](#).
  - 154 The retained EU law Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes etc (Regulation on consumer ODR) on which see Vol.II, para.[40-164](#)) was revoked on IP completion day by the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\) reg.10](#) (the reference in the [2018 Regulations reg.1\(3\)](#) to reg.10's coming into force on exit day must be read as referring to IP completion day: [EU \(WA\) Act 2020 s.39\(1\), s.41\(4\) and Sch.5 para.1](#) and see above, para.[1-021](#)). On the ODR Regulation, see Vol.II, para.[40-164](#).
- 155 Above, paras [1-022—1-024](#).
- 156 On IP completion day, see above, para.[1-019](#).
- 157 [2018 Act s.4](#) (as amended by the [EU \(WA\) Act 2020 s.25\(3\)](#)) and see [Explanatory Notes to 2018 Act paras 92–99](#).
- 158 [2018 Act s.6\(7\)](#) (as amended by the [EU \(WA\) Act 2020 s.26\(1\)\(a\)](#)) “retained EU law”.
- 159 [2018 Act s.5\(1\)](#) (as amended by the [EU \(WA\) Act 2020 s.25\(4\)\(a\)](#)).
- 160

- 2018 Act s.5(2) (as amended by the EU (WA) Act 2020 s.25(4)(b)) and see *R. (on the application of Open Rights Group) v Secretary of State for the Home Department [2021] EWCA Civ 800, [2021] 1 W.L.R. 3611* at [12]–[13], [29] and [55]–[58].
- 161 On this see famously *The Queen v Secretary of State for Transport Ex p. Factortame Ltd (C-213/89) [1990] I-2433* and generally Craig and de Búrca, EU Law, Text, Cases & Materials (7th edn) 2020, Ch.10.
- 162 2018 Act s.6 as amended by the EU (WA) Act 2020 s.26(1) and brought into force on IP completion day by the European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020 (Commencement, Transitional and Savings Provisions) Regulations 2020 (SI 2020/1622) reg.3(e)) except for s.6(7) (which was already in force). On IP completion day, it ceased to be possible for a UK court or tribunal to refer any matter to the European Court: 2018 Act s.6(1)(b) (as amended by EU (WA) Act 2020 s.26(1)(a)), but transitional provision was made in the Withdrawal Agreement according to which the CJEU continues to have jurisdiction to give a preliminary ruling even after IP completion day as regards references by UK courts to the CJEU made before IP completion day (31 December 2020) and its resulting judgment or orders have “binding force in their entirety on and in the United Kingdom”: Withdrawal Agreement 2020 arts 86 and 89. Examples may be found in *X v Kuoni Travel Ltd [2019] UKSC 37; (C-578/19) ECLI:EU:C:2021:213, 18 March 2021; [2021] UKSC 34, [2021] 1 W.L.R. 3910* esp. at [45] (on which see Vol.II, para.40-147) and *K v Tesco Stores Ltd (C-624/19) EU:C:2021:429*, 3 June 2021.
- 163 See above, para.1-019. This follows from the references in the relevant definitions in s.6(7) of the 2018 Act noted in the following notes to case law in so far as it relates to anything to which ss.2, 3 or 4 applies, and are not excluded by s.5 or Sch.1: see above, paras 1-021—1-025.
- 164 2018 Act s.6(7) “retained case law” and “retained EU case law” (as amended by EU (WA) Act 2020 s.26(1)(a)).
- 165 Defined in terms of temporal origin by the 2018 Act s.6(7) (as amended by EU (WA) Act 2020 s.26(1)(a)) as “the general principles of EU law, as they have effect in EU law immediately before IP completion day”. An example of “retained general principle of EU law” may be found in the principle of effectiveness which has been relied on by the CJEU in the context of consumer protection see Vol.II, paras 40-021, 40-393 and 40-412—40-413. A further important example may be found in the principle of conforming interpretation according to which national courts must interpret national law (including national implementing legislation) “so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive”: *Schulte v Deutsche Bausparkasse Badenia AG (C-350/03) EU:C:2005:637, [2005] E.C.R. I-9215* at [71] and see also *Marleasing SA v La Comercial Internacionale de Alimentacion SA (C-106/89) EU:C:1990:395* and see Vol.II, para.40-015.
- 166

2018 Act s.6(3) (as amended by EU (WA) Act 2020 s.26(1)(a)). On the possible practical difficulties for a UK court of interpreting retained EU law without the possibility of reference to the CJEU see *Covea Insurance Plc v Greenaway [2021] EWHC 1506 (QB), [2021] 4 W.L.R. 97* at [14], [20]–[23] and [44]–[51] in the context of permitting expert evidence as to the significance of a term in a directive in its non-English language versions.

- 167 2018 Act s.6(4)(a) (as amended by EU (WA) Act 2020 s.26(1)(c)). Further provision is made as regards the (Scottish) High Court of Justiciary.
- 168 2018 Act s.6(5) (as amended by EU (WA) Act 2020 s.26(1)(c)).
- 169 Department for Exiting the European Union, Cm.9446 (March 2017) para.2.16 quoting the House of Lords Practice Statement (Judicial Precedent) of 1966, *[1966] 1 W.L.R. 1234*; and see also Explanatory Notes to 2018 Act, paras 113 and 115.
- 170 This change was effected by the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525) (“SI 2020/1525”) reg.3 (which lists the “relevant courts”). These regulations were made under the 2018 Act s.6(4)(ba), s.6(5A)–(5D) (as inserted into 2018 Act s.6 by the EU (WA) Act 2020 s.26(1)(d)) and see Ministry of Justice, Retained EU Case Law, Consultation on the Departure from Retained EU Case Law by UK Courts and Tribunals (July 2020), pp.17 et seq.
- 171 SI 2020/1525 reg.4(2). “Post-transition case law” is defined as “any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect on or after IP completion day”: SI 2020/1525 reg.2.
- 172 SI 2020/1525 reg.5. For an example of the CA refusing to depart from the relevant EU case law, see *Tunein Inc v Warner Music UK Ltd [2021] EWCA Civ 441, [2022] 2 All E.R. 35* at [77]–[99], in the context of the concept of “communication to the public” in art.3 of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the Information Society Directive”) [2001] O.J. L167/10. On the temporal application of any departures from retained EU case law by the SC or listed appellate courts, see *Whittaker (2021) 137 L.Q.R. 477, 486–488*.
- 173 2018 Act s.6(1)(a) (as amended by the EU (WA) Act 2020 s.26(1)(a)). On the exception made for decisions of the CJEU made after IP completion on requests for preliminary references made before IP completion day, see above, para.1-027 (note).
- 174 2018 Act s.6(2) (as amended by the EU (WA) Act 2020 s.26(1)(a)) (emphasis added).
- 175 Explanatory Notes to 2018 Act, para.110. See, however, *Tunein Inc v Warner Music UK Ltd [2021] EWCA Civ 441, [2022] 2 All E.R. 35* at [90]–[91] where Arnold LJ considered

a judgment of the CJEU made after IP completion day “highly persuasive” in the context, though cf. at [183] (Rose LJ).

- 176 The position applicable under the [1998 Act](#) would change if the Bill of Rights Bill 2022 cl.3 on the interpretation of the Convention rights were enacted.

- 177 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (24 December 2020). The UK and EU also concluded two further agreements: the Nuclear Cooperation Agreement (NCA) and the Security of Classified Information Agreement (SCIA). While the text of the TCA was agreed on 24 December 2020, it later underwent a final process of legal revision which included the renumbering of its provisions; the references in this paragraph follow this renumbering with the earlier numbering in parentheses. Most of the TCA’s provisions came into force only provisionally at the end of the transition period, i.e. 1 January 2021; see TCA art.783 (formerly art.FINPROV.11). See generally House of Commons Briefing Paper No.09106, The UK-EU Trade and Cooperation Agreement: Summary and Implementation (30 December 2020), pp.14–15.

- 178 In general the TCA itself does not itself give rise to any private rights or obligations on persons not party to the Agreement under international law: TCA art.5 (formerly art.COMPROV.16) Private rights.

- 179 The Act provided for some of its provisions to come into force on the day on which it was made (i.e. 31 December 2020): [EU \(FR\) Act 2020 s.40\(6\)](#), it being specified that other provisions would be brought into force “on such day as a Minister of the Crown may by regulations appoint”: [s.40\(7\)](#). A first example of the latter may be found in the [European Union \(Future Relationship\) Act 2020 \(Commencement No.1\) Regulations \(SI 2020/1662\)](#) (which brought some provisions into force on IP completion day (i.e. 30 December 2020 at 11.00pm) and some on 1 March 2021).

- 180 The specific implementation provisions are contained in Pt 1 Security and Pt 2 Trade and Other Matters; Pt 3 concerns General Implementation.

- 181 [EU \(FR\) Act 2020 s.31](#).

- 182 “Existing domestic law” is defined so as to include the law having effect on the day of a provision of the TCA coming into provisional effect (i.e. 1 January 2021) or, if it does not, on its coming into force: [EU \(FR\) Act 2020 s.29\(4\)](#).

- 183 The relevant day is defined as the day when the TCA (or aspect of the TCA) is provisionally applied or, where this is not the case, when it comes into force: [EU \(FR\) Act 2020 s.29\(4\)](#).

- 184

- EU (FR) Act 2020 s.29(1).
- 185 *Lipton v BA City Flyer Ltd [2021] EWCA Civ 454* at [78] per Green LJ (with whom Coulson LJ agreed as regards the effect of the TCA and Haddon-Cave LJ agreed generally); and see further at [73]–[83] in the context of the retained EU law Denied Boarding Regulation and the TCA art.438 (art.AIRTRN.22).
- 186 TCA art.197(1) (formerly art.DIGIT.2(1)) Scope.
- 187 TCA art.205 (formerly art.DIGIT.10(1)) Conclusion of contracts by electronic means.
- 188 TCA art.208 (formerly art.DIGIT.13) Online consumer trust.
- 189 TCA Pt 2, Heading One, Title VI.
- 190 See below, para.[7-011A](#) (on the TCA art.205 (formerly art.DIGIT.10)) and Vol.II, paras [40-165](#) (note) and [40-186](#) on the TCA art.208(1)(a) and (b) (formerly art.DIGIT.13(1)(a) and (b)).

## Section 2. - Definitions of Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 1 - Contract Law and “Contracts”

Section 2. - Definitions of Contract

### Competing definitions of contract

- <sup>131</sup> There are two main competing definitions of a contract in the common law.<sup>191</sup> The first, which was adopted by the 26th edition of this work, defines a contract as a promise or set of promises which the law will enforce.<sup>192</sup> The competing view, which was taken by the 2nd edition of this work,<sup>193</sup> is that a “contract is an agreement giving rise to obligations which are enforced or recognised by law”.<sup>194</sup>

There are two main arguments in favour of the definition of contract in terms of promise. First, the idea of contracts as being based on agreement was introduced into English legal discussions only in the nineteenth century, in particular under the influence of Pothier’s Treatise on Obligations<sup>195</sup> and does not accord with the raw material of the common law, in particular in relation to the requirement of consideration.<sup>196</sup> For English law does not in general enforce gratuitous promises, the element of non-gratuity being expressed technically by the requirement that some consideration must move from the promisee and in lay terms that it enforces bargains rather than agreements.<sup>197</sup> Moreover, it is in relation to the requirement of consideration that modern usage most readily relies on the language of promise: what is required is consideration for a party’s *promise*, not consideration for the parties’ *agreement*.<sup>198</sup> Finally, one of the justifications for the enforcement of contracts is said to lie in the moral obligation of a party to perform his promise.<sup>199</sup>

### Difficulties with “contract as promise”

<sup>132</sup>

However, analysis of contracts in terms of an enforceable promise or sets of enforceable promises is not entirely satisfactory. First, outside the context of consideration, in general neither courts nor parties to contracts describe the relationships which they create in terms of promises, but rather in terms of agreements, and for the courts this is clearest in the context of the rules as to offer and acceptance which when satisfied form that agreement.<sup>200</sup> Moreover, as will be described later, the doctrine of consideration to which the “promise theory” is so closely related, is somewhat under siege: from the legislature, since the enactment of the *Contracts (Rights of Third Parties) Act 1999* has limited its traditional domain,<sup>201</sup> and from the courts, notably in the decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd.*<sup>202</sup> Secondly, definition of contracts in terms of sets of promises does not give full force to the interrelationship of the obligations of the parties which exists in many contracts,<sup>203</sup> an interrelationship which can be seen particularly in the availability of the remedy of termination for substantial failure in performance, by which an injured party may terminate his own obligations by reason of the failure of the other party to perform his side of the bargain.<sup>204</sup>

## Difficulties with “contract as agreement”

- 133 However, an understanding of modern contracts as agreements does not fit easily with two recognised types of contract. First, in the case of a unilateral contract<sup>205</sup> where A promises to do something if B does something else, the performance by B of the condition is enough for A to be bound. Here, analysis in terms of doing something of value in return for a promise fits more naturally than does the construction of an acceptance by B’s performance of the condition of A’s promise.<sup>206</sup> Secondly, promises contained in deeds<sup>207</sup> are enforceable by the person in whose favour they are made, whether or not that person is aware of them<sup>208</sup> and so while a deed may give contractual force to an agreement, agreement is unnecessary for the enforcement of the promises which it contains. And, for Pollock, writing in 1885, the position of contracts under seal made it difficult for him to accept that “proposal and acceptance [form] part of the general conception of contract”.<sup>209</sup> For other writers, however, it has led instead to a denial that the binding force of a promise in a deed depends on contract at all.<sup>210</sup> Certainly, although it is true that the action to enforce promises made under seal, the action of covenant, was traditionally classified as arising *ex contractu*,<sup>211</sup> this classification cannot be treated as conclusive as to whether promises in deeds should be considered contractual, given that at the time other actions which are clearly not so considered were also included within this category (notably, actions for money had and received, which would now be understood as restitutionary<sup>212</sup> and actions for detinue whose function before their abolition was clearly proprietary).<sup>213</sup>

## Actual agreement not required

- 134 Moreover, even though it is true that the existence of an agreement is in the vast majority of cases a condition for the existence of a contract not contained in a deed, this statement ought to be treated with some caution. First, the existence of an agreement is not an issue merely of fact, to be found by a psychological investigation of the parties at the time of its alleged origin: in general English law takes an “objective” rather than a “subjective” view of the existence of agreement<sup>214</sup> and so its starting point is the manifestation of mutual assent by two or more persons to one another<sup>215</sup>:

“Agreement is not a mental state but an act, and, as an act, is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done.”<sup>216</sup>

Furthermore, for reasons of commercial convenience, the common law regulates what is to be treated as a manifestation of assent capable of giving rise to a contract in its rules relating to offer and acceptance.<sup>217</sup> For example, a posted acceptance of an offer is said to conclude a contract on posting, rather than on communication to the offeror, and so an acceptance lost in the post will bind the offeror.<sup>218</sup> Similarly, if A sends an offer to B by post, and then changes his mind and sends a letter revoking his offer, but B posts an acceptance of the offer after A posted his letter of revocation, but before B received it, there may be a contract, though the parties were never *ad idem*.<sup>219</sup> Another example of common law regulation of what constitutes an agreement may be found in the general rule that silence in an offeree cannot be treated as acceptance.<sup>220</sup> And it has been held that the traditional analysis in battle of forms cases will not be displaced unless it is shown that it was the parties’ common intention (as objectively construed from their words or conduct) that some other terms were intended to prevail.<sup>221</sup>

## Agreement and consideration not sufficient

- 135 The presence of an agreement supported by consideration is not always sufficient to establish the existence of a contract. This is notably the case where the parties agree in circumstances in which it is considered inappropriate for the law to impose legal obligations, for example, in a social or domestic context, and is justified on the basis that the parties cannot be considered to have intended to create a legal relationship.<sup>222</sup> However, the courts have used the requirement that the parties must possess an intention to create legal relations to exclude other types of non-gratuitous agreement from the domain of contract.<sup>223</sup> Furthermore, even if a transaction fulfils these three conditions of agreement, consideration and an intention to create legal relations, it

may be defeated by the presence of other factors such as the absence of a particular form,<sup>224</sup> mistake,<sup>225</sup> misrepresentation,<sup>226</sup> duress,<sup>227</sup> undue influence,<sup>228</sup> incapacity<sup>229</sup> or illegality.<sup>230</sup> Some of these factors will render the contract void,<sup>231</sup> others voidable,<sup>232</sup> and others still will render it unenforceable against one or both contracting parties.<sup>233</sup>

## Agreements intended not to be contracts

- 136 As will be seen in Ch.4, where an agreement otherwise satisfies all the conditions for the creation of a contract and is made in a commercial context where an intention to create legal relations is normally presumed, an express provision within that agreement may negative this intention and so lead to a holding that there is no contract. This is the case as regards agreements which are expressed as binding in honour only or agreements made “subject to contract”.<sup>234</sup> Moreover, the intention to create legal relations may be negated impliedly.<sup>235</sup>

## Enforcement of agreements under other rules

- 137 Even though contracts are in general to be defined as agreements, this does not mean that all enforceable agreements (or enforceable promises) are contracts. This is particularly noticeable in relation to promissory and proprietary estoppel and constructive trust. In the case of promissory estoppel, A may be prevented from going back on a promise not to rely on his legal rights against B, subject to the condition that B has relied on A’s promise (possibly, to B’s detriment).<sup>236</sup> B does not need to furnish consideration for A’s promise for it to be enforceable under this doctrine and although the requirement of reliance by B suggests some element of acceptance on the latter’s part of the benefit of the promise, there is no need for this to be communicated to or known by A.<sup>237</sup> The doctrines of proprietary estoppel and constructive trust may also enforce promises or agreements, even though these elements form merely part of the factual circumstances which attract their application. For example, in *Crabb v Arun DC*,<sup>238</sup> A made an assurance to B that it would grant a right of way to B over its land to and from B’s land and B acted in reliance on this assurance. B’s claim for a declaration that he was entitled to the right of access succeeded by way of estoppel, even though apparently B could not have established the existence of a contract on the ground of its uncertainty.<sup>239</sup> So too, as will be seen, constructive trust, and possibly also proprietary estoppel, can be used by the courts to give some legal effect to agreements for the sale or other disposition of an interest in land which do not constitute contracts for lack of the proper form.<sup>240</sup> On the other hand, sometimes constructive trust is used not so as to allow an agreement not counting as a contract to be enforced between its parties but rather so as to allow it to affect the position of third parties. For example, in *Binions v Evans*,<sup>241</sup> A had been given permission by

B to occupy a cottage on B's land for the rest of her life. B sold the land to C expressly subject to A's tenancy of the cottage, but a few months later C gave A notice to quit. It was accepted by the majority of the Court of Appeal<sup>242</sup> that the agreement between A and B had contractual force, but for Lord Denning MR in the circumstances of the case it would also give rise to a constructive trust so as to bind C.<sup>243</sup>

## Agreements in statutory contexts

- D** 138 Some agreements between two or more parties which are enforceable in law may not count as "contracts" owing to their particular legislative contexts.

<sup>244</sup>

**U** For example, where companies supply public utilities such as water, gas and electricity under a statutory duty to supply to "tariff customers", their relationship with these customers has been held to be statutory rather than contractual: the legal compulsion as to both the creation of the relationship and the fixing of its terms was held inconsistent with the existence of a contract.<sup>245</sup> The relationship between local authorities and tenants who exercise their "right to buy" under the scheme created by Pt V of the Housing Act 1985 is not contractual, as the obligation of a landlord faced with the exercise by the tenant of the right to buy derives solely from the Act, whose provisions set out a prescriptive procedure for this purpose.<sup>246</sup> And the licences to broadcast given to broadcasters under the Broadcasting Act 1990 are not contracts but rather "public law instruments" subject to a "comprehensive statutory scheme governing the relationship between the parties".<sup>247</sup> Moreover, a patient to whom medicines are supplied under the National Health Service does not make a contract to buy them either from the chemist or the Minister of Health even if they pay a subscription charge, as the patient has a statutory right to demand the drug on payment of the charge and the hospital has a statutory obligation to supply it on such payment: there is no contract nor, indeed, is there a need for any agreement between the parties.<sup>248</sup> On the other hand, an "income payments agreement" between a bankrupt and their trustee or between a bankrupt and their official receiver under s.310A of the Insolvency Act 1986 has been held to be a contract even though it is subject to controls set out by the Act.<sup>249</sup>

## EU law definitions of contract

- D** 139 The definitions which we have so far discussed have been those which have arisen from analysis of the common law, equitable and statutory material native to English law or the legal systems which have developed from it. However, as earlier noted,<sup>250</sup> legislation of the EU has had a

very considerable effect on the law governing English contracts. In these areas, the relevant EU legislation often makes the application of legislation contingent on the existence of a contract, but, in the absence of an express definition of “contract” in the legislation itself,<sup>251</sup> the question arises whether this notion should be interpreted according to the understanding of the various Member State laws or instead on the basis of an “autonomous” definition to be formulated by the Court of Justice of the EU. It is submitted that there is not likely to be any single answer to be given to this question and that different answers may be given according to the context of the legislation in question, these turning on a variety of considerations, but particularly on the degree of juridical integration which the Court of Justice thinks desirable and practicable in that context. However, where the Court of Justice considers it right to take an autonomous view of “contract” for the purposes of EU legislation, it may well take as its starting-point the definition of contract set out in the Proposed Regulation on a Common European Sales Law, which defines “contract” as “an agreement intended to give rise to obligations or other legal effects”.<sup>252</sup> It is to be noticed, in particular, that this definition makes no requirement of reciprocity or provision of value such as is found in the doctrine of consideration with the result that, in principle, purely gratuitous agreements could fall within its scope.<sup>253</sup> The following paragraphs consider the approach to definitions of “contract” following existing case law of the European Court. In this respect, it should be recalled that the status for English courts of decisions made and principles laid down by the European Court changed on IP completion day, as explained earlier.<sup>254</sup>

## EU private international law

- 140 The Court of Justice itself has had occasion to hold that a European and “autonomous” view should be taken of the understanding of what constitutes a contractual as opposed to a non-contractual matter for the purposes of jurisdictional rules under the Brussels Convention (later brought within EU law as the Brussels Ibis Regulation),<sup>255</sup> and this has meant that an action classified in one Member State (France) as contractual has been held extra-contractual for these purposes.<sup>256</sup> The European Court decided that:

“... the phrase ‘matters relating to a contract’ within the meaning of Article 5(1) of the Convention should not be understood to cover a situation where there is no obligation freely entered into by one party to another. Where a sub-buyer of goods which are bought from an intermediate seller brings an action against a manufacturer for damages on the sole ground that the goods are not in conformity, it is important to observe that there is no contractual link between the sub-buyer and the manufacturer because the latter has not undertaken a contractual obligation of any kind to the former.”<sup>257</sup>

As regards the EU instruments governing applicable law, the Rome II Regulation on the law applicable to non-contractual obligations specifies that “the concept of non-contractual obligation”

must be understood as an “autonomous concept”<sup>258</sup> and includes certain areas of law (notably, “product liability” and pre-contractual liability (“culpa in contrahendo”)) which in some national laws fall within contract and in others outside it.<sup>259</sup> The scope of the Rome I Regulation (replacing the earlier Rome Convention) on the law applicable to *contractual obligations* is to be interpreted in a way consistent with the earlier Rome II Regulation.<sup>260</sup> For this purpose, the Court of Justice of the EU has held that “the concept of ‘contractual obligation’ [under the Rome I Regulation] designates a legal obligation freely consented to by one person towards another”.<sup>261</sup>

## European definition of “worker”

- ¶41 As to the various legislative provisions governing contracts of employment and contracts under which “workers” act, clearly their concern is not with “contract”, but rather with “employment contract” or “worker”, but in this respect some of the EU legislation clearly invites the courts of the Member States to refer to a conception of contract drawn from their own legal system, while other provisions have attracted a European conception. So, for example, Directive 91/533 which makes certain requirements as to the information to be given by employers to their employees as to the conditions of employment expressly provides that it shall apply “to every paid employee having a contract or employment relationship defined by the law in force in a Member State”.<sup>262</sup> On the other hand, the European Court of Justice made clear as early as 1964 that “worker” for the purposes of the principle of freedom of movement of workers contained in art.48 (later art.39) of the EC Treaty (now art.45 TFEU) must be given a European understanding<sup>263</sup> the fleshing out of this being the matter for a series of subsequent judgments.<sup>264</sup>

## “Consumer contract”

- ¶42 Finally, while it is clear that certain aspects of the notion of “consumer contract” for the purposes of the Directive on Unfair Terms in Consumer Contracts 1993 are to be interpreted “autonomously”, it is less clear whether the notion of “contract” itself is to be interpreted autonomously or instead falls to be governed by the legislation or case law of the Member States.<sup>265</sup> If it were to be interpreted autonomously, then the significance of “contract” may well differ from that given generally by English law, notably as regards the latter’s requirement of consideration. Furthermore, if the Court of Justice felt it necessary to come to a view as to what constitutes “a contract” for this purpose, the Court of Justice is likely to be inspired by the definition already noted in the Proposal for a Regulation on a common European sales law.<sup>266</sup>

## “Contract” in EU public procurement law

- 143 The Court of Justice has adopted an autonomous European view of “contract” for the purposes of the public procurement directives. In *Teckal Srl v Comune di Viano*<sup>267</sup> the Court recognised that the conclusion of an agreement by a public authority and a company which, although a separate entity, is in substance a department of the authority falls outside the requirements of these directives.<sup>268</sup> According to the Court:

“As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.

In that regard ... it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.”<sup>269</sup>

As AG Stix-Hackl observed in the *TREA Leuna Case*, “in *Teckal* the court ... narrowed the concept of “contract” by interpreting it teleologically”.<sup>270</sup> Subsequent case law in the European Court (as reviewed by the Supreme Court in *Risk Management Partners Ltd v Brent LBC*) makes clear that the “*Teckal* exception” does not “depend on the meaning to be given to particular words or phrases in the Directive, such as those to be found in the definition of ‘public contracts’”, but rather on fundamental policies pursued both by the procurement directives and by the EC Treaty itself.<sup>271</sup> On IP completion day, the body of UK legislation which implemented EU procurement law became part of “retained EU law” subject to amendment.<sup>272</sup>

## Footnotes

- 191 This sentence was referred to with apparent approval in *Engel v Joint Committee for Parking and Traffic Regulation Outside London [2013] I.C.R. 1086, [2013] I.R.L.R. 787* at [6].
- 192 Chitty on Contracts, 26th edn (1989), Vol.I, para.1; Pollock, Principles of Contract, 13th edn (1950), p.1; cf. Pollock, Principles of Contract at Law and in Equity, 1st edn (1876), p.5. The American Law Institute’s Restatement of Contracts, 2nd edn, para.1, adopts substantially the same definition.
- 193 Chitty, A Practical Treatise on the Law of Contracts (1834), pp.1–2.

- 194 Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.1–001. cf. Burrows, *A Restatement of the English Law of Contract*, 2nd edn (2020), s.2 which defines “contract” as “an agreement that is legally binding because – it is supported by consideration or made by deed”, certain and complete, made with the intention to create legal relations, and complies with any formal requirement needed for the agreement to be legally binding; and see the commentary at pp.44–55.
- 195 Pothier, *Treatise on Obligations* (trans. Evans, 1806) and see *Simpson* (1975) 91 *L.Q.R.* 247, 257–262; Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p.399; Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), Ch.6.
- 196 cf. Nicholas, *The French Law of Contract*, 2nd edn (1992), p.144.
- 197 According to the Restatement of Contracts at para.3, a bargain is an agreement, whereby two or more persons exchange promises, or exchange a promise for a performance. However, the word “bargain” is seldom used in any technical sense in the law of contract: Atiyah, *Essays on Contract* (1986), Essay 8, p.207; and see *Eisenberg* (1982) 95 *H.L.R.* 741. It is sometimes said that the requirement of consideration means that contracts are *exchanges*. This suggests some element of reciprocity between the parties to the contract and while this is often the case, a promise by A to do work for B can support a promise by C of payment for it: see below, para.6-004. According to Gordley above, at pp.137–139, the systematisation of the doctrine of consideration took place at the same time as the acceptance of civilian theories of contract and was intended to act as a control device on the ambit of contract.
- 198 See below, para.6-001.
- 199 Goodhart, *English Law and the Moral Law* (1953), p.101; Fried, *Contract as Promise* (1983); *Harris* (1983) 3 *Int. Rev. Law & Econ.* 69; Burrows (1985) *C.L.P.* 141. cf. Atiyah (1978) 94 *L.Q.R.* 193; *Promises, Morals and Law* (1981); *Essays on Contract* (1986), Essays 2 and 6; Raz in Hacker and Raz (eds), *Law, Morality and Society* (1977), Ch.12; Smith, *Contract Theory* (2004), Chs 2–4.
- 200 See below, Ch.4.
- 201 And see the Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com. No.242 (1996), para.6.8 and below, Ch.20.
- 202 *Williams v Roffey Bros Nicholls (Contractors) Ltd [1991] 1 Q.B. 1* and see below, para.6-069. See also *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553, [2017] Q.B. 604; on appeal [2018] UKSC 24, [2018] 2 W.L.R. 1603* at [18] the SC considered it unnecessary to decide the issue of consideration and decided the case on other grounds, on which see below, paras 6-129—6-133.
- 203 cf. Atiyah, *An Introduction to the Law of Contract*, 5th edn (1995), pp.38–39.
- 204 See below, Ch.27 and esp. at paras 27-010—27-012 where the circumstances in which a party may terminate for breach and with what effect are explained. This is not to say that the availability of this remedy cannot be expressed in terms of independent or dependent promises, but the term “promise” here is used synonymously with that of obligation and can apply to obligations imposed on a contractor by law, which are not a matter of “promise” at all. Thus, a buyer of goods can reject the goods and terminate the contract, and thereby extinguish his own obligation to pay the price, for breach of the term that they are of

- satisfactory quality, a term imposed by s.14 of the Sale of Goods Act 1979 on sellers selling goods in the course of business to non-consumers, and see Vol.II, paras 46-066 and 46-093.
- 205 See below, para.1-073.
- 206 There is some doubt as to whether an offeree of a unilateral offer must be aware of that offer on performance of the condition for a contract to arise: see below, para.4-051. If the offeree need not be so aware, then no agreement can be constructed from performance of the condition. It is clear that the offeree of a unilateral offer does not in general have to communicate his acceptance to the offeror before he fulfils the condition and the contract arises: *Carlill v Carbolic Smoke Ball Co [1893] 1 Q.B. 256*, and see below, para.4-059.
- 207 After the abolition by the Law of Property (Miscellaneous Provisions) Act 1989 s.1(1) of the requirement of sealing for the validity of deeds made by individuals, it is more appropriate to refer to promises in deeds rather than the former “promises under seal”: see below, paras 1-081 et seq.
- 208 *Xenos v Wickham (1866) L.R. 2 H.L. 296, 312; Macedo v Stroud [1922] 2 A.C. 330.*
- 209 Pollock, Principles of Contract at Law and in Equity, 4th edn (1885), p.9 and cf. p.5.
- 210 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.3-172. cf. Burrows, A Restatement of the English Law of Contract, 2nd edn (2020), ss.2 and 8(1), commentary on pp.63–64, which includes agreements supported by a deed within its definition of contract, but distinguishes deeds which contain agreements and those which do not (deeds poll).
- 211 Bacon, A New Abridgment of the Law, 7th edn (1832), Vol.I, p.55 included debt, detinue, account, covenant, assumpsit, quantum meruit, quantum valebat and annuity in his treatment of actions ex contractu. cf. Chitty and Chitty, A Treatise on the Parties to Actions and on Pleading, 6th edn (1836), pp.98–125.
- 212 See below, para.32-006; Birks, An Introduction to the Law of Restitution (1985), pp.29–39.
- 213 Technically, detinue protected the plaintiff’s right to possession of personal property. For further discussion of the classification of actions at common law, see below, para.3-002. Detinue was abolished by the Torts (Interference with Goods) Act 1977 s.2.
- 214 *Howarth (1984) 100 L.Q.R. 265 and 528; Vorster (1987) 103 L.Q.R. 274; Goddard (1987) 7 L.S. 263; de Moor (1990) 106 L.Q.R. 632 and see The Hannah Blumenthal [1983] 1 A.C. 854; The Leonidas D. [1985] 1 W.L.R. 925; Beatson (1986) 102 L.Q.R. 19; Atiyah (1986) 102 L.Q.R. 363 and below, para.4-002.* In principle, an objective approach is also taken to the construction of contracts, that is, the determination of what the parties have agreed: see below, paras 15-053—15-054. cf. however, the position as regards rectification of contractual documents below, paras 5-058 et seq.
- 215 Restatement of Contracts at para.3.
- 216 Furmston, Cheshire, Fifoot and Furmston’s Law of Contract, 17th edn (2017), p.42.
- 217 See below, paras 4-003 et seq.
- 218 *Household Fire Insurance Co v Grant (1879) 4 Ex. D. 216*, overruling *British and American Telegraph Co Ltd v Colson (1871) L.R. 6 Ex. 108*. See below, paras 4-064 et seq.
- 219 *Byrne v Van Tienhoven (1880) 5 C.P.D. 344*; below, para.4-115.
- 220 *Felthouse v Bindley (1862) 11 C.B.(N.S.) 869, affirmed (1863) 1 N.R. 401* and see below, paras 4-087 et seq.

- 221 *Tekdata Interconnections Ltd v Amplenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357 especially at [11], [21], [25] and [30].
- 222 See below, paras 4-206—4-235.
- 223 See below, para.4-250.
- 224 See below, Ch.7.
- 225 See below, Chs 5 and 8.
- 226 See below, Ch.9.
- 227 See below, paras 10-003—10-071.
- 228 See below, paras 10-072—10-160.
- 229 See below, Chs 11 and 12.
- 230 See below, Ch.18.
- 231 See below, para.1-074.
- 232 See below, para.1-076.
- 233 See below, para.1-078.
- 234 See below, para.4-214.
- 235 See below, para.4-216.
- 236 See below, paras 6-144 et seq.
- 237 See below, para.6-101.
- 238 [1976] Ch. 179 and see below, para.6-159.
- 239 [1976] Ch. 179, 195 and see below, para.6-159.
- 240 Below, paras 7-049—7-060 discussing *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 and *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776.
- 241 [1972] Ch. 359.
- 242 [1972] Ch. 359 at 367, 371.
- 243 [1972] Ch. 359 at 367–368. Megaw and Stephenson LJJ preferred to protect A's position by holding her to be a tenant for life within the meaning of the Settled Land Act 1925.
- 244 See also on the position of civil servants below, para.4-251 and Vol.II, para.42-037. Members of the armed forces are appointed by the Crown under the prerogative and the relationship between them is not contractual, a position supported by authority, the absence of an intention to create legal relations and public policy: *Quinn v Ministry of Defence* [1998] P.I.Q.R. P387 at 394–396; applied by *Malone v Ministry of Defence* [2021] EWHC 2958 (QB), [2022] I.C.R. 478 at [22].
- 245 *Read v Croydon Corp* [1938] 4 All E.R. 631; *Norweb Plc v Dixon* [1995] 1 W.L.R. 637 at 643–644. See similarly, *Oceangas (Gibraltar) Ltd v Port of London Authority* [1993] 2 Lloyd's Rep. 292 (no contract in respect of compulsory pilotage services).
- 246 *Rushton v Worcester City Council* [2001] EWCA Civ 367, [2002] H.L.R. 9 at [57].
- 247 R. (on the application of Data Broadcasting International Ltd) v Office of Communications [2010] EWHC 1243 (Admin), [2010] All E.R. (D) 289 (May) at [88]–[94] esp. at [88] and [92].
- 248 *Pfizer Corp v Ministry of Health* [1965] A.C. 512 at 535–536.

249 *Elston v King [2020] EWHC 55 (Ch)* at [7].

250 Above, para.1-013.

251 cf. Amended Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2017) 637 final, art.2(g) and a Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634 art.2(7), where “contract” is defined for the purposes of the proposed directives as “an agreement intended to give rise to obligations or other legal effects”. However, these definitions of “contract” were not retained in the directives as enacted: Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc. [2019] O.J. L136/28 and Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] O.J. L136/1, but they do provide that they “shall not affect the freedom of Member States to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, in so far as they are not regulated [by the directives], or the right to damages”: Directive (EU) 2019/771 art.3(6) and Directive (EU) 2019/770 art.3(10). These features suggest that the definition of contract is left for national contract laws: Sein and Spindler (2019) 15 E.R.C.L. 257 at 260–261 (arguing from the omission of the definition in proposal of Directive (EU) 2019/770).

252 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final art.2(a). On the Proposal, see above, para.1-015. As noted above, this definition was adopted by recent proposals for directives in the areas of contracts of sales of goods and for the supply of digital content, but not in the directives as enacted.

253 cf. the inclusion within those contracts for which the Common European Sales Law would have been available of “contracts for the supply of digital content … irrespective of whether the digital content is supplied in exchange for the payment of a price”: Proposal COM(2011) 635 final, art.5(b). However, Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] O.J. L136/1 art.3(1) first sentence restricts the scope of the directive generally to “any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price” (defining “price” (art.2(7) as “money or a digital representation of value that is due in exchange for the supply of digital content or a digital service”), but then adds that it also applies “where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader” (with certain exceptions).

254 Above, paras 1-027—1-029.

255 *Kalfelis v Schröder (189/87) EU:C:1988:459, [1988] E.C.R. 5565* especially at 5577 (AG Darmon), 5585; *ÖFAB, Östergötlands Fastigheter AB v Koot (C-147/12) EU:C:2013:490, 18 July 2013* at para.33; *Brogsitter v Fabrication de Montres Normandes EURL (C-548/12)*

*EU:C:2014:148*, 13 March 2014 at para.18; *ERGO Insurance SE v If P&C Insurance AS (Joined Cases C-359/14 and C-475/14)* EU:C:2016:40, 21 January 2016 at para.43; *Kolassa v Barclays Bank Plc (C-375/13)* EU:C:2015:37, 28 January 2015 at para.43; *Granarolo SpA v Ambrosi Emmi France SA (C-196/15)* EU:C:2016:559, 14 July 2016 at para.19; *flightright GmbH v Air Nostrum (Joined cases C-274/16, C-447/16 and C-448/16)* EU:C:2017:787, 7 March 2018 at [58]–[65]. The Brussels Convention was replaced as from 1 March 2002 by the Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L012/1 (“Brussels I Regulation”), which was in turn replaced as from 10 January 2015 by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”). And see below, para.3-063. On IP completion day, however, the retained EU law Brussels Ibis Regulation was revoked: see above, para.1-024.

- 256 *Jakob Handte & Co GmbH v Société Traitements Mécano-chimiques des Surfaces (TMCS) (C-26/91)* EU:C:1992:268, [1993] I.L.Pr. 5 and see below, para.3-063.
- 257 [1993] I.L.Pr. 5 at 22.
- 258 Regulation 864/2007 of the European Parliament and of the Council law applicable to non-contractual obligations (“Rome II Regulation”) [2007] O.J. L199/40 recital 11. After IP completion day, the Rome II Regulation became part of “retained EU law” as amended: see above, para.1-024.
- 259 Rome II Regulation arts 5 and 12 respectively.
- 260 Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6 recital 7. On IP completion day, the Rome I Regulation became part of “retained EU law” as amended: see above, para.1-024. See below, Ch.33 and esp. paras 33-002 and 33-018 et seq.
- 261 *ERGO Insurance SE v If P&C Insurance AS (Joined Cases C-359/14 and C-475/14)* EU:C:2016:40, 21 January 2016 para.44; *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15)* EU:C:2016:612, 28 July 2016 esp. at para.60 (action for cessation of use of unfair contract terms falls under Rome II as concerning a non-contractual obligation, though the assessment of the terms falls under Rome I as concerning a contractual obligation following the nature of these terms whether this arises in an action for cessation or in an individual action between a trader and a consumer); *Committeri v Club Mediterranee SA [2016] EWHC 1510 (QB)* at [45]–[48]; *Pan Oceanic Inc v UNIPEC UK Co Ltd [2016] EWHC 2774 (Comm)*, [2017] 2 All E.R. (Comm) 196 at [153]–[163].
- 262 Directive 91/533 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] O.J. L288/32 art.1(1). Similarly, Framework Agreement on Part-time Work cl.2(1) “[t]his Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State”, Annex to Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] O.J. L14/9.
- 263 *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (C-75/63)* EU:C:1964:19, [1964] E.C.R. 177.

- 264 See Craig and de Búrca, EU Law, 7th edn (2020), Ch.22 and Vol.II, para.42-009.
- 265 *Whittaker (2000) 116 L.Q.R. 95* and see Vol.II, paras 40-016, 40-253—40-255, esp. in relation to *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Kanyeba, Nijs, Dedroog (C-349 to C-351/18) EU:C:2019:936, 7 November 2019*. cf. the position under the Consumer Rights Directive 2011 art.6(5), on which see Vol.II, paras 40-066—40-068. However, in *KH v Sparkasse Sudholstein (C-639/18)*, 12 March 2020 at paras 45–51 AG Sharpston advised that the notion of a “contract concerning financial services” in art.2(a) of Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16 should be given an autonomous interpretation and that for this purpose “a key element for a ‘contract’ to exist within the meaning of Article 2(a) is that there should be an agreement between the parties, that is to say a meeting of minds” (para.51) (the decision of the CJEU of 18 June 2020 did not express a view on this issue). On this directive and its implementation in UK law by the *Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095)* see Vol.II, para.40-143.
- 266 Above, para.1-039. On the interpretative significance of such a decision (made after IP completion day) see above, para.1-029.
- 267 *C-107/98 EU:C:1999:562, [1999] E.C.R. I-8121*.
- 268 At the time, Council Directive 1992/50/EEC relating to the co-ordination of procedures for the award of public service contracts; Directive 93/36/EEC of 14 June 1993 co-ordinating procedures for the award of public supply contracts.
- 269 *C-107/98 EU:C:1999:562, [1999] E.C.R. I-8121* at paras 49 and 50.
- 270 *Stadt Halle & RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energierverwertungsanlage (C-26/03) EU:C:2005:5, [2005] E.C.R. I-1* at [52].
- 271 *Risk Management Partners Ltd v Brent LBC [2011] UKSC 7, [2011] 2 A.C. 34* at [22], per Lord Hope of Craighead and see further *[2011] UKSC 7* at [38]. The conclusion of public contracts between entities in the public sector (which forms the context of this case-law) was the subject of regulation by the Public Contracts Directive 2014: Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] O.J. L94/65 art.12 and recitals 31 and 32.
- 272 European Union (Withdrawal) Act ss.2 and 3; Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319). On “retained EU law” see above, paras 1-020—1-029.

## **(a) - The Different Types of Classification**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 3. - Classification of Contracts**

**(a) - The Different Types of Classification**

### **Classification by the law**

- 144 The law may classify contracts in a variety of ways and for a variety of legal purposes, but four types of classification are prominent. First, contracts may be classified according to their form (whether contained in deeds<sup>273</sup> or in writing,<sup>274</sup> whether express or implied<sup>275</sup>) or means of formation (for example, whether they are “distance contracts” or concluded by electronic means).<sup>276</sup> Secondly, they may be classified according to the nature or the role of their parties (in particular, whether the parties are “traders” or otherwise acting in the course of business, “consumers” or public bodies).<sup>277</sup> Thirdly, and perhaps of the greatest importance, contracts may be classified according to their subject matter (for example, whether they are for the sale of goods, insurance, guarantee, carriage of goods, etc.).<sup>278</sup> Finally, they can be classified according to their effect (whether bilateral or unilateral,<sup>279</sup> whether valid, void, voidable or unenforceable<sup>280</sup>). As regards each of these types of classification the significance of the choice of the contracting parties as regards the law’s classification differs, there sometimes being distinctions within each type of classification.

### **Footnotes**

<sup>273</sup> See below, paras 1-046, 1-080—1-112.

<sup>274</sup> See below, Ch.7.

<sup>275</sup> See below, para.1-047.

- 276 Below, para.1-048.
- 277 Below, paras 1-051—1-053.
- 278 Below, paras 1-054—1-071.
- 279 See below, para.1-073.
- 280 See below, paras 1-074—1-078.

---

End of Document

© 2022 SWEET & MAXWELL

## **(b) - Classification of Contracts According to their Form or Means of Formation**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 3. - Classification of Contracts**

**(b) - Classification of Contracts According to their Form or Means of Formation**

### **Introduction**

- 145 Contracts can be classified according to their form or means of formation and for this purpose, distinctions can be drawn between formal and informal contracts, express and implied contracts, contracts which are and which are not made at a distance or “off-premises”, and contracts concluded by electronic means.

### **Formal and informal contracts**

- 146 Contracts may be either formal or informal. Apart from the so-called contracts of record, comprising judgments and recognisances, which are not properly speaking contracts at all, the only formal contract in English law is the contract contained in a deed, sometimes known as a specialty contract. All other contracts are informal contracts, or simple contracts as they are sometimes termed. In principle, simple contracts may be oral or in writing,<sup>281</sup> though particular types of contract possess their own requirements as to writing, signature and attestation.<sup>282</sup> The requirements for valid contracts contained in a deed are discussed in the next section of this chapter. The chief respect in which they differ from simple contracts as a matter of substance is that, for historical reasons, they are valid without the need for consideration.

## Express and implied contracts

147

Contracts may be either express or implied.<sup>283</sup> The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry them safely to their destination.<sup>284</sup> There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term or the court may infer an implied contract drawing on some of the terms of the earlier contract, but omitting others.<sup>285</sup> Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen,<sup>286</sup> agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follows that the distinction between express and implied contracts has little importance. However:

“One distinction exists ... in relation to the ease with which an express or implied contract may be established. Where there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed. It is otherwise when the case is that a contract should be implied from the parties’ conduct. It is then for the party asserting a contract to show the necessity for implying it.”<sup>287</sup>

U

The recognition of implied contracts in the sense explained in the present paragraph does not mean that a court should imply terms in an oral agreement so as to enable it to be sufficiently complete to amount to a binding contract. As Lewison LJ has observed:

“... [i]t is of course the case that the court may imply terms into a concluded contract. But that assumes that there is a concluded contract into which terms can be implied. It is not legitimate, under the guise of implying terms, to make a contract for the parties.”<sup>288</sup>

## “Distance contracts”, “off-premises contracts” and other contracts

- 148 Under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#),<sup>289</sup> distinctions are drawn within the broad category of consumer contracts between “distance contracts”, “off-premises contracts” and consumer contracts concluded in other circumstances (termed “on-premises contracts”). For this purpose, “distance contract” means:

“... a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.”<sup>290</sup>

The definition of “off-premises contract” is more elaborate, but it includes:

“... a contract concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader.”<sup>291</sup>

The [2013 Regulations](#) impose differing information requirements in the trader according to this triple distinction as to the circumstances in which the contracts are concluded, and, as regards distance contracts and off-premises contracts for the purposes of rights of cancellation in the consumer.<sup>292</sup> More generally, the law imposes a duty on providers of information society services, such as selling goods online, to provide information on specified matters before the conclusion of contract to be concluded by electronic means.<sup>293</sup> And the Trade and Cooperation Agreement 2020’s Title on “Digital Trade”<sup>294</sup> includes a number of provisions governing “measures of the two contracting parties” (the EU and the UK) “affecting trade enabled by electronic means” except audio-visual services.

[295](#)



## Relevance of choice of contracting parties

- 149 In principle the parties are free to choose whether to put their agreement in a deed or instead to conclude it as a “simple” or informal contract<sup>296</sup> and equally they may choose whether to conclude their contract in person, via postal correspondence or by electronic means. The role of the law

is to regulate the conditions under which the contract is concluded once this choice is made (for example, by imposing special requirements of form for deeds and not requiring the provision of consideration,<sup>297</sup> or imposing information requirements in respect of contracts concluded by electronic means<sup>298</sup>) or to regulate the effects or incidental rules attaching to the contracts once concluded (for example, a right of cancellation for “distance (consumer) contracts”<sup>299</sup> or a different period for the limitation of actions in the case of contracts contained in deeds<sup>300</sup>). Exceptionally, however, the law requires that a particular type of contract is concluded in a particular form or in conformity with a particular set of formal requirements. These exceptional requirements are discussed in Ch.7.<sup>301</sup>

## Relevance of intention as to classification

150 The question whether it matters that an agreement is *expressed* as being in a particular form differs according to the context. As will be seen, one of the requirements for an instrument to qualify as a deed is that:

“... it makes clear on its face that it is intended to be a deed by the person making it ... (whether by describing itself as a deed or expressed itself to be executed to be signed as a deed or otherwise.”<sup>302</sup>

Here, therefore, the designation of its nature by the instrument in which the agreement is contained is a condition of the classification of the contract. By contrast, in the case of the various classifications of consumer contract as distance contracts, off-premises contracts or on-premises contracts, the classification arises on the fulfilment of the factual and/or substantive conditions which the legislation sets out without reference to the parties’ expressed intention.<sup>303</sup> For while the contracting parties may indeed choose to conclude their contract in a certain way or by a certain means, once they have chosen to do so, any expression contained in their contract which purports to *avoid* the resulting classification (and the attendant obligations for the trader and rights for the consumer) would be ineffective as contrary to the “mandatory” character of these obligations and rights.<sup>304</sup>

## Footnotes

281 *Rann v Hughes* (1778) 7 T.R. 350n. See also *Blue v Ashley* [2017] EWHC 1928 (Comm) at [49].

282 See below, Ch.7.

- 283 cf. below, para.3-130 (no contract of employment implied so as to give effect to person's rights under the ECHR).
- 284 *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 at [100].
- 285 *Hamsard 3147 Ltd (trading as "Mini Mode Childrenswear") v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [71], [84]–[88] (where a contract of joint venture between a supplier and a retailer expired in circumstances where the retailer was concerned with the reliability of its future supply, the contract to be implied by reason of the necessity of circumstances dealt only with the parties' current operational arrangements, and did not include an implied term requiring good faith in the parties in relation to the operation of the contract as had been expressed in the earlier joint venture contract).
- 286 Above, para.1-034.
- 287 *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 at [102], per Mance LJ; *Heis v MF (Global) Services Ltd* [2016] EWCA Civ 569, [2016] Pens. L.R. 225 at [36]–[47]; *Zymurgorium Ltd v Hammonds of Knutsford Plc* [2021] EWHC 2295 (Ch) at [23]–[27]; *Mackie Motors (Brechin) Ltd v RCI Financial Services Ltd* [2022] EWHC 1942 (Ch) at [15]–[24] and see below, paras 4-209—4-211.
- 288 *Devani v Wells* [2016] EWCA Civ 1106, [2017] Q.B. 959 at [19] (with whom McCombe LJ agreed at [79]), referring to *Scancarriers A/S v Aotearoa International Ltd* [1985] 2 Lloyd's Rep. 419, 422 per Lord Roskill.
- 289 SI 2013/3134 ("2013 Regulations"), implementing Directive 2011/83/EU on consumer rights [2011] O.J. L304/64. The 2013 Regulations revoked and replaced the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816) and the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334): see generally Vol.II, paras 40-063 et seq. In addition, financial services contracts concluded at a distance are governed by the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095): see Vol.II, para.40-143.
- 290 2013 Regulations reg.5 "distance contract" and see Vol.II, paras 40-089 et seq.
- 291 2013 Regulations reg.5 "off-premises contract" (a) and see Vol.II, paras 40-084 et seq.
- 292 2013 Regulations regs 7–18, 27–38 on which see Vol.II, paras 40-094 et seq.
- 293 Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) reg.9 on which see Vol.II, para.40-165.
- 294 Pt II, Heading One, Title III Digital Trade. On the general significance of the TCA see above, para.1-030.
- 295 TCA art.197 (formerly art.DIGIT.2(1)) Scope.
- 296 On deeds see below, paras 1-080 et seq.
- 297 See below, paras 1-084—1-096, 1-104.
- 298 See Vol.II, para.40-165.
- 299 See Vol.II, paras 40-115—40-134.
- 300 Limitation Act 1980 s.8 and see below, para.1-112.
- 301 See below, Ch.7.

- 302 Law of Property (Miscellaneous Provisions) Act 1989 s.1(2)(a) and see below, para.1-091.
- 303 See Vol.II, paras 40-084—40-093.
- 304 See Vol.II, para.40-069.

## **(c) - Classification of Contracts According to their Parties**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 3. - Classification of Contracts**

**(c) - Classification of Contracts According to their Parties**

**Commercial contracts, non-commercial contracts and consumer contracts**

- 151 Contracts are sometimes classified according to the nature or role of their parties. Perhaps the most important of this type of division is between commercial and non-commercial contracts. Commercial contracts can be described as those which are made between two or more parties who are in business for the purposes of trade. Unlike some legal systems, there is in English law no general *legal* definition of a “commercial contract” nor “commercial law”,<sup>305</sup> but particular legislation is explicitly tied to the commercial context which it defines specially for its own purposes (for example, in the case of rules governing late payment of commercial debts<sup>306</sup> or contracts under which “commercial agents” are engaged).<sup>307</sup> While in principle the common law does not regulate commercial contracts distinctly, the courts sometimes refer to the commercial nature of the contract before them as relevant to the application of rules more widely applicable, notably, in the context of the construction of contracts.<sup>308</sup> In contrast, “non-commercial contracts” is a residual category and would include transactions as disparate as contracts on the dissolution of marriage, contracts under which legal claims are settled, and sales between private individuals other than in the course of business as well as “consumer contracts”. In the modern law, the last of these is an important category and may be defined as those contracts which are made between one party who is in business (often termed the “trader” by more recent legislation) and another party who is contracting other than for business purposes (the “consumer”).<sup>309</sup> The regulation of consumer contracts by legislation controls the fairness of contract terms generally<sup>310</sup> and regulates the consequences of the main types of consumer contracts, notably, consumer credit

agreements,<sup>311</sup> contracts for the supply to the consumer of goods, digital content or services<sup>312</sup> and some very particular types of consumer contracts, such as timeshare and holiday contracts.<sup>313</sup> However, in principle the common law of contract does not regulate the category of consumer contracts distinctly, though on occasion doctrines of the general law appear to be applied specially or in a modified way in the consumer context.<sup>314</sup>

## Contracts made by public bodies

- 152 Another important distinction in the modern law is between contracts made between private persons and those where one or both parties are public bodies. This distinction will be discussed later in Ch.3 for the purposes of the Human Rights Act 1998<sup>315</sup> and will be discussed generally in Ch.13.<sup>316</sup>

## Relationship of classifications according to parties and according to their subject matter

- 153 There are two ways in which the classifications of contracts according to their parties relate to classifications according to their subject matter. First, the legal classifications themselves may distinguish according to both types of criteria, as, for example, in the two sets of rules governing contracts for the sale of goods, one applicable to applying to consumer contracts and<sup>317</sup> one to non-consumer contracts.<sup>318</sup> Secondly, however, an individual contract may be classified both by reference to its subject matter and by reference to its parties, as in the case of a guarantee contracted for the benefit of a bank by an individual guarantor acting wholly or mainly outside their trade, business, craft or profession. Such a contract is both a contract of guarantee and a “consumer contract”.<sup>319</sup>

## Footnotes

- 305 cf. McKendrick, Goode and McKendrick on Commercial Law, 6th edn (2020), para.4.02. Some legal systems possess a commercial code to govern at least in part the relationships of traders and which is distinct from the civil code which is of more general application: see Zekoll and Reimann, Introduction to German Law, 2nd edn (2005), Ch.4; Bell in Bell, Boyron and Whittaker, Principles of French Law, 2nd edn (2008), Ch.11.
- 306 Late Payment of Commercial Debts (Interest) Act 1998 which applies in principle to “a contract for the supply of goods or services where the purchaser and the supplier are each

acting in the course of a business” ([s.2\(1\)](#)). On the [1998 Act](#) see below, paras 29-291—29-292.

- 307 [Commercial Agents \(Council Directive\) Regulations 1993 \(SI 1993/3053\)](#) (as amended), on which see below, paras 21-020—21-023. “Commercial agent” is defined by [reg.2\(1\)](#) as meaning (with exceptions) “a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the ‘principal’), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal”. The Regulations themselves impose duties on the principal and agent in respect of the latter’s activities, referring for this purpose to the “agency contract” under which the agent works.
- 308 See generally below, paras [15-047](#) et seq. and esp. at para. [15-095](#) (on the relevance of “commercial common sense”).
- 309 See generally Vol.II, [Ch.40](#) esp. paras [40-030](#)—[40-061](#) on the definitions of “trader” and “consumer”. See also the (retained EU law) Rome I Regulation art.6, setting a special rule governing the applicable law for consumer contracts; see below, paras [33-150](#)—[33-171](#).
- 310 [Consumer Rights Act 2015 Pt 2](#) on which see Vol.II, paras [40-243](#) et seq.
- 311 [Consumer Credit Act 1974](#) and see Vol.II, [Ch.41](#).
- 312 See the [Consumer Rights Act 2015 Pt 1](#), on which see Vol.II, paras [40-467](#) et seq.
- 313 [Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 \(SI 2010/2960\)](#), on which see Vol.II, paras [40-157](#)—[40-163](#); [Package Travel and Linked Travel Arrangements Regulations 2018 \(SI 2018/634\)](#) on which see Vol.II, paras [40-144](#), [40-150](#)—[40-156](#).
- 314 See, for example, the treatment of third party “non-commercial” sureties in the context of the law of undue influence (below, para. [10-147](#)) or the apparent restriction of loss of amenity damages to those representing the loss of the “consumer surplus”, that is, the personal, subjective gain which a claimant expected to receive from full performance (below, paras [29-163](#)—[29-164](#)).
- 315 See above, paras 3-103—3-105, 3-116—3-125.
- 316 See below, Ch.13.
- 317 Most of the rules are contained in the [Consumer Rights Act 2015 Pt 1 Ch.2](#), but some remain in the [Sale of Goods Act 1979](#): see Vol.II, paras [40-474](#)—[40-475](#).
- 318 [Sale of Goods Act 1979](#).
- 319 See Vol.II, paras [47-160](#) et seq.

## **(i) - Importance of Classification According to Subject Matter**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 1 - Contract Law and “Contracts”

Section 3. - Classification of Contracts

**(d) - Classification of Contracts According to their Subject Matter**

**(i) - Importance of Classification According to Subject Matter**

### **Introduction**

- 154 The starting point of English contract law is very broad, setting the conditions for the existence of a contract in general terms, as contrasted with the position, notably, in ancient Roman law, where the law set out particular conditions for particular types of contract defined either by reference to their form (notably, stipulation) or their subject matter (sale, hire, mandate, etc.), so-called nominate contracts.<sup>320</sup> The explanation for the English approach is that when contract law developed in the early seventeenth century, it did so around an action (*assumpsit*) which was very general in its purview and its application: the action could apply to any promise or undertaking as long as it was supported by “consideration” (that is, very broadly speaking, something in return for the promise).<sup>321</sup> While some special substantive rules were developed by the courts to govern aspects of particular types of contract (for example, the implied warranty of title in sale of goods<sup>322</sup> or the rule of disclosure of material facts in contracts of insurance<sup>323</sup>) contract law remained dominated by a general and open procedural form, which remained distinguishable from other procedures potentially available to dissatisfied parties to contracts, such as the action for debt or on a covenant. The most important exception to this pattern was created by the *Statute of Frauds 1677*, which imposed particular requirements of form for a list of types of contract defined by reference to their subject matter: thus, leases for longer than three years had to be put in signed writing<sup>324</sup>; sales of interests in land had to be in signed writing attested by three or four witnesses<sup>325</sup>; and contracts of guarantee and contracts for the sale of goods worth £10 or more had to be evidenced

by “some Memorandum or Note thereof in writing and signed by the party to be charged”.<sup>326</sup> In the absence of definition by the statute, it was left to the courts to define the different types of contracts with which the statute dealt and to distinguish between those contracts which were and those which were not caught by its formal requirements: in this context, therefore, the classification of the contract by the court was often crucial to its enforceability. More generally, though, in the nineteenth century, reforms of the civil process<sup>327</sup> gradually whittled away the distinctiveness of the procedures of the common law, and writers such as Anson<sup>328</sup> organised the common law materials of contract around the notion of agreement, though they retained the established requirement of consideration.<sup>329</sup> One consequence of this process was that the framework of the English common law of contract remained dominated by the rules applicable in principle to *all* contracts. And it was completely clear that an agreement which satisfies the conditions required to count as a “contract” (including consideration and, later, an intention to create legal relations) do so even though it does not fall into any particular type of contract specifically recognised and regulated by the law: in English law, “innominate” or *sui generis* contracts are equally valid and enforceable.<sup>330</sup>

## Importance in the modern law

- 155 Nevertheless, in the modern law the classification of contracts according to their subject matter has become of great importance. The more prominent examples of these special contracts are discussed in the second volume of the present work, but here we can distinguish between their classification for legislative purposes and for the purposes of the common law.

## Classification for legislative purposes

- 156 A multitude of statutes regulate particular types of contracts. Sometimes, the types of contract to which the statutory provisions apply are themselves defined by the statute, for example, contracts of sale of goods,<sup>331</sup> contracts of partnership,<sup>332</sup> contracts to supply digital content,<sup>333</sup> contracts for the carriage of goods by sea,<sup>334</sup> contracts of marine insurance,<sup>335</sup> and contracts of consumer credit,<sup>336</sup> and the purpose of these definitions is made clear by the statutes in which they are contained. However, in other cases, even where important statutory regulation applies to a particular type of contract, its definition is left to the common law, examples of this being contracts of employment,<sup>337</sup> contracts for services,<sup>338</sup> and contracts of insurance.<sup>339</sup>

## Classification for common law purposes

- 157 Classification of the parties' agreement as a particular type of contract may also need to be undertaken for the purposes of the common law. First, the courts have over the years found many implied terms in contracts which are not special to the particular agreement of the parties,<sup>340</sup> but are considered incidental to the *type* of agreement in question.<sup>341</sup> By attaching an implied term to a particular set of facts in this way, a court thereby either recognises an existing category of contract or creates a new one. In this respect, there is a certain tendency for the broader categories of contracts to be subdivided into smaller ones. For example, the contract of employment attracts many implied terms which are of general application,<sup>342</sup> but in *Sim v Rotherham MBC*,<sup>343</sup> the court implied a term into a contract of employment between a local authority and a school teacher that the latter would cover for her fellow teachers in their absence if reasonably requested to do so, a term which would apply to similar contracts but not necessarily to contracts of employment beyond that context.<sup>344</sup> In *Scally v Southern Health and Social Services Board*,<sup>345</sup> Lord Bridge felt able to imply a term in the contracts of employment between a hospital board and its employees to take reasonable steps to inform the latter of their valuable right to opt to make payments into their pension schemes. His Lordship rejected the argument that the formulation of an implied term must necessarily be too wide, holding that "this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision".<sup>346</sup> Similarly, while some terms are implied into leases in general,<sup>347</sup> others apply only to particular types of lease. Thus, in *Liverpool City Council v Irwin*<sup>348</sup> the House of Lords implied a term into a contract of lease, but their Lordships' speeches suggest that this term was considered incidental to a much more specific type of contract, namely one made by a local authority for the lease of a flat in a high-rise block.<sup>349</sup> Finally, the courts have recently referred to the category of "relational contracts" for the purposes of finding an implied term of good faith.<sup>350</sup>

## Exceptional rules

- 158 Secondly, the courts sometimes make a formal exception to a rule of common law which applies only to a particular type of contract. For example, although in general a breach of contract, however fundamental, does not terminate it so as to prevent the application of any exemption clause which it may contain,<sup>351</sup> in a contract of carriage of goods by sea, any unnecessary deviation from the agreed or customary route constitutes a breach of the contract which gives rise in the owner to a right to treat himself as discharged and this right, if exercised, does have the effect of disapplying any exemption clause from the deviating journey.<sup>352</sup> Similarly, although in general a person is not bound by an exemption clause in a contract to which he is not party, if for example, A sends goods

for repair to B with permission to send the work out to a sub-contractor, C, A may be bound by any exemption clause in this contract of sub-bailment.<sup>353</sup> A final example may be found in relation to restrictive covenants concerning land. These started life as a particular type of contract, or rather a particular type of contractual obligation, as they were stipulated as part of the sale of land,<sup>354</sup> but after *Tulk v Moxhay*<sup>355</sup> in 1848, they were held capable of binding a successor in title of the purchaser of the land, despite the principle of privity of contract. While technically this is justified by saying that the making of the covenant creates an equitable (proprietary) interest in land,<sup>356</sup> it can equally be seen as an example of the law creating an exception to the rules of privity of contract for a particular type of term in a particular type of contract.

## Classification for private international law

- 159 The rules governing applicable law distinguish between different types of contract classified according to their subject matter. In particular, in the absence of choice of applicable law by the parties, the (retained EU law) Rome I Regulation art.4 provides rules governing the law applicable to a series of types of contract including contracts for the sale of goods, contracts for the provision of services, contracts “relating to a right in rem in immovable property or to a tenancy of immovable property,” franchise contracts and distribution contracts.<sup>357</sup> Other articles in the Regulation designate the law applicable to contracts of carriage, insurance contracts and individual employment contracts.<sup>358</sup> The classifications for these purposes are likely to require autonomous meanings in the sense of ones special to the European private international law context.<sup>359</sup>

## Commercial practice

- 160 Other types of contract arise from commercial practice rather than from the regulation of either statute or common law, though the practical homogeneity on which they are based easily attracts particular treatment by the courts. Very clear examples of this can be found in an area like the building industry, in which the industry offers standard forms for the conclusion of the many contracts which modern construction requires.<sup>360</sup> Moreover, new types of contracts in this sense are constantly arising, for example, for the supply and maintenance of information technology.<sup>361</sup>

## Footnotes

<sup>320</sup> See Nicholas, An Introduction to Roman Law, revd edn (2008) p.165; *Nicholas (1974)* 48 *Tulane L.R.* 946, 948–949. The approach of English law is also to be contrasted with a

modern civil law system such as French law. In that legal system, while the Civil Code contains provisions describing the conditions for and effects of contracts in general, it also contains much more extensive sections relating to particular *types* of contract, e.g. sale, hire, mandate, etc. In this way, some of the “nominate contracts” of Roman law survived into the Civil Code, though as particular examples of a general principle of contract based on agreement: art.1101, C. civ (both as promulgated in 1804 and as reformulated by *Ordinance No.2016/131 of 10 February 2016*).

- 321 Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) pp.135–147. On the modern requirements of consideration see below, Ch.6.
- 322 Blackstone, *Commentaries on the Law of England* (1765–1769), Book II, Ch.30, “Of Title by Gift, Grant, and Contract”, p. 452 citing *Furnis v Leicester* (1618) *Cro. Jac.* 474. 1 *Roll. Abr.* 90.
- 323 *Carter v Boehm* (1766) 3 *Burr* 1905; and see Vol.II, para.44-033.
- 324 ss.1 and 2. See now the *Law of Property (Miscellaneous Provisions) Act 1989* s.2(1) and (5) (a); *Law of Property Act 1925* s.54(2).
- 325 s.5. The modern law is contained in the *Law of Property (Miscellaneous Provisions) Act 1989* s.2, on which see below, paras 7-016 et seq.
- 326 s.4 (guarantee) (which is still in force): see Vol.II paras 47-043—47-062; s.17 (sale of goods). *Statute of Frauds* s.17 was later re-enacted as the *Sale of Goods Act 1893* s.4, which in its turn was repealed by the *Law Reform (Enforcement of Contracts) Act 1954* s.2.
- 327 Notably, the *Common Law Procedure Act 1852* esp. ss.34, 35, 41 and 74.
- 328 Anson, *Principles of the English Law of Contract*, 1st edn (1869).
- 329 *Simpson* (1975) 91 *L.Q.R.* 247 esp. at 254 et seq. and see above, para.1-031.
- 330 cf. below, para.1-062.
- 331 *Sale of Goods Act 1979* s.2(1) and see below, Vol.II, para.46-020. In the case of consumer contracts, the *Consumer Rights Act 2015* places “sales contracts” within a wider framework of “goods contracts”: 2015 Act s.3(2)(a) and 5. “Goods contracts” also includes contracts of the hire of goods, hire-purchase agreements and contracts for transfer of goods: 2015 Act s.3(2): see Vol.II, paras 40-487—40-493.
- 332 *Partnership Act 1890* s.1 (defining “partnership”).
- 333 *Consumer Rights Act 2015* s.33 (definition for purposes of Ch.3 of Pt 1 of the Act) which applies only to contracts for a trader to supply digital content to a consumer: see Vol.II, paras 40-544—40-547.
- 334 *Carriage of Goods by Sea Act 1971* s.1 and Sch. art.I(b).
- 335 *Marine Insurance Act 1906* s.1.
- 336 *Consumer Credit Act 1974* s.8 and see below, Vol.II, para.41-017.
- 337 See Vol.II, paras 42-010 et seq., where it is noted that there is no comprehensive definition of the contract, the cases instead relying on a number of factors relevant to finding whether a particular contract is of service.
- 338 See, in particular, the *Supply of Goods and Services Act 1982* ss.12–16 (on which see below, paras 16-046—16-047) and the *Consumer Rights Act 2015* ss.48–57 (on which see Vol.II, paras 40-571—40-592). In both respects, the legislation explains contracts for

services generally only by providing that this does not include a contract of employment or apprenticeship: 1982 Act s.12(2); 2015 Act s.48(2).

339 See Vol.II, para.44-001. See, in particular, the *Consumer Insurance (Disclosure and Representations) Act 2012* and *Insurance Act 2015* and see Vol.II, paras 44-031 et seq.

340 cf. *Ashmore v Corp of Lloyd's [1992] 2 Lloyd's Rep. 620, 630–631*.

341 See below, paras 2-062—2-064 and 16-005 et seq.

342 For example, it is an implied term in every contract of employment that the employee will not disclose any confidential information which he learns by reason of his employment: see Vol.II, para.42-068.

343 [1987] Ch. 216.

344 cf. [1987] Ch. 216 at [248].

345 [1992] 1 A.C. 294.

346 [1992] 1 A.C. 294 at [307]. Lord Bridge defined the category by reference to three special circumstances.

347 e.g. a landlord's implied covenant for quiet enjoyment: see Woodfall on Landlord and Tenant (2021), paras 11.266 et seq.

348 [1977] A.C. 239.

349 See [1977] A.C. 239 at 254, 258, 261. This subdivision of large categories for the purposes of the implication of terms can be seen in *Jones v Just (1868) L.R. 3 Q.B. 197, 202–203* in relation to sale before the *Sale of Goods Act 1893*.

350 See below, paras 2-084—2-087.

351 *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827*.

352 See below, para.17-032.

353 *Morris v C. W. Martin & Sons Ltd [1966] 1 Q.B. 716; The Pioneer Container [1994] 2 A.C. 324* and see below, para.17-057, Vol.II, para.35-026.

354 Lawson and Rudden, *The Law of Property*, 3rd edn (2002), p.157.

355 (1848) 2 Ph. 774.

356 Gray and Gray, *Elements of Land Law*, 5th edn (2009), paras 3.4.16–3.4.18.

357 See below, paras 33-101—33-110.

358 Rome I Regulation arts 5, 7 and 8 respectively on which see below, paras 33-128—33-149, 33-173—33-200, 33-201—33-218 respectively.

359 See below, para.33-024.

360 These are known as “RIBA/JCT standard forms”: see Vol.II, paras 39-022 et seq.

361 See Morgan and Burden, *Morgan and Burden on IT Contracts*, 10th edn (2021).

## **(ii) - Relationship Between Classifications of Contracts According to their Subject Matter**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 3. - Classification of Contracts**

**(d) - Classification of Contracts According to their Subject Matter**

**(ii) - Relationship Between Classifications of Contracts According to their Subject Matter**

### **Introduction**

- 161 As was earlier seen, a particular contract may be classified by the law as a matter of the nature or role of its contracting parties, its means of conclusion and according to its subject matter as in the case of a contract being a “consumer contract” for the supply of goods which is concluded by electronic means.<sup>362</sup> However, the question whether two or more legal classifications all of which relate to its subject matter can apply to an individual contract is more difficult and depends, in particular, on whether the classifications are incompatible or whether instead they are permitted to overlap in the case of a particular individual contract.

### **Legal classifications and sui generis contracts**

- 162 Sometimes the key legal question is simply whether an individual contract before a court falls within a particular classification or falls outside it as being a contract without any specific classification for legal purposes, a sui generis innominate contract. A striking example of this

may be found in the decision of the Supreme Court in the *Res Cogitans* where it was held that a contract for the supply of fuel bunkers which contained a retention of title clause and permitted the purchasing vessel owners to consume the bunkers during the credit period, was not a contract for the sale of goods within the meaning of the **Sale of Goods Act 1979**, being instead a “*sui generis* supply contract”.<sup>363</sup>

## Incompatible categories

- D** 163 Sometimes two legal classifications of an individual contract before a court may be competing in the sense that that individual contract may be classified as either as one type or the other, but not as both as they are seen as incompatible. A classic example of this type is the distinction between contracts of guarantee (where the surety assumes only a secondary liability in respect of the debt of another person who is primarily liable) and contracts of indemnity (where the surety assumes a primary liability), a distinction first worked out in the context of the formal requirements of the **Statute of Frauds** but relevant for a number of other purposes.<sup>364</sup> Other examples of this kind may be found in relation to the law governing contracts for the sale of goods in the **Sale of Goods Act 1979**, where contracts for this type of contract are to be distinguished from contracts of exchange or barter, contracts for work and materials, and hire-purchase contracts.<sup>365</sup>

## Distinct but overlapping categories

- 164 On the other hand, sometimes the law may permit the same individual contract to be classified by reference to more than one type of subject matter as long as the *content* of the contract so allows. A very clear example of this is the treatment of contracts under which goods are to be transferred and services are to be provided.<sup>366</sup> In the case of non-consumer contracts, the **Supply of Goods and Services Act 1982 Pt 1** governs “relevant contracts for the transfer of goods” and “relevant contracts of hire of goods”, while **Pt 2** governs “relevant contracts for the supply of a service”. For this purpose, s.1(1) defines a “relevant contract for the transfer of goods” both positively and negatively, providing that a:

“... contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract, and other than a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies.”

The excepted contracts are then listed, these including a contract of sale of goods, a hire-purchase agreement, and a contract intended to operate by way of mortgage, pledge, charge or other

security<sup>367</sup>: these classifications are therefore deemed incompatible with the contract being “for the transfer of goods”. Section 1(3) of the 1982 Act continues:

“For the purposes of this Act ... a contract is a relevant contract for the transfer of goods whether or not services are also provided or to be provided under the contract...”

Similar provision is made for contracts for the hire of goods.<sup>368</sup> Pt 2 governing contracts for services makes complementary provision by stating that:

“... a contract is a relevant contract for the supply of a service for the purposes of this Act whether or not goods are also—

- (a)transferred or to be transferred, or
- (b)bailed or to be bailed by way of hire,  
under the contract...”

As a result, an individual contract can be both a contract for the transfer of goods and a contract for a service or it can be both a contract for the hire of goods and a contract for a service, subject to the conditions for the application of each of these categories being satisfied. The consequence of this overlapping of classification is that the provisions of the Act (Pt 1 governing contracts for the transfer of goods and for the hire of goods and Pt 2 governing contracts for services) may apply to those aspects of the contract to which they relate. For example, in what is often called a contract for work and materials, the work (a service) must be carried out with reasonable care and skill<sup>369</sup> and the materials (goods) must correspond with their description and be of satisfactory quality.<sup>370</sup>

## “Mixed contracts”

- 165 In the case of consumer contracts, the Consumer Rights Act 2015 reaches a very similar substantive result as has just been seen in relation to contracts falling under the Supply of Goods and Services Act 1982, but the 2015 Act does so by reference to the concept of a “mixed contract”. Pt 1 of the 2015 Act applies to three types of contract: contracts for the trader to supply, respectively, goods, digital content or a service to a consumer. Each of these types of contract is defined for these purposes and is regulated (principally by means of treating the contracts as including a series of terms) by Chs 2, 3 and 4 respectively.<sup>371</sup> For this purpose, it is provided that, where a particular chapter applies by reason of its subject matter, “[i]n each case the Chapter applies even if the contract also covers something covered by another Chapter (a mixed contract)” and that “[t]wo or all three of those Chapters may apply to a mixed contract”.<sup>372</sup> In this way, an individual contract

between a trader and a consumer may count as, for example, a “goods contract” and a “services contract” and so be regulated by the relevant provisions applicable to that classification.<sup>373</sup>

## Footnotes

362 Above, paras 1-048 and 1-053.

363 *PST Energy 7 Shipping LLC v OW Bunker Malta (The Res Cogitans)* [2016] UKSC 23; [2016] 2 W.L.R. 1193; see Vol.II, para.46-020 (note) and Benjamin’s Sale of Goods, 11th edn (2021) para.1-030.

364 Vol.II, paras 47-043 et seq. and esp. para.47-045.

365 See Vol.II, paras 46-025—46-027.

366 cf. the question whether a contract of sale or for services which contains elements of insurance is to be regarded as a contract of insurance, this being said to depend on whether, “taking the contract as a whole, it can be said to have as its principal object the provision of insurance”: MacGillivray on Insurance, 14th edn (2020) para.1-008.

367 Supply of Goods and Services Act 1982 s.1(2) (as amended).

368 1982 Act s.6(3).

369 1982 Act s.13.

370 1982 Act ss.3 & 4.

371 See Vol.II, paras 40-487 et seq., 40-539 et seq. and 40-571 et seq. respectively.

372 2015 Act s.1(4) and (5).

373 See further Vol.II, paras 40-467 et seq. esp. at para.40-486 and paras 40-505 and 40-506, where the special further provision for “mixed contracts” in ss.15 and 16 of the 2015 Act is noted.

## **(iii) - Significance of Choice of the Parties**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 3. - Classification of Contracts**

**(d) - Classification of Contracts According to their Subject Matter**

**(iii) - Significance of Choice of the Parties**

### **Agreement of the parties**

- 166 Clearly, the parties' agreement determines its classification according to its subject matter to the extent to which that agreement sets out its subject matter. However, the question arises whether the parties may by their agreement themselves *classify* their contract in legal terms whether positively or negatively, either by an explicit provision to this effect (for example, “this contract shall not be construed as creating a relationship of partnership”) or by use of terminology linked to a particular classification (for example, a contract which refers to itself as a “guarantee” or its parties as “partners”).

### **The law classifies contracts according to the substance of what is agreed**

- 167 The general starting point is that, while in principle the parties are free to determine the content of their contract by their agreement, it is the law which then classifies the resulting contract. For example, in the context of suretyship, the question whether a person has agreed to answer for the debt of another person so as to qualify their contract as a “guarantee” (and so within the **Statute of Frauds**) is a question of substance rather than one of form.<sup>374</sup> This is to be determined by construction of the actual words used and, in this respect:

“... [t]he fact that the parties have used the word ‘guarantee’ is not itself conclusive, but in doubtful cases it may provide some guide, especially if the word is repeated a number of times in the document.”<sup>375</sup>

Similarly, in the case of partnership (which is defined and explained by the [Partnership Act 1890 ss 1 and 2](#)), according to Lindley and Banks on Partnership:

“... in determining the existence of a partnership ... regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case.”<sup>376</sup>

For this purpose, the contract must be construed as a whole and the mere fact that the parties describe themselves as partners is not conclusive.<sup>377</sup> Moreover, “a declaration against partnership will be ineffective when all the indicia of partnership are present” although:

“... such a declaration may be of particular significance where the nature of the relationship does not appear clearly from the remainder of the agreement.”<sup>378</sup>

A similar approach is taken to the existence of agency.

<sup>379</sup>



## A two-stage process

<sup>168</sup> In [Agnew v Commissioner of Inland Revenue](#)<sup>380</sup> Lord Millett, speaking in the context of whether a charge that the parties had described as fixed should be re-characterised as floating, described the process of characterisation in this way:

“In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent

with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it.”

## “Sham” transactions

- <sup>169</sup> In some cases the court may decide that the parties have signed a document that deliberately misstates or conceals what they have actually agreed: it is a “sham”. In what is seen as the classic statement of the law, in *Snook v West Riding Investments Ltd*, Diplock LJ (with whom Russell LJ agreed) considered what is meant by the “popular and pejorative word” a “sham”, <sup>381</sup> observing that:

“... if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.”<sup>382</sup>

In this respect, Diplock LJ was clear that for an act or document to be a “sham” all its parties:

“... must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.”

<sup>383</sup>



For this purpose, exceptionally, the courts take a subjective rather than an objective view of the intention of the parties.<sup>384</sup>

- <sup>170</sup> In many cases there is no sham in the sense used by Diplock LJ but, as Lord Millett explained,<sup>385</sup> the court will have to determine the true meaning of the terms agreed and then characterise the agreement. In other cases, before the court can characterise the transaction, it may be necessary to look behind the document to see what the true terms of the agreement were. And, as will be seen from the next paragraph, this may involve asking whether the document represents the true terms of the agreement even though there was not a “sham” in the sense that the parties had a common intention to hide the true agreement.

“... the court or tribunal should consider what was actually agreed between the parties, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded.”

<sup>386</sup>



Determining the “actual agreement” may involve considering the way in which the relationship between the parties operates in practice.

## Classification by the contract and protective statutes

- <sup>387</sup> The courts have been particularly careful not to allow the stronger party to a particular class of contract which is regulated by legislation for the protection of the other party to avoid that regulation by drafting the contract so as to appear to fall outside that class. An important example may be found in *Street v Mountford*, where the contractual document under which Mountford occupied premises was entitled “licence agreement” and contained a declaration signed by her to the effect that “she understood that the agreement did not give her a tenancy protected under the Rent Acts”. <sup>387</sup> Despite this, however, the House of Lords held that the relationship created by the contract was one of tenancy (and so governed by the Rent Acts) as the occupier enjoyed exclusive possession under it. <sup>388</sup> As Lord Templeman observed:

“Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement.” <sup>389</sup>

Lord Templeman later added:

“Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts.” <sup>390</sup>

A similar approach has recently been taken by the Supreme Court in *Uber BV v Aslam* in the context of the protection of “workers”.

391

**U** There Lord Leggatt (with whom the other members of the court agreed) adopted Lord Templeman's view in *Street v Mountford* that:

“... it is for the courts and not the parties ... to determine the legal effect of a contract and whether it falls within one legal category or another.”<sup>392</sup>

In that case, Uber organised a system for the provision of rides by drivers in their own cars under which the passengers booked a ride through a digital platform by an “app” and paid Uber, which then paid the driver (less a service fee). The crucial question before the Supreme Court was whether the driver undertook to “perform personally ... work or services” for Uber London (which held the relevant operator’s licence) so as to qualify the driver as a “worker” for the purposes of protective legislation (including governing the national minimum wage and paid annual leave) or whether they were instead independent contractors performing services only for their own customers (the passengers).<sup>393</sup> In the Supreme Court’s view where, as here, legislation protected a particular class of contractor, the proper starting point for answering this question should *not* be the terms of any contract between them as the question was one of interpretation of the legislation rather than interpretation of the contract,<sup>394</sup> and the legislation should be interpreted purposively<sup>395</sup> so as to prevent a party such as Uber having the “power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers”.<sup>396</sup> The fact, therefore, that the contractual structure in which the relationship between Uber and the drivers was placed by Uber sought to characterise it as an “agency” (Uber acting on behalf of the driver in finding and charging customers) and/or the provision of an electronic service by Uber (including providing the “app” by which the ride was booked) did not prevent the relationship in fact involving the performance of work by the driver for Uber.<sup>397</sup> In the context of protective legislation, therefore, in the view of the Supreme Court, the court’s approach should go beyond the narrow approach to “sham” transactions adopted by Diplock LJ in *Snook v London and West Riding Investments Ltd.*<sup>398</sup>

## Footnotes

- 374 *Actionstrength Ltd v International Glass Engineering INGLE SpA* [2001] EWCA Civ 1477, [2002] 1 W.L.R. 566 (affirmed on other grounds [2003] UKHL 17, [2003] 2 A.C 541) citing with approval the dictum to this effect of Vaughan Williams LJ in *Harburg India Rubber Comb Co v Martin* [1902] 1 K.B. 778, 784–785 and see Vol.II, para.47-046.
- 375 *Clement v Clement* (1996) 71 P. & C.R. D19, CA, per Warner J, quoted with approval by Peter Gibson LJ in the CA. See Vol.II, para.47-047.
- 376 Lindley & Banks on Partnership (2021) para.5-003, attributing this to Lord Lindley.
- 377 Lindley & Banks on Partnership (2021) para.5-004.
- 378 Lindley and Banks on Partnership (2021) para.5-04.

- 379 See below, para.21-025.
- 380 [2001] UKPC 28, [2001] A.C. 710 at [32] (the case is also known as *Re Brumark Investments Ltd*). Lord Millett continued to say that the process is similar to construing a document to see if it creates a licence or a tenancy, as in *Street v Mountford* [1985] A.C. 809, noted in para.1-071, below.
- 381 The expression “sham transaction” may also be used to describe an agreement made with “no intention … to create bona fide legal relations” which is not a contract for lack of intention to create legal relations: *Glatzer & Warwick Shipping Co v Bradstone Ltd (The Ocean Enterprise)* [1997] 1 Lloyd's Rep. 449 at 485 and see below, para.4-234.
- 382 [1967] 2 Q.B. 786 at 802.
- 383 [1967] 2 Q.B. 786 at 802 (this condition was not satisfied on the facts). The issue was whether the transaction before the court (in the form of hire-purchase of a car) was a “sham” on the basis that it was in fact a loan secured on the car: see Vol.II, para.41-313. See further on “sham” transactions *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] A.C. 300 at 337; *Hitch v Stone* [2001] S.T.C. 214 at [64]–[69]; *R. (on the application of Hazlett) v South Sefton Magistrates' Court* [2001] EWHC 791 (Admin), [2002] L.L.R. 94 at [24]–[25]; *Broxfield v Secretary of State v Neufeld* [2009] EWCA Civ 280, [2009] 3 All E.R. 790 at [36]–[37]; *Go Capital Ltd v Phull* [2020] EWHC 1235, [2020] B.P.I.R. 819 at [27]–[32]. See generally *Vella* (2008) L.M.C.L.Q. 488.
- 384 *Hitch v Stone* [2001] S.T.C. 214 at [66] per Arden LJ.
- 385 See above, para.1-068.
- 386 *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All E.R. 209 at [62], citing *Autoclenz Ltd v Belcher* [2011] UKSC 41, (2011) I.C.R. 1157 at [32].
- 387 [1985] A.C. 809.
- 388 [1985] A.C. 809 at 826–827 (defining tenancy as the “exclusive possession at a rent for a term”).
- 389 [1985] A.C. 809 at 819.
- 390 [1985] A.C. 809 at 825 disapproving the decision in *Somma v. Hazelhurst* [1978] 1 W.L.R. 1014.
- 391 [2021] UKSC 5, [2021] 4 All E.R. 209 and see *Sejpal v Rodericks Dental Ltd* [2022] EAT 91 at [19]–[22] and further Vol.II, paras 42-009 and 42-025.
- 392 [2021] UKSC 5 at [81].
- 393 [2021] UKSC 5 at [42] and see [34]–[38], referring to the definition of “worker” in the Employment Rights Act 1996 s.230(3).
- 394 [2021] UKSC 5 at [68]–[69], referring to *Autoclenz Ltd v Belcher* [2011] UKSC 41, (2011) I.C.R. 1157 where Lord Clarke had held that in the context of legislation designed to protect employees and other workers, the “ordinary principles of contract law” such as the parol evidence rule, the signature rule governing notice and the principles that govern rectification

of contractual documents on the grounds of mistake should not apply: see also [2021] UKSC 5 at [76].

395 [2021] UKSC 5 at [70]–[71].

396 [2021] UKSC 5 at [77].

397 [2021] UKSC 5 at [93]–[101], [119].

398 *Autoclenz Ltd v Belcher* [2011] UKSC 41 at [28]; *Uber BV v Aslam* [2021] UKSC 5 at [62].  
On Diplock LJ's approach, see above, para.1-069.

---

## **(e) - Classification of Contracts According to their Effect**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 3. - Classification of Contracts**

**(e) - Classification of Contracts According to their Effect**

### **Introduction**

- 172 Contracts are sometimes classified according to their effect and so distinctions can be drawn between unilateral and bilateral contracts and valid, void, voidable and unenforceable contracts. The last three terms denote varying degrees of imperfection and are in constant use in the law of contract.

### **Unilateral and bilateral contracts**

- 173 Contracts may be either unilateral or bilateral.<sup>399</sup> By a unilateral contract is meant a contract under which only one party undertakes an obligation.<sup>400</sup> Bilateral (or synallagmatic) contracts, on the other hand, are those under which both parties undertake obligations. It is to be noted, though, that the unilateral nature of the contract does not (in the ordinary case) mean that there is only one party, nor that there is no need for an acceptance or the provision of consideration by the other party.<sup>401</sup> An example of a unilateral contract may be found in the case of an offer for a reward for the return of lost property: here, a contract is formed (at the latest) on the return of the property, this constituting the offeree's acceptance of the offer and the furnishing of consideration for the creation of the contract.<sup>402</sup> Bilateral contracts comprise the exchange of a promise for a promise, e.g. if you promise to pay me £1,000, I promise to sell you my car.

## Void contracts

- 174 A void contract is strictly a contradiction in terms, because if a contract is truly void it is not a contract at all; but the term is a useful one and well understood by lawyers. Properly speaking, a void contract should produce no legal effects whatsoever. Neither party should be able to sue the other on the contract. If goods have been delivered, they or their value should be recoverable by an action in tort, because the property will not pass. If money has been paid, it should be recoverable by an action in restitution, because the money was not due. In one situation, i.e. where a contract is void for mistake, these consequences would appear to follow from the fact that the contract is void.<sup>403</sup> But it is by no means true that all contracts termed “void” by the law necessarily produce this effect.

## “Void” contract may have effects

- 175 For example, where A and B paid money to C under an agreement under which C was empowered to pay some of the money to B, the court did not at A’s request restrain C from so doing, even though the agreement was held illegal and void as an unreasonable restraint of trade.<sup>404</sup> Other difficult questions arise in relation to the relative positions of the parties to a contract for the sale or other disposition of an interest in land which is a nullity as a result of not having been made in writing as is required by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989.<sup>405</sup>

## Voidable contracts

- 176 A voidable contract is one where one or more of its parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by affirmation of the contract to extinguish the power of avoidance.<sup>406</sup> In English law, contracts may be voidable, e.g. for misrepresentation,<sup>407</sup> duress,<sup>408</sup> undue influence,<sup>409</sup> minority,<sup>410</sup> lack of mental capacity,<sup>411</sup> drunkenness<sup>412</sup> or under statute.<sup>413</sup> If the contract is wholly executory, the party entitled to avoid the contract can plead its voidability in an action against him. If it has been wholly or partly executed, he can claim to have set it aside and to be restored to his original position.<sup>414</sup> But until the right of avoidance is exercised, the contract is valid. Thus if a contract for the sale of goods is voidable for fraud (but has not been avoided), the fraudulent party acquires a good title to the goods which he can transfer to an innocent purchaser for value.<sup>415</sup> The right of avoidance must also be exercised promptly in most cases. It is theoretically possible for a contract to be avoidable by both parties thereto, e.g. if each defrauds the other, or both are drunk; but naturally instances of

this are rare. A contract could also be said to be voidable at the option of one of parties where the latter has a right to “terminate” the contract on the ground of the other party’s breach of contract, but it should be noted that the effect of such a termination differs importantly from the effect of rescission on the ground of misrepresentation, duress and undue influence.<sup>416</sup>

## Power to set aside on terms

- <sup>177</sup> In the case of contracts said to be voidable for common mistake in equity, this description refers not to a power in one or other of the parties to avoid the contract, but to a power in the court to set aside the contract on terms.<sup>417</sup> However, the existence of such a distinct equitable jurisdiction has been denied on the ground of its being irreconcilable with the leading, higher common law authority.<sup>418</sup>

## Unenforceable contracts

- <sup>178</sup> Unenforceable contracts are valid in all respects except that one or both parties cannot be sued on the contract. Instances of unenforceable contracts in English law are afforded by certain contracts which are not evidenced by a signed writing as required by statute<sup>419</sup>; contracts in respect of which the right of action is barred by the [Limitation Act 1980](#)<sup>420</sup>; and certain contracts with a foreign sovereign<sup>421</sup> or in breach of foreign exchange control regulations.<sup>422</sup> In some cases the defect of unenforceability is curable. Thus, if written evidence of a contract of guarantee comes into existence, the contract becomes enforceable, though it was made orally<sup>423</sup>; a current period of limitation may be repeatedly extended if the defendant makes a written acknowledgment of his indebtedness, or a part payment<sup>424</sup>; a foreign sovereign may waive his immunity.<sup>425</sup> An unenforceable contract may be indirectly enforceable by means other than bringing an action. Thus a statute-barred debt may be recoverable indirectly if the creditor has a lien on goods of the debtor which are in his possession.<sup>426</sup> Although in principle a term in a consumer contract found to be unfair will not bind a consumer, “the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term”.<sup>427</sup> If, therefore, a contract is not capable of continuing in existence without the unfair term, then apparently the consumer contract is unenforceable by either party.<sup>428</sup>

## Relevance of party choice

- <sup>179</sup>

The relevance of the choice of the contracting parties differs according to the particular type of classification of a contract according to its legal effect. The distinction between bilateral and unilateral contracts depends directly on what the parties have agreed and whether, therefore, the agreement intended to impose an obligation or obligations on both or only one of the contracting parties.<sup>429</sup> On the other hand, where a contract is said to be void, voidable or unenforceable, this classification stems from the legal ground from which this effect arises and in principle does not result from any agreement of the parties, as in the case of a contract voidable for misrepresentation or void for mistake.<sup>430</sup> Even here, though, the agreement of the parties to the contract may have a role, as, in principle, the contract may define the circumstances in which a contract is or is not voidable for misrepresentation (by excluding a party's right to rescission<sup>431</sup>) or may be terminated for breach of contract (by expressly designating a term of the contract as a technical condition<sup>432</sup>). And in mistake cases the agreement of the parties may allocate the risk of the relevant mistake.<sup>433</sup>

## Footnotes

- <sup>399</sup> Restatement of Contracts (1932), para.12. The Restatement of Contracts, 2nd edn (1981), para.45 abandons this distinction and substitutes for unilateral contracts "option contracts".
- <sup>400</sup> See *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd [1975] A.C. 154, 167–168, 171, 177*. Quaere whether the engagement of an estate agent is a unilateral contract: *Luxor (Eastbourne) Ltd v Cooper [1941] A.C. 108, 124*; *Murdoch (1975) 91 L.Q.R. 357*; *McConnell (1983) 265 E.G. 547*.
- <sup>401</sup> See *Carlill v Carbolic Smoke Ball Co [1893] 1 Q.B. 256*. In certain situations, a contract under which only one party undertakes an obligation may be truly one-sided, in that the other party may be dispensed from the need to provide consideration. Thus, an agreement contained in a deed under which A covenants to pay B a sum of money may be considered a unilateral contract as only A undertakes an obligation (see below, para.1-104).
- <sup>402</sup> For an unusual example of a unilateral contract see *Rollerteam Ltd v Riley [2016] EWCA Civ 1291, [2017] Ch. 109* esp. at [45], where the description in the text of unilateral contracts was cited with approval and see on this case below, para.7-020. On the issue of when such a contract is formed see below, paras 4-102 et seq.
- <sup>403</sup> See below, paras 5-036 et seq. and 8-008 but cf. paras 5-029 et seq.
- <sup>404</sup> *Boddington v Lawton [1994] I.C.R. 478*. For the modern law of illegality recast by the important decision of the SC in *Patel v Mirza [2016] UKSC 42, [2017] A.C. 467*, see below, paras 18-025 et seq.
- <sup>405</sup> See below, paras 7-047 et seq.
- <sup>406</sup> See Restatement of Contracts, 2nd edn, para.7.
- <sup>407</sup> See below, Ch.9. See also the consumer's "right to unwind" a contract made with a trader if the trader engages in a "misleading action" under the *Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A* as amended by *Consumer Protection*

(Amendment) Regulations 2014 (SI 2014/870): see Vol.II, paras 40-181 et seq. esp. at 40-190, 40-205—40-206.

- 408 See below, paras 10-001—10-071. See also the consumer’s “right to unwind” a contract made with a trader if the trader engages in an “aggressive commercial practice”: the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870): see Vol.II, paras 40-181 et seq. esp. at 40-197, 40-205—40-206.
- 409 See below, paras 10-072—10-160.
- 410 See below, paras 11-005—11-074.
- 411 See below, paras 11-075 et seq.
- 412 See below, paras 11-106—11-107.
- 413 e.g. Auctions (Bidding Agreements) Act 1969 s.3(1) (right to avoid contract); Consumer Credit Act 1974 ss.67–73 (right to cancel consumer credit agreements) and see Vol.II, paras 41-096 et seq.; Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) regs 27–38 and see Vol.II, paras 40-115 et seq. (right to cancel off-premises or distance contracts).
- 414 In these cases it is the act of a party to rescind the contract, not the act of the court though there are dicta to the contrary in the context of misrepresentation: see below, para.9-128.
- 415 See *Phillips v Brooks Ltd* [1919] 2 K.B. 243; *Lewis v Averay* [1972] 1 Q.B. 198; Sale of Goods Act 1979 s.23. Contrast *Cundy v Lindsay* (1878) 3 App. Cas. 459 and *Ingram v Little* [1961] 1 Q.B. 31, where the contract was void for mistake (though see *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919). See below, Vol.II, para.46-210.
- 416 On the effects of termination for breach of contract see below, paras 27-078 et seq. and the comparison of termination for breach and rescission for misrepresentation above, para.9-123.
- 417 See *Solle v Butcher* [1950] 1 K.B. 671, 696–697.
- 418 *Great Peace Shipping Ltd v Tsavliris Salvage Ltd* [2002] EWCA Civ 1407, [2003] Q.B. 679; *Bell v Lever Bros* [1932] A.C. 161 and see below, paras 8-055—8-060.
- 419 e.g. contracts of guarantee: Statute of Frauds 1677 s.4 (see Vol.II, paras 47-043—47-061). cf. consumer credit agreements whose failure to satisfy certain requirements of form render them in principle enforceable only on order of the court: Consumer Credit Act 1974 ss.60, 61, 65 and see Vol.II, paras 41-082, 41-094—41-095.
- 420 See below, Ch.31.
- 421 See below, Ch.14.
- 422 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 A.C. 168, 189–190.
- 423 See Vol.II, para.47-054.
- 424 Limitation Act 1980 s.29 and see below, paras 31-093 et seq.
- 425 See below, paras 14-021 et seq.
- 426 See below, para.31-134.
- 427 Consumer Rights Act 2015 ss.62(2)–(3) and 67 on which see Vol.II, paras 40-405 et seq.
- 428 See Vol.II, paras 40-409—40-410.
- 429 See above, para.1-073.

- 430 See below, paras 9-120 et seq. (rescission for misrepresentation); paras 8-026 et seq. (contracts void for common mistake).
- 431 See below, paras 9-153 et seq.
- 432 See below, paras 27-013—27-015.
- 433 See below, para.8-037.

---

End of Document

© 2022 SWEET & MAXWELL

## **(a) - General**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 4. - Contracts Contained in Deeds**

**(a) - General**

### **Preliminary**

- 180 At common law, contracts under seal, or specialties, were an important example of deeds and at common law a deed was an instrument which was not merely in writing, but which was sealed by the party bound thereby, and delivered by him to or for the benefit of the person to whom the liability was incurred.<sup>434</sup> In no other way than by the use of this form could validity be given to executory contracts at common law in early times. At common law, all deeds were documents under seal, but not all documents under seal were and are deeds. A deed must:

- (a)effect the transference of an interest, right or property;
- (b)create an obligation binding on some person or persons; or
- (c)confirm some act whereby an interest, right or property has already passed.

Some documents under seal are not deeds, for instance a certificate of admission to a learned society or probate of a will.<sup>435</sup>

### **General abolition of the requirement of sealing**

- 181 In 1989, legislation was enacted which abolished the ancient requirement of sealing for the execution of deeds in many situations.<sup>436</sup> As regards deeds executed by an individual, [s.1 of the Law of Property \(Miscellaneous Provisions\) Act 1989 \(the “1989 Act”\)](#) replaced the requirement of sealing with requirements that the intention of the party making a deed should

make this intention clear on its face, of signature by that party<sup>437</sup> and of attestation.<sup>438</sup> As regards companies incorporated under the Companies Acts (“companies”), the requirement of sealing for the execution of *documents*<sup>439</sup> was supplemented by an alternative method of execution of a document which required signature by a director and the secretary of the company or by two directors and the expression “in whatever form of words” that it was executed by the company; and it was further provided that where a document made clear on its face that it was intended to be a *deed*, it should take effect on delivery as a deed, delivery being rebuttably presumed where it was so executed.<sup>440</sup> Similar provisions were enacted in 1993 to govern the position of charities incorporated under the [Charities Act 1993](#), later replaced by the [Charities Act 2011](#).<sup>441</sup> In the case of deeds executed by other persons (including other corporations aggregate<sup>442</sup> and corporations sole<sup>443</sup>), the common law requirement of sealing was left unaffected.

## Further amendment of the law governing the execution of instruments

- 182 In 2005 further amendments were made to the law governing the execution of deeds and some other instruments by an order (“the [2005 Order](#)”) made under the [Regulatory Reform Act 2001](#),<sup>444</sup> so as to give effect to the principal recommendations of a report of the Law Commission.<sup>445</sup> The main changes introduced in 2005 concern the creation of standard requirements for companies incorporated under the [Companies Act 1985](#) and corporations aggregate (but not corporations sole) for the due execution of instruments in general and of deeds in particular; the making of specific provision for the execution of documents by persons (including companies and corporations aggregate) by or on behalf of another person (whether the latter is an individual, a company within the meaning of the [Companies Act](#) or a corporation); and the clarification that the mere sealing of a document by a person (whether an individual or another corporate body) does not in itself satisfy the so-called “face-value requirement” that:

“... an instrument shall not be a deed unless ... it makes clear on its face that it is intended to be a deed by the person making it.”<sup>446</sup>

The changes introduced by the [2005 Order](#) came into force as regards “instruments executed” on or after 15 September 2005, but leave unaffected any instrument executed before this date.<sup>447</sup>

## Electronic documents and deeds<sup>448</sup>

- 183 Following the recommendations of the Law Commission,<sup>449</sup> the [Land Registration Act 2002](#) made provision for the creation of a framework in which it will be possible to transfer and create interests

in registered land by electronic means through a network controlled by the Land Registry (“e-conveyancing”). In order to permit this, Pt 8 of the Act makes provision for the fulfilment of formality requirements by the transactions in question. Accordingly, by s.91(4) and (5) of the 2002 Act:

“... a document to which this section applies is to be regarded as: (a) in writing; and (b) signed by each individual, and sealed by each corporation, whose electronic signature it has. [And such a document] is to be regarded for the purposes of any enactment as a deed.”<sup>450</sup>

Section 91 applies to “documents in electronic form” of certain types dealing with registered interests in land<sup>451</sup> as long as: (a) the document makes provision for the time and date when it takes effect; (b) the document has the electronic signature of each person by whom it purports to be authenticated; (c) each electronic signature is certified; and (d) such other conditions as rules may provide are met. This provision does not, therefore, create a new type of deed capable of being made electronically; rather it assimilates certain qualifying electronic documents to deeds for the purposes of any enactment requiring the dispositions to which those documents relate to use a deed.<sup>452</sup> A further stage in e-conveyancing would bring into force s.93 of the 2002 Act and would involve the compulsory use of electronic conveyancing; without electronic creation, there would be no proprietary interest nor even a contractual or other personal right.<sup>453</sup> At the time of writing, these new systems have not yet been brought into operation.<sup>454</sup>

## Footnotes

434 Compare above, para.1-033 on the question of agreement in relation to deeds.

435 *R. v Morton (1873) L.R. 2 C.C.R. 22, 27.*

436 On the ancient requirement see Sheppard’s Touchstone of Common Assurances, 7th edn (1820), p.56. The recognition of “electronic seals” by Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] O.J. L257/73 (the “eIDAS Regulation”), see esp. arts 2(25), 35–40, does not affect the law described in the text, as art.2(3) provides that the Regulation does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form: see further below, paras 7-009—7-011, which also notes the effect of the UK’s leaving the EU on this law.

437 This requirement had been imposed by the Law of Property Act 1925 s.73.

438 Law of Property (Miscellaneous Provisions) Act 1989 s.1. See also Law Commission, Electronic execution of documents (21 August 2018) (Consultation Paper) Ch.4; Law Commission, Electronic execution of documents, Law Com. No.386 (Report) (3 September 2019) Chs 5 and 6, the latter recommending a general review of the law of deeds to see

whether the concept remains fit for purpose and outline the issues to be addressed by such a review.

- 439 [Companies Act 1985 s.36A\(2\)](#) (as inserted by the [Companies Act 1989 \(c.40\)](#) ss.130(2), 213(2)). This provision has been superseded as explained at para.[1-095](#) below.
- 440 [Companies Act 1985 s.36A\(4\)](#) and [\(5\)](#) (as inserted by the [Companies Act 1989 \(c.40\)](#) ss.130(2), 213(2)). This provision has been superseded as explained at para.[1-095](#) below.
- 441 [Charities Act 1993 ss.50](#) and [60](#); [Charities Act 2011 ss.252](#) and [260–261](#).
- 442 A corporation aggregate may be defined as consisting of: “[A] body of persons which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder of the office in question for the time being”: Law Com. No.253 para.4.1, n.1 referring to Halsbury’s Laws of England, 4th edn (reissue, 1998), Vol.9(2), para.1005.
- 443 A corporation sole may be defined as consisting of: “[O]ne person and his or her successors in some particular office or status, who are incorporated in law in order to give them certain legal capacities and advantages which they would not have in their natural person”: Law Com. No.253 para.4.23 referring to Halsbury’s Laws of England, 4th edn, Vol.9(2), para.1007 and giving as examples a government minister or Church of England bishop.
- 444 [Regulatory Reform \(Execution of Deeds and Documents\) Order 2005 \(SI 2005/1906\)](#).
- 445 The Execution of Deeds and Documents by or on behalf of Bodies Corporate, Law Com. No.253 (1998).
- 446 [Law of Property \(Miscellaneous Provisions\) Act 1989 s.1\(2\)\(a\)](#) and see below.
- 447 [2005 Order art.1](#) (this being 12 weeks from 23 June 2005, the day on which the Order was made).
- 448 “Electronic documents and deeds” for the purposes of the [Land Registration Act 2002](#) (which are the subject of the present paragraph) are to be distinguished from “electronic seals” recognised by Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] O.J. L257/73 (the “eIDAS Regulation”), see below, paras [7-009](#)—[7-011](#). On the question whether a deed can be executed using electronic means see Law Commission, Electronic execution of documents, Consultation Paper No.237 (21 August 2018), Ch.4.
- 449 Law Commission, Land Registration for the Twenty-First Century (2001) Law Com. No.271.
- 450 [Land Registration Act 2002 \(Commencement No.4\) Order 2003 \(SI 2003/1725\)](#) brought this provision into force on 13 October 2003.
- 451 The relevant dispositions are specified by the [Land Registration Act 2002 s.91\(2\)](#).
- 452 [Land Registration Act 2002 s.91\(3\)](#).
- 453 [Land Registration Act 2002 s.93\(2\)](#) and see Smith, Property Law, 9th edn (2017), 115–116.
- 454 See Smith, Property Law, 9th edn (2017), pp.113–115 discussing the [Land Registration Act 2002](#) and noting that in 2011 the Land Registry halted the e-conveyancing project: Land Registry Annual Report and Accounts 2010–2011, p.26; Megarry and Wade, The Law of Real Property 9th edn (2019) by Bridge, Cooke and Dixon, paras 6-157—6-163. See further Law Commission, Updating the Land Registration Act 2002, Law Com No.380 (July 2018), Ch.20, noting (at paras 20.2 and 20.9) that, though progress has been made,

the electronic system envisaged by the 2002 Act had not been developed, and making recommendations on three specific issues: the requirement for simultaneous completion and registration, the powers to “switch on” electronic conveyancing and to “switch off” paper-based conveyancing, and the ability to overreach an interest under a trust if a single conveyancer has signed a deed on behalf of multiple trustees. See also Department of Housing, Communities and Local Government, Improving the home buying and selling process, Summary of responses to the Call for Evidence and government response (April 2018); Emmet & Farrand on Title (2021), para. 9-003. See also below, para. 1-085.

## **(b) - Intention, Form and Delivery**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 4. - Contracts Contained in Deeds**

**(b) - Intention, Form and Delivery**

### **Introduction**

- 184 The following paragraphs will explain first the law as amended by the legislation in 1989 and then explain how this position was affected by the [2005 Order](#), though it is to be noted that the position of charitable corporations differs again.<sup>455</sup> There will then follow a discussion of certain aspects of the requirements of form and of delivery which apply to deeds whenever executed.

### **Footnotes**

- [455](#) Below, para.[1-087](#). It is also to be noted that the relevant provisions of the [Companies Act 1989](#) which were amended in 2005 were then replaced by the [Companies Act 2006](#), though without substantive changes. The notes to the following paragraphs explain these sets of legislative changes.

## **(i) - Deeds Executed on or after 31 July 1989 and before or on 14 September 2005**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 1 - Contract Law and “Contracts”

Section 4. - Contracts Contained in Deeds

(b) - Intention, Form and Delivery

**(i) - Deeds Executed on or after 31 July 1989 and before or on 14 September 2005**

### **Deeds executed by an individual**

- 185 The law introduced by the [Law of Property \(Miscellaneous Provisions\) Act 1989 s.1](#) requires that for an instrument made by an individual to be a deed, it must make:

“... clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise).”<sup>456</sup>

It has been observed that:

“... the Act provides that documents can be deeds without using the word ‘deed’; but ... that a document is only to be held to be a deed if it is clear from the wording of the document itself (‘on its face’) that it was intended to be a deed.”<sup>457</sup>

As a result, words which indicate an intention by the parties that a document should be legally binding are not enough: “what is needed is something showing that the parties intended the document to have the extra status of being a deed”.<sup>458</sup> The [1989 Act](#) also introduced other

requirements for the execution of a deed by an individual and preserved an existing one. For an instrument to be validly executed as a deed, it must be:

“... signed (i) by him in the presence of a witness who attests the signature; or (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature.”<sup>459</sup>

“Signature” is defined later in the section to include making one’s mark.<sup>460</sup> The Act specifically preserved the common law requirement that for an instrument to be validly executed as a deed it must be “delivered” as a deed by him or a person authorised to do so on his behalf.<sup>461</sup>

## Deeds executed by companies incorporated under the Companies Acts

- 186 In 1989, the law governing the execution of documents and deeds by companies incorporated under the Companies Acts was amended so as to create a “dual system”.<sup>462</sup> So, while it preserved the possibility for a company to execute a document (including a deed) by the affixing of its common seal,<sup>463</sup> it also provided that a document signed by a director and secretary, or by two directors, of a company incorporated under the Act and expressed to be executed by the company has the same effect as if executed under the common seal of the company and notwithstanding that the company has no common seal.<sup>464</sup> In either case, it is provided that a:

“... document executed by a company which makes clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed.”<sup>465</sup>

The deeds of a company must be executed in accordance with its articles of association but, in favour of a purchaser, s.74(1) of the Law of Property Act 1925 provides that a deed is deemed to have been duly executed if its seal is affixed thereto in the presence of and attested by its secretary and a member of the board of directors<sup>466</sup> and a similar deeming provision applies to documents not made under the company seal, but where the document makes clear on its face that it is intended by the person or persons making it to be a deed.<sup>467</sup> There is no statutory requirement that the name used in the body of a deed should be the company’s registered name rather than its trading name and the common law rule therefore applies so that extraneous evidence is admissible to identify a contracting party when its identity is not clear from the face of the deed.<sup>468</sup>

## Deeds executed by other persons

Where a deed is executed by a person other than a private individual, a company incorporated under the Companies Acts, or a charity incorporated under the *Charities Act 1993*,<sup>469</sup> the common law requirement of sealing still applies. This would apply to corporations aggregate and to corporations sole.<sup>470</sup> However, the requirement of sealing has been interpreted by the courts very liberally: “to constitute a sealing neither wax nor wafer nor a piece of paper nor even an impression is necessary”.<sup>471</sup> Pieces of green ribbon<sup>472</sup> or a circle printed on the document containing the letters “L.S.” (locus sigilli)<sup>473</sup> or even a document bearing no indication of a seal at all<sup>474</sup> will suffice, if there is evidence (e.g. attestation) that the document was intended to be executed as a deed.<sup>475</sup> In the absence of such evidence, a signatory of a document expressed to have been “signed, sealed and delivered” by him may be estopped from denying that it was sealed.<sup>476</sup>

## Delivery

- 188 It remains the case after the 1989 legislation that “[w]here a contract is to be by deed, there must be a delivery to perfect it”.<sup>477</sup> “Delivered”, however, in this connection does not mean “handed over” to the other party. It means delivered in the old legal sense,<sup>478</sup> namely, an act done so as to evince an intention to be bound.<sup>479</sup> Any act of the party which shows that he intended to deliver the deed as an instrument binding on him is enough. He must make it his deed<sup>480</sup> and recognise it as presently binding on him.<sup>481</sup>

“The critical thing is that the person who has signed the deed must have separately indicated that he intends to be bound by the deed. Mere signature is not enough. Nor is it enough that what looks like a deed has been given to the person who appears to be the beneficiary of it—the issue is not whether the document has been physically handed over to the beneficiary, but whether the person whose deed it is supposed to be intended to be bound by it.”<sup>482</sup>

Delivery is effective even though the grantor retains the deed in his own possession. There need be no actual transfer of possession to the other party:

“... the efficacy of a deed depends on its being sealed<sup>483</sup> and delivered by the maker of it, not on his ceasing to retain possession of it.”<sup>484</sup>

Where a solicitor or licensed conveyancer in the course of a transaction involving the disposition or creation of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.<sup>485</sup>

## Delivery and corporate bodies

- <sup>489</sup> In *Bolton Metropolitan BC v Torkington*<sup>486</sup> the Court of Appeal held that while s.74(1) of the Law of Property Act 1925 deemed a deed “duly executed” where a corporation’s seal is affixed in the presence of and attested by its designated officers, it created no presumption as to its delivery.<sup>487</sup> Moreover, while strictly obiter, Peter Gibson LJ expressed the view that at common law:

“... to describe the sealing by a corporation as giving rise to a rebuttable presumption may go too far, implying, as that does, that the burden is on the corporation affixing the seal.”<sup>488</sup>

As a result, where, as on the facts before the court, negotiations were undertaken towards a lease expressly subject to contract, a court should not infer an intention to be bound from the mere sealing of a deed of execution of a lease.<sup>489</sup> On the other hand, in the case of a company incorporated under the **Companies Act 1985**, where a document makes it clear on its face that:

“... [I]t is intended by the person or persons making it to be a deed ... it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.”<sup>490</sup>

## Footnotes

- 456 s.1(2)(a). Section 1(11) of the 1989 Act provided that “nothing in this section applies in relation to instruments *delivered* as deeds before this section comes into force” i.e. 31 July 1989. This appears to mean that an *instrument* made before this date but delivered after it remains governed by the earlier law.
- 457 *HSBC Trust Co v Quinn* [2007] EWHC 1543 (Ch), [2007] All E.R. (D) 125 (Jul) at [50], per Christopher Nugee QC followed *Katara Hospitality v Guez* [2018] EWHC 3063 (Comm). cf. *Johnsey Estates (1900) Ltd v Newport Marketworld Ltd Unreported 10 May 1996* (noted and criticised by Law Com. No.253, paras 2.17–2.18) where it was held that the mere fact that a document was made under seal is sufficient to make it clear that it was executed as a deed.
- 458 [2007] EWHC 1543 (Ch) at [51]; *Katara Hospitality v Guez* [2018] EWHC 3063 (Comm) at [50].
- 459 **Law of Property (Miscellaneous Provisions) Act 1989** s.1(3) (as enacted). It has been said that the signature and attestation must form part of the same physical document which constitutes the deed: *R. (on the application of Mercury Tax Group Ltd) v Revenue and*

*Customs Commissioners* [2008] EWHC 2721 (Admin), [2009] S.T.C. 743 at [40]. While the Law Commission has seen this proposition as obiter, it has endorsed the suggestions of the Law Society as to practical arrangements for “virtual signings” by which the requirement stated in *Mercury Tax Group* can be satisfied: Electronic execution of documents, Law Com. No.386 (3 September 2019) (Report) at paras 5.45–5.55 referring to The Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees, “Note on execution of documents at a virtual signing or closing” (May 2009, with amendments February 2010 and subsequently reviewed in May 2020 as “Execution of documents by virtual means”). The Law Commission considered that a person may witness an electronic signature as “what they can see is the signatory purporting to add their signature to a document on the screen” (para.5.20) but considered that it is not clear that the requirement that the witness is present can be satisfied other than by being physically present, which puts in doubt witnessing by remote means such as by video link: paras 5.21–5.37 esp. at paras 5.30 and 5.35. See also Land Registry, Practice Guidance 8: Execution of Deeds (updated 15 February 2021) paras 2.1.1 and 2.1.2. On the other hand, it has been held that there is no requirement that the witness must sign in the presence of the person signing the deed: *Wood v Commercial First Business Ltd* [2019] EWHC 2205 (Ch), [2020] C.T.L.C. 1 at [42]–[48] (appeal on other grounds dismissed: [2021] EWCA Civ 471). It has been said that s.1(3) does not require that the witness be independent of the parties to the deed, but if the witness is not independent, “there might be problems thereafter in proving that [an alleged signatory] did in fact sign the document”: *Copeland v Bank of Scotland Plc* [2020] EWHC 1441 (QB) at [56], per Freedman J.

- 460 Law of Property (Miscellaneous Provisions) Act 1989 s.1(4). The question whether the requirement of signature may be satisfied other than by a party writing his or her name or mark with his or her own hand remains not completely clear: see below, in relation to the requirement of signature under the “new law”: para.1-094.
- 461 1989 Act s.1(3)(b).
- 462 Law Commission, The Execution of Deeds and Documents by or on behalf of Bodies Corporate, Law Com. No.253 (1998), para.3.3.
- 463 Companies Act 1985 s.36A(4) as inserted by Companies Act 1989 s.130(2).
- 464 Companies Act 1985 s.36A(3) as inserted by Companies Act 1989 s.130(2).
- 465 Companies Act 1985 s.36A(5) as inserted by Companies Act 1989 s.130(2).
- 466 This provision was amended by the 2005 Order for instruments executed on or after 14 September 2005, below, para.1-095.
- 467 Companies Act 1985 s.36A(6) and cf. s.36C, also inserted by Companies Act 1989 s.130(1) (pre-incorporation contracts, deeds and obligations).
- 468 *OTV Birwelco Ltd v Technical & General Guarantee Co Ltd* [2002] 4 All E.R. 668.
- 469 Charities Act 1993 ss.50, 60 remain applicable to instruments executed between 1 August 1993 and 13 March 2012, being the day preceding the coming into force of the Charities Act 2011 ss.260–261: see below, para.1-091 (note).
- 470 Law of Property (Miscellaneous Provisions) Act 1989 s.1(10). On “corporations aggregate” and “corporations sole” see above, para.1-081 (note). Note also s.1(9) which specifically reserves the requirement of sealing at common law in relation to deeds required or authorised

to be made under the seals of the County Palatine of Lancaster, the Duchy of Lancaster or the Duchy of Cornwall.

- 471 *Ex p. Sandilands* (1871) *L.R.* 6 *C.P.* 411, 413.
- 472 *Ex p. Sandilands* (1871) *L.R.* 6 *C.P.* 411; See also *Stromdale & Ball Ltd v Burden* [1952] *Ch.* 233, 230.
- 473 *First National Securities Ltd v Jones* [1978] *Ch.* 109; *Hoath* (1980) 43 *M.L.R.* 415.
- 474 *First National Securities Ltd v Jones* [1978] *Ch.* 109; *Commercial Credit Services v Knowles* [1978] 6 *C.L.* 64.
- 475 cf. *National Provincial Bank v Jackson* (1886) 33 *Ch. D.* 1; *Re Balkis Consolidated Ltd* (1888) 58 *L.T.* 300; *Re Smith* (1892) 67 *L.T.* 64 (these cases were explained in *First National Securities Ltd v Jones* [1978] *Ch.* 109); cf. *TCB v Gray* [1986] 1 *Ch.* 621, 633.
- 476 *TCB v Gray* [1986] 1 *Ch.* 621. cf. *Rushingdale Ltd v Byblos Bank* (1985) *P.C.C.* 342, 346–347.
- 477 *Xenos v Wickham* (1863) 14 *C.B.(N.S.)* 435, 473; *Termes de la Ley*, s.v. *Fait*; *Co Litt.* 171b; *Law of Property (Miscellaneous Provisions) Act 1989* s.1(3)(b). See also the Law Commission, Electronic execution of documents, Consultation Paper No.237 (21 August 2018), paras 4.58–4.87.
- 478 But see *Yale* [1970] *C.L.J.* 52.
- 479 *Vincent v Premo Enterprises Ltd* [1969] 2 *Q.B.* 609, 619. See further *Longman v Viscount Chelsea* [1989] 58 *P. & C.R.* 189 at 195; *Silver Queen Maritime Ltd v Persia Petroleum Services Ltd* [2010] *EWHC 2867 (QB)* [107]–[114].
- 480 *Tupper v Foulkes* (1861) 9 *C.B.(N.S.)* 797; *Xenos v Wickham* (1867) *L.R.* 2 *H.L.* 296, 312; *Re Seymour* [1913] 1 *Ch.* 475.
- 481 *Xenos v Wickham* (1867) *L.R.* 2 *H.L.* 296.
- 482 *Bibby Financial Services Ltd v Magson* [2011] *EWHC 2495 (QB)* at [335], per Judge Richard Seymour QC.
- 483 But see above, para.1-081.
- 484 *Xenos v Wickham* (1867) *L.R.* 2 *H.L.* 296, per Lord Cranworth at 323; cf. per Pigott B. at 309; *Doe d. Garnons v Knight* (1826) 5 *B. & C.* 671; *Macedo v Stroud* [1922] 2 *A.C.* 330; *Beesly v Hallwood Estates Ltd* [1960] 1 *W.L.R.* 549, affirmed [1961] *Ch.* 105; *Vincent v Premo Enterprises Ltd* [1969] 2 *Q.B.* 609.
- 485 *Law of Property (Miscellaneous Provisions) Act 1989* s.1(5). In *Bank of Scotland Plc v King* [2007] *EWHC 2747 (Ch)*, [2007] *All E.R. (D)* 376 (Nov) at [66] it was held that s.1(5) does not apply where a solicitor or licensed conveyancer transfers a deed in escrow as they would not have “purport[ed] to deliver an instrument as a deed on behalf of a party to the instrument”. For deeds in escrow see below, para.1-101. The definition of the persons to whom this provision applies changed on the bringing into force on 1 January 2010 of the *Legal Services Act 2007* s.208(1), Sch.21 para.81(a) to “a relevant lawyer, or an agent or employee of a relevant lawyer”, s.1(6) of the 1989 Act (as amended) providing that “‘relevant lawyer’ means a person who, for the purposes of the *Legal Services Act 2007*, is an authorised person in relation to an activity which constitutes a reserved instrument activity (within the meaning of that Act)”.

- 486 [2003] EWCA Civ 1634, [2004] Ch. 66. The decision concerned the effect of s.74(1) as in force before its amendment by the 2005 Order, on which see below, para.1-095.
- 487 [2003] EWCA Civ 1634 at [22], [45].
- 488 [2003] EWCA Civ 1634 at [46].
- 489 [2003] EWCA Civ 1634 at [53].
- 490 Companies Act 1985 s.36A(5) as inserted by the Companies Act 1989 s.130(2). On the new law, see below, para.1-095.

## **(ii) - Instruments Executed on or after 15 September 2005**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 4. - Contracts Contained in Deeds**

**(b) - Intention, Form and Delivery**

**(ii) - Instruments Executed on or after 15 September 2005**

**“Instruments executed”**

- 190 The 2005 Order<sup>491</sup> refers to “instruments executed” and this raises the question as to how the changes it introduced apply in relation to the making of deeds.<sup>492</sup> It could be thought that a deed (the “instrument”) is “executed” only after its delivery, and not merely after the making of the document, as only on delivery is the deed a valid instrument. However, the 2005 Order (following the Law Commission’s recommendation<sup>493</sup>) distinguishes clearly between the formal requirements required for the execution of an instrument (or document) and the further requirement of delivery for the execution of an instrument *as a deed*<sup>494</sup> and this argues that the changes introduced by the Order apply only to *documents executed* on or after 15 September 2005, and not also to documents executed as deeds on or before 14 September 2005, but delivered as deeds only after this date. This interpretation also has the practical advantage of not applying the changes contained in the Order retrospectively.

**The new general requirements for deeds after the 2005 Order**

- 191 Under s.1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 (as amended by the 2005 Order<sup>495</sup>), an instrument shall not be a deed unless:

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

(b)it is validly executed as a deed—

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

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

These requirements apply to instruments executed by an individual, by a company incorporated under the [Companies Act 1985](#), by a corporation aggregate or by a corporate sole.<sup>496</sup> However, even after the reforms of 2005, the significance and impact of these provisions differ somewhat according to these different categories of person. In this respect, a distinction is to be drawn between the condition contained in [s.1\(2\)\(a\) of the 1989 Act](#) as amended (the so-called “face-value requirement”) and the condition in [s.1\(2\)\(b\) of the 1989 Act](#) as amended (the condition of “valid execution”).<sup>497</sup>

## The “face-value requirement” for deeds

- 192 The reforms of 1989 introduced the idea that an instrument should qualify as a deed by reference to the intention of the party or parties to it as made clear on its face,<sup>498</sup> this reflecting earlier developments in judicial attitudes to the common law requirement of sealing.<sup>499</sup> Following the Law Commission’s recommendations,<sup>500</sup> this face-value requirement was retained in 2005, though its formulation was clarified and standardised for instruments executed by individuals and companies.<sup>501</sup> In particular, it is expressly provided that:

“... an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal.”<sup>502</sup>

## Execution on behalf of one or more of the parties to the instrument

- 193 Following the Law Commission’s recommendations,<sup>503</sup> the [2005 Order](#) introduced new clarifying provisions so as to provide expressly for execution in the name or on behalf of another person. So, it is provided that as regards individuals, a document may be executed by a person on behalf of

another, and that it is the person who executes the document (whether or not on behalf of the other) who must comply with the formalities<sup>504</sup>; as regards companies, the legislative provisions which state how a company may execute a document and provide for deemed execution in favour of a purchaser apply where a company executes a document on behalf of another person<sup>505</sup>; and as regards corporations aggregate, the [Law of Property Act 1925](#) was amended so as to provide that deemed execution in favour of a purchaser applies where the corporation executes an instrument on behalf of another person.<sup>506</sup>

## “Valid execution”: individuals

**D** 194 After amendment by the [2005 Order](#), the [1989 Act](#) provides that for an instrument to be validly executed as a deed by an individual, it must be:

“... signed

- (i)by him in the presence of a witness who attests the signature; or
- (ii)at his direction and in his presence and the presence of two witnesses who each attest the signature.”

<sup>507</sup>



“Signature” is defined later in the section to include making one’s mark.

<sup>508</sup>

**D** 195 The [2005 Order](#) preserved the further common law requirement that for an instrument to be validly executed as a deed it must be “delivered” as a deed.

<sup>509</sup>



## “Valid execution”: companies and corporations aggregate

**D** 195 One of the purposes of the [2005 Order](#) was to harmonise the law governing the execution of instruments as deeds by corporate bodies.<sup>510</sup> So, it is now provided that a document is validly executed *as a deed* by both companies and corporations aggregate so as to satisfy

the general requirements imposed by the 1989 Act<sup>511</sup> “if, and only if” it is “duly executed” by the corporate body *and* if it is delivered as a deed.<sup>512</sup> As regards delivery, it is provided for both types of corporate body that an instrument shall be presumed to be delivered for these purposes “upon its being executed, unless a contrary intention is proved”.<sup>513</sup> As regards companies, this provision marked a change from the previous law where the presumption of delivery was irrebuttable in these circumstances<sup>514</sup>; as regards corporations aggregate, it clarified the position given that the existence of a rebuttable presumption at common law had been recently judicially questioned.<sup>515</sup> However, the conditions for the “due execution” of a document still differ somewhat as between companies and corporations aggregate. In the case of companies, there are alternative requirements: a document may be executed either by the affixing of its common seal or by being signed “by two authorised signatories, or by a director of the company in the presence of a witness who attests the signature”,<sup>516</sup>

<sup>516</sup>

**U** provided that such a signed document is “expressed, in whatever words, to be executed by the company”.<sup>517</sup> Where a document is to be signed by a person as a director or the secretary of more than one company, it shall not be taken to be duly signed by that person for these purposes unless the person signs it separately in each capacity.<sup>518</sup> In the case of corporations aggregate, the common law requirement of affixing the corporation’s seal still applies in principle,<sup>519</sup> but it is provided that:

“... in favour of a purchaser an instrument shall be deemed to have been duly executed ... if a seal purporting to be the corporation’s seal purports to be affixed to the instrument in the presence of and attested by (a) two members of the board of directors, council or other governing body of the corporation, or (b) one such member and the clerk, secretary or other permanent officer of the corporation or his deputy.”<sup>520</sup>

## “Valid execution”: corporations sole

196 Where a deed is executed by a corporation sole, the common law requirement of sealing which has already been explained still applies.<sup>521</sup>

## Footnotes

491 Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005/1906).

- 492 cf. the discussion in Law Com. No.253, paras 3.6–3.12 as to the confusion over whether the term “executed” in the [Companies Act 1985 s.36A](#) (as amended in 1989), the [Law of Property Act 1925 s.74](#) and the [Law of Property \(Miscellaneous Provisions\) Act 1989 s.1](#) included “delivery”.
- 493 Law Com. No.253, para.3.12.
- 494 See notably, the [2005 Order arts 4, 6](#) and below, paras [1-094—1-095](#).
- 495 [2005 Order art.7\(3\)](#).
- 496 In the case of instruments executed by charities incorporated under statute, the formal requirements contained in the [Charities Act 1993 s.60](#) remain applicable to instruments executed between 1 August 1993 and 13 March 2012, whereas those contained in the [Charities Act 2011 ss.260–261](#) apply to instruments made on or after 14 March 2012 (the date of their coming into force).
- 497 See also Law Commission, Electronic execution of documents, Consultation Paper No.237 (21 August 2018), Ch.4; Law Commission, Electronic execution of documents, Law Com. No.386 (3 September 2019) Ch.5 as to how electronic deeds may be possible under the current law.
- 498 Above, para.[1-081](#).
- 499 *First National Securities v Jones [1978] Ch. 109* and Chitty on Contracts, 26th edn (1989), para.23.
- 500 Law Com. No.253, paras 2.29–2.34.
- 501 [2005 Order art.7\(3\)](#) (individuals); [Sch.2](#), repealing [Companies Act 1985 s.36A\(5\)](#) (companies); Law Com. No.253, paras 2.50, 2.54. cf. above, paras [1-085—1-086](#).
- 502 [Law of Property \(Miscellaneous Provisions\) Act 1989 s.1\(2A\)](#) as inserted by the [2005 Order art.8](#). cf. *Startwell Ltd v Energie Global Management Ltd [2015] EWHC 421 (QB)* at [48] where it was noted that the fact that there is a witness to a contract contained in a document is not of itself enough to satisfy the “face value requirement” of [s.1](#).
- 503 Law Com. No.253, Pt 7.
- 504 [Law of Property \(Miscellaneous Provisions\) Act 1989 s.1\(2\)\(b\)](#) and [\(4A\)](#), as amended and inserted by the [2005 Order art.7\(3\)](#) and [7\(4\)](#) respectively.
- 505 [Companies Act 1985 s.36A\(7\)](#) as inserted by the [2005 Order art.7\(2\)](#) and replaced by [Companies Act 2006 s.44\(8\)](#).
- 506 [Law of Property Act 1925 s.74\(1A\)](#) as inserted by the [2005 Order art.7\(1\)](#).
- 507 [Law of Property \(Miscellaneous Provisions\) Act 1989 s.1\(3\)](#) (as amended by [2005 Order art.7\(3\)](#)). The signature and attestation must form part of the same physical document which constitutes the deed: *R. (on the application of Mercury Tax Group Ltd) v Revenue and Customs Commissioners at [2008] EWHC 2721 (Admin), [2009] S.T.C. 743* at [40]. See, however, the discussion of how these formal requirements may be satisfied using electronic means in Law Commission, Electronic execution of documents, Law Com. No.386 (3 September 2019) (Report) at paras 5.45–5.55 where the proposition in *Mercury Tax Group Ltd* is seen as obiter: see further above, para.[1-085](#). A signature of an unidentified individual added later cannot constitute attestation for these purposes: *Darjan Estate Co Plc v Hurley [2012] EWHC 189 (Ch), [2012] 1 W.L.R. 1782* at [11]–[12]. It has been said that the purpose

of attestation is that “it limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed” (*Shah v Shah [2001] EWCA Civ 527, [2002] Q.B. 35* at [29] per Pill LJ) but a person (even a professional person) who agrees to assist in this evidential role does not agree more in the absence of evidence to this effect; as a result, such a person does not owe a duty of care in the tort of negligence to the apparent signatory who claims that the signature is a forgery: *Ashraf v Lester Dominic Solicitors [2022] EWHC 621 (Ch), [2022] P.N.L.R. 18* at [152]–[155] (Edwin Johnson J).

- 508 Law of Property (Miscellaneous Provisions) Act 1989 s.1(4)(b) as amended by the 2005 Order Sch.1 para.14. As earlier noted above, para.1-085 (note), the question whether electronic signatures can satisfy the requirement of signature here has caused some hesitation. There is authority for the purposes of s.2 of the 1989 Act that appears to require a manuscript signature (*Firstpost Homes Ltd v Johnson [1995] 1 W.L.R. 1567* though on this see below, paras 7-041—7-045), but a more liberal position has been taken for the purposes of the (less demanding) formalities of s.4 of the Statute of Frauds: *J Pereira Fernandes SA v Mehta [2006] EWHC 813 (Ch), [2006] 2 All E.R. 881* at [31]; *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542* at [32] (on which see Vol.II, para.47-058). In *Ramsay v Love [2015] EWHC 65 (Ch)* at [7], Morgan J observed (in the context of s.1(3) of the 1989 Act, obiter) that the position in *Firstpost Homes Ltd v Johnson* (which appears to require signature by an executing party with a pen in his own hand) was not designed to distinguish between signing in such a way and by use of a signature writing machine. The Law Commission, Electronic Execution of Documents, Law Com. No.386 (3 September 2019) Ch.3 and para.5.9 has expressed the view that an electronic signature can satisfy the statutory requirement of a signature for the purposes of the 1989 Act s.1 and this view was endorsed by the government: Government response to the Law Commission report Electronic Execution of Documents (3 March 2020) by Right Hon R. Buckland QC MP, Lord Chancellor and Secretary of State for Justice, who agreed with the Law Commission’s conclusion that “formal primary legislation is not necessary to reinforce the legal validity of electronic signatures”. Moreover, it is the Land Registry’s current practice to accept so-called “Mercury signatures” (referring to *R. (on the application of Mercury Tax Group Ltd) v HMRC [2008] EWHC 2721 (Admin)*, where the form of signature involved is a scanned manuscript signature being added to the final version of the deed) for the purposes of registration transfers and certain other deeds: Land Registry, Practice Guidance 82: electronic signatures accepted by HM Land Registry (28 March 2022), para.2 (which outlines the steps necessary for this purpose where a transfer is involved); the Land Registry Practice Guidance lists the deeds which it accepts as “Mercury signed” at Appendix 1. The Land Registry also accepts “Conveyancer-certified electronic signatures” as regards most documents where a listed series of steps have been followed, one of which is that a conveyancer provides the Land Registry with a certificate concerning the signature: Practice Guidance 82: electronic signatures accepted by HM Land Registry, para.3 (noting that “the signing will require the use of an operating system or a platform that manages the electronic signing process, including the creation of the electronic signature”). For further discussion of the significance of “signature”, see Emmet & Farrand on Title (2021) paras 2–

041—2–041.06, *Hewitson (2021) Conv. 120* and Law Society, Executing a Document Using an Electronic Signature (21 July 2016, reviewed in May 2020) for a broad overview of use of electronic signature in commercial transactions.

•509 **Law of Property (Miscellaneous Provisions) Act 1989 s.1(3)(b).**

- 510 Law Com. No.153, Pt 4.
- 511 **Law of Property (Miscellaneous Provisions) Act 1989 s.1(2)(b)** (as amended); see above, para.1-091.
- 512 **Law of Property Act 1925 s.74A(1)** as inserted by the **2005 Order art.4** (corporations aggregate); **Companies Act 1985 s.36AA(1)** as inserted by the **2005 Order art.6** replaced by **Companies Act 2006 s.46(1)**.
- 513 **Law of Property Act 1925 s.74A(2)** as inserted by the **2005 Order art.4** (corporations aggregate); **Companies Act 1985 s.36AA(2)** (companies) as inserted by **2005 Order art.6** and replaced by **Companies Act 2006 s.46(2)**. For these purposes an objective approach must be taken to the establishment of contrary intention: *Silver Queen Maritime Ltd v Persia Petroleum Services Ltd [2010] EWHC 2867 (QB)* at [117]—[118]. It has been held that a requirement of the “execution” of a deed in a consent order must equally be understood as requiring delivery as well as signature of a document: *Arrowgame Ltd v Wildsmith [2016] EWHC 3608 (Ch)*.
- 514 As a result, the **2005 Order art.5** amended the **Companies Act 1985 s.36A(6)** and see Law Com. No.253 paras 6.37–6.43.
- 515 *Bolton Metropolitan BC v Torkington [2003] EWCA Civ 1634, [2004] Ch. 66* at [46], above, para.1-089.
- 516 **Companies Act 2006 s.44(2)** replacing **Companies Act 1985 s.36A(1), (4)** as inserted by the **Companies Act 1989 s.130(2)**. For the Land Registry’s current practice in relation to signature on behalf of a company by two “authorised signatories” under **s.44(2)(a) of the 2006 Act** by way of “*Mercury* signatures” or “Conveyancer-certified electronic signatures” see Land Registry, Practice Guidance 82: electronic signatures accepted by HM Land Registry (28 March 2022) para.5 where the differences in the steps required in this respect for signature by an individual are noted. On the requirements relevant to deeds signed by an individual, see above, para.194 (note).
- 517 **Companies Act 2006 s.44(4)**. This proviso has been held not to require that, in addition to the signature of the individuals who are authorised signatories, there must be words spelling out that those signatures are “by or on behalf of” the company, as long as the capacity in which they sign is demonstrated from the terms of the document: *Williams v Redcard Ltd [2011] EWCA Civ 466, [2011] All E.R. (D) 214 (Apr)* at [25]–[27].
- 518 **Companies Act 2006 s.44(6)** replacing **Companies Act 1985 s.36A(4A)** as inserted by **2005 Order art.10(1), Sch.1 para.10**.
- 519 Law Com. No.253 para.4.5.
- 520 **Law of Property Act 1925 s.74(1)** as substituted by the **2005 Order art.3**. Section 74(1B) of the **1925 Act** as inserted by the **2005 Order art.10(1), Sch.1 para.2** provides that for these purposes: “a seal purports to be affixed in the presence of and attested by an officer of the

corporation, in the case of an officer which is not an individual, if it is affixed in the presence of and attested by an individual authorised by the officer to attest on its behalf.” And see Law Com. No.253 paras 4.6–4.9 and *Lovett v Carson County Homes Ltd [2009] EWHC 1143 (Ch), [2009] 2 B.C.L.C. 196* at [70]–[80].

- 521 See above, para.1-081 (note) for a definition of corporations sole and see also Law. Com. No.253 para.4.23. On the common law requirements see above, para.1-087.

## **(iii) - Common Aspects**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 1 - Contract Law and “Contracts”**

**Section 4. - Contracts Contained in Deeds**

**(b) - Intention, Form and Delivery**

**(iii) - Common Aspects**

### **Introduction**

- 197 There remain certain aspects of the law governing deeds which apply irrespective of the nature of the person making them or the date on which they are executed.

### **Date**

- 198 A date is not essential to the validity of a deed.<sup>522</sup> A deed takes effect on the date of its delivery.<sup>523</sup>

### **Effect of failure to comply with formal requirements**

- 199 The wording of s.1 of the 1989 Act makes clear that a failure to satisfy the formal requirements which it sets out leads to the invalidity of the instrument as a deed. Section 1(2) provides that:

“[a]n instrument shall not be a deed unless—

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

(b)it is validly executed as a deed.”<sup>524</sup>

And s.1(3) specifies that an “instrument is validly executed as a deed by an individual if, and only if” it is signed (as then detailed) and delivered as a deed. On the other hand, this does not prevent an agreement which is contained in a deed invalid for want of formality from being enforced as a simple contract as long as it is supported by consideration and unless the particular type of contract has to be made by deed.

<sup>525</sup>



## Estoppel preventing reliance on formal invalidity

<sup>100</sup> In *Shah v Shah*<sup>526</sup> the Court of Appeal held in relation to an instrument governed by the 1989 Act as enacted<sup>527</sup> that where an individual has signed an instrument which on its face purports to be a deed and has delivered it apparently attested by the signature of a witness, he may be estopped from denying the validity of this “deed” on the ground that the apparently attesting signatory was not present at the time of that individual’s signature.<sup>528</sup> The Court of Appeal expressed its approval in this respect for Beldam LJ’s earlier statement in *Yaxley v Goffs* to the effect that the:

“... general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it.”<sup>529</sup>

While it was accepted before the Court of Appeal in *Shah v Shah* that no estoppel could operate in the case of the absence of a signature by the person allegedly executing a deed, there was no social policy requiring a person attesting such a signature to be present so as to prevent an estoppel from arising in respect of a defect in attestation.<sup>530</sup> On the other hand, in *Briggs v Gleeds* it was held that estoppel cannot be invoked where a document does not even appear to comply with the 1989 Act in that it did not bear any signature (or even a place for a signature) of a witness, distinguishing the position in *Shah v Shah*.<sup>531</sup> Moreover, as the House of Lords made clear in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* (which concerned s.4 of the Statute of Frauds<sup>532</sup>), an estoppel cannot arise to prevent a person relying on formal invalidity unless there is an unambiguous representation that the transaction in question was enforceable.<sup>533</sup>

This was the case in *Shah v Shah* where “the delivery of an apparently valid deed constituted an unambiguous representation of its nature”.<sup>534</sup>

## Delivery of deed as an escrow

- [01] A party may deliver a deed as an escrow, that is, so that it shall take effect or be his deed on certain conditions. It is in other words a limited or conditional delivery.<sup>535</sup> Such delivery need not be accompanied by express words; if from all the facts attending the transaction it can reasonably be inferred that the writing was delivered so as not to take effect as a deed until a certain condition should be satisfied, it will operate as an escrow.<sup>536</sup> To constitute a delivery as an escrow, however, it was at one time necessary that the deed should not have been handed over to the grantee or covenantee.<sup>537</sup> But nowadays a deed may be delivered as an escrow by handing it to a solicitor who is acting for all the parties to it<sup>538</sup>; or even to the solicitor of the grantee or covenantee himself, provided it is clear upon the whole transaction that such handing over was not intended to be a delivery at that time to such grantee or covenantee.<sup>539</sup> In other words, evidence is admissible to show the character in which and the terms upon which the deed was delivered.<sup>540</sup> It is a question of fact, and depends on what the parties intended. Their intention may be ascertained either from their statements or from the surrounding circumstances prior to or simultaneous with (but not subsequent to) the delivery of the instrument.<sup>541</sup>

## Conveyance as an escrow

- [02] Where a conveyance is executed by the vendor and entrusted to his solicitor with a view to its being handed over to the purchaser on completion, then, in the absence of special circumstances, it is to be inferred that the conveyance is executed as an escrow conditional upon payment of the purchase price and (where appropriate) execution by the purchaser.<sup>542</sup> In such a case, there must be a time limit within which the implied condition of the escrow is to be performed.<sup>543</sup> So if the vendor by notice makes time of the essence of the contract, and the purchaser does not within the time specified in the notice perform the condition, it is no longer possible for the condition of the escrow to be performed.<sup>544</sup> However, the inference as to delivery as an escrow arising from non-payment of the price can be rebutted by other circumstances attending the delivery.<sup>545</sup>

## Retrospective effect

- [03]

A deed delivered as an escrow takes effect as between grantor and grantee retrospectively from the date of its delivery, and not on the date on which the relevant conditions are satisfied.<sup>546</sup>

## Footnotes

- 522 Bacon, Abridgment Obligation (C); Comyns Digest Fait (B3); *Goddard's Case (1584)* 2 Co. Rep. 4b.
- 523 This paragraph was cited with approval in *Silver Queen Maritime Ltd v Persia Petroleum Services Ltd [2010] EWHC 2867 (QB)* at [124]. See also below, para.1-101 (escrow).
- 524 (emphasis added). See above, paras 1-085—1-086, 1-091, 1-094—1-095 for these requirements and the related requirements applicable to companies.
- 525 *Signature Living Hotel Ltd v Sulyok [2020] EWHC 257 (Ch), [2020] Bus. L.R. 588* at [29]–[34] (in the context of the requirements for the valid execution of a document by a company in the **Companies Act 2006 s.44**), approving the position adopted by Andrews & Millett, Law of Guarantees, 7th edn (2015), para.2-021 (which cites *Lloyds TSB Bank Plc v The Dye House Ltd [2005] EWHC 1998 (Comm)* as an example) and the Law Commission, Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) (Law Com No.253) (Cm.4026), para.2.45 and not following a possible reading to the contrary of a passage of Underhill J in *R. (on the application of Mercury Tax Group Ltd) v Revenue and Customs Commissioners [2008] EWHC 2721 (Admin), [2009] S.T.C. 743* at [40]. See also *Al Saif Group v Cable [2022] EWHC 271 (QB)* at [151].
- 526 [2001] EWCA Civ 527, [2002] Q.B. 35.
- 527 Above, para.1-085.
- 528 The **1989 Act s.1(3)** requires that the instrument is signed in the presence of the attending witness or witnesses.
- 529 [2001] EWCA Civ 527, [2002] Q.B. 35 at 44 (Pill LJ with whom Tuckley LJ and Sir Christopher Slade agreed): *Yaxley v Gotts [2000] Ch. 162, 191*.
- 530 [2001] EWCA Civ 527, [2002] Q.B. 35 at 47.
- 531 [2014] EWHC 1178 (Ch), [2015] Ch. 212 at [43]–[44]; *Bank of Scotland Plc v Waugh [2014] EWHC 2117 (Ch), [2015] 1 P. & C.R. DG3* at [68]–[79].
- 532 See Vol.II, para.47-061.
- 533 [2003] UKHL 17, [2003] 2 All E.R. 615 at [51].
- 534 [2003] UKHL 17 at [51], per Lord Walker of Gestingthorpe; [2001] EWCA Civ 527, [2002] Q.B. 35 at 47.
- 535 It may be difficult to distinguish between a deed which has not been delivered at all and one which has been delivered as an escrow: Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.3–175; *Vincent v Primo Enterprises (Voucher Sales) Ltd [1969] 2 Q.B. 609, 620*; *Kingston v Ambrian Investments Ltd [1975] 1 W.L.R. 161*; *Windsor Refrigerator Co Ltd v Branch Nominees Ltd [1961] Ch. 88* at 102 (reversed on other grounds [1961] Ch. 375); *Silver Queen Maritime Ltd v Persia Petroleum Services Ltd [2010] EWHC 2867 (QB)*.

- 536 *Murray v Earl of Stair* (1823) 2 B. & C. 82; *Xenos v Wickham* (1867) L.R. 2 H.L. 296 at [323]; *Macedo v Stroud* [1922] 2 A.C. 330 at [337]; *Beesly v Hallwood Estates Ltd* [1961] Ch. 105; *Vincent v Premo Enterprises Ltd* [1969] 2 Q.B. 609; *D'Silva v Lister House Development Ltd* [1971] Ch. 17; *Kingston v Ambrian Investment Co Ltd* [1975] 1 W.L.R. 161; *Glessing v Green* [1975] 1 W.L.R. 863; *Terrapin International Ltd v IRC* [1976] 1 W.L.R. 665; *Bank of Scotland Plc v King* [2007] EWHC 2747 (Ch), [2007] All E.R. (D) 376 (Nov) at [63].
- 537 *Co.Litt.* 36a; Sheppard's Touchstone of Common Assurances, 7th edn (1820), p.59.
- 538 *Millership v Brookes* (1860) 5 H. & N. 797; *Kidner v Keith* (1863) 15 C.B.(N.S.) 35; 42. *Glessing v Green* [1975] 1 W.L.R. 863.
- 539 *Watkins v Nash* (1875) L.R. 20 Eq. 262, 266; *Nash v Flynn* (1844) 1 Jo. & La.T. 162, 177.
- 540 *London Freehold and Leasehold Property Co v Suffield* [1897] 2 Ch. 608, 621–622.
- 541 *Bowker v Burdekin* (1843) 11 M.W. 128, 147; *Davis v Jones* (1856) 17 C.B. 625, 634; *Governors, etc., of Foundling Hospital v Crane* [1911] 2 K.B. 367, 374. *Thompson v McCullough* [1947] K.B. 447.
- 542 *Kingston v Ambrian Investment Co Ltd* [1975] 1 W.L.R. 161; *Glessing v Green* [1975] 1 W.L.R. 863.
- 543 *Glessing v Green* [1975] 1 W.L.R. 863. cf. *Kingston v Ambrian Investment Co Ltd* [1975] 1 W.L.R. 161 at [168]–[169].
- 544 *Glessing v Green* [1975] 1 W.L.R. 863. cf. *Beesly v Hallwood Estates Ltd* [1961] Ch. 105, 118, 120; *Kingston v Ambrian Investment Co Ltd* [1975] 1 W.L.R. 161 at 166.
- 545 *Bank of Scotland Plc v King* [2007] EWHC 2747 (Ch), [2007] All E.R. (D) 376 (Nov) at [51].
- 546 *Alan Estates Ltd v W.G. Stores Ltd* [1982] Ch. 511, not following *Terrapin International Ltd v IRC* [1976] 1 W.L.R. 665; *Bank of Scotland Plc v King* [2007] EWHC 2747 (Ch), [2007] All E.R. (D) 376 (Nov) at [51]; *Kenny* (1982) Conv. 409.

## (c) - Consideration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 1 - Contract Law and “Contracts”

Section 4. - Contracts Contained in Deeds

(c) - Consideration

### No consideration required

- <sup>104</sup> Generally speaking, as will be seen later in detail,<sup>547</sup> the law does not enforce gratuitous promises but instead requires a certain reciprocity for the creation of a “simple” contract, this requirement being expressed through the rules gathered under the heading of the doctrine of consideration. However, in contracts contained in a deed no such reciprocity is ordinarily required, the rule being that a contract contained in a deed is good even against a party standing to derive no advantage from it.<sup>548</sup> This means that the common law actions of debt (for a promised sum of money) or damages (for failure to perform promises more generally) are available to the person for whose benefit they are expressed. On the other hand equity never favoured voluntary transactions even if they were contained in a deed, and refused to grant its special remedies in cases where these were without consideration. So it has been laid down that specific performance will not be decreed of a contract contained in a deed which is entirely without consideration.<sup>549</sup> Knight-Bruce LJ in *Kekewich v Manning*<sup>550</sup> said:

“In equity, where at least the covenantor is living, or where specific performance of such a (voluntary) covenant is sought, it stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed.”<sup>551</sup>

And an imperfect conveyance, if voluntary, is not binding, and equity will not execute it in favour of volunteers if anything remains to be done.<sup>552</sup> A contract contained in a deed, if made without consideration, may be impeached by third parties on similar grounds to those on which voluntary

settlements can be impeached as being fraudulent as against creditors or purchasers.<sup>553</sup> Where a promise or agreement unsupported by consideration is enforceable by reason of its being contained in a deed, it may be avoided on the ground of special equitable rules of mistake which are distinct from the rules of mistake applicable to contracts.<sup>554</sup>

## Footnotes

547 See below, Ch.6.

548 See Plowd. 308; *Morley v Boothby* (1825) 3 Bing. 107, 111–112.

549 *Wycherley v Wycherley* (1763) 2 Eden 175, 177; *Groves v Groves* (1829) 3 Y. & J. 163; *Jefferys v Jefferys* (1841) Cr. & Ph. 138. See Fry on Specific Performance, 6th edn (1921), p.53; Jones and Goodhart, Specific Performance, 2nd edn (1996), p.24. Contrast *Mountford v Scott* [1975] Ch. 258 (token payment for grant of option). See also below, paras 6-024, 30-052—30-053.

550 (1851) 1 De G.M. & G. 176, 188.

551 But see above, para.1-080 on the general abolition of the requirement of sealing for deeds.

552 As in *Milroy v Lord* (1862) 4 De G.F. & J. 264; *Richards v Delbridge* (1874) L.R. 18 Eq. 11; *Re Kay's Settlement* [1939] Ch. 329; *Re Fry* [1946] Ch. 312. See also Law of Property Act 1925 s.173, replacing Voluntary Conveyances Act 1893.

553 See Law of Property Act 1925 s.173; Insolvency Act 1986 ss.423–425, 436 (replacing Law of Property Act 1925 s.172).

554 *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 esp. at [115] applied in *Van der Merwe v Goldman* [2016] EWHC 790 (Ch), [2016] 4 W.L.R. 71 at [26]–[32]. On the common law rules applicable to mistakes in contracts, see below, Chs 5 and 8.

## (d) - Other Aspects

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 1 - Contract Law and “Contracts”

Section 4. - Contracts Contained in Deeds

(d) - Other Aspects

### Benefit of person not a party

- <sup>105</sup> According to an ancient rule of the common law, no one could take an immediate interest as grantee nor the benefit of a covenant as covenantee under an indenture *inter partes* (as opposed to a deed poll) unless he was named as a party thereto.<sup>555</sup> This was altered by [s.5 of the Real Property Act 1845](#), which provided that under an indenture, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, might be taken, although the taker was not named a party to the same indenture.<sup>556</sup> This section was re-enacted with modifications by [s.56\(1\) of the Law of Property Act 1925](#), which provides that a person may take the benefit of any covenant *or agreement over or respecting land or other property*, although he may not be named as a party to the conveyance or other instrument.<sup>557</sup> The determination of the exact scope of this provision is a matter of considerable difficulty<sup>558</sup>; but it is clear that it does not effect any general abrogation of the doctrine of privity of contract.<sup>559</sup> In *Beswick v Beswick*,<sup>560</sup> a majority of the House of Lords was of the opinion that a limited meaning should be given to the word “property”. Lord Guest thought it meant real property. Lord Upjohn, however, was not prepared to accept this limitation, although he considered that the application of the section was restricted to covenants contained in documents strictly *inter partes* and under seal.<sup>561</sup>

## Contract (Rights of Third Parties) Act 1999

- <sup>106</sup> It is not entirely clear how the position described in the preceding paragraph was affected by the coming into force of the [Contract \(Rights of Third Parties\) Act 1999](#), which created a new exception to privity of contract where the contract expressly provides that a third party may in his own right enforce a term of the contract, or where a term purports to confer a benefit on him unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.<sup>562</sup> Where a contract in the ordinary sense of an agreement supported by consideration is contained in a deed, there is nothing in the [1999 Act](#) which suggests that its provisions should not apply to contracts owing to the use of this formality: indeed the [1999 Act](#) itself assumes that some actions upon a specialty can be brought under it as it provides that “an action upon a specialty” in [s.8 of the Limitation Act 1980](#) shall include references to … an action brought in reliance on [s.1] relating to a specialty”.<sup>563</sup> More difficult, however, is the question whether an agreement contained in a deed is itself “a contract” for the purposes of the [1999 Act](#) even in the absence of any supporting consideration. As has been noted,<sup>564</sup> there is no agreement as to whether in general a promise or an agreement contained in a deed takes effect as a “contract”. In the case of the [1999 Act](#), though, its own provisions do make clear that the contracts with which it is concerned must consist of an agreement between two or more persons for the benefit (as defined) of a third party.<sup>565</sup> Moreover, the Law Commission’s report on whose recommendations the [1999 Act](#) was based took the view that its proposed reform would restrict the ambit of the doctrine of consideration so as to prevent the rule that “consideration must move from a promisee” from denying a right in a third party to a contract otherwise fulfilling the requisite conditions.<sup>566</sup> In the course of exposing its views of the future position, however, the Law Commission observed that:

“… provided there is a contract supported by consideration (*or made by deed*), it may then be enforceable by a third party beneficiary who has not provided consideration.”<sup>567</sup>

Given that the courts refer to Law Commission reports for guidance in the interpretation of resulting legislation,<sup>568</sup> this suggests that an agreement contained in a deed should count as a “contract” for the purposes of the [1999 Act](#), even if it is unsupported by consideration.<sup>569</sup>

## Non est factum and mistake

- <sup>107</sup> There was an ancient common law defence to actions on specialties known as non est factum: if an illiterate man, to whom the provisions of a deed had been wrongly read, executed it under a

mistake as to its contents, he could say that it was not his deed.<sup>570</sup> In modern times this doctrine has undergone modification<sup>571</sup> and has been extended to cases other than those of illiteracy and to simple contracts in writing,<sup>572</sup> so that there is now no difference between specialty and other written contracts in this respect. This position is to be contrasted with mistakes made in making gifts or other voluntary dispositions (including those made by deed), where equitable rules apply which differ from the common law rules applicable to mistake in contracts, whether or not these are contained in deeds.<sup>573</sup>

## Estoppel and facts stated in the deed

108



“A party who executes a deed is estopped in a Court of Law from saying that the facts stated in the deed are not truly stated.”

<sup>574</sup>



The principle has been extended to statements in recitals in a deed.

<sup>575</sup>

**U** It is a question of the construction of the deed as a whole as to which parties are estopped by a recital. When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party: and the intention is to be gathered by construing the instrument.

<sup>576</sup>

**U** The scope of the doctrine is extremely limited in modern law. First, it only applies between the parties to the deed and those claiming through them.

<sup>577</sup>

**U** Secondly, it only applies when an action is brought to enforce rights arising out of the deed and not collateral to it.

<sup>578</sup>

**U** Thirdly, it only applies if the statement is clear and unambiguous.

<sup>579</sup>

**U** Fourthly, it does not prevent a party from relying on defences such as non est factum, fraud, illegality or incapacity. In such cases the facts may be pleaded in order to defeat the deed, even though they may contradict statements made on the face of the deed.

580

**U** And so, although a party to a deed may be estopped from denying facts which are stated in it, he is not estopped from saying that, on the facts so stated, the deed is void in law.

581

**U** Fifthly, where a deed is rectifiable (that is to say, ought to be rectified), the doctrine of estoppel by deed will not bind the parties to it.

582

**U** However, it may be going too far to say that there is, given these restrictions, little point in preserving a separate category of estoppel by deed on the basis that it appears to be covered by estoppel by representation or by convention. As Lord Toulson has observed:

“For one thing, convention may be contractual or non-contractual. Consideration is still ordinarily a requirement of a contract. In *Johnson v Gore Wood*

583

**U** Lord Goff expressed reservation about attempting to encapsulate the many circumstances capable of giving rise to an estoppel within a single formula, in part because consideration remains a fundamental principle of the law of contract and is not to be reduced out of existence by the law of estoppel. A particular characteristic of a deed is that consideration is not ordinarily required for it to be effective as between the parties. ... However, where there is a contractual convention, it makes no difference in principle whether or not the contract is embodied in a deed.”

584

**U**

## Merger

**109** A deed is an instrument of a higher nature than a simple contract. A security created by simple contract will be merged in and extinguished by a specialty security if it secures the same obligation.<sup>585</sup> A simple contract may also be merged in a deed, e.g. a conveyance, if so intended by the parties.<sup>586</sup>

## Alteration of deeds

- [10] Where a deed is altered in a material way either by a party in whose custody it is kept or by a stranger to the transaction, it becomes void, but where the alteration is not material it does not become void.<sup>587</sup> This rule applicable to deeds was extended in 1791 to contracts in written instruments generally<sup>588</sup> and is discussed further in Ch.28.<sup>589</sup>

## Variation or discharge

- [11] At common law, an attribute of a contract contained in a deed was that it could only be varied or discharged by another contract contained in a deed, and not by a contract under hand or by word of mouth<sup>590</sup>; but in equity such contracts could be varied or discharged by parol,<sup>591</sup> and the rule of equity now prevails.<sup>592</sup>

## Period of limitation

- [12] The period of limitation for an action for a breach of contract is 12 years if the contract is contained in a deed, whereas it is only six years in the case of a simple contract.<sup>593</sup>

## Footnotes

555 *Scudamore v Vandenstene* (1587) 2 Co.Inst. 673; *Berkeley v Hardy* (1826) 5 B. & C. 355; *Forster v Elvet Colliery Co Ltd* [1908] 1 K.B. 629, 639, affirmed sub nom. *Dyson v Forster* [1909] A.C. 98. (An “indenture” is a deed executed by more than one party, whereas a “deed poll” is one executed by only one party.) cf. *Moody v Condor Insurance Ltd* [2006] EWHC 100, [2006] 1 W.L.R. 1847, where it was held that the mere fact that a deed was executed by a guarantor and a principal debtor and expressed as being made “between” them did not conclude the issue whether the document was a deed poll or a deed inter partes, as it was “necessary to examine what the parties ... set out to do by it”: at [18], per Park J.

556 *Kelsey v Dodd* (1881) 52 L.J. Ch. 34, 39; *Forster v Elvet Colliery Co Ltd* [1908] 1 K.B. 629.

557 “Property” is defined in s.205(1)(xx). See also Law of Property Act s.78, re-enacting with modifications Conveyancing Act 1881 s.58.

- 558 *Beswick v Beswick* [1968] A.C. 58; *Elliott* (1956) 20 Conv.(N.S.) 43, 114; *Andrews* (1959) 23 Conv.(N.S.) 179; *Ellinger* (1963) 26 M.L.R. 396; below, para.20-005.
- 559 *Beswick v Beswick* [1968] A.C. 58.
- 560 [1968] A.C. 58, 77, 81, 87.
- 561 [1968] A.C. 58 at [105]–[107]. See also Lord Pearce at [94]. The reference to sealing must be read in the light of the effect of the **Law of Property (Miscellaneous Provisions) Act 1989** s.1, above, para.1-080.
- 562 Contract (Rights of Third Parties) Act 1999 s.1 and see generally, below, paras 20-091 et seq.
- 563 Contracts (Rights of Third Parties) Act 1999 s.7(3).
- 564 See above, para.1-033.
- 565 Contract (Rights of Third Parties) Act 1999 s.1(2) which refers to the intention of the *parties*.
- 566 Law Commission, Privity of Contract: Contracts for the Benefit of Third Parties, Law Com. No.242 (1996) Pt VI.
- 567 Privity of Contract, Law Com. No.242, para.6.4 (emphasis added).
- 568 *Wilson v First County Trust Ltd* (No.2) [2003] UKHL 40, [2003] 3 W.L.R. 568 at [56].
- 569 In *Prudential Assurance Co Ltd v Ayres* [2008] EWCA Civ 52, [2008] L. & T.R. 30 at [33]–[42] it was assumed that a third party could take a right under a deed under the **Contracts (Rights of Third Parties) Act 1999**, although on the facts the Court of Appeal held that as a matter of construction the parties did not intend to do so (landlord's undertaking by deed that liability for rent owed by partnership assignees of a lease should not extend to their personal assets held not intended to create a right in the former tenant, guarantor of that rental liability). On the facts, however, there was consideration moving to the promisors (the landlords) under the deed, which was expressed as supplemental to the lease.
- 570 *Thoroughgood's Case* (1584) 2 Co. Rep. 9a. But the doctrine was much older than that case: see Holdsworth, History of English Law, Vol.8, p.50.
- 571 See below, paras 5-049 et seq.
- 572 See below, para.5-049.
- 573 *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 esp. at [115] applied in *Van der Merwe v Goldman* [2016] EWHC 790 (Ch), [2016] 4 W.L.R. 71 at [26]–[32]. On the common law rules applicable to mistakes in contracts, see below, Chs 5 and 8.
- 574 *Baker v Dewey* (1823) 1 B. & C. 704, 707. See also *Hayne v Maltby* (1789) 3 Term Rep. 438, 441; *Potts v Nixon* (1870) I.R. 5 C.L. 45.
- 575 *Lainson v Tremere* (1834) 1 Ad. & El. 792; *Bowman v Taylor* (1834) 2 Ad. & El. 278; *Young v Raincock* (1849) 7 C.B. 310, 338.
- 576 *Stroughill v Buck* (1850) 14 Q.B. 781, 787; cf. *Greer v Kettle* [1938] A.C. 156, 168–171.
- 577 *Carpenter v Buller* (1841) 8 M. & W. 209, 212.
- 578 *Carpenter v Buller* (1841) 8 M. & W. 209 at [213]; *Wiles v Woodward* (1850) 5 Exch. 557, 563; *Ex p. Morgan* (1875) 2 Ch. D. 72.

- 579 *Bensley v Burdon* (1830) 8 L.J.(O.S.) Ch. 85, 87; *Right v Bucknell* (1831) 2 B. & Ad. 278, 282; *Heath v Crealock* (1874) L.R. 10 Ch. App. 22; *General Finance, etc., Co v Liberator, etc., Building Society* (1879) 10 Ch. D. 15; *Onward Building Society v Smithson* [1893] 1 Ch. 1; *Poulton v Moore* [1915] 1 K.B. 400; cf. *Trinidad Asphalte Co v Coryat* [1896] A.C. 587.
- 580 *Collins v Blantern* (1767) 2 Wils. K.B. 341; *Hayne v Maltby* (1789) 3 Term Rep. 438; *Hill v Manchester and Salford Waterworks Co* (1831) 2 B. & Ad. 544.
- 581 *Doe d. Preece v Howells* (1831) 2 B. & Ad. 744, and see *Re A Bankruptcy Notice* [1924] 2 Ch. 76.
- 582 *Greer v Kettle* [1938] A.C. 156, 171; *Wilson v Wilson* [1969] 1 W.L.R. 1470; *OTV Birwelco Ltd v Technical & General Guarantee Co Ltd* [2002] 4 All E.R. 668.
- 583 [2002] 2 A.C. 1, 39–40.
- 584 *Prime Sight Ltd v Lavarello (Official Trustee)* [2013] UKPC 22, [2014] A.C. 436 at [30] (on behalf of the Privy Council). On estoppel by convention more generally see Vol.I, paras 6-116—6-126.
- 585 See below, paras 28-001 et seq.
- 586 See below, para.28-003.
- 587 *Pigot's Case* (1614) 11 Co. Rep. 26B, 27A; *Aldous's Case* (1868) L.R. 3 Q.B. 753; *Northern Bank Ltd v Laverty* [2001] N.I. 315.
- 588 *Master v Miller* (1791) 14 T.R. 320.
- 589 See below, paras 28-020 et seq.
- 590 *Kaye v Waghorn* (1809) 1 Taunt. 428; cf. *Ex p. Morgan* (1875) 2 Ch. D. 72 at 89 and see the rule recognised but infringed in *Nash v Armstrong* (1861) 10 C.B.(N.S.) 259.
- 591 *Webb v Hewitt* (1857) 3 K. & J. 438.
- 592 Senior Courts Act 1981 s.49; *Steeds v Steeds* (1889) 22 Q.B.D. 537; *Berry v Berry* [1929] 2 K.B. 316; *Mitas v Hyams* [1951] 2 T.L.R. 1215; *Plymouth Corp v Harvey* [1971] 1 W.L.R. 549. cf. *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2018] 2 W.L.R. 1603 where a majority of the SC held that a “no oral modification” clause in a simple contract is effective to prevent the variation of the contract except subject to the formal requirements set out in the clause.
- 593 Limitation Act 1980 s.8(1) (but subject to s.8(2)). Section 8 refers to an “action on a specialty” and in *Liberty Partnership Ltd v Tancred* [2018] EWHC 2707 (Comm), [2019] 2 W.L.R. 923 at [52]–[64] it was held as a preliminary issue that an instrument which was a “deed” within s.1 of the 1989 Act was a “speciality” for the purposes of s.8 of the 1980 Act even in the absence of a seal by one or more of its parties. See, e.g. *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 W.L.R. 1281, 1292. See below, paras 31-002, 31-003.

## Section 1. - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 2 - Fundamental Principles of Contract Law

Section 1. - Introduction

*Simon Whittaker*

- 101 There are a number of legal propositions in the English law of contract of a generality, pervasiveness and importance to have attracted the designation of principle, though such a designation does not have a technical legal significance. These could include the principle of privity of contract,<sup>1</sup> the principle of the “objectivity” of intention in agreement,<sup>2</sup> and principles of contractual interpretation.<sup>3</sup> However, two linked principles remain of fundamental importance, viz the principles of freedom of contract and of the binding force of contract.<sup>4</sup> By these two principles, English law has expressed its attachment to a general vision of contract as the free expression of the choices of the parties which will then be given effect by the law, while bearing in mind the practical needs required for private transactions to flourish, particularly in a market context. However, while the modern law still takes these principles as the starting point of its approach to contracts, it also recognises a host of qualifications on them, some recognised at common law and some created by legislation.<sup>5</sup> In this respect, while the law does not recognise a general legal principle requiring good faith, fairness or reasonableness in the contracting parties or in the contract itself, both contractual practice (in the form of express terms requiring good faith) and the law itself have recognised contexts in which these standards are to be met.<sup>6</sup> In this respect, recently the role of implied terms of good faith (whether qualifying the exercise of a broad contractual power or more generally) have become prominent.<sup>7</sup>

Contractual principles of (retained) EU law

102

EU law has also recognised the importance of freedom of contract and the binding force of contracts and these general propositions have sometimes been seen as “general principles” of EU law.<sup>8</sup> On the other hand, EU legislation has also sometimes used the idea of a requirement of good faith in both a consumer and a commercial context, drawing on, in particular, the civil law tradition which requires good faith in contracts generally<sup>9</sup>; and the Court of Justice of the EU has appeared to recognise a general principle of good faith in contracts.<sup>10</sup> After the departure of the UK from the EU came into full effect on IP completion day,<sup>11</sup> this EU approach to contractual principle is significant in two ways. First, the UK legislation which implemented directives that referred to good faith in the contractual context form part of retained EU law and are to be interpreted, in principle, by reference to the retained EU case law that explained the significance of this requirement.<sup>12</sup> Secondly, to the extent to which freedom of contract, the binding force of contract and (possibly) good faith in contracts already constituted “general principles of EU law” on IP completion day, they were themselves retained by operation of the [European Union \(Withdrawal\) Act 2018](#)<sup>13</sup>; and the [2018 Act](#) requires that questions of the interpretation of retained EU law are, in principle, to be determined in accordance with “retained general principles of EU law” as well as with “retained EU case law”.<sup>14</sup>

## Footnotes

- 1 See below, [para.20-006](#) (where the “doctrine” of privity of contract is described as a general rule).
- 2 See below, [para.4-002](#).
- 3 See below, paras 15-047 et seq. and especially *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd [1998] 1 W.L.R. 896* at 912–913, per Lord Hoffmann.
- 4 See below, paras 2-003—2-019, 2-020—2-023.
- 5 See below, paras 2-004, [2-011](#) et seq.
- 6 See below, paras 2-036 et seq.
- 7 See below, paras 2-062 et seq.
- 8 See below, paras 2-006—2-008 and 2-020—2-021 respectively.
- 9 On the EU law and the civil law tradition see below, [para.2-035](#) and [para.2-034](#) respectively.
- 10 Below, [para.2-035](#).
- 11 On which see above, paras 1-020 et seq.
- 12 European Union (Withdrawal) Act 2018 s.6(3) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)), above, [para.1-028](#).
- 13 s.6(3) and “retained general principles of EU law” defined in s.6(7) (both as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)).
- 14 2018 Act s.6(3) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)). On this general rule and its qualifications see above, [para.1-028](#).

---

End of Document

© 2022 SWEET & MAXWELL

## **(a) - General Importance of Freedom of Contract**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 2. - Freedom of Contract**

**(a) - General Importance of Freedom of Contract**

### **Freedom of contract in the nineteenth century**

- )03 In the nineteenth century, freedom of contract was regarded by many philosophers, economists and judges as an end in itself, finding its philosophical justification in the “will theory” of contract and its economic justification in laissez faire liberalism.<sup>15</sup> Thus, the parties were to be the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it. In particular, its validity should not be challenged on the ground that its effect was unfair or socially undesirable (as long as it was not actually illegal or immoral, the latter of which was understood in a restrictive sense)<sup>16</sup> and it was immaterial that one party was economically in a stronger bargaining position than the other. Nowhere can this attitude be seen more clearly than in the attitude of the courts to clauses which attempted to regulate the damages payable on breach of contract. For, the courts held that parties to a contract were able to limit or exclude liability in damages not merely for breach of contract, but also in tort.<sup>17</sup> The courts’ attitude to freedom of contract can also be seen in their treatment of an exception to it, for while they accepted that penalty clauses were ineffective even if agreed by the parties, they did so only owing to the force of established precedent to this effect and with considerable reluctance.<sup>18</sup>

### **Freedom of contract in the modern common law**

)04



Freedom of contract as a general principle of the common law retains considerable support. For example, in 1966, Lord Reid rejected the idea that the doctrine of fundamental breach was a substantive rule of law, negating any agreement to the contrary (and capable of being used to strike down an exemption clause)<sup>19</sup> on the ground, *inter alia*, that this would restrict “the general principle of English law that parties are free to contract as they may think fit”.<sup>20</sup> In 1980, in the same context, Lord Diplock observed<sup>21</sup> that:

“A basic principle of the common law of contract … is that parties to a contract are free to determine for themselves what primary obligations they will accept.”<sup>22</sup>

This support remains particularly strong in commercial contexts. So Lord Bingham of Cornhill stated that “[l]egal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting”.<sup>23</sup> Moreover, English courts have proved unwilling to strike down contracts on the ground simply that one of the parties suffered from an “inequality of bargaining power”.

<sup>24</sup>

 Conversely, the House of Lords held that it would not *add* to the agreement which the parties have made by implying a term merely because it would be reasonable to do so, but only where it is “necessary”,<sup>25</sup> nor will the courts put a meaning on the words of a contract different from that which they clearly express.<sup>26</sup> Even where the common law recognises an exception to freedom of contract, as in the case of the law controlling penalty clauses,<sup>27</sup> the courts have distinguished between the nature of this control and wider controls of contracts on the ground of fairness. According to Lord Neuberger and Lord Sumption (with whom Lord Carnwath agreed) in *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis*:

“There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men’s bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party’s primary obligations, not the primary obligations themselves.”<sup>28</sup>

In the view of the Supreme Court, the true test whether a contract term imposes a “penalty” on the party in default is whether:

“… it imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.”<sup>29</sup>

For this purpose:

“... the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.”<sup>30</sup>

And the bargaining position of the parties more generally may be relevant.<sup>31</sup>

## Freedom of contract as a principle and practical lack of choice

- 105 The law has long presumed that contracting parties are free in their contractual decision-making (whether to contract, with whom, and to what effect), but it has also long been recognised that in some contexts this legal presumption is not reflected in the parties having a practical choice. Indeed, many contracts, whether between two commercial parties and even more between such a party and a consumer, are made on the written standard terms of one of the parties in such circumstances that it is all but impossible for them to be varied,<sup>32</sup> a phenomenon which led French commentators to refer to such transactions as contrats d’adhésion.<sup>33</sup> Similarly, the terms of employees’ contracts of employment may be determined by agreement between their trade union and their employer,<sup>34</sup> or by a statutory scheme of employment.<sup>35</sup> Despite the lack of real freedom of the parties in these situations to do other than accept or reject the whole package as it is offered to them, these types of transactions are still treated as contracts by English law. On the other hand, the restricted nature of typically one of the parties’ choice has led to legislative intervention to control the content of the resulting contract. This can be seen in the general control of the fairness of the terms of consumer contracts<sup>36</sup> and the more targeted controls on the reasonableness of exemption clauses and certain related terms in many types of non-consumer contracts.<sup>37</sup> Moreover, where one of the contracting parties is seen as weaker and unable to bargain, the contracts which they make may be subject to protective controls which are incapable of exclusion by agreement. This is particularly prominent in the case of consumers<sup>38</sup> and employees.<sup>39</sup>

## Freedom of contract in EU law

- 106 The “principle of freedom of contract” has been recognised by the European Court of Justice.<sup>40</sup> According to AG Kokott:

“Contractual freedom is one of the general principles of Community law. It stems from the freedom to act for persons. It is inseparably linked to the freedom to conduct a business [protected by art.16 of the EU Charter of Fundamental Rights]. In a

Community which must observe the principle of an open market economy with free competition, contractual freedom must be guaranteed.”<sup>41</sup>

Moreover, freedom of contract was set by the European Commission as a fundamental point of reference for the development of European contract law<sup>42</sup> and was placed by it as a “general principle” in its Proposal for a Regulation on a Common European Sales Law,<sup>43</sup> it being explained that “[p]arty autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection”.<sup>44</sup> The principle of “party autonomy” is also important in EU private international law.<sup>45</sup> On the other hand, the Late Payments in Commercial Transactions Directive 2011 recognised that freedom of contract may be “abused” and therefore requires contract terms in commercial contracts to be rendered unenforceable where they are “grossly unfair to the creditor” in relation to the rights which the directive sets out.<sup>46</sup>

## Alemo-Herron v Parkwood Leisure Ltd

- 107 The decision of the Court of Justice in *Alemo-Herron v Parkwood Leisure Ltd* provides a striking illustration of the use of art.16 of the EU Charter of Fundamental Rights to give effect to its vision of freedom of contract.<sup>47</sup> There, the UK Supreme Court asked the Court of Justice whether a Member State is prohibited by the Transfer of Undertakings Directive<sup>48</sup> from extending to employees, in the event of a transfer of an undertaking or business, a “dynamic” protection as a result of the recognition by domestic contract law of the effectiveness of a contract term in the employees’ individual contracts of employment that their pay may be determined from time to time by a third party, there a public sector collective negotiating body (the “dynamic pay clause”). If such a dynamic protection were permitted, then in the particular case the transferee (a private sector company which had bought the undertaking from a local authority) would in effect be bound by a collective agreement to whose negotiation it could not be party.<sup>49</sup> The Transfer of Undertakings Directive provides that:

“... the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing *on the date of a transfer* shall, by reason of such transfer, be transferred to the transferee”

but also that Member States have the right to apply or introduce laws “which are more favourable to employees or to promote or permit collective agreements between social partners more favourable to employees”.<sup>50</sup> While acknowledging this right in Member States, the Court of Justice held that the aim of the directive was not solely to safeguard the interests of employees on the transfer of an undertaking, but to ensure a fair balance between their interests and the interests of the transferee employer, which “must be in a position to make the adjustments and changes necessary to carry

on its operations”, notably where the transfer of the undertaking was from the public sector to the private sector.<sup>51</sup> Giving effect to the dynamic pay clause would undermine this fair balance.<sup>52</sup> Moreover, the fundamental freedom to conduct a business laid down in art.16 of the EU Charter of Fundamental Rights “covers, inter alia, freedom of contract”.<sup>53</sup> In the light of the Directive’s provision that the transferee of an undertaking must give effect to the rights of employees existing at the date of its transfer:

“... [i]t is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity.”<sup>54</sup>

This is not the case where a transferee cannot participate in the collective bargaining body identified by the dynamic pay clause and so, in this situation, “the transferee’s contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.”<sup>55</sup>

- 108 The Court of Justice therefore held that the Directive cannot be interpreted as “entitling Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee’s freedom to conduct a business”.<sup>56</sup> So, in effect, the need to preserve the transferee employer’s freedom of contract trumps the freedom of contract of the contracting parties to the original contracts of employment who had agreed to set the employees’ pay by a third party.<sup>57</sup> In so deciding, the Court of Justice interpreted restrictively the reference in the Directive to “the transferor’s ... obligations arising from a contract of employment ... existing on the date of a transfer”, treating the relevant obligation as the obligation to pay the employee’s wages rather than a wider obligation to honour the contract’s terms governing the determination of pay, including its future determination.

## Significance after IP completion day

- 109 The position taken by the EU legislature and by the Court of Justice of the EU to freedom of contract is significant to UK law after the departure of the UK from the EU took full effect on IP completion day in two ways. First, particular decisions made and principles laid down by the European Court before IP completion day form part of retained EU case law and are in principle binding on UK courts in relation to the UK legislation that implemented the European legislation to which they related.<sup>58</sup> Secondly, the recognition of freedom of contract by the Court of Justice before IP completion day as a “general principle of EU law” renders it independently relevant to the interpretation of other UK legislation belonging to retained EU law.<sup>59</sup> In this respect, it should

be noted that while the EU Charter of Fundamental Rights was not itself retained by UK law by the European Union (Withdrawal) Act 2018,<sup>60</sup> this did not affect the retention of:

“... any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).”<sup>61</sup>

It is submitted, therefore, that the close relationship between freedom of contract as a general principle of EU law and “freedom to conduct a business” in art.16 of the Charter seen, for example, in *Alemo-Herron v Parkwood Leisure Ltd*, does not prevent freedom of contract from taking effect as a “retained general principle of EU law” under the 2018 Act.<sup>62</sup>

## Freedom of Contract and the ECHR

- )10 While the European Convention on Human Rights does not refer to freedom of contract, the European Court of Human Rights has held that the extent to which a State interferes with an owner of property’s freedom of contract relating to the property is relevant to the assessment of its compliance with its duties in respect of the right to property under art.1 of the First Protocol. This body of law is noted in the context of the wider relationship between the Human Rights Act 1998 and contracts.<sup>63</sup>

## Footnotes

15 See Dicey, Law and Opinion in England, 2nd edn (1914), pp.150–158; *Printing and Numerical Registering Co v Sampson (1875) L.R. 19 Eq. 462* at [465], per Jessel MR; *Manchester, Sheffield and Lincolnshire Ry v Brown (1883) 8 App. Cas. 703* at [716]–[720], per Lord Bramwell; *Salt v Marquess of Northampton [1892] A.C. 1* at [18]–[19], per Lord Bramwell. It is instructive to observe that Lord Bramwell, who was one of the foremost judicial champions of freedom of contract, also believed in the necessity for a real as opposed to an apparent consent: see his judgment in *British and American Telegraph Co Ltd v Colson (1871) L.R. 6 Ex. 108*, and his dissenting judgment in *Household Fire Insurance Co v Grant (1879) 4 Ex. D. 216, 232*. See further, Atiyah, The Rise and Fall of Freedom of Contract (1979) and cf. Gordley, The Philosophical Origins of Modern Contract Doctrine (1991) at pp.214–217.

16 See below, paras 18-008 et seq.

17 *Nicholson v Willan (1804) 5 East 507*. Lord Ellenborough CJ, at 513, rejected the plaintiff’s argument that the attempt of the defendant, a common carrier, to exclude his liability for the

loss of goods carried beyond the value of £5 was: “contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent for losses not occasioned by ... act of God [or] the King’s enemies”.

- 18 *Ranger v G.W. Ry Co* (1854) 5 H.L. Cas. 72, 94–95, 118–119; Atiyah, The Rise and Fall of Freedom of Contract (1979), pp.414–415.
- 19 See *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 and below, paras 17-023—17-027.
- 20 [1967] 1 A.C. 361 at 399.
- 21 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 848.
- 22 And see *Eurico SpA v Philipp Brothers* [1987] 2 Lloyd’s Rep. 215, 218 (term to do the impossible valid).
- 23 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2003] 3 W.L.R. 711 at [57]. See also *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] A.C. 436 at [47] (contractual recital of fact known by both parties to be untrue enforceable in principle); *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [28] (“the principle of freedom of contract is still fundamental to [English] commercial law”). See also *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2018] 2 W.L.R. 1603 at [11] (holding that “party autonomy” justifies the binding nature of “no oral modification” clause in a contract).
- 24 • *National Westminster Bank Plc v Morgan* [1985] 1 A.C. 686, 708, disapproving the dictum of Lord Denning MR in *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 339; *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40, [2021] 3 W.L.R. 727 esp. at [3] and [24]–[26] and see below, para.10-181 cf. paras 10-161 et seq. (unconscionable bargains).
- 25 *Liverpool City Council v Irwin* [1977] A.C. 239, 254; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80, 104–105; *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 W.L.R. 1843 at [14]–[21] and [77]; *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] I.C.R. 531 at [7] and see below, paras 16-001 et seq. especially at 16-011—16-012.
- 26 See below, paras 15-047 et seq.
- 27 *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [33] (“[t]he penalty rule is an interference with freedom of contract”, per Lord Neuberger and Lord Sumption); at [257] per Lord Hodge. On this decision see below, paras 29-203 et seq.
- 28 [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [13]; and see similarly at [73].
- 29 [2015] UKSC 67 at [32] per Lord Neuberger and Lord Sumption (with whom Lord Carnwath and Lord Clarke agreed). See similarly at [152] per Lord Mance and [249] and [255] per Lord Hodge.
- 30 [2015] UKSC 67 at [35] per Lord Neuberger and Lord Sumption (with whom Lord Carnwath and Lord Clarke agreed). See similarly at [75]. For discussion of this point, see below, para.29-243.
- 31 [2015] UKSC 67 at [35].

- 32 *Sales* (1953) 16 M.L.R. 318; Law Commission, Unfair Terms in Contracts, Law Com No.292 (2005), especially Pts 4 and 5. Where both parties to the contract are in business, each may attempt to impose its own conditions on the other, and this sometimes gives rise to what is known as a “battle of forms”: see below, paras 4-041—4-047.
- 33 While le contrat d’adhésion did not appear in the French Civil Code as promulgated in 1804, it was introduced there on the reform of French contract law in 2016 (and subsequently amended on ratification of *Ordinance* No.2016/131 of 10 February 2016 by the French Parliament by Loi No.2018/287 of 20 April 2018): see arts 1110 and 1171 C.civ. On this law see further *Whittaker* (2019) 39 O.J.L.S. 404.
- 34 See Vol.II, paras 42-049 et seq.
- 35 cf. *Barber v Manchester Regional Hospital Board* [1958] 1 W.L.R. 181, 196; *Roy v Kensington & Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 624; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294, 304.
- 36 Consumer Rights Act 2015 Pt 2, esp. s.62. This control used to be restricted to terms which were not “individually negotiated” (under the *Unfair Terms in Consumer Contracts Regulations 1999* (SI 1999/2083) reg.5) but this restriction was not retained by the 2015 Act: see Vol.II, para.40-262.
- 37 *Unfair Contract Terms Act 1977*; see below, paras 17-069 et seq. The most general control on the exclusion or restriction of contractual liability is restricted to terms contained in the proponent’s written standard terms of business: 1977 Act s.3, on which see below, paras 17-088—17-096.
- 38 See Vol.II, Ch.40, and in particular the rights of consumers in respect of goods, digital content and services in Pt 1 of the *Consumer Rights Act 2015*, the majority of which are not capable of exclusion by agreement: see paras 40-535, 40-568 and 40-589—40-591.
- 39 See Vol.II, para.42-060.
- 40 *Spain v European Commission* (C-240/97) EU:C:1999:479, [1999] E.C.R. I-6571 at [99] (common agricultural policy); *Société thermale d’Eugénie-les-Bains v Ministère de l’Economie, des Finances et de l’Industrie* (C-277/05) EU:C:2007:440, [2007] E.C.R. I-6415 at [21], [24], [28] and [29] (VAT); Opinion of AG Wahl in *Kasler v OTP Jelzalogbank Zrt* (C-26/13) EU:C:2014:282, 12 February 2012 at [3] referring to art.4(2) of Directive 93/13/EEC on unfair terms in consumer contracts as “safeguarding, to some extent, the principles of freedom of choice and freedom of contract”. The CJEU’s judgment of 30 April 2014 did not refer to art.4(2) in this way.
- 41 *European Commission v Alrosa Co Ltd* (C-441/07) EU:C:2010:377, [2010] 5 C.M.L.R. 11 at AG para.225.
- 42 EC Commission, First Annual Progress Report on European Contract Law and the Acquis Review COM(2005) 456 final, para.2.6.3 and see above, para.1-014.
- 43 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final, Annex I, art.1 CESL. On the Proposal generally see above, para.1-015.
- 44 CESL Proposal recital 30.
- 45 See Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] O.J. L177/6, art.3 and see below, paras 33-018 et seq. The Rome I Regulation

became part of “retained EU law” by operation of [s.3 of the European Union \(Withdrawal Agreement\) Act 2020](#).

- 46 Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. L48/1 recital 28 and art.7 and see [IOS Finance EFC SA v Servicio Murciano De Salud \(C-555/14\) EU:C:2017:121, \[2017\] 3 C.M.L.R. 5](#) at paras 28–36. The 2011 Directive was implemented in UK law by the [Late Payment of Commercial Debts \(Interest\) Act 1998](#) as amended by [SI 2013/395](#), [SI 2015/1336](#) and [SI 2018/117](#): see further below, paras [29–291](#)—[29–294](#).
- 47 [C-426/11, EU:C:2013:521, 18 July 2013](#). For the UK Supreme Court judgment of referral see [\[2011\] UKSC 26, \[2011\] 4 All E.R. 800](#). See also [Anonymi Geniki Etairia Tsimenton Iraklis \(AGET Iraklis\) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis \(C-201/15\) EU:C:2016:972, \[2017\] 2 C.M.L.R. 32](#) at paras 68–70 (framework of collective redundancies which was subject to authorisation by a public authority held to be an interference in employer’s freedom to conduct a business and, in particular, freedom of contract).
- 48 Directive 2001/23 relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] O.J. L82/16 which was implemented in UK law by the [Transfer of Undertakings \(Protection of Employment\) Regulations 2006 \(SI 2006/246\)](#). The case itself concerned earlier UK regulations implementing an earlier EEC directive, but the relevant provisions were essentially identical.
- 49 [C-426/11](#) at para.8.
- 50 Directive 2001/23 arts 3(1) and 8 respectively (emphasis added).
- 51 [C-426/11](#) at paras 25 and 26.
- 52 [C-426/11](#) at paras 28–29.
- 53 [C-426/11](#) at para.32.
- 54 [C-426/11](#) at para.33.
- 55 [C-426/11](#) at para.35.
- 56 [C-426/11](#) at para.36.
- 57 cf. [Alemo-Herron v Parkwood Leisure Ltd \[2011\] UKSC 26](#) at [9], Lord Hope referring to the argument in favour of the binding nature of a third party pay determination clause as “entirely consistent with the common law principle of freedom of contract”.
- 58 European Union (Withdrawal) Act 2018 s.6(3) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)); see above, para. [1-028](#), where the important qualifications on this general position are noted.
- 59 European Union (Withdrawal) Act 2018 s.6(3) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)); see above, para. [1-028](#).
- 60 European Union (Withdrawal) Act 2018 s.5(4) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.25(4)(a)).
- 61 European Union (Withdrawal) Act 2018 s.5(5) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.25(4)(a)).
- 62 [C-426/11, EU:C:2013:521, 18 July 2013](#) above, paras [2-007](#)—[2-008](#).

- 63 *Hutten-Czapska v Poland App. No.35014/97 (2006) 42 E.H.R.R. 15* at [151]; *Edwards v Malta App. No.17647/04* at [69]–[71]; *Gauci v Malta App. No.47045/06 (2011) 52 E.H.R.R. 25* at [58]. See further on the relationship between “Convention rights” under the **Human Rights Act 1998** and contract law, below, paras 3-099 et seq. and esp. at para.3-114.

## **(b) - Qualifications on Freedom of Contract**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 2. - Freedom of Contract**

### **(b) - Qualifications on Freedom of Contract**

- )11 The principle of freedom of contract is subject to many qualifications in modern English law. These qualifications may affect a person's decision as to whether and with whom to contract; the content of the contract which the parties have concluded, including their choice as to the terms on which their contractual relations are to be governed, and more generally as to their legal consequences. Furthermore, even where it does not bear directly on the mutual rights and duties of the contracting parties, modern legislation has also regulated the contractual environment in which the parties to some types of contract negotiate, conclude and perform their contracts.

## **(i) - Restricted Choice Whether or With Whom to Contract**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 2 - Fundamental Principles of Contract Law

Section 2. - Freedom of Contract

(b) - Qualifications on Freedom of Contract

(i) - Restricted Choice Whether or With Whom to Contract

**Refusal to enter contracts**

- 112 Even at common law, an innkeeper or common carrier was not entitled to refuse to accommodate a would-be customer without sufficient excuse.<sup>64</sup> Companies which supply what used to be called public utilities such as water, gas and electricity, in some circumstances are under a statutory duty to supply the commodity in question,<sup>65</sup> though in this type of case the existence of the duty has led the courts to hold that the relationship so created is not contractual.<sup>66</sup>

**The law of equality**

- 113 The modern law of equality has forbidden a person to refuse to contract in certain situations and has provided more widely for the prevention of discrimination. This was first the case as regards discrimination on the grounds of sex<sup>67</sup> and racial group,<sup>68</sup> and was later extended to discrimination on the grounds of disability of the would-be contractor,<sup>69</sup> and, in the context of employment, prohibitions on discrimination on the ground of a person's sexual orientation,<sup>70</sup> religion or belief,<sup>71</sup> and age.<sup>72</sup> However, the *Equality Act 2010* subjected this earlier law of discrimination to considerable legislative consolidation, reframing and reform. A full discussion of the scope of this important legislation would be beyond the scope of the present work, but

the general scheme of the legislation is as follows. A key concept is “protected characteristics”, which are set out by the Act: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.<sup>73</sup> The Act then defines and explains “prohibited conduct” in relation to these protected characteristics, which includes “direct and indirect discrimination, harassment and victimisation”.<sup>74</sup> The Act sets out the extent to which and how the various “protected characteristics” are protected against the different types of prohibited conduct, notably, for present purposes, in relation to the provision of public services (which includes goods and facilities)<sup>75</sup>; the disposal of premises<sup>76</sup>; work, including provisions governing employment and partnerships<sup>77</sup>; education<sup>78</sup>; and associations.<sup>79</sup> Provision is made for the relationship of the Act’s rules on discrimination and contracts,<sup>80</sup> including a general provision to the effect that:

“... [a] term of a contract is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of that or another person that is of a description prohibited by this Act.”<sup>81</sup>

## Public law

<sup>114</sup> While in principle a person is free to decide with whom to contract or not to contract, public law may sometimes constrain the basis of the decision-making of public authorities. A particular example may be found in a local authority’s decision not to contract with a company which had indirect trading links with South Africa: although the policy was not itself unreasonable, it had been adopted partly in order to penalise the company in question and not solely in order to further racial harmony within the borough and was therefore unlawful as having this improper purpose.  
<sup>82</sup>

 Much more generally, the law of public procurement frames and to an extent constrains the decision-making of public bodies in their procurement decisions.<sup>83</sup> For example, the **Public Contracts Regulations 2015** set “principles of procurement” including that “Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner”.<sup>84</sup>

## Footnotes

- 64 *Clarke v West Ham Corp* [1909] 2 K.B. 858, 879, 882. See Vol.II, para.38-008 on the ways by which a carrier could “abdicate” this status by giving notice that he would not accept custom from the public.
- 65 Gas Act 1986 s.10; Electricity Act 1989 s.16 (as substituted by Utilities Act 2000 s.44 and as amended); Electricity Act 1989 Sch.6 para.3 (as substituted by Utilities Act 2000 s.51 and Sch.4) (deemed contracts in respect of the supply of electricity in certain cases).
- 66 *Read v Croydon Corp* [1938] 4 All E.R. 631; *Norweb Plc v Dixon* [1995] 1 W.L.R. 637 (on which see Peel (ed.), Treitel on The Law of Contract, 13th edn (2011), para.1-042 n.37). cf. *Oceangas (Gibraltar) Ltd v Port of London Authority* [1993] 2 Lloyd's Rep. 292; cf. *Rushton v Worcester City Council* [2001] EWCA Civ 367, [2002] H.L.R. 9; R. (on the application of Data Broadcasting International Ltd) v Office of Communications [2010] EWHC 1243 (Admin), [2010] All E.R. (D) 289 (May) at [88]–[94] and above, para.1-038.
- 67 Sex Discrimination Act 1975 s.6(1)(c).
- 68 Race Relations Act 1976 ss.4(1)(c), 17, 20 and 21.
- 69 Disability Discrimination Act 2005.
- 70 Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661).
- 71 Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660).
- 72 Employment Equality (Age) Regulations 2006 (SI 2006/1031).
- 73 Equality Act 2010 ss.4–12. The main provisions concerning discrimination in the workplace and in the provision of goods, facilities and services took effect from 1 October 2010: Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (SI 2010/2317). A summary of the commencement dates of the provisions of the 2010 Act may be found at <http://www.homeoffice.gov.uk/equalities/equality-act/commencement> [Accessed 1 September 2021]. The statutory provisions noted above were superseded on the coming into force of the relevant provisions of the Equality Act 2010, which repealed and replaced, inter alia, the Equal Pay Act 1970; the Sex Discrimination Acts 1975 and 1986; the Race Relations Act 1976; and the Disability Discrimination Act 2005: Equality Act 2010 Sch.27 Pt 1. See also below, paras 4-250, 4-251, 4-252, 30-036—30-037, 42-009, 42-041, 42-099, 42-128—42-132, 42-135—42-141 and 42-179.
- 74 Equality Act 2010 ss.13–27.
- 75 Equality Act 2010 Pt 3 ss.28–31.
- 76 Equality Act 2010 Pt 4 ss.32–38.
- 77 Equality Act 2010 Pt 5 ss.39–83.
- 78 Equality Act 2010 Pt 6 ss.84–97.
- 79 Equality Act 2010 Pt 7 ss.100–106.
- 80 Equality Act 2010 Pt 10 ss.142–148.
- 81 Equality Act 2010 s.142(1).
- 82 *R. v Lewisham London BC Ex p. Shell UK Ltd* [1988] 1 All E.R. 938, applying *Wheeler v Leicester City Council* [1985] A.C. 1054 and see Local Government Act 1988 ss.17–23.

See, however, Craig, *Administrative Law*, 9th edn (2021), paras 27-027—27-028 on when a public body's contracting is subject to judicial review.

83 See further below, paras 13-057—13-060.

84 [Public Contracts Regulations 2015 \(SI 2015/102\) reg.18\(1\)](#).

## **(ii) - Illegal Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 2. - Freedom of Contract**

**(b) - Qualifications on Freedom of Contract**

**(ii) - Illegal Contracts**

### **Illegality in contracts**

- 115 Illegality may prevent the enforcement of a contract, there being a broad distinction between cases in which claims will not be enforced on the ground of public policy because the contract involves the commission of a legal wrong and where they will not be enforced for other reasons of public policy.<sup>85</sup> To the extent to which this body of law restricts the content and/or the way in which parties are free to contract, it constrains their contractual freedom and the binding force of any contracts which they conclude. This complex body of law is discussed in Ch.18.

### **Contracts or covenants “in restraint of trade”**

- 116 A particularly interesting (as well as prominent) example of illegality is found in relation to contracts or contract terms which are in unreasonable restraint of trade.  
<sup>86</sup>

**U** As will be seen, where parties conclude a contract which is itself “in restraint of trade” or where a wider contract includes a particular promise (often termed a “covenant”) in restraint of trade, this contract or promise respectively are unenforceable at common law unless they are

reasonable.<sup>87</sup> While at first sight this law constitutes an exception to freedom of contract (in that it restricts the power of the parties to make an enforceable contract or term), it can equally be seen as supporting their freedom of contract by ensuring that they are not unreasonably restrained from future contracting. This tension between the two aspects of freedom of contract (or perhaps better here, freedom to trade) was recently highlighted by Lord Wilson (with whom Lord Lloyd-Jones, Lady Arden and Lord Kitchin agreed) in approving Lord Wilberforce's "trading society test" as to whether the doctrine of restraint of trade is engaged by a covenant which restrains the use of land according to whether it is a type which has "passed into the accepted and normal currency of commercial or contractual or conveyancing relations" and which may therefore be taken to have "assumed a form which satisfies the test of public policy".<sup>88</sup> In Lord Wilson's view:

"... the phrase 'trading society' aptly describes the test. For it reflects the importance attached on the one hand to freedom to trade and on the other to the enforceability of contracts in the interests of trade. It is the former which generates the doctrine [of restraint of trade] and the latter which keeps it within bounds."<sup>89</sup>

## Footnotes

- <sup>85</sup> Below, para.18-001.
- <sup>86</sup> However, the Supreme Court has recently observed that the principles governing restraint of trade are well-established and "already reflect the type of flexibility that *Patel v Mirza* [[2016] UKSC 42, [2017] A.C. 467] has brought to the law on contracts affected by illegality" so that it "seems preferable, therefore, to treat the law on the enforceability of contracts in restraint of trade as being separate from, albeit similar to, the law on the enforceability of contracts affected by illegality as laid down" in *Patel v Mirza: Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32, [2021] 3 W.L.R. 598 at [45].
- <sup>87</sup> Below, para.18-123 et seq.
- <sup>88</sup> *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland)* [2020] UKSC 36 at [46] quoting Lord Wilberforce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269 at 333.
- <sup>89</sup> [2020] UKSC 36 at [45]. On the substantive significance of the Supreme Court's decision see below, para.18-125.

### **(iii) - Restrictions on Freedom as to Terms**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 2. - Freedom of Contract**

**(b) - Qualifications on Freedom of Contract**

**(iii) - Restrictions on Freedom as to Terms**

- <sup>117</sup> The law affects the terms of the contracts which parties conclude in three main ways. First, positively, the courts imply terms into contracts, either in fact (where a term is implied in a particular contract to give effect to the intention of the parties) or in law to govern a particular category or class of contract.<sup>90</sup> In the case of terms implied in law, the courts generally require that it is a “*necessary* incident of a definable category of contractual relationship”,<sup>91</sup> but over the years they have found many such implied terms, often in situations where it is difficult to see how this test is fulfilled,<sup>92</sup> thereby creating for many types of contracts the “legal incidents of those ... kinds of contractual relationship”.<sup>93</sup> According to one author:

“Faced with a problem in contract, the Common lawyer is as likely as not to try to solve it with an implied term. [In contrast,] the Civil lawyer will probably resort to a rule, whether it be a broad and fundamental precept such as the German requirement of good faith<sup>94</sup> ... or one derived from the nature of obligation or contract ... or, finally, one derived from the nature of the particular contract in question.”<sup>95</sup>

While some judicially implied terms have been recognised by statute,<sup>96</sup> many remain a matter of common law, where they constitute an important part of the regulation of many contractors’ relations.<sup>97</sup> Secondly, and again positively, in the modern law the effects of many contracts are regulated by statute, sometimes by way of statutory insertion of an implied term<sup>98</sup> but sometimes by attaching a legal consequence directly to the conclusion of a particular type of contract. This is particularly noticeable as regards some types of contracts made by consumers, notably

contracts for the sale or supply of goods, hire purchase and consumer credit,<sup>99</sup> where the protection which the law thereby ensures is often not capable of avoidance by an expression of contrary intention.<sup>100</sup> Contracts of employment and between a landlord and tenant have also been subjected to considerable legislative regulation, to the extent that the voluntary aspect of the contract appears only to be whether or not to enter the contract, a decision which then triggers a set of obligations which are determined by the law.<sup>101</sup> Thirdly, and this time negatively, in some contexts the law controls the fairness or reasonableness of contract terms, this being the case in relation to exemption clauses and certain related terms in non-consumer contracts<sup>102</sup> and generally in the case of the terms of consumer contracts.<sup>103</sup> However, even in the case of consumer contracts, the control of fairness applies in principle only to “incidental terms” and not to an assessment of the fairness of the contract itself, that is, its main subject matter and the “appropriateness of the price ... by comparison with the goods, digital content or services supplied under it”.<sup>104</sup> As will be explained, this exclusion from the assessment of fairness was included in the EU directive from which it stemmed so as to reflect the importance of the principle of freedom of contract even in the consumer context.<sup>105</sup>

## Footnotes

- <sup>90</sup> See above, para.2-004 and below, paras 16-005 et seq.
- <sup>91</sup> *Scally v Southern Health and Social Services Board [1992] 1 A.C. 294, 307* per Lord Bridge of Harwich (emphasis added); see below, para.16-016.
- <sup>92</sup> See below, para.16-005.
- <sup>93</sup> *Mears v Safecar Securities Ltd [1983] Q.B. 54, 78*, per Stephenson LJ. The learned Lord Justice specifically accepted, however, that “the obligation must be a *necessary* term; that is, required by their relationship”. A legislative regime governing a particular category of contracts may require the implication of an appropriate term by the courts: see, e.g. contracts governed by the **Housing Grants, Construction and Regeneration Act 1996** and the **Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649)** and *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc [2015] UKSC 38, [2015] 1 W.L.R. 2961* esp. at [23].
- <sup>94</sup> cf. below, para.2-034.
- <sup>95</sup> *Nicholas (1974) 48 Tulane L.R. 946, 950.*
- <sup>96</sup> See, e.g. *Jones v Just (1868) L.R. 3 Q.B. 197* and Sale of Goods Act 1893 s.14 (now Sale of Goods Act 1979 s.14 and Consumer Rights Act 2015 ss.9 and 10).
- <sup>97</sup> See, below, Ch.16. The contract of employment has proved particularly fertile ground for the implication of terms: see Vol.II, paras 42-061—42-070, 42-074—42-075.
- <sup>98</sup> See Equality Act 2010 s.66(1); Sale of Goods Act 1979 ss.12–15; Supply of Goods (Implied Terms) Act 1973 ss.8–11. cf. Consumer Rights Act 2015 ss.9–14, 17, 34–37, 39–41, 49–52 referring to the contracts to which they apply as “treated as including” terms of various contents.

- 99 See Vol.II, Chs 41 and 46 (on the law generally applicable) and paras 40-460 et seq. (on the law applicable to consumer contracts).
- 100 Other contracts made with consumers, for example contracts of insurance and guarantee, were long left unregulated in this way, but important changes were made in this respect by the [Unfair Terms in Consumer Contracts Regulations 1994 \(SI 1994/3159\)](#); revoked and replaced by the [Unfair Terms in Consumer Contracts Regulations 1999 \(SI 1999/2083\)](#) and themselves replaced by the [Consumer Rights Act 2015 Pt 2](#): see below, Vol.II, paras 40-223 et seq.
- 101 *Hepple (1986–1987) 36 King's Counsel 11.*
- 102 Unfair Contract Terms Act 1977; see below, paras 17-069 et seq.
- 103 Consumer Rights Act 2015 Pt 2 and esp. [s.62](#), on which see Vol.II, paras 40-223 et seq.
- 104 Consumer Rights Act 2015 s.64; see Vol.II, paras 40-351 et seq.
- 105 See Vol.II, para.40-351.

## **(iv) - Regulation of Markets**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 2. - Freedom of Contract**

**(b) - Qualifications on Freedom of Contract**

**(iv) - Regulation of Markets**

### **Market regulation and freedom of contract**

- 118 Other statutory techniques for the regulation of contracts are less direct than the rules adding “necessary terms” or subtracting unfair terms. For example, one aim of modern competition law is to help ensure that no “undertaking” is able to impose what terms it likes on those with whom it deals because of its “dominant position” in the market.

106

119 Moreover, if, after market investigation, the Competition and Markets Authority (CMA) considers that “any feature or combination of features” of a market prevent, restrict or distort competition in the UK or part of it, it has a duty to remedy these adverse effects,

107

120 a prominent example of this being the regulation of the market for the supply of retail groceries by the Groceries Supply Code of Practice.

108

121 These bodies of law can be seen either as an intervention in the market (and therefore as interfering with the principle of freedom of contract

109

**U**) or as a mechanism for ensuring that the market functions properly (and therefore as promoting freedom of contract). Another modern technique is for legislation to set up a system of regulation for a particular type of business. For example, under the [Financial Services and Markets Act 2000](#), there is a general prohibition on the carrying on without authorisation or exemption of a regulated investment activity,

<sup>110</sup>

**U** and doing so may constitute an offence and give rise to civil liability.

<sup>111</sup>

**U** The Act gives to the Financial Conduct Authority very considerable rule-making powers for the conduct of investment business,

<sup>112</sup>

**U** and breach of a rule so made is actionable at the suit of a private person who suffers loss as a result, though it will not constitute a criminal offence.

<sup>113</sup>

**U** Clearly, this system of regulation affects the way in which contracts relating to investment business are concluded, even though breach of the rules does not affect the validity of any such contract.

<sup>114</sup>

**U**

## Unfair commercial practices business-to-consumer

<sup>119</sup> A further important example of the regulation of market behaviour may be found in the [Consumer Protection from Unfair Trading Regulations 2008](#) which implemented the Unfair Commercial Practices Directive 2005.<sup>115</sup> The Regulations set a very broad standard of behaviour “business-to-consumer” by prohibiting “commercial practices” which contrary to “professional diligence”, materially distort the economic behaviour of an average consumer.<sup>116</sup> The Regulations flesh out this general prohibition by setting three main examples of unfair commercial practices each subject to their own definitions (misleading actions, misleading omissions and aggressive commercial practices<sup>117</sup>) and by providing a list of particular commercial practices which “are in all circumstances considered unfair”.<sup>118</sup> These various prohibitions are supported by criminal offences<sup>119</sup> and enforcement powers in the CMA and other enforcement authorities.<sup>120</sup> While the [2008 Regulations](#) as made restricted their scope to this form of control, in 2014 they were amended so as to create a series of “rights to redress” for consumers against traders in respect of two categories of unfair commercial practices (misleading actions and aggressive commercial

practices).<sup>121</sup> In this way, controls conceived purely as a form of market regulation became the basis of individual rights for consumers against traders.

## Footnotes

- 106 See art.102 TFEU (ex. 82 EC); **Competition Act 1998** s.18. See further Vol.II, Ch.45, esp. paras 45-010 et seq. and 45-201 et seq.
- 107 Enterprise Act 2002 ss.131, 134, 138 and 161; and see Whish and Bailey, Competition Law, 10th edn (2021), Ch.11.
- 108 Competition Commission, Groceries (Supply Chain Practices) Market Investigation Order 2009 arts 4 and 5 and Sch.1; **Groceries Code Adjudicator Act 2013** (creating the office of Groceries Code Adjudicator). And see *Whittaker (2019)* 39 O.J.L.S. at 427–431.
- 109 See, e.g. *European Commission v Alrosa Co Ltd (C-441/07) EU:C:2010:377, [2010] 5 C.M.L.R. 11* at para.225.
- 110 Financial Services and Markets Act 2000 s.19(1). “Regulated activities” are defined by s.22.
- 111 ss.23, 20(3), respectively.
- 112 Financial Services and Markets Act 2000 Pt IXA.
- 113 Financial Services and Markets Act 2000 ss.138D(2), 138E(1).
- 114 Financial Services and Markets Act 2000 s.138E(2).
- 115 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) implementing Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market; the **2008 Regulations** became part of “retained EU law” on IP completion day subject to minor amendment: see Vol.II, paras 40-166 et seq.
- 116 Consumer Protection from Unfair Trading Regulations 2008 reg.3(3).
- 117 Consumer Protection from Unfair Trading Regulations 2008 regs 5, 6 and 7.
- 118 Consumer Protection from Unfair Trading Regulations 2008 reg.3(4)(d), Sch.1.
- 119 Consumer Protection from Unfair Trading Regulations 2008 Pt 3; see Vol.I, para.40-179.
- 120 These are contained in the Consumer Protection from Unfair Trading Regulations 2008 Pt 4 and the **Enterprise Act 2002** Pt 8: see Vol.II, paras 40-179—40-180.

- 121 Consumer Protection from Unfair Trading Regulations 2008 Pt 4A, as inserted by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870), on which see Vol.II, paras 40-181 et seq.

## Section 3. - The Binding Force of Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 2 - Fundamental Principles of Contract Law

Section 3. - The Binding Force of Contract

### General significance

- <sup>120</sup> A concomitant of the doctrine of freedom of contract is the binding force of contracts,<sup>122</sup> a force which the French Civil Code compares to the binding force of the law itself<sup>123</sup> and which has been recognised by the European Court of Justice as a “general principle of civil law”.<sup>124</sup> English law has also long recognised this principle, which suits the needs of commerce as well as the expectations of parties to contracts more generally.

### Binding force and remedies for breach

- <sup>121</sup> Care must, however, be taken in interpreting what is meant by the “binding force” of contracts in English law. Some authors argue that:

“... [g]enerally speaking the law does not actually compel the performance of a contract, it merely gives a remedy, normally damages, for the breach”<sup>125</sup>

an approach which echoes Oliver Wendell Holmes’ famous statement that the law leaves a contractor “free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses”.<sup>126</sup> However, four arguments can counter such an approach. First, the courts sometimes do enforce the primary obligations of a contract: apart from the equitable remedies of specific performance and injunction,<sup>127</sup> this is clearest in relation to the action for the agreed contract price, a remedy available at common law and as of right which enforces a party’s

primary contractual obligation to pay money.<sup>128</sup> Moreover, the special statutory consumer right to repair and replacement of goods or digital content, and the right to repeat performance of services, similarly seek to ensure that one party (the consumer) obtains a conforming performance from the other (the trader).<sup>129</sup> Secondly, the purpose of many awards of damages for breach of contract, and the one which is particular to it,<sup>130</sup> is to put the injured party in the position as though the contract had been performed.<sup>131</sup> While this approach to damages is not without its restrictions<sup>132</sup> (notably, those imposed by the rules as to remoteness<sup>133</sup> and mitigation of damage),<sup>134</sup> where an award of damages is made on this basis, it can be seen as reflecting the idea that the obligations created by the contract *should* have been performed. Thirdly, a concern with the apparent injustice of allowing a party to break his contract without sanction where the breach has occasioned no loss but has allowed him to make a profit can be seen to lie behind the recognition of the exceptional remedy of an “account of profits” on breach.<sup>135</sup> Fourthly, English law recognises the binding force of contracts in another way, it being a tort for a third party knowingly<sup>136</sup> to induce a party to a contract to break his obligations to his co-contractor.<sup>137</sup> While a third party may be liable in damages for such a tort of interference with a contractual relationship, its commission may also be prevented by injunction in an appropriate case.<sup>138</sup> And finally, and at a much more general level, the argument that English law does not recognise the truly obligational character of contracts often rests on the absence of a particular form of sanction for a breach of contract—viz the threat of punishment for contempt of court, a sanction which exists in the contractual context only in relation to a failure to conform to a judicial order for specific performance or injunction. However, to this it may be countered that there is no reason to tie the question of the truly binding character of a contract to the presence of a particular type of sanction for its breach and that many English lawyers are content to use the language of obligation to describe the consequences of contracts, which suggests that they see contract terms as set up and to be used as guides for the conduct of the contracting parties.<sup>139</sup>

## General rejection of review of contracts on the ground of fairness

- 122 However, rather than alluding to the nature of the sanctions which are available on breach of contract, the notion of the binding force of contracts is often used instead to draw attention to the general refusal of the courts to review them on the ground of unfairness or inequality, for example where an inadequate price has been stipulated for the sale of property.<sup>140</sup> This refusal is also reflected in the development of the law of frustration. Until 1863, the general rule was that a party who contracted in absolute terms remained liable, notwithstanding a change of circumstances between the time of making the contract and the time for performance,<sup>141</sup> but in that year this harsh rule was mitigated by the doctrine of frustration,<sup>142</sup> which for many years was reconciled with principle by the device of implying a term into the contract, to which both parties could be supposed to have agreed, and which provided for its discharge in the event of a given thing or

state of things ceasing to exist. However, the doctrine came to be applied in circumstances where it was obvious that both parties would never have agreed to any such term and in *Davis Contractors Ltd v Fareham Urban DC*,<sup>143</sup> this basis for relief on frustration was firmly rejected. While some judges had relied simply on the notion of justice to justify the doctrine,<sup>144</sup> this decision of the House of Lords also made clear that its proper basis is the construction of the contract.<sup>145</sup> By so doing, reliance is again placed on what the parties agreed or rather on what they did not agree, viz to perform the contract in such radically different circumstances from those which obtained when it was made. However, even if the view were taken that the rationale for the doctrine of frustration is simply that in the circumstances the law decides that it would be unfair to keep the parties to the terms of their agreement, this does not mean that simple unfairness is the test of frustration. Again, in *Davis Contractors Ltd*<sup>146</sup> Lord Radcliffe made clear that the proper test for frustration is whether performance of the contract is radically different from that which was undertaken by the contract<sup>147</sup> and this test has been consistently upheld,<sup>148</sup> the courts refusing to grant relief for frustration merely because performance of the contract is more onerous than was envisaged by the parties on contract.<sup>149</sup>

## Limits on binding force of contracts

Nevertheless, recognition of the principle of the binding force of contracts does not mean that contracts, or particular terms of contracts, will always be enforced. This is clearest in cases of illegal contracts,<sup>150</sup> but another exception to the principle exists at common law in the case of penalty clauses.<sup>151</sup> As regards the latter, the Supreme Court has clarified the limits of the law which renders a contract term unenforceable as a penalty, holding that a contract term which stipulates the payment of a sum of money on breach of contract will be classed as a penalty clause (and so unenforceable) only if it “imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation”.<sup>152</sup> Furthermore, very important qualifications on the binding force of contract terms were introduced as a result of modern legislative intervention, of which the *Unfair Contract Terms Act 1977*<sup>153</sup> and the *Consumer Rights Act 2015* are particularly prominent.<sup>154</sup> First, the *Unfair Contract Terms Act 1977* declares exemption clauses totally ineffective where they attempt to exclude business liability for death or personal injuries caused by negligence.<sup>155</sup> Furthermore, in a series of other cases the *1977 Act* denies effectiveness to exemption clauses and certain related clauses unless they are proven to be “fair and reasonable” by the person who seeks to rely upon it.<sup>156</sup> Secondly, the *Consumer Rights Act 2015* provides a general regime for the control of unfair terms in consumer contracts and also makes special provision as regards the exclusion of liability for breach of the statutory terms which it inserts into three categories of consumer contracts.<sup>157</sup> Another very striking inroad into the binding force of contracts may be found in provisions of the *Consumer*

Credit Act 2006 which replaced earlier provisions governing extortionate credit bargains in the Consumer Credit Act 1974 with very broad provisions concerning “unfair relationships” arising from a consumer credit agreement.

158

**U** As a result, a court is empowered to make a range of orders (including requiring the creditor to repay any sums paid by the debtor, to reduce or discharge any sum payable by the debtor and to alter the terms of the agreement)<sup>159</sup> in connection with a consumer credit agreement:

“... if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor”

in one or more of a number of ways.<sup>160</sup> According to the Supreme Court, this provision

“... is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application ... It is not possible to state a precise or universal test for its application, which must depend on the court’s judgment of all relevant facts”,”

although the Supreme Court offered some general points which courts should take into account for this purpose.<sup>161</sup> Finally, legislation has recently been enacted which invalidates contract terms which prohibit the assignment of a receivable (defined as a right to be paid any amount under a contract for the supply of goods, services or intangible assets) where the supplier of goods etc. is not a “large enterprise” or a “special purpose vehicle”.<sup>162</sup>

## Footnotes

122 This has even been termed the “sanctity of contracts”: see Hughes Parry, *The Sanctity of Contracts in English Law* (1959).

123 The relevant provision of the French Civil Code was originally contained in art.1134(1) (inspired by D. 16.3.1.6; D. 50.17.23 (both attributed to Ulpian)), but since the Code’s amendment in 2016 has been contained in art.1103. The principle of the binding force of contracts is, however, much qualified in modern French contract law: see the contributions by Fauvarque-Cosson, Pérès, Stoffel-Munck and Whittaker in Cartwright and Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (2017), Chs 11, 9, 8 and 1 respectively.

124 *Société thermale d’Eugénie-les-Bains v Ministère de l’Economie, des Finances et de l’Industrie (C-277/05) EU:C:2007:440, [2007] E.C.R. I-6415* at [24].

125 Atiyah, *An Introduction to the Law of Contract*, 5th edn (1995), p.37.

126 *The Common Law* (1881), p.301.

- 127 See below, Ch.30.
- 128 See below, paras 29-010 and 30-002—30-014.
- 129 See *Consumer Rights Act 2015* ss.23 (goods), 43 (digital content) and 55 (services) and 58 (powers of the court) on which see Vol.II, paras 40-520, 40-562, 40-564, 40-585 and 40-587.
- 130 In particular, a contrast is drawn here with the basis of awards of damages in tort: see below, paras 3-055—3-057.
- 131 See below, para.29-001. Such an award is sometimes said to be made to protect the injured party's expectation interest or performance interest. An award of damages may be made on other bases, in particular in order to protect what is known as the reliance interest of the injured party: below, paras 29-022 et seq.
- 132 A practical as opposed to a legal restriction is that a claim for damages on the basis of an injured party's performance interest may be difficult to show: see below, para.29-027.
- 133 See below, paras 29-124 et seq.
- 134 See below, paras 29-096 et seq.
- 135 See *AG v Blake [2001] 1 A.C. 268* and below, paras 29-070—29-072.
- 136 See Clerk & Lindsell on Torts, 23rd edn (2020), paras 23-16 et seq.
- 137 See *Lumley v Gye (1853) 2 E.B. 216* and below, para.3-066.
- 138 e.g. *Torquay Hotel Co Ltd v Cousins [1969] 2 Ch. 106*.
- 139 cf. Hart, *The Concept of Law* (1961), pp.79–88, who distinguishes the situation where a person is under an *obligation* and where a person is *obliged*.
- 140 This can be seen in those cases which hold that the consideration for a promise need not be adequate: below, paras 6-015—6-024.
- 141 *Paradine v Jane (1647) Aleyn 26*.
- 142 *Taylor v Caldwell (1863) 3 B.S. 826*; see below, Ch.26.
- 143 [1956] A.C. 696, 720–729.
- 144 e.g. *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd [1944] A.C. 265, 275*; *British Movietonews Ltd v London and District Cinemas Ltd [1951] 1 K.B. 190, 202* (reversed [1952] A.C. 166).
- 145 [1956] A.C. 696, 720–721; and see below, paras 26-009—26-014.
- 146 [1956] A.C. 696.
- 147 [1956] A.C. 696, 729; and see below, para.26-012.
- 148 See below, para.26-013.
- 149 *British Movietonews Ltd v London and District Cinemas Ltd [1952] A.C. 166, 185*; *Davis Contractors Ltd v Fareham Urban DC Ltd [1956] A.C. 696*; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] A.C. 93*.
- 150 See below, Ch.18.
- 151 See below, paras 29-203 et seq. Another exception is to be found in the inability of the parties to a contract to fetter the discretion of the court in deciding whether to grant the remedy of specific performance: *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd [1993] B.C.L.C. 442, 451, 452*.
- 152 *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis [2015] UKSC 67, [2015] 3 W.L.R. 1373* at [32] per Lord Neuberger and Lord Sumption (with whom Lord

Carnwath and Lord Clarke of Stone-cum-Ebony (at [291] agreed); and see similarly at [152] (Lord Mance) and [255] (Lord Hodge, with whom Lord Toulson at [292] agreed on this issue). On this decision see below paras [29-203](#) et seq.

- 153 See below, paras [17-069](#) et seq.
- 154 On the [Consumer Rights Act 2015](#) see Vol.II, paras [40-223](#) et seq. The [2015 Act](#) replaced earlier controls on unfair terms in consumer contracts contained in the [Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083](#), on which see Vol.II, para.[40-227](#).
- 155 [Unfair Contract Terms Act 1977](#) s.2(1). See also [1977 Act](#) ss.6(1) and [7\(3A\)](#) (exclusion of liabilities for breach of implied terms as to title etc.).
- 156 [Unfair Contract Terms Act 1977](#) ss.2(2), 3, 6(1A), [7\(1A\)](#) and [\(4\)](#) and [11](#); and see below, paras [17-084](#) et seq.
- 157 The general regime is in the [2015 Act Pt 2](#), on which see Vol.II paras [40-223](#) et seq.; on the controls on the exclusion of statutory terms see the [2015 Act](#) s.31 (“goods contracts”), [s.47](#) (“digital content contracts”) and s.57 (“services contracts”) (providing the special controls). The [2015 Act](#) ss.[65](#) and [66](#) also makes similar provision as regards the exclusion of liability for personal injuries and death caused by negligence as are found more widely in [s.2\(1\)](#) of the [1977 Act](#).
- 158 [Consumer Credit Act 1974](#) ss.140A–140C as inserted by [Consumer Credit Act 2006](#) ss.19–22. See Vol.II, paras [41-213](#)—[41-232](#).
- 159 [Consumer Credit Act 1974](#) s.140B(1).
- 160 [Consumer Credit Act 1974](#) s.140A(1). On these provisions see Vol.II, paras [41-214](#)—[41-232](#).
- 161 *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61, [2014] 1 W.L.R. 4222* at [10] per Lord Sumption (with whom Baroness Hale of Richmond, Lord Clarke of Stone-cum-Ebony, Lord Carnwath and Lord Hodge agreed).
- 162 [Business Contract Terms \(Assignment of Receivables\) Regulations 2018](#) (SI 2018/1254), esp. regs 1(3) (“receivable”), 2 (rendering the terms of “no effect”), 3 (exception for large enterprises and special purpose vehicles) and 4 (further exceptions, including for consumer contracts (reg.4(c))). The [2018 Regulations](#) were made under the [Small Business, Enterprise and Employment Act 2015](#) ss.1 and 161. On the [2018 Regulations](#) see below, para.[22-048](#); *Day (2019) 135 L.Q.R. 205*.

## **(a) - Introduction**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

### **(a) - Introduction**

#### **The increased significance of good faith**

<sup>124</sup> Until relatively recently, the question whether the English law of contract required the parties to act in good faith could be dealt with very briefly—if not passed over in silence altogether. While there was earlier authority suggesting that good faith is a requirement in all contracts,<sup>163</sup> good faith as a legal requirement was generally seen as applicable only in a restricted class of contracts—principally insurance (where uberrima fides required disclosure both before and during the course of the contract), partnership and fiduciary relationships (notably including agency).<sup>164</sup> Moreover, at times English judges have expressed something very close to hostility to the idea of good faith in the contractual context, the most famous example being Lord Ackner's view that:

“... the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations<sup>165</sup> ... [and] ... unworkable in practice.”<sup>166</sup>

And judges have stated very clearly that English law contains no general legal principle or doctrine of good faith or fairness.<sup>167</sup> However, as will be explained, while it remains the case that English law does not recognise a general legal principle of good faith (whether at the stage of negotiations, in the performance of contracts or in relation to their breach), good faith has become more prominent both in contractual practice and in the law itself.

<sup>168</sup>



## Good faith as a legal value and as a legal concept

<sup>125</sup> In the following discussion, it is helpful to bear in mind the distinction between good faith or fairness as giving expression to a legal value or values (or possibly objectives) and good faith or fairness as legal concepts. Most if not all English lawyers would agree that English contract law reflects a value of good faith and fair dealing and where it does not do so it should be changed accordingly. For example, Lord Steyn (writing extra-judicially) saw “a thread [running] through our contract law that effect must be given to the reasonable expectations of honest men,”

<sup>169</sup>

this being “the central objective of the law of contract”.

<sup>170</sup>

Noticing use of good faith by civil laws and international instruments, Lord Steyn identified two meanings:

“... good faith has a subjective requirement: the threshold requirement is that the party must act honestly. That is an unsurprising requirement and poses no difficulty for the English legal system. But good faith additionally sets an objective standard, viz., the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned.”

<sup>171</sup>



Although Lord Steyn expressed an openness to use of good faith by the law itself (for example, in the context of pre-contractual negotiations), he put forward:

“... no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary. As long as our courts always respect the reasonable expectations of parties our contract law can satisfactorily be left to develop in accordance with its own pragmatic traditions.”

<sup>172</sup>



This argument therefore reflects both roles of good faith or fair dealing: as a purpose or value (in Lord Steyn's view, the need to give effect to the reasonable expectations of the parties) underlying particular rules, and good faith as a legal concept. The two significances of good faith or fairness can also be seen in the work of legal scholars. For example, Collins has argued that the basis of implied terms in English law (whether implied in fact or in law) is the idea of good faith and fair dealing in performance, and that this means that it is generally *unnecessary* to recognise a general legal duty or an independent implied term of good faith and fair dealing.

<sup>173</sup>

**U** Sometimes, however, it is not completely clear which significance is being given to use of the language of good faith. For example, Leggatt LJ (as he then was, with whom Rose and Flaux LJJ joined) recently observed that the doctrine of rectification of a contractual document to give effect to a subjective common intention was based on an "equitable principle of good faith".

<sup>174</sup>

**U** With respect, as a view of the justification or basis of rectification this is uncontroversial, but as a recognition of a wider legal principle, it is more open to discussion.

<sup>175</sup>

**U**

- 126 This is not to say, of course, that some laws or international legal instruments do not pose a general principle of good faith or fair dealing or otherwise generally require good faith; and, where they do so, such a legal requirement reflects a general ethical stance or overall purpose of the law.<sup>176</sup> For example, in French law the two significances of good faith run together. Having defined a "contract", the provisions on contract law in the Civil Code as reformed in 2016 start by making two general statements recognising freedom of contract and the binding force of contracts<sup>177</sup> and then immediately provide that "contracts must be negotiated, formed and performed in good faith" and that this is a matter of public policy (ordre public) so that it may not be excluded or restricted by agreement.<sup>178</sup> In the words of its authors:

"... this choice to highlight three fundamental principles expresses one of the essential aims pursued [by the reforming legislation]: to find a balance between contractual fairness and the autonomy of the will."<sup>179</sup>

## Differing concepts used by the law

- 127 The following discussion will, however, be concerned with the use of good faith and fairness as legal or contractual concepts, that is, ones which are used by the law itself or by contractual

practice rather than with broader justifications for legal doctrines or rules expressed in other terms. In this respect, it should be noticed, though, that sometimes a duty or requirement of good faith is expressed positively: the parties must behave honestly, in good faith or in accordance with good commercial practice. Sometimes, however, a substantively similar position is reached by the use of negative language, notably, by the law (or the contract) sanctioning (in one way or another) *bad* faith. A clear example of the latter may be found in the long-established rules governing fraud in the sense of the making of a false statement knowingly or reckless as to its falsity.<sup>180</sup> Moreover, the terminology used by the law may vary more widely, and very closely related concepts may be used instead of good faith, bad faith or fairness: in particular, English law often refers to the reasonableness/unreasonableness or (negatively) the unconscionability of a party's behaviour. Where used by the law itself, what these concepts typically have in common is that they require an assessment or evaluation of the party's behaviour by reference to an external, legal standard rather than by reference to whether or not the party has fulfilled the terms of the contract as made. While the focus of the present discussion will therefore be on good faith, it will also at times refer to these related evaluative concepts.

## Increased significance of good faith as a legal concept

- <sup>128</sup> As earlier noted, the significance of good faith has increased considerably over the 30 years since Lord Ackner expressed the hostile view quoted above.<sup>181</sup> This can be seen in three main ways.

## Good faith in EU law

- <sup>129</sup> First, a number of EU directives have used the concept of good faith in the legislation to be implemented in Member States.

<sup>182</sup>

 This is most prominent in relation to consumer contracts, where good faith is a distinct element both in the general test of the fairness of contract terms<sup>183</sup> and in the general test of the fairness of commercial practices by traders to consumers.<sup>184</sup> However, in EU law good faith has also been used in rules governing commercial contracts in relation to the control of contract terms governing late payments and to set the standard of the duties of commercial agents to their principals.<sup>185</sup> All the UK law implementing these directives became part of "retained EU law" on IP completion day, subject to relatively minor amendments.<sup>186</sup>

## Express terms requiring good faith

- 130 Secondly, the courts have been increasingly willing to give effect to express contract terms requiring the parties to negotiate (or renegotiate) a contract in good faith or to act in good faith towards each other.<sup>187</sup>

## Implied terms requiring good faith

- 131 Thirdly, and most strikingly, the courts have proved increasingly willing to imply terms requiring good faith, fairness or rationality. There are here three distinct but related strands of common law authority. First, there are a number of established examples where terms requiring good faith or its equivalent expressed in other words, are implied in law in particular types of contract. This can be seen in particular in relation to contracts of employment.<sup>188</sup> Secondly, the courts have recognised that the unilateral exercise of a contractual power by one party to a contract may sometimes be qualified by an implied term that it be exercised honestly, rationally and in good faith.<sup>189</sup> And, thirdly, since the decision of Leggatt J (as he then was) in *Yam Seng Pte Ltd v International Trade Corp Ltd*,<sup>190</sup> English courts have increasingly considered whether the commercial contract before them should be held to contain an implied term requiring good faith.<sup>191</sup>

## Two key questions

- 132 Finally, it is helpful to note that two key questions arise in relation to each of these usages of good faith. First, in what circumstances is good faith used as a legal concept? Where it is used by legislation this is straightforward, but it is much less so, in particular, in relation to the incidence of implied terms.<sup>192</sup> Secondly, where it is used, what is its significance? In this respect, its significance may refer either to its meaning: does good faith merely require honesty, or does it also require adherence to a higher standard of behaviour such as good commercial behaviour or consideration for the other party's legitimate interests? Or its significance may equally refer to the role which it plays within the law: does a failure in good faith provide a ground of rescission of the contract? does it impose a duty whose breach gives rise to damages and/or termination of the contract? or does it form part of a wider evaluative standard as, for example, in the test of fairness of the terms of consumer contracts? Wherever good faith is used, therefore, we need to consider both its meaning and its role in the law.

## Footnotes

- 163 Notably, *Carter v Boehm* (1766) 3 *Burr. 1905, 1910* and see below, para.2-036.
- 164 See below, para.2-049.
- 165 [1992] 2 A.C. 128, 138. The agreement was held unenforceable on the grounds of uncertainty, and see below, paras 4-168—4-170.
- 166 [1992] 2 A.C. 128, 138 and see below, paras 4-168—4-169.
- 167 Below, paras 2-037—2-038.
- 168 See generally: *Bridge* (1984) 9 *Can. Bus. L.J.* 385; Collins, The Law of Contract, 4th edn (2003), Chs 13 and 15; Finn in Finn (ed.), Essays on Contract Law (1987), p.104; Lücke in Finn (ed.), Essays on Contract Law, p.155; Steyn (1991) *Denning L.J.* 131; Carter and Furmston (1994) 8 *J.C.L.* 1; Brownsword (1994) 7 *J.C.L.* 197; Staughton (1994) 7 *J.C.L.* 193; Beatson and Friedmann (eds), Good Faith and Fault in Contract Law (1995), especially the essays by Beatson and Friedmann, p.3; Cohen, p.25; McKendrick, p.305; Friedmann, p.399; Brownsword in Deakin and Michie (eds), Contracts, Co-operation and Competition (1997), p.255; Stein (1997) 113 *L.Q.R.* 433; Teubner (1998) 6 *M.L.R.* 11; Brownsword [1997] *C.L.P.* 111; Zimmermann and Whittaker (eds), Good Faith in European Contract Law (2000); Smith, Atiyah's Introduction to the Law of Contract, 6th edn (2006), pp.164–166; Collins (2014) 67 *C.L.P.* 297; Campbell (2014) 77 *M.L.R.* 475; Tan (2015) *J.B.L.* 420; Foxton (2017) *L.M.C.L.Q.* 360; Campbell (2017) *Edinburgh L.R.* 376; Cheung (2017) 34 *International Construction L.R.* 242; Saintier (2017) *J.B.L.* 441; Bridge (2017) *Uniform L.R.* 98; McKendrick, Contract Law, Text, Cases and Materials, 8th edn (2018), Ch.15; Bridge (2019) 135 *L.Q.R.* 227; Leggatt (2019) *J.B.L.* 104; Davies [2019] *Journal of Commonwealth Law* 1; Davies in Davies and Raczynska, Contents of Commercial Contracts, Terms Affecting Freedoms (2020) Ch.6; Collins (2021) 137 *L.Q.R.* 426; Rowan (2021) 84 *M.L.R.* 1066; Burrows, A Restatement of the English Law of Contract (2016) commentary to s.5, p.50; commentary to ss.15(3)–(4), p.93.
- 169 Steyn (1997) 113 *L.Q.R.* 433.
- 170 (1997) 113 *L.Q.R.* 433, 434.
- 171 (1997) 113 *L.Q.R.* 433, 438.
- 172 (1997) 113 *L.Q.R.* 433, 439.
- 173 Collins (2014) 67 *C.L.P.* 297 esp. at 330–331. A similar view was much earlier taken by Addison, A Treatise of the Law of Contracts and Rights and Liabilities arising Ex Contractu, 1st edn (1847) at pp.206–207 who referred to the law's recognition of implied covenants in

certain contracts “in order to give a proper force and effect to the contract to promote good faith and make men act up to the spirit as well as to the letter of their engagements”.

- 174 In *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd [2019] EWCA Civ 1361*, [2020] Ch. 365 at [142] and see also at [54]–[55] and [146]–[147] and see below, paras 5-086—5-094.

- 175 In *FSHC Group Holdings Ltd [2019] EWCA Civ 1361* at [51]–[55] Leggatt LJ traced the history of the equitable jurisdiction to rectify written documents on the ground of mistake, referring in particular to *Calverley v Williams (1790) 1 Ves. Jun. 210* at 211 where Lord Thurlow LC explained that, as Leggatt LJ expressed it, “it would be contrary to good faith for a party to take advantage of a mistake made in drawing up a written contract by seeking to apply the contract inconsistently with what that party knew to be the common intention of the parties when the document was executed”. Later in his judgment (at [146]–[147]), Leggatt LJ referred to an underlying moral principle of good faith as the rationale justifying the subjective approach to intention in the context of common mistake rectification.

- 176 e.g. art.1:201(1) of the Principles of European Contract Law provides that “[e]ach party must act in accordance with good faith and fair dealing”. cf. the provision in the proposed Common European Sales Law (above, para.1-015), art.1(1) which provides that “Each party has a duty to act in accordance with good faith and fair dealing”: see further below, para.2-035.

177 arts 1102–1103 C.civ.

178 art.1104 (trans. Cartwright, Fauvarque-Cosson and Whittaker).

179 Rapport au Président de la République relatif à l’ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligation, at p.4 (trans. editor) and see further Whittaker in Cartwright and Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (2017) Ch.3, 29, 44–46.

180 Where A’s fraud induces B to contract, B has remedies against A of rescission and damages in the tort of deceit: below, paras 9-055 et seq. And more generally, the tort of deceit can give rise to liability in damages, e.g. where A’s fraud induces B to contract with C: below, para.9-094.

181 Above, para.2-024.

- 182 Below, para.2-035.

183 See Vol.II, paras 40-278 et seq.

184 See Vol.II, paras 40-172 and 40-177. Good faith can also be found in relation to the information requirements imposed on suppliers of financial services to consumers: above, para.2-035 and see Vol.II, para.40-143.

185 Below, para.2-049.

186 See below, paras 2-046—2-048.

187 Below, paras 2-052—2-061.

188 Below, para.2-063.

189 Below, paras 2-066—2-079.

190 *[2013] EWHC 111 (QB), [2013] Lloyd's Rep. 526.*

191 Below, paras 2-080—2-091.

192 Below, paras 2-071—2-079 and 2-083—2-087.

---

End of Document

© 2022 SWEET & MAXWELL

## **(b) - Good Faith in Other Laws**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(b) - Good Faith in Other Laws**

### **Good faith in other common law systems**

133 As Lord Browne-Wilkinson observed:

“... throughout the common law world it is a matter of controversy to what extent obligations of good faith are to be found in contractual relationships”,<sup>193</sup>

and other common law systems have taken varying positions as to the relevance of good faith in the creation or the performance of contracts.<sup>194</sup> Perhaps the most extensive use is taken by lawyers in the United States, the Restatement (Second) of Contracts requiring that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement”.<sup>195</sup> In Australia too, courts and writers are generally quite open to the use of good faith, holding that an agreement to negotiate in good faith may be contractually enforceable,<sup>196</sup> and willing to find implied terms requiring co-operation in performance, if not always good faith, between the parties.<sup>197</sup> Moreover, although earlier Canadian cases showed considerable hesitation in accepting a general duty of good faith in either negotiation or performance of contract,<sup>198</sup> in 2014 the Canadian Supreme Court ruled that there is:

“... a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance”

and that:

“... as a further manifestation of this organizing principle of good faith, ... there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.”<sup>199</sup> However, the Canadian Supreme Court acknowledged that

“... the principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest.”<sup>200</sup>

## Good faith in civil law systems

<sup>194</sup> As Bingham LJ’s observations quoted below illustrate,<sup>201</sup> in modern discussions of the English position contrasts are often drawn with the use of the concept of good faith in civil law systems, i.e. those whose private law has derived substantially from doctrines and rules of Roman law.<sup>202</sup> The practical interest of this use became significant for English contract law by the increasing reference to good faith or “good faith and fair dealing” in European legislation in the area of contract law and the possibility of the Court of Justice of the EU drawing on its existing significance in the laws of the Member States in interpreting its significance there.<sup>203</sup> In this respect, though, it is helpful to note that, even restricting the discussion to the legal systems of western Europe, there are very considerable divergences both in the significances given to “good faith” and its supposed linguistic equivalents and in the uses to which they are put within each legal system. So, in some (but not in all) systems, good faith has provided the basis of some pre-contractual grounds of relief or compensation (notably, as regards duties of disclosure and information and breaking-off from negotiations); the addition of “supplementary” obligations to those expressly provided either by the parties or by legislation; the control of unfair contract terms; the toughening of the sanction of deliberate breaches of contract; the control of the exercise of a party’s contractual right; and relief on account of supervening circumstances or the substantively unfair nature of the contract as a whole.<sup>204</sup> In the result:

“... the notion of good faith (or its equivalents in the various languages ...) actually means different things both *within* a particular legal system and *between* the legal systems.”<sup>205</sup>

And while in those legal systems which possess a general requirement of good faith:

“... good faith is not devoid of meaning, a pious hope or incantation or simply a super-technique waiting to be put to whatever legal end a legal system wishes (though it may act as a super-technique if required) ... even where a particular meaning of good faith is accepted in two systems, this does not entail that they will take the same view of what it in fact requires in any given situation.”<sup>206</sup>

Moreover, the extent of the use to which a legal system puts a potentially corrective principle such as good faith depends on the extent to which it is dissatisfied with its more particular, established laws of contract, on the availability of other legal techniques which have a similar corrective possibility and on the perceived appropriateness of judicial as opposed to legislative intervention in the area in question.

## “Good faith” and “good faith and fair dealing” in EU law

- 135 EU legislation has had increased recourse to the concept of good faith in setting standards for various legal purposes. In this respect, a particularly prominent example is found in the reference to the “requirement of good faith” in the test of unfair terms in consumer contracts under the Directive of 1993.<sup>207</sup> The concept of “good faith and fair dealing” has also been used in the directive on late payment in commercial transactions as part of its control on unfair terms.<sup>208</sup> Moreover, good faith has been used for legal purposes other than the control of unfair terms. So, the Financial Services Distance Marketing Directive of 2002 refers to the “principles of good faith in commercial transactions” in setting the information which a supplier must provide to a consumer prior to the conclusion of the contract<sup>209</sup> and the Unfair Commercial Practices Directive of 2005 sets its general test of an “unfair commercial practice” in part by reference to the “requirements of professional diligence”, which is then itself defined as:

“... the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.”<sup>210</sup>

Finally, “good faith” is used by Commercial Agents Directive 1986 to set the standard of the agents’ duties to their principals, providing that the “agent must ... act dutifully and in good faith”.<sup>211</sup> Apart from these particular examples of the use of “good faith” by EU legislation, the European Court of Justice has referred to good faith as a “principle of civil law”, although in a way where it is not explicitly clear whether this principle is a principle of EU law or merely of the national law before the court.<sup>212</sup> Support for the existence of such a general principle may be found in the earlier proposal for a Common European Sales Law, art.2 of which provided that:

- “1.Each party has a duty to act in accordance with good faith and fair dealing.
- 2.Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
- 3.The parties may not exclude the application of this Article or derogate from or vary its effects.”<sup>213</sup>

The Proposed Regulation defined “good faith and fair dealing” as:

“... a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.”<sup>214</sup>

The proposed optional Common European Sales Law would have been available only to contracts for the sale of goods, the supply of digital content and related services,<sup>215</sup> but many of its provisions were equally appropriate to contract law in general. Apart from the general principle of good faith and fair dealing, the proposed Common European Sales Law made specific use of good faith and fair dealing in its provisions governing duties of information in commercial contracts,<sup>216</sup> mistake,<sup>217</sup> fraud,<sup>218</sup> contractual interpretation,<sup>219</sup> the implication of terms<sup>220</sup> and unfair contract terms.<sup>221</sup> However, the CESL Proposal was withdrawn by the Commission in 2014,<sup>222</sup> and the legislative proposals put forward by the EU Commission instead are of much narrower scope than the CESL and do not refer to the concept of good faith.<sup>223</sup>

## Footnotes

193 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2002] 2 All E.R. (Comm) 849 (PC)* at [54].

194 See also works noted above, para.2-024.

195 Restatement (Second) of Contracts para.205. cf. Uniform Commercial Code s.1-203 and see for a general introduction Summers in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law* (2000), Ch.4.

196 *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 N.S.W.L.R. 1* at 21–27.

197 Carter, *Contract Law of Australia*, 7th edn (2018), Ch.2.

198 Waddams, *The Law of Contracts*, 7th edn (2017), paras 17, 210, 498–508, 550.

199 *Bhasin v Hrynew 2014 SCC 71, [2014] 3 S.C.R. 495* at [33] per Cromwell J giving the judgment of the S.C. of Canada, which reviews earlier Canadian cases and wider common law literature. An “organizing principle” was defined by the court as one which “states in general terms a requirement of justice from which more specific legal doctrines may be derived” and is “not a free-standing rule, but rather a standard that underpins and is

manifested in more specific legal doctrines and may be given different weight in different situations”: *Bhasin v Hrynew* at [64]. However, the list of these specific legal doctrines “is not closed”: *Bhasin v Hrynew* at [66]. The Supreme Court of Canada saw the duty of honest performance as a “general doctrine of contract law” rather than as an implied term, thereby operating “irrespective of the intentions of the parties”: *Bhasin v Hrynew* at [74]. As a result, the duty was mandatory and was not affected by an express entire agreement clause in the contract, though there may be circumstances in which it could be influenced by the agreement of the contracting parties: *Bhasin v Hrynew* at [75]–[78]. See further Percy in Degeling, Edelman and Goudkamp (eds), Contract in Commercial Law (2016), Ch.11.

- 200 2014 SCC 71 at [70].
- 201 Below, para.[2-036](#).
- 202 On the significance of good faith in the ancient Roman law of contracts see Schermaier in Zimmermann and Whittaker (eds), Good Faith in European Contract Law (2000), Ch.2.
- 203 Below, para.[2-035](#).
- 204 For an overview see Whittaker and Zimmermann in Zimmermann and Whittaker (eds), Good Faith in European Contract Law (2000), Ch.1. On the significance of the broad legislative recognition of a principle of good faith in relation to contracts in the reformed French Civil Code see Whittaker in Cartwright and Whittaker (eds), The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms (2017), Ch.3.
- 205 Whittaker and Zimmermann in Zimmermann and Whittaker (eds), Good Faith in European Contract Law (2000) at p.690 and cf. *Director General of Fair Trading v First National Bank [2001] UKHL 52, [2002] 1 A.C. 507* at [17], per Lord Bingham of Cornhill (Member States “have no common concept of … good faith”).
- 206 Whittaker and Zimmermann at p.699.
- 207 art.3(1) which was implemented by the *Consumer Rights Act 2015* s.62(4) (on which see Vol.II, para.[40-274](#)).
- 208 Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. 48/1 art.7(1)(a) (“any gross deviation from good commercial practice, contrary to good faith and fair dealing” relevant to whether a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is grossly unfair to the creditor). Directive 2011/7/EU was implemented in UK law by the *Late Payment of Commercial Debts (Interest) Act 1998* (as amended), on which see below, paras 29-291—29-293.
- 209 Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16, art.3(2) implemented by the *Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.7(2)*. Article 3(2) provides that the information to be supplied (as earlier specified by art.3(1)): “the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors”. On these Regulations see Vol.II, para.[40-143](#).

- 210 Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] O.J. L149/16 art.5(2) and art.2(h) implemented by the [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#) regs 3(3) and 2(1) “professional diligence”.
- 211 Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17: art.3(1) which was implemented in UK law by the [Commercial Agents \(Council Directive\) Regulations 1993 \(SI 1993/3053\)](#) reg.3(1), and see paras 21-020 and 21-129.
- 212 *Messner v Krüger (C-489/07) EU:C:2009:502, [2009] E.C.R. I-7315* para.26. cf. *Gruber v Bay Wa AG (C-464/01) EU:C:2005:32, [1997] E.C.R. I-3767* at [53] where the European Court used good faith in the application of the special jurisdiction provisions in art.13 of the Brussels Convention.
- 213 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final Annex I, CESL Proposal Annex I, art.2 CESL. On the CESL Proposal generally, see above, para.1-015.
- 214 CESL Proposal art.2(b).
- 215 CESL Proposal art.1 above, para.1-015.
- 216 CESL Proposal Annex I, art.23(2) CESL.
- 217 CESL Proposal Annex I, art.48 CESL.
- 218 CESL Proposal Annex I, art.49 CESL.
- 219 CESL Proposal Annex I, art.59 CESL.
- 220 CESL Proposal Annex I, art.68 CESL.
- 221 CESL Proposal Annex I, arts 83, 86 and 170 CESL.
- 222 European Commission, Annex 2 to the Commission Work Programme 2015 COM(2014) 910 final, p.12. See also the Communication from the Commission, A Digital Single Market Strategy for Europe COM(2015) 192 final, pp.4–5 and see above, para.1-015.
- 223 Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods etc of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/28 and Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/1.

## **(c) - No General Legal Principle of Good Faith**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(c) - No General Legal Principle of Good Faith**

### **Historical background**

- 136 English law long accepted the use of broad notions of good faith and commercial expectation under the lex mercatoria or law merchant which was current throughout western Europe,<sup>224</sup> but by the middle of the seventeenth century, the law merchant was considered part of English law and by the end of the century the common law courts no longer felt the need to take evidence of mercantile custom.<sup>225</sup> Even so, in 1766, in the context of recognising the duty of disclosure in contracts of insurance,<sup>226</sup> Lord Mansfield CJ (who was well-versed in the civil law<sup>227</sup>) stated that:

“The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon.”<sup>228</sup>

It will be seen that, while expressed as applicable to “all contracts and dealings”, the significance of good faith was limited by Lord Mansfield to generating a duty of disclosure in a party of what he knows where the other party believes the contrary. Even as so narrowed, such a broad proposition is inconsistent with later authority (such as *Smith v Hughes*<sup>229</sup>) and has been seen instead as expressing the special position governing contracts of insurance.<sup>230</sup> Certainly, no trace of good faith as a legal principle applicable to all contracts can be seen in the rationalising textbooks of the nineteenth century by Anson<sup>231</sup> and Pollock.<sup>232</sup>

## No general legal principle, but “piecemeal solutions”

- 137 The modern view is therefore that there is no legal principle of good faith of general application in English contract law. As Bingham LJ famously observed:

“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table.’ It is in essence a principle of fair open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.”<sup>233</sup>

The fact that at least some English judges have not been attracted by the idea of a general ground for relief for unfairness is also clear from judicial treatment of the attempt of Lord Denning MR to construct a general principle of “inequality of bargaining power” in *Lloyds Bank Ltd v Bundy*<sup>234</sup> and the House of Lords’ refusal in *Walford v Miles*<sup>235</sup> to imply a term in a “lock-out” agreement that a party to it be obliged to continue to negotiate in good faith.

- 138 Similarly, Potter LJ, in denying relevance to an injured party’s motive in termination of a contract, observed that:

“There is no general doctrine of good faith in the English law of contract. The [injured parties] are free to act as they wish, provided that they do not act in breach of a term of the contract.”<sup>236</sup>

Moreover, according to Rix LJ in *ING Bank NV v Ros Roca SA*:

“Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence

is golden, for where there is no obligation to speak, silence gives no hostages to fortune.”<sup>237</sup>

And, more recently, in 2016 Moore-Bick LJ observed that:

“... the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some ‘general organising principle’ drawn from cases of disparate kinds ... There is ... a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.”<sup>238</sup>

<sup>239</sup> A very stark example of the preference of English judges for the strict application of the terms of a contract rather than tempering their effect on the grounds of fairness may be found in *Union Eagle Ltd v Golden Achievement Ltd*.<sup>239</sup> There, the Privy Council refused specific performance of a contract for the sale of land to its purchaser who had paid the price 10 minutes late, time for performance of this obligation having been made expressly of the essence. The Privy Council rejected the argument that the courts enjoyed a discretion to relieve a party from the contractual consequences of late performance (stemming from its jurisdiction to relieve from forfeitures in equity<sup>240</sup>). According to Lord Hoffmann:

“The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority ... but also upon considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be ‘unconscionable’ is sufficient to create uncertainty.”<sup>241</sup>

It is to be noted, though, that Lord Hoffmann recognised that “the same need for certainty is not present in all transactions”.

<sup>242</sup>

## Unconscionability

- 140 Moreover, the House of Lords has had occasion to hold that a party is not prevented from relying on the formal invalidity of a contract on the ground merely that it would be “unconscionable” to do so, in the absence of an unambiguous representation of the contract’s validity (not being the promise to be enforced itself) on which to base an estoppel.<sup>243</sup> In the words of Lord Clyde:

“Without entering into questions of categorisation of different classes of estoppel, it seems to me that some recognisable structural framework must be established before recourse is had to the underlying idea of unconscionable conduct in the particular circumstances.”<sup>244</sup>

Similarly, in *Cobbe v Yeoman’s Row Management Ltd*<sup>245</sup> (which concerned claims, inter alia, for proprietary estoppel and/or constructive trust arising from an oral agreement to develop another person’s land intended to be binding “in honour alone”), Lord Scott of Foscote observed that:

“... unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present ... To treat a ‘proprietary estoppel equity’ as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.”<sup>246</sup>

In the view of Lord Walker of Gestingthorpe, no cases cited before the House:

“... cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.”<sup>247</sup>

## The Times Travel case: no “overriding doctrine of good faith in contracting”

- 140A In *Pakistan International Airline Corp v Times Travel (UK) Ltd* a majority of the Supreme Court reaffirmed the absence of a general principle of good faith in contracting in English law, which it saw as related to the absence of a doctrine of inequality of bargaining power and of a general

doctrine of unconscionability.<sup>248</sup> As will be explained in Ch.10 below, the context of these observations was the proper conditions under which a contract can be avoided on the ground of lawful act duress.<sup>249</sup> For this purpose, Lord Burrows JSC (in the minority in terms of reasoning) considered that in the context of a demand for what is claimed to be owing (or analogously a demand for the waiver of a claim, as was the case on the facts before the Court):

“it is a necessary requirement for establishing lawful act economic duress that the demand is made in bad faith in the particular sense that the threatening party does not genuinely believe that it is owed what it is claiming to be owed or does not genuinely believe that it has a defence to the claim being waived by the threatened party.”<sup>250</sup>

This test is therefore “concerned with either a dishonest assertion of an existing right or the dishonest removal (by waiver) of an existing right”.<sup>251</sup> As a result, in his Lordship’s view, the case was not an appropriate one

“in which to rely on a general principle of good faith dealing in so far as that would require a court to try to apply a standard of what is commercially unacceptable or unreasonable behaviour. That would be a radical move forward for the English law of contract and the uncertainty caused by it seems unlikely to be a price worth paying.”<sup>252</sup>

Since there had been no finding of bad faith in Lord Burrows’ special sense on the part of the party whose threats had led to the waiver of the claim, the doctrine of lawful act duress did not apply.<sup>253</sup>

**D** 40B While Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones JSC and Lord Kitchin JSC concurred) agreed with this result (holding that lawful act duress did not apply to the case before the Court<sup>254</sup>), he disagreed with Lord Burrows’ reliance on a requirement of “bad faith demand”.<sup>255</sup> In Lord Hodge’s view:

“the courts should approach any extension [of the boundaries of lawful act duress] with caution, particularly in the context of contractual negotiations between commercial entities. In any development of the doctrine of lawful act duress it will also be important to bear in mind not only that analogous remedies already exist in equity, such as the doctrines of undue influence and unconscionable bargains, but also the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power.”<sup>256</sup>

In this respect,

“The courts have taken the position that it is for Parliament and not the judiciary to regulate inequality of bargaining power where a person is trading in a manner which is not otherwise contrary to law.”<sup>257</sup>

Lord Hodge went on to say that while English contract law seeks to protect the reasonable expectations of honest people,<sup>258</sup> as can be seen in the interpretation of contracts, as Bingham LJ famously observed in the *Interfoto Picture Library* case,<sup>259</sup> in contrast to many civil law systems, it has not recognised a general principle of good faith in contracting but has instead adopted piecemeal solutions to demonstrated problems of unfairness.<sup>260</sup> The absence of the doctrines of good faith and inequality of bargaining power formed one of the grounds on which Lord Hodge rejected Lord Burrows’ approach based on a requirement of a “bad faith demand”,<sup>261</sup> as it meant that this approach was not “anchored in established legal principle”.<sup>262</sup> Instead, in Lord Hodge’s view, the illegitimacy of the pressure in duress is closely aligned with the equitable concept of unconscionability<sup>263</sup> and requires reprehensible conduct that amounts to illegitimate means in which bad faith is potentially relevant both to the content of the demand and to the context in which the demand is made.<sup>264</sup> Moreover, he observed that:

“Unconscionability is not an overarching criterion to be applied across the board without regard to context. Were it so, judges would become arbiters of what is morally and socially acceptable. Equity takes account of the factual and legal context of a case and has identified specific contexts which call for judicial intervention to protect the weaker party.”<sup>265</sup>

These specific contexts include the equitable doctrines of undue influence or unconscionable bargains.

<sup>266</sup>



- 140C Thus the majority of the Supreme Court not only confirmed the absence of a principle of good faith in English contract law but also saw its absence as a reason for rejecting an approach to a particular doctrine of the law (there, lawful act duress) which relies directly on the concept of bad faith, even though understood in a specially defined way and even though this would require dishonesty by the party in question. In doing so, the Supreme Court related this absence of a principle of good faith to the law’s rejection of a doctrine of inequality of bargaining power, a general doctrine of unconscionability and, indeed, a general doctrine of the abuse of rights.<sup>267</sup>

## Contractual rights and public law controls

- ¶41 The courts do not generally allow a party to a contract to rely on public law defences (such as one based on its legitimate expectation) against its contractual partner where the latter's claim is fundamentally for the enforcement of a commercial bargain, even if that partner was a public authority acting under statutory powers, though it has been accepted that they may do so where "a true public law defence vitiates a contractual claim".<sup>268</sup> For this purpose, in the view of Lewison LJ, it cannot "usually be an abuse of power [in a public body] to exercise contractual rights freely conferred, even if the result may appear to be a harsh one".<sup>269</sup>

## Reasons for the denial of a general legal principle of good faith or fairness

- ¶42 It is submitted that there are several reasons behind the denial of a general legal principle of good faith or fairness. First, such a general principle would tend to qualify the two established principles earlier set out, that is to say, freedom of contract and the binding force of contract, by preventing a party from relying on their strict rights under the contract or, conversely, imposing further duties on a party not contained in its express terms. Indeed, good faith could act as a *counter-principle* to freedom of contract and the binding force of contract,<sup>270</sup> whereas English law sees these principles as requiring particular (if sometimes considerable) exceptions rather than general qualification. Secondly, as Bingham LJ observed,<sup>271</sup> instead of recourse to such a general corrective principle, English law has instead preferred to use "piecemeal solutions" to address problems of fairness and it has done so by a host of particular doctrines, rules and regulatory frameworks. While at times this generates considerable complexity, it also allows a particular and tailored approach to be taken to the issues affected. Thirdly, the recognition of a general legal principle of good faith or fairness by the courts would give them a very considerable degree of power to decide the fairness of contractual relations, a power which they can be seen to have steadfastly refused to accept (as can be seen in the rejection of the general doctrine of inequality of bargaining power,<sup>272</sup> the disapproval of the doctrine of fundamental breach used as a way of avoiding exemption clauses<sup>273</sup> and the affirmation by the Supreme Court that terms should be implied in fact only where necessary to do so<sup>274</sup>). Instead, imbalances of bargaining power between contracting parties and the unfairness or injustice which may result from them should be addressed by Parliament, as can be seen in the commercial context in competition law<sup>275</sup> and also in consumer law<sup>276</sup> and employment law.<sup>277</sup> Fourthly, the recognition of such a general legal principle would generate very considerable uncertainty as to where it should not apply (by way of exception to the principle) and as to its meaning in the circumstances where it does apply. As

will be seen, to an extent, the last of these difficulties can already be seen in relation to implied terms requiring good faith.<sup>278</sup>

## Footnotes

- 224 Goode, The Concept of ‘Good Faith’ in English Law (1992) at p.2; O’Connor, Good Faith in English Law (1990) at 39. For the following see Whittaker and Zimmermann in Zimmermann and Whittaker (eds) *Good Faith in European Contract Law* (2000) Ch.1 at pp.41–43.
- 225 Holdsworth, History of English Law, Vol.V (1966) 112 et seq.
- 226 See Vol.II, paras 44-030 et seq.
- 227 Holdsworth, History of English Law, Vol.V (1966) at p.147.
- 228 *Carter v Boehm* (1766) 3 *Burr. 1905, 1910.*
- 229 (1871) *L.R. 6 Q.B.* 597; see further below, para.5-025.
- 230 See Vol.II, para.44-034.
- 231 Principles of the English Law of Contract and of Agency in Relation to Contract, 1st edn (1879).
- 232 Principles of Contract at Law and in Equity, 1st edn (1876). cf. however, Addison’s reference to good faith as the justification for the implication of covenants in certain contracts: *A Treatise of the Law of Contracts and Rights and Liabilities arising Ex Contractu*, 1st edn (1847) at pp.206–207, above, para.2-025 (note).
- 233 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] *Q.B.* 433, 439. Bingham LJ gave as illustrations of these solutions equity’s striking down of unconscionable bargains (see below, paras 10-161 et seq.), statutory control of exemption clauses (see below, paras 17-069 et seq.) and hire-purchase (see Vol.II, paras 41-360 et seq.) and the ineffectiveness of penalty clauses (see below, paras 29-203 et seq.). See similarly, *Director General of Fair Trading v First National Bank* [2001] *UKHL* 52, [2002] *1 A.C.* 507 at [17] (Lord Bingham of Cornhill), on which see Vol.II, para.40-284.
- 234 [1975] *Q.B.* 326, 339; and see below, para.10-181.
- 235 *Walford v Miles* [1992] *2 A.C.* 128, 138. cf. *Little v Courage Ltd*, *The Times*, 19 January 1994; *Cobbe v Yeomans Row Management Ltd* [2006] *EWCA Civ* 1139, [2006] *1 W.L.R.* 2964 at [4]. The CA’s decision on the facts applying the doctrine of proprietary estoppel was overturned by the House of Lords: see [2008] *UKHL* 55, [2008] *1 W.L.R.* 1752 and below, paras 6-173—6-174.
- 236 *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* Unreported 8 April 1998, CA (Civ Div). See similarly *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] *EWHC* 977, [2004] *2 Lloyd’s Rep.* 352 at [113]; *Horkulak v Cantor Fitzgerald International* [2004] *EWCA Civ* 1287, [2005] *I.C.R.* 402 at [30]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] *EWCA Civ* 200, [2013] *B.L.R.* 265 at [105]; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] *EWCA Civ* 789, [2017] *1 All E.R. (Comm)* 483 at [45]. cf. *Yam Seng Pte Ltd v International Trade*

*Corp Ltd* [2013] EWHC 111 (QB), [2013] *Lloyd's Rep.* 526 at [121]–[154] where Leggatt J discussed, obiter, the arguments in favour of and against the recognition of an apparently general implied duty of good faith in the performance of commercial contracts. On the latter and the subsequent case law see below, paras 2-081 et seq.

237 [2011] EWCA Civ 353, [2011] All E.R. (D) 39 (Apr) at [92]. Having stated this as a general rule, Rix LJ held that, in the circumstances, the relationship between the parties and the unconscionable conduct of the silent party justified the latter being estopped from relying on the contract as concluded: at [93]–[107], [111]. Carnwath LJ agreed on the basis of estoppel by convention ([66]–[71]). Stanley Burton LJ agreed with both judgments: [2011] EWCA Civ 353 at [76].

238 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 *Lloyd's Rep.* 494 at [45]. The learned judge at trial was Leggatt J, who had earlier given judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 *Lloyd's Rep.* 526, discussed below, paras 2-081—2-082.

239 [1997] A.C. 514.

240 See below, paras 29-268—29-269.

241 [1997] A.C. 514 at 518.

242 [1997] A.C. 514 at 519. cf. *O'Neill v Phillips* [1999] 1 W.L.R. 1092, 1098 where Lord Hoffmann observed in the context of contracts of partnership and a company's duty not to engage in conduct “unfairly prejudicial” to its members that: “One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith.” See also the significance of “unconscionability” in the context of the law of duress in *Borrelli v Ting* [2010] UKPC 21, [2010] Bus. L.R. 1718 (below, paras 10-014—10-015) and *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40, [2021] 3 W.L.R. 727 (below, paras 2-040A—2-040C, 10-057—10-058, and 10-063).

243 *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 All E.R. 615 especially at [16]–[20], [51] and see below, paras 7-047—7-048.

244 [2003] 2 All E.R. 615 at [34].

245 [2008] UKHL 55, [2008] 1 W.L.R. 1752, on which see below, paras 6-173—6-174.

246 [2008] UKHL 55 at [16].

247 [2008] UKHL 55 at [81].

248 [2021] UKSC 40, [2021] 3 W.L.R. 727.

249 See below, paras 10-056—10-063G.

250 [2021] UKSC 40 at [102] and see further below, para.10-063B.

251 [2021] UKSC 40 at [125].

252 [2021] UKSC 40 at [95] and see also at [133] (Lord Burrows “not advocating a general principle of good faith dealing”).

253 [2021] UKSC 40 at [138].

254 [2021] UKSC 40 at [60]–[61].

255 [2021] UKSC 40 at [2] and see further below, paras 10-063B—10-063D.

- 256 *[2021] UKSC 40* at [3].
- 257 *[2021] UKSC 40* at [26]. Later (at [33]), Lord Hodge referred to statutory competition law as an example of this, to which could be added the regulation of consumer contracts on which see Vol.II, Ch.40.
- 258 Referring to Steyn (1997) 113 L.Q.R. 433 and see above, para.2-025.
- 259 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, 439 quoted above, para.2-037.
- 260 *[2021] UKSC 40* at [27].
- 261 *[2021] UKSC 40* at [3].
- 262 *[2021] UKSC 40* at [44]. cf. also *[2021] UKSC 40* at [49].
- 263 *[2021] UKSC 40* at [20].
- 264 *[2021] UKSC 40* at [56]–[59] and see below, para.10-063C.
- 265 *[2021] UKSC 40* at [23].
- 266 *[2021] UKSC 40* at [23] and [24] and see below, paras 10-072 et seq. and 10-161 et seq. respectively. For interpretations by the CA of the SC's views on good faith in the context of the construction of express terms referring to bad faith and good faith see *Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd* [2022] EWCA Civ 153 at [90] and *Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd* [2022] EWCA Civ 440 at [123] noted below, para.2-060A.
- 267 Lord Hodge agreed with the view of Professor Jack Beatson (later Beatson LJ) in explaining the basic approach of the common law in relation to commercial negotiation that “[a]ll that is not prohibited is permitted and there is no general doctrine of abuse of rights. If therefore a person is permitted to do something, he will generally be allowed to do it for any reason or for none”: *[2021] UKSC 40* at [28] quoting Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford, 1991) Ch.5 at pp.129–130 in the context of the doctrine of economic duress.
- 268 *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [29] per Lewison LJ (with whom Treacy and Gloster LJJ agreed) (local authority able to enforce covenant in lease as to re-conveyance of freehold transferred under option on the failure of a condition as to obtain timely planning permission). cf. below, para.3-093 on cases where a public authority has been held to have been acting “publicly” in relation to its contracts so as to attract the possibility of judicial review.
- 269 *[2015] EWCA Civ 1123* at [49]. Lewison LJ also noted (at [50]) that in the case before the court, private law mechanisms which preclude a person from relying on his strict legal rights such as promissory estoppel had not been pleaded.
- 270 On the idea of good faith in French contract law acting as a counter-principle to the principles of contractual freedom and the binding force of contract see Whittaker in Cartwright and Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (2017), Ch.3 at pp.44–46.
- 271 Above, para.2-037.
- 272 Above, para.2-037.
- 273 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 and see below, paras 17-023 —17-027.

- 274 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2015] 3 W.L.R. 1843* and see below, para.16-012.
- 275 See Vol.II, Ch.45 and esp. paras 45-100 et seq. and 45-201 et seq. on the abuse of a dominant position.
- 276 See Vol.II, Ch.40 and esp. paras 40-057 and 40-168 (noting the need to protect the consumer as “weaker party”).
- 277 See Vol.II, Ch.42.
- 278 Below, paras 2-066—2-091.

## **(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

### **Introduction**

- <sup>143</sup> The following paragraphs set out a series of ways by which English law takes into account considerations of good faith or fairness which qualify the position established either by the general law or by a particular contract, and they may govern the creation or the regulation of contractual relationships. Some of these refer explicitly to the notion of good faith, as is the case of consumer contracts, contracts arising from fiduciary relations, contracts of partnership and of employment, and contracts of insurance (which are said to be of the utmost good faith, though the significance of this is much altered by recent legislation<sup>279</sup>). Sometimes, the law gives effect to the notion of good faith by way of the application of an exceptional rule and sometimes by the implication of a term. Moreover, other qualifications on the strictness of the express terms of the contract or of the apparently relevant contract law itself do not refer explicitly to good faith, preferring rather to use the language of fairness, equitableness or reasonableness.

### **Footnotes**

279 Consumer Insurance (Disclosure and Representations) Act 2012; Insurance Act 2015 and see Vol.II, paras 44-030 et seq.



## **(i) - Equitable and Statutory Discretions**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(i) - Equitable and Statutory Discretions**

### **Relevance of fairness, justice or equity to exercise of discretion**

- 144 General considerations of fairness are relevant to the availability of certain equitable doctrines which are significant in the contractual context, notably promissory and proprietary estoppel,<sup>280</sup> as well as to the equitable remedies of specific performance and injunction which are sometimes available on breach.<sup>281</sup> To these, modern statutes have added discretions given to the courts to act according to the dictates of justice or equity (as the case may be) in relation to the exercise of other remedies by parties to contracts, notably, in relation to rescission for misrepresentation<sup>282</sup> and in relation to contracts which have been frustrated.<sup>283</sup>

### **Footnotes**

<sup>280</sup> See below, paras 6-144 et seq.

<sup>281</sup> See below, paras 30-046 et seq. See also the relevance of proportionality and discretions as to which remedies are available to the consumer under the *Consumer Rights Act 2015* Pt 1: below, para.2-047.

<sup>282</sup> *Misrepresentation Act 1967* s.2(2) (damages in lieu of rescission) on which see below, paras 9-112—9-118.

283 Law Reform (Frustrated Contracts) Act 1943 s.1(2) and (3) and see below, paras 26-111 and 26-120.

---

End of Document

© 2022 SWEET & MAXWELL

## **(ii) - Reasonableness and Legitimate Interest in Relation to Remedies for Breach**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(ii) - Reasonableness and Legitimate Interest in Relation to Remedies for Breach**

**Rules allowing assessment of appropriateness of remedy**

- <sup>145</sup> A number of the rules governing remedies for breach of contract take into account what is reasonable, and this can leave considerable room for a court to assess the fairness or appropriateness of the remedy. This is the case notably as regards restrictions on the availability of damages based on the cost of re-instatement,<sup>284</sup> the injured party's duty to mitigate<sup>285</sup> and the law of remoteness of damage.<sup>286</sup> Furthermore, the ability of an injured party faced with a repudiatory breach by the other party to affirm, perform and recover the price is subject to the injured party having a legitimate interest in doing so.<sup>287</sup> Similarly, the Supreme Court has held that a contract term stipulating payment of a sum of money on breach of contract will be a penalty clause at common law (and so unenforceable) only if the term does not serve a legitimate interest and if in the circumstances its amount is extravagant, exorbitant or unconscionable.<sup>288</sup> And sometimes particular provision is made by statute which qualifies the availability of a remedy by reference to reasonableness, as, for example, in the case of the rejection of the goods by reason of breach of condition in non-consumer contracts of sale of goods.<sup>289</sup>

## Footnotes

- 284 *Ruxley Electronics and Construction Ltd v Forsyth [1996] A.C. 344* and see below, paras 29-043—29-045.
- 285 See below, paras 29-096 et seq.
- 286 Below, paras 29-124 et seq.
- 287 *White and Carter (Councils) Ltd v McGregor [1962] A.C. 413* and see below, para.27-063. While this law was seen by Leggatt J in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2015] EWHC 283 (Comm), [2015] 1 Lloyd's Rep. 359* at [97] as reflecting an “increasing recognition in the common law world of the need for good faith in contractual dealings” as it implies “some constraint on the decision-maker’s freedom to act purely in its own self-interest”, on appeal the CA (which did not see the *White & Carter* principle as applicable on the facts) did not encourage judges to recognise a “general organising principle” drawn from cases of disparate kinds in this way: *[2016] EWCA Civ 789* at [43] and [45] respectively.
- 288 *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis [2015] UKSC 67, [2015] 3 W.L.R. 1373* at [32] and [152] and see, below, paras 29-203 et seq.
- 289 Sale of Goods Act 1979 s.15A and see Vol.II, para.46-070.

## **(iii) - Consumer Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(iii) - Consumer Contracts**

### **The fairness of contract terms**

- 146 The most obvious relevance of good faith in relation to consumer contracts is that the “requirement of good faith” constitutes a distinct and important element in the general test of fairness of contract terms under the [Consumer Rights Act 2015](#). The Act provides that a term is unfair if:

“A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.”<sup>290</sup>

As will be explained in Vol.II, [Ch.40](#), the reference to the requirement of good faith provides courts with “a means of making an overall evaluation of the different interests involved”<sup>291</sup> rather than being limited to a mere examination of the significance of the imbalance of the rights between the trader and the consumer. On the other hand, as earlier noted, the regime of control of unfair terms in the [2015 Act](#) specifically excludes the review of terms which define the main subject matter of the contract and also excludes the assessment of the appropriateness of the price payable under the contract by comparison with what is supplied under it, as long as the term is prominent and transparent<sup>292</sup>: the courts can review the fairness of contract terms but not the fairness of contractual bargains.<sup>293</sup>

## “Piecemeal solutions”

- ¶47 However, apart from this use in relation to unfair contract terms, the law governing the relative rights and duties of the parties to consumer contracts generally does *not* refer to good faith. In particular, when the law sets duties of information in traders to consumers (which are both widely applicable and demanding in content), it does so by specifying the circumstances and the category of information in question rather than by setting a very general standard such as what good faith requires of traders on the basis of which such a duty is to be imposed.<sup>294</sup> Similarly, the [Consumer Rights Act 2015 Pt 1](#) sets out a series of statutory terms in relation to the goods, digital content and services contracts to which it applies and creates sets of rights in the consumer when these terms are broken,<sup>295</sup> rather than simply requiring the parties to act in good faith towards each other. On the other hand, the actually availability of the rights for the consumer under the [2015 Act](#) is sometimes subject to qualifications based on “proportionality”<sup>296</sup> and is also subject to a discretion in the court as to how to support their rights (in particular, whether or not specific performance should be available to support a consumer’s right to repair or replacement of defective goods) and whether one of the other rights for a consumer which the Act provides would be more appropriate instead.<sup>297</sup>

## The fairness of trader behaviour towards consumers

- ¶48 However, the law governing trader behaviour towards consumers *does* refer to a general principle of good faith as part of its broad, regulatory framework of control. The [Consumer Protection from Unfair Trading Regulations 2008](#) (which implemented the Unfair Commercial Practices Directive 2005, as noted earlier<sup>298</sup>) prohibits “unfair commercial practices” of traders which are directly connected with the promotion, sale or supply of a “product” to or from consumers, whether occurring “before, during or after a commercial transaction” (if any) in relation to that product.<sup>299</sup> In this respect, the [2008 Regulations](#) provide a general test of unfairness by stating that “[a] commercial practice is unfair if … it contravenes the requirements of professional diligence” and “it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product”.<sup>300</sup> For this purpose “professional diligence” is defined as:

“… the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either—

- (a) honest market practice in the trader’s field of activity, or
- (b) the general principle of good faith in the trader’s field of activity.”<sup>301</sup>

The generality of this standard and the breadth of its application to the behaviour of traders to consumers justifies referring to it as setting a general legal principle requiring fairness in traders in their behaviour to consumers, and this general principle could be seen as then reflected in the detailed provisions governing traders' duties and consumers' rights in wider consumer contract law.<sup>302</sup> However, the principle of fair behaviour set by the [2008 Regulations](#) does not itself have any direct consequence for the consumer party to any contract concluded with a trader as a result of the unfair commercial practice, as the commission of an unfair commercial practice by a trader under this general test does not give rise to a right to redress in the consumer, unlike the position as regards the commission of the two particular examples of misleading actions or aggressive commercial practices by the trader.<sup>303</sup> On the other hand, there is a *possibility* that a consumer will enjoy "redress" in respect of any unfair commercial practice as the result of an application for the enforcement of the [2008 Regulations](#) made by an "enforcer" under [Pt 8 of the Enterprise Act 2002](#). This possibility is, though, subject to a double discretion: in the enforcer in deciding whether or not to bring proceedings and, secondly, in the court, both as to whether or not to make an enforcement order and also as to include within it a "redress measure".<sup>304</sup>

## Footnotes

- [290](#) [2015 Act s.62\(4\)](#). cf. Unfair Terms in Consumer Contracts Directive 1993 art.3(1) and its former implementation in the [Unfair Terms in Consumer Contracts Regulations 1999 reg.5\(1\)](#).
- [291](#) Unfair Terms in Consumer Contracts Directive 1993 recital 16; see Vol.II, para.[40-278](#).
- [292](#) [Consumer Rights Act 2015 s.64](#) and see above, para.[2-017](#).
- [293](#) See Vol.II, paras [40-351](#) et seq. where the difficulties in drawing the line between the two are explained.
- [294](#) This can be seen in the duties of information imposed in relation to "distance contracts", "off-premises contracts" and "on-premises contracts" under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (on which see Vol.II, paras [40-062](#) et seq. and esp. at paras [40-094](#) et seq.), and also in relation to particular contracts such as timeshare contracts and package holiday contracts: see Vol.II, paras [40-159](#), [40-146](#) and [40-152](#) respectively.
- [295](#) See Vol.II, paras [40-060](#) et seq.
- [296](#) e.g. [Consumer Rights Act 2015 s.23\(3\)](#) (right to repair or replacement of goods); [s.43\(3\)](#) (right to repair or replacement of digital content) on which see Vol.II, paras [40-520](#) and [40-562](#) respectively.
- [297](#) [Consumer Rights Act 2015 s.58](#) on which see Vol.II, paras [40-524](#), [40-564](#) and [40-587](#).
- [298](#) Above, para.[2-035](#).
- [299](#) [2008 Regulations reg.2\(1\)](#) "commercial practice"; [reg.3\(1\)](#) and [\(3\)](#).
- [300](#) [2008 Regulations reg.3\(3\)](#).
- [301](#) [2008 Regulations reg.2\(1\)](#) "professional diligence".

- 302 *Whittaker* (2017) 133 L.Q.R. 47 at 70–71.
- 303 2008 Regulations Pt 4A and esp. regs 27A and 27B. On the consumer's rights to redress see Vol.II, paras 40-181 et seq.
- 304 *Whittaker* (2017) 133 L.Q.R. 47 at 70–71. On the powers in the 2002 Act see, in particular, s. 215(2), (3) and (4A) (discretion in “enforcers” to make application for enforcement order); s.217(3) (court’s discretion as to making of enforcement order); and ss.219A and 219B (defining “enhancing consumer measures” (including in the “redress category”) and empowering courts to include such a measure in their order). See generally on enforcement of consumer law under Pt 8 of the 2002 Act Vol.II, paras 40-136 et seq. and esp. at para.40-141.

## **(iv) - Contracts Whose Nature Requires Good Faith**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(iv) - Contracts Whose Nature Requires Good Faith**

### **Types of contracts requiring good faith**

- <sup>149</sup> Some particular types of contract attract rules (usually considered to be of law, though sometimes justified by reference to the implied intentions of the parties) which impose duties on one party to act in good faith and, in particular, to act other than just in their own interest. An important (and long-standing) example of a contract where the law requires good faith of its parties are contracts of partnership.

<sup>305</sup>

**U** There are several important consequences of this requirement, including that prospective partners owe each other a duty to disclose all material facts of which each has knowledge and of which the other negotiating parties may not be aware

<sup>306</sup>

**U**; a duty of co-operation (for example, in relation to the preparation of accounts

<sup>307</sup>

**U**); and that the partners must act in good faith and not “against the truth and honour of the contract” in the exercise of an express power in the partnership deed to expel a partner without providing any reason.

<sup>308</sup>

**U** Secondly, in contracts under which a person assumes fiduciary duties, as is notably the case as regards agents, the fiduciary must act honestly and must not allow his own interests to conflict with those of his principal.

309

**U** Indeed, the [Commercial Agents \(Council Directive\) Regulations 1993](#), echoing the EU Directive that they implemented, put the duties of agents to their principals expressly in terms of good faith.

310

**U** Another example may be found in relation to mortgages: the Privy Council has recognised that a mortgagee of property must exercise his powers in good faith and for the purpose of obtaining repayment of the debt, though given this purpose these powers may be exercised in such a way that disadvantageous consequences accrue to the borrower.

311

**U** And at common law the parties to contracts of insurance owe each other duties of “the utmost good faith”, the most important consequence of which is the imposition of extensive obligations of disclosure, though this law has been partly abrogated and widely amended by statute.

312

**U**

## Good faith required in particular circumstances

**D** Even where the contract is not of a type which necessarily attracts fiduciary duties, it may do so in particular circumstances. So, for example, in a contract of joint venture

313

**U** for the development of premises under which A provided finance and B managed the development and the disposal of its funds and the parties were to share the profits, B was held to owe a fiduciary duty of good faith to A in respect of the venture assets, with the result that B was prohibited from using or paying to itself any part of the proceeds except as regards the venture expenses or in accordance with the agreement.<sup>314</sup> On the other hand, while a contractual and a fiduciary relationship may co-exist between the same parties in this way, it has been said that:

“... the courts must be careful not to distort the parties’ contractual bargain by the inappropriate introduction of equitable principles. In a commercial context wider duties will not lightly be implied. Fiduciary duties do not commonly arise outside the settled categories of fiduciary relationships, not least because independently contracting parties do not undertake normally to subordinate their own commercial interests to another.”<sup>315</sup>

For this purpose, while a fiduciary must act in good faith, the existence of an express contract term requiring good faith in one or more parties does not necessarily mean that a fiduciary relationship exists.<sup>316</sup> Moreover, any fiduciary duties which do exist in a party or parties to a contract must “be moulded to fit the contractual framework”.<sup>317</sup>

## Footnotes

- 305 *O'Neill v Phillips [1999] 1 W.L.R. 1092, 1098*, per Lord Hoffmann and see *Blisset v Daniel (1853) 10 Hare 493*; *Floydd v Cheney, Cheney & Floydd [1970] Ch. 602, 608* and generally Lindley and Banks on Partnership, 20th edn (2017, updated to 2020) Ch.16. Perhaps surprisingly, the **Partnership Act 1890** (which “codified” the law of partnership and was made at a time when the nature of partnership as a relationship requiring good faith was firmly established) does not itself set a general requirement or principle to this effect, nor does it even refer to good faith in its particular provisions. Instead, some of those provisions (e.g. the duty of partners to render accounts ([s.28](#)), the accountability of partners for private profits ([s.29](#)) and the duty of partners not to compete with the firm ([s.3](#))) are seen as reflecting this nature: Lindley and Banks on Partnership paras 16-03 and 16-18. Generally, though, the **1890 s.46** preserved the rules of equity and of common law applicable to partnership and these clearly included the rules concerning good faith. cf. also the position of parties to a contract setting up a limited liability partnership: *F & C Investments (Holdings) Ltd v Barthelemy [2011] EWHC 1731 (Ch), [2012] 3 W.L.R. 10* at [207]–[254] (reversed on costs order *[2012] EWCA Civ 843*).
- 306 *Conlon v Simms [2006] EWCA Civ 1749, [2007] 3 All E.R. 802* at [127].
- 307 *Golstein v Bishop [2014] Ch. 131* at [136].
- 308 *Blisset v Daniel (1853) 10 Hare 493* at 521–522 (Sir W. Page Wood VC).
- 309 See paras 21-129 et seq.
- 310 SI 1993/3053 reg.3(1), which implemented Directive 86/653 art.3(1), above, para.2-035.
- 311 *Downsview Ltd v First City Corp Ltd [1993] A.C. 295, 312* and see also *Albany Home Loans Ltd v Massey [1997] 2 All E.R. 609, 612–613*; *Alpstream AG v PK Airfinance Sarl [2015] EWCA Civ 1318, [2016] 2 P. & C.R. 2* at [115]. In *UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch)* at [36] it was noted that the duty of good faith between the mortgagee and the mortgagor “does not arise by contractual implication but by virtue of

the creation of a mortgage”, referring to *Socimer International Bank Ltd v Standard Bank London Ltd (No.2) [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558* at [148]–[150] where Lloyd LJ noted that the origin of the mortgagee’s obligations go back to the early intervention of equity in mortgages.

•312 Consumer Insurance (Disclosure and Representations) Act 2012; Insurance Act 2015 especially ss.5 and 14, and see Vol.II, paras 44-030 et seq.

•313 According to Lindley and Banks on Partnership, 20th edn (2017, updated to 2020), para.5-06 (with citations), “[a]lthough partnerships and joint ventures obviously have a number of common characteristics, in some instances the two expressions appear to be used interchangeably, whilst in others the joint venture is recognised as a relationship quite separate and distinct from partnership” and noting that Lloyd LJ in *Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910, [2014] 1 B.C.L.C. 545* at [34] observed that “the phrase ‘joint venture’ is not a term of art either in a business or in a legal context”. See similarly *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd. [2021] EWHC 3015 (Ch)* at [63] and Hewitt on Joint Ventures, 7th edn (2020), Ch.3.

314 *Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910, [2014] 1 B.C.L.C. 545* at [64] and [93].

315 *Fujitsu Services Ltd v IBM United Kingdom Ltd [2014] EWHC 752 (TCC), 153 Con. L.R. 203* at [126], per Carr J, referring, inter alia, to *Re Goldcorp Exchange Ltd (In Receivership) [1995] 1 A.C. 74* at 98 (Lord Millett); *Ross River Ltd v Cambridge City Football Club Ltd [2008] 1 All E.R. 1004* at [197] (though the court held that there was a fiduciary duty on the facts); *F & C Alternative Investment (Holdings) Ltd v Barthelemy [2011] EWHC 1731, [2013] Ch. 613* at [223] and [225]; *John Youngs Insurance Services Ltd v Aviva Insurance Service UK Ltd [2011] EWHC 1515 (TCC), [2012] 1 All E.R. (Comm) 1045* at [94]; *Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910, [2014] 1 B.C.L.C. 545* at [40], [56] and [59] (upholding a fiduciary duty of good faith as consistent with the contract made); *Glenn v Watson [2018] EWHC 2016 (Ch)* at [131]; *Hughes v Burley [2021] EWHC 104 (Ch)* at [69].

316 *Fujitsu Services Ltd v IBM United Kingdom Ltd [2014] EWHC 752 (TCC)* at [133].

317 *Fujitsu Services Ltd v IBM United Kingdom Ltd [2014] EWHC 752 (TCC)* at [123], referring, inter alia, to *Hospital Products Ltd v United States Surgical Corp (1984) 156 C.L.R. 41* at [70] (HC Aus, Mason J); *Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145* at 206 (on which see below, paras 3-022—3-025).

## **(v) - The Construction of Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(v) - The Construction of Contracts**

- 151 Considerations of fairness and reasonableness have often been seen as relevant to the way in which English courts treat the consequences of making contracts in several different ways. First, the fairness or reasonableness of the result reached is relevant to the construction of the express terms which the parties have made. The courts have long made clear that, in general, they should look to the intention of the parties (as objectively construed) rather than the strict letter of a contract's stipulations<sup>318</sup> and in interpreting their intention, the courts look at the factual matrix of the contract:

“... modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result.”<sup>319</sup>

As Lord Reid earlier observed, “[t]he more unreasonable the result the more unlikely it is that the parties can have intended it”.<sup>320</sup> Moreover, the Supreme Court has confirmed in the context of a commercial guarantee that:

“... [i]f there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”,

although it added that “[w]here the parties have used unambiguous language, the court must apply it”.<sup>321</sup> Again, in *Arnold v Britton* the Supreme Court reaffirmed that the meaning of words in a contract must be seen in their “documentary, factual and commercial context”, including “commercial common sense”,<sup>322</sup> but the latter and the surrounding circumstances “should not be invoked to undervalue the importance of the language of the provision which is to be construed”<sup>323</sup>: “[t]he purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed”.<sup>324</sup> On the other hand, other principles governing the relationship of the parties also find their formal source in the construction of the contract: so, for example, the courts accept that, in general, a party in default under a contract cannot take advantage of his own wrong,<sup>325</sup> an idea which in some other legal systems is put in terms of the adage *nemo auditor turpitudinem suam allegans*.

## Footnotes

- 318 e.g. *Solley v Forbes* (1820) 2 Brod. & B. 28, 48, per Dallas CJ.
- 319 *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 W.L.R. 461, 468, per Potter LJ and see the important speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 W.L.R. 896, 912–913, explaining *Prenn v Simmonds* [1971] 1 W.L.R. 1381 especially at 1383–1384 and *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313 especially at 387–388; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [3], [33]–[39]; *Oceanbulk Shipping SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 A.C. 662 and see further below, paras 15–047 et seq.
- 320 *Wickman Machine Tool Sales Ltd v Schuler AG* [1974] A.C. 235, 251. For examples of this sort of approach in the context of rights of termination of a contract see *Ringway Roadmarking v Adbruf Ltd* [1998] 2 B.C.L.C. 625; *Rice (t/a The Garden Guardian) v Great Yarmouth BC* (2001) 3 L.G.L.R. 4, CA; *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* [2010] EWHC 1193 (Ch), [2010] N.P.C. 63.
- 321 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [21] and [23] respectively per Lord Clarke of Stone-cum-Ebony with whom the other JJSC agreed. cf. *OMV Supply and Trading AG v Kazmunaygaz Trading AG* [2014] EWCA Civ 75, [2014] 1 C.L.C. 113 at [18] rejecting a construction which would have made the contract “grossly unfair” to a point which “borders on the absurd” (with supporting further reasons).
- 322 [2015] UKSC 36, [2015] A.C. 1619 at [15] per Lord Neuberger of Abbotbury (with whom Lord Sumption and Lord Hughes agreed); Lord Hodge in a separate judgment also agreed with Lord Neuberger, at [66]). See also *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 W.L.R. 1095 at [8]–[15].
- 323 [2015] UKSC 36 at [15].
- 324 [2015] UKSC 36 at [20] per Lord Neuberger of Abbotbury; *Globe Motors Inc v TRW Lucas Varsity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [62].

325 *Alghussein Establishment v Eton College [1988] 1 W.L.R. 587* and see below, para.15-113.

---

End of Document

© 2022 SWEET & MAXWELL

## **(vi) - Express Terms as to Good Faith or Fairness**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 2 - Fundamental Principles of Contract Law

Section 4. - Good Faith, Contractual Fairness and Reasonableness

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(vi) - Express Terms as to Good Faith or Fairness**

**Differing roles of express terms of good faith or fairness**

- 152 Sometimes, the express terms of a contract require one or both of the parties to act fairly or in good faith towards the other in a particular context or respect, or more generally.<sup>326</sup> The contract may also stipulate expressly that its terms are to be interpreted according to good faith.<sup>327</sup>

**Express term to negotiate in good faith**

- 153 The validity of a term to negotiate in good faith long remained doubtful owing to the view expressed by Lord Ackner in *Walford v Miles* that a duty to negotiate in good faith is “inherently repugnant to the adversarial position of the parties when involved in negotiations” and “unworkable in practice”.<sup>328</sup> This view has been followed by some later courts, which saw an express agreement to negotiate in good faith as an (unenforceable) agreement to agree.<sup>329</sup> However, since the decision of the Court of Appeal in *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)*, the courts have usually taken a more liberal view of such terms.<sup>330</sup> In that case, the Court of Appeal considered that Lord Ackner’s observations were not appropriate (nor binding on it<sup>331</sup>) to determine the validity of an express obligation to negotiate in good faith contained in

a complex concluded contract which had been drafted by City of London solicitors. The term in question formed part of a contract supplementing a complex series of contractual arrangements relating to the purchase, “upgrading” and hire of an oil production platform, and provided for the negotiation in good faith of the cost of the upgrading of the platform for use on a particular oil field. On the loss by fire of the platform, the question arose, *inter alia*, of the applicability and enforceability of the term as to negotiation in good faith. Having held it inapplicable as a matter of construction,<sup>332</sup> Longmore LJ nevertheless considered whether the term would have been enforceable. In this respect, he noted that there were three traditional objections to enforcing an obligation to negotiate in good faith:

“(1) … that the obligation is an agreement to agree and thus too uncertain to enforce, (2) that it is difficult, if not impossible, to say where, if negotiations are brought to an end, the termination is brought about in good or in bad faith, and (3) that, since it can never be known whether good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it would have been reached, it is impossible to assess any loss caused by breach of the obligation.”<sup>333</sup>

In the view of the learned Lord Justice, the first of these objections carried little weight in the context as the express obligation to negotiate in good faith was contained in a contract which it was accepted was generally enforceable; and the third objection could be overcome as the obligation to negotiate in question related to a limited aspect of the extra costs involved in the upgrade of the platform and so, if agreement were not reached, the court could itself ascertain the losses arising, these being likely to be the same as the reasonable cost of the upgrade.<sup>334</sup> Rather:

“It is the second objection that is likely to give rise to the greatest problem viz that the concept of bringing negotiations to an end in bad faith is somewhat elusive. But the difficulty of a problem should not be an excuse for the court to withhold relevant assistance from the parties by declaring a blanket unenforceability of the obligation.”

However, he added that in the absence of fraud, it would be unlikely that there would be a finding of bad faith.<sup>335</sup> Overall, therefore, given the inclusion of a term of “comparatively narrow scope” which had been “deliberately and expressly” entered by the parties to a professionally drafted commercial contract, Longmore LJ concluded that it would be “a strong thing to declare [it] unenforceable” as this would “defeat the reasonable expectations of honest men”.<sup>336</sup> This approach has been followed at first instance so as to allow the enforcement of a contract term to seek to resolve any dispute or claim by “friendly discussions” for a period of four weeks before proceeding to arbitration.

<sup>337</sup>

 On the other hand, while it may indeed be “generally accepted that [a contract] may impose an obligation on one or both parties to conduct negotiations in good faith”,<sup>338</sup> it has been said

that “the validity of such a provision will depend upon the court being satisfied that the traditional objections to such clauses identified by Longmore LJ in *Petromec* do not arise”.<sup>339</sup>

## Express term to act fairly

- 154 In *Gray v Marlborough College*<sup>340</sup> the Court of Appeal considered the significance of an express term in the standard contract between an independent school and the parent of one of its pupils which required the headmaster of the school to consult the pupil’s parents and generally to act fairly before requiring the pupil’s removal from the school. For this purpose, in the view of Auld LJ:

“... fairness is a flexible principle and highly fact-sensitive in its application. That is so whether a duty to act fairly is one of public law or contractual in nature. Much depends on the context of and procedural framework in which a decision is made, the nature of the decision, who made it, how it was made, what is at stake and the contribution, if any, by those affected by it to the chain of events leading to it.”<sup>341</sup>

As will be seen, the courts have sometimes seen some *implied* contractual duties to act fairly as analogous to public law duties, though sometimes this analogy has also been rejected.<sup>342</sup>

## Express terms to act in good faith

- 155 In a series of more recent cases the courts have considered the proper approach to express terms in commercial contracts which require one or more of the parties to the contract to act in good faith or with the utmost good faith.<sup>343</sup> Following the general approach to construction, the meaning given to good faith in these terms depends on the intention of the parties as construed objectively from the wording used by the contract, the context of the contract as a whole (including its overall purpose where relevant), and the matrix of fact in which it was concluded<sup>344</sup>: as Jackson LJ has observed in the context of an express term requiring good faith, “it is clear from the authorities that the content of a duty of good faith is heavily conditioned by its context”.<sup>345</sup>
- 156 In *Berkeley Community Villages Ltd v Pullen*<sup>346</sup> a property developer contracted with owners of land to use its expertise to maximise the potential for development of a substantial part of the land in return for a fee payable in certain circumstances. The contract contained an express term that:

“... [i]n all matters relating to this Agreement the parties will act with the utmost good faith towards one another and will act reasonably and prudently at all times.”

Although the developer made efforts to promote the owners' land (including towards obtaining a Planning Consent of considerable value), the owners wished to sell the land in question to a third party for a very large sum. The developer, which argued that the would-be sale price reflected the significant improvement in its planning prospects, applied for an injunction to prevent the owners from selling or otherwise disposing of the land. Morgan J agreed to grant such an injunction, holding first that, as a matter of construction, the express term imposed on the owners:

“... a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also [required] faithfulness to the agreed common purpose and consistency with the justified expectations of the [developer].”<sup>347</sup>

He held, secondly, that in the circumstances the intended sale would amount to breach of the owners' obligation of good faith on the grounds that: the developer had invested considerable time and incurred expense as a result of which the value of the land had been significantly enhanced; on the terms of the contract, the owner was not obliged to pay a reasonable fee to the developer on the sale; in any event, the developer's expectations were that they would promote the land to obtain planning consent and sale in the open market (whereupon they would be entitled to a fee under the express terms of the contract); the third party buyer would not be bound by the terms of the contract; and, finally, the owner had put forward no extenuating circumstances or hardship.<sup>348</sup>

<sup>347</sup> *Berkeley Community Villages Ltd v Pullen*<sup>349</sup> was considered in *Gold Group Properties Ltd v BDW Trading Ltd*.<sup>350</sup> There A, a property developer, agreed by contract to construct dwellings on land owned by B; B was then to sell the dwellings, sharing the revenue with A. Minimum sale prices for each of the properties were agreed together with revenue sharing provisions. An express term of the contract required each of the parties “at all times to act in good faith towards the other and use all reasonable endeavours to ensure the observance by themselves of the terms of this Agreement ...”. A failed to develop the land and was sued for damages for repudiatory breach of contract by B, to which A countered that B was in repudiatory breach of this express term requiring good faith by refusing to countenance any negotiation or revision of their agreement so as to address the difficulties caused by a fall in the property market and insisting that the minimum prices which it contained were for its benefit alone.<sup>351</sup> Having cited the dictum of Morgan J in *Berkeley Community Villages Ltd v Pullen* quoted above, Judge Stephen Furst QC quoted the observations of Barrett J in the Supreme Court of New South Wales in *Overlook v Foxtel* to the effect that:

“... the party subject to the obligation [of good faith] is not required to subordinate the party's own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms

so that the enjoyment becomes (or could become) ... ‘nugatory, worthless or, perhaps, seriously undermined’ ... the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary ... The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.”<sup>352</sup>

In applying this approach to the meaning of good faith on the facts before him, Judge Stephen Furst QC concluded that,

“... good faith, whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract.”<sup>353</sup>

He therefore found for the landowners B, holding that the owners were not in breach of their obligation to act in good faith in refusing to accept or negotiate on the basis of the developer’s (A’s) offer to delay the development for two years or to revise the revenue sharing agreement in the contract.<sup>354</sup>

- 158 The approach of Morgan J in *Berkeley Community Villages Ltd v Pullen* was followed by Vos J in *CPC Group Ltd v Qatari Diar Real Estate Investment Co.*<sup>355</sup> This case concerned a number of issues arising from a contract of joint venture for the development of a large site in London, including alleged breaches of an express term which required its parties to:

“... act in the utmost good faith towards each other in relation to the matters set out [in the contract] and [the defendant] shall use all reasonable but commercially prudent endeavours to enable the achievement of the various threshold events and Payment Dates [for the benefit of the claimant] ...”.

In Vos J’s view, in the context:

“... the obligation of utmost good faith in the [contract] was to adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Development Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties.”<sup>356</sup>

While the learned judge did not require “to decide whether this obligation could *only* be broken if [the defendant or the claimant] acted in bad faith”, he considered that “it might be hard to understand, as Lord Scott said in *Manifest Shipping*, how, without bad faith, there can be a breach of a ‘duty of good faith, utmost or otherwise’”.<sup>357</sup> On the facts, however, he found that there had been no breach of the obligation of utmost good faith as so interpreted.<sup>358</sup>

<sup>359</sup> In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)*  
D <sup>359</sup>

U the Court of Appeal considered the significance of an express term in a detailed contract for the supply of catering and cleaning services for a seven-year period by a contractor to an NHS Trust at one of its hospitals. The term in question provided that:

“The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust ... to derive the full benefit of the Contract.”

At first instance, it had been held that “it accorded with commercial common sense for there to be a general obligation on both parties to co-operate in good faith” and that the Trust’s behaviour constituted breach of this obligation.<sup>360</sup> The Court of Appeal disagreed, reversing the decision below. First, on its proper construction the term did not create a general obligation to co-operate in good faith which “qualifies or reinforces all of the obligations of the parties in all situations where they interact”, but rather the term was “specifically focused upon the two purposes stated in the second half of that sentence”.<sup>361</sup> As Beatson LJ observed:

“... care must be taken not to construe a general and potentially open-ended obligation such as the obligation to ‘co-operate’ or ‘to act in good faith’ as covering the same ground as other, more specific provisions, lest it cut across those more specific provisions and any limitations in them.”<sup>362</sup>

Secondly, the Court of Appeal considered that “it is clear from the authorities that the content of a duty of good faith is heavily conditioned by its context”<sup>363</sup> and in the context the relevant term means that the “parties will work together honestly endeavouring to achieve the two stated purposes”.<sup>364</sup> Having so decided, the Court of Appeal held that the behaviour complained of by the contractor related to neither of the purposes set by the term; nor had there been any finding of dishonesty by the Trust.<sup>365</sup> As a result, the Trust was not in breach of its obligation under this express term.

<sup>360</sup>

*Health & Case Management Ltd v Physiotherapy Network Ltd* furnishes an example of a case where a court has been satisfied that a party has broken an express term requiring good faith.<sup>366</sup> There, the original claimant (“HCML”) was a company providing services to insurance companies by managing referrals to physiotherapy clinics on behalf of the insurance companies’ insured and they would look to place an individual patient so referred to a geographically convenient physiotherapy clinic. The original defendant (“TPN”) had established a nationwide network of physiotherapy clinics and agreed with HCML that they would work together in the arrangement of physiotherapy services for a major insurance company client of HCML, HCML agreeing expressly that it would “act in good faith towards TPN at all times”.<sup>367</sup> Referrals were made by HCML in a way considered satisfactory by TPN for a period, but they were later reduced and ceased principally because HCML had set up its own network of clinics.<sup>368</sup> The High Court considered earlier cases considering express terms requiring good faith,<sup>369</sup> seeing the express term before it as requiring HCML to “adhere to the spirit of the contract, to observe reasonable commercial standards of fair dealing and to be faithful to the agreed common purpose and to act consistently with the justified expectations of the parties”.<sup>370</sup> In this respect, it held that HCML had dishonestly obtained data from TPN and had used it covertly to set up its own network and had diverted referrals which were likely otherwise to have gone to TPN.<sup>371</sup> Although the contract did not impose an obligation on HCML to make referrals, there was an expectation by both parties that it would do so, their “shared commercial objective” and this “heightens the importance of the good faith provision in the contract”.<sup>372</sup> Moreover,

“... [s]etting up the rival network ... (hidden from TPN, but making use of its data) when HCML knew and intended that, once established, TPN would be cut out of the picture; whilst, at the same time, continuing to benefit from a commercial relationship that (in all probability) would have been terminated had TPN known HCML’s true intentions was opportunistic, underhand and exploitative.”<sup>373</sup>

This conduct was held to be breach of the express term requiring good faith in HCML.<sup>374</sup>

## Contractual references to good faith or bad faith and Times Travel (UK) Ltd

- <sup>360A</sup> In two recent decisions, the Court of Appeal has referred to the decision of the Supreme Court in *Pakistan International Airline Corp v Times Travel (UK) Ltd* in construing references to bad faith and good faith in express terms of commercial contracts.

375

 In *Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd*

376

 the Court of Appeal considered the construction of an express term in a contract for the appointment of an adjudicator which entitled the latter to recover fees in respect of work done before his resignation “save for any act of bad faith in the Adjudicator”. In this respect, Coulson LJ (with whom Moylan and Arnold LJ agreed) took as his starting-point that in the decision of the Supreme Court in *Times Travel (UK) Ltd*

377

 “it was made plain that, depending on the circumstances of the case, an act of bad faith will usually require some measure of dishonesty or unconscionability”.

378

 In this respect, the Court of Appeal considered that the contract of appointment distinguished between “bad faith” and “default or misconduct” and that the former “must involve some form of unconscionable or deliberately unacceptable conduct on the part of the adjudicator”.

379

 It therefore rejected the suggestion that “bad faith meant no more than ‘commercially unacceptable conduct which failed to show fidelity to the parties’ bargain’”

380

 as had been argued by reference to passages in the well-known judgment of Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd*.

381

 The Court of Appeal considered that *Yam Seng Pte Ltd*, which concerned the requirement of good faith in commercial contracts, was not directly relevant and that if such an “ill-defined” test of “commercially unacceptable conduct” were applied to the clause before it, it would apparently be satisfied even if there was no default or misconduct.

382

 The Court of Appeal took a similar view of the significance of the Supreme Court’s decision in *Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd*.

383

 There the Court of Appeal considered, inter alia, the construction of an express term in a commercial contract for the provision of IT services which allowed the customer to withhold payment where it “disputes an invoice in good faith”.

384

 In this respect, Coulson LJ (with whom Phillips LJ and Zacaroli J agreed) observed that “the authorities are tolerably clear that, unless the contracting party has acted in bad faith, it is difficult to see how he can be in breach of an obligation of good faith”,

385

**U** Coulson LJ also quoted Leggatt J (as he then was) in *Astor Management AG v Atalaya Mining Plc* where he referred to the duty to act in good faith as reflecting “the expectation that the contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract, or which could be regarded as commercially unacceptable by reasonable and honest people”.

386

**U** Coulson LJ concluded his discussion of the significance of good faith by referring to the Supreme Court’s decision in *Times Travel (UK) Ltd*,

387

**U** observing that there:

“The Supreme Court said a ‘bad faith demand’ would not be one simply motivated by commercial self-interest; it would be motivated by reprehensible or unconscionable conduct, such as where the party making the demand does so in the knowledge that it did not have the legal entitlement to which it claims.”

388

**U**

In the particular context, the Court of Appeal upheld the decision of the judge at trial that the relevant party had acted in good faith as it had “acted fairly and honestly” towards the other party “and did not conduct itself in a way which was calculated to frustrate the purpose of the contract or act in a way that was commercially unacceptable”; and “[t]here was no intentional or objectively reprehensible conduct”.

389

**U** Applying his view of the Supreme Court in *Times Travel (UK) Ltd*, Coulson LJ saw the real question as being whether in disputing the invoice the party genuinely believed that it was entitled to refuse to pay, and it had clearly done so.

390

**U**

**D** However, as is noted elsewhere in the present work,

391

**U** the majority of the Supreme Court in *Times Travel (UK) Ltd* held that a “bad faith demand” (in the particular sense of a claim for something owed which is not genuinely believed to be owed) is not enough to establish the illegitimacy of pressure for the purposes of lawful act duress,

392

U holding that the illegitimacy of the pressure in duress is closely aligned with the equitable concept of unconscionability

393

U and requires reprehensible conduct that amounts to illegitimate means.

394

U For this purpose, bad faith is potentially relevant both to the content of the demand and to the context in which the demand is made.

395

U Therefore, and with the greatest respect to the views expressed by the Court of Appeal in *Steve Ward Services (UK) Ltd and Soteria Insurance Ltd*, the Supreme Court did not interpret what is meant by a “bad faith demand” for the purposes of lawful act duress, but instead required what it clearly saw as the more demanding requirement of reprehensible or unconscionable conduct.

396

U It is submitted, therefore, that the decision of the Supreme Court should not be seen as taking a view as to the significance of good faith or bad faith more widely and, in particular, as regards the use of these terms by express contract terms; in this respect, as earlier noted, it explicitly rejected a general principle of good faith in English contract law

397

U from which one may deduce such a wider significance.

## Express term requiring interpretation of the contract in good faith

D<sup>161</sup> In *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* the Supreme Court considered the terms of an international franchise development agreement (“FDA”) which set English law as its governing law, provided for the arbitration of disputes in Paris and for its interpretation in good faith.

398

U The Supreme Court held that English law governed the arbitration agreement as well as the FDA more generally and the question then arose as to whether there was any real prospect that a future court would find that the defendant, which was not a named party to the FDA, had become a party to it and therefore to the arbitration agreement.

399

U The court saw as elements against a court so finding that there was no agreement in writing to this effect and that the FDA contained a series of No Oral Modification clauses which prevented the company from becoming party to the FDA by means of novation by addition.

400

**U** The question then arose whether this position was affected by the presence of the provision in the FDA according to which:

“The provisions of the Agreement, as well as any statements made by the Parties in connection therewith, shall be interpreted in good faith.”

The Supreme Court held that this provision did not affect the position. First, this clause could not be relied on against the defendant unless and until it had been established that the defendant was party to the FDA or is precluded from contending otherwise.

401

**U** But, even if the clause could be relied on, “it is not contrary to good faith to interpret the terms of the FDA in accordance with their express wording”,

402

**U** all the more so given the presence of a further provision in the FDA according to which “[u]nder no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement”.

403

**U** Moreover, Lord Hamblen JSC and Lord Leggatt JSC added that:

“The only circumstances in which under English law it might be contrary to good faith to rely on a No Oral Modification clause would be where the minimum requirements for an estoppel identified in *Rock Advertising* were met.”

404

**U**

In this respect, the Supreme Court held that it was not arguable that these requirements had been met.

405

**U**

## Footnotes

326 Below, paras 2-053—2-060.

327 Below, para.2-061.

328 [1992] 2 A.C. 128.

- 329 *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548, [2012] 2 All E.R. (Comm) 963 especially at [44]–[46].
- 330 [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121; *Tang v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch), [2014] 2 C.L.C. 663 at [55], [57]–[58]. In *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 (Comm) at [23] Leggatt J observed that, “notwithstanding the decision of the House of Lords in *Walford v Miles*” it is now generally accepted that a binding contract to regulate the parties’ negotiations “may impose an obligation on one or both parties to conduct negotiations in good faith”, citing *Petromec Inc* as an example.
- 331 [2005] EWCA Civ 891 at [121].
- 332 [2005] EWCA Civ 891 at [45], [112]–[113] and [124].
- 333 [2005] EWCA Civ 891 at [117].
- 334 [2005] EWCA Civ 891 at [117]. cf. *Shaker v Vistajet Group Holding SA* [2012] EWHC 1329 (Comm) at [17] where the court distinguished this aspect of the position in *Petromec Inc* on the basis that in the latter case there were objective criteria by which the extra costs could be assessed in the absence of an agreement of which the obligation to negotiate in good faith was the object.
- 335 [2005] EWCA Civ 891 at [119].
- 336 [2005] EWCA Civ 891 at [121] echoing Steyn (1997) 113 L.Q.R. 433, above, para.2-025.
- 337 *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2104 (Comm), [2015] 1 W.L.R. 1145 especially at [26], Teare J considering that such a contract term imports an obligation to resolve disputes in good faith at [51]–[52], [63]–[64] and reviewing extensively the authorities. See also *Football Association Premier League Ltd v PP Live Sports International Ltd* [2022] EWHC 38 (Comm) at [86] (express term providing for party with entitlement to a “period of good faith negotiations” to discuss possible reduction of the fees payable for rights to broadcast Premier League football matches if there had been (which it was held that there had not) a “fundamental change in the format of the competition”).
- 338 *Trustees of Edward Higgs Charity v SISU Capital Ltd* [2014] EWHC 1194 (QB) at [23] per Leggatt J (but holding it impossible to imply a longer duty to negotiate in good faith than the period set by such an express term: at [27]–[28]).
- 339 *Rosalina Investments Ltd v New Balance Athletic Shoes (UK) Ltd* [2018] EWHC 1014 (QB) at [50] per May J.
- 340 [2006] EWCA Civ 1262, [2006] E.L.R. 516.
- 341 [2006] EWCA Civ 1262 at [54].
- 342 Below, paras 2-067—2-068 and 2-070.
- 343 See also Peel in Burrows and Peel (eds), *Contract Formation and Parties* (2010), Ch.2.
- 344 On this general approach, see below, paras 15-047 et seq.
- 345 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [109] and see similarly [2013] EWCA Civ 200 at [151] (Beatson LJ). And see further below, para.2-059.
- 346 [2007] EWHC 1330 (Ch), [2007] 3 E.G.L.R. 101.

- 347 [2007] EWHC 1330 (Ch) at [97], relying in particular on the judgment of French J in *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 at [92]–[93] (decided outside the context of contract, though itself quoting the American Restatement of Contracts (2nd edn) para.205).
- 348 [2007] EWHC 1330 (Ch) at [109].
- 349 [2007] EWHC 1330 (Ch).
- 350 [2010] EWHC 1632 (TCC), [2010] All E.R. (D) 18 (Jul).
- 351 [2010] EWHC 1632 (TCC) at [74].
- 352 [2002] NSWSC 17; (2002) Aust. Contract R. 90-143 at [65]–[67]: [2010] EWHC 1632 (TCC) at [90]. As was noted in *Gold Group Properties Ltd*, this dictum was quoted with approval by Hasluck J in the Supreme Court of Western Australia in *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286 at 357.
- 353 [2010] EWHC 1632 (TCC) at [91]. See also *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm), 169 Con. L.R. 141 at [401] per Simon Bryan QC (“good faith does not normally require a party to surrender contractual rights”).
- 354 [2010] EWHC 1632 (TCC) at [92]–[103].
- 355 [2010] EWHC 1535 (Ch), [2010] C.I.L.L. 2908. See also *F & C Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch) at [255]–[259] (clause in agreement setting up LLP that “[e]ach Member shall at all times show the utmost good faith to the LLP”).
- 356 [2010] EWHC 1535 (Ch) at [246].
- 357 [2010] EWHC 1535 (Ch) at [246], quoting Lord Scott in *Manifest Shipping Co v Uni-Polaris Shipping Co* [2003] 1 A.C. 469 at [111] (which concerned the obligation of utmost good faith in s.17 of the Marine Insurance Act 1906).
- 358 [2010] EWHC 1535 (Ch) at [277].
- 359 [2013] EWCA Civ 200, [2013] B.L.R. 265 at [106] per Jackson LJ, with whom Lewison and Beatson LJJ agreed. See similarly *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC) at [92]–[96]. However, the HC accepted (at [110]–[112]) that the exercise of a party’s decision-making power under the contract which affected the other party’s rights was subject to an implied term that it would be exercised honestly, on proper grounds and not in a manner that is arbitrary, irrational or capricious, on which cf. below, paras 2-066 —2-079 esp. at para.2-075. See also *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm), 169 Con. L.R. 141 (express term requiring one party to act in good faith while performing its contractual obligations requires other party to identify one or more such obligations and their breach by not acting in good faith in a particular way at a particular time or times; there was no “free-standing obligation of good faith” (at [403] per Simon Bryan QC); and on the facts no such breach was established: at [409]); *VR Global Partners LP v Exotix Partners LLP* [2017] EWHC 2620 (Comm) (express terms “to act in good faith in relation to any unwinding” of the transaction not breached on the facts); *Westfields Homes Ltd v Keay Homes (Windrush) Ltd* [2020] EWHC 3368 (Ch) at [30]–[32]. In *Unwin v Bond* [2020] EWHC 1768 (Comm) at [215] et seq. the HC emphasised the importance of context in interpreting the requirements of an express duty of good faith, but it identified five “minimum standards” which the party contractually bound to act in good faith must observe: “i) they

must act honestly; ii) they must be faithful to the parties' agreed common purpose as derived from their agreement; iii) they must not use their powers for an ulterior purpose; iv) when acting they must deal fairly and openly with the claimant; v) they can consider and take into account their own interests but they must also have regard to the claimant's interest": [2020] *EWHC 1768 (Comm)* at [230] per HH Judge Klein. The case itself concerned an express duty of good faith in a shareholders' agreement, one of the shareholders claiming that another had not acted in good faith in dismissing him from employment in a subsidiary company. The court held that, as a matter of construction, this duty did apply to the defendant's decision to terminate the claimant's employment and that, while not acting dishonestly nor with an ulterior motive, the defendant had breached this duty in that he had not dealt fairly and openly with the claimant and did not have regard to his interests: [2020] *EWHC 1768 (Comm)* at [241]. See similarly *Re Audas Group Ltd* [2019] *EWHC 2304 (Ch)* at [109]–[111] and [120] (unfair prejudice petition by minority shareholder). See also *Costain Ltd v Tarmac Holdings Ltd* [2017] *EWHC 319 (TCC)*, [2017] 1 C.L.C. 491 at [118]–[125] (analogy drawn between express term requiring "mutual trust and cooperation" and good faith) and *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* [2021] *EWHC 3015 (Ch)* at [101]–[105] where the court referred to cases on the content of *implied* duties of good faith, (on which see below, paras 2-088—2-089) in finding breach of an express term to use reasonable endeavours and act in good faith, awarding (at [221]) damages on a loss of chance basis).

360 [2013] *EWCA Civ 200* at [99]–[101], Jackson LJ reporting the decision of Cranston J.

361 [2013] *EWCA Civ 200* at [106] per Jackson LJ, with whom Lewison and Beatson LJJ agreed. See similarly *Portsmouth City Council v Ensign Highways Ltd* [2015] *EWHC 1969 (TCC)* at [92]–[96]. However, the HC accepted (at [110]–[112]) that the exercise of a party's decision-making power under the contract which affected the other party's rights was subject to an implied term that it would be exercised honestly, on proper grounds and not in a manner that is arbitrary, irrational or capricious, on which cf. below, paras 2-066—2-070. See also *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] *EWHC 2461 (Comm)*, 169 Con. L.R. 141 (express term requiring one party to act in good faith while performing its contractual obligations requires other party to identify one or more such obligations and their breach by not acting in good faith in a particular way at a particular time or times; there was no "free-standing obligation of good faith" (at [403] per Simon Bryan QC); and on the facts no such breach was established: at [409]); *VR Global Partners LP v Exotix Partners LLP* [2017] *EWHC 2620 (Comm)* (express terms "to act in good faith in relation to any unwinding" of the transaction not breached on the facts).

362 [2013] *EWCA Civ 200* at [154].

363 [2013] *EWCA Civ 200* at [109] (with whom Lewison LJ agreed) and see similarly [2013] *EWCA Civ 200* at [151] where Beatson LJ cited in support *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] *EWHC 111 (QB)* at [141], [144], [147], on which see below, paras 2-081—2-082 and 2-088—2-089.

364 [2013] *EWCA Civ 200* at [112].

365 [2013] *EWCA Civ 200* at [114], [116].

366 [2018] *EWHC 869 (QB)*.

367 [2018] *EWHC 869 (QB)* at [12].

- 368 [2018] EWHC 869 (QB) at [18]–[19].
- 369 [2018] EWHC 869 (QB) at [107]–[129] referring in particular to *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch); *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch), [2010] C.I.L.L. 2908 and *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] B.L.R. 265, discussed above, paras 2-055—2-059.
- 370 [2018] EWHC 869 (QB) at [128] per Nicklin J.
- 371 [2018] EWHC 869 (QB) at [124]–[126], [129].
- 372 [2018] EWHC 869 (QB) at [128].
- 373 [2018] EWHC 869 (QB) at [129].
- 374 [2018] EWHC 869 (QB) at [129].
- 375 [2021] UKSC 40, [2021] 3 W.L.R. 727. On the decision of the SC see above, paras 2-040A—2-040C and below, paras 10-056—10-063G.
- 376 [2022] EWCA Civ 153.
- 377 [2021] UKSC 40, [2021] 3 W.L.R. 727 on which see above, paras 2-040A—2-040C and below, paras 10-056—10-063G.
- 378 [2022] EWCA Civ 153 at [90] per Coulson LJ.
- 379 [2022] EWCA Civ 153 at [92] per Coulson LJ.
- 380 [2022] EWCA Civ 153 at [94].
- 381 [2022] EWCA Civ 153 at [91] referring to [2013] EWHC 111 (QB), [2013] Lloyd's Rep. 526 at [138]–[139] and [144] and see below, para.2-081.
- 382 [2022] EWCA Civ 153 at [94].
- 383 [2022] EWCA Civ 440.
- 384 [2022] EWCA Civ 440 at [107] (the clause itself) and [117] et seq. (discussion of the relevant law).
- 385 [2022] EWCA Civ 153 at [121] referring to Lord Scott in *Manifest Shipping Co v Uni-Polaris Shipping Co* [2003] 1 A.C. 469 at [111] (in the context of the obligation of utmost good faith in s.17 of the Marine Insurance Act 1906) and also Vos J (as he then was) in *CPC Group Ltd v Qatari Diar Real Investment Co* [2010] EWHC 1535 (Ch), [2010] C.I.L.L. 2908 (Coulson LJ's judgment as reported does not refer to the relevant paragraph or paragraphs in Vos J's judgment; but part of the quoted text appears at [2010] EWHC 1535 (Ch) at [246]. On *CPC Group Ltd* itself see above, para.2-058.

- 386 [2022] EWCA Civ 440 at [122] quoting from [2017] EWHC 425 (Comm), [2017] 1 Lloyd's Rep. 476 at [98]. The dictum related to an implied term of good faith following *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] Lloyd's Rep. 526 on which see below, paras 2-081 et seq.
- 387 [2021] UKSC 40, [2021] 3 W.L.R. 727.
- 388 [2022] EWCA Civ 440 at [123] (no reference was made to any particular paragraph of the SC's judgments).
- 389 [2022] EWCA Civ 440 at [133]–[140].
- 390 [2022] EWCA Civ 440 at [139].
- 391 Above, paras 2-040A—2-040C and below, paras 10-063B—10-063E.
- 392 [2021] UKSC 40 at [2]–[3], [43]–[45], thereby rejecting the view adopted by Lord Burrows JSC: [2021] UKSC 40 at [62] et seq.
- 393 [2021] UKSC 40 at [20].
- 394 [2021] UKSC 40 at [4], [17] and [52].
- 395 [2021] UKSC 40 at [56] and see below, para. 10-063C.
- 396 [2021] UKSC 40 at [2]–[3].
- 397 [2021] UKSC 40 at [3] and [27] (Lord Hodge JSC); similarly at [95] (Lord Burrows JSC) and see above, paras 2-040A—2-040C.
- 398 [2021] UKSC 48, [2022] 1 All E.R. (Comm) 773.
- 399 [2021] UKSC 48 at [54] et seq.
- 400 [2021] UKSC 48 at [69].
- 401 [2021] UKSC 48 at [73].
- 402 [2021] UKSC 48 at [74] per Lord Hamblen JSC and Lord Leggatt JSC (with whom Lord Hodge JSC, Lord Lloyd JSC and Lord Sales JSC agreed).
- 403 cl.14(3) final sentence, set out at [2021] UKSC 48 at [37]; see [2021] UKSC 48 at [74].

•404 [2021] UKSC 48 at [74], referring to the judgment of Lord Sumption JSC in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] A.C. 119 at [16] quoted [2021] UKSC 48 at [74].

•405 [2021] UKSC 48 at [74].

## **(vii) - Implied Terms as to Good Faith**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(vii) - Implied Terms as to Good Faith**

### **Introduction**

- 162 As has been indicated, the common law often resorts to the implication of a term in a contract in a case where other legal systems instead refer to a general requirement of “good faith in the performance of a contract”<sup>406</sup>; and it has also been noted that implied terms (whether implied in law or in fact) can be justified by reference to good faith.<sup>407</sup> However, the law governing implied terms can be more directly relevant to good faith as the courts have sometimes recognised implied terms requiring good faith of the contracting parties. As Professor (now Lord) Burrows observes in the comments to his Restatement of the English Law of Contract:

“... although English law does not impose a free-standing duty to perform a contract in good faith, it sometimes comes to the same result by implying a term (by fact) that performance must be carried out in good faith.”<sup>408</sup>

As indicated earlier,<sup>409</sup> there are three distinct but related strands of authority: terms implied requiring good faith in certain types of contract<sup>410</sup>; terms implied qualifying the exercise of a contractual power by a party to a contract that it be exercised honestly, rationally and in good faith<sup>411</sup>; and terms implied requiring good faith in commercial contracts more generally.<sup>412</sup> The following paragraphs will consider each of these in turn.

## Footnotes

- 406 See above, para.[2-017](#) and on implied terms generally see below, [Ch.16](#).
- 407 Above, para.[2-025](#).
- 408 Burrows, *A Restatement of the English Law of Contract*, 2nd edn (2020), p.96 (commentary to s.15(3) on implied terms) and see similarly pp.49–50 (commentary to s.5 on freedom of contract).
- 409 Above, para.[2-031](#).
- 410 Below, paras [2-063](#)—[2-064](#).
- 411 Below, paras [2-066](#)—[2-079](#).
- 412 Below, paras [2-080](#)—[2-091](#).

## **(aa) - Implied Terms Requiring Good Faith in Particular Types of Contract**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(vii) - Implied Terms as to Good Faith**

**(aa) - Implied Terms Requiring Good Faith in Particular Types of Contract**

### **Employment contracts**

- 163 The House of Lords accepted that a term is to be implied in contracts of employment to the effect that the:

“... employer [will] not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”<sup>413</sup>

The courts sometimes refer to this as an implied term requiring good faith and loyalty in both employer and employee.<sup>414</sup> Sometimes, indeed, an implied term imposes a duty on an employer to act positively in the interests of the employee. So, for example, in *Scally v Southern Health and Social Services Board*,<sup>415</sup> the House of Lords held that an employer who knew that its employees had a valuable right under the terms of their contracts of employment (here, relating to the enhancement of their pension rights), in a situation where it was reasonable for the employee to be unaware of that right (as it stemmed from a collective agreement), was under a duty to take reasonable steps to inform those employees of their rights. And again in the context of employment,

it has been accepted that where an employee bonus scheme gives the employer a very wide discretion as to the payment and size of bonus, this discretion must nevertheless be exercised bona fide, rationally and not perversely.<sup>416</sup> Moreover, conversely, there is an implied term in contracts of employment that employees will serve their employers with fidelity and good faith and this has a number of consequences, including a duty not to solicit the customers of their employers to transfer their customer to them after the employee has left the employment, a duty not to work for another employer during the term of the employment where it would be inconsistent to do so, but not including a general duty of disclosure of information about their own breaches of duty.<sup>417</sup>

## Other examples

- ¶64 In *Tregg v Hunt* the House of Lords held that there was an implied term in contracts of sale of the goodwill of a business that the seller is not entitled to solicit the business's former customers, it being "not an honest thing to pocket the price and then to recapture the subject of sale",<sup>418</sup> though it did not accept that the seller is not entitled to compete with his purchaser in the absence of express provision.<sup>419</sup> In so doing, the judges expressed themselves in terms which indicated that the implied term would apply in principle to all contracts of sale of goodwill of a business. In other cases, the courts have implied terms requiring good faith in circumstances where the particular type of contract that the parties have concluded requires it. This may be seen in relation to contracts for joint business ventures, though in a way which suggests that the implied duty is tied to the particular contract which the parties concluded rather than to the *type* of contract more generally.<sup>420</sup>

## Contracts with duties of good faith but not by reference to implied term

- ¶65 The weight of authority is that the duty of utmost good faith in the parties to contracts of insurance at common law (which continues during performance of the contract) is imposed by the law rather than arising from an implied term in the contract, one significance of the difference being that breach of the duty does not sound in damages.<sup>421</sup> Similarly, the duty of good faith owed by partners to each other under the law of partnership arises by law from the nature of the contract<sup>422</sup> and there is, therefore, no need to have recourse to the implication of a term in the contract regarding good faith. And it has been said that:

"... although a mortgage is a contractual transaction, the imposition of ... duties [on the mortgagee] has nothing to do with the implication of terms in a contract under the general law of contracts."<sup>423</sup>

## Footnotes

- 413 *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20 but see *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 A.C. 518 (no term to be implied not to dismiss employee without good cause or in an unfair manner as inconsistent with the statutory system of unfair dismissal) and see Vol.II, para.42-157. cf. *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 (implied term in contract of membership of British Athletic Federation under which Federation agreed to provide a disciplinary hearing to provide a fair result overall).
- 414 *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 A.C. 518 at [24]. *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 A.C. 503 at [4]–[6], [51]; cf. *Prudential Staff Pensions Ltd v Prudential Assurance Co Ltd* [2011] EWHC 960 (Ch), [2011] Pens. L.R. 239 at [140]–[153] (obligation of good faith on employer in relation to decision-making under employee pension scheme); *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 (QB), [2011] I.R.L.R. 138 at [148]–[159] (distinction between employee’s general duty of good faith and loyalty and employee’s fiduciary duty, which would arise where “the particular functions of an employee may require him to pursue the interests of his employer to the exclusion of other interests, including his own” ([2010] EWHC 2878 at [152], per Hickinbottom J); *Threlfall v ECD Insight Ltd* [2012] EWHC 3543 (QB) at [112]–[115]. See generally *Bogg* (2011) 32 Comparative Labor Law and Policy Journal 729; *Collins* (2021) 137 L.Q.R. 426. cf. *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Co* [2015] EWHC 1322 (Ch) (no implied condition of mutual trust and confidence in contract setting some terms and acting as precursor for development contract).
- 415 [1992] 1 A.C. 294; *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 W.L.R. 4021 at [19]. cf. *University of Nottingham v Eyett* [1999] 1 W.L.R. 594.
- 416 *Horkulak v Cantor Fitzgerald* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [46]–[47]; *Commerzbank AG v Keen* [2006] EWCA Civ 1536, [2007] I.C.R. 623 at [53]–[59].
- 417 See Vol.II, paras 42-064—42-066. See also the duty to refrain from disruption of the functioning of the employer’s business and the duty of confidentiality: Vol.II, paras 42-067 and 42-068.
- 418 *Trego v Hunt* [1896] A.C. 7 at 25, per Lord Macnaghten.
- 419 [1896] A.C. 7 at 20.
- 420 *Nathan v Smilovitch (No.2)* [2002] EWHC 1629 (Ch) at [9]–[12] (accepting the analogy with contracts of partnership); *Training in Compliance Ltd v Dewse* [2004] EWHC 3094 (QB), [2004] All E.R. (D) 377 (Dec) at [48]. As earlier noted (above, para.2-050 (note)), there is no generally applicable definition of a “joint venture” though its relationship with partnership (where good faith is required as a matter of law) is clear. In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All E.R. (Comm) 849 at [57] the PC did not rule out an implied obligation of good faith in a franchise contract; but cf. *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 451 at [51], relying

on *Bedfordshire CC v Fitzpatrick Contractors Ltd [1998] 62 Con. L.R. 64* (Dyson J), where the court refused to imply a term of trust and loyalty owed by a franchisor to a franchisee since such a relationship is “much closer to an ordinary commercial relationship, than one between employer and employee”); *Carewatch Care Services Ltd v Focus Caring Services Ltd [2014] EWHC 2313 (Ch)* at [106]–[112] (no implied terms of good faith etc. in franchise agreements). But cf. the case law developed after *Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB)*, below, paras 2-080 et seq.

- 421 *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 777–778; Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd [1990] 1 Q.B. 818, 888–889 (rev'd on other grounds [1992] 1 A.C. 233)*; see Vol.II, para.44-033.
- 422 Lindley and Banks on Partnership, 20th edn (2017, updated to 2020), Ch.16 esp. para.16-01.
- 423 *Socimer International Bank Ltd v Standard Bank London Ltd (No.2) [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558* at [148] per Lloyd LJ; *UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch)* at [36] and see above, para.2-049 (note).

## **(bb) - Implied Restrictions on Broad Contractual Powers**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 2 - Fundamental Principles of Contract Law

Section 4. - Good Faith, Contractual Fairness and Reasonableness

(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant

(vii) - Implied Terms as to Good Faith

(bb) - Implied Restrictions on Broad Contractual Powers

### **Introduction**

- ¶66 The courts have sometimes used the implication of a term to restrict the ambit of a unilateral discretionary power conferred on one of the parties by the contract.<sup>424</sup> This development, which is often associated with the decisions of the Court of Appeal in *Socimer International Bank Ltd v Standard Bank London Ltd*<sup>425</sup> and of the Supreme Court in *Braganza v BP Shipping Ltd*<sup>426</sup> results in requiring the power to be exercised honestly, rationally and in good faith, though, as will be seen, the precise content, terminology and significance of the implied restriction differ according to the context.<sup>427</sup> However, as will also be explained, it may sometimes be difficult to distinguish between the kind of contractual powers which should be qualified in this way and powers which are “absolute” and which should therefore not be so qualified.<sup>428</sup>

### **Earlier cases**

- ¶67 In *Paragon Finance Plc v Nash*<sup>429</sup> a mortgage company possessed a power expressed in very general terms to vary the interest rates in a contract of consumer credit. Drawing on analogies

from public law, the Court of Appeal held that this power was “not completely unfettered”<sup>430</sup> and implied a term that “it should not be exercised dishonestly, for an improper purpose, capriciously or arbitrarily”.<sup>431</sup> While the court was prepared to imply a term that the interest rate would not be set in a way that “no reasonable lender, acting reasonably, would do”, this was not the same as saying that the lender could not impose unreasonable rates.<sup>432</sup> Moreover, in *Paragon Finance Plc v Pender*<sup>433</sup> it was observed that this qualification on the exercise of a right should not mean:

“... that a lender may not, *for a genuine commercial reason*, adopt a policy of raising interest rates to levels at which its borrowers generally, or a particular category of its borrowers, may be expected to consider refinancing their borrowings at more favourable rates of interest offered by other commercial lenders. Save as otherwise expressly agreed with its borrowers, a commercial lender is ... free to conduct its business in what it genuinely believes to be its best commercial interest.”<sup>434</sup>

In a different context, in *Lymington Marina Ltd v MacNamara*<sup>435</sup> the Court of Appeal accepted that it should imply some limitations on the exercise of a contractual power in one of the parties drawn in very broad terms, but it considered that the standard to be applied should not be too onerous, nor should it rest on public law principle.<sup>436</sup> The case concerned a contractual licence to berth a yacht at a marina, the express terms of which provided that the licensee was entitled to authorise a third party to exercise his rights for a period of between one month and one year “provided that such party first be approved” by the licensor who operated the marina. In these circumstances, the Court of Appeal was clear that the grounds on which approval of the sub-licence might be withheld were limited to those relating to the sub-licensee himself and his proposed use, and more generally could not be “wholly unreasonable” or be made “arbitrarily”, “capriciously” or “in bad faith”.<sup>437</sup> However, it refused to imply a term in the contract that the approval should be “objectively justifiable” as this was neither so obvious that the parties would not have thought it necessary to mention nor necessary to give the contract business efficacy.<sup>438</sup>

## Socimer International Bank Ltd

- 168 In *Socimer International Bank Ltd v Standard Bank London Ltd*<sup>439</sup> in the context of an express contractual discretion in a seller of securities on a forward basis to value assets on default of payment by the buyer), Rix LJ observed that:

“... a decision-maker’s discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury*

unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time.”<sup>440</sup>

Rix LJ agreed with the observation of Laws LJ in the course of argument that:

“... pursuant to the *Wednesbury* rationality test, the decision remains that of the decision maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself.”<sup>441</sup>

The Court of Appeal therefore rejected the contention that the seller’s decision as to valuation of the assets had to be exercised with reasonable care (an implied term which was both unnecessary and of uncertain content in the context),<sup>442</sup> rejecting also for this purpose the analogy (accepted by the court below) between the position of the parties to the commercial contract before it and the relationship between a mortgagor and a mortgagee.<sup>443</sup>

## No qualification on exercise of “absolute contractual right”

<sup>469</sup> In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)*<sup>444</sup> the Court of Appeal considered whether the decision-making of a party under particular terms of its contract was impliedly subject to a term that it should not do so “in an arbitrary, capricious or irrational manner”. Jackson LJ (with whom Lewison and Beatson LJJ agreed) reviewed the authorities that accepted such a qualification on the exercise of a contractual discretion, notably *Socimer International Bank Ltd v Standard Bank London Ltd*,<sup>445</sup> but distinguished the contractual terms with which these cases dealt and the relevant terms before the court:

“... [a]n important feature of the ... authorities is that in each case the discretion does not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so.”<sup>446</sup>

In the contract before the Court of Appeal, an NHS Trust had agreed to employ the respondent to supply catering and cleaning services for seven years for one of its hospitals. Under the contract, the Trust was entitled to award “service failure points” in respect of failures in the provision of the services, the contract specifying both how these points should be calculated and their consequences for the contractor in terms of deductions from its remuneration and possible termination of the contract. This being the case, the Court of Appeal held that the contract left no room for discretion in the calculation of the “service failure points” nor in their deduction from the remuneration and, as a result, there could be no implied term not to act in relation to this calculation or deduction in an arbitrary, irrational or capricious manner when assessing these matters.<sup>447</sup> As Lewison LJ observed, while “it was up to the Trust to decide whether or not to levy payment deductions; and whether or not to award [service failure points]”, in doing so “[e]ither the Trust was right or wrong in its application of the contract terms to the facts of the case”.<sup>448</sup> In these circumstances, the Trust had no discretion to exercise in these matters.<sup>449</sup>

## Braganza v BP Shipping Ltd

- 170 In *Braganza v BP Shipping Ltd* an employer had a power under the contract of employment to determine the facts surrounding the death of its employee while serving on its vessel at sea; the employer had decided that he had committed suicide, with the result that no death-in-service payments were payable to his widow under the contract.<sup>450</sup> The Supreme Court was agreed on the principles applicable. According to Lady Hale:

“Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties’ bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.”<sup>451</sup>

In this respect, the Supreme Court approved Rix LJ’s view of the authorities in *Socimer International Bank Ltd*<sup>452</sup> and accepted the parallel earlier drawn with the control of decision-making by public bodies under a statutory or prerogative power,<sup>453</sup> while noting the “understandable reluctance” of the courts to adopt the “fully developed rigour of the principles of judicial review of administrative action in a contractual context” and their difficulty in articulating

the difference.<sup>454</sup> In the particular context the Supreme Court held that the contractual power in the employer to decide the facts surrounding the employee's death was subject to an implied term that:

“... the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose.”<sup>455</sup>

This meant that “both limbs of the *Wednesbury* formulation in the rationality test” applied, i.e. imposing requirements both as to the decision-making process (considerations properly to be taken into account and ones not to be taken into account)<sup>456</sup> and as to the outcome (the result not being “so outrageous that no reasonable decision-maker could have reached it”).<sup>457</sup> In the case before them, the majority of the Supreme Court held that the employer should not simply have accepted the conclusion of its investigators' report (whose purpose was to determine if its systems could be improved) in deciding whether its employee had committed suicide, and had relied on insubstantial evidence and had failed to take all relevant matters into account.<sup>458</sup> As a result, the decision of the employer could not stand and the employee's widow was entitled to the death-in-service payment.

## Contractual discretions and “absolute contractual rights”

- <sup>171</sup> In some cases it may not be straightforward to draw the line between a contractual discretionary power of the type which attracts the application of the qualifying implied term foreseen by *Socimer*<sup>459</sup> and *Braganza*<sup>460</sup> and “a simple decision whether or not to exercise an absolute contractual right”,<sup>461</sup> which does not. In *Property Alliance Group Ltd v Royal Bank of Scotland Plc*<sup>462</sup> a contract under which a bank provided a financial facility to a property investment business (the borrower) contained express authority (by a “valuation clause”) for the bank to obtain a professional valuation of the premises charged as security for the funding provided at the cost of the borrower. The borrower claimed, inter alia, that the bank's power to obtain such a valuation was subject to an implied term that the bank must act reasonably, in a commercially acceptable or rational way, in good faith, not capriciously nor arbitrarily and for the purpose for which the power was conferred and that, on the facts, a purported exercise by the bank of this power was “pointless, without good or rational reason” and so in breach of this implied term.<sup>463</sup> At first instance, Asplin J observed that a discretion “requires the contracting party to make some kind of assessment or to choose from a range of options” and held that “no element of discretion, assessment, or formulation of opinion arises” arose in relation to the exercise of the power in the valuation clause and that instead the bank had an “absolute right to call for the valuation” so as to preclude the application of the *Socimer* implied term.<sup>464</sup> On this point, however, the Court of Appeal disagreed, holding that the bank's power under the valuation clause was “not wholly unfettered”.<sup>465</sup> While the clause was indeed inserted for the benefit of the bank which must have

been “free to act in its own interests” and “was under no duty to attempt to balance its interests against those of [the borrower]”, nevertheless, it could be inferred:

“... that the parties intend the power granted by [the valuation clause] to be exercised in pursuit of legitimate commercial aims rather than, say, to vex [the borrower] maliciously.”<sup>466</sup>

Accordingly, the bank was not entitled to commission a valuation “for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them”.<sup>467</sup> However, the facts did not justify a finding that such an implied term had been broken so that the decision below holding that the bank was entitled to commission the valuation and to recover its cost was affirmed.<sup>468</sup>

<sup>172</sup> In *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*,<sup>469</sup> the Court of Appeal considered the significance of the *Braganza* implied term in the context of an aspect of the reinsurance implications of the special rules governing causation in claims for mesothelioma resulting from exposure of employees to asbestos (the so-called “*Fairchild* enclave”).<sup>470</sup> Under these rules:

“... any employer who has exposed a victim to asbestos in breach of duty, for however short a period, is liable in full to a victim of mesothelioma, while any [employers liability] insurer of such an employer is liable in full to indemnify the employer, again regardless of the period for which it has provided insurance and received premium.”<sup>471</sup>

The Court of Appeal considered whether an insurer which had so indemnified an employer could then claim an indemnity against its reinsurer

“...for its full loss under whichever annual reinsurance policy within this period [of exposure to asbestos] it chooses in order to maximise its reinsurance recovery, or whether it is limited to claiming under each annual reinsurance policy a pro rata share of the settlement sum.”<sup>472</sup>

In addressing this question, Males LJ (with whom Patten LJ agreed) considered that it was desirable to correct the anomalies created by the *Fairchild* enclave once its objective of ensuring victim protection had been achieved by returning to common law principles by which liability should be apportioned by reference to contribution to the risk.<sup>473</sup> In this respect, he considered whether the insurer’s “contractual right to present its reinsurance claims to the policy year of its choice”<sup>474</sup> was qualified in a way suggested by the line of cases associated with *Braganza*.<sup>475</sup> For this purpose, Males LJ noted Jackson LJ’s distinction in the *Mid Essex* case between discretions involving “an assessment or choosing from a range of options, taking into account the interests of both parties”

and “those involving a simple decision whether or not to exercise an absolute contractual”,<sup>476</sup> observing that

“... although the *Mid Essex* case uses the expression ‘absolute contractual right’ that is the result of a process of construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context, not a starting point intrinsic to the term itself. It is only possible to say whether a term conferring a contractual choice on one party represents an absolute contractual right after that process of construction has been undertaken.”<sup>477</sup>

- 173 Males LJ saw “powerful reasons” to support the implication of a term requiring the exercise of the insurer’s contractual choice as to the year of presentation of its reinsurance claims “in a manner which is not arbitrary, irrational or capricious” in the very specific reinsurance context existing within the *Fairchild* enclave<sup>478</sup> and held that, in this context:

“... rationality requires that [the insurer’s claims] be presented by reference to each year’s contribution to the risk, which will normally be measured by reference to time on risk unless in the particular circumstances there is a good reason ... for some other basis of presentation”

as allowing the insurer to choose which year within the period of exposure in which to claim “is inconsistent with the presumed intentions and reasonable expectations of the parties at the time when the contracts were concluded”.<sup>479</sup> While such an implied term may be described conveniently as requiring “good faith” this is merely a label as its content and rationale is particular to the context, as Males LJ had set out.<sup>480</sup>

- 174 Leggatt LJ (with whom Patten LJ also agreed) concurred with Males LJ and noted the development of:

“... the readiness of courts to imply a term as to the manner in which contractual power may be exercised so as to ensure that the power is not abused and is exercised in good faith. The doctrine of good faith in this context requires a contractual power to be exercised in a way which is consistent with the justified expectations of the parties arising from their agreement, construed in its relevant context.”<sup>481</sup>

Leggatt LJ saw the basis of such an implied term of good faith as proceeding from the construction of the express terms and founded on the test of necessity,<sup>482</sup> it being, in the words of Lord Steyn, “essential to give effect to the reasonable expectations of the parties”.<sup>483</sup> For this purpose:

“... the courts recognise that, where the contract permits a party to make a choice or requires it to make an evaluative judgment, it is for that party and not the court to make the relevant choice or evaluation”<sup>484</sup>

and this is the reason why the courts have had recourse to a standard of review similar to the review of administrative action, though:

“... [w]hat is honest and reasonable is judged by reference to the purpose(s) which the contract requires or permits the party exercising the relevant power to pursue.”<sup>485</sup>

On the other hand, Leggatt LJ recognised that there are also occasions in which a contractual power is not fettered by an implied term in this way, this also being a matter of construction.<sup>486</sup> In the particular case before the court, he held that it was:

“... necessary to imply a term which restricts the exercise of the reinsured’s power to select how it will present its claim as between policy years”

so as to “make the contracts work as consistently as is possible with the parties’ presumed intention and reasonable expectations”.<sup>487</sup> Such an implied term prevents the insurer from abusing its contractual power to allocate loss among policy years.<sup>488</sup>

## Drawing the line between “contractual discretions” and “absolute contractual rights”

**D** 75 The courts have decided a number of other cases in which they have held that a contractual power falls on one or other side of the line between discretions which are subject to an implied qualification of good faith, etc.

<sup>489</sup>

**U** 490 or instead provides the parties with an “absolute discretion”

**U** 491 ; in some cases they have held that the same contract contains a power of one nature and also a power of the other.

**U** From the cases, three main elements are relevant to their decisions.

## Construction of the express term

176 First, the courts start with the wording of the express term which provides the power subject to consideration, construing it in particular in relation to its function in the contract more generally, its matrix of fact and purpose.

492

U In this respect, it is relevant whether the power is expressed as being exercised by a party “at its discretion”,

493

U but even a very widely drafted power may need to be qualified in the particular context.

494

U Moreover, a contractual power which is described as being “discretionary” may in fact on its proper construction not involve any discretion, as in *Mid Essex Hospital Services NHS Trust* where “[e]ither the Trust was right or wrong in its application of the contract terms to the facts of the case”.

495

U And where a contractual power of decision-making is qualified expressly by the contract itself (as where a contract requires one of the parties to demonstrate certain matters “to the reasonable satisfaction” of the other party), this express objective qualification means that there is “no need for a further or different control mechanism” by way of implied term.

496

U Finally, it has been said that “the Braganza doctrine has no application to unqualified termination provisions within expertly drawn complex commercial agreements between sophisticated commercial parties”.

497

U

## Relevance of regulatory context

177 The process of construction of the contract may include reference to its legal or regulatory context. This was seen above in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*,<sup>498</sup> where the very specific reinsurance context existing within the *Fairchild* enclave<sup>499</sup> was held relevant.<sup>500</sup>

And in *Telefonica O2 UK Ltd v British Telecommunications Plc* the Supreme Court held that a power in British Telecom unilaterally to fix its charges to mobile network operators must be exercised in good faith and not arbitrarily or capriciously, and should be limited by reference to the purposes set out in the relevant EU directive which formed part of a pan-European regulatory scheme.<sup>501</sup>

## Nature of the relationship between the parties

- 178 Secondly, in holding that the contractual power in question should be qualified, the Supreme Court in *Braganza* emphasised the importance of the fact that a term which allowed one party to determine the relative rights of itself and the other party created a conflict of interest which was “heightened where there is a significant imbalance of power between the contracting parties” as there often will be in an employment contract”.<sup>502</sup> This factor could also be seen as relevant to the earlier case of *Paragon Finance Plc v Nash*,<sup>503</sup> where the court implied a qualification in the power of a lender to vary the interest rate in a consumer credit agreement.<sup>504</sup> Such an imbalance of power explains the attraction for the courts of the analogy with review of the exercise of discretionary powers as a matter of administrative law. By contrast, the Court of Appeal in *Mid Essex Hospital Services NHS Trust* in holding that a power granted the NHS hospital trust an “absolute contractual right” in relation to a decision-making power in respect of failures in the provision of the services for which it had contracted, noted that the “Trust is a public authority delivering a vital service to vulnerable members of the public.”<sup>505</sup> Finally, in a professionally drafted joint operation contract relating to North Sea oil fields express terms provided that the relationship was not and was not intended to be a partnership<sup>506</sup> and that the parties were fully entitled to vote at joint operation committee meetings in accordance with what they perceived to be their own best interests<sup>507</sup>; and it was therefore held that the unqualified nature of a right to terminate the status as “operator” of the fields of one of its participants was consistent with the common understanding of the parties to the agreement as to the nature of their relationship.<sup>508</sup>

## Nature of the decision-making authorised by the contract term

- 179 Thirdly, the nature of the decision-making granted to the party is important in determining whether or not it should be qualified. Where, as in *Braganza*, the decision-making power involves the assessment of facts and the application to those facts of rules (whether contractual or legal) the power must be exercised in a way which is lawful, rational “in the public law sense”, in good faith and “consistently with its contractual purpose”.<sup>509</sup> This kind of implied restriction has also been applied where one of the parties has a power to value assets and can thereby affect the legal rights or obligations of the other party, as in *Socimer International Bank Ltd.*<sup>510</sup> On the other hand, it has

been said that a right to terminate a contract granted by an express contract term does not involve the exercise of a discretion but instead “involves a binary choice” and there should therefore be no implied term that the party would not exercise it:

“... in bad faith and/or in any manner which unconscionably deprived [the other party] of its accrued and/or future rights arising under that Agreement and/or only for a proper purpose.”<sup>511</sup>

## Footnotes

- 424 See, in particular, *Morgan* (2015) *L.M.C.L.Q.* 483; *Chan* (2019) *135 L.Q.R.* 88; *Bridge* (2019) *135 L.Q.R.* 227; *Foxton* (2017) *L.M.C.L.Q.* 360; *Sales* (2020) *136 L.Q.R.* 384; *Hopkins* (2021) *J.B.L.* 219; *Rowan* (2021) *84 M.L.R. forthcoming*. cf. *Johnstone v Bloomsbury Health Authority* [1992] *Q.B.* 333 (express discretionary power in employer read subject to duty not to harm employee’s health), below, para.3-038.
- 425 [2008] *EWCA Civ* 116, [2008] *1 Lloyd’s Rep.* 558 and see below, para.2-068.
- 426 [2015] *UKSC* 17, [2015] *1 W.L.R.* 1661 and see below, para.2-070.
- 427 Below, paras 2-068 et seq.
- 428 Below, paras 2-069, 2-071—2-079.
- 429 [2001] *EWCA Civ* 1466, [2002] *1 W.L.R.* 685.
- 430 [2002] *1 W.L.R.* 685 at [30], per Dyson LJ.
- 431 [2002] *1 W.L.R.* 685 at [32].
- 432 [2002] *1 W.L.R.* 685 at [40].
- 433 [2005] *EWCA Civ* 760, [2005] *1 W.L.R.* 3412.
- 434 [2005] *EWCA Civ* 760 at [120] (original emphasis).
- 435 [2007] *EWCA Civ* 151, [2007] *Bus. L.R. D29*, *Morgan* [2008] *L.M.C.L.Q.* 523. cf. *Eastleigh BC v Town Quay Developments Ltd* where, while it was accepted (by agreement of the parties) that there is no general principle that, whenever a contract requires the consent of one party to be obtained by the other, there must be a term implied that such consent shall not be unreasonably withheld, in the circumstances a term should be implied that consent to the exercise of a right over land would not be unreasonably withheld: [2009] *EWCA Civ* 1391, [2010] *2 P. & C.R.* 2 at [20], [36]–[39].
- 436 [2007] *EWCA Civ* 151 at [36]–[37].
- 437 [2007] *EWCA Civ* 151 at [42]–[44].
- 438 [2007] *EWCA Civ* 151 at [43], per Arden LJ (with whom Pill LJ and Sir Martin Nourse agreed). See similarly *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] *EWHC 2433 (QB)* at [33]–[34]. cf. *Barclays Bank Plc v Unicredit Bank AG* [2014] *EWCA Civ* 302, [2014] *1 C.L.C.* 342 at [19]–[21], where it was held that an express term as to the giving of consent by a guarantor to termination of a guarantee “in a commercially reasonable manner” did not on its proper construction mean that the guarantor had to give priority to the other party’s

commercial interest over its own: *[2014] EWCA Civ 302* at [21]–[22]; *Lehman Bros Special Financing Inc v National Power Corp* *[2018] EWHC 487 (Comm)* at [63]–[82] concerning an express term that a party could make a determination “[a]ct[ing] in good faith and us[ing] commercially reasonable procedures in order to produce a commercially reasonable result” in relation to which Robin Knowles J observed, at [68], that “the choice to make a party to the contract the decision maker does not ... compel a conclusion that ‘reasonableness’ is deployed to mean rationality. It will depend on the wording and the context”.

- 439 *[2008] EWCA Civ 116*, *[2008] 1 Lloyd's Rep. 558*. cf. *Prudential Staff Pensions Ltd v Prudential Assurance Co Ltd* *[2011] EWHC 960 (Ch)*, *[2011] Pens. L.R. 239* at [140]–[153] (obligation of good faith on employer in relation to decision-making under employee pension scheme).
- 440 *[2008] EWCA Civ 116* at [66] (with whom Laws and Lloyd LJ agreed).
- 441 *[2008] EWCA Civ 116* at [66]. See also *Lehman Bros Special Financing Inc v National Power Corp* *[2018] EWHC 487 (Comm)* at [63]–[82]; *LBI EHF v Raiffeisen Bank International AG* *[2018] EWCA Civ 719*.
- 442 *[2008] EWCA Civ 116* at [107]–[121] (Rix LJ).
- 443 *[2008] EWCA Civ 116* at [122] (Rix LJ); [147]–[157] (Lloyd LJ), with both of whom Laws LJ agreed: *[2008] EWCA Civ 116* at [158].
- 444 *[2013] EWCA Civ 200*, *[2013] B.L.R. 265*.
- 445 *[2008] EWCA Civ 116*, *[2008] 1 Lloyd's Rep. 558*, above, para.2-068. See also *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The “Product Star”)* *[1993] 1 Lloyd's Rep. 397* esp. at 404; *Horkulak v Cantor Fitzgerald International* *[2004] EWCA Civ 1287*, *[2005] I.C.R. 402* at [66]; *JML Direct Ltd v Freesat UK Ltd* *[2010] EWCA Civ 34* at [14].
- 446 *[2013] EWCA Civ 200* at [83].
- 447 *[2013] EWCA Civ 200* at [84]–[92].
- 448 *[2013] EWCA Civ 200* at [138].
- 449 *[2013] EWCA Civ 200* at [138]–[139]; applied in *Monde Petroleum SA v Western Zagros Ltd* *[2016] EWHC 1472 (Comm)* at [261]–[275], *[2017] 1 All E.R. (Comm) 1009* (contractual right to terminate a contract not a discretion and may be exercised irrespective of the party’s reasons for doing so) (affirmed on other grounds *[2018] EWCA Civ 25*); *Monk v Largo Foods Ltd* *[2016] EWHC 1837 (Comm)* at [52]–[60]; *Foxton* (2017) *L.M.C.L.Q. 360*.
- 450 *[2015] UKSC 17*, *[2015] 1 W.L.R. 1661*.
- 451 *[2015] UKSC 17* at [18] with whom Lord Kerr agreed generally. Lords Wilson, Hodge and Neuberger agreed with Lady Hale in this respect: *[2015] UKSC 17* at [52]–[53], [102]–[103].
- 452 *Socimer International Bank Ltd v Standard Bank Ltd* *[2008] EWCA Civ 116* at [60]–[66], above, para.2-068, and see *[2015] UKSC 17* at [22] and [102].
- 453 *[2015] UKSC 17* at [19].
- 454 *[2015] UKSC 17* at [20] per Lady Hale and see also at [28], [53] (Lord Hodge) and [103] (Lord Neuberger). It was considered unnecessary to conclude finally on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action: *[2015] UKSC 17* at [31] (Lady Hale).
- 455 *[2015] UKSC 17* at [30]. Lady Hale and Lord Kerr considered that the fact that contracts of employment contain an implied obligation of trust and confidence is relevant for this

purpose: [2015] *UKSC* 17 at [32]; Lord Hodge agreed (at [61]), though he did not rely on this as it had not been argued and cf. at [54]–[55]. cf. Lord Neuberger considered that such an implied term did not add anything once the implied term based on *Wednesbury* rationality had been accepted: [2015] *UKSC* 17 at [104].

- 456 [2015] *UKSC* 17 at [30] and cf. at [24]; similarly at [53] (Lord Hodge) [103] (Lord Neuberger).
- 457 [2015] *UKSC* 17 at [24]. cf. *Patural v DB Services (UK) Ltd* [2015] *EWHC* 3659 (QB), [2016] *I.R.L.R.* 286 at [61].
- 458 [2015] *UKSC* 17 at [38]–[42] (Lady Hale and Lord Kerr); [49]–[50], [58]–[59], [62] (Lord Hodge). In this respect, Lords Neuberger and Wilson dissented, considering that the employer was justified in finding that the employee had committed suicide based on a combination of cogent reasons: [2015] *UKSC* 17 at [114] and [126].
- 459 *Socimer International Bank Ltd v Standard Bank London Ltd (No.2)* [2008] *EWCA Civ* 116, [2008] *1 Lloyd's Rep.* 558, above, para.2-068.
- 460 *Braganza v BP Shipping Ltd* [2015] *UKSC* 17, [2015] *1 W.L.R.* 1661.
- 461 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] *EWCA Civ* 200, [2013] *B.L.R.* 265 at [83], per Jackson LJ, above, para.2-069.
- 462 [2016] *EWHC* 3342 (Ch); [2018] *EWCA Civ* 355, [2018] *1 W.L.R.* 3529.
- 463 [2018] *EWCA Civ* 355 at [162].
- 464 [2016] *EWHC* 3342 (Ch) at [278] per Asplin J.
- 465 [2018] *EWCA Civ* 355 at [169] (approved judgment of Sir Terence Etherton MR, Longmore and Newey LJJ).
- 466 [2018] *EWCA Civ* 355 at [169].
- 467 [2018] *EWCA Civ* 355 at [169].
- 468 [2018] *EWCA Civ* 355 at [174]–[175].
- 469 [2019] *EWCA Civ* 718, [2020] *1 Q.B.* 418.
- 470 *Fairchild v Glenhaven Funeral Services Ltd* [2002] *UKHL* 22, [2003] *1 A.C.* 32; Compensation Act 2006 s.3 and see [2019] *EWCA Civ* 718 at [24] et seq.
- 471 [2019] *EWCA Civ* 718 at [5].
- 472 [2019] *EWCA Civ* 718 at [4].
- 473 [2019] *EWCA Civ* 718 at [91]–[93].
- 474 [2019] *EWCA Civ* 718 at [102].
- 475 [2019] *EWCA Civ* 718 at [106]. Males LJ considered that as a matter of authority the post-contractual duty of an insurer to act in good faith did not extend to this situation: [2019] *EWCA Civ* 718 at [104].
- 476 [2019] *EWCA Civ* 718 at [111]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] *EWCA Civ* 200, [2013] *B.L.R.* 265 at [83] per Jackson LJ quoted above, para.2-069.
- 477 [2019] *EWCA Civ* 718 at [113].
- 478 [2019] *EWCA Civ* 718 at [114].
- 479 [2019] *EWCA Civ* 718 at [114].
- 480 [2019] *EWCA Civ* 718 at [116].

- 481 [\[2019\] EWCA Civ 718](#) at [148].
- 482 [\[2019\] EWCA Civ 718](#) at [149]–[150]. On the test of necessity see below, paras 16-011 et seq.
- 483 [Equitable Life Assurance Society v Hyman \[2002\] 1 A.C. 408, 459](#) quoted [\[2019\] EWCA Civ 718](#) at [149]. On the views of Lord Steyn, see above, para.2-025.
- 484 [\[2019\] EWCA Civ 718](#) at [151].
- 485 [\[2019\] EWCA Civ 718](#) at [151].
- 486 [\[2019\] EWCA Civ 718](#) at [155] citing [Compass Group UK and Ireland Ltd \(trading as Medirest\) v Mid Essex Hospital Services NHS Trust \[2013\] B.L.R. 265](#) (on which see above, para.2-066) where “the only discretion which the trust had was to decide whether or not to exercise an absolute contractual right”: [\[2019\] EWCA Civ 718](#) at [156].
- 487 [\[2019\] EWCA Civ 718](#) at [158].
- 488 [\[2019\] EWCA Civ 718](#) at [162].
- 489 See [B.H.L. v Leumi ABL Ltd \[2017\] EWHC 1871 \(QB\)](#), [\[2017\] 2 Lloyd's Rep. 237](#) at [36]–[41] (contractual power to set an additional percentage fee for collection of receivables must be exercised in a way which is not arbitrary, capricious or irrational in a public law sense); [JML Direct Ltd v Freesat UK Ltd \[2010\] EWCA Civ 34](#) at [14] ((satellite television service contracting to supply a provider of television shopping channels with two shopping channels on its platform and having discretion under the contract in the allocation of logical channel numbers); [Watson v Watchfinder.co.uk Ltd \[2017\] EWHC 1275 \(Comm\)](#), [\[2017\] Bus. L.R. 1309](#) [102]–[103] (contractual option to purchase shares in a company which formed part of a wider commercial relationship between the parties and which was contingent on the consent of that company’s board, which had to be made by reference to the qualifications in *Braganza*); [Mckay v Centurion Credit Resources LLC \[2012\] EWCA Civ 1941](#), especially at [17], [21]–[22] (contract term in business loan arrangement providing for advance of funds “in the lender’s sole discretion” on demand of borrower); [Brogden v Investec Bank Plc \[2014\] EWHC 2785 \(Comm\)](#), [\[2014\] I.R.L.R. 924](#) at [91], [95]–[102] (term in employment contract for payment of bonus); [Portsmouth City Council v Ensign Highways Ltd \[2015\] EWHC 1969 \(TCC\)](#) at [103]–[113] (term in PFI contract providing for assessment of the number of “service points” based on other party’s breach); [Everwarm Ltd v BN Rendering Ltd \[2019\] EWHC 3060 \(TCC\)](#) at [122]–[123] (express term entitling the employer of a building contractor to assess the value of work done and what it therefore owed and, as relevant, to recover the difference from what it had paid); [Essex CC v UBB Waste \(Essex\) Ltd \[2020\] EWHC 1581 \(TCC\)](#) at [96]–[98], [149], [271] and [278] (no breach of implied term to act rationally, not capriciously if implied); [Multiplex Construction Europe Ltd v R&F One \(UK\) Ltd \[2019\] EWHC 3464 \(TCC\)](#) at [27]–[28] (not “arbitrary or capricious” to exercise a contractual discretion to suspend performance on the ground of failure to provide payment security as stipulated as to do so “would be exercising its discretion consistently with the contractual purpose of the right to suspend”); [UK Acorn Finance Ltd v Markel \(UK\) Ltd \[2020\] EWHC 922 \(Comm\)](#), [\[2020\] Lloyd's Rep. I.R. 356](#) at [63]–[68] (contractual power under innocent non-disclosure clause in contract of insurance); [Langage Energy Park Ltd v EP Langage Ltd \[2022\] EWHC 432 \(Ch\)](#) at [50]–[83] (implicit in contract relating to the development of an energy centre (a gas-fired power station) and energy park that, in asserting

in a notice that there is or will be a demand from occupiers for specified energy services, the party operating the energy park must reach a decision “by a reasonable process (in public law terms), not for extraneous reasons, and the decision must not be capricious or irrational”).

- 490 See *TSG Building Services Plc v South Anglia Housing Ltd [2013] EWHC 1151 (TCC)* esp. at [42] and [51] (no implied term of good faith restricting the exercise of contractual right “in either party to terminate for any or even no reason”); *Greenclose Ltd v National Westminster Bank Plc [2014] EWHC 1156 (Ch), [2014] 2 Lloyd's Rep. 169* at [144]–[151] (no implied qualifications on express “unqualified right” to extend the term of an interest rate hedging transaction); *Myers v Kestrels Acquisitions Ltd [2015] EWHC 916 (Ch)* at [40]–[41], [50]–[63] (no implied term that a power in a loan-note instrument to modify its terms had to be exercised in good faith); *UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch)* at [49]–[57] (a lender’s power under an express term in a commercial loan secured by mortgage to call in the loan “in its absolute discretion” was not qualified by “a Braganza term” as it was a power that is always exercised solely for the benefit of the mortgagee, though it was noted that the mortgagor retained the protection of the equitable duty of good faith as between mortgagor and mortgagee); *Monde Petroleum SA v WesternZagros Ltd [2016] EWHC 1472 (Comm), [2016] 2 Lloyd's Rep. 229* at [261]–[275] (affirmed on other grounds *[2018] EWCA Civ 25*) (termination clause in agreement for consulting services on which see below, para.2-079); *Cathay Pacific Airways Ltd v Lufthansa Technik Ag [2020] EWHC 1789 (Ch)* at [150]–[183] (no *Braganza* type restriction on the exercise of an express option in one party to a long-term aircraft engine maintenance contract).

- 491 In *Shurbanova v Forex Capital Markets Ltd [2017] EWHC 2133 (QB)* a contractual power to revoke trades made by a customer on an online foreign exchange and commodities facility was held to be an “absolute contractual right” (at [93]–[95]), while a contractual power to revoke trades on the ground that they were based on “manifest error” would have been subject to a qualification of a type recognised in *Braganza* absent an express contractual duty to act fairly (at [81]); and in *Morley (t/a Morley Estates) v Royal Bank of Scotland [2020] EWHC 88 (Ch)* at [160] (Kerr J) a bank’s decision to call in a loan made under a loan facility agreement was held to be an absolute contractual right and not a discretion, but its powers to obtain a revaluation of the charged assets and to charge a default interest rate were both discretions which “had to be exercised for purposes rationally connected to the bank’s commercial interests and not so as to vex the [borrower] maliciously”; the HC’s decision was affd principally on other grounds, but the CA held that, even if there were an implied term requiring good faith, there was no breach on the facts: *[2021] EWCA Civ 338, [2022] 1 All E.R. (Comm) 703* at [70]–[71].

- 492 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200, [2013] B.L.R. 265* at [85]–[96] (and see above, para.2-069); *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd [2019] EWCA Civ 718* at [113] (Males LJ, quoted above, para.2-072); and at [149]–[150], [155]–[156] (Leggatt LJ); *TAQA Bratani Ltd v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm), [2020] 2 Lloyd's Rep. 64* at [35]–[37]

and [39]; *UK Acorn Finance Ltd v Markel (UK) Ltd* [2020] EWHC 922 (Comm), [2020] *Lloyd's Rep. I.R.* 356 at [57].

•493 e.g. *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34 at [14].

•494 See, e.g., *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408 at 459 (where the amount of a bonus payable to the holders of pension annuities was “within the absolute discretion of the directors, whose decision thereon shall be final and conclusive” but where it was held that it was the supposition of the parties that the directors “would not exercise their discretion in conflict with contractual rights”. See also *Mckay v Centurion Credit Resources LLC* [2012] EWCA Civ 1941, especially at [17], [21]–[22] (contract term in business loan arrangement providing for advance of funds “in the lender’s sole discretion” on demand of borrower).

•495 [2013] EWCA Civ 200 at [138]; see above, para.2-069.

•496 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 at [93]–[94]. cf. *UK Acorn Finance Ltd v Markel (UK) Ltd* [2020] EWHC 922 (Comm), [2020] *Lloyd's Rep. I.R.* 356 at [62]–[68] (clause empowering party to decide whether the other party was able to establish “to [its] satisfaction” that non-disclosure or misrepresentation was innocent was held to be qualified by a *Braganza* implied term).

•497 *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), [2020] 2 Lloyd's Rep. 64 at [46] per HH Judge Pelling QC and see similarly *Cathay Pacific Airways Ltd v Lufthansa Technik Ag* [2020] EWHC 1789 (Ch) at [183].

498 [2019] EWCA Civ 718, [2020] 1 Q.B. 418.

499 See above, para.2-072.

500 [2019] EWCA Civ 718 at [114] (Males LJ) and see above, para.2-072.

501 [2014] UKSC 42, [2014] 4 All E.R. 907 at [37], referring to Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002) O.J. L108/33; and see [2014] UKSC 42 at [4].

502 [2015] UKSC 17 at [18] and see above, para.2-070. See also *Brogden v Investec Bank Plc* [2014] EWHC 2785 (Comm), [2014] I.R.L.R. 924 at [100], where the HC linked the qualification on the discretion to fix the amount of a bonus payment to the employee to the general obligation good faith and fair dealing incidental to employment contracts.

503 [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685.

504 Above, para.2-067.

505 [2013] EWCA Civ 200, [2013] B.L.R. 265 at [91]; see above, para.2-069.

506 cf. above, para.2-049 in relation to partnership contracts themselves.

507 *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), [2020] 2 Lloyd's Rep. 64 at [38].

508 [2020] EWHC 58 (Comm) at [38].

- 509 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 W.L.R. 1661 at [30] and see above, para.2-070. cf. *Gray v Marlborough College* [2006] EWCA Civ 1262, [2006] E.L.R. 516, above, para.2-054 (*express* term in contract between an independent school and the parent of one of its pupils required the headmaster of the school to consult the pupil's parents and generally to act fairly before requiring the pupil's removal from the school).
- 510 Above, para.2-068. See also *WestLB AG v Nomura Bank International Plc* [2012] EWCA Civ 495, especially at [30], [32] and *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, [2018] 1 W.L.R. 3529, above, para.2-071.
- 511 *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2016] 2 Lloyd's Rep. 229 at [261]–[275] esp. at [275], referring to *Lomas v JFB Firth Rixon Inc* [2012] EWCA Civ 419, [2012] 2 Lloyd's Rep. 548 at [46]. The decision of the HC in *Monde Petroleum SA* was affirmed on other grounds: [2018] EWCA Civ 25. See also *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) esp. at [42] and [51]; *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), [2020] 2 Lloyd's Rep. 64 at [35] (binary decision with “no evaluatory or adjudicatory exercise” required).

## **(cc) - Implied Terms Requiring Good Faith in Commercial Contracts More Generally**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 2 - Fundamental Principles of Contract Law**

**Section 4. - Good Faith, Contractual Fairness and Reasonableness**

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(vii) - Implied Terms as to Good Faith**

**(cc) - Implied Terms Requiring Good Faith in Commercial Contracts More Generally**

### **Introduction**

<sup>180</sup> Since the decision of Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd*  
<sup>512</sup>

 in 2013, a number of courts at first instance have accepted his suggestion that some commercial contracts (which may be described as “relational contracts”) should contain an implied term requiring good faith in the contracting parties, but other courts at first instance have refused to accept such an implied term in the contract before them. Although, as will be seen, the Court of Appeal has recognised the possibility of finding an implied term of good faith on the basis that the contract is “relational”,  
<sup>513</sup>

 no court higher than the High Court has yet accepted the implication of such a term in a contract on the basis of this particular line of authority.  
<sup>514</sup>



## Yam Seng Pte Ltd

- <sup>181</sup> In *Yam Seng Pte Ltd v International Trade Corp Ltd*<sup>515</sup> Leggatt J held, though strictly obiter, that a contract for a licence to distribute and for the supply of branded goods contained an implied term of good faith in its performance. The key significance of this implied term in the context was that one of the parties should not *knowingly* providing false information on which the other party was likely to rely.<sup>517</sup> In so holding, Leggatt J recognised that the general view among commentators is that there is no legal principle of good faith of general application,<sup>518</sup> but considered that:

“... a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one.”<sup>519</sup>

He continued:

“I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.”<sup>520</sup>

While, therefore, the decision could be fitted into established case-law on the implication of terms of good faith in particular circumstances or as regards particular types of contract (in the *Yam Seng* case, “a distributorship agreement which required the parties to communicate effectively and cooperate with each other in its performance”)<sup>521</sup> in the course of a lengthy discussion of implied terms as to good faith, Leggatt J appeared on occasion to go further and argue in favour of the implication of a term requiring good faith in performance not merely in what he referred to as “relational contracts”<sup>522</sup> but in most, if not all, commercial contracts on the ground of the expectations of their parties.<sup>523</sup> In his view, for this purpose, while good faith would have the significance of honesty, “not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include ‘improper’, ‘commercially unacceptable’ or ‘unconscionable’.”<sup>524</sup>

## Later cases

 52 As Coulson LJ has observed in *Candey Ltd v Bosheh*, in reliance on the authority of *Yam Seng Pte Ltd and Al Nehayan v Kent*,

525



“there has been something of an avalanche of claimants in recent years trying to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith. Only a relatively few have succeeded.”

526



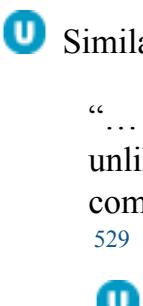
In very broad terms, subsequent judicial comments on Leggatt J’s discussion have suggested that the decision in *Yam Seng Pte Ltd* should not be seen as establishing a principle of general application to all commercial contracts, but rather as recognising a particular example of a type of contract where a term as to good faith should be implied.

527



In particular, in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* Jackson LJ noted that, while there is no general doctrine of “good faith” in English contract law, a duty of good faith may be implied by law as an incident of certain categories of contract, citing *Yam Seng Pte Ltd* as an example.

528



Similarly, in *Greenclose Ltd v National Westminster Bank Plc* Andrews J observed that:

“... there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms’ length.”

529

In Andrew J’s view, *Yam Seng Pte Ltd* is not to be regarded as laying down any general principle applicable to all commercial contracts, but rather “the implication of an obligation of good faith is heavily dependent on the context,” as Leggatt J had expressly recognised.

530



## Term implied in fact or term implied in law?

183

**D** It is submitted that there remains a degree of ambiguity in the approach of the courts in their application of the line of authority following *Yam Seng Pte Ltd* as to whether a term requiring good faith is implied in law or in fact. Sometimes it is said to be implied in fact (as was apparently the case in *Yam Seng Pte Ltd* itself

531

**U** ), but sometimes it appears to be implied in law, that is, implied as an incident consequential on a finding that the contract before the court is a “relational contract”.

532

**U** The distinction between the two types of implied term (which was reaffirmed by the Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*

533

**U** ) is important as it determines the approach applicable to implication. Terms implied in fact are implied to give effect to the intentions of the parties to the particular contract in the light of the express terms of the contract, commercial common sense and the facts known to both parties at the end of the contract, but only where this is *necessary*.

534

**U** In this respect, the proper approach of the court is to start with the construction of the contract and then to consider whether any terms should be implied and, if so, what term, and this allows the application of the “cardinal rule that no term can be implied into a contract if it contradicts an express term”.

535

**U** By contrast, terms implied in law are implied into a “class of contractual relationship ... as a necessary incident of the relationship concerned”.

536

**U** And as regards the latter, the courts do not confine themselves to a narrow test of necessity, but draw upon a broader range of factors.

537

**U** For this purpose, it is clearly required that the category of relationship is definable as, once found, the implied term applies to other contracts within the category.

538

 As will be explained, the Court of Appeal in *Candey Ltd v Bosheh*

539

 considered in turn whether a term of good faith was to be implied either under the “usual test” for the implication of terms (apparently referring to terms implied in fact) or on the basis that the contract was “relational” and therefore contained such a term implied in law.

540



## “Relational contracts”

184 In his discussion of the implication of terms of good faith in *Yam Seng Pte Ltd*, Leggatt J referred to the idea of “relational contracts”<sup>541</sup> which:

“... may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements.”<sup>542</sup>

He gave as possible examples “*some* joint venture agreements, franchise agreements and long term distributorship agreements”.<sup>543</sup> In later cases, the idea of “relational contracts” has been referred to in three ways.

185 First, it has sometimes been used, in a similar way as in *Yam Seng Pte Ltd*, to describe a broad class of contracts in which the court is likely to find a term requiring good faith implied in fact.  
 544



186 Secondly, sometimes courts have considered whether the contract before them should be classed as “relational” and have decided on this basis whether or not good faith should be implied in law,  
 545

 sometimes also considering whether to imply a relevant term in fact.

546

 In *Bates v Post Office Ltd*

547

 Fraser J held that the contracts between the Post Office and sub-postmasters before him were “relational contracts”,

548

 holding this to be an established concept in the case-law

549

 describing a “specie of contracts … in which there is an implied obligation of good faith”

550

 and setting out nine (non-exhaustive) criteria for the identification of this category of contract,

551

 viz:

“1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.

2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.

552



3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.

4. The parties will be committed to collaborating with one another in the performance of the contract.

5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.

6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.

8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.

9. Exclusivity of the relationship may also be present.”

553



The learned judge held that all these features were present in the contracts before him and concluded therefore that they included an implied term requiring good faith.

554

**U** However, Fraser J then considered each of the 21 distinct implied terms alleged by the claimants both in terms of whether they were consequential on his finding that the contracts were “relational” and also, if they were not so consequential, in terms of whether they were necessary to give business efficacy to the contracts, that is, on the basis that they were implied in fact.

555



<sup>187</sup> **D** Thirdly, in *UTB LLC v Sheffield United Ltd* Fancourt J considered that while there may be no difficulty if “relational contract” is used to refer to contracts of the kind described by Leggatt LJ in *Al Nehayan v Kent* (which concerned a joint venture intended as a long-term collaboration and requiring the co-operation and commitment of both parties) with the characteristics identified in *Bates* used to assist their identification, this is not the case if it is used in a broader sense.

556



In his view:

“... there is a danger in using the term ‘relational contract’ that one is not clear about what exactly is meant by it. There is a great range of different types of contract that involve the parties in long-term relationships of varying types, with different terms and varying degrees of detail and use of language, and to characterise them all as ‘relational contracts’ may be in one sense accurate and yet in other ways liable to mislead. It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith.”

557



Rather than seeking “to identify and weigh likely indicia of a ‘relational contract’ in the narrower sense” he considered it preferable to consider directly whether the term should be implied in fact under the test of necessity explained by the Supreme Court in the *Marks & Spencer Plc* case,

558

**U** concluding that on the facts of the case before him, this test had not been satisfied and so no implied term of good faith should be implied.

559

**U** And sometimes a court has denied that the category of “relational contract” justifies the finding of a term implied in law and have instead considered whether a term can be found under the test of necessity in *Marks & Spencer Plc*.

560

**U**

## Candey Ltd v Bosheh

**D** 187A Most recently, in *Candey Ltd v Bosheh* the Court of Appeal considered whether a term should be implied in a contract of retainer between solicitors and their clients under a contingency fee arrangement (CFA) so as to require the *clients* to act in good faith towards the solicitors, whether on the basis of the “usual test for implied terms” (apparently referring to the test for terms implied in fact

561

**U** ) or on the basis that it was a “relational contract”.

562

**U** As to the latter, Coulson LJ (with whom Arnold and Phillips LJ agreed

563

**U** ) referred to the “useful checklist of the possible indicators of a relational contract”

564

**U** provided by Fraser J in *Bates v Post Office Ltd*,

565

**U** but added that “as a general rule, it is important not to veer from the test as to implied terms” which he had earlier stated.

566

**U** Moreover, Coulson LJ quoted with approval Beatson LJ’s observations in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* to the effect that:

“... an implication of a duty of good faith will only be possible where the language of the contract viewed against its context permits it. It is thus not a reflection of a special rule of interpretation for this category of contract.”

567

**U**

According to Coulson LJ, “[p]utting that another way, it might be said that the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law”.

568

**U** In *Candey Ltd v Bosheh* the solicitors had been retained by two clients to defend them against a claim for fraud in earlier proceedings and the clients had settled the action on terms which did not entitle the solicitors to receive payment under the CFA.

569

**U** The solicitors then brought proceedings against the clients

570

**U** on the basis, inter alia, that the contract of retainer was subject to an implied term that the clients would act in good faith towards them and that by settling the fraud action on the basis that they did, they had acted in bad faith and so deprived the solicitor of payment under the retainer. However, the Court of Appeal rejected the implication of such a term as to good faith whether under the “usual test for implied terms” or on the basis that the retainer was a relational contract. As regards the former, such an implied term was not so obvious that it went without saying, nor was it necessary for the retainer to work; there was neither a cogent basis nor any authority for implying such a “startling” implied term

571

**U**; and the fact that the retainer was a CFA did not justify its implication as this feature merely “governs the solicitor's remuneration” and “does not change the services or duties that the solicitor owes the client, or vice versa”.

572

**U** Moreover, the terms of the CFA were themselves contrary to the existence of an implied duty of good faith in the clients to the solicitors, as the solicitors were well aware of the risk that the claims of fraud against their clients would be proven and the retainer provided that in these circumstances they would recover nothing.

573

**U** According to Coulson LJ:

“There can be no room for a good faith obligation in such circumstances; otherwise, rather than this being a conditional fee agreement, it would become a guaranteed fee agreement: [the solicitors] would ‘win’ (ie recover its costs) if their clients were telling the truth (because the [claimant in the earlier proceedings] would lose and the CFA would allow [the solicitors] to recover); but they would also ‘win’ if their clients were found not to be telling the truth (because of the breach of the good faith obligation).”

574

**U**

Finally, Coulson LJ considered that the retainer “was not a relational contract and so the good faith obligation would not be implied as a matter of law”.

<sup>575</sup>

 He supported this conclusion by considering each of the nine indicators set out by Fraser J in *Bates v Post Office Ltd* using these “merely as a sense check rather than a series of statutory requirements”.

<sup>576</sup>

 Thus, apart from the fact that the implied term ran counter to the CFA itself, there was no guarantee that the retainer would be a long-term contract; there was no question of integrity in the clients as they would have paid if the contract had required them do so, and instead the solicitors’ lack of remuneration resulted from the terms of the CFA; there was no commitment to collaboration between the parties; the agreement between the parties was quite capable of being expressed in a written contract (the solicitors being required to take reasonable care in their services and the clients paying for them in accordance with the CFA); the relationship was a fiduciary one under which the solicitors owed an obligation of “loyal subordination” to their clients’ interests, but this was a duty which was “different to the trust and confidence in a relational contract”; there was no high degree of communication and no expectation of loyalty from the clients nor any degree of investment by them; and there was no exclusivity of relationship between them.

<sup>577</sup>

 Overall, therefore, the Court of Appeal held that the solicitors’ claim that the retainer contained an implied term of good faith had no real prospect of success.

<sup>578</sup>



## What good faith requires is sensitive to context

<sup>578</sup> In *Yam Seng Pte Ltd*<sup>579</sup> Leggatt J considered that “[w]hat good faith requires is sensitive to context”<sup>580</sup> and while this “includes the core value of honesty” it may extend to conduct described as “‘improper’, ‘commercially unacceptable’ or ‘unconscionable’”.<sup>581</sup> As Leggatt J later explained:

“... [a] duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable

and honest people”, considering it therefore a “lesser duty” than an express contractual “positive obligation to use all reasonable endeavours to achieve a specified result”.<sup>582</sup>

Where other courts have held that a contract does contain an implied term of good faith, they have determined the meaning of good faith in the circumstances, sometimes in part as a result of their view as to whether the term is implied in law or in fact. For example, in *Bristol Groundschool Ltd v Whittingham* a contract which combined a joint venture and a product distribution agreement was held to be a “relational contract” and therefore to contain an implied term requiring honesty, the relevant test being “that of conduct that would be regarded as ‘commercially unacceptable’ by reasonable and honest people in the particular context involved”, the action of the party concerned being found not to “accord with the normally accepted standards of honest conduct”.<sup>583</sup> Similarly, in *New Balance Athletics Inc v Liverpool Football Club and Athletic Grounds Ltd*<sup>584</sup> a sportswear company had entered a sponsorship agreement with a football club which contained an express term allowing the company to match any third party offer for renewal of the sponsorship contract. The parties had agreed that the contract was subject to an implied obligation of good faith,<sup>585</sup> and it was held that this duty could be “breached not only by dishonesty but also by conduct which lacks fidelity to the parties’ bargain” bearing in mind “the nature of the bargain, the terms of the contract and the context in which the matter arises”.<sup>586</sup> And in *Bates v Post Office Ltd*, having held that the contracts between the Post Office and sub-postmasters were “relational” and contained an implied term of good faith, the court held that this had as its consequence a series of more particular implied terms,<sup>587</sup> including ones which concerned the Post Office suspending the sub-postmaster, terminating the contract, not exercising its discretion arbitrarily, irrationally or capriciously, and exercising its contractual or other powers “honestly and in good faith for the purpose for which [they were] conferred”.<sup>588</sup> The effect of the latter two of these implied terms was held to apply to the exercise of all the Post Office’s contractual powers and discretions under the contract.<sup>589</sup> In this respect, the decision in *Bates* combined elements of the approach to the implication of terms of good faith in *Yam Seng Pte Ltd* with the qualification of contractual powers by implied term associated with the decision of the Supreme Court in *Braganza v BP Shipping Ltd*,<sup>590</sup> as explained above.<sup>591</sup>

<sup>589</sup> In contrast, in *UTB LLC v Sheffield United Ltd*, the court preferred to consider whether it should imply a term in fact in the particular contract before it, rather than on the basis that it may constitute a “relational contract” in part because:

“... the exact content of any implied obligation of fair dealing, or to act with integrity, or to act in good faith, will be highly sensitive to the particular context of the contract ... The greater part of that context is the express terms of the contract.”

<sup>592</sup>

U

In this respect, for example, it has been held that a term implied in a contract for the provision of services relating to a company pension required honesty but *not* good faith in the sense of “fair and open dealing”.

593

U In *Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) v Boots UK Ltd* it was held that there was no implied term requiring good faith in the implicit contract brought about by force of circumstance as an interim arrangement subsequent to a contract by a retailer to outsource its supply of branded goods from a supplier (referred to as a “joint venture”) containing an express term requiring good faith in relation to the operation of the contract,

594

U but that, if there were such a term, it would have imposed on the parties only “a duty to deal with one another on an open and collaborative basis” and not an “obligation to maximise profit”

595

U and would not qualify a party’s right to terminate on reasonable notice by limiting it to exercise only in “good faith”

596

U nor its contractual right to set prices

597

U : the relevant party would still be free to exercise its contractual rights honestly in its own commercial interests, rather than being obliged to subordinate those interests to further the other party’s competing interests.

598

U Similarly, it has been held that even if it were possible to imply a term of good faith in the particular franchise agreement before it, this would not impose a duty upon the franchisor to remind the franchisee of its own contractual rights,

599

U Moreover, while the duty of good faith requires asking whether a party’s conduct would be regarded as “commercially unacceptable” by reasonable and honest people, such a duty does not require a party to renegotiate key aspects of the contract or to give up its right to hold the other party to its bargain.

600

U Finally, while, as has been seen, the Court of Appeal in *Candey Ltd v Bosheh* rejected a claim by solicitors that a contract of retainer made by clients under a contingency fee arrangement to defend them against a claim of fraud imposed an implied term of good faith on those clients,

601

**U** it further held that, if this were wrong and such a term were to have been implied, the clients would not have been in breach of it by settling that claim in a way “which was better for them rather than better for the solicitors”

602

**U** as it meant that the solicitors received no remuneration.

603

**U** According to Coulson LJ:

“it is self-evident that, irrespective of any duty of good faith, the client cannot be in breach because he or she chooses a settlement which they perceive to be as good as or better for them than the one that obviously suits the solicitor. Any other conclusion would fundamentally alter the solicitor/client relationship.”

604

**U**

Moreover, in this respect, the clients were entitled to take into account emotional as well as economic considerations: as Coulson LJ asked rhetorically, “[i]s it really said that the boundaries of ... a duty [of good faith] are to be limited to economic considerations only?”

605

**U**

## Relationship to express terms

190 Finally, as earlier noted, any implied term of good faith must be consistent with the express terms of the contract as properly construed<sup>606</sup> and some judges have expressed the view that any implied term as to good faith should not qualify a right provided by an express term of the contract.<sup>607</sup> This reflects a similar concern to the one expressed by Moore-Bick LJ in *MSC Mediterranean Shipping Co SA v Cottonex Anstaldt* quoted above in relation to a “general principle of good faith”.<sup>608</sup> Moreover, it has been said that where a contract contains express good faith obligations, this:

“... indicates that when the parties intended to impose an obligation of good faith they did so, strongly suggesting that implying a more general good faith obligation would be inconsistent with the express terms.”<sup>609</sup>

Similarly, it has been held that there is no need or scope for implying a term of good faith where in the context its significance was subsumed within an express term to use all reasonable endeavours.<sup>610</sup>

## Comments

**D** 191 It has been seen that there are some categories of contract (notably, employment) where a term imposing a duty of good faith is implied in law as an incident of the contract

[611](#)

**U** and there is, of course, no reason in principle why a future court should not decide that a further category of contract should equally contain such a duty, subject to it being appropriate as a matter of the nature of the contract and the proper balance of the parties' relationship, and to both the category of contract and the content of the duty in the context being able to be defined sufficiently clearly.

[612](#)

**U** However, it is respectfully submitted that the category of "relational contract" is too difficult to define sufficiently clearly for this purpose, even with the aid of the indications proposed in the case law.

[613](#)

**U** In this respect, as has been seen, in *Bates v Post Office Ltd*. Fraser J referred to nine indicators of a relational contract and he found them *all* present in relation to the contracts between the postmasters and the Post Office before him so that it counted as a relational contract.

[614](#)

**U** Conversely, the Court of Appeal in *Candey Ltd v Bosheh* found that *none* of the nine indicators set out by Fraser J in *Bates* were present in relation to the contract of retainer before it and that therefore it was not a relational contract.

[615](#)

**U** Much more difficult, though, are cases where some of the indicators of a relational contract are present, but others are not; and it should also be recalled that the list in *Bates* was explicitly seen as non-exhaustive.

[616](#)

**U** Certainly, if "relational contract" were understood broadly so as to justify the terms of good faith implied in law, this would tend to undermine the denial by English law of a general *legal* duty of good faith in parties to contracts (whether commercial or otherwise).

[617](#)

**U** Instead, rather than focusing on the category of “relational contract” and positing a term implied in law on that basis, it is submitted that the better approach is to consider whether a particular contract necessarily requires a term of good faith to be implied in fact, following the approach of the Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd.*

618

**U** This would allow the sort of indications which have been used by courts to determine whether or not a contract is relational to contribute to the finding of such an implied term in the circumstances under this established legal principle. Such an approach would also enable a court more easily to imply a term of good faith in relation to one or more particular aspects of the parties’ contractual relationship (for example, qualifying particular rights or imposing a duty in relation to particular matters) rather than more generally across the contract subject to the usual test that this is both appropriate and necessary.

619

**U**

## Footnotes

- 512 [2013] EWHC 111 (QB), [2013] Lloyd’s Rep. 526; Whittaker (2013) 129 L.Q.R. 463; Campbell (2014) 77 M.L.R. 475 and see below, para.2-081.
- 513 *Candey Ltd v Bosheh* [2022] EWCA Civ 1103, [2022] 4 W.L.R. 84 on which see below, para.2-087A. The CA had earlier commented on the development in *Globe Motors Inc v TRW Lucas Varsity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [67]–[68]; and *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [105] and [150].
- 514 *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [196]. As will be seen below, para.2-087A, while the CA in *Candey Ltd v Bosheh* [2022] EWCA Civ 1103 accepted the possibility of implying such a term, it held no such term should be implied in the contract before it.
- 515 [2013] EWHC 111 (QB), [2013] Lloyd’s Rep. 526; Whittaker (2013) 129 L.Q.R. 463; Campbell (2014) 77 M.L.R. 475.
- 516 The decision on implied term was strictly obiter as Leggatt J held that Yam Seng Pte Ltd had been entitled to terminate the contract for repudiatory breach on the ground that the other party had threatened not to supply it with products in breach of an express term: [2013] EWHC 111 (QB) at [115]; either this breach or breach of the implied term were held to have justified termination: [2013] EWHC 111 (QB) at [174].
- 517 [2013] EWHC 111 (QB) at [156].

- 518 [2013] EWHC 111 (QB) at [121] citing the present work, 31st edn (2012), Vol.I para.1-039 (and cf. above, paras 2-037—2-038).
- 519 [2013] EWHC 111 (QB) at [131] and see above, para.2-063 (employees and fiduciaries), but cf. above, para.2-049 (partnership).
- 520 [2013] EWHC 111 (QB) at [131].
- 521 [2013] EWHC 111 (QB) at [143].
- 522 [2013] EWHC 111 (QB) at [142].
- 523 [2013] EWHC 111 (QB) at [132], [135]—[136].
- 524 [2013] EWHC 111 (QB) at [138].
- ① 525 [2018] EWHC 333 (Comm), [2018] 1 C.L.C. 216.
- ② 526 [2022] EWCA Civ 1103, [2022] 4 W.L.R. 84 at [31], giving as an example of the acceptance of such an implied obligation *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) (on which see below, para.2-086).
- ③ 527 *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), esp. at [46], but see below, paras 2-083—2-087 in relation to the question whether such a term is implied in fact or in law in “relational contracts”. For cases discussing *Yam Seng Pte Ltd* see also *Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [83]—[92]; *Bristol Groundschool Ltd v Whittingham* [2014] EWHC 2145 (Ch) at [196]); *Acer Investment Management Ltd v Mansion Group Ltd* [2014] EWHC 3011 (QB) at [101]—[109]; *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch) at [106]—[112]; *D & G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) at [176]; *National Private Air Transport Services Co (National Air Services) Ltd v Creditrade LLP* [2016] EWHC 2144 (Comm) at [132]—[136]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [67]; *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2017] 1 All E.R. (Comm) 1009 at [249]—[275]; *Apollo Window Blinds Ltd v McNeil* [2016] EWHC 2307 (QB) at [22]—[24]; *National Private Air Transport Services Co (National Air Services) Ltd v Creditrade LLP* [2016] EWHC 2144 (Comm) at [132]—[136]; *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) at [250] and [275]—[276] (affirmed in relation to other issues [2018] EWCA Civ 355, [2018] 1 W.L.R. 3529); *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), [2017] 1 Lloyd's Rep. 476; *New Balance Athletics Inc v Liverpool Football Club and Athletic Grounds Ltd* [2019] EWHC 2837 (Comm) at [68]—[70]; *UBS AG v Rose Capital Ventures Ltd* [2018] EWHC 3137 (Ch) at [36]; *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [167]—[176]; *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [198]; *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), 188 Con. L.R. 141 at [55]—[56]; *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB); *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd* [2020] EWHC 16 (Comm) at [72]—[80]; *Essex CC v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) at [114]—[116]; *Cathay Pacific Airways Ltd v Lufthansa Technik Ag* [2020] EWHC 1789 (Ch) at [185]—[183] esp. at [197]; *Morley (t/a Morley Estates) v*

*Royal Bank of Scotland* [2020] EWHC 88 (Ch) at [159] (affd. on other grounds [2021] EWCA Civ 338, [2022] 1 All E.R. (Comm) 703); *Russell v Cartwright* [2020] EWHC 41 (Ch) at [87]–[89]; *Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd* [2022] EWCA Civ 153 at [91]–[94] (distinguishing the issue before it as relating to the construction of “bad faith” in the context of a clause entitling an adjudicator to claim fees for work done before resignation).

- 528 [2013] EWCA Civ 200, [2013] B.L.R. 265 at [105] and see also at [150]. cf. *UBS AG v Rose Capital Ventures Ltd* [2018] EWHC 3137 (Ch) at [36] where it was noted that the duty of good faith between mortgagee and mortgagor “does not arise by contractual implication but by virtue of the creation of a mortgage” and distinguishing implied terms of good faith in relation to “business contracts”.
- 529 [2014] EWHC 1156 (Ch), [2014] 2 Lloyd’s Rep. 169 at [150]; *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) at [250] and [276].
- 530 [2014] EWHC 1156 (Ch) at [150], referring to [2013] EWHC 111 (QB) at [147].
- 531 [2013] EWHC 111 (QB) at [131]–[132]. In considering the law of implied terms, Leggatt J relied on *Attorney General for Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [19]–[25] where “Lord Hoffmann characterised the traditional criteria [for the implication of terms], not as a series of independent tests, but rather as different ways of approaching what is ultimately always a question of construction”: [2013] EWHC 111 (QB) at [132]. However, in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [15], [22]–[32] the SC reaffirmed the distinction between terms implied in law and terms implied in fact and the distinction between construction of the contract and the implication of terms: see below, paras 16-010—16-015. It has been later observed that “Leggatt J implied an obligation of good faith into the distributorship contract as a matter of fact and not because the contract was a distributorship contract or, more generally, a ‘relational’ contract”: *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [198]. On the basis of implied terms of good faith see also *Davies (2019) Journal of Commonwealth Law 1*.
- 532 See below, paras 2-084—2-087.
- 533 [2015] UKSC 72, [2016] A.C. 742 at [15] referring to *Geys v Société Générale, London Branch* [2013] 1 A.C. 523 at [55].
- 534 See below, paras 16-005—16-006 and 16-012.
- 535 [2015] UKSC 72 at [28] (Lord Neuberger PSC (with whom Lord Sumption JSC, Lord Hodge JSC and [at [75]] Lord Clarke of Stone-cum-Ebony JSC agreed). cf. at [69]–[71] (Lord Carnwath). And see below, para.16-018.

- 536 *Geys v Société Générale, London Branch* [2013] 1 A.C. 523 at [55] per Baroness Hale DPSC; see further below, paras 16-005 and 16-015.
- 537 Below, paras 16-005 and 16-015 and authorities there cited.
- 538 Below, paras 16-015—16-017.
- 539 [2022] EWCA Civ 1103, [2022] 4 W.L.R. 84.
- 540 Below, para.2-087A.
- 541 On which see Collins in Degeling, Edelman and Goudkamp, Contract in Commercial Law (2016) Ch.3 and *Collins* (2021) 137 L.Q.R. 426 (where the author argues for recognition of employment as a “relational contract” and the latter as a special class of contract whose key feature is “indeterminacy in design”).
- 542 [2013] EWHC 111 (QB), [2013] Lloyd’s Rep. 526 at [142].
- 543 [2013] EWHC 111 (QB) at [142] (emphasis added).
- 544 In *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [167]–[176] Leggatt LJ, sitting in the HC, held that a contract of joint venture contained an implied term requiring good faith on the basis that it was a “relational contract” based on “trust that the other party will act with integrity and in a spirit of cooperation” (at [167]), whether this term was implied in fact or in law (at [174])). In *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [200], Fancourt J noted in relation to *Al Nehayan v Kent* that Leggatt LJ found a term implied in fact and also in law, and as regards the latter was “there explaining that a particular type of contract, which may be called a ‘relational’ contract, is one that will as a matter of law include an obligation of good faith”. cf. *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), [2020] 2 Lloyd’s Rep. 64 at [55] (HH Judge Pelling QC agreed with parties that *Yam Seng Pte Ltd* “does not suggest that wherever there is a ‘relational’ contract there is an implied duty owed by each party to the other or others to act in good faith”).
- 545 *Bristol Groundschool Ltd v Whittingham* [2014] EWHC 2145 (Ch) at [196] (contract which combined joint venture and product distribution agreement held to be a “relational contract”).
- 546 *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [167]–[176], Leggatt LJ at [167] and at [174]. See also *D & G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) at [176] (longer term contract for the recovery of vehicles in the defendant’s police area on its behalf held to be “a ‘relational’ contract *par excellence*”); *Acer Investment Management Ltd v Mansion Group Ltd* [2014] EWHC 3011 (QB) at [101]–[109] esp. at [107] (the argument that a contract for the distribution of financial products was a ‘relational contract’ which contained an implied term of good faith was not grounded in the commercial reality of the relationship between the parties, or in the express terms which … they agreed” (per Elizabeth Laing J); *Essex CC v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) at [99]–[113] (25

year PFI contract for the design, construction and operation of a biological waste treatment plant held to be “a paradigm example of a relational contract in which the law implies a duty of good faith” (per Pepperall J at [113]) though there was no breach of this duty ([\[2020\] EWHC 1581 \(TCC\)](#) at [452.7]); [National Private Air Transport Services Co \(National Air Services\) Ltd v Creditrade LLP \[2016\] EWHC 2144 \(Comm\)](#) at [132]–[136] (no implied term in aircraft lease, as not a “relational” contract contrasting the contracts before the court as “conventional contracts in which the parties’ relationship is ‘legislated for in the express terms of the contract’” (referring to [Yam Seng Pte Ltd \[2013\] EWHC 111 \(QB\)](#) at [143]); [Cathay Pacific Airways Ltd v Lufthansa Technik Ag \[2020\] EWHC 1789 \(Ch\)](#) at [185]–[241] (no term requiring good faith should be implied as a matter of law in a long-term aircraft engine maintenance contract as it was not a “relational contract”; nor should such a term be implied as a matter of fact under the test of necessity); [Bank of Scotland Plc v Hoskins \[2021\] EWHC 3038 \(Ch\)](#) at [73]–[79]; [Morley \(t/a Morley Estates\) v Royal Bank of Scotland \[2020\] EWHC 88 \(Ch\)](#) at [159] (contract not “relational” as it was an “ordinary loan facility agreement”; affd. on other grounds [\[2021\] EWCA Civ 338](#), [\[2022\] 1 All E.R. \(Comm\) 703](#)); [Zymurgorium Ltd v Hammonds of Knutsford Plc \[2021\] EWHC 2295 \(Ch\)](#) at [167]–[172] (while the issue was “academic”, contracts between a manufacturer of spirits and a drinks wholesaler were on balance not found to be “relational” taking into account the factors set out by Fraser J in [Bates v Post Office Ltd \(No.3: Common Issues\) \[2019\] EWHC 606 \(QB\)](#) (on which see below), especially given that the contract was not “relational” at the outset and that to become so would require a basis for finding that it had been varied). In [Wales \(t/a Selective Investment Services\) v CBRE Managed Services Ltd \[2020\] EWHC 16 \(Comm\)](#) at [72]–[80] HH Judge Halliwell considered the discussion in [Bates](#) on “relational contracts” in holding that a contract for the provision of professional advisory services on pensions to a company did not contain an implied term requiring good faith to the recipient of these services as its legal incident, given the particular features of the relationship created by the contract, nor was such an implied term “necessary”; it had, however, been rightly conceded that the contract contained an implied term to deal honestly: [\[2020\] EWHC 16 \(Comm\)](#) at [66].

•547 [Bates v Post Office Ltd \(No.3: Common Issues\) \[2019\] EWHC 606 \(QB\)](#) (Fraser J). This decision is one of several made in complex litigation under a Group Litigation Order (GLO).

•548 [\[2019\] EWHC 606 \(QB\)](#) at [702] et seq.

•549 [\[2019\] EWHC 606 \(QB\)](#) at [705]–[720].

•550 [\[2019\] EWHC 606 \(QB\)](#) at [711].

•551 [\[2019\] EWHC 606 \(QB\)](#) at [721]–[737] and esp. at [725]. Fraser J held that there were no express terms in the contract preventing such a duty of good faith being implied, considering that, if there were, the contracts could not be “relational contracts”: at [737].

•552

While the courts may be more willing to find duties of co-operation or good faith in certain categories of long-term contracts, the mere fact that the contract is long-term does not justify such an implied term: *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601* at [67]. cf. *Acer Investment Management Ltd v Mansion Group Ltd [2014] EWHC 3011 (QB)* at [109] (fact that contract not “long-term” relevant to decision against implied term requiring good faith). Where a contract contains a right to terminate on reasonable notice, it has been said that it does not have “the degree of longevity that points towards the relational analysis”: *Zymurgorium Ltd v Hammonds of Knutsford Plc [2021] EWHC 2295 (Ch)* (appeal pending) at [168.2].

•553 [2019] EWHC 606 (QB) at [725].

•554 [2019] EWHC 606 (QB) at [727]–[728] and [738].

•555 [2019] EWHC 606 (QB) at [743] et seq. In Fraser J’s judgment, the 17 particular implied terms which he held consequential on the implied term of good faith are identified (at [746]) by reference to their paragraphs in “Common Issue 2” (set out at [45] but in two cases as amended by Fraser J). Three terms were held to be implied under the business efficacy test even though they were not held to be consequential on the implied term of good faith (at [749] and [750]–[752]) and one alleged implied term was rejected on either basis (at [753]–[754]).

•556 [2019] EWHC 2322 (Ch) at [202] referring to *Al Nehayan v Kent [2018] EWHC 333 (Comm)* at [167]–[176] (Leggatt LJ).

•557 *UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch)* at [202].

•558 [2019] EWHC 2322 (Ch) at [203] and see below, para.2-089.

•559 [2019] EWHC 2322 (Ch) at [213]; followed by *Mackie Motors (Brechin) Ltd v RCI Financial Services Ltd [2022] EWHC 1942 (Ch)* at [27]–[32] and [35]. cf. *Zymurgorium Ltd v Hammonds of Knutsford Plc [2021] EWHC 2295 (Ch)* (appeal pending) at [170] where HH Judge Pearce observed that “whilst it may not be correct to say that a relational contract should only be found to exist where it is necessary to do so in order to give effect to the presumed intentions of the parties, the court should be slow to introduce obligations into a contract by the use of the concept of the relational contract where it is unnecessary to do so to give proper effect to those intentions”.

•560 *Monde Petroleum SA v WesternZagros Ltd [2016] EWHC 1472 (Comm), [2017] 1 All E.R. (Comm) 1009* at [249]–[251] referring to *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601* at [68]; *Property Alliance Group Ltd v Royal Bank of Scotland Plc [2016] EWHC 3342 (Ch)* at [250] and [275]–[276] (no implied term requiring good faith and fair dealing in “swap agreement” between sophisticated commercial parties negotiating at arm’s length) (affirmed in relation to other

issues [2018] EWCA Civ 355, [2018] 1 W.L.R. 3529). cf. *Hebden v Domino Recording Co Ltd* [2022] EWHC 74 (IPEC) at [81] which concerned an exclusive recording contract under which an artist agreed to provide sound recordings and to assign their copyright to a record label company and where it was held arguable that it may be necessary to make the agreement work effectively to imply a term requiring good faith in the record label company in relation to the exploitation of the sound recordings.

- 561 This significance of the “usual test for implied terms” can be seen from its formulation by Coulson LJ which follows closely the summary by Popplewell J in *Europa Plus SCA SIF, Anthracite Balanced Company (R-26) Ltd v Anthracite Investments (Ireland) Plc* [2016] EWHC 437 (Comm) at [33] which he cited and which was expressly restricted to terms implied in fact: [2022] EWCA Civ 1103 at [29].
- 562 [2022] EWCA Civ 1103, [2022] 4 W.L.R. 84 esp. at [35]. The CA also refused the appeals of the solicitors against orders forbidding their reliance on privileged and/or confidential material in their claims: [2022] EWCA Civ 1103 at [63]–[111].
- 563 [2022] EWCA Civ 1103 at [112] and [119] respectively.
- 564 [2022] EWCA Civ 1103 at [31].
- 565 *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) (Fraser J) at [725] and see above, para.2-086.
- 566 [2022] EWCA Civ 1103 at [32].
- 567 [2016] EWCA Civ 396, [2017] 1 All ER (Comm) 601 at [68] quoted [2022] EWCA Civ 1103 at [32].
- 568 [2022] EWCA Civ 1103 at [32].
- 569 *Candey Ltd v Bosheh* [2022] EWCA Civ 1103, [2022] 4 W.L.R. 84 at [27] on appeal from [2021] EWHC 3409 (Comm), [2022] 4 W.L.R. 12. The solicitors also appealed the HC’s decisions as to its reliance on professionally privileged and/or confidential material.
- 570 They also sued another person who had been sued for fraud in the earlier proceedings but for whom they did not act on the basis that he had procured their clients’ breach of the retainer and/or was liable in unlawful conspiracy.
- 571 [2022] EWCA Civ 1103 at [37].
- 572 [2022] EWCA Civ 1103 at [38].
- 573

- 574 [2022] EWCA Civ 1103 at [39].  
574 [2022] EWCA Civ 1103 at [40].
- 575 [2022] EWCA Civ 1103 at [41].
- 576 [2022] EWCA Civ 1103 at [41] and see above, para.2-086 for the list of indicators as set out in *Bates* itself.
- 577 [2022] EWCA Civ 1103 at [41].
- 578 [2022] EWCA Civ 1103 at [43].
- 579 Above, para.2-081.
- 580 [2013] EWHC 111 (QB) at [141]. In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [150] Beatson LJ considered that this view as to the content of a duty of good faith applies also to the construction of an *express* term requiring good faith and see above, para.2-059.
- 581 [2013] EWHC 111 (QB) at [138].
- 582 *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), [2017] 1 Lloyd's Rep. 476 at [98].
- 583 [2014] EWHC 2145 (Ch) at [196(iv), (v) and (xii)].
- 584 [2019] EWHC 2837 (Comm).
- 585 [2019] EWHC 2837 (Comm) at [43].
- 586 [2019] EWHC 2837 (Comm) at [44]; it was held that there was no such breach by the company in relation to their matching offer on the facts (at [68]–[72]).
- 587 [2019] EWHC 606 (QB) at [743] et seq. Fraser J considered (at [743] et seq.) each of the 21 distinct implied terms alleged by the claimants both in terms of whether they were consequential on his finding that the contracts were “relational” and also, if they were not so consequential, in terms of whether they were necessary to give business efficacy to the contracts, that is, on the basis that they were implied in fact and so within the first category of implied terms recognised by Baroness Hale of Richmond JSC in *Geys v Société Générale* [2013] UKSC 63, [2013] 1 A.C. 523 at [55] (on which see below, paras 16-005 et seq.). In Fraser J’s judgment, the 17 particular implied terms which he held consequential on the implied term of good faith are identified (at [746]) by reference to their paragraphs in “Common Issue 2” (set out at [45] but in two cases as amended by Fraser J). Three terms were held to be implied under the business efficacy test even though they were not held to be consequential on the implied term of good faith (at [749] and [750]–[752]), and one alleged implied term was rejected on either basis (at [753]–[754]).
- 588 [2019] EWHC 606 (QB) at [755].
- 589 [2019] EWHC 606 (QB) at [768] (two further implied terms also had this effect).
- 590 [2015] UKSC 17, [2015] 1 W.L.R. 1661. cf. *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), 188 Con. L.R. 141 at [55]–[56] (even if contract were a “relational

contract”, no implied term as to good faith so as to qualify an express contractual power construed as absolute). See also *Bridge* (2019) 135 L.Q.R. 277.

591 See above, paras 2-070 et seq.

592 *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [204] per Fancourt J referring to *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) at [175] and concluding (at [213]) that in the context no term of good faith should be implied. Fancourt J’s approach was approved and followed by *Russell v Cartwright* [2020] EWHC 41 (Ch) at [87].

593 *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd* [2020] EWHC 16 (Comm) at [66], [72]–[80] (HC agreed with concession made by counsel).

594 [2013] EWHC 3251 (Pat) at [83]–[84] (Norris J).

595 [2013] EWHC 3251 (Pat) at [87].

596 [2013] EWHC 3251 (Pat) at [89].

597 [2013] EWHC 3251 (Pat) at [90].

598 [2013] EWHC 3251 (Pat) at [92].

599 *Apollo Window Blinds Ltd v McNeil* [2016] EWHC 2307 (QB) at [22]–[24].

600 *Essex CC v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) at [114]–[116], esp. at [116.2] and [282].

601 [2022] EWCA Civ 1103, [2022] 4 W.L.R. 84, above, para.2-087A.

602 [2022] EWCA Civ 1103 at [52].

603 [2022] EWCA Civ 1103 at [44]–[59].

604 [2022] EWCA Civ 1103 at [54].

605 [2022] EWCA Civ 1103 at [59]. Coulson LJ also considered that the potential conflict of interest that can arise under a CFA between the client and the solicitor where the terms are drafted in such a way that the solicitor's costs recovery is itself dependent on the client recovering something from the proceedings “cannot be resolved by an implied duty owed by the client to consider the solicitor's financial interests rather than his own; it is for the solicitor to ensure that such conflicts do not arise in the first place”: [2022] EWCA Civ 1103 at [53].

606 *Globe Motors Inc v TRW Lucas Varsity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [68] per Beatson LJ (“an implication of a duty of good faith will

only be possible where the language of the contract, viewed against its context, permits it”); *Monde Petroleum SA v Western Zagros Ltd* [2016] EWHC 1472 (Comm), [2017] 1 All E.R. (Comm) at [250]; *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch) at [106]–[112]. And cf. above, para.2-076 and below, para.16-018 for the position as regards implied terms more generally.

- 607 *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) at [51] (rejecting the existence of an implied term by analogy with the term of trust and confidence in employment, but observing that “[e]ven if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in [an express term of the contract], which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed”, though putting aside the case of “material fraud or dishonesty” which was not present on the facts (per Akenhead J); *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) at [250] and [275]–[276] (no implied term requiring good faith and fair dealing in “swap agreement” between sophisticated commercial parties in part as it would have been inconsistent with express terms excluding equitable or fiduciary duties) (affd in relation to other issues [2018] EWCA Civ 355, [2018] 1 W.L.R. 3529); *Chambers v Rushmon Ltd* [2017] EWHC 124 (Ch) at [6] (no implied term as to good faith where inconsistent with express terms)).
- 608 [2016] EWCA Civ 789, [2016] 2 Lloyd’s Rep. 494 at [45], above, para.2-038.
- 609 *Russell v Cartwright* [2020] EWHC 41 (Ch) at [89], per Falk J. See also *Trustees of Edward Higgs Charity v SISU Capital Ltd* [2014] EWHC 1194 (QB) at [27]–[28], where Leggatt J held that it was impossible to imply a longer duty to negotiate in good faith than the period set by an express term to this effect.
- 610 *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm) at [99].
- 611 Above, para.2-063.
- 612 See below, paras 16-005 and 16-015—16-016.
- 613 Above, paras 2-086—2-087.
- 614 *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [727] and see above, para.2-086.
- 615 *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB), above, para.2-086.
- 616 *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [726].
- 617 Above, paras 2-036—2-039.
- 618 [2015] UKSC 72, [2015] 3 W.L.R. 1843 and see above, para.2-087.
- 619

cf. *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200, [2013] B.L.R. 265* where the CA held in relation to an express term requiring co-operation in good faith that on its proper construction it did not create a general obligation but rather was specifically focussed on two purposes stated in the relevant term: above, para.2-059.

## **(viii) - Government Guidance on Responsible Contractual Behaviour in Response to Covid-19 Epidemic**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 2 - Fundamental Principles of Contract Law

Section 4. - Good Faith, Contractual Fairness and Reasonableness

**(d) - Situations where Good Faith, Fairness or Reasonableness is Relevant**

**(viii) - Government Guidance on Responsible Contractual Behaviour in Response to Covid-19 Epidemic**

### **The content of the guidance**

- 192 In May 2020, the UK Government (and specifically the Cabinet Office) issued a note, Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency.<sup>620</sup> As its title suggests, the note:

“... sets out guidance and recommendations for parties to contracts, in both the public and private sectors, where the performance of contracts (including an obligation to make payment) is materially impacted by the Covid-19 emergency”.<sup>621</sup>

The problem which the Cabinet Office Guidance identifies is that:

“... parties to some contracts may find it difficult or impossible to perform those contracts in accordance with their agreed terms as a result of the impact of Covid-19.”<sup>622</sup>

Accordingly:

“... the Government is strongly encouraging all individuals, businesses (including funders) and public authorities to act responsibly and fairly in the national interest in performing and enforcing their contracts, to support the response to Covid-19 and to protect jobs and the economy.”<sup>623</sup>

For this purpose, the Cabinet Office Guidance explains responsible and fair contractual behaviour in general terms:

“This includes being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties), the availability of financial resources, the protection of public health and the national interest.”<sup>624</sup>

It then lists 15 particular contexts in which fair and responsible contractual behaviour is encouraged, including, notably, requesting, and giving, relief for impaired performance; making, and responding, to claims for, force majeure or frustration or requests for contract changes and variations; making claims for payment, damages, or termination; and making and responding to court procedures and alternative dispute resolution.<sup>625</sup> The Guidance also strongly encourages the use of “negotiation, mediation or other alternative or fast-track dispute resolution” to settle contractual disputes.<sup>626</sup>

## The legal status of the advice

- 193 However, as the Cabinet Office Guidance itself makes clear, it sets out merely “guidance and recommendations for parties to contracts”,<sup>627</sup> it is “non-statutory”<sup>628</sup> and it is expressed in the language of “strong encouragement” rather than the imposition of any new duty or duties on contracting parties. Moreover, it states that, in particular, it does not override specific guidance or procurement policy notes issued by the Government (or any public or regulatory authority); any specific support or relief available in the relevant contract, or in law, custom or practice (including any equitable relief), or from the Government in response to the Covid-19 emergency.<sup>629</sup> Nor does it override “any other legal duties or obligations with which a party to a contract is bound to comply and any national security interests”.<sup>630</sup> Given these restrictions (and especially the restriction as to the parties’ legal duties or obligations), it would appear that the Cabinet Office Guidance explicitly disavows any intention of affecting the legal rights or duties of parties to contracts.<sup>631</sup> It remains unclear whether the courts will nevertheless take it into account in their decision-making, for example, in relation to the exercise of a discretion (for instance, in relation

to the remedies of specific performance or injunction), or in the assessment of the significance of reasonableness<sup>632</sup> or fairness<sup>633</sup> where this is legally relevant, or in deciding whether the parties have acted in good faith in the broader sense of commercially acceptable behaviour where this is required by the express or implied terms of the contract.<sup>634</sup>

## Footnotes

- 620** Cabinet Office (7 May 2020) (“Cabinet Office Guidance (May 2020”). The advice was supplemented with an update on 30 June 2020 which added three further specific issues on which guidance was given: for both see <https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency> [Accessed 1 September 2021]. The update cross-references to further guidance specific to procurement, construction and commercial leases.
- 621** Cabinet Office Guidance (May 2020), para.6.
- 622** Cabinet Office Guidance (May 2020), para.12.
- 623** Cabinet Office Guidance (May 2020), para.3.
- 624** Cabinet Office Guidance (May 2020), para.14.
- 625** Cabinet Office Guidance (May 2020), para.15.
- 626** Cabinet Office Guidance (May 2020), para.17.
- 627** Cabinet Office Guidance (May 2020), para.17.
- 628** Cabinet Office Guidance (May 2020), para.6.
- 629** Cabinet Office Guidance (May 2020), para.7(a) and (b).
- 630** Cabinet Office Guidance (May 2020), para.7(c).
- 631** The note indicates that further measures could be taken, including the introduction of legislation: Cabinet Office Guidance (May 2020), para.23.
- 632** For possibly relevant discretions and legal relevance of reasonableness see above, paras 2-044—2-045.
- 633** Notably, in the consumer context, above, paras 2-046 and 2-048.
- 634** See above, paras 2-055—2-060 (express terms requiring good faith); paras 2-088—2-089 (implied terms requiring good faith).

# Section 1. - The Relationship between Contract and Tort

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 1. - The Relationship between Contract and Tort

*Simon Whittaker*

## Overview

- 101 The proper relationship between contract and tort has caused considerable difficulty and justifies some discussion of its history as well as an examination of the modern law.<sup>1</sup> As a matter of history, the first problem for the common law was to decide whether a particular form of action which it granted ought to be considered as founded on tort or on contract, a problem of the classification of actions.<sup>2</sup> Secondly, it is clear that there are considerable differences between the typical cases of liability in tort and contract: contractual obligations are voluntary and particular to the parties, whereas liability in tort is imposed by law as a matter of policy and affects persons generally.<sup>3</sup> Moreover, the distinction between the two liabilities is reflected in differences of rule which govern not merely the conditions of their existence but also their incidents.<sup>4</sup> Thirdly, given these differences of regime between contract and tort, the question arises whether a party to a contract may choose to sue the other party in tort where the constituent elements of a tort can be made out and, if so, with what effects.<sup>5</sup> Again, where the existence of liability in tort is doubtful, the question arises whether the existence of a contract between the parties is a reason in favour of the recognition of such a tortious duty or a reason against it, a question which has arisen in particular in the context of recovery of pure economic loss in the tort of negligence.<sup>6</sup> Finally, the question arises whether or to what extent the existence of a contractual obligation owed by A to B under a contract affects any liability in A to C, who is not party to that contract or, conversely, liability in C to A: do contracts affect torts beyond privity?<sup>7</sup>

## Footnotes

- 1 See Prosser, Selected Topics on the Law of Torts (1953), p.380; *Guest (1961) 3 Univ. Malaya L.R. 191*; *Poulton (1966) 82 L.Q.R. 346*; *Fridman (1977) 93 L.Q.R. 422*; *Duncan Wallace (1978) L.Q.R. 60*; *Burrows (1983) 99 L.Q.R. 217*; *Smith (1984) U.B.C.L. Rev. 95*; *Jaffey (1985) 5 L.S. 77*; *Reynolds (1985) 11 N.Z. Univ. Law Rev. 215*; *Atiyah (1986) Law & Contemporary Problems 287*; Cane, in Furmston (ed.), *The Law of Torts* (1986), Ch.6; Cane, *Tort Law and Economic Interests*, 2nd edn (1996), pp.129–149, 307–343; *McLaren (1989) 68 Can. Bar Rev. 30*; *Adams and Brownsword (1991) 55 Sask. L. Rev. 441*; *Burrows (1995) C.L.P. 103*; Cane in Rose (ed.), *Consensus ad Idem* (1996), p.96; *Whittaker (1996) 16 O.J.L.S. 191*; *Whittaker (1997) 17 Legal Studies 169*; Davies, in S. Worthington et al (eds), *Revolution and Evolution in Private Law* (2018) 273; *Jackson (2015) 23 Tort L. Rev. 3*; *Taylor (2019) 82 M.L.R. 17*; *Gardner and Morris (2021) 137 L.Q.R. 77*. For an economic analysis see *Bishop (1983) 12 L.S. 241*. For comparative studies see Weir, *International Encyclopedia of Comparative Law* (1986), Vol.XI, “Torts” Ch.12; *Markesinis (1987) 103 L.Q.R. 354*.
- 2 See below, para.3-002.
- 3 See below, paras 3-003—3-005.
- 4 See below, paras 3-006—3-009.
- 5 See below, paras 3-010 et seq.
- 6 See below, paras 3-021 et seq.
- 7 See below, paras 3-065 et seq.

## **(a) - The Classification of the Forms of Action at Common Law**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 1. - The Relationship between Contract and Tort**

**(a) - The Classification of the Forms of Action at Common Law**

### **Forms of action**

- 102 For a long time, the common law did not require formally to distinguish between actions in contract and in tort.<sup>8</sup> Until the late seventeenth century, only Bracton used a Roman legal framework for the treating of common law material, including the distinction between actions ex delicto and ex contractu, and even he did not make this distinction central to his exposition.<sup>9</sup> Moreover, while some early decisions appear to turn on such a distinction, care should be taken not to read into these cases, which turned on differences of individual writs, disputes as to a classification unfamiliar and irrelevant to contemporary legal thought<sup>10</sup>: indeed, the action which became the main sanction of breach of contract (assumpsit) and the modern torts both grew out of the action of trespass.<sup>11</sup> However, from the late seventeenth century, the courts did distinguish between actions in contract (assumpsit, covenant and account) and actions in tort (which included trespass, trover and nuisance). They did so for the purposes of rules governing transmissibility of actions on death<sup>12</sup> and capacity,<sup>13</sup> but the principal purposes were procedural and in particular the rules as to joinder of actions in the same declaration and joinder of parties to proceedings were said to turn on whether the action was in a form ex contractu or a form ex delicto.<sup>14</sup> Even so, it was not until the nineteenth century that this distinction was used as a general basis of exposition of the common law material,<sup>15</sup> though it had been mentioned in earlier works.<sup>16</sup> However, since the abolition in the mid-nineteenth century of many of the procedural differences between the two types of action,<sup>17</sup> these disputes could be seen as “useless, and worse than useless learning”.<sup>18</sup> Where, therefore, after these reforms a court has had to classify a particular type of claim by a claimant as contractual or tortious, for example for the purposes of the jurisdiction of a court of

limited jurisdiction, it has done so on the basis of what it considered was the substance rather than the form of action.<sup>19</sup>

## Footnotes

- 8 Maitland, Appendix A to Pollock, *The Law of Torts*, 1st edn (1887), pp.467, 468.
- 9 Maitland, Appendix A to Pollock, *The Law of Torts*, p.468.
- 10 Prosser above, para.3-001 (note), at pp.380–381.
- 11 Simpson, *A History of the Common Law of Contracts* (1975), p.199; Milsom, *Historical Foundations of the Common Law*, 2nd edn (1981), Ch.12; *Fridman* (1977) 93 *L.Q.R.* 422.
- 12 *Pinchon's Case* (1608) 9 *Col. Rep.* 86b; *Hambly v Trott* (1776) 1 *Cowp.* 371.
- 13 *Johnson v Pye* (1666) 1 *Sid.* 258, 1 *Keb.* 913; *Bristow v Eastman* (1794) 1 *Esp.* 172.
- 14 *Denison v Ralphson* (1682) 1 *Vent.* 365; *Bosun v Sandford* (1691) 2 *Salk.* 440. In this respect, there was something of a dispute as to the form in which the action of detinue was properly to be classified: see Chitty, *A Practical Treatise on Pleading* (1809), Vol.II, p.399; *Cooper v Chitty* (1756) 1 *Burr.* 20, 31; *Gledstane v Hewitt* (1831) 1 *C. & J.* 566; Manning, note to *Walker v Needham* (1841) 3 *Man. & Gr.* 561. This dispute appears particularly strange given the clearly proprietary function of the action.
- 15 Chitty, above, Vol.I, Chs 1 and 2.
- 16 Bracton, Fol. 102; Bacon, *A New Abridgement of the Law* (1736) “Actions in General (A) Of the different Kinds of Actions”; Comyns, *A Digest of the Laws of England*, 1st edn (1762-67), Vol.1, p.120; Blackstone, *Commentaries*, III, Ch.VIII.
- 17 *Common Law Procedure Act 1852 ss.34, 35, 41, 74.*
- 18 *Bryant v Herbert* (1878) 3 *C.P.D.* 389, 392, per Bramwell LJ, referring to the problem of the classification of detinue, on which see above.
- 19 *Bryant v Herbert* (1878) 3 *C.P.D.* 389; *Legge v Tucker* (1856) 1 *H. & N.* 500. In theory, this issue of the classification of a particular type of claim is distinct from the issue whether in cases of concurrence of actions the claimant may choose the basis of his claim. Thus, in *Att-Gen v Canter [1939] 1 K.B. 318* the question arose whether a claim by the Crown for a penalty imposed on a taxpayer for fraud transmitted against the latter's estate under s.1 of the *Law Reform (Miscellaneous Provisions) Act 1934*, and if so, whether it ought to be considered a “cause of action in tort” for the purposes of s.1(3) of the same Act which imposed time restrictions as to the accrual of such a transmitted claim. At first instance, Lawrence J held that the claim was “one for a debt created by the statute” under which the penalty was imposed and did transmit against the estate, but was not a “cause of action in tort”: at 321. The Court of Appeal confirmed this decision, though only the principle of transmissibility was addressed. However, the courts have also looked to the substance of a plaintiff's claim as being contract rather than tort in cases of concurrence, to prevent the plaintiff's choice of form of action from governing the procedural rule applicable: see *Legge v Tucker*, above, though the court denied the “independence” of the tort from the contractual

duty: at 502; *Kelly v Metropolitan Ry Co* [1895] 1 Q.B. 944; *Edwards v Mallen* [1908] 1 K.B. 1002.

## **(b) - Differences of Substance between Contract and Tort**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 1. - The Relationship between Contract and Tort

**(b) - Differences of Substance between Contract and Tort**

### **General**

- <sup>103</sup> Publication in the mid-nineteenth century of the great systematising textbooks of Addison,<sup>20</sup> Underhill<sup>21</sup> and Pollock<sup>22</sup> saw a change in understanding of the distinction between contract and tort from one of form to one of substance. This change resulted, not only from the sweeping away of the old procedural differences between the two types of action, but also from the acceptance by English lawyers of the “will theory” of contractual obligation,<sup>23</sup> a theory which pointed to the special voluntary nature of contractual obligations, in contrast to duties in tort which were not.<sup>24</sup> This contrast lies behind part of the generally accepted modern distinction between contract and tort. Thus, according to Winfield,<sup>25</sup> liability for breach of contract is distinguished from liability in tort in that:

- “(i)the duties in tort are primarily fixed by the law while in contract they are fixed by the parties themselves; and
- “(ii)in tort the duty is towards persons generally while in contract it is towards a specific person or persons.”

Both propositions still hold good, at least as a starting point. So, Jackson L.J has observed that:

“Contractual obligations are negotiated by the parties and then enforced by law because the performance of contracts is vital to the functioning of society. Tortious duties

are imposed by law (without any need for agreement by the parties) because society demands certain standards of conduct.”<sup>26</sup>

Moreover, there is a further real, general distinction: for torts can be said to make the claimant’s (existing) position worse, whereas a breach of contract often consists of failing to make the claimant’s position better, better, that is, from the claimant’s pre-contractual position and as defined by the other party’s obligations under the contract.<sup>27</sup> However, developments in the modern law have blurred these contrasts. First, as has already been remarked, many of the incidents of modern contracts are not fixed by the parties: the courts<sup>28</sup> and the legislature have regulated the relationships of many contractors. Moreover, even where this regulation is effected by the implication of a term, some terms are not susceptible to express exclusion or alteration by the parties.<sup>29</sup> Indeed, in some types of contracts legislative regulation has reached a level where the “voluntary element” is reduced to a simple choice whether or not to enter the relationship.<sup>30</sup> Furthermore, in general common law or statute, rather than the parties, specify what legal consequences arise on the failure to perform a contract, whether this is considered a matter of breach<sup>31</sup> or frustration.<sup>32</sup> It is the law itself which provides and delineates the remedies of damages, termination for major breach of contract or specific performance, and the role of the parties’ agreement here is not to create but at most to modify the rules already provided by the law.<sup>33</sup> Conversely, “voluntariness” can be relevant to the imposition of liability in tort: positively, where “voluntariness” or consent on the part of the *defendant* is a factor in the imposition of liability, for example, in relation to occupier’s liability,<sup>34</sup> liability for omissions<sup>35</sup> or under the principle established by *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.<sup>36</sup> Negatively, however, the consent of a claimant may prevent liability from arising in tort: thus, consent to medical treatment<sup>37</sup> or to a risk of injury in sport<sup>38</sup> may exclude liability in tort by operation of the maxim *volenti non fit injuria*, as may a contractual agreement by the parties excluding liability, whether in tort or in contract.<sup>39</sup>

- 104 Some writers have stressed the special protection of expectations created by a contract, reflected in the nature of the damages awarded on its breach and the lack of protection of expectations by the law of torts.<sup>40</sup> Others have disagreed,<sup>41</sup> arguing that this obscures the importance of awards of damages in contract based on the claimant’s “reliance interest”, which is similar to that protected generally in tort.<sup>42</sup> Conversely, damages in tort can compensate the injured party’s disappointed expectations, for example, his expectation to be able to earn a living,<sup>43</sup> although it has been pointed out that this expectation is general, unlike contractual expectations which are induced by making the contract.<sup>44</sup> On the other hand, while traditionally it could be said that recovery for non-intentional pure economic loss was generally irrecoverable in tort, while being recoverable in contract, this position has been very significantly qualified by the House of Lords’ application of

the principle of “assumption of responsibility” of *Hedley Byrne & Co Ltd v Heller & Partners*<sup>45</sup> to some cases of the negligent performance of services.<sup>46</sup>

- 105 More radical criticism of the division between contract and tort argues that it, together with other broad conceptual distinctions in the law, at times helps to obscure similarities of factual situation which cut across it and at others to group together situations which have practically nothing in common.<sup>47</sup> Instead, it has been suggested, private law should be reclassified according to the nature of the interest of the claimant to be protected.<sup>48</sup> However, this type of suggestion has not been generally accepted and the distinction between contract and tort remains fundamental.

## Differences of regime between contract and tort: damages

- 106 Some legal incidents of liability differ according to whether the claimant’s claim is based on a breach of contract or a tort. Thus, there are important differences between the damages recoverable in contract and in tort.<sup>49</sup> As has been noted, the most basic difference remains that the function of damages in contract is primarily to put the injured party as far as possible in the position in which he would have been had the contract been performed,<sup>50</sup> whereas the function of damages in tort is to put the injured party in the position in which he would have been if the tort had not been committed.<sup>51</sup> Thus, damages for breach of warranty may give the claimant his lost bargain,<sup>52</sup> whereas damages in the tort of deceit,<sup>53</sup> negligent misstatement,<sup>54</sup> under s.2 of the Misrepresentation Act 1967<sup>55</sup> and in respect of “misleading actions” or “aggressive commercial practices”<sup>56</sup> may not, being instead restricted to what has been termed compensation of his “status quo interest”.<sup>57</sup> The tests of remoteness of damage in contract and in tort are apparently different<sup>58</sup> and in general the defence of contributory negligence does not apply to claims in contract, though it is established that the court may reduce a claimant’s damages for breach of contract on this ground if his claim is based on breach of a contractual duty to take reasonable care, concurrent with liability in the tort of negligence.<sup>59</sup>
- 107 Other differences in the heads of damages available in contract and in tort are often to be based on circumstances other than the mere classification of the liability in issue. Thus, whereas nominal damages are always possible in an award in contract, it would appear that they are only available in tort if it is actionable per se.<sup>60</sup> Punitive or exemplary damages are sometimes said to be possible in tort, but not in contract,<sup>61</sup> though the exceptional circumstances in which they are permitted in tort are usually inapplicable to the contractual context.<sup>62</sup> Similarly, damages for injured feelings or mental distress not consequential on the claimant’s own physical injury are very closely, if differently, circumscribed both in tort<sup>63</sup> and in contract,<sup>64</sup> though there remains some authority

which excludes them entirely from liability in contract.<sup>65</sup> Traditionally, it was sometimes said that damages for loss of reputation are not available in contract in contrast to tort,<sup>66</sup> but there were conflicting decisions on this point,<sup>67</sup> and some cases clearly recognised such a recovery in contract in appropriate cases, such as injury to a trader whose business reputation is affected by the breach<sup>68</sup> and where the contract can be said to be for the maintenance or promotion of the claimant's reputation.<sup>69</sup> Moreover, in *Mahmud v Bank of Credit and Commerce International SA (In Liquidation)*,<sup>70</sup> the House of Lords allowed recovery by two former employees for damage to their employment prospects by breach of their employer's obligation not to damage the relationship of trust between employer and employee, seeing this as an example of the general rule allowing recovery for financial harm caused by breach of contract (as opposed to having been caused by the manner in which the contract was breached).<sup>71</sup>

## Limitation of actions

<sup>108</sup> Although the Limitation Act 1980<sup>72</sup> provides an identical period of six years<sup>73</sup> for actions founded on simple contract or on tort, the period begins to run "from the date on which the cause of action accrued".<sup>74</sup> This may vary according to whether the action is framed in tort, contract or restitution.<sup>75</sup> For example, in contract the cause of action accrues when the breach of contract takes place, not when the damage occurs or is discovered.<sup>76</sup> But, in the tort of negligence, the cause of action accrues when damage occurs, and not at the time of the act or default giving rise to the claim.<sup>77</sup> However, the practical effect of this rule was reduced by the *Latent Damage Act 1986* inserting a provision into the *Limitation Act 1980*,<sup>78</sup> the effect of which is that actions for damages for negligence in respect of latent damage not involving personal injuries may be brought for a period of three years after the discovery of the damage by the claimant, even if this is after six years after the accrual of the cause of action. However, this provision created its own distinction between claims in contract and in tort, as it has been held that the term an "action for damages for negligence" for this purpose does not include actions for breach of a contractual obligation to take reasonable care, even where this is concurrent with an action for tortious negligence.<sup>79</sup>

## Other differences

<sup>109</sup> A contractual right, for example, to a certain sum due under a contract, can generally be assigned, but a right of action in tort generally cannot.<sup>80</sup> The rules of the conflict of laws governing both jurisdiction and applicable law are different in matters relating to tort and to contract.

81

**U** The law governing the capacity of parties may be different: so, for example, a minor is in principle liable for his torts, but only to a limited extent on his contracts.<sup>82</sup> Statutory provisions sometimes distinguish according to rights arising out of a contract, and other rights (which would include tort) though this appears to be a diminishing practice.<sup>83</sup>

## Footnotes

- 20 Addison, Contracts, 1st edn (1845).
- 21 Underhill, A Summary of the Law of Torts or Wrongs Independent of Contract, 1st edn (1873).
- 22 Pollock, Principles of Contract at Law and in Equity, 1st edn (1876); The Law of Torts, 1st edn (1887).
- 23 See Gordley, The Philosophical Origins of Modern Contract Doctrine (1991), Ch.6.
- 24 Atiyah, The Rise and Fall of Freedom of Contract (1979), p.408.
- 25 Winfield, Province of the Law of Tort (1931), p.380.
- 26 *Robinson v P.E. Jones (Contractors) Ltd [2011] EWCA Civ 9, [2011] B.L.R. 206* at [79] (with whom Stanley Burnton and Maurice Kay LJJ agreed).
- 27 cf. Weir, International Encyclopedia of Comparative Law (1986), Vol.XI, “Torts”, Ch.12, p.5; *Whittaker (1996) 16 O.J.L.S. 191, 207 et seq.* cf. below, para.3-006.
- 28 See above, para.2-017; below, Ch.16.
- 29 See, e.g. [Sale of Goods Act 1979 s.14](#) and [Unfair Contract Terms Act 1977 s.6](#); and [Consumer Rights Act 2015 ss.9–10; 31](#) (controls on exclusion of liability for breach of statutory terms). On these provisions see below, para.17-097 and Vol.II, para.40-535.
- 30 *Hepple (1986-1987) 36 King's Counsel 11* and see above, para.2-017.
- 31 See below, Chs 27, 29, 30.
- 32 See below, Ch.26.
- 33 For example, the law specifies what losses may be compensated by an action for damages for breach of contract: below, Ch.29. In principle, the parties may specify the circumstances in which a right to terminate a contract on the ground of breach will arise (below, paras 27-018 and 27-060) and they can exclude or limit a party’s liability in damages (below, Ch.17), but they cannot resort to the use of “penalties”: below, paras 29-203 et seq.
- 34 The liability of an occupier to someone on the premises for injury depends, inter alia on whether that person had permission to be there: see [Occupiers' Liability Act 1957 s.1\(2\)](#) (visitors) and [Occupiers' Liability Act 1984 s.1\(1\)](#) (trespassers).
- 35 Thus, liability in the tort of negligence will be imposed for a negligent “pure omission” where the defendant has voluntarily accepted a duty: Clerk & Lindsell on Torts, 23rd edn (2020), para.7-59.
- 36 *[1964] A.C. 465*. See [Spring v Guardian Assurance Co Ltd \[1995\] 2 A.C. 296](#); [Henderson v Merrett Syndicates Ltd \[1995\] 2 A.C. 145](#); [Williams v Natural Life Health Foods Ltd and](#)

*Mistlin* [1998] 1 W.L.R. 830. cf. *Smith v Eric S Bush* [1990] 1 A.C. 831; *Harris v Wyre Forest DC* [1990] 1 A.C. 831 at 862 and see below, paras 3-022 et seq. See also *Barker* (1993) 109 L.Q.R. 461; *Whittaker* (1997) 17 Legal Studies 169.

37 *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] 2 W.L.R. 768.

38 *Condon v Basi* [1985] 1 W.L.R. 866.

39 See below, para.3-037.

40 *Burrows* (1983) 99 L.Q.R. 217; *Taylor* (1982) 45 M.L.R. 139; *Friedmann* (1995) 111 L.Q.R. 628; *Whittaker* (1996) 16 O.J.L.S. 191, 207 et seq. cf. *Stapleton* (1997) 113 L.Q.R. 257.

41 Atiyah, Essays on Contract (1986), Essay 2; *Hedley* (1988) 9 L.S. 137.

42 *Fuller & Purdue* (1936-1937) 46 Yale L.J. 52 and 373.

43 Atiyah, The Rise and Fall of Freedom of Contract (1979), pp.762–763.

44 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.20-024.

45 [1964] A.C. 465.

46 See *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; *Williams v Natural Life Health Foods Ltd and Mistlin* [1998] 1 W.L.R. 830 and below, paras 3-022—3-029.

47 Atiyah, Essays on Contract (1986), pp.53–55. cf. *Burrows* (1983) 99 L.Q.R. 217.

48 Atiyah at Essay 2; *Hedley* (1988) 8 L.S. 137.

49 McGregor on Damages, 21st edn (2020), Ch.24; *Burrows*, Remedies for Torts and Breach of Contract, 3rd edn (2004), Ch.2.

50 *Robinson v Harman* (1848) 1 Ex. 850, 855; *Burrows* (1983) 99 L.Q.R. 217. cf. Atiyah (1978) 94 L.Q.R. 193 and Essays on Contract (1986), Ch.2; *Owen* (1984) 4 O.J.L.S. 393; *Waddams* (1983-84) 8 Can. Bus. L.J. 2; *Friedmann* (1995) 111 L.Q.R. 628. See further below, paras 29-001 and 29-022—29-024.

51 *Livingstone v Raywards Coal Co* (1880) 5 App. Cas. 25, 39; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] A.C. 174, 186 et seq.; *Gates v City Mutual Life Assurance Society Ltd* (1986) C.L.R. 1, 11–12; *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2018] 2 W.L.R. 1353 at [31]–[36].

52 e.g. Sale of Goods Act 1979 s.53(3).

53 *Peek v Derry* (1887) 37 Ch. D. 541, 578; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158, 167 and see *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254; cf. *Davidson v Tullock* (1860) 3 Macq. 783; *East v Maurer* [1991] 1 W.L.R. 461; *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778, [2017] 3 All E.R. 157 and see below, paras 9-063, 9-065—9-066.

54 *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801, 820–821; *Box v Midland Bank Ltd* [1979] 2 Lloyd's Rep. 391.

55 *André & Cie SA v Ets Michel Blanc et Fils* [1977] 2 Lloyd's Rep. 166, 181; *McNally v Welltrade International Ltd* [1978] I.R.L.R. 497, 499; *Taylor* (1982) 45 M.L.R. 139; *Cartwright* (1987) 51 Conv. 423; *Sharneyford Supplies Ltd v Edge Barrington & Black* [1986] Ch. 128, [1987] Ch. 305, not following *Watts v Spence* [1976] Ch. 16; *Royscot Trust Ltd v Rogerson* [1991] 2 Q.B. 297 and see below, para.9-087.

56 The right in a consumer to claim damages in respect of the “misleading action” or “aggressive practice” of a trader is contained in the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) regs 5 and 7, 27A–27D, 27J (as amended by

the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)). The measure of damages is set by reg.27J(1); reg.27J(3) specifically excludes recovery of damages for financial loss in respect of the difference between the market price of a product (as specially defined) and the amount payable for it under the contract: see generally Vol.II, paras 40-181 et seq. and, on the right to damages, para.40-213 (where the degree of uncertainty in this respect is explained).

- 57 *Burrows* (1983) 99 *L.Q.R.* 217, 219–221; McGregor on Damages, 21st edn (2020), para.24-003. Damages in tort may include compensation for wasted expenditure and lost opportunities: *East v Maurer* [1991] 1 *W.L.R.* 461 and see below, para.9-065.
- 58 *Koufos v Czarnikow Ltd* [1969] 1 *A.C.* 350; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] *I.R.L.R.* 112 at [119]–[122] but see *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 *W.L.R.* 1351; McGregor on Damages, 21st edn (2020), paras 24-005—24-015 and below, paras 29-133—29-135. The principles of causation, e.g. in relation to the effect of supervening causes, are said sometimes to be the same in contract as in tort: *Beoco Ltd v Alfa Laval Co Ltd* [1995] *Q.B.* 137; cf. *Galoo Ltd v Bright Grahame Murray* [1994] 1 *W.L.R.* 1360; McGregor on Damages, 21st edn (2020), para.24-018.
- 59 Law Reform (Contributory Negligence) Act 1945; *Forsikringsaktieselskapet Vesta v Butcher* [1989] *A.C.* 852; *Barclays Bank Plc v Fairclough Building Ltd* [1995] *Q.B.* 214; *Barclays Bank Plc v Fairclough Building Ltd (No.2)* [1995] *I.R.L.R.* 605 and see below, para.29-091.
- 60 Ogus, *The Law of Damages* (1973), pp.22 et seq. cf. *Marzetti v Williams* (1830) 1 *B. & Ad.* 415.
- 61 *Addis v Gramophone Co Ltd* [1909] *A.C.* 488; *Perera v Vandiyar* [1953] 1 *W.L.R.* 672, see below, paras 29-067—29-068.
- 62 *Rookes v Barnard* [1964] *A.C.* 1129; *Cassell & Co Ltd v Broome* [1972] *A.C.* 1027. cf. below, para.9-079 (fraud). The exception to this is where “the defendant’s conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff”: *Rookes v Barnard* [1964] *A.C.* 1129, 1126–1127. The traditional and general rule is that a party injured by a breach of contract cannot on this ground alone recover against the party in breach for profits made as a consequence of that breach as distinct from losses caused by that breach: *Teacher v Calder* [1899] *A.C.* 451; *Surrey CC v Bredero Homes Ltd* [1993] 1 *W.L.R.* 1361. However, in *Att-Gen v Blake* [2001] 1 *A.C.* 268, the House of Lords held that exceptionally the courts possess a discretion to award an account of profits against a party in breach of contract, even where the injured party has suffered no loss and see below, paras 29-001, 29-069 et seq.
- 63 McGregor on Damages, 21st edn (2020), Ch.5. cf. *McLoughlin v O’Brian* [1983] 1 *A.C.* 410; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 *A.C.* 310; *Page v Smith* [1995] 2 *W.L.R.* 644; *White v Chief Constable of South Yorkshire* [1998] 3 *W.L.R.* 1509; *Rothwell v Chemical Insulating Co Ltd* [2008] 1 *A.C.* 281.
- 64 Below, paras 29-157—29-165 and see McGregor on Damages, 21st edn (2020) paras 5-015 et seq. *Cook v Swinfen* [1967] 1 *W.L.R.* 457; *Jarvis v Swann Tours Ltd* [1973] 1 *Q.B.* 233; *Bliss v S.E. Thames Regional Health Authority* [1985] *I.R.L.R.* 308; *Hayes v James & Charles Dodd (A Firm)* [1990] 2 *All E.R.* 815, 824; *McLeish v Amoo-Gottfried & Co*,

*The Times*, 13 October 1993; *Watts v Morrow* [1991] 1 W.L.R. 1421; *Knott v Bolton* [1995] E.G.C.S. 59; *Mahmud v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20; *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 W.L.R. 1076; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 W.L.R. 55. cf. *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 at [119].

- 65 *Addis v Gramophone Co Ltd* [1909] A.C. 488 but see McGregor on Damages, 21st edn (2020), paras 5-023—5-035.
- 66 *Addis v Gramophone Co Ltd* [1909] A.C. 488; *Withers v General Theatre Corp Ltd* [1933] 2 K.B. 536.
- 67 cf. *Withers v General Theatre Corp Ltd* [1933] 2 K.B. 536 with *Marbe v George Edwardes (Daly's Theatre) Ltd* [1928] 1 K.B. 269.
- 68 *Wilson v United Counties Bank Ltd* [1920] A.C. 102.
- 69 *Rolin v Steward* (1854) 14 C.B. 595; *Aerial Advertising Co v Batchelors Peas (Manchester) Ltd* [1938] 2 All E.R. 788.
- 70 [1998] A.C. 20 and see McGregor on Damages, 21st edn (2020), para.5-035.
- 71 [1998] A.C. 20, 51. But see *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 A.C. 518; *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 A.C. 503; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 W.L.R. 55; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 and below, paras 29-166—29-167.
- 72 ss.2, 5.
- 73 But see s.11 (three years for actions in respect of personal injuries): below, paras 31-006 et seq. This provision specifically applies to actions in contract as well as in tort.
- 74 A similar phrase is used in the Senior Courts Act 1981 s.35A (interest on debt and damages) which by the Administration of Justice Act 1982 s.15(1), Sch.1 Pt 1 replaced s.3 of the Law Reform (Miscellaneous Provisions) Act 1934.
- 75 *Battley v Faulkner* (1820) 3 B. & Ald. 288; *Beaman v A.R.T.S. Ltd* [1948] 2 All E.R. 89, 92 (reversed on other grounds [1949] 1 K.B. 550); *Bagot v Stevens, Scanlan & Co Ltd* [1966] 1 Q.B. 197; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch. 384. See below, paras 31-031—31-063. *Saunders v Edwards* (1662) Sid. 95; *Bonomi v Backhouse* (1859) E., B. & E. 646; *Gibbs v Guild* (1881) 8 Q.B.D. 296, 302; *Chesworth v Farrar* [1967] 1 Q.B. 407; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1. See also below, paras 31-031—31-032.
- 76 *Battley v Faulkner* (1820) 3 B. Ald. 288; *Walker v Milner* (1866) 4 F. & F. 745; *Lynn v Bamber* [1930] 2 K.B. 72; *Bagot v Stevens, Scanlan & Co Ltd* [1966] 1 Q.B. 197. cf. *Shaw v Shaw* [1954] 2 Q.B. 429; *Midland Bank Trust Co Ltd v Hett, Stubbs Kemp* [1979] Ch. 384; *Forster v Outred & Co* [1982] 1 W.L.R. 86.
- 77 *Watson v Winget Ltd* (1960) S.C. 92; *Cartledge v E. Jopling & Sons Ltd* [1963] A.C. 758 (now modified by ss.11(4), 14 of the Limitation Act 1980); *Sparham-Souter v Town and Country Developments Ltd* [1976] Q.B. 858; *Anns v Merton London BC* [1978] A.C. 728; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch. 384; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1; *Ketteman v Hansel Properties Ltd*

[1987] A.C. 189; *London Congregational Union Inc v Harriss and Harriss (A Firm)* [1988] 1 All E.R. 15; *D. W. Moore & Co Ltd v Ferrier* [1988] 1 W.L.R. 267; *Lee v Thompson* [1989] 40 E.G. 89; *McGee* (1988) 104 L.Q.R. 376; *Law Society v Sephton & Co* [2006] UKHL 22, [2006] 2 W.L.R. 1091.

- 78 Creating new s.14A of the Limitation Act 1980.
- 79 *Iron Trades Mutual Insurance Co Ltd v J.K. Buckenham Ltd* [1989] 2 Lloyd's Rep. 85 and see below, paras 31-010 and 31-033. cf. *Consumer Protection Act 1987* s.5(5) which sets a different time of accrual for actions for damage to property against a supplier or producer under Pt I of the Act from that which would exist against a contractor under the general law of limitation.
- 80 See below, para.22-051.
- 81 See in particular Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6; Regulation (EC) 864/2007 applicable to non-contractual obligations (“Rome II Regulation”) [2007] O.J. L199/40 and generally Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2014), Chs 32–35. On IP completion day, the Rome I and Rome II Regulations became part of “retained EU law” as amended: see above, para.1-024. On the retained EU law Rome I Regulation, see below, paras 33-019 et seq. On the rules governing international jurisdiction, see below, para.3-063.
- 82 See below, paras 11-053—11-054. See also below, para.12-081 (trade unions).
- 83 An example may be found in *Companies Act 2006* ss.81 and 83 (replacing ss.4 and 5 of the *Business Names Act 1985*). The former distinction in the *Bankruptcy Act 1914* s.30(1) between demands arising by reason of contract which were provable in bankruptcy and others which were not normally so provable, is not found in the provisions which replaced it in the *Insolvency Act 1985* (ss.163, 211(1), (2) and (3)).

## (c) - Concurrence of Actions in Contract and Tort

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 1. - The Relationship between Contract and Tort

(c) - Concurrence of Actions in Contract and Tort

### General

- )10 Where the constituent elements of a claimant's case are capable of being put either in terms of a claim in tort or for breach of contract, the general rule is that the claimant may choose on which basis to proceed, though this rule is subject to a number of qualifications, notably where to do so would be inconsistent with the terms of the contract. This traditional position was affirmed clearly by the House of Lords in *Henderson v Merrett Syndicates Ltd*,<sup>84</sup> which drew to a close the uncertainty on this point caused by a dictum of Lord Scarman in the Privy Council in 1985 in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*, to the effect that:

“... their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.”<sup>85</sup>

This dictum appeared to favour the exclusion of claims in tort where the parties were in a contractual relationship, though the context of its acceptance by later courts was typically the denial of liability for pure economic loss in the tort of negligence.<sup>86</sup> However, paradoxically, the House of Lords' decision on the nature and ambit of the tortious liability to be found on the facts before it in *Henderson v Merrett Syndicates Ltd* created new and very considerable uncertainty as regards the relationship of contractual and tortious claims between parties to a contract. For, it accepted that its own earlier decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>87</sup> should be interpreted as establishing a “broad principle” of liability in tortious negligence based on the

defendant's assumption of responsibility, an assumption which appears to be present whenever a party to a contract either possessing or holding himself out as possessing a special skill agrees to perform a service for the other party. In this respect, the courts apparently returned to an approach similar to one taken in the earlier nineteenth century, though subsequently superseded.<sup>88</sup>

- ¶11 The present discussion will start by looking briefly at the older authorities which governed the issue of concurrence of actions in contract and tort; it will then state the modern law allowing an option, first as regards pre-contractual liability and then as regards liability for torts committed in the course of performance of a contract; as to the latter, it will discuss the breadth of the principle of "assumption of responsibility" recognised in *Henderson v Merrett Syndicates Ltd*, and the nature and ambit of the qualifications on the option and on the effects which its exercise will entail.

## Older authorities

- ¶12 Disputes as to the availability of an action in tort against one's fellow contractor are not new and before the reforms of common law procedure of the mid-nineteenth century three positions can be detected in the cases. The first was that a plaintiff could neither join a claim in tort with one in contract in the same action nor opt whether to sue in tort where there was a contract between the parties. For example, in *Orton v Butler*,<sup>89</sup> Best J refused to allow the joining of actions in trover (tort) and money had and received (contract), stating that:

"There is a broad distinction between actions ex contractu and ex delicto. Here, it arises out of breach of a contract, and the party ought not to be allowed to proceed in the present mode of framing his count [sc. claim] ex delicto."<sup>90</sup>

Other cases distinguished between the rules against joinder of counts in contract and tort and the question whether a plaintiff was entitled to opt on which of the two bases to put his claim,<sup>91</sup> some expressly recognising the validity of the option. Moreover, where they did so it was acknowledged that the plaintiff's choice would affect the rules applicable to his claim. As Abbott J observed:

"There is nothing to compel a plaintiff to elect that form which may be most convenient to the defendant. The very notion of election imports that the plaintiff may exercise it for his own benefit."<sup>92</sup>

At the time, those courts which allowed an option between contract and tort thereby enabled a plaintiff to avoid in particular the rules against transmissibility of actions on death which applied to actions in tort<sup>93</sup> or the rules of joinder of parties to litigation which applied to actions in contract.<sup>94</sup> However, the courts did not allow the plaintiff's option to avoid certain other rules which applied

to contract, notably, those as to capacity,<sup>95</sup> nor the express terms of a contract, notably, limitation clauses.<sup>96</sup>

- ¶13 The third approach to the relationship between actions in contract and tort can be seen in the decision in *Brown v Boorman*.<sup>97</sup> The plaintiffs retained the defendant as broker to sell their linseed oil on commission. This he did, but in breach of contract delivered it without payment and to the wrong (and later insolvent) person. The plaintiffs sued in case (i.e. tort), contending that the broker owed them a duty at common law to take reasonable care based on his trade or calling. The defendant countered that their proper form of action should have been assumpsit (i.e. contract). The House of Lords upheld Tindal CJ's judgment for the plaintiffs, Lord Campbell stating that:

“... wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract.”<sup>98</sup>

It is difficult not to agree with the defendant's contention that such an approach “would altogether destroy the distinction between assumpsit [i.e. contract] and tort”,<sup>99</sup> as it suggests that the option to plead in tort or contract exists in *all* situations of breach of contract and not merely in those where an independent cause of action exists in tort. However, this was not the fate of *Brown v Boorman*. As Pollock stated<sup>100</sup>:

“... notwithstanding the verbal laxity of one or two passages, the House of Lords did not authorize the parties to treat the mere non-performance of a promise as a substantive tort.”

Instead, the decision was relied on as authority for the existence of an option for the plaintiff as to whether to sue in tort as long as a distinct and independent action in tort exists.<sup>101</sup>

## The modern law

- ¶14 In the modern law, a distinction can usefully be drawn between a claim by a party to a contract on the basis of a pre-contractual liability to be imposed on the other party and one based on a liability arising in the course of performance of the contract.

## Footnotes

- 84 [1995] 2 A.C. 145. This position is also taken in Canada: *Central Trust Co v Rafuse* (1987) D.L.R. (4th) 481 SCC; *Canadian Pacific Hotels Ltd v Bank of Montreal* (1988) 40 D.L.R. (4th) 385; *B.C. Checo International Ltd v British Columbia Hydro & Power Authority* (1993) 99 D.L.R. (4th) 477. Although there was Australian authority against concurrence (*Hawkins v Clayton* (1988) 164 C.L.R. 539), the approach of the Canadian Supreme Court in *Central Trust Co v Rafuse* was followed in *Bryan v Maloney* (1995) 182 C.L.R. 609, 620–622.
- 85 [1986] A.C. 80, 107.
- 86 See, e.g. *Banque Keyser Ullmann SA v Skandia (UK) Co Insurance Ltd* [1990] 1 Q.B. 665, [1991] 2 A.C. 249 (affirmed on other grounds; *National Bank of Greece SA v Pinios Shipping (No.1)* [1990] 1 A.C. 637).
- 87 [1964] A.C. 465.
- 88 See below, para.3-013.
- 89 (1822) 5 B. & Ald. 652.
- 90 (1822) 5 B. Ald. 652 at 656.
- 91 e.g. *Brown v Dixon* (1786) 1 T.R. 274, 276–277.
- 92 *Ansell v Waterhouse* (1817) 6 M. & S. 385, 392.
- 93 *Hambly v Trott* (1776) 1 Cowp. 371.
- 94 *Govett v Radnidge* (1802) 3 East 62.
- 95 *Johnson v Pye* (1666) 1 Sid. 258, 1 Keb. 913.
- 96 *Nicholson v Willan* (1804) 5 East 507.
- 97 (1842) 3 Q.B. 511, (1844) 11 Cl. & Fin. 1, HL.
- 98 (1844) 11 Cl. & Fin. 1, 44.
- 99 (1844) 11 Cl. & Fin. 1, 12.
- 100 Pollock, *Torts*, 1st edn (1887), p.434.
- 101 *Hyman v Nye* (1881) 6 Q.B.D. 685; *Baylis v Lintott* (1873) L.R. 8 C.P. 345; *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch. 384.

## **(i) - Pre-contractual Liability**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 1. - The Relationship between Contract and Tort**

**(c) - Concurrence of Actions in Contract and Tort**

**(i) - Pre-contractual Liability**

### **Representations**

- 115 Even at the time when it was doubtful whether a party to a contract could claim in tort against the other party in respect of matters relating to the performance of the contract, it was established that such a party could rely on established liabilities in tort arising from facts which occur in the course of the dealings of the parties before contract. A party to a contract can therefore claim damages for a pre-contractual statement which induced him to contract under various headings: in the tort of deceit, where the statement was made fraudulently<sup>102</sup>; in the tort of negligence,<sup>103</sup> if the claimant can establish the conditions for the existence of a duty of care under *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,<sup>104</sup> under the provisions of the Misrepresentation Act 1967,<sup>105</sup> or as a right to redress under the Consumer Protection from Unfair Trading Regulations 2008.<sup>106</sup> It is also clear that these rights to damages in tort may exist whether or not the misrepresentation has been incorporated into the contract, thereby giving rise to a claim for breach of contractual warranty,<sup>107</sup> and whether or not the claimant chooses to exercise any right of rescission of the contract on the grounds of misrepresentation.<sup>108</sup>
- 116 More complex, however, is the question whether the claimant's option to rely on one of these liabilities in tort enables him to avoid restrictions which exist on any claim in contract. While it is clear that a party can by contract exclude liability for negligent misstatement at common law or liability in damages for misrepresentation under the 1967 Act to the extent to which such a term

satisfies the requirements of reasonableness or fairness<sup>109</sup> but a party to a contract cannot exclude liability in damages for his own fraud.<sup>110</sup> On the other hand, a party to a contract with a minor cannot avoid a defence of infancy by claiming damages in the tort of deceit against the minor on the ground that the latter fraudulently misrepresented his age, even though in general, an infant is liable for his torts,<sup>111</sup> because:

“If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants.”<sup>112</sup>

## Damages for misrepresentation

<sup>117</sup> Finally, although there are considerable differences between damages in tort and for breach of contract,<sup>113</sup> not all of these are significant in the context of pre-contractual statements. In general, an injured party can claim damages for the loss of an expectation or performance interest in contract but not in tort, and in the context of pre-contractual representation the latter rule means that a claimant can recover damages for misrepresentation in tort only so as to put him in a position as though the representation (and, therefore, it is assumed, the contract) had not been made and not damages as though the representation had been true.<sup>114</sup> By contrast, if a court finds that a party made a contractual promise or warranty that his pre-contractual statement was true, then he can recover damages for breach of contract to put him in the position as though the statement had been true.

<sup>115</sup>

 On the other hand, in some cases where a claim is based on breach of a term which has resulted from the incorporation of a pre-contractual statement,<sup>116</sup> there will be no difference on this ground between the contractual and tortious measures of damages. In *Esso Petroleum Co Ltd v Mardon*,<sup>117</sup> the Court of Appeal accepted that a representation of “throughput” of petrol of a garage by Esso which later proved false, was incorporated into the contract as a warranty. However, the ability of the representee to claim for breach of contract did not affect the damages which he could recover, in particular it did not allow him to recover the loss of profits he expected to make from taking a lease of the garage with the throughput represented, despite such claims for lost profits being typical of contract. This resulted from the court’s decision as to the *content* of the warranty: it was construed not as a promise that the throughput would be a certain amount, but rather that Esso had taken reasonable care in making the estimate of throughput.<sup>118</sup> A claim in contract can indeed put an injured party in the position as though the contract had been performed, but if Esso had performed this contractual warranty, and as a result Mardon had been given a true

estimate of the throughput of the garage, then Mardon would not have entered into the contract.<sup>119</sup> In this way, damages in contract and in tort<sup>120</sup> are based on the same measure, viz to put the claimant in the position as though the contract had not been made.<sup>121</sup> On the other hand, while it has been stated that a claimant will not recover more damages in tort than he would in contract,<sup>122</sup> it is clear that a claimant may indeed recover more damages where his claim is based on fraud or for negligent misrepresentation under the *1967 Act*,<sup>123</sup> as the test of remoteness of damage applicable to these claims is more generous than the test which applies to claims for breach of contract.<sup>124</sup> Furthermore, it is possible (if unlikely) that someone suing for fraud may be able to recover punitive damages,<sup>125</sup> whereas these are not available for claims for breach of contract.<sup>126</sup>

## Liability for non-disclosure

**D**<sup>118</sup> As will be seen, the courts draw a clear line between cases of misrepresentation and of non-disclosure for the purposes of deciding the availability of rescission for the other party.<sup>127</sup> While in general the courts have echoed this distinction in the context of liability in damages, they have accepted that in principle a contractor may be liable in the tort of negligence for a failure to speak,<sup>128</sup>

**U** but the modern approach has been to restrict liability in these circumstances to cases where the defendant has “voluntarily accepted responsibility”.<sup>129</sup> Indeed, even in a case where the law exceptionally imposes a duty of pre-contractual disclosure on a party to a contract, the courts have refused to impose liability in damages in tort to sanction its breach.<sup>130</sup> While this result was reached before the House of Lords in *Henderson v Merrett Syndicates Ltd*<sup>131</sup> had disapproved the idea that the existence of a contract between the parties is in itself a reason for denying a claim in tort, it may well be that a future court would hold that a person cannot be said to “assume responsibility” for a matter in relation to which he owes a legal duty. Moreover, the idea that the law of tort should not be allowed to “cut across the principles of contract law” could be considered as a consideration of policy arguing against the existence of a duty of care in the tort of negligence, even where this was based on an “assumption of responsibility”.<sup>132</sup>

## Duress

**D**<sup>119</sup> Duress, whether by means of physical or economic threats, exercised by A against B with the view to making B enter a contract with A, may in certain circumstances give rise to a right in B

to avoid that contract.<sup>133</sup> While the circumstances which give rise to this right of avoidance will not necessarily give rise to a right to damages,<sup>134</sup> in contrast to the position as regards fraud,<sup>135</sup> they may satisfy the conditions of liability under the tort of intimidation (or tort of causing loss by unlawful means).<sup>136</sup>

**U** This tort is usually applied to cases where A forces B to do or to refrain from doing something to the prejudice of C (“three-party intimidation”), but there is high authority for the proposition that it also applies to cases where A forces B to do something for A’s intended benefit (“two-party intimidation”).<sup>137</sup> In circumstances where the conditions for the existence of the tort exist, it would seem that it can be relied on by one party to a contract as against the other, although it is more controversial whether this right remains after the coerced party has affirmed the contract.<sup>138</sup> While the ambit of the doctrine of economic duress as a vitiating element in contract remains somewhat uncertain,<sup>139</sup> it has been suggested that its ambit should be coterminous and not wider than any liability which would exist under the tort of intimidation.<sup>140</sup> A consumer may be able to recover damages in respect of an “aggressive practice” committed by a trader under the **Consumer Protection from Unfair Trading Regulations 2008 Pt 4A.**<sup>141</sup>

## “Culpa in contrahendo”<sup>142</sup>

- 120 Some legal systems consider that cases of fraud or duress are merely examples of a wider category of “fault in the formation of contract”, a category famously termed culpa in contrahendo by the German jurist, von Ihering.<sup>143</sup> In French law, despite its general rule against allowing delict to intrude between contractors (a rule known as non-cumul),<sup>144</sup> pre-contractual fault can give rise to a claim for damages in delict,<sup>145</sup> there being a very general principle of delictual liability based on fault.<sup>146</sup> The extent to which English law reaches similar results to those a continental court might reach by applying doctrines like culpa in contrahendo are explored in Ch.4.<sup>147</sup> However, English law possesses no such general principle and so no claims for damages in tort based on a party’s “pre-contractual fault” can be brought in the absence of proof of an established tort. This had led to an occasional temptation in the courts to resort to the law of contract to found a claim for damages in this type of situation. This was clearest in relation to claims for damages for innocent (i.e. non-fraudulent) misrepresentation before the **Misrepresentation Act 1967**, where the courts allowed some claims for damages for false pre-contractual statements by way of contractual warranty.<sup>148</sup> More recently, in *Blackpool and Fylde Aero Club v Blackpool BC*,<sup>149</sup> the defendant local authority had invited sealed tenders from a limited number of persons for a concession to use a local airport, to arrive at their premises by a certain date. The plaintiff delivered such a tender by the stipulated time, but owing to the failure of the defendant’s staff, it did not consider the plaintiff’s tender and failed therefore to award it the concession. The plaintiff’s claim for damages

for breach of contract was upheld by the Court of Appeal<sup>150</sup> on the basis that the defendant local authority's express request for tenders to be made in a particular form by a particular date,<sup>151</sup> coupled with the limited number of persons invited to tender,<sup>152</sup> gave rise to an implied contract to consider conforming tenders<sup>153</sup> and therefore the court found it unnecessary to consider whether the plaintiff could have succeeded in the tort of negligence.<sup>154</sup> Overall, however, it cannot be said that English courts evince any desire to develop a general principle of liability in damages for pre-contractual fault, whether this is put in terms of tort or contract, any more than they wish to recognise a general legal principle of pre-contractual good faith to which such a liability would be closely related.<sup>155</sup> Moreover, when in 2014 the UK government created rights to redress for consumers against traders in respect of the latter's unfair commercial practices, it was careful to restrict the practices in question to "misleading actions" and "aggressive commercial practices" so that "misleading omissions" and commercial practices assessed as unfair under the general test in the 2008 Regulations would not have this effect.<sup>156</sup>

## Footnotes

- 102 *Pasley v Freeman* (1789) 3 T.R. 51; *Peek v Derry* (1887) 37 Ch. D. 541 (reversed on other grounds (1889) 14 App. Cas. 337); *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158; *Archer v Brown* [1985] 1 Q.B. 401. cf. *Jack v Kipping* (1882) 9 Q.B.D. 113; *Tilley v Bowman Ltd* [1910] 1 K.B. 745.
- 103 *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; *Howard Marine & Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574; *Rust v Abbey Life Insurance Co Ltd* [1978] 2 Lloyd's Rep. 386; *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1991] 2 A.C. 249, 275. cf. *Cemp Properties (UK) Ltd v Dentsply Research & Development Corp (No.1)* (1989) 35 E.G. 99, 104.
- 104 [1964] A.C. 465.
- 105 See below, paras 9-083—9-093. Liability in damages under s.2(1) is treated as tortious: see *André & Cie SA v Ets. Michel Blanc et Fils* [1977] 2 Lloyd's Rep. 166; *Royscott Trust Ltd v Rogerson* [1991] 2 Q.B. 297 and see below, para.9-084.
- 106 SI 2008/1277 reg.5 and Pt 4A (as amended by *Consumer Protection (Amendment) Regulations 2014* (SI 2014/870)), on which generally see Vol.II, paras 40-166 et seq. On the question of the nature of a claim for damages under the right to redress for the consumer see Vol.II, para.40-210—40-214.
- 107 *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801.
- 108 *Archer v Brown* [1985] 1 Q.B. 401, 415 and see below, para.9-089. After the *Misrepresentation Act 1967* s.1(a) a representee's right to rescind is not barred merely by the incorporation of a representation as a term of the contract. cf. the power of the court under s.2(2) of the *Misrepresentation Act 1967* to refuse rescission of the contract and award damages in lieu; and see below, para.9-112. A consumer who has the "right to unwind" the

contract under the Consumer Protection from Unfair Trading Regulations 2008 reg.27E may also have a right to damages under reg.27J: see Vol.II, para.40-210.

- 109 The common law position is clear from *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465* and *Smith v Eric S. Bush [1990] 1 A.C. 831*. After 2015, the regime governing the exclusion of liability distinguishes according to whether a claimant was or was not a “consumer”. The exclusion of liability at common law or under s.2 of the Misrepresentation Act 1967 to non-consumers is controlled by the Unfair Contract Terms Act 1977 s.2(2) and the Misrepresentation Act 1967 s.3 respectively: see below, paras 9-153 et seq. Consumers cannot rely on s.2(1) of the 1967 Act where they have a right to redress under the Consumer Protection from Unfair Trading Regulations 2008 (Misrepresentation Act 1967 s.2(4)), but any purported exclusion or limitation of the consumer’s claims to redress under the 2008 Regulations is subject to the test of unfairness in the Consumer Rights Act 2015 Pt 2: see Vol.II, paras 40-220, 40-222 and 40-321.
- 110 *S. Pearson & Son Ltd v Dublin Corp [1907] A.C. 351, 353–354, 362* and see below, para.17-067.
- 111 *Johnson v Pye (1666) 1 Sid. 258* and see below, para.11-053.
- 112 *Jennings v Rundall (1799) 8 T.R. 335, 336*, per Lord Kenyon CJ and see below, para.11-053.
- 113 See above, paras 3-006—3-007.
- 114 *Doyle v Olby (Ironmongers) Ltd [1969] 2 Q.B. 158; André & Cie SA v Ets Michel Blanc et Fils [1977] 2 Lloyd’s Rep. 166; East v Maurer [1991] 1 W.L.R. 461; Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd [2001] Q.B. 488; OMV Petrom SA v Glencore International AG [2016] EWCA Civ 778, [2017] 3 All E.R. 157* and see below, paras 9-063—9-066 and 9-087.
- 115 Cartwright, Misrepresentation, Mistake, and Non-disclosure, 6th edn (2022), paras 8–32—8–34.
- 116 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), paras 9-056—9-064 and Atiyah, Essays on Contract (1986), Essay 10.
- 117 [1976] 1 Q.B. 801.
- 118 [1976] 1 Q.B. 801 at 818, 823–824.
- 119 [1976] 1 Q.B. 801 at 820 (Lord Denning MR) and [834] (Shaw LJ). This reasoning is based on two assumptions: first, that if Esso had taken reasonable care in making its statement as to throughput it would have made an accurate estimate and, secondly, that if Mardon had been given an accurate estimate he would not have entered the contract or perhaps, would not have entered it on the same terms. Ormrod LJ expressed no view on the claim for loss of profits as it was “virtually incapable of proof”: at 829.
- 120 The Court of Appeal based its decision in tort on *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465*.
- 121 The Court of Appeal did allow Mardon damages for loss of his “general expectations”, i.e. what he would have expected to have earned if he had not spent his time running the garage: [1976] 1 Q.B. 801, 821.
- 122 *Chinery v Viall (1860) 5 H. & N. 28, 29 L.J. Ex. 180; Johnson v Stear (1863) 33 L.J. C.P. 130* (both conversion).

- 123 *Royscott Trust Ltd v Rogerson [1991] 2 Q.B. 297*, in which the Court of Appeal rejected the proposition that a claim for damages under s.2(1) of the Misrepresentation Act 1967 possesses the same test of remoteness of damage as applies generally to claims in the tort of negligence; and see below, para.9-087.
- 124 See below, paras 29-133—29-135. It is also more generous than the test for remoteness of damage applicable to a claim for damages by a consumer under the Consumer Protection from Unfair Trading Regulations 2008 Pt 4A and especially reg.27J(4), which applies a requirement that the loss was “reasonably foreseeable at the time of the prohibited practice”: see Vol.II, para.40-214.
- 125 *Mafo v Adams [1970] 1 Q.B. 548*; *Cassell & Co Ltd v Broome [1972] A.C. 1027, 1076*; *Archer v Brown [1985] 1 Q.B. 401, 418–421* and see below, para.9-079.
- 126 See below, para.29-067.
- 127 See below, paras 9-021 et seq. It should be noted that the consumer’s rights to redress under the Consumer Protection from Unfair Trading Regulations 2008 Pt 4A (as inserted by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)) do not arise in respect of a trader’s misleading omission: Vol.II, paras 40-189 and 40-196.
- 128 *Rust v Abbey Life Assurance Co Ltd [1978] 2 Lloyd’s Rep. 386*; *Cornish v Midland Bank Plc [1985] 3 All E.R. 513, 522–523*; *Al-Kandari v J.R. Brown & Co [1988] Q.B. 665, 672*; *Banque Keyser Ullmann SA v Skandia (UK) Co Insurance Ltd [1990] 1 Q.B. 665, 794*. cf. *Argy Trading Developments Ltd v Lapid Developments Ltd [1977] 1 W.L.R. 444, 461*; *Barclays Bank Plc v Khaira [1992] 1 W.L.R. 623*; *Ashmore v Corp of Lloyd’s [1992] 2 Lloyd’s Rep. 1, 5* (and see [1992] 2 Lloyd’s Rep. 620). See also Cartwright, Misrepresentation, Mistake, and Non-disclosure, 6th edn (2022), para.17-44.
- 129 *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665* at 794, per Slade LJ; *Green v Royal Bank of Scotland [2013] EWCA Civ 1197, [2014] Bus. L.R. 168* at [17] (no duty to give information unless without it a relevant statement made within the context of the assumption of responsibility is misleading). cf. below, paras 3-022—3-029 concerning the significance more generally of a “voluntary assumption of responsibility” for liability for pure economic loss in the tort of negligence.
- 130 *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665*.
- 131 [1995] 2 A.C. 145.
- 132 For the relevance of considerations of policy in this context, see below, paras 3-027 et seq.
- 133 See below, paras 10-001 et seq.
- 134 *Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 A.C. 366, 385*, cf. 400; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665* at 780; and see below, para.10-071.
- 135 See above, para.3-017 and below, para.9-055.
- 136 See Clerk & Lindsell on Torts, 23rd edn (2020), paras 23-62 et seq. In *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young [2007] UKHL 21, [2008] 1 A.C. 1* the HL preferred to refer to the “tort of causing loss by unlawful means” rather than to “intimidation”, seeing threats as only one example of “unlawful means” for this purpose: see

- below, paras 3-030—3-031. Where the defendant's conduct threatens physical injury to the claimant, the latter may possess an action of assault: Clerk & Lindsell on Torts, para.14–12.
- 137 *Rookes v Barnard* [1964] A.C. 1129, 1205, 1209 and see Clerk & Lindsell on Torts 23rd edn (2020) at para.23-75.
- 138 See below, para.10-071.
- 139 See below, paras 10-020 et seq.
- 140 Clerk & Lindsell on Torts, 22nd edn (2017) at para.24–70.
- 141 Pt 4A was inserted by the [Consumer Protection \(Amendment\) Regulations 2014 \(SI 2014/870\)](#). The right of redress may include damages for financial loss other than “the difference between the market price of a product and the amount payable for it under a contract” (reg.27J(1)(a) and (3)) and for “alarm, distress or physical inconvenience or discomfort” (reg.27J(1)(b)), though damages are recoverable “only in respect of loss that was reasonably foreseeable at the time of the prohibited practice” (reg.27J(4)). See generally Vol.II, paras 40-181 et seq. esp. at 40-197 and 40-210—40-215.
- 142 This terminology is adopted for the purposes of applicable law by Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (“Rome II”) art.12. On IP completion day, the Rome II Regulation became part of retained EU law under [s.3 of the European Union \(Withdrawal\) Act 2018](#) (as amended) as itself amended by the [Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/834\)](#) reg.11: cf. above, para.1-024.
- 143 On the German position see Markesinis, The German Law of Obligations, Vol.I; Markesinis, Lorenz and Dannemann, The Law of Contracts and Restitution: a Comparative Introduction (1997), pp.64 et seq.
- 144 *Bell v Peter Browne & Co* [1990] 2 Q.B. 495, 511. The full term for the rule is non-cumul des responsabilités contractuelle et délictuelle and see Whittaker in Bell, Boyron and Whittaker, Principles of French Law, 2nd edn (2008), pp.328–329.
- 145 Whittaker at pp.308–309.
- 146 i.e. arts 1241–1242 C. civ. (formerly arts 1382–1383) and see Whittaker at pp.364 et seq.
- 147 See below, paras 4-272 et seq.
- 148 *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801, 817.
- 149 [1990] 1 W.L.R. 1195 and see below, paras 13-048 et seq.
- 150 The case came to the court by way of a preliminary issue as to the existence of liability.
- 151 [1990] 1 W.L.R. 1195 at 1204.
- 152 [1990] 1 W.L.R. 1195 at 1202.
- 153 The public character of the defendant was also relied on by the plaintiff as support for the existence of the contract as it had as a matter of public law a duty to comply with its standing orders (to consider tenders) and a fiduciary duty to ratepayers to act with reasonable prudence in managing its financial affairs: [1990] 1 W.L.R. 1195 at 1201.
- 154 [1990] 1 W.L.R. 1195 at 1204.
- 155 See above, paras 2-036 et seq. and below, para.4-254.

- 156 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A (inserted by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)) on which see Vol.II, paras 40-169 et seq. esp. at 40-181 and 40-189.

---

End of Document

© 2022 SWEET & MAXWELL

## **(ii) - Torts Committed in the Course of Performance of a Contract**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 1. - The Relationship between Contract and Tort**

**(c) - Concurrence of Actions in Contract and Tort**

**(ii) - Torts Committed in the Course of Performance of a Contract**

### **General**

121 As Greer LJ observed in 1936:

“... where the breach of duty alleged arises out of a liability independent of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of the contract.”<sup>157</sup>

In the modern law, it may be stated that a party to a contract may choose to base his claim on an established and independent tort against the other party, but this choice will not be allowed to subvert the contract's express<sup>158</sup> or implied terms<sup>159</sup> nor any legal immunity attaching to the other party qua contractor.<sup>160</sup> On the other hand, where the contract is silent as to the issue to which a tort relates, in principle this is no reason for denying the existence of that tort, though an exception may properly be made where the tort is based on the defendant's “assumption of responsibility”.<sup>161</sup> In general,<sup>162</sup> though, the choice whether to sue in tort or contract does allow a claimant to gain the benefit of any incidental rules of the regime of liability applicable,<sup>163</sup> though the modern tendency has been to reduce the differences between these two regimes in cases of concurrence.<sup>164</sup>

## Henderson v Merrett Syndicates Ltd

- 122 As has been noted, in *Henderson v Merrett Syndicates Ltd*<sup>165</sup> (*Henderson*) the House of Lords held that a party to a contract may rely on a tort committed by the other party, as long as doing so is not inconsistent with the express or implied terms of the contract. However, in finding a duty of care on which to base the plaintiffs' claim in tort, Lord Goff of Chieveley relied on *Hedley Byrne* as establishing a very broad principle of liability based on an "assumption of responsibility" and this principle suggests a very considerable overlap between the tort of negligence and liability in contract between parties to contracts.<sup>166</sup> As will be seen, moreover, the basis of a finding of an "assumption of responsibility" is so closely related to the finding of an agreement in respect of the same matter that the claim to true independence of the tortious liability thereby established is open to question.
- 123 In *Henderson*, the plaintiffs were all Lloyd's "Names" who had agreed to take unlimited liability in respect of certain proportions of risks to be underwritten in the insurance market, but who had done so through different forms of arrangement. In the case of "direct Names",<sup>167</sup> those persons who acted as their members' agents also acted as their managing agents (being known sometimes as "combined agents", though being termed "managing agents" here) and therefore any claim for negligence in respect of their claims was within privity of contract. The issue which came before the House of Lords was whether the "direct Names" could opt to sue their managing agents in the tort of negligence in respect of the management of the underwriting, the limitation period for their action for breach of contract having expired. In this respect, Lord Goff of Chieveley, who gave the leading speech and with whom Lords Keith of Kinkel, Browne-Wilkinson, Mustill and Nolan concurred, held that *prima facie* the managing agents did owe a duty of care in the tort of negligence to the "Names". Such a duty was, according to Lord Goff, to be based on a broad principle found in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,<sup>168</sup> according to which a person possessed of special skill or knowledge may owe a duty of care in tort by assuming a responsibility to another person within a relationship (whether special or particular to a transaction and whether contractual or not): the principle was not, therefore, restricted to cases of statements.<sup>169</sup> The House of Lords further held that, on the facts of the case, there was no reason why the "Names" should not opt to sue on the breach of such a duty of care in the tort of negligence rather than for breach of an implied term in their contract with the managing agents. Lord Goff considered that there was "no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy",<sup>170</sup> though he added that this general right of option was:

“... subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.”<sup>171</sup>

## Contract inconsistent with liability in tort

- 124 This decision therefore affirms the general availability of an option to sue in either tort or contract where the constituent elements allow, the exception being where the contract is inconsistent with a claim in tort. While Lord Goff’s discussion of the “inconsistency of the contract” did not go beyond reference to its express or implied terms (on the facts there was no reason for it to do so), it is submitted that neither the decision itself in *Henderson* nor Lord Goff’s speech casts doubt on the proposition that such an “inconsistency” may be found in other features of the contract, notably the existence of a certain contractual immunity enjoyed by the party to the contract against whom the claim in tort is brought.<sup>172</sup>

## Assumption of responsibility

- 125 However, with respect, Lord Goff’s approach in *Henderson* to the existence of a duty of care in tort on which a party to a contract may choose to rely is more problematic. As has been noted, this approach rested on a broad principle of assumption of responsibility drawn from the speeches of the members of the House of Lords in *Hedley Byrne*.<sup>173</sup> While the notion of “assumption of responsibility” is clearly present in those speeches, they also contained various other elements on which the imposition of a duty of care was to be based, including the special skill and knowledge of the defendant and his or her “special relationship” with the plaintiff. During the period from its decision in 1963 to the mid-1990s,<sup>174</sup> the courts either combined these various elements or emphasised one or more of them as the facts of the case or their own preference suggested,<sup>175</sup> but *Hedley Byrne* was not, in general, used to expand liability for pure economic loss beyond the situation of liability for negligent *misstatements*.<sup>176</sup> This restriction on the ambit of the “broad principle of assumption of responsibility” was, however, firmly rejected by Lord Goff in *Henderson*<sup>177</sup> and it seems that the principle applies where: (i) the defendant has agreed to perform a service or otherwise to do something for the claimant, whether under a contract or not<sup>178</sup>; (ii) the defendant possessed or held himself out as possessing special skill or knowledge

in relation to these services or this task<sup>179</sup>; and (iii) some evidence of reliance by the claimant can be made out.

180

**U** As regards the last of these conditions, in cases of negligent misstatement the claimant's reliance provides the causal link between the defendant's statement and the claimant's loss.<sup>181</sup> However, outside this type of case and as between parties to a contract, the element of "reliance" by the claimant may be found in the claimant's entering the contract under which the services, etc. are agreed to be done by the defendant.<sup>182</sup> Such a basis of liability in tort is not merely "equivalent to contract"; it is likely in very many cases to be parasitic on it.<sup>183</sup>

## Robinson v P E Jones (Contractors) Ltd<sup>184</sup>

- 126 However, in 2011 the Court of Appeal took a step back from this apparent result of the reasoning in *Henderson*. There the claimants had bought a house from the defendant, a builder, on terms which included a clause which limited the defendant's liability to the liability arising under the National House-Building Council's standard form of agreement (which the parties also executed). The claimants later claimed damages for the financial consequences of a defect in the house as built for them in the tort of negligence, their claim in contract being time-barred. In these circumstances, the Court of Appeal denied the existence of a duty of care in the tort of negligence on the basis that the claimants' claim was for pure economic loss against a builder for defects in the building.<sup>185</sup> For the Court of Appeal, the existence of an effective limitation clause<sup>186</sup> was inconsistent with the imposition of a duty of care in tort based on an assumption of responsibility, applying the clear approach taken by the House of Lords in *Henderson*.<sup>187</sup> However, the Court of Appeal expressed views which more generally took a more cautious approach to assumption of responsibility under *Hedley Byrne*. So, Jackson LJ (with whom Maurice Kay LJ and Stanley Burton LJ agreed) saw nothing in the case before him:

"... to suggest that the defendant "assumed responsibility" to the claimant in the *Hedley Byrne* sense. The parties entered into a normal contract whereby the defendant would complete the construction of a house for the claimant to an agreed specification and the claimant would pay the purchase price. The defendant's warranties of quality were set out and the claimant's remedies in the event of breach of warranty were also set out. The parties were not in a professional relationship whereby, for example, the claimant was paying the defendant to give advice or to prepare reports or plans upon which the claimant would act."<sup>188</sup>

Even apart from the limitation clause, Jackson LJ therefore would have been disinclined to find a duty of care based on assumption of responsibility. Stanley Burton LJ added that:

“It is important to note that a person who assumes a contractual duty of care does not thereby assume an identical duty of care in tort to the other contracting party. The duty of care in contract extends to any defect in the building, goods or service supplied under the contract, as well as to loss or damage caused by such a defect to another building or goods. The duty of care in tort, although said to arise from an assumption of liability, is imposed by the law. In cases of purely financial loss, assumption of liability is used both as a means of imposing liability in tort and as a restriction on the persons to whom the duty is owed ... The provider of a service, such as an accountant or solicitor, owes a duty of care in tort to his client because his negligence may cause loss of the client’s assets.”<sup>189</sup>

These passages therefore emphasise that the mere existence of a contractual agreement to undertake something for the contracting party will not necessarily be treated as an “assumption of responsibility” for the task which is the subject matter of their contractual obligation.

## Fair, just and reasonable

- 127 According to Lord Goff in *Henderson*, where an alleged duty of care is based on the doctrine of assumption of responsibility there is no need to enter the question of whether it is “fair, just and reasonable” to impose such a duty, even in cases where the claimant’s loss is purely economic:

“... the concept [of assumption of responsibility] provides its own explanation why there is no problem in cases of this kind about liability for economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for [sic, to] that other in respect of economic loss which flows from the negligent performance of those services.”<sup>190</sup>

It may be argued in support of this proposition that where a claimant has satisfied the conditions for the application of the “broad principle”, there is no need for an inquiry as to the desirability as a matter of policy of the imposition of liability for *pure economic loss* as the principle itself contains the requisite factors—such as “special skill or knowledge” and “reliance”—which balance the justice of its imposition.<sup>191</sup> However, in the dictum quoted above Lord Goff may be thought to go further: for it appears to suggest, if not that a person who “assumes responsibility” does so for economic loss (a position which gives to “assumption of responsibility” the meaning of agreeing *to be liable* which was clearly rejected by the House of Lords), then at least that such a person is to be held liable for a type of loss which flows from the nature of his agreement (to perform a certain type of service) which he has made. If so, this surely expresses no more than the idea that in these circumstances pure economic loss is a natural and probable (or indeed foreseeable) type of harm

arising from the breach of his agreement. And if this is so, then it is at most an argument in favour of recovery for pure economic loss, rather than an unanswerable reason for it. With the greatest respect, Lord Goff's suggestion that there "should be no need" to inquire into the "fairness, justice and reasonableness" of imposition of a duty of care should not be interpreted to mean that, apart from the issue of liability for pure economic loss, questions of policy are incapable of acting to negative a *prima facie* duty arising from an assumption of responsibility. Such an interpretation would, it is submitted, be inconsistent with the careful enquiry undertaken by members of the House of Lords in *Arthur J.S. Hall v Simons*<sup>192</sup> into the considerations of policy relevant to the question whether barristers and other advocates should enjoy a degree of immunity from liability in respect of the conduct and management of litigation. Rather, as Hamblen LJ observed in *Burgess v Lejonvarn*, in cases of assumption of responsibility:

"... [w]hilst there is no need to make a further inquiry into whether it would be fair, just and reasonable to impose liability, that is because such considerations will have been taken into account in determining whether there has been an assumption of responsibility."<sup>193</sup>

Moreover, in *Marc Rich & Co AG v Bishop Rock Marine Co*,<sup>194</sup> the House of Lords confirmed that the mere fact that a defendant's conduct has caused damage to property of a foreseeable type does not rule out an inquiry as to the "justice and reasonableness" of the imposition of a duty of care in the tort of negligence. It would be indeed a paradox if the courts were to inquire into the justice and reasonableness of imposing liability for foreseeable damage to property caused by negligence, but not into the justice and reasonableness of imposing liability for albeit foreseeable pure economic loss.

## Effect of broad liability in tort

- <sup>192</sup> One effect of judicial acceptance of a very broad principle of "assumption of responsibility" under *Hedley Byrne* may be seen to be the creation of a very wide means of circumventing the doctrine of consideration: for as long as a defendant is possessed of special skill or knowledge, his agreement with the claimant to perform a service within that skill or pertaining to that knowledge will give rise to a cause of action in tort based on the negligent performance of those services, whether they were to be paid for or not.

<sup>193</sup>

- <sup>194</sup> A second type of effect may be the disapplication of other established rules of contract law. For example, in *Barclays Bank Plc v Fairclough Building Ltd (No.2)*,<sup>196</sup> building sub-contractors had engaged cleaning contractors to clean an asbestos cement roof, but in doing so negligently the cleaners created a danger from the asbestos which required considerable expenditure by the owner

of the building to make it safe.<sup>197</sup> The Court of Appeal upheld the builders' claim for an indemnity against the cleaners in respect of their own liabilities, but reduced the award on the basis of their contributory negligence in failing to take steps to inform themselves of the problems involved in the cleaning of the asbestos cement in the way intended. The Court of Appeal accepted that contributory negligence is a defence to a claim for breach of contract only where it is concurrent with the existence of a liability in tort based on negligence,<sup>198</sup> but found such a liability in the cleaners in their breach of a duty of care based on their "assumption of responsibility", the latter arising simply from their contractual undertaking to do a job which required special skill and which they held themselves out as capable of doing, coupled with the roofing contractors' reliance on this, as evidenced by their entering into the same contract. In the result, the cleaners were entitled to rely on their own duty of care in tort to allow them to reduce by one half their own liability for breach of contract. Clearly, then, while in some cases, notably those turning on issues of limitation of actions such as *Henderson* itself, judicial acceptance of such a wide basis for establishing a duty of care in tort will benefit claimants, allowing them to avoid disadvantageous incidental rules applicable to actions in contract, paradoxically in others, it will instead benefit defendants.

- <sup>129</sup> The following discussion will look first at the question whether a threatened breach of contract gives rise to liability in the tort of intimidation, before turning to examine the qualifications on the general rule allowing a claimant to opt whether to sue in contract or in tort and at how such an option affects the regime of liability applicable to the claimant's claim.

## Threatened breach of contract as a tort

- <sup>130</sup> While some dicta in *Brown v Boorman*<sup>199</sup> suggest that any breach of contract gives rise to liability in tort,<sup>200</sup> such a broad interpretation of that case does not reflect the modern law: a breach of contract may be linked historically to tort, but does not itself constitute one.<sup>201</sup> However, it would seem that what has often been called the tort of intimidation (and is also known as the tort of causing loss by unlawful means<sup>202</sup>) could allow at least *threatened* breaches of contract to give rise to liability in tort. The tort is committed, *inter alia*, where A uses "unlawful means" to force B to do something to his prejudice and it is clear that it includes a threatened breach of contract<sup>203</sup> and it appears that this applies to "two-party" intimidation as much as to "three-party" intimidation.<sup>204</sup> Thus, according to Clerk & Lindsell on Torts, the tort of intimidation extends to a threat of breach of contract or at least to a threat of some breaches of contract,<sup>205</sup> despite the fact that the victim of such a threat may also have an action for anticipatory breach of contract.<sup>206</sup>

<sup>131</sup>



If so, then it would appear that rules which govern claims in contract, for example ruling out punitive damages or relating to remoteness of damage, could be avoided.<sup>207</sup> Indeed, Clerk & Lindsell on Torts' notes that it is not clear whether a party who has affirmed the contract after a threatened breach is thereby prevented from relying on the tort of intimidation.

<sup>208</sup>

However, if a claimant who was the victim of such a threat were allowed to rely on this tort rather than on the contract, it would be odd to deny him the same option where the other party had not merely threatened to break the contract, but had carried out this threat.<sup>209</sup> If this situation were allowed to give rise to liability in the tort of intimidation, then the law would be fast approaching the recognition of a distinction based on whether or not a defendant's breach of contract was "wilful" or "intended to injure" and there is no reason to think that English courts are inclined to do so.<sup>210</sup> It is submitted that there is no convincing reason for allowing a party to a contract to avoid the restrictions which the law already has decided should apply to that party's claim simply by claiming in tort. For this reason, the view that "two-party" and "three-party" intimidation should be treated differently where breach of contract is relied on as the unlawful means is to be preferred.<sup>211</sup> Thus, while a threatened breach of contract may constitute the tort of intimidation/tort of causing harm by unlawful means, as between parties to a contract a threatened breach should not in itself be considered sufficient "unlawful means" for the purposes of that tort; other independent "unlawful" elements should be required, for example, tortious means.<sup>212</sup>

## Breach of contract as an "aggressive commercial practice"

- 132 In 2014 the [Consumer Protection from Unfair Trading Regulations 2008](#) were amended so as to create new "rights to redress" for consumers in respect of certain categories of unfair commercial practices.<sup>213</sup> Accordingly, a consumer may recover, inter alia, damages in respect of an "aggressive commercial practice" where the consumer has entered into a contract with a trader for the sale or supply of a "product" (as specially defined by the Regulations<sup>214</sup>) by the trader or a contract with a trader for the sale of goods to the trader, or where the consumer makes a payment to a trader for the supply of a product, and the aggressive commercial practice is a significant factor in the consumer's decision to enter into the contract or make the payment.<sup>215</sup> For these purposes, a "commercial practice" is aggressive if:

- "(a)it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and
- (b)it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise."<sup>216</sup>

It is clear that a threat to break a contract or a breach itself may constitute an aggressive commercial practice for these purposes and, where this threat or breach is a significant factor in the consumer's decision to make a payment to the trader which was not due, the consumer may have a right to receive back the payment from the trader<sup>217</sup> and/or a right to damages against the trader for any loss caused, to include financial loss and any "alarm, distress or physical inconvenience or discomfort" which he would not have suffered if the aggressive commercial practice had not taken place.<sup>218</sup>

## Contractual standards of care: can tort be stricter?

- 133 It is clear that where either the express or implied terms of the contract or the law itself governs the standard of care owed by the defendant to the claimant, the latter cannot seek to impose a higher standard by claiming in tort, notably the tort of negligence.<sup>219</sup> Where a contract expressly restricts a party's standard of care, it would seem that ordinary principles of construction apply, rather than construction contra proferentem which has traditionally been applied to exemption clauses proper, i.e. those clauses which intend to restrict or exclude a party's *liability*.<sup>220</sup> In the case of implied terms, those which relate to the safety of a person or of his property often impose either reasonable care<sup>221</sup> or some stricter duty on the contractor,<sup>222</sup> and so any liability in tort in the latter would not impose any higher standard than in contract. However, implied terms whose breach gives rise to economic loss in the other party sometimes impose a more restricted standard of care than that imposed by the general law, and here the courts have refused to allow the other party to circumvent this contractual standard by claiming in tort. This was the particular issue in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*<sup>223</sup> which gave rise to Lord Scarman's dictum advising against the intervention of tort between parties to a contract,<sup>224</sup> and this was the basis on which the decision of the Privy Council in that case which denied a claim in tort was explained by the House of Lords in *Henderson v Merrett Syndicates Ltd*.<sup>225</sup> *Tai Hing Cotton Mill Ltd* itself concerned a claim by a bank against its customer for economic loss caused by the latter's alleged negligence in the running of its own account. The Privy Council held that as a matter of authority a bank customer owed only a duty to act honestly in relation to the conduct of his own account under the contract with the bank and should not, therefore, be held to a duty to take reasonable care whether by way of implied term or of breach of an alleged duty of care in the tort of negligence.<sup>226</sup> Similarly, where a party to a contract owes only a "duty to act rationally", i.e. to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally in the exercise of a contractual discretionary power, and owes no duty to act with reasonable care under an implied term in the contract, then, apart from the situation where the party acts in excess of that power, it will owe no duty of care in tort<sup>227</sup>: once a claimant's:

“... case on implied statutory or contractual term fails, there is ... no room for the imposition of a tortious duty of care, which is more extensive than that which was provided for under the [contract].”<sup>228</sup>

Therefore, a clearing broker conducting a close out under a mandate with an options trader did not owe the latter a duty to take reasonable care in contract or in the tort of negligence.<sup>229</sup>

## Contractual standards and equitable principles

- 134 The courts have taken a similar approach where the relationship between the parties is contractual, but where it has traditionally been subject to regulation by equitable principle. Thus, in *Parker-Tweedale v Dunbar Bank Plc*<sup>230</sup> Nourse LJ stated that any duty of a mortgagee to a mortgagor or of a creditor to a guarantor in respect of the property or debt respectively arose in equity out of that particular relationship, it being:

“... both unnecessary and confusing for the duties owed by a mortgagee to the mortgagor and the surety, if there is one, to be expressed in terms of the tort of negligence.”<sup>231</sup>

Similarly, according to Lord Templeman, giving judgment on behalf of the Privy Council, where a creditor was “not obliged to do anything” for the benefit of a surety under these equitable principles, for example in relation to the recovery of the debt, no duty of care in the tort of negligence can arise.<sup>232</sup> Indeed, it has been said that “the duty arises in equity, not in contract or tort”.<sup>233</sup>

## Contractual standard stricter

- 135 In certain types of case, the courts have refused to construe a contract or imply a term in it so as to circumvent the traditional standard of care or scope of liability applied to the type of case in question, even where this has usually been put as a matter of tort. For example, in *Thake v Maurice*,<sup>234</sup> a majority of the Court of Appeal refused to interpret a contract to perform a vasectomy as importing an obligation that the patient would be rendered sterile as a result, holding that it contained only one of reasonable care in warning the latter of the possibility of future fertility. Although not put in these terms by the court, it could be said that the established standard of care in tort was applied to the claim in contract despite persuasive factual considerations which could have

lead in a different direction.<sup>235</sup> However, in many other situations the courts have accepted that the standard of care owed by a defendant in contract by reason of an implied term is higher than the reasonable care which would be imposed in the tort of negligence.<sup>236</sup> An example may be found in the decision of the Privy Council in *Wong Mee Wan v Kwan Kin Travel Services Ltd.*<sup>237</sup> There a travel agent was held liable for the death of one of its customers on the basis of the negligence of one of its agents, even though there was no negligence on its own part, on the basis that the contract included an obligation that the services which the travel agent had engaged to perform *would be carried out* with reasonable care.

## Stricter contractual standard does not affect tort

- <sup>136</sup> Finally, in *Aiken v Stewart Wrightson Members Agency Ltd*<sup>238</sup> the question arose whether the fact that the defendant owed a contractual duty *more onerous* than one of reasonable care could and should affect the standard of care owed in the tort of negligence. The case concerned a claim by Lloyd's "indirect Names" against their "members' agents", i.e. the agents who had contracted with them to advise them on their choice of syndicates and to place them on any syndicate once chosen, leaving the placing of the insurance to "managing agents". It was conceded by the members' agents that they owed the plaintiff "Names" a contractual duty that:

"... the actual underwriting would be carried out with reasonable care and skill so that the members' agent remains directly responsible to its Names for any failure to exercise reasonable care and skill by the managing agent of any syndicate to whom such underwriting has been delegated."<sup>239</sup>

The "Names" contended that the members' agents also owed them a duty of care in the tort of negligence of the same content, a "parallel and *co-extensive* duty of care in tort", arguing that it was inherent in Lord Goff's view expressed in *Henderson v Merrett Syndicates Ltd*<sup>240</sup> that any liability in tort should not be inconsistent with the terms of the contract that the latter "ought in logic and in law to be definitive also of the nature and extent of their duty in tort".<sup>241</sup> However, Potter J rejected this argument both as a matter of authority<sup>242</sup> and principle. The latter he considered well expressed in a dictum of Le Dain J in *Central Trust Co v Rafuse*<sup>243</sup>:

"A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract."

Potter J therefore concluded that on the facts before him the:

“... common law duty of care ... falls short of the specific obligation or duty imposed by the express terms of the contract, unless that common law duty of care can be shown to be non-delegable in character for the purposes of the law of tort,”

a proviso which was not satisfied in the case itself.<sup>244</sup>

## Contractual exclusion of liability in tort

- 137 The law has taken a similar but not identical approach to cases where a contract term excludes or limits *liability* of one contractor to another. Since at least the early nineteenth century, exemption clauses have been held capable of excluding or limiting liability in tort,<sup>245</sup> though it should be noted that where the clause limits liability, a (limited) claim in tort may still exist.<sup>246</sup> While at times the interpretation of exemption clauses *contra proferentem* has led to the courts distinguishing between the two types of liability, holding that a particular clause covered a strict contractual liability but did not cover liability for negligence in tort,<sup>247</sup> there would appear to be no real reason to characterise a contractor’s liability for negligence in these circumstances as tortious rather than contractual and in other cases the courts have simply inquired whether a particular clause should be construed to cover cases of negligence as well as any stricter liability.<sup>248</sup> Of course, in many situations, the effectiveness of such a term will be subject to the provisions of [s.2 of the Unfair Contract Terms Act 1977](#) or [ss.62 or 65 of the Consumer Rights Act 2015](#), all of which may apply to cases of tortious as well as to contractual negligence.<sup>249</sup>

## Incompatibility of express term and liability in tort

- 138 *Johnstone v Bloomsbury Health Authority*<sup>250</sup> concerned an alleged incompatibility between an express term of a contract and the existence of an established liability in the tort of negligence in a rather unusual way. The plaintiff was a junior hospital doctor who worked under a contract of employment which stipulated a working week of 40 hours and provided for a possible 48 additional hours availability for work. He claimed that in compliance with this contract he had sometimes worked in excess of 88 hours per week and had become ill as a result. The issue before the Court of Appeal was whether his claim for a declaration that he should not be required to work more than a 72-hour week should be struck out. The plaintiff relied on his employer’s duty, which exists both as a matter of contract and the tort of negligence,<sup>251</sup> to take reasonable care as to his health at work, but the defendant countered that the express provision in the contract as to his hours of work limited the impact of the implied term to take reasonable care and that no wider tortious duty could be imposed, relying on Lord Scarman’s dictum in *Tai Hing Cotton Mill Ltd v Liu Chong*

*Hing Bank Ltd.*<sup>252</sup> The majority of the Court of Appeal refused to strike out the plaintiff's claim, but for different reasons. Stuart-Smith LJ considered that while it was quite possible for an express term to exclude an implied one, the express term in question had not attempted to do so.<sup>253</sup> Sir Nicolas Browne-Wilkinson VC agreed with Stuart-Smith LJ's decision on this point, but on more restricted grounds. The Vice-Chancellor considered that the approach of the Privy Council in *Tai Hing Cotton Mill Ltd*:

“... shows that where there is a contractual relationship between the parties their respective rights and duties have to be analysed wholly in contractual terms and not a mixture of duties in tort and contract. It necessarily follows that the scope of the duties owed by one party to the other will be defined by the terms of the contract between them.”<sup>254</sup>

However, the Vice-Chancellor held that the clause in question did not on its terms impose an absolute obligation on the doctor to work the extra hours, but merely gave the defendant a discretion as to the number of hours extra that were to be worked and that this right should be considered subject to their ordinary duty not to injure the plaintiff.<sup>255</sup> Leggatt LJ, dissenting, considered that the express term on the facts did indeed cut down the impact of the employer's implied term as to the safety of its employee and, following *Tai Hing Cotton Mill Ltd*, no tortious obligation could be any greater.<sup>256</sup> It is submitted that the approach of all members of the Court of Appeal in *Johnstone v Bloomsbury Health Authority* to these issues is consistent with that adopted subsequently by the House of Lords in *Henderson v Merrett Syndicates Ltd*,<sup>257</sup> since the latter confirmed that no concurrent liability in tort would be allowed where this would be inconsistent with the terms of the contract between the parties.<sup>258</sup> However, the decisions of the majority in *Johnstone* also shows that judges will be slow to interpret a contract as incompatible with an established liability in tort, perhaps particularly where this relates to personal injuries.

On the other hand, where the express terms of a contract as properly construed do not impose any duty to take reasonable care for the benefit of the other party to the contract, the court may hold that this is incompatible with the imposition of a duty of care at common law of the same scope in the absence of any existing authority. In *McFarland-Cruickshanks v England Kerr Hands Solicitors Ltd*,<sup>259</sup> it was held that as a matter of their construction the express terms of the contract between a barrister and a solicitor (which reflected closely a professional standard form and the traditional relationship between barristers, solicitors and their lay clients) did not impose a duty to exercise reasonable skill and care in the barrister *for the benefit of the solicitor on his own account*, this reflecting the general position that the barrister's primary duty was to the lay client.<sup>260</sup> Unlike *White v Jones*,<sup>261</sup> therefore, this was not a case where the law leaves a claimant (here, the solicitor), without a remedy:

“The reasons of justice which might lead to a court to recognise a duty of care at common law to provide a remedy for those who have suffered a loss do not exist. This

was a commercial relationship. The parties were free to make their own bargain. The agreement that these parties made did not provide for such a duty, notwithstanding that [the relevant express term] gave them the opportunity to do so. For this court to then impose a duty of care at common law would run counter to the parties' agreement. That is not a course which the court should take.”<sup>262</sup>

The High Court therefore struck out the solicitor's claim for damages against the barrister in respect of their alleged losses incurred by way of their lost opportunity of claiming fees from the lay client under a conditional fee agreement.<sup>263</sup>

## Effect on liability in tort of inconsistency of term implied in law with express terms

- 138A The courts have recognised terms implied in law in a range of categories of contract as their usual incident, but they will not do so where the implied term would be contrary to or otherwise inconsistent with the express terms of the particular contract before them.

<sup>264</sup>

U In *Stonecrest Marble Ltd v Shepherds Bush Housing Association Ltd* the High Court explained the effect of such an exclusion of an implied term in law on any possible parallel liability in tort for negligence, in the context of the term usually implied in leases that “where the lessor retains in his possession and control something ancillary to the premised demised ... the maintenance of which in proper repair is necessary for the protection of the demised premises ... the lessor is under an obligation to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the tenant or to the premises demised”.

<sup>265</sup>

U According to Patten LJ in *Gavin v Community Housing Association Ltd* the lessor's liability in this sort of case arises from an implied term rather than the tort of negligence, but he considered that:

“the precise juristic basis of liability may not matter in cases where ... the parties have a contractual relationship under the terms of the lease. Whether the duty imposed on the landlord to take reasonable care of the retained premises arises in tort or contract, the court has still to consider whether the express scheme of repair or insurance imposed by the lease excludes any other form of liability which the law might otherwise impose.”

<sup>266</sup>



In *Stonecrest Marble Ltd* the court agreed with Patten LJ's view of the contractual nature of the lessor's liability but held that the implication of such a term was inconsistent with the express terms of the lease before it.

<sup>267</sup>

**U** The claimant lessee had put its claim solely in tort for negligence, but the High Court held that, given the inconsistency of the implied term, "to impose in the alternative a tortious duty would necessarily be inconsistent with the express terms and contrary to the rule in *Henderson v Merrett Syndicates*"

<sup>268</sup>

**U** to the effect that "a party to a contract may rely upon a tort committed by the other party, as long as doing so is not inconsistent with the express or implied terms of the contract".

<sup>269</sup>

**U**

## Contract removing condition of or giving rise to a defence to liability in tort

**139** A contract's terms can affect liability in tort in another way as they may remove one of the conditions for its existence or give rise to the existence of a defence, and this is particularly clear where the consent of an injured party excludes liability. Thus, in cases concerning medical treatment involving physical contact with the patient, the contact is *prima facie* a battery unless the claimant has consented to the treatment,<sup>270</sup> but where a person is able to and has consented, this will exclude liability in tort as well as contract.<sup>271</sup> Similarly, a contractual licence given by an owner of land prevents any liability arising in the licensee in the tort of trespass as long as the latter does not act beyond the permission.<sup>272</sup> A contractual consent can also allow the application of the defence of *volenti non fit injuria*. For example, in *Chapman v Ellesmere*,<sup>273</sup> a racing steward who acted under a licence from the Jockey Club was held unable to sue members of a committee appointed under that club's rules in the tort of defamation in respect of the publication of a report on his role in a particular race, because on accepting his licence he had agreed to rules under which publication of such a report was specifically permitted.

## Legal immunities for contractors

**140**

**D**

Where the law itself rather than a contractual term grants a party to a contract a certain immunity from liability, the courts have looked to the reason for this immunity and decided whether it applies equally to a claim in tort as to the one in contract.

<sup>274</sup>

**U** For example, while the courts recognised that a solicitor enjoyed a certain immunity from liability in negligence in relation to the conduct and management of a case for reasons of policy, this immunity applied both to tort and to contract.<sup>275</sup> However, the approach of the courts to the very wide<sup>276</sup> immunity from liability at common law<sup>277</sup> of landlords to their tenants has been very different. In *Rimmer v Liverpool City Council*,<sup>278</sup> while the Court of Appeal did not consider itself able as a matter of authority to impose a duty of care in the tort of negligence on a landlord as to the safety of the premises at the time of letting, it did impose a duty of care on a landlord qua designer of the premises let as to the reasonable safety of their design to the tenant qua person who might reasonably be expected to be affected.<sup>279</sup> As Stephenson LJ noted, *Cavalier v Pope*,<sup>280</sup> the leading authority which supported the landlord's immunity, should be restrictively interpreted<sup>281</sup> for at the time it was decided:

“... contractual duties were regarded as excluding delictual duties and a contractual relationship determined completely the rights and obligations of the related parties, as well as the rights of third parties.”<sup>282</sup>

- 141 In this context, and as regards liability for personal injuries, the courts showed themselves willing to allow the tort of negligence to develop in order to circumvent an immunity attaching to a particular contract where that immunity was no longer considered justified as a matter of policy, but which was supported by superior authority.<sup>283</sup>
- 142 The decision of the Court of Appeal in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)*<sup>284</sup> concerned a situation in which a legal rule (as opposed to the terms of the contract) provided one party to a contract with a remedy based on breach of a duty in the other, but where that breach of duty had not previously been held to give rise to liability in damages. One issue before the court was whether breach by an insurer of its duty to disclose matters to the assured during the course of the contract could give rise to liability in damages as well as the possibility of rescission of the contract by the assured.<sup>285</sup> Having held that it should not imply a relevant term as to disclosure into the contract either on the basis of the “bystander test”<sup>286</sup> or the “test of necessity”,<sup>287</sup> the court considered that, whatever the degree of proximity of the parties or the fairness and reasonableness of recognising a duty of care in tort, it should still apply the “principle established in *Tai Hing Cotton Mill Ltd v Lui Chong Hing Bank Ltd*”.<sup>288</sup> According to May LJ:

“... the [insurer] was entitled ... to look to the contract between the parties to discover what was the obligation of the [insurer] with regard to reporting to the [assured].”<sup>289</sup>

- )43 Thus, legal recognition of a *limited* remedy for a party to a contract for breach of a particular legal duty imposed on the other party, was seen by the court as a reason for refusing to impose a duty of care in the tort of negligence so as to give an *additional* remedy.
- )44 It should be noted, however, that *Bank of Nova Scotia* was decided before the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd*<sup>290</sup> and therefore at a time when *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*<sup>291</sup> was still seen as an authority against allowing a liability in tort (at least for economic loss) to be relied on by one party to a contract against the other and some of these dicta should be seen in this light.<sup>292</sup> While it would be open to a court simply to distinguish the decision on this basis, it is submitted that it is more likely that the latter will be interpreted as an illustration of the proposition that new or doubtful liabilities in tort should not be imposed between parties to a contract where to do so would subvert the policy of the law of contract as reflected in its grant of a more limited remedy than recognition of the tort would entail. Such a proposition could be seen as the reflection of the idea that any liability in tort between the parties to a contract should not be inconsistent with that contract or, more directly, as constituting a consideration of policy arguing for the rejection of a duty of care in tort.<sup>293</sup> So, for example, in *Johnson v Unisys Ltd*<sup>294</sup> a majority of the House of Lords held that a claim for damages by an employee for breach of contract for the manner of his dismissal by his employer had rightly been struck out as disclosing no reasonable cause of action on the basis that any implied term concerning the manner of dismissal would be inconsistent with the statutory scheme of unfair dismissal put in place by Parliament. Lord Hoffmann considered that the same reasoning precluded any imposition of a duty of care in the tort of negligence and observed that:

“It is of course true that a duty of care can exist independently of the contractual relationship. But the grounds upon which ... it would be wrong to impose an implied contractual duty would make it equally wrong to achieve the same result by the imposition of a duty of care.”<sup>295</sup>

## Contractual silence

)45



In the preceding situations, either the contract's terms or the law itself has regulated the obligation or liability imposed on the defendant. More difficult has been the case where the contract is silent as to an issue which is allegedly governed by a tort, for silence is ambiguous: where the parties have not provided for a certain issue, this can mean either that they did not address that issue, even implicitly, or it can mean that they consciously chose *not* to provide for that issue.<sup>296</sup> The typical case in which this problem has arisen has been where a contract has been held not to contain a relevant implied term and so the claimant has sued instead in the tort of negligence.

<sup>297</sup>

**U** Clearly, the choice for a court is whether to hold that the contract's silence excludes the recognition of any liability in tort, or, conversely, that it has no effect on the recognition of any liability in tort, which arises or does not arise according to its own rules. The acceptance by the House of Lords in *Henderson v Merrett Syndicates Ltd* of the general rule that a party to a contract may rely on a tort committed by the other party even in the course of performance of the contract would appear at first sight to have settled this question in favour of the latter position, but, as been already noted, that same decision's acceptance of the "broad principle" of assumption of responsibility drawn from *Hedley Byrne* reintroduces the question in this particular context. The following will, therefore, look first at the general position and then at the approach taken by the courts to the question of tortious "assumptions of responsibility" between parties to a contract which is silent as to the issue on which the assumption is alleged to have been made.

## The general position

- <sup>296</sup> In *Henderson v Merrett Syndicates Ltd* it was held, *inter alia*, that a party to a contract may rely on a tort committed by the other party, as long as doing so is not inconsistent with its express or implied terms: contract does not necessarily exclude tort.<sup>298</sup> While Henderson itself concerned a case where the defendant owed a contractual duty *concurrent* with the alleged tortious duty, it could be argued that a contract's silence is by its nature not inconsistent with the existence of any liability in tort. In support of this position, it can be noted that to allow a person's mere entering into a contract with another to have the effect of excluding the latter's liability in tort would mean that the law allowed by *implication* (the implication that by their silence the parties had intended that the issue in question should not be regulated) what it traditionally allowed only by a clear contractual *expression*,<sup>299</sup> a paradox which would only be heightened by the fact that such an express exemption clause would, in many cases, be subject to legislative control.<sup>300</sup> In general, therefore, a contract's silence should not be interpreted as a choice to oust the general law of tort.

## Contractual silence and "assumption of responsibility"

<sup>297</sup>

However, more difficulty arises in relation to cases of recovery of pure economic loss in the tort of negligence based on the idea of “assumption of responsibility” drawn from the speeches of the members of the House of Lords in *Hedley Byrne*. Certainly, until the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd*<sup>301</sup> the courts on more than one occasion refused to recognise a duty of care in the tort of negligence in respect of pure economic loss based on an “assumption of responsibility” of one party to a contract to the other where that contract was silent as to the issue in question. For example, in *Reid v Rush & Tompkins Group Plc*<sup>302</sup> the plaintiff was injured in a car accident in Ethiopia in the course of his employment for his English employer, but as he could not recover compensation there from the person responsible, he sued his employer, arguing that the latter owed him an obligation either to insure him against this type of accident or to advise him that he ought himself to take out appropriate insurance. However, having refused to find an implied term in his contract of employment either as to insurance or advising him of his position,<sup>303</sup> the Court of Appeal rejected his claim for pure economic loss in the tort of negligence, refusing to accept his argument that the defendant had voluntarily accepted this responsibility. According to Ralph Gibson LJ:

“Where there is a contract between the parties, and any ‘voluntary assumption of responsibility’ occurred, if at all, at the time of making and by reason of the contract, it seems unreal to me to try to separate a duty of care arising from the relationship created by the contract from one ‘voluntarily assumed’ but not specifically assumed by a term of the contract itself.”<sup>304</sup>

Having cited with approval Lord Scarman’s dictum in *Tai Hing Cotton Ltd v Liu Chong Hing Bank Ltd*<sup>305</sup> the learned Lord Justice added that:

“... it is not open to this court to extend the duty of care owed by this defendant to the plaintiff by imposing a duty in tort which ... is not contained in any express or implied term of the contract.”<sup>306</sup>

Similarly, in *National Bank of Greece SA v Pinios Shipping Co (No.1), The Maira*,<sup>307</sup> while Lloyd LJ accepted that “in a large class of cases it was always, and maybe still is, possible for the plaintiff to sue either in contract or in tort”<sup>308</sup> he considered that:

“... it has never been the law that a plaintiff who has the choice of suing in contract or tort can fail in contract yet nevertheless succeed in tort; and if it ever was the law, it has ceased to be the law since *Tai Hing Cotton Ltd.*”<sup>309</sup>

Here, again, therefore, the silence of the contract prevented the imposition of a duty of care in tort.<sup>310</sup>

148

However, as this brief discussion makes clear, this approach to the imposition of a duty of care based on an assumption of responsibility in the context of contractual silence was heavily influenced by the general judicial disfavour with which *any* liability in tort between the parties to a contract was viewed, and such an approach was thoroughly disapproved by the House of Lords in *Henderson v Merrett Syndicates Ltd.*<sup>311</sup> However, even after the latter decision a logical difficulty remains with the imposition of liability in tort based on an assumption of responsibility where the contract is silent. As has been seen, the current meaning given to the notion of “assumption of responsibility” by the courts is that the defendant agreed to undertake a task or perform some service for the claimant.

<sup>312</sup>

**U** In cases of “contractual silence”, ex hypothesi,<sup>313</sup> the court has already decided that a defendant did not make any relevant agreement (as a matter of the express or implied construction of the contract). How then can a court hold that a defendant did not agree for one legal purpose, but did do so for another? It would be understandable if a court should consider it illogical to find the existence of such a duty of care owed by one contractor to another having already decided that there has been no contractual assumption of responsibility.

149

However, in *Holt v Payne Skillington*,<sup>314</sup> the Court of Appeal took a rather different view of this matter. In this case, the plaintiffs had indicated to the defendant estate agents that they wished to purchase a property in London with the view to letting it on “holiday lets”, a use which they made clear they required so as to benefit from tax relief in respect of a capital gain they had already made.<sup>315</sup> One of the estate agent’s employees had, at some time before any retainer, assured them that he knew about the local planning requirements which would need to be satisfied to allow the plaintiffs to use whatever property they bought for this purpose. In the result, however, the property which the estate agents put forward and which the plaintiffs bought could not be used for holiday lets under the relevant planning rules. At first instance, the judge held the estate agents liable in the tort of negligence, but not liable for breach of contract on the basis that there was no express term of the retainer agreement (nor of a second “valuation agreement”) between the parties that the agents should investigate the planning issue. The estate agents appealed against this decision as to their liability in tort, but no appeal was made by the plaintiffs on the decision made against them in contract. Before the Court of Appeal, therefore, the estate agents argued that any duty of care in tort which they might have owed to the plaintiffs could not be wider than the express and implied terms of the contract between them and contended that the judge’s decision on the terms of their contracts meant that they could not be liable in tort. Hirst LJ, however, rejected this argument, relying on a passage of Lord Goff of Chieveley’s speech in *Henderson v Merrett Syndicates Ltd*<sup>316</sup> and stating that:

“... there is no reason in principle why a *Hedley Byrne* type of duty of care cannot arise in an overall set of circumstances where, by reference to certain limited aspects of those circumstances, the same parties enter into a contractual relationship involving more limited obligations than those imposed by the duty of care in tort. In such circumstances, the duty of care in tort and the duties imposed by the contract will be concurrent but not coextensive.”<sup>317</sup>

The Court of Appeal held, therefore, that the judge below was entitled to rely on a factual context wider than the contractual agreements between the parties to establish a duty of care in tort.<sup>318</sup> This approach clearly accords with the general position taken in *Henderson v Merrett Syndicates Ltd* in favour of allowing tort to apply between parties to a contract, but it appears to ignore the thrust of the “logical argument” outlined in the previous paragraph against finding a tortious assumption of responsibility in a case of contractual silence. In this regard, however, there is, with respect, a particular difficulty with the decision in *Holt*: for while Hirst LJ based the estate agent’s liability in tort on the principle of assumption of responsibility,<sup>319</sup> he found (as he had been invited to by *both* parties) the “essential characteristics of a situation giving rise to a cause of action in negligence based on a duty of care of the *Hedley Byrne* type”, in a passage of Lord Oliver’s speech in *Caparo Industries Plc v Dickman*,<sup>320</sup> which looks to the defendant’s giving of advice to a person who he knows is likely to rely on it, rather than to any agreement to do a task by the defendant.<sup>321</sup> This approach to the *Hedley Byrne* principle was entirely understandable on the facts, since it was clearly the bad or inadequate advice which the plaintiffs were given by the estate agents’ employee which formed the basis of any imposition of liability in tort. Certainly, where liability under *Hedley Byrne* is put in terms of a negligent misstatement given by a person who can foresee that it will be relied on rather than in the broader terms of an “assumption of responsibility” in the sense of an agreement to perform a service for the other party, then there is nothing inconsistent in finding a duty of care under *Hedley Byrne* but no express or implied duty of care in contract.<sup>322</sup> By contrast, however, to the extent to which a defendant’s having “assumed responsibility” for doing something is to mean that he “agreed to do it”, then it is submitted that it is much more difficult to hold that a party “agreed to do it” for the purposes of the tort but did not “agree to do it” for the purposes of the contract.<sup>323</sup> So, in *Outram v Academy Plastics Ltd*<sup>324</sup> the Court of Appeal held that where a contract of employment did not contain an express or implied term imposing on the employer a duty to inform his employee of a right arising from the contract, no duty of care in the tort of negligence would be imposed to the same effect based on an assumption of responsibility or otherwise.<sup>325</sup>

## Relationship between the scope of duty in tort and the scope of contractual implied term

The discussion in the preceding paragraphs has considered whether the existence or content of a contract between the parties should affect any claimed liability in tort arising between them, but in *Greenway v Johnson Matthey Plc* the High Court and the Court of Appeal considered the relationship between the scope of a contracting party's duty in tort and under a contract more generally in the context of an employer's liability to its employee.<sup>326</sup> In *Greenway v Johnson Matthey Plc* the claimants were employees of the defendants and had, during their employment, been exposed to platinum salts. This had created a sensitivity to the salts which would have developed into an allergy had exposure continued (which it did not, as the sensitivity was discovered), but otherwise the sensitivity was without symptoms. The claimants claimed damages alleging that they had lost earnings as they had changed jobs (or tasks within their employment) as a result of the need to avoid the relevant salts. In these circumstances, the High Court held that the claimants had not suffered any actionable injury for the purposes of their claims in tort (whether in the tort of negligence or for breach of statutory duty); properly analysed, their claims were for pure economic loss.<sup>327</sup> Having so decided, it further held that the claimants' alternative claims for breach of the implied term in their contracts of employment that their employers should take reasonable care of their safety did not lead to any different result. This implied term "arises because the law imposes it in view of the relationship between the parties" and "is in substance the same as the tortious obligation which arises for exactly the same reasons".<sup>328</sup> The scope of the rule of public policy in these cases is to safeguard the health and safety of employees and this is reflected in the fact that the protection is from personal injury but not for economic or financial loss suffered without personal injury.<sup>329</sup>

"Put another way, it is because the implied contractual duty is precisely coterminous with and reflects the obligations imposed by the law of tort—and, in particular, the tort of negligence, that the outcome must be the same however the cause of action is sought to be classified."<sup>330</sup>

The Court of Appeal upheld this decision, agreeing that the claimants had not suffered any actionable physical injury, but only pure economic losses.<sup>331</sup> The Court of Appeal considered that the:

"... classic formulation of the duty owed by an employer to an employee is focused on protection of the employee from physical injury, not protection from economic harm ... and this is true both in contract and in tort."<sup>332</sup>

Moreover:

"... having regard to the general policy reasons which inform the analysis of whether a standard term or duty of care should be implied into a contract of employment ... the proposed term or duty to hold the employee harmless from economic loss should not be taken to be implied."<sup>333</sup>

First, it was not possible for a term to be implied in the claimants' contracts of employment, "either as a usual feature of employment contracts in general or in these particular contracts in their commercial setting", especially as the terms of the collective agreement incorporated into the individual employment contracts had made specific provision as to the extent of the defendant employer's responsibility as regards the financial welfare of employees affected by the possibility of developing platinum sensitisation.<sup>334</sup> Echoing the language of the famous approach of Lord Bridge of Harwich to the existence of a duty of care in the tort of negligence in *Caparo Industries Plc v Dickman*,<sup>335</sup> the Court of Appeal added that it would not be "fair, just or reasonable" to hold that the defendant's *contractual* duty extended to protecting the claimants against the financial consequences of losing their jobs, etc. beyond the protection provided by those collective agreements (notably, the receipt of special termination payments).<sup>336</sup> Finally, the Court of Appeal held that no duty of care should be imposed in the tort of negligence in respect of the claimants' pure economic losses, seeing such an imposition on an employer as being recognised only in very specific situations.<sup>337</sup> Moreover, where it had been recognised, as in *Spring v Guardian Assurance Plc*<sup>338</sup>:

"... [t]he policy arguments relevant to implication of the duty in contract and the imposition of a duty of care in tort were closely similar."<sup>339</sup>

According to Sales LJ (with whom Davis LJ and Lord Dyson MR agreed):

"This is significant. Where the nexus between parties is founded in a contractual relationship, as here, it is the contract which they have made with each other which is the primary source and reference point for the rights they have and the obligations they owe each other. Although a duty of care in tort may run in parallel with the contractual duty and have the same content, it is difficult to see how the law of tort could impose obligations in this area which are more extensive than those given by interpretation of the contract which the parties have made for themselves. The usual rule is that freedom of contract is paramount, and if the parties have agreed terms to govern their relationship which do not involve the assumption of responsibility by the employer for some particular risk, the general law of tort will not operate to impose on the employer an obligation which is more extensive than that which they agreed."<sup>340</sup>

As a result, since there is no implied contractual term according to which the defendant employer is obliged to protect the claimants in relation to their financial losses arising in the circumstances of this case, nor could there be a duty in tort to protect them in relation to pure economic loss suffered by reason of those financial losses.<sup>341</sup> It will be seen, therefore, that while the High Court in *Greenway* started with the restricted scope of a relevant duty of care in the tort of negligence (which did not extend to recovery for pure economic loss) and then held that any implied contractual duty

could not differ in scope, the Court of Appeal instead held that the lack of any relevant implied contract term meant that no duty of care in tort should go any further. On appeal by the claimants from the rejection of their claims by the Court of Appeal, the Supreme Court unanimously reversed the decision below, holding that the claimants had suffered “actionable personal injury” as their bodies had undergone a harmful physiological change in that their bodily capacity for work had been impaired and that they were therefore significantly worse off.<sup>342</sup> This decision meant that it was unnecessary for the Supreme Court to consider the claimants’ alternative ground that they should be able to recover for pure financial loss<sup>343</sup> and, for this reason, it did not discuss the relationship between such a claim and the contract between them and their employers.

<sup>151</sup> However, in *James-Bowen v Commissioner of Police of the Metropolis* the Supreme Court considered the proper relationship between the implication of a term in a standardised contract of employment and the recognition of a duty of care in a novel situation.<sup>344</sup> In that case, police officers claimed damages against their Police Commissioner (who was treated as their employer for these purposes<sup>345</sup>) on the ground that the Commissioner owed a duty of care to them in the conduct of the defence of civil proceedings brought against her as vicariously liable for their actions, this duty requiring her to act “as effectively as possible” in order to protect the officers from economic or reputational harm.<sup>346</sup> Lord Lloyd-Jones JSC<sup>347</sup> noted that, if approached on the basis of implied contract terms, the issue whether such a duty of care could be extracted from the recognised implied term of trust and confidence in employment contracts had not been decided before and doing so “would be to move substantially beyond the specific derivative duties established to date”.<sup>348</sup> Lord Lloyd-Jones added that he had:

“difficulty in understanding how this principal argument [based on an implied contract term] on behalf of the officers can circumvent the requirement adverted to by Lord Bridge in *Caparo Industries Plc v Dickman*<sup>349</sup> that the imposition of the duty must be fair, just and reasonable. In order to establish such a duty of care, the officers rely here upon a class of implied terms which are implied in law as a necessary incident of a particular class of contractual relationship.”<sup>350</sup>

In deciding whether to imply a term as a necessary incident of a particular class of contractual relationship, the court should look to considerations of reasonableness, fairness and the balancing of competing policy considerations<sup>351</sup> and “[s]uch an implied term could not ... be wider in scope than the duty imposed by the law of tort”.<sup>352</sup> Accordingly, “the battlefield on which the conflicting contentions as to the existence of such a duty must be fought out is the scope of the duty of care in tort”.<sup>353</sup> As the claim was clearly novel, the law should develop incrementally and taking into account considerations of legal policy and having regard both to the achievement of justice and the coherent development of the law.<sup>354</sup> The Supreme Court concluded that no

such duty of care should be imposed on the grounds that it would create a conflict between the Commissioner's own interests (as employer) and the interests (reputational and economic) of the officers (as employees),<sup>355</sup> that her public duty in respect of the conduct of the Metropolitan Police would be "totally inconsistent" with duties of care of this sort to the officers,<sup>356</sup> and on other grounds of public policy relating to the conduct of litigation.<sup>357</sup> Given its earlier view as to the relationship between duty of care in tort and in contract, the Supreme Court's decision rejecting the novel duty of care in the tort of negligence as relied on by the claimants also determined the question whether a term could be implied as an incident of this standardised contract.<sup>358</sup> Similarly, in *Benyatov v Credit Suisse Securities (Europe) Ltd*

<sup>359</sup>

**U** the High Court held that there was no duty of care in the tort of negligence based on the incremental approach in respect of the novel claim brought by a former employee against his employer (a bank) for the pure economic losses resulting from his conviction abroad in the performance of his duties for the bank, the court holding that such a conviction was not reasonably foreseeable in the circumstances.

<sup>360</sup>

**U** And the High Court also rejected the employee's claim based on the general contractual indemnity implied in law in contracts of employment, which it held was limited to payments made and to be made in discharge of liabilities incurred by the employee and did not extend to consequential loss of earnings suffered by the employee beyond such payments or liabilities.

<sup>361</sup>

**U** To accept such an extension of the contractual indemnity would, *inter alia*, side-step the incremental approach taken by the courts to the imposition of duties of care in tort in novel cases and would not be consistent with the legislative policy of employer's liability statutes.

<sup>362</sup>

**U** Moreover, the High Court rejected the implication of an implied indemnity in fact on the basis that the facts necessary to do so had not been established, though it recognised that such a term may be implied in fact even where a claim in the tort of negligence had failed.

<sup>363</sup>

**U**

## Scope of duty in tort affecting claim for breach of express contract term

Shortly after the decision of the Supreme Court in *James-Bowen* noted in the previous paragraph, though without reference to it,<sup>364</sup> in *ARB v IVF Hammersmith Ltd* the Court of Appeal adopted a similar approach to a claim for “wrongful life” on the basis of breach of an express term of contract.<sup>365</sup>

**U** There, the father claimed damages representing his financial loss in respect of the upbringing of a child born using his gametes without his consent as required by an express term of the contract which he had concluded with the defendant’s clinic. In these circumstances, the Court of Appeal held that the legal policy considerations which precluded an action for damages in the tort of negligence for financial losses flowing from the birth of a healthy child, namely the impossibility of calculating this loss given the benefits and burdens of bringing up such a child,<sup>366</sup> applied equally to claims founded upon breach of an express contract term imposing a strict obligation,<sup>367</sup> in the absence of the parties having sought to quantify the damages in the event of breach, for example, by a liquidated damages clause.<sup>368</sup>

## The “scope of duty principle” in tort and contract and professional advisers

152A In *Khan v Meadows*

**D** 369

**U** and *Manchester Building Society v Grant Thornton UK LLP*

370

**U** the Supreme Court provided general guidance on the proper approach to determining the scope of duty and the extent of liability of professional advisers in the tort of negligence and in particular sought to place the “scope of duty principle” within a general conceptual framework of the law of the tort of negligence.

371

**U** For this purpose, the Supreme Court held by a majority that “the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given”.

372

**U** While the details of this law lie beyond the scope of the present discussion,

373

**U** it is relevant to note here that in *Manchester Building Society v Grant Thornton UK LLP* the Supreme Court observed that where, as usually, accountancy advice (with which the case itself was concerned) and legal advice are given under a contract

“[t]he extent of the responsibility assumed by the professional adviser, and the extent of their liability if they fail to act with reasonable care, is the same in tort and in contract. Medical advice [with which *Khan v Meadows* was concerned] may also be given pursuant to a contract, in the private medical sector. There too there is a parallel duty of care in tort and in contract, and the extent of the responsibility assumed by the professional adviser and the extent of their liability will again be the same.”

<sup>374</sup>



While the Supreme Court in *Manchester Building Society* focused on the scope of the duty of care in tort, it made clear that “[t]he scope of the parallel duty of care in contract depends on the same factors”.

<sup>375</sup>



## The contractual regime

- 153 Both common law and legislation attach particular legal consequences to the classification of a claim as contractual and together these consequences can be considered to form the “contractual regime”. As has been noted, some rules of this regime are significantly different from their counterparts in the law of torts, particularly in the context of rules as to the capacity of minors, damages, limitation of actions and the conflict of laws.<sup>376</sup> It is clear from the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd*<sup>377</sup> that, in principle, the option of a party to a contract to sue in tort rather than in contract attracts the application to his claim of those rules incidental to tort, since on the facts of that case proceeding in tort allowed the plaintiffs to avoid the expiry of the limitation period for their action for breach of contract. Moreover, the general terms of the acceptance by the House of Lords of a party’s option to sue in tort (if one is established on the facts) rather than in contract supports the converse of this proposition, so that a party who could sue in tort, but chooses instead to sue in contract, thereby gains whatever advantages may be had from those rules which are incidental to claims in contract. However, it is submitted that these general effects of an option will not be universally followed by the courts (as the example of the contractual capacity of minors will show) and, perhaps more importantly, where (even before *Henderson v Merrett Syndicates Ltd*) the courts have accepted a claimant’s option, they have sometimes reduced the practical differences between the rules incidental to one or other basis of liability, so that the choice of legal basis does not affect the outcome of the case.

## Capacity of minors

154 A minor's capacity to make a contract and to commit a tort are very different.<sup>378</sup> However, as has been seen, a party to a contract with a minor cannot in general avoid a minor's contractual incapacity by suing in tort where to do so would subvert the policy of the common law in protecting minors from making unfavourable contracts.<sup>379</sup> This approach is particularly clear in the context of a fraudulent misrepresentation by a minor as to his age,<sup>380</sup> but has been applied to other torts.<sup>381</sup> However, the courts have allowed a person who has contracted with a minor to sue the latter in tort, but only if the minor's tort can be considered as arising *independently* of the contract.<sup>382</sup> For example, in one case a minor who hired a mare "merely for a ride" and was warned at the hiring that she was unfit for jumping, having lent her to a friend who killed her by that act, was held liable in the tort of trespass which was "wholly independent of any contract".<sup>383</sup> Here, it cannot be said that the tort was unrelated to the contract: the tort consisted in permitting something to be done which the minor had been expressly forbidden by the contract to do.<sup>384</sup> In this type of case, the courts are concerned to limit the protection which the rules of contractual capacity give to a minor where this policy is considered to be outweighed by the tort's appeal for sanction and this is the case where a contractual permission for use of property by the minor is exceeded.<sup>385</sup>

## Damages

155 There are important differences in the rules under which damages are awarded for breach of contract and in tort.<sup>386</sup> However, in cases of concurrence of liability in contract and tort, in many cases the courts have found means to prevent a claimant recovering more damages merely by the way in which his claim is put. Thus, although a claim for breach of contract can compensate the claimant for loss of his expectation or performance interest, whereas a claim in tort can compensate only his status quo interest,<sup>387</sup> in cases of concurrence of liability the courts are slow to allow the claimant to recover damages based on the former measure merely because the claim can be classified as contractual, and instead award damages for loss of his "general expectations".<sup>388</sup> In this type of case, indeed, the significant distinction appears to be between cases where the content of the contractual obligation is to take reasonable care and where it is stricter, a "guarantee" that something is the case or will occur.<sup>389</sup>

156 This has already been seen in relation to pre-contractual statements which are held to have been incorporated into the contract,

390

U but that the proper distinction in these cases turns on the content of the defendant's obligation, rather than on the mere classification of his liability can be supported by other cases which concern professional negligence, whether contractual or tortious. In *Ford v White & Co*

391

U a firm of solicitors was sued for contractual

392

U negligence by the plaintiffs who had been advised that a particular restrictive covenant did not affect a plot of land which they were intending to purchase (whereas it did).

393

U The plaintiffs' claim for the difference between the value of the property with and without the restriction was rejected by the court. Although Pennycuick J accepted that in general damages for breach of contract should put the injured party in "as good a situation as if the contract had been performed",

394

U this did not mean that the plaintiffs should be put in a better position than if the defendant solicitors had performed their duty, as though the latter had warranted that their view of the restrictive covenant was right.

395

U A similar view was taken by the House of Lords in relation to a claim by a finance company against a valuer of a house intended as security for a loan.

396

U Their Lordships held that the finance company could recover damages for the negligence of the valuer representing the difference in what the secured property could make if sold (less the expenses of this) and the amount which they had lent in reliance on the valuation. The House of Lords rejected the finance company's claim that it could recover the interest which it had hoped to charge the borrower on the transaction (but had not been able to), accepting the valuer's argument that this would put them in a position as if he had warranted performance of the loan contract by the borrower,

397

U rather than the proper damages for the valuer's negligence.

398

U *Thake v Maurice*

399

U supplies an example of this difference in the context of medical negligence. At first instance, Peter Pain J had found on the facts that the defendant surgeon had warranted to his patient that a vasectomy operation would be successful,

400

 but the majority of the Court of Appeal disagreed,

401

 holding that the defendant could be held bound only to take reasonable care in the giving of information as to the effect of the operation and finding it unnecessary to distinguish for this purpose between claims of contractual or tortious negligence, referring to this as the “negligence claim”.

402

 However, Kerr LJ disagreed with the majority’s interpretation of the contract and would have upheld the existence of a contractual warranty as to the success of the operation (the “contractual claim”).

403

 If this approach had been accepted, he considered that it would affect the damages recoverable by the plaintiffs, as damages in tort (i.e. the negligence claim) would be lower than those in contract.

404

 In tort, damages for pain and suffering caused by the pregnancy should be reduced to take into account the distress of having to undergo an abortion (which *would* have been the case even if the patient had been properly advised as to the risk of pregnancy after the operation), but this was not the case in contract,

405

 where if the defendant’s warranty had not been broken the plaintiff’s wife would not have become pregnant and so would not have suffered either proceeding. It is clear, however, that though put in terms of a contrast between tort and contract, the contrast which Kerr LJ was intending to draw was between a duty to take reasonable care whether in tort or contract and a contractual duty to see that a particular result occurs.

406



## Remoteness of damage

157

 Another important difference between claims in tort and contract is said to be found in relation to the applicable tests of remoteness of damage.

407

**U** In contract, the court asks whether the kind of loss is within the reasonable contemplation of the parties,

408

**U** whereas in the tort of negligence, it asks whether the type of harm is reasonably foreseeable.

409

**U** Although the difference between these has been termed “semantic, not substantial”,

410

**U** members of the House of Lords in *The Heron II*

411

**U** considered, and some authors agree,

412

**U** that a real difference in the two tests exists in relation to the degree of probability required, the position in contract being less generous than that in tort.

413

**U** However, where a case concerns concurrent liability in tort and contract, the courts have sometimes proved unwilling to allow the way in which the claimant puts his claim to affect the quantum of damages recoverable. Thus, in the Court of Appeal’s decision in *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*

414

**U** which was such a case, Scarman LJ, with whom Orr LJ agreed, assimilated the tests of remoteness in tort and in contract.

415

**U** The unwillingness of the courts to allow a claimant in the tort of negligence to recover more than a claim in contract may be illustrated by the decision in *How Engineering Services Ltd v Southern Insulation (Medway) Ltd*.

416

**U** There the question arose as to how the existence of a contract between the parties would affect the losses for which a defendant would be liable in the tort of negligence. The particular issues before the court concerned a claim by a building sub-contractor against a sub-sub-contractor for negligence on the basis of a duty of care in tort alongside the contract between them. In rejecting the sub-sub-contractor’s application to strike out this claim or for summary judgment in its favour, Akenhead J held

417

**U** that the sub-sub-contractor could and did owe the sub-contractor such a concurrent duty of care in tort which was “definable by reference to the contractual responsibilities and liabilities assumed by the parties to the contract”.

418

**U** For this purpose, the learned judge considered “the scope of the contractual or tortious duty” in relation to the losses recoverable, following dicta of Lord Hoffmann on the importance of defining the “scope of duty” in *South Australia Asset Management Corp v York Montague Ltd*<sup>419</sup>

419

**U** and applying Lord Hoffmann’s approach to the question of remoteness of damage in claims for breach of contract in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* according to which a party in breach is liable for those kinds of loss “which would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking”.<sup>420</sup>

420

**U** In Akenhead J’s view:

“... [o]nce one ha[s] determined the kind of loss which the innocent party is contractually entitled to expect to recover, that measure of loss can effectively be applied to the breach of any concurrent duty of care in tort, save and to the extent there is some overriding principle in the law of tort which prevents it (if any). Generally, at least, the damages recoverable in negligence will not exceed what would have been recoverable in contract.”<sup>421</sup>

421

**U**

On the facts before him, Akenhead J held that the scope of the concurrent tortious duty of care owed by the sub-sub-contractor to the sub-contractor:

“... involves the execution by [the sub-sub-contractor] of the works, which it was contractually employed to carry out, with reasonable care and skill ... Put simply, the cost of remedial works was the, or one, kind of loss which was within the scope of both the contractual and tortious duties. Almost inevitably, a sub-sub-contractor in [the defendant’s] position would, objectively speaking, foresee or anticipate that, if it did work badly, (assuming that it itself did not do the remedial works) it would have to pay up the line through the sub-sub-contract damages or compensation for the cost of putting that bad work right”<sup>422</sup>

even though the “contractual route through which [this loss] comes” was a chain of collateral warranties between the sub-contractor and main contractor, and between the main contractor and the employer.<sup>423</sup> However, in a very different context in *Yapp v Foreign and Commonwealth Office* the Court of Appeal denied that the cases support the proposition that: “where there is concurrent liability in tort and in contract arising out of a contractual relationship claims under either head should be governed by the contractual rather than the tortious rule as to remoteness”.<sup>424</sup> There the

claimant claimed for psychiatric injury against his employer either for breach of contract or in the tort of negligence. In the view of the Court of Appeal “in claims for breach of the common duty of care it is immaterial that the duty arises in contract as well as in tort: they are in substance treated as covered by tortious rules”; in such a case “in order to establish whether the duty is broken it will be necessary to establish … whether psychiatric injury was reasonably foreseeable; and if that is established no issue as to remoteness can arise when such injury eventuates”.<sup>425</sup> On the other hand, where an employee claims for breach of the implied term of mutual trust and confidence or for breach of an express term, the contractual test of remoteness applies.<sup>426</sup>

## Wellesley Partners LLP v Withers LLP

158

**D** In *Wellesley Partners LLP v Withers LLP*<sup>427</sup> a differently constituted Court of Appeal expressed the opposite view as to the proper approach to remoteness of damage in cases of concurrence of liability in contract and tort from the one which that court had expressed in *Yapp v Foreign and Commonwealth Office*,<sup>428</sup> which was not discussed in *Wellesley Partners LLP*.<sup>429</sup> In *Wellesley Partners LLP*, the claimants were a partnership of executive recruitment consultants which had instructed the defendant firm of solicitors to draft amendments to their partnership agreement so as to allow a third party investor to gain an interest in the partnership. The amendments which were drafted (and agreed) allowed the investor to withdraw half its funds *within* a period of 41 months from its formation, rather than (as instructed by the partnership) only *outside* such a period: this failure was held to constitute negligence in the solicitors.<sup>430</sup> The Court of Appeal considered whether the claimants could recover a percentage of the profits which might have been made if the investment had remained in place until the end of 41 months, in particular in relation to a recruitment handling contract or contracts with a major bank. In this respect, it held that where a claimant is able to sue either for breach of contract or for pure economic loss in the tort of negligence based on an assumption of responsibility which is assumed under a contract, the contract law test for remoteness of damage applies even if the claim is brought in tort:

“... [i]t would be anomalous ... if the party pursuing the remedy in tort in these circumstances were able to assert that the other party has assumed a responsibility for a wider range of damage than he would be taken to have assumed under the contract.”<sup>431</sup>

In so holding, the Court of Appeal related the remoteness of damage rule for breach of contract (as reformulated by Lord Hoffmann in *The Achilleas* in terms of assumption of responsibility  
432

**U**) to the basis of liability in tort in the context (assumption of responsibility as explained by *Henderson v Merrett Syndicates Ltd*<sup>433</sup>). Although, therefore, the Court of Appeal applied the

contract test rather than the tort test of remoteness, it held that this did not make any difference on the facts as the damage claimed by the partnership was of a kind for which the solicitors had assumed responsibility under their contract and was in the reasonable contemplation of the parties as not unlikely to result from a breach.<sup>434</sup>

- <sup>159</sup> The Court of Appeal in *Wellesley Partners LLP*<sup>435</sup> therefore took a different view on the question as to the proper test of remoteness applicable to a claim in the tort of negligence concurrent with a claim for breach of contract from the one which it had taken in *Yapp*.<sup>436</sup> In neither case were these views necessary for the courts' decisions on the facts before them, as in both cases it was held that the two tests of remoteness (in tort and in contract) would have led to the same result.<sup>437</sup> Moreover, the two approaches to the proper test of remoteness, while apparently opposing, may be reconciled by reference to their contexts. In *Yapp*, the claim was for damages by an employee against his employer for psychiatric injury suffered as a result of withdrawing him from his post without informing him of the case against him for doing so (which was held to have been unfair)<sup>438</sup> and the Court of Appeal held (summarising the authorities in that context) that in such a claim "for breach of the common law duty of care" it is immaterial that the duty arises in contract as well as tort.<sup>439</sup> In such a context, therefore, the defendant's liability in tort in respect of psychiatric injury (which did not rest on any assumption of responsibility) could be seen as primary as compared with its contractual liability arising from breach of the term implied in law on the employer to take reasonable care of the employee's health and safety.<sup>440</sup> By contrast, in *Wellesley Partners LLP* the defendant's liability in contract was for breach of an express term of the contract (that is, to follow their client's instructions as to the terms of the amendment agreement) whereas its liability in tort was for pure economic loss based on an assumption of responsibility where the assumption stemmed from the contract itself; indeed, the judges in the Court of Appeal rested their decision on the test of remoteness to the situation where the tort was based on such a contractual assumption of responsibility.<sup>441</sup> A distinction between claims for psychiatric injury (and, it is submitted, other harms, such as personal injury and damage to property) where liability in tort in the defendant does not rest on an assumption of responsibility (*Yapp*) and claims for pure economic loss where it does (*Wellesley Partners LLP*) would echo the approach of Lord Denning MR in his minority reasoning in *H Parsons (Livestock) Ltd v Utley Ingham & Co Ltd* (where he distinguished between concurrent claims for physical damage and pure economic loss<sup>442</sup>) with the difference that under *Wellesley Partners LLP* the contract test of remoteness would apply to a claim for pure economic loss in tort only where it is based (as would often be the case) on an assumption of responsibility. More generally, while the Court of Appeal in *Wellesley Partners LLP* acknowledged that the House of Lords in *Henderson v Merrett* Syndicates Ltd treated liability in the tort of negligence that is based on a "broad principle" of assumption of responsibility in *Hedley Byrne* as independent from any liability in contract,<sup>443</sup> its own decision treated the liability of the defendant solicitors in tort for negligence as dependent on their liability for breach of the contract of retainer.<sup>444</sup> It is submitted that a better approach to the question as to which test (contractual or tortious) is appropriate in cases of concurrence between breach of contract and the tort of negligence would

be to hold that the contract test should apply whenever one party has had the opportunity to alert the other to the type of loss of which he is at risk, and that such an opportunity should be assumed (or perhaps presumed) where the parties are in a contractual relationship.<sup>445</sup>

- )60 It should be recalled, moreover, that the “foreseeability test” of remoteness of damage<sup>446</sup> does not apply to claims for damages in the tort of deceit, where the claimant can recover all the damage directly flowing from the tortious act,<sup>447</sup> and the Court of Appeal has made clear that the latter test also applies to claims for damages under s.2(1) of the Misrepresentation Act 1967, whose imposition rests on a fiction of fraud.<sup>448</sup> This suggests that in some cases a representee will have an advantage in claiming damages for misrepresentation, rather than for breach of a contractual warranty which results from the incorporation of a statement into the contract,<sup>449</sup> as the former allows recovery of all losses flowing from the misrepresentation even if unforeseeable, “provided that they [are] not otherwise too remote”.<sup>450</sup> On the other hand, a consumer’s claim for damages as a “right to redress” against a trader in respect of the latter’s “misleading action” or “aggressive commercial practice” (the “prohibited practice) under the Consumer Protection from Unfair Trading Regulations 2008 is limited to “loss that was reasonably foreseeable at the time of the prohibited practice”.<sup>451</sup>

## Contributory negligence

- )61 In *Forsikringsaktieselskapet Vesta v Butcher*,<sup>452</sup> the Court of Appeal took a very similar approach to the defence of contributory negligence as it had done in *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*<sup>453</sup> to remoteness of damage, and held that while s.1 of the Law Reform (Contributory Negligence) Act 1945 does not in general apply to claims for breach of contract so as to allow a court to reduce any award of damages on the ground of contributory negligence, it does apply to claims based on the breach of a contractual obligation to take reasonable care (“contractual negligence”) as long as this is concurrent with liability for breach of a duty of care in tort.<sup>454</sup> This approach leads to the paradox that a court’s recognition of a duty of care in the tort of negligence in *addition* to and concurrent with a contractual obligation to take reasonable care owed to a claimant may lead to *the reduction* of the latter’s damages on the ground of contributory negligence, whereas its denial of such a duty of care in tort would rule out such a reduction.<sup>455</sup>

## Limitation of actions

- )62

As has been seen, differences as to the rules of limitation of actions exist according to whether the claim is brought in tort or contract<sup>456</sup> and this has often been a reason for a claimant to put a claim in tort rather than breach of contract. Traditionally, the courts allowed a claimant's choice whether to sue for breach of contract or in tort to determine which of the two regimes of limitation will apply and this practice was confirmed in *Henderson v Merrett Syndicates Ltd.*<sup>457</sup> However, although the general rule is that an action in contract accrues on its breach, whereas an action in tort accrues only on damage being suffered by the claimant,<sup>458</sup> in those cases where the courts accept that the claimant would have had<sup>459</sup> a claim for pure economic loss in the tort of negligence concurrent with a claim in contract, their approach has been to assimilate the two rules as to accrual, by finding that the claimant suffered damage for the purposes of the rule in tort at the same date as the breach of contract.<sup>460</sup> On the other hand, rather than reducing differences of rule as to limitation of actions in contract and in tort, the *Latent Damage Act 1986* added a further one, as its provision governing the "starting date" for the running of time in "negligence actions" for latent damage (other than personal injury) (set at the date of the claimant's "knowledge required for bringing an action for damages in respect of the relevant damage" rather than the date of occurrence of the damage) has been held to apply only to actions based on negligence in tort.<sup>461</sup>

## The conflict of laws: jurisdiction

<sup>462</sup> It was clearly established under the general law that in cases with a foreign element where English law allows a person alternative claims in contract and in tort, his election between them brings with it the appropriate rules both of jurisdiction (under *RSC Ord.11*) and choice of law (at common law).

<sup>463</sup> Until the departure of the UK from the EU came into full effect on IP completion day,

<sup>464</sup> within its scope Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Ibis Regulation") governed jurisdiction both in "matters relating to a contract" and "matters relating to tort".

<sup>465</sup> In a case where English substantive law would in principle allow a claimant to choose whether to put his claim in terms of contract or of tort, it would appear instead that the Court of Justice of the EU would consider whether the claim was one "relating to a contract" for this purpose and so outside the scope of the jurisdictional rule for tort.

<sup>466</sup> Moreover, the classification of a claim as contractual or tortious for these purposes is in principle a matter for EU law as these concepts should have an "autonomous" interpretation.

466

**U** Before IP completion day, this view of the position was taken by the Court of Appeal in *Source Ltd v TUV Rheinland Holding AG*.

467

**U** In that case, the plaintiffs claimed that the English courts had jurisdiction to hear their claim in tortious negligence against the defendants, a claim which arose out of and was concurrent with a claim against them for breach of their contractual obligation to exercise reasonable care and skill in presenting a report following the inspection of goods which they (the plaintiffs) had wished to import from China and Taiwan. The Court of Appeal noticed that the European Court of Justice in *Kalfelis v Schröder*,

468

**U** had held that the phrase “matters relating to tort” in art.5(3) of the Brussels Convention (a predecessor to the Brussels Ibis Regulation art.7(2)) refers to:

“... all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of Article 5(1).”

469

**U**

For Staughton LJ, with whom Waite and Aldous LJJ agreed, this means that a claim which may be brought under a contract or independently of a contract on the same facts, save that a contract does not need to be established, is excluded from art.5(3) by the European Court’s words “which are not related to a ‘contract’ within the meaning of Art.5(1)”.

470

**U** In the result, therefore, both the contractual and tortious claims of the plaintiffs “related to a contract” and they could not by relying on art.5(3) bring the tortious claim before the English courts.

471

**U** In a series of later cases, the Court of Justice of the EU confirmed its approach to the relationship of the contract and tort provisions in the Brussels Regulation taken in *Kalfelis v Schröder* in relation to the Brussels Convention

472

**U** and has therefore made clear that the question whether a particular claim falls within “matters relating to contract” or “matters relating to tort, delict or quasi-delict” must be judged by reference to autonomous EU law understandings of these concepts; and that for this purpose the latter concept:

“... covers all actions which seek to establish the liability of the defendant and do not concern ‘matters relating to a contract’ within the meaning of Article 5(1)(a)”

of the Brussels Regulation.

473

**U** As a result, where a national court finds that a claim is a “matter relating to a contract”, a national court does not enjoy jurisdiction on the basis that the claim could be viewed as relating to tort as a matter of national law.

474

**U**

**D** 163A However, on IP completion day the (retained EU law) Brussels Ibis Regulation was revoked

475

**U** and the rules governing the international jurisdiction of UK courts are found instead in other instruments, notably the [Civil Jurisdiction and Judgments Act 1982](#) (as amended

476

**U**) and the [Civil Procedure Rules rr.6.30–6.47](#) and Practice Direction 6B. The details of these rules lie beyond the scope of the present work, but it should be noted that the rules governing the general jurisdictional “gateways” to court permission for service out of the jurisdiction distinguish between “claims in relation to contracts” and “claims in tort”.

477

**U** For this purpose, as noted above, the earlier law governing [RSC Ord.11](#) was interpreted as allowing a claimant who claimed alternatively for breach of contract and in tort to choose the gateway contained in the rules on which to rely.

478

**U** A similar position may be supported by the way in which [CPR r.6.36](#) is expressed as it provides that “the claimant may serve a claim form out of the jurisdiction with the permission of the court if *any* of the grounds set out in paragraph 3.1 of Practice Direction 6B apply”.

479

**U** However, the position remains different in the case of civil jurisdiction within the United Kingdom under [Sch.4 to the 1982 Act](#), which contains a modified version of Ch.II of the Brussels I Regulation.

480

**U** In *Cornwall Renewable Developments Ltd v Wright Johnston & Mackenzie LLP* Chief Master Shuman considered the jurisdiction rules applicable to a claim for professional negligence by a claimant based in England against lawyers domiciled in Scotland under Sch.4.

<sup>481</sup>

**U** She held, first, that the English court had jurisdiction on the basis that the claim concerned a contractual obligation to be performed in England within para.3(a) of Sch.4,

<sup>482</sup>

**U** but she also held that the claimant could not have simply opted to rely on the tort provisions in para.3(b), applying the European and UK case law on the Brussels Regulation (including *Source Ltd v TUV Rheinland Holding AG*

<sup>483</sup>

**U**) and holding that the “substance of the claim is rooted in contract and is correctly categorised as ‘matters relating to a contract’”.

<sup>484</sup>

**U** In this respect, “[i]t is of no consequence that the claimant elects to pursue a purely tortious remedy if it relates to a contract, as it would still be caught within rule 3(a)”.

<sup>485</sup>

**U**

## Conflict of laws: applicable law

**D** Under the Rome Convention on the Law Applicable to Contractual Obligations<sup>486</sup> it was held that there is nothing to prevent a party to a contract from framing his claim in tort so as to attract the choice of law rules applicable to that basis of liability, rather than in contract whose applicable law would be determined by that Convention.<sup>487</sup> However, after the enactment of the Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (“Rome II Regulation”)<sup>488</sup> and the replacement for most purposes of the Rome Convention by Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”),<sup>489</sup> it is highly unlikely that a claimant will have the option as to how to frame his or her claim given that the two EU regulations will classify claims within their scope autonomously as being “contractual” or “non-contractual” for these purposes and these classifications are likely to be held mutually exclusive.

<sup>490</sup>

- U On IP completion day both the Rome I Regulation and the Rome II Regulation became part of “retained EU law”, subject to amendment.<sup>491</sup>

## Footnotes

- 157 *Jarvis v Moy, Davies, Smith, Vandervell & Co [1936] 1 K.B. 399, 405.*
- 158 See below, paras 3-033, 3-039.
- 159 See below, para.3-033.
- 160 See below, paras 3-040—3-044.
- 161 See below, paras 3-045—3-051.
- 162 The clear exception is in the case of contractual capacity, but see also below, paras 3-057—3-058 on the rules of remoteness of damage.
- 163 See below, para.3-053.
- 164 See above, paras 3-006 et seq.
- 165 *[1995] 2 A.C. 145.*
- 166 *Burrows (1995) C.L.P. 103, 118 et seq.; Whittaker (1997) 17 Legal Studies 169.*
- 167 For the position of “indirect Names” see below, para.3-075.
- 168 *[1964] A.C. 465.*
- 169 *[1995] 2 A.C. 145* at 180–181.
- 170 *[1995] 2 A.C. 145* at 193–194.
- 171 *[1995] 2 A.C. 145* at 194.
- 172 See below, paras 3-040 et seq.
- 173 *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465.*
- 174 It would seem that the speech of Lord Goff in *Spring v Guardian Assurance Plc [1995] 2 A.C. 296* marked the turning point.
- 175 e.g. *Caparo Industries v Dickman [1990] 2 A.C. 605; Smith v Eric S. Bush [1990] 1 A.C. 831.*
- 176 An exception could be found in the decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd [1983] 1 A.C. 520*, but this decision has not been followed but has been distinguished on various grounds: see below, paras 3-071 et seq.
- 177 *[1995] 2 A.C. 145* at 178–181.
- 178 See especially *White v Jones [1995] 2 A.C. 207, 273–274* (Lord Browne-Wilkinson, referring to “assumption of responsibility for the task not the assumption of legal liability”), 280, 288 (Lord Mustill). See also *Barclays Bank Plc v Fairclough Building Ltd (No.2) [1995] I.R.L.R. 605*; below, para.3-028.
- 179 *Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145, 180*, per Lord Goff of Chieveley.
- 180 See also the use of assumption of responsibility to impose a duty of care in the tort of negligence in a party to a contract to a person *not* party to a contract, below, paras 3-074—3-080.

- 181 *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 180 and see *Hunt v Optima (Cambridge) Ltd* [2014] EWCA Civ 714, [2015] 1 W.L.R. 1346 especially at [54] and [66]–[67] and below, paras 9-041—9-042.
- 182 *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 180, 182.
- 183 cf. *Lennon v Metropolitan Police Commissioner* [2004] EWCA Civ 130, [2004] 1 W.L.R. 2594 where the principle in *Henderson v Merrett Syndicates* [1995] 2 A.C. 145 was applied so as to impose liability on a police authority vicariously in respect of its agent's express assumption of responsibility towards one of its constables (technically not being a contractual employee) in respect of the task of transferring him without loss of allowance to another police force.
- 184 [2011] EWCA Civ 9, [2012] Q.B. 44.
- 185 [2011] EWCA Civ 9 at [44] and [92].
- 186 The Court of Appeal held the term “reasonable” under s.2(2) and 3 of the Unfair Contract Terms Act 1977: [2011] EWCA Civ 9 at [58]–[64].
- 187 [2011] EWCA Civ 9 at [80] and [84] and see above, para.3-022. See similarly *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811, [2007] 2 C.L.C. 134 at [28]; *Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas* [2017] EWHC 3182 (Comm).
- 188 [2011] EWCA Civ 9 at [83].
- 189 [2011] EWCA Civ 9 at [94]. See similarly [2011] EWCA Civ 9 at [76].
- 190 [1995] 2 A.C. 145, 181. This proposition was treated as established by *Henderson* by Lord Steyn in *Williams v Natural Life Health Foods Ltd and Mistlin* [1998] 1 W.L.R. 830, 834.
- 191 cf. the approach of Lord Steyn to the question of “justice and reasonableness” in *Marc Rich & Co AG v Bishop Rock Marine Co* [1996] A.C. 211 at 236 et seq., where he weighed various factors for and against the imposition of a duty of care on the facts.
- 192 [2002] 1 A.C. 615 and see especially 688 et seq. (Lord Hoffmann), the HL not following its earlier decision in *Rondel v Worsley* [1969] 1 A.C. 191. In *Jones v Kaney* [2011] UKSC 13, [2011] 2 A.C. 398 a majority of the SC (Lord Phillips of Worth Matravers, Lord Browne of Eaton-under-Heywood, Lord Collins of Mapesbury and Lord Dyson of Tonaghmore; Lord Hope of Craighead and Baroness Hale of Richmond dissenting) overruled *Stanton v Callaghan* [2000] Q.B. 75 and held that expert witnesses do not enjoy any immunity from liability in negligence, rejecting arguments of the public interest in favour of such an immunity. Although the SC recognised that expert witnesses (unlike witnesses of fact) choose to provide their services (at [18], per Lord Phillips of Worth Matravers) and even owe their clients a contractual duty to take reasonable care ([2011] UKSC 13 at [67] and [95]), the SC did not uphold the duty of care in the tort of negligence on the basis of an “assumption of responsibility”, even though Lord Dyson considered that liability in tort was based on *Hedley Byrne*: [2011] UKSC 13 at [95].
- 193 [2017] EWCA Civ 254, [2017] P.N.L.R. 24 at [64] (with whom Gloster VP and Irwin LJ agreed) referring in particular to Lord Hoffman's speech in *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2006] 3 W.L.R. 1 at [35]–[36].
- 194 [1996] A.C. 211.
- 195

See, e.g. *Burgess v Lejonvarn* [2017] EWCA Civ 254, [2017] P.N.L.R. 24 esp. at [86]–[87] in which the claimants' friend who had provided them with project management services in a professional context but not under a contract (for lack of agreement as to terms, intention to create legal relations and consideration) was held to a duty of care in tort based on an assumption of responsibility. The CA emphasised that the duty thereby imposed was “not a duty to provide [the] services. It is a duty to exercise reasonable skill and care in providing the professional services which [the defendant] did in fact provide”, adding that “[a] duty expressed in these terms does not trespass on the realm of contract”: at [88] and [89] per Hamblen LJ. See also *Spire Property Development LLP v Withers LLP* [2022] EWCA Civ 970, where the CA considered the scope in the circumstances of a solicitor's duty of care in tort for negligence to their former client based on an assumption of responsibility arising from advice or a failure to advise in the absence of a contractual duty to do so.

196 *[1995] I.R.L.R. 605.*

197 cf. *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 214 which concerned the claim by the owner of the buildings against the main building contractors.

198 *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852 and see below, para.29-094.

199 (1842) 3 Q.B. 511, (1844) 11 Cl. & Fin. 1, HL.

200 See above, para.3-013.

201 But compare paras 3-025—3-026.

202 *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 especially at [6]–[8].

203 *Rookes v Barnard* [1964] A.C. 1129.

204 For example, where A threatens B, his creditor, that he will not pay a debt owed unless B accepts a smaller sum in full satisfaction, A may be liable to B in the tort of intimidation: *D.&C. Builders Ltd v Rees* [1966] 2 Q.B. 617, 625.

205 Clerk & Lindsell on Torts, 23rd edn (2020) para.23–75. In *Morgan v Fry* [1968] 2 Q.B. 710, 737, Russell LJ's judgment suggests that not every threat to break a contract of employment would be sufficient to constitute the tort of intimidation.

206 See below, para.27-070.

207 Clerk & Lindsell on Torts, 19th edn (2006) at para.25–86, especially at n.87, referring to *Kenny v Preen* [1963] 1 Q.B. 499 in which the Court of Appeal refused to award punitive damages where the claim was only for breach of contract, and see above, para.3-007.

•208 Clerk & Lindsell on Torts, 23rd edn (2020) para.23-75 at n.404.

209 Cane, Tort Law and Economic Interests, 2nd edn (1996), p.130.

210 cf. *Kenny v Preen* [1963] 1 Q.B. 499; *McCall v Abelesz* [1976] Q.B. 585, 594 and see below, para.29-067 and cf. the refusal of English courts to distinguish between deliberate and other breaches of contract for the purposes of the validity of exemption clauses, below, para.17-019 and see Unfair Contract Terms Act 1977 s.1(4). In *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 Q.B. 818, 894, May LJ observed that “a deliberate contract breaker is guilty of no more than breach of contract”.

211 Winfield and Jolowicz on Tort, 20th edn (2020), paras 19–30—19–31.

- 212 In *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 at [61] Lord Hoffmann was careful to put aside the question of possible recovery by a claimant who has been compelled by unlawful intimidation to act to his own detriment: “[s]uch a case of ‘two party intimidation’ raises altogether different issues”.
- 213 SI 2008/1277 (“2008 Regulations”) especially Pt 4A as inserted by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) on which see generally Vol.II, paras 40-166 et seq.
- 214 2008 Regulations regs 2(1), 27C and 27D, on which see Vol.II, paras 40-169 and 40-187.
- 215 2008 Regulations reg.27A and 27B on which see further Vol.II, paras 40-188, 40-189, 40-200 and 40-202.
- 216 2008 Regulations reg.7(1) on which see further Vol.II, para.40-197.
- 217 2008 Regulations reg.27H on which see further Vol.II, para.40-207.
- 218 2008 Regulations reg.27J especially (1) on which see further Vol.II, paras 40-210—40-214.
- 219 An exception to this rule is found in the case of personal fraud in a contractor liability for which cannot be excluded by contract: *S. Pearson & Son Ltd v Dublin Corp* [1907] A.C. 351, 353–354, 362. Fraud may occur in the course of performance of a contract as well at the pre-contractual stage, for example, where a solicitor’s clerk acts fraudulently in relation to his commission: see *Lloyd v Grace, Smith & Co* [1912] A.C. 716, where a solicitor’s employee’s fraud was held to give rise to liability in both tort and contract in the solicitor. Of course, in many situations the standard of care owed by a contractor is the same in tort and in contract, notably where the tort is one of negligence and the relevant contractual obligation is one of reasonable care: see below, para.16-046.
- 220 cf. *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 230–231 and see below, para.17-012 but cf. Unfair Contract Terms Act 1977 s.13(1), below, para.17-079.
- 221 e.g. *Readhead v Midland Ry Co* (1867) L.R. 2 Q.B. 412, (1869) L.R. 4 Q.B. 379 (carriage of persons); *Davie v New Merton Board Mills* [1959] A.C. 604 (employment); Occupiers’ Liability Act 1957 s.5(1); *Thake v Maurice* [1986] Q.B. 644 (medical liability).
- 222 e.g. *Samuels v Davis* [1943] 1 K.B. 526 (dentist who designed and constructed prosthesis liable strictly to patient) and see Sale of Goods Act 1979 s.14.
- 223 [1986] A.C. 80.
- 224 [1986] A.C. 80, 107.
- 225 [1995] 2 A.C. 145 see especially at 186.
- 226 cf. *Blackwood v Robertson* 1984 S.L.T. 68 (lesser standard of care between partners).
- 227 *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm), [2013] 1 B.C.L.C. 125 at 130, relying on *Socimer International Bank Ltd v Standard Bank London Ltd (No.2)* [2008] EWCA Civ 116, [2008] 1 Lloyd’s Rep. 558 at [66] on which see above, paras 2-066 et seq. See similarly *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [78]–[89].
- 228 [2012] EWHC 584 (Comm) at [132], referring, inter alia, to the paragraph in the 30th edition of the present work equivalent to the present paragraph and the cases cited therein.
- 229 [2012] EWHC 584 (Comm) at [133]–[134].
- 230 [1991] Ch. 12 (and see *Shamji v Johnson Matthey Bankers Ltd* [1986] B.C.L.C. 278).

- 231 [1991] Ch. 12 at 18 (and cf. at 24–25, Purchas LJ), thereby disapproving Salmon LJ’s dictum in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch. 949, 966 which talks of a duty of care in the context of the liability of a mortgagee; and see *Downsview Nominees Ltd v First City Corp Ltd* [1993] A.C. 295, 315 and *AIB Finance Ltd v Debtors* [1998] 2 All E.R. 929, 937; *Yorkshire Bank Plc v Hall* [1999] 1 W.L.R. 1713, 1728; *Raja v Lloyds TSB Bank Plc* [2001] EWCA Civ 210, [2001] Lloyd’s Rep. Bank. 113; and see Smith, Property Law, 9th edn (2017) 618–621.
- 232 *China and South Seas Bank v Tan* [1990] 1 A.C. 536, 543–544.
- 233 *Raja v Lloyds TSB Bank Plc* [2001] EWCA Civ 210 at [31], per Mance LJ.
- 234 [1986] Q.B. 644. Peter Pain J at first instance and Kerr LJ on appeal took the opposite view on this issue from the majority in the Court of Appeal and see below, para.3-056.
- 235 cf. *Readhead v Midland Ry Co* (1867) L.R. 2 Q.B. 412, (1869) L.R. 4 Q.B. 379, in which the court held that a passenger injured while travelling on a railway could sue the company only on the basis of breach of a duty to take reasonable care, rejecting the plaintiff’s contention that the company owed an obligation to provide a carriage fit for its purpose, by analogy with cases on sale of goods.
- 236 The stricter type of contractual term was implied by the courts in the context of sale of goods: *Jones v Just* (1868) L.R. 3 Q.B. 197 (see now Sale of Goods Act 1979 s.14). See further, *Samuels v Davis* [1943] 1 K.B. 526 (liability of dentist in respect of manufacture and supply of dental prosthesis); Supply of Goods and Services Act 1982 s.4 and below, para.16-040; and, in the case of consumer contracts, Consumer Rights Act 2015 ss.9–11, on which see Vol.II, paras 40-499—40-501.
- 237 [1996] 1 W.L.R. 38. cf. the contractual liability under Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) reg.15 and the Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634) reg.15 on which see Vol.II, paras 40-147—40-148 and 40-155 respectively.
- 238 [1995] 1 W.L.R. 1281.
- 239 [1995] 1 W.L.R. 1281 at 1290.
- 240 [1995] 2 A.C. 145, 194 and see above, paras 3-022—3-023.
- 241 [1995] 1 W.L.R. 1281 at 1294.
- 242 [1995] 1 W.L.R. 1281 at 1295. Notably, *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80.
- 243 (1986) 31 D.L.R. (4th) 481, 521–522.
- 244 [1995] 1 W.L.R. 1281, 1301, 1305.
- 245 *Nicholson v Willan* (1804) 5 East 507 and see below, paras 17-001 et seq.
- 246 *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 1285; *How Engineering Services Ltd v Southern Insulation (Medway) Ltd* [2010] EWHC 1878 (TCC), [2010] B.L.R. 537 at [14], where Akenhead J observed that where a duty of care in the tort of negligence exists concurrently with a contract between the parties “[t]hat duty of care will be definable by reference to the contractual responsibilities and liabilities assumed by the parties to the contract and, if for instance, certain types of loss are, on the proper interpretation of the contract, excluded or otherwise irrecoverable, the duty of care is similarly circumscribed”.

- 247 *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 1285 at 1294 where Denning LJ held that the plaintiff “can avoid the exemption clause by framing his claim in tort”.
- 248 e.g. *Hollier v Rambler Motors (A.M.C.) Ltd* [1972] 2 Q.B. 71. In principle a valid exemption clause in a contract between the parties may exclude any liability in the tort of negligence otherwise arising on the basis that it would be inconsistent with the contract: *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [84]. On the modern significance of construction contra proferentem see below, para.17-012.
- 249 Unfair Contract Terms Act 1977 s.1(1) and see below, paras 17-071, 17-085—17-087. On the position under the Consumer Rights Act 2015 see esp. s.65(4), governing the special controls in s.65, and more generally s.62(4) and (5) on which see Vol.II, paras 40-423 and 40-273 et seq.
- 250 [1992] Q.B. 333.
- 251 See *Davie v New Merton Board Mills* [1959] A.C. 604 (negligence); *Matthews v Kuwait Bechtel Corp* [1959] 2 Q.B. 57 (contract).
- 252 [1986] A.C. 80, 107; see above, para.3-010.
- 253 [1986] A.C. 80.
- 254 [1986] A.C. 80 at 350.
- 255 [1986] A.C. 80 at 350–351.
- 256 [1986] A.C. 80 at 349.
- 257 [1995] 2 A.C. 145.
- 258 See above, paras 3-022—3-023.
- 259 [2021] EWHC 525 (Comm), [2021] 4 W.L.R. 57 (application to strike out counter-claim by solicitor).
- 260 [2021] EWHC 525 (Comm) at [38]–[53].
- 261 [1995] 2 A.C. 207 and see below, para.3-076.
- 262 [2021] EWHC 525 (Comm) at [67] per Worster J sitting as a judge of the HC: see also at [68]–[69]. The HC therefore did not consider it necessary to consider possible public policy considerations against the imposition of such a duty of care at common law (for example, that it would lead to conflicts of interest in the barrister as between duties to the solicitor and the lay client).
- 263 [2021] EWHC 525 (Comm) at [69].
- 264 Below, paras 16-005 and 16-018.
- 265 [2021] EWHC 2621 (Ch), [2022] L. & T.R. 3 at [18] (appeal pending), referring to *Duke of Westminster v Guild* [1985] Q.B. 688 itself quoting with approval Woodfall, Landlord and Tenant, 28th edn (1978), Vol.1, para.1-1469.
- 266 [2013] EWCA Civ 580, [2013] 2 P. & C.R. 17 at [31] (Black and Mummery LJJ agreed).
- 267 [2021] EWHC 2621 (Ch) at [21c].
- 268

[2021] EWHC 2621 (Ch) at [21c] per HHJ Richard Williams, referring to *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145.

•269 [2021] EWHC 2621 (Ch) at [21b], and see above, paras 3-022—3-023 on *Henderson v Merrett Syndicates Ltd*.

270 *Chatterton v Gerson* [1981] 1 Q.B. 432, 442–443. For the extent to which the consent needs to be “informed” see *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] 2 W.L.R. 768. That the consent of the claimant goes to the existence of the tort of battery rather than being merely an example of *volenti non fit injuria* is supported by the fact that the claimant must show his own lack of consent: *Freeman v Home Office (No.2)* [1984] Q.B. 524, 539.

271 *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] A.C. 871 at 904–905. Although the SC in *Montgomery v Lanarkshire Health Board*, above, departed from what was said in *Sidaway* on informed consent, it did not discuss this point.

272 There is no need for such a licence to be contractual for the defence to arise. See Clerk & Lindsell on Torts, 23rd edn (2020), para.18-48.

273 [1932] 2 K.B. 431.

•274 Similarly, where the law classifies the relationship between the parties as *non-contractual*, the court may hold that a party cannot circumvent a legal immunity in the other party which results from this classification by suing in tort. In *Malone v Ministry of Defence* [2021] EWHC 2958 (QB), [2022] I.C.R. 478 at [23]–[25] the HC so held as regards a claim by a member of the armed forces for breach of the Queen’s Regulations or the **Armed Forces Act 2006**, holding that the claimant’s claim for damages in the tort of negligence or for breach of statutory duty could not circumvent the “umbrella of protection” provided by the established rule that the relationship between members of the armed forces and the Crown was *non-contractual*; the HC (at [26]) also noted the exception to this general position provided by the **Employment Rights Act 1996 ss.191–192**.

275 *Saif Ali v Sydney Mitchell & Co* [1980] A.C. 198 applying to solicitors *Rondel v Worsley* [1969] A.C. 191. In *Arthur J.S. Hall v Simons* [2002] 1 A.C. 615 this immunity was rejected and these earlier decisions not followed.

276 The immunity extended to positive acts of malfeasance as well as to non-feasance and to claims for personal injuries: *Travers v Gloucester Corp* [1947] 1 K.B. 71.

277 *Cavalier v Pope* [1906] A.C. 428. See now **Defective Premises Act 1972 ss.3, 4**.

278 [1985] 1 Q.B. 1.

279 [1985] 1 Q.B. 1 at 13.

280 [1906] A.C. 428.

281 *Rimmer v Liverpool City Council* [1985] 1 Q.B. 1 at 9.

282 [1985] 1 Q.B. 1 at 11.

283 cf. *McNerny v Lambeth LBC* (1988) 21 H.L.R. 188 (no liability in tort of negligence in landlord to tenant for condensation damage and illness) and *Baxter v Camden LBC (No.2)* [2001] Q.B. 1 (no liability in tort of nuisance in landlord to tenant owing to noise from

neighbouring property also owned by landlord) in both of which the rule in *Cavalier v Pope [1906] A.C. 428* was applied.

284 [1990] 1 Q.B. 818 (*reversed on other grounds [1992] 1 A.C. 233*).

285 cf. *Banque Keyser Ullmann SA v Skandia (UK) Co Insurance Ltd [1990] 1 Q.B. 665* (affirmed on other grounds [1991] 2 A.C. 249). On the law governing duties of disclosure and representation in contracts of insurance see *Consumer Insurance (Disclosure and Representations) Act 2012* and *Insurance Act 2015*, on which see Vol.II, paras 44-033 et seq.

286 [1990] 1 Q.B. 818; [1990] 1 Q.B. 655 at 897-898.

287 [1990] 1 Q.B. 818 at 898-899 and see below, paras 16-006—16-010 (where later developments are explained).

288 [1990] 1 Q.B. 818, at 901, per May LJ.

289 [1990] 1 Q.B. 818 at 902.

290 [1995] 2 A.C. 145.

291 [1986] A.C. 80.

292 See above, para.3-010.

293 On this role of policy in recognition of the duty of care in the tort of negligence, see especially *Marc Rich & Co AG v Bishop Rock Marine Co [1996] A.C. 211*. For the significance of considerations of policy in relation to liability in the tort of negligence based on an “assumption of responsibility”, see above, para.3-027.

294 [2001] 2 W.L.R. 1076 and see *Eastwood v Magnox Plc [2004] UKHL 35, [2005] 1 A.C. 503*.

295 [2001] 2 W.L.R. 1076 at 1097 and see also at 1122, per Lord Millett. cf. *Greenway v Johnson Matthey Plc [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487* (impact of absence of implied term for duty of care in the tort of negligence), on which see below para.3-050.

296 cf. *Ali v Christian Salvesen Food Services Ltd [1997] 1 All E.R. 721*, especially at 726 in which the Court of Appeal refused to imply a term in a collective agreement which represented “a carefully negotiated compromise between two potentially conflicting objectives” and which was “wholly silent” as to the issue about which it was argued a term should be implied.

297 cf. the effect on liability in tort where the law would usually imply a term in law, but where such a term would be inconsistent with the express terms of the contract, above, para.3-038A.

298 [1995] 2 A.C. 145 and see above paras 3-022—3-023.

299 See below, paras 17-008 et seq. and cf. *Smith v Charles Baker & Sons [1891] A.C. 325* (mere entry of contract with knowledge of risk not sufficient for defence of volenti non fit injuria).

300 This would be the case notably as regards “business liability for negligence” under the *Unfair Contract Terms Act 1977 s.2* or in the case of a term in a “consumer contract” under the *Consumer Rights Act 2015 Pt 2*.

301 [1995] 2 A.C. 145 and see above, paras 3-022—3-023.

302 [1990] 1 W.L.R. 212 and see also *Van Oppen v Clerk to the Bedford Charity Trustees [1990] 1 W.L.R. 235*.

303 Relying on *Liverpool City Council v Irwin [1977] A.C. 239* and see below, para.16-016.

304 [1990] 1 W.L.R. 212 at 229.

- 305 [1986] A.C. 80, 107 above, para.3-010.
- 306 [1990] 1 W.L.R. 212, 232.
- 307 [1990] 1 A.C. 637.
- 308 [1990] 1 A.C. 637 at 650.
- 309 [1990] 1 A.C. 637. If given a general application, this statement would clearly prevent a claimant from suing in tort after the expiry of a limitation period applicable to a contractual action, on which see below, para.3-062.
- 310 See similarly, *Bank of Nova Scotia v Hellenic War Risks Association (Bermuda) Ltd* [1990] 1 Q.B. 818 and see above, paras 3-040—3-043 and *Greater Nottingham Co-Operative Society Ltd v Cementation Piling & Foundations Ltd* [1989] Q.B. 71.
- 311 Above, paras 3-022 et seq.
- 312 See also below, paras 3-074—3-080 for further discussion of liability in the tort of negligence based on an assumption of responsibility *beyond* privity of contract, where the further factors in the finding of such an assumption are explained.
- 313 On the assumption that the implied term is put before the court for its consideration.
- 314 [1995] 49 Con. L.R. 99.
- 315 The plaintiffs also claimed against their solicitors, but no issue relating to the latters' liability arose before the Court of Appeal.
- 316 [1995] 2 A.C. 145, 193.
- 317 [1995] 49 Con. L.R. 99, 114.
- 318 This approach was followed by the HC in *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep. 487 (duty of care arising from failure in carrying out pre-contractual disclosure).
- 319 This can be seen Hirst LJ's reliance on passages from Lord Goff's speech in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 178 and 193–194.
- 320 [1990] 2 A.C. 605, 638.
- 321 [1995] 49 Con. L.R. 99, 114.
- 322 See, e.g. *Barness v Ingenious Media Ltd* [2019] EWHC 3299 (Ch), [2020] P.N.L.R. 10 at [49], [61]–[67] where it was held that there was no implied term relating to the suitability of a tax-avoidance scheme for which the defendant bank had made loans to the claimants, but the court nevertheless considered whether the defendant had communicated with the claimants so as to assume responsibility to advise and whether the latter had relied on that assumption so as to found a claim in the tort of negligence, finding that they had not.
- 323 cf. *Tesco Stores Ltd v Norman Hitchcox Partnership Ltd* [1998] 56 Con. L.R. 42, 163–165.
- 324 [2000] I.R.L.R. 499 at [21]–[23].
- 325 See similarly *Freemont (Denbigh) Ltd v Knight Frank Ltd* [2014] EWHC 3347 (Ch), [2015] P.N.L.R. [34], [148]–[149] (surveyor's restricted contractual duty limiting any duty of care in tort).
- 326 [2014] EWHC 3957 (QB), [2015] P.I.Q.R. P10, [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487. On appeal to the SC sub nom. *Dryden v Johnson Matthey Plc* [2018] UKSC 18 on which see below.

- 327 [2014] EWHC 3957 (QB) at [32]–[33].
- 328 [2014] EWHC 3957 (QB) at [38] and [46] per Jay J.
- 329 [2014] EWHC 3957 (QB) at [47], applying the approach to the “scope of the duty” of Lord Hoffmann in *SAMCO v York Montague* [1997] A.C. 191 at 211–212.
- 330 [2014] EWHC 3957 (QB) at [47] per Jay J.
- 331 [2016] EWCA Civ 408 at [29]–[33].
- 332 [2016] EWCA Civ 408 at [37] per Sales LJ (with whom Davis LJ and Lord Dyson MR agreed).
- 333 [2016] EWCA Civ 408 at [37] per Sales LJ.
- 334 [2016] EWCA Civ 408 at [39]–[40].
- 335 [1990] 2 A.C. 605, 618.
- 336 [2016] EWCA Civ 408 at [40] and [45].
- 337 [2016] EWCA Civ 408 at [47].
- 338 [1995] 2 A.C. 296.
- 339 [2016] EWCA Civ 408 at [48] per Sales LJ.
- 340 [2016] EWCA Civ 408 at [49], referring to *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294 at 303 on which see above, para.2-063.
- 341 [2016] EWCA Civ 408 at [51].
- 342 *Dryden v Johnson Matthey Plc* [2018] UKSC 18 esp. at [40], so interpreting and applying *Cartledge v E. Jopling* [1963] A.C. 758 and *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39, [2008] 1 A.C. 281.
- 343 [2018] UKSC 18 esp. at [49].
- 344 [2018] UKSC 40, [2018] 1 W.L.R. 4021. See similarly *Elite Property Holdings Ltd v Barclays Bank Plc* [2018] EWCA Civ 1688, [2019] Bus. L.R. 129 [27], [62]–[68] (reasons against the existence of a duty of care in tort in the circumstances recognised by earlier authority militate strongly against recognition of a contractual obligation to the same effect in the absence of a clear expression of intention by the defendant to assume such an obligation).
- 345 This was the case even though it was acknowledged that the officers as constables were not employees; [2018] UKSC 40 at [15].
- 346 [2018] UKSC 40 at [13] (this was the sole remaining allegation before the SC, though other allegations had been put earlier).
- 347 With whom Baroness Hale of Richmond, Lord Kerr of Tonaghmore, Lord Wilson and Lord Mance agreed.
- 348 [2018] UKSC 40 at [17].
- 349 [1990] 2 A.C. 605.
- 350 [2018] UKSC 40 at [21].
- 351 [2018] UKSC 40 at [21] quoting with approval to this effect Dyson LJ in *Crossley v Faithful & Gould Holdings Ltd* [2004] I.C.R. 1615 at [36].
- 352 [2018] UKSC 40 at [21].
- 353 [2018] UKSC 40 at [21].
- 354 [2018] UKSC 40 at [23].
- 355 [2018] UKSC 40 at [31]–[32].

- 356 [2018] UKSC 40 at [33].
- 357 [2018] UKSC 40 at [34]–[38] and [47].
- 358 See above in this paragraph, referring to [2018] UKSC 40 at [21].
- ❶359 [2022] EWHC 135 (QB), [2022] 4 W.L.R. 54.
- ❷360 [2022] EWHC 135 (QB) at [150], [154] and [225]–[227].
- ❸361 [2022] EWHC 135 (QB) at [330]–[338]. On this indemnity see below, para.21-178 and Vol.II, para.42-117.
- ❹362 [2022] EWHC 135 (QB) at [334] and see also at [336].
- ❺363 [2022] EWHC 135 (QB) at [365].
- 364 *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 W.L.R. 4021, above, para.3-051.
- ❻365 [2018] EWCA Civ 2803, [2020] Q.B. 93.
- 366 *McFarlane v Tayside Health Board* [2000] 2 A.C. 59 and *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 A.C. 309.
- 367 [2018] EWCA Civ 2803 at [49].
- 368 [2018] EWCA Civ 2803 at [32]–[36] and [39].
- ❻369 [2021] UKSC 21, [2022] A.C. 852. *Khan v Meadows*, unlike *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] A.C. 783, did not concern a concurrent claim for breach of a contractual duty of care: [2021] UKSC 21 at [81].
- ❻370 [2021] UKSC 20, [2022] A.C. 783.
- ❻371 [2021] UKSC 20 at [4]; see similarly [2021] UKSC 21 at [28] and [36].
- ❻372 [2021] UKSC 20 at [4] per Lord Hodge DPSC and Lord Sales JSC (with whom Lord Reed PSC, Lord Kitchin JSC and Lady Black agreed) and see further at [13]–[17] and [27]. Lord Leggatt and Lord Burrows JJSC gave judgments concurring on the outcome of the appeal but differing on aspects of the reasoning from the majority. cf. *Khan v Meadows* [2021] UKSC 21 at [41] and [65], where in the context of medical advice the question of the scope of the professional's duty was put in terms of “what is the risk which the service which the defendant undertook was intended to address?”.
- ❻373 See below, paras 29-035—29-037.
- ❻374 *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 at [2] per Lord Hodge DPSC and Lord Sales JSC.

•375 [2021] UKSC 20 at [2] and see similarly at [179], [188] (Lord Burrows JSC). cf. however, the observations of Lord Hoffmann in holding that the scope of a duty should be determined by its purpose in the context of negligent valuation of commercial property in *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 at 212 (which was quoted with apparent approval by the SC [2021] UKSC 20 at [13]) that “[i]n the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care”. In *Radia v Marks* [2022] EWHC 145 (QB), [2022] P.N.L.R. 12 at [57]–[63] the scope of the duty of care in tort of an expert medical witness to a litigant recognised by *Jones v Kaney* [2011] UKSC 13, [2011] 2 A.C. 398 was held not to extend to the protection of the litigant from the risk of an adverse finding of credibility or a finding of dishonesty in them, as it was no part of the role of the expert witness to comment on the credibility of a party or witness and such an extension of the scope of the expert witness’s duty would create a real conflict between the expert’s overriding duty to the court and his or her duty to the party. While the HC noted that the expert’s duty of care in *Jones v Kaney* arose both in tort and in contract ([2022] EWHC 145 (QB) at [58]), its decision on the scope of the duty related to the claim in tort, although the claim in contract also failed on the ground of breach of duty and causation: [2022] EWHC 145 (QB) at [63] and [83].

376 See above, paras 3-006—3-009.

377 [1995] 2 A.C. 145, above, para.3-022.

378 See below, paras 11-053—11-054.

379 See above, para.3-009.

380 *Johnson v Pye* (1664) 1 Sid. 258.

381 See below, para.11-053.

382 See below, para.11-054.

383 *Burnard v Haggis* (1863) 32 L.J.N.S. 189, 191, per Keating J. This passage does not appear in the other report at (1863) 14 C.B.(N.S.) 45.

384 (1863) 14 C.B.(N.S.) 45, 53, (1863) 32 L.J.N.S. 189, 191.

385 See also *Ballett v Mingay* [1943] K.B. 281.

386 See above, paras 3-006—3-007.

387 See above, para.3-006 and below, paras 9-063, 9-087, 29-001 and 29-022 et seq.

388 See above, para.3-006.

389 And cf. Cane, Tort Law and Economic Interests, 2nd edn (1996), pp.142–145 and *Whittaker* (1996) 16 O.J.L.S. 191, 207 et seq.

•390 See above, para.3-017.

•391 [1964] 1 W.L.R. 885.

•392

- [1964] 1 W.L.R. 885 at 891.
- ③93 And cf. *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1987] 1 W.L.R. 916, where the court did not generally feel it necessary to classify the claim beyond that it was for negligence, though the test of remoteness applied was found in *Hadley v Baxendale* (1854) 9 Exch. 341; *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1987] 1 W.L.R. 916 at 926.
- ③94 [1964] 1 W.L.R. 885, 887, citing Lord Haldane in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] A.C. 673, 689.
- ③95 [1964] 1 W.L.R. 885 at 888. As the property with the restriction was worth the price which they paid, the plaintiffs' loss was held to be nil: at [891]. cf. *Murray v Lloyd* [1989] 1 W.L.R. 1260.
- ③96 *Swingcastle Ltd v Alistair Gibson* [1991] 2 A.C. 223. cf. *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; sub nom. South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 especially at 216–217; *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33, [2011] 3 All E.R. 655 at [73] (scope of duty of lawyers advising on invalid loan agreement treated as same in contract and tort); *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2017] 2 W.L.R. 1029; *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] A.C. 783. And see above, paras 3-050—3-052A and below, paras 29-034—29-037.
- ③97 *Swingcastle Ltd v Alistair Gibson* [1991] 2 A.C. 223, 225.
- ③98 *Swingcastle Ltd v Alistair Gibson* [1991] 2 A.C. 223 at 238. While the House of Lords noted that the action before it was founded in tort, it did not consider the principles applicable to be any different from those in contract.
- ③99 [1986] 1 Q.B. 644.
- ④00 [1986] 1 Q.B. 644 at 658.
- ④01 [1986] 1 Q.B. 644 at 685, 688.
- ④02 [1986] 1 Q.B. 644 at 679 (Kerr LJ), with whom Neill and Nourse LJJ agreed on this point: at 684, 685.
- ④03 [1986] 1 Q.B. 644 at 678.
- ④04 [1986] 1 Q.B. 644 at 683. This point had been agreed by the parties.
- ④05

[1986] 1 Q.B. 644.

- 406 These observations must be read subject to more recent authority which restricts recovery in respect of the birth of a healthy child: see *McFarlane v Tayside Health Board* [2000] 2 A.C. 59; *Parkinson v St. James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 A.C. 309; and *ARB v IVF Hammersmith Ltd* [2018] EWCA Civ 2803, [2020] Q.B. 93; and see above, para.3-052.
- 407 See McGregor on Damages, 21st edn (2020), paras 24-005—24-008; *Cartwright* (1996) 55 C.L.J. 488 and see Cane, above, para.3-055 at pp.145–147, for a discussion of the different treatment in tort and contract of damages for “lost chances”. On differences in damages for breach of contract and the tort of conversion see McGregor on Damages, 21st edn (2020), para. 24-016.
- 408 See below, paras 29-124 et seq. which includes discussion of the significance for remoteness of damage in contract of the defendant’s “assumption of responsibility” for a particular kind of loss after *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 A.C. 61 and *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18, [2021] A.C. 23.
- 409 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound (No.1)* [1961] A.C. 388.
- 410 *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] Q.B. 791, 807. See similarly *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] Q.B. 375, 405, per Sir Thomas Bingham MR (though the decision of the Court of Appeal was reversed on other grounds sub nom. *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191).
- 411 *Koufos v C. Czarnikow Ltd* [1969] 1 A.C. 350, 385–386, 422–423 and cf. at 413; *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351 at [74] and [146] and see below, paras 3-058 and 29-136.
- 412 See Harris, Campbell and Halson, Remedies in Contract and Tort, 2nd edn (2002), pp.331–333.
- 413 For recent discussion by the PC of the proper approach to the degree of probability for remoteness of damage in claims for breach of contract see *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18, [2021] A.C. 23 esp. at [27]–[35] adopting the test (at [32]) that “[t]o be recoverable, the type of loss must have been reasonably contemplated as a serious possibility”.
- 414 [1978] Q.B. 791.

- 415 [1978] *Q.B.* 791 at 806–807. Lord Denning MR agreed with the result of the majority, but justified it by drawing a distinction between claims for physical damage and ones for economic loss: at 802–804. For further discussion of this decision, see Burrows, Remedies for Torts and Breach of Contract, 3rd edn (2004), pp.88 et seq.; Cane, above, para.3-055 at pp.146–147; McGregor on Damages, 19th edn (2014), para.22-009. cf. *Galoo Ltd v Bright Grahame Murray* [1994] 1 *W.L.R.* 1360, 1369 where Glidewell LJ adopted an approach to causation which he considered applicable to a claim for breach of contract and to one in “tort in a situation analogous to a breach of contract”.
- 416 [2010] *EWHC* 1878 (TCC), [2010] *B.L.R.* 537 (preliminary issue as to duty of care); *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] *EWHC* 2931 (TCC), 133 *Con. L.R.* 211 (trial), Akenhead J.
- 417 Applying *Henderson v Merrett Syndicates Ltd* [1995] 2 *A.C.* 145 on which see above, para.3-023.
- 418 [2010] *EWHC* 1878 (TCC) at [14].
- 419 [1996] *UKHL* 10, [1997] *A.C.* 191 at [8], [9] and [14]–[15]. On the “scope of duty principle” see above, para.3-052A and below, paras 29-035—29-037.
- 420 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] *UKHL* 48, [2009] 1 *A.C.* 61 at [22]; [2010] *EWHC* 1878 (TCC) at [16]. On the significance of this decision see below, paras 29-144 et seq.
- 421 [2010] *EWHC* 1878 (TCC) at [16] in fine.
- 422 [2010] *EWHC* 1878 (TCC) [23] and [24].
- 423 [2010] *EWHC* 1878 (TCC) at [23] and [25]. At trial, Akenhead J found that A was not in any material breach of duty: *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] *EWHC* 2931 (TCC), 133 *Con. L.R.* 211 at [106].
- 424 [2014] *EWCA Civ* 1512, [2015] *I.R.L.R.* 112 at [119] n.8 per Underhill LJ (with whom Davis and Patten LJJ agreed) and rejecting the position adopted by Burrows in Remedies for Torts and Breach of Contract, 3rd edn (2004) and suggested by McGregor on Damages, 19th edn (2014), para.22-009.
- 425 [2014] *EWCA Civ* 1512 at [119] per Underhill LJ.
- 426 [2014] *EWCA Civ* 1512 at [119] per Underhill LJ.
- 427 [2015] *EWCA Civ* 1146, [2016] 2 *W.L.R.* 1351.
- 428 [2014] *EWCA Civ* 1512, [2015] *I.R.L.R.* 112, above, para.3-057.
- 429 The CA in *Yapp* consisted of Underhill, Davis and Patten LJJ; the CA in *Wellesley Partners LLP* consisted of Longmore and Floyd LJJ and Roth J.
- 430 [2015] *EWCA Civ* 1146 at [41], [54] and [58]–[59] (decision at trial not appealed on this point).

- 431 [2015] EWCA Civ 1146 at [68] per Floyd LJ and see also at [75], explicitly approving the position proposed by McGregor on Damages, 19th edn (2014), para.22-009 that had been rejected by the CA in *Yapp* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 at [119], n.8 and at [80]. See similarly, at [151] (approving the view of Burrows in Burrows and Peel (eds), Commercial Remedies (2003) 27 at 35), [157] and [163] (Roth J); [183]–[186] (Longmore LJ). The 21st edition of McGregor on Damages (2020), paras 24–009–24–015 approves the approach in *Wellesley Partners LLP* without reference to the decision of the CA in *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512.
- 432 Transfield Shipping Inc v Mercator Shipping Inc (*The Achilleas*) [2009] 1 A.C. 61 on which see below, paras 29–144 et seq. and in particular the comment in *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18, [2021] A.C. 23 at [26] on its use of assumption of responsibility.
- 433 [1995] 2 A.C. 145. See [2015] EWCA Civ 1146 at [69], [74], [80]–[83] and [155].
- 434 [2015] EWCA Civ 1146 at [81]–[89], [179] and [188].
- 435 [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351.
- 436 [2014] EWCA Civ 1512, [2015] I.R.L.R. 112.
- 437 In *Yapp* the CA held that the claimant's depressive illness was not reasonably foreseeable under the tort test (seen as more favourable to the claimant), and therefore was also too remote as regards his claim for breach of contract: [2014] EWCA Civ 1512 at [121]–[124], [133]. In *Wellesley Partners LLP* the partnership's losses were held not too remote under the contract test thereby leading to the CA affirming the result at trial which had held them not too remote under the tort test: [2015] EWCA Civ 1146 at [81], [179], and [188]. In *Wright v Lewis Silkin LLP* [2016] EWCA Civ 1308, [2017] P.N.L.R. 16 the CA saw itself as bound by *Wellesley Partners LLP*, no reference being made either by the parties or by the court to the contrasting approach of the CA in *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112, above, para.3-057. The CA in *Wright v Lewis Silkin LLP* therefore held that “where there were contractual and tortious duties to take care in carrying out instructions, the test for recoverability of damage should be the same, and it should be the contractual one”: [2016] EWCA Civ 1308 at [60] per Jackson LJ (with whom Patten LJ agreed).
- 438 [2014] EWCA Civ 1512 at [60] and [67].
- 439 [2014] EWCA Civ 1512 at [119].
- 440 [2014] EWCA Civ 1512 at [42]–[43]. The CA also referred to breach of the implied term of mutual trust and confidence, but this was not seen as paralleled with any breach of duty at common law.
- 441 [2015] EWCA Civ 1146 at [80], [151] and [186]. See also at [163] and [187] where the question was raised whether the contractual test of remoteness of damage should also apply to liability for negligent advice or services where the relationship was “equivalent to contract”.
- 442 [1978] Q.B. 791 at 802–804 noted above, para.3-057.
- 443 [2015] EWCA Civ 1146 at [68].
- 444 cf. above, paras 3-047–3-049 on the question whether one party to a contract can be held to have “assumed responsibility” to the other contracting party under the *Hedley Byrne*

principle even where the contract contained no express or implied term as to the claimed subject matter of such an assumption of responsibility. See also above, paras 3-025—3-028 on assumption of responsibility under *Hedley Byrne* more generally.

- 445 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.20–133 and see similarly McGregor on Damages 21st edn (2020), para.24-009.
- 446 The *Wagon Mound (No.1)* [1961] A.C. 388.
- 447 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158.
- 448 *Royscott Trust Ltd v Rogerson* [1991] 2 Q.B. 297; and see below, paras 9-086—9-087.
- 449 See above, para.3-017.
- 450 *Royscott Trust Ltd v Rogerson* [1991] 2 Q.B. 297 at 307, per Balcombe LJ.
- 451 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.27J(4) (as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)) on which see Vol.II, para.40-214.
- 452 [1989] A.C. 852, 858.
- 453 [1978] Q.B. 791.
- 454 And see *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch. 560; *Youell v Bland Welch & Co Ltd (No.2)* [1990] 2 Lloyd's Rep. 431; *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 214; *Barclays Bank Plc v Fairclough Building Ltd (No.2)* [1995] I.R.L.R. 605; *UCB Bank Plc v Hepherd Winstanley & Pugh* [1999] Lloyd's Rep. P.N. 963; *Trebor Bassett Holdings Ltd v ADT Fire and Security Plc* [2012] EWCA Civ 1158, [2012] B.L.R. 441 and see below, para.29-094.
- 455 *Barclays Bank Plc v Fairclough Building Ltd (No.2)* [1995] I.R.L.R. 605, above, para.3-028.
- 456 In particular, in principle, accrual of actions for breach of contract occurs on breach, whereas accrual for actions in tort occurs when the damage is suffered. The latter rule has caused not inconsiderable difficulty in cases for negligently caused economic loss: see *D.W. Moore & Co Ltd v Ferrier* [1988] 1 W.L.R. 267, 279–280; *Iron Trades Mutual Insurance Co Ltd v J.K. Buckenham Ltd* [1990] 1 All E.R. 808; *Bell v Peter Browne & Co* [1990] 2 Q.B. 495; *F.G. Whitley & Sons & Co Ltd v Thomas Bickerton* (1993) 07 E.G. 100; *Knapp v Ecclesiastical Insurance Group* [1997] All E.R. (D) 44 (Oct); *McCarroll v Statham Gill Davies* [2003] EWCA Civ 425, [2003] P.N.L.R. 25; *Watkins v Jones Maidment Wilson* [2008] EWCA Civ 134, 118 Con. L.R. 1; *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, [2009] Bus. L.R. 42; *AXA Insurance Ltd v Akther & Darby Solicitors* [2009] EWCA Civ 1166, [2010] 1 W.L.R. 1662; and *Pegasus Management Holdings SCA v Ernst & Young* [2010] EWCA Civ 181, [2010] 3 All E.R. 297. cf. *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 W.L.R. 1627; *Law Society v Sephton & Co* [2006] 2 A.C. 543. The general approach of the English courts has not been followed by the H.C. Aus.: *Wardley Australia Ltd v State of Western Australia* (1992) 175 C.L.R. 514 and see above, para.3-008.
- 457 [1995] 2 A.C. 145. In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch. 384, it was held that a claim in tort could exist even if the claim in contract was statute-barred, though the contract claim still existed on the facts. In *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1, a case in which the plaintiff's claim in contract was statute-barred, the House of Lords had to decide when a claim in tort accrued, on the plaintiff's suffering of the damage or on its discovery: [1983] 2 A.C. 1 at 12. This discussion

would have been pointless if the expiry of the contractual limitation period had been thought to have prevented any concurrent claim in tort even if the latter's limitation period had not expired.

- 458 *Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 A.C. 1* at 19 and see above para.3-008.
- 459 i.e. apart from the question whether the claim is statute-barred.
- 460 See *D.W. Moore & Co Ltd v Ferrier [1988] 1 W.L.R. 267, 280; Iron Trades Mutual Insurance Co Ltd v J.K. Buckenham Ltd [1990] 1 All E.R. 808, 820–821; Bell v Peter Browne & Co [1990] 2 Q.B. 495, 501–504; Lee v Thompson [1989] 40 E.G. 89; Havenledge Ltd v Graeme John & Partners [2001] Lloyd's Rep. P.N. 223* at [35] et seq. cf. *Forster v Outred & Co [1982] 1 W.L.R. 86; F.G. Whitley & Sons Co Ltd v Thomas Bickerton (1993) 07 E.G. 100* at 108 and see Cane, above, para.3-055, at pp.134–136.
- 461 Limitation Act 1980 s.14A; *Iron Trades Mutual Insurance Co Ltd v J.K. Buckenham [1990] 1 All E.R. 808*, see above, para.3-008 and below, para.31-010.
- 462 See *Matthews v Kuwait Bechtel Corp [1959] 2 Q.B. 57* and *Coupland v Arabian Gulf Oil Co [1983] 1 W.L.R. 1136* respectively and see Dicey and Morris on the Conflict of Laws, 15th edn (2015), para.11-187.
- 463 Above, paras 1-028 et seq.
- 464 [2012] O.J. L351/1 arts 7(1) and 7(2) (in force on 10 January 2015) replacing Regulation 44/2001 on jurisdiction and the enforcement of judgments in civil and commercial matters (“Brussels I Regulation”) arts 5(1) and 5(3), which itself replaced the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. For the law under the Brussels I Regulation see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2015), Ch.11 esp. at para.11-285.
- 465 *Kalfelis v Schröder (189/87) [1988] E.C.R. 5565, 5577* (AG Darmon), 5585 and see Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), paras 11-284, 11-299.
- 466 *Netherlands State v Rüffer (814/79) EU:C:1980:291, [1980] E.C.R. 3807, 3832–3833, 3836; Kalfelis v Schröder (189/87) EU:C:1988:459, [1998] E.C.R. 5565; Jakob Handte & Co GmbH v Société Traitements Mécano-chimiques des Surfaces (TMCS) (C-26/91) EU:C:1992:268 [1993] I.L.Pr. 5; eDate Advertising and Martinez (C-161/10) EU:C:2011:685, 25 October 2011* at para.38; *ÖFAB, Östergötlands Fastigheter AB v Koot (C-147/12) EU:C:2013:490, 18 July 2013* at para.27 and see Dicey and Morris and Collins, 15th edn (2015), paras 11-268—11-272, 11-285.
- 467 [1998] Q.B. 54.
- 468 *Kalfelis v Schröder (189/87) EU:C:1988:459, [1988] E.C.R. 5565*. The equivalent provision of art.5(1) in the Brussels Convention is art.7(1) of the Brussels Ibis Regulation.

- 469 [1988] E.C.R. 5565 at [5585] and see *ÖFAB, Östergötlands Fastigheter AB v Koot* (C-147/12) EU:C:2013:490, 18 July 2013 at para.32.
- 470 [1998] Q.B. 54, 63.
- 471 The decision of the Court of Appeal in *Source Ltd v TUV Rheinland Holding AG* [1998] Q.B. 54 was held to represent the law by Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2015), para.11-285, but its authority was doubted by Tuckey J in *Raiffeisen Zentralbank Österreich Aktiengesellschaft v National Bank of Greece SA* [1999] 1 Lloyd's Rep. 408, 411 on the basis that its wide approach to art.5(1) is inconsistent with the restrictive approach taken by the HL in *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 A.C. 153. See also *Domicrest Ltd v Swiss Bank Corp* [1999] Q.B. 548, 561; *William Grant & Sons International Ltd v Marie Brizard Espana Sa* [1998] S.C. 536.
- 472 189/87, EU:C:1988:459, [1988] E.C.R. 5565 at para.17.
- 473 *Brogsitter v Fabrication de Montres Normandes EURL* (C-548/12) EU:C:2014:148, 13 March 2014 at para.20; *ERGO Insurance SE v If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14) EU:C:2016:40, 21 January 2016 paras 43–45; *Kolassa v Barclays Bank Plc* (C-375/13) EU:C:2015:37, 28 January 2015 at para.44; *Granarolo SpA v Ambrosi Emmi France SA* (C-196/15) EU:C:2016:559, 14 July 2016 at para.20. See further at *Aspen Underwriting Ltd v Kairos Shipping Ltd* [2017] EWHC 1904 (Comm) at [74]–[77] (misrepresentation by contracting party inducing contract is a “matter relating to a contract” but misrepresentation by a third party to the contract is a “matter relating to tort”).
- 474 *Granarolo SpA v Ambrosi Emmi France SA* (C-196/15) EU:C:2016:559, 14 July 2016 at para.28.
- 475 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) reg.84 (the reference in reg.1(1) to their coming into force on exit day must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4) and Sch.5 para.1) and see above, para.1-024. The UK had applied to rejoin the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (whose rules on jurisdiction distinguish between matters relating to a contract and matters relating to tort, delict and quasi-delict in a similar way to the Brussels Ibis Regulation), but its doing so requires the consent of all the existing parties and on 28 June 2021 the EU formally communicated its lack of consent to the Depositary of the Convention, the Swiss Federal Council.
- 476 The amendments were made by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479), as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 (SI 2020/1493).

•477 CPR r.6.36; PD6B(4A), (6)–(8) (claims in relation to contracts) and (9) (claims in tort).

•478 *Matthews v Kuwait Bechtel Corp [1959] 2 Q.B. 57.*

•479 Emphasis added.

•480 Dicey and Morris on the Conflict of Laws, 15th edn (2015), para.11-248.

•481 [2022] EWHC 441 (Ch), [2022] P.N.L.R.16.

•482 [2022] EWHC 441 (Ch) at [63].

•483 [1998] Q.B. 54.

•484 [2022] EWHC 441 (Ch) at [76].

•485 [2022] EWHC 441 (Ch) at [74].

486 Introduced into English law by the Contracts (Applicable Law) Act 1990 and see generally, below, paras 33-018 et seq.

487 *Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157* especially at [33].

488 Regulation 864/2007 [2007] O.J. L199/40 and see Dicey, Morris and Collins on the Conflict of Laws 15th edn (2014), Ch.35.

489 [2008] O.J. L177/6. On which see below, paras 33-019 et seq. and Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2014) paras 32-012 et seq.

•490 Below, para.33-041 and see *ERGO Insurance SE v If P&C Insurance AS (Joined Cases C-359/14 and C-475/14) EU:C:2016:40*, 21 January 2016 paras 43–45; *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15) EU:C:2016:612*, 28 July 2016, paras 36–53 and 58 and *Committeri v Club Mediterranee SA [2018] EWCA Civ 1889, [2019] I.L. Pr. 19* at [48]–[58].

491 European Union (Withdrawal) Act 2018 s.3; Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834) regs 10 and 11; see above, para.1-024.

## **(d) - The Influence of Contract on Tort Beyond Privity**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 1. - The Relationship between Contract and Tort

**(d) - The Influence of Contract on Tort Beyond Privity**

### **Introduction**

- 165 One of the most basic characteristics of liability in tort is that it can exist in the absence of any contractual relationship existing between the parties: there is in general no need for any voluntary element on the part of someone on whom duties or liabilities in tort are imposed.<sup>492</sup> However, a contract may affect liabilities in tort beyond its parties either positively or negatively. Positively, in certain circumstances someone not party to a contract, C, may be liable in tort for behaviour which induces breach of B's contract with A (the tort of inducing breach of contract)<sup>493</sup> and, secondly, A may be liable to C for threatening B that he will break his contract with B (so-called "three-party" intimidation).<sup>494</sup> A contract may have a negative effect on torts involving third parties in two ways. First, in certain circumstances the fact that A and B are parties to a contract has sometimes been seen as a reason for refusing to impose or for modifying any liability in tort in A to C. This idea, long derided as the "privity of contract fallacy", enjoyed during the later 1980s and early 1990s a resurgence of judicial popularity in the context of liability for pure economic loss in the tort of negligence, and to a much lesser extent, in the context of liability in the same tort for damage to property.<sup>495</sup> However, since 1994 the courts have taken rather different approaches to these questions, often considering whether or not to impose liability in negligence for pure economic loss by reference to the doctrine of "assumption of responsibility" and treating the disruption of contractual arrangements as a possible reason of policy for refusing to accept a novel duty of care.<sup>496</sup> Secondly, the existence of a contract between A and B may be a reason for refusing to impose liability on C to either A or B, depending on the terms of the contract between A and B.<sup>497</sup> This issue arises clearly in the context of the question whether A and B can by contract ensure that a third party, C, enjoys the benefit of an exemption clause so as to be protected from liability

to A or B, whether or not C is in privity of contract with that person. These situations will be examined in turn.

## The tort of inducing breach of contract

- <sup>166</sup> It was clearly established by *Lumley v Gye*<sup>498</sup> in 1853 that if A intentionally induces B to break her contract with C,<sup>499</sup> then A can be liable in damages for any harmful consequences that this causes C<sup>500</sup> or restrained by injunction from continuing to prejudice C's contractual rights in this way.<sup>501</sup> The courts accept that in this way C may be able to recover more damages against A than he would be able to against B, this being seen as a reason for imposing the liability in tort, rather than for denying it.<sup>502</sup> While at one time this liability in tort was held to extend to cases where A's interference with C's rights does not constitute a breach of contract by reason, for example, of the presence of a force majeure clause, the House of Lords has since held that it may not arise in the absence of a breach of contract: the tort liability is accessory to the breach of contract.<sup>503</sup> Moreover, liability under this tort does not extend to interference with remedies arising out of a broken contract. Thus, where A has received shares from B in breach of B's contractual obligations to C, while A may be ordered to retransfer the shares to B and may be restrained by injunction from retransferring them to D, it is no tort in A to retransfer them nor in D to receive them.<sup>504</sup>

## The tort of causing loss by unlawful means: “three-party intimidation”

- <sup>167</sup> The tort of causing loss by unlawful means is committed, inter alia,<sup>505</sup> where A threatens B that he will commit an act, or use means, unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage to C, an instance of tortious liability often called “three-party intimidation”.<sup>506</sup> In *Rookes v Barnard*,<sup>507</sup> the House of Lords recognised the existence of this liability in tort and further held that a threatened breach of contract by A can constitute unlawful means for this purpose.<sup>508</sup> In the Court of Appeal the view had been expressed that to extend the tort to threats of breach of contract “would overturn or outflank some elementary principles of contract law”,<sup>509</sup> notably, privity of contract.<sup>510</sup> However, for the House of Lords the two causes of action (for breach of contract and for the “tort of intimidation”) were “quite independent”,<sup>511</sup> “the vice of [C's] argument is the threat to break and not the breach itself”.<sup>512</sup> Thus, it is the independence of liability in tort which allows its extension into what had previously been an exclusively contractual domain.<sup>513</sup>

## A contractor's liability beyond privity and independent torts

- 168 At common law, in principle privity of contract prevents any breach by A of a term of a contract made with B from giving rise to any contractual liability in A to C, a third party to the contract. This position was qualified significantly by the [Contract \(Rights of Third Parties\) Act 1999](#), which allows parties to a contract to create rights in third parties (not being party to the contract) in certain circumstances.<sup>514</sup> But can C sue A in tort instead? First, it is clear that the mere breach of a contract by A does not in itself give rise to liability in tort to C. As Pollock stated in 1887<sup>515</sup>:

“... there is a certain tendency to hold that facts which constitute a contract cannot have any other legal effect. We think we have shown that such is not really the law ... the authorities commonly relied on for this proposition<sup>516</sup> really prove something different and much more rational, namely that if A breaks his contract with B ... that is not of itself sufficient to make A liable to C, a stranger to the contract, for consequential damage.”

Secondly, therefore, where the facts which constitute a breach of contract in A to B also constitute the grounds of an *independent* liability in tort in A to C, the existence of that contract does not in itself prevent liability in A to C.<sup>517</sup> Thus, as has been seen, where A *threatens* to break his contract with B, this may give rise to an action in C in the tort of causing loss by unlawful means<sup>518</sup> and this tort may also apply to cases of actual as opposed to threatened breach of contract.<sup>519</sup> Similarly, where a tenant, A, commits an act which constitutes a breach of the terms of his lease with his landlord, B, this does not prevent his neighbour, C, from suing A in private nuisance for any harm which he suffers as a result as long as the conditions for the existence of that tort are fulfilled.<sup>520</sup>

“If it is the tenant who has undertaken the repair [sc. of the premises], of course he is liable, but his liability is based on the fact that he is the occupier of the premises; any additional obligation which he may have undertaken by contract with the landlord cannot affect his liability in tort to third parties.”<sup>521</sup>

On the other hand, where the landlord has undertaken to the tenant to repair, he can be liable in nuisance to a third party based on the control which this gives him despite not being an occupier<sup>522</sup> in addition to his liability to the tenant.<sup>523</sup> Finally, where an agent publishes defamatory material concerning the claimant, the fact that this publication also constitutes a breach of his contract actionable at the suit of his principal<sup>524</sup> does not prevent the claimant from suing the agent in the tort of defamation.<sup>525</sup>

## Privity of contract and the tort of negligence <sup>526</sup>

- 169 At two stages in the development of the tort of negligence, it has been argued that A's breach of contract to B should not be considered capable of giving rise to liability in this tort for harm caused to C. The leading nineteenth-century authority was *Winterbottom v Wright*,<sup>527</sup> in which the plaintiff was employed to drive a mail-coach by one Atkinson, who had been engaged to carry mail by the Postmaster-General. The latter had hired a coach from the defendant, who had undertaken to him that it would be kept in a fit, proper, safe and secure state. The plaintiff's claim for damages in respect of injuries suffered when the coach broke down on a journey owing to its dangerous state was rejected by the court, which accepted the defendant's contention that:

“... wherever a wrong arises merely out of the breach of a contract ... whether the form in which the action is conceived be ex contractu or ex delicto, the party who made the contract alone can sue.”<sup>528</sup>

However, this approach<sup>529</sup> was of course rejected by the House of Lords in *Donoghue v Stevenson*.<sup>530</sup> As Lord Macmillan put it:

“... there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort.”<sup>531</sup>

The approach in *Winterbottom v Wright*<sup>532</sup> came to be derided as the “privity of contract fallacy”.<sup>533</sup>

## Liability for pure economic loss

- 170 In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>534</sup> one of the circumstances on which the House of Lords relied for finding the existence of a “special relationship” so as to give rise to liability for pure economic loss caused by a negligent misstatement was that the relationship of the parties was “equivalent to contract”.<sup>535</sup> While Lord Devlin considered that the reason that the plaintiff's claim could not be considered contractual was the absence of consideration for the defendants' undertaking,<sup>536</sup> on the facts there was also no obvious privity between the parties.<sup>537</sup> In this way, the “contractual environment” of the claim in the tort of negligence was considered a ground for the imposition of a duty of care, rather than a reason for rejecting one.

## The Junior Books case

- 171 The courts' recognition of liability for negligently caused pure economic loss was taken one stage further in 1982 by the decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd*,<sup>538</sup> where it held that a specialist flooring sub-contractor who had built a defective but not dangerous floor could owe a duty of care to the owner of the building who had to replace it as a result.<sup>539</sup> Clearly, there was no privity of contract between the parties, but the majority of their Lordships found that there was a "special relationship" between them, which rested on a variety of factors, of which one was the fact that it fell "only just short of a direct contractual relationship".<sup>540</sup> At the time of its decision, *Junior Books* appeared to mark a radical departure, for it allowed recovery in respect of pure economic loss beyond privity of contract other than where it was consequential on the defendant's negligent misstatement. However, the fate of *Junior Books* was not a happy one, its approach to liability for pure economic loss not being followed by subsequent courts.<sup>541</sup> While the courts gave many reasons in the many cases in which recovery for pure economic loss in the tort of negligence was denied,<sup>542</sup> in some cases the presence of a contract or contracts has proven particularly important. In *Junior Books* itself, Lord Roskill noted that any exclusion clause in the main contract<sup>543</sup> may exclude or modify the liability in the sub-contractor directly to the building owner,<sup>544</sup> and Lord Fraser of Tullybelton considered that the terms of the sub-contract may have a similar effect.<sup>545</sup> However, later courts have considered the *possibility* that the imposition of a duty of care will upset contractual standards or allocations of risk as itself a reason for refusing to impose one, thereby preferring Lord Brandon's approach in his dissenting speech in *Junior Books*.<sup>546</sup>

## "Contractual structure" and liability in tort

- 172 Thus, the existence of a "contractual structure" of which the parties to the litigation are members but according to which they are not in privity of contract was relied on as a reason for refusing to impose liability for economic loss in the tort of negligence. For example, in *Balsamo v Medici*<sup>547</sup> Walton J refused to allow a claim in the tort of negligence by a principal against an unauthorised sub-agent on the ground that otherwise the *Anns* principle<sup>548</sup> of the tort of negligence "will come perilously close to abrogating completely the concept of privity of contract".<sup>549</sup> In 1987 in *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)*,<sup>550</sup> there was a chain of contracts, consisting of a building owner (A), a main building contractor (B), a sub-contractor (C) and a manufacturer of glass which had been incorporated into a building (D). The glass had failed to come up to specification and B, who had settled with A, claimed damages in the tort of negligence

against D for the economic loss which it had thereby been caused. The Court of Appeal rejected this claim. According to Bingham LJ:

“Just as equity remedied the inadequacies of the common law, so has the law of torts filled gaps left by other causes of action where the interests of justice so required. I see no such gap here, because there is no reason why the claims beginning with [A] should not be pursued down the contractual chain.”<sup>551</sup>

Thus the courts treated the fact that A owes a duty under a contract to B to be an important factor in denying liability to C for negligently caused pure economic loss<sup>552</sup> and considered that where B owes a contractual duty to C, there is no good reason for adding an additional duty of care in A for C’s benefit.<sup>553</sup>

- 173 Nevertheless, at least in some situations the existence of a contractual duty in A to B was not allowed to rule out the existence of a duty of care in respect of pure economic loss owed by A to C concerning the same issue. This was the position in the decision of the House of Lords in *Smith v Eric S. Bush*,<sup>554</sup> in which a valuer had been engaged by a mortgagee to report on a property of modest value to be bought by the plaintiff. The plaintiff bought the property in reliance on the report and suffered economic loss as a result. The House of Lords unanimously held that the valuer owed the plaintiff a duty of care in the circumstances, which included the fact that the valuer knew that the plaintiff would be told of their advice and that he would act in reliance on it. The House of Lords further held that a disclaimer under which the valuer worked did not prevent the duty of care in tort from arising on the basis that it was incompatible with any “voluntary assumption of responsibility”, but was to be treated as an exemption notice and subjected to the reasonableness test imposed by the *Unfair Contract Terms Act 1977*.<sup>555</sup> Moreover, Lord Griffiths disapproved the notion of “assumption of responsibility” as a test for the imposition of a duty of care in the tort of negligence, considering it “not a helpful or realistic test of liability”.<sup>556</sup>

## Assumption of responsibility

- 174 However, in 1994 the House of Lords took a very different approach to the imposition of liability for pure economic loss in the tort of negligence and by so doing opened the way to allowing liability to be imposed on one party to a contract in respect of this type of harm beyond privity. The basis on which the courts have tended to rely for the imposition of liability for pure economic loss has been an “assumption of responsibility” in the defendant to the claimant, this idea being drawn from the Lords’ earlier decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>557</sup> but its application has been extended beyond the context of negligent misstatement.<sup>558</sup> This “broad principle of *Hedley Byrne*” or of “assumption of responsibility” has already been seen in relation

to liability in the tort of negligence between the parties to a contract, but now its impact beyond the parties will be assessed. In this respect, three cases are of particular importance.<sup>559</sup>

## Henderson v Merrett Syndicates Ltd

<sup>175</sup> The first and most important decision remains *Henderson v Merrett Syndicates Ltd.*<sup>560</sup> This case concerned claims in the tort of negligence by various underwriting members of Lloyd's ("Names") against the underwriting agents who had acted for them. In the case of the "indirect Names", with whom we are now concerned, they had entered agreements with underwriting agents, known as "members' agents", who advised "Names", inter alia, on their choice of syndicates and placed them on a syndicate once chosen, but who entrusted the placing of the insurance to others, "managing agents" for the syndicate which they had chosen. The claims of the "indirect Names" therefore bypassed two contracts: the first being the agency contract between themselves and the members' agents and the second being the sub-agency contract between the members' agents and the managing agents. Despite this, however, the House of Lords found no difficulty in finding a duty of care owed by the managing agents directly to the "indirect Names". Lord Goff of Chieveley, who gave the leading speech and with whom Lords Keith of Kinkel, Browne-Wilkinson, Mustill and Nolan concurred, based this decision on a finding of an assumption of responsibility by the managing agents to the "indirect Names", this being found in the managing agents' agreement to undertake the commission for the indirect Names, coupled with the formers' special skill. However, the wider significance of this decision was far from clear. Lord Goff:

"... strongly suspect[ed] that the situation ... [was] most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties."<sup>561</sup>

With respect, no very clear indication was given as to what was special about the facts of *Henderson* for this purpose: the managing agents had agreed to take on their commission and were aware of the position of their ultimate principals, but then so are many other sub-agents. Clearly, the context of the Lloyd's insurance market may have played some part, but the precise nature of its role does not appear from the speeches. On the other hand, Lord Goff did see the case of a claim by a building owner against his sub-contractor in respect of a failure to conform to the required standard as an example of where "ordinarily" such an assumption of responsibility would be inconsistent with a contractual structure.<sup>562</sup> Clearly, then, it was not intended that any doubt should be thrown on the decision of the House in *Murphy v Brentwood DC*.<sup>563</sup>

## White v Jones

<sup>176</sup> The second important decision is *White v Jones*,<sup>564</sup> in which a majority of the House of Lords held that a solicitor who had negligently failed to execute a testament before the decease of the testator owed a duty of care in the tort of negligence to the would-be legatee under that testament. The House of Lords considered whether the legatee should be able to sue in contract, rather than in tort, the contract in question being between the testator and the defendant solicitor. While Lord Goff of Chieveley considered this attractive, he thought that it “would be open to criticism as an illegitimate circumvention of [the] long-established doctrines” of privity and consideration.<sup>565</sup> Instead, he preferred to hold the defendant liable in tort on the basis that his “assumption of responsibility … should be held in law to extend” to the plaintiff, though the contract between the testator and the solicitor remained significant in that its terms set the content of the duty of care in tort.<sup>566</sup> Lord Nolan also relied on the defendant’s “assumption of responsibility”, though apparently seeing this as real rather than (as with Lord Goff) deemed.<sup>567</sup> Lord Browne-Wilkinson preferred to consider the facts before him as justifying the imposition of a duty of care as a matter of “justice and reasonableness” as an “extension of the principle of assumption of responsibility”.<sup>568</sup> By contrast, Lords Mustill and Keith of Kinkel dissented, finding no special reason why a special exception should be made in the circumstances, the latter expressing the view that the principle of privity of contract should not be circumvented by extending the law of tort.<sup>569</sup> This decision of the majority is clearly a remarkable example of the willingness of our judges to find legal justifications for the imposition of a duty where they find it necessary in the interests of justice and, as both their own and the minority’s speeches make clear, despite established principle, whether tortious or contractual. However, the speeches of their lordships in the case itself and subsequent judicial discussions of it have made clear that the situation in *White v Jones* was exceptional<sup>570</sup> and the decision has not been as influential on subsequent judicial developments as has *Henderson v Merrett Syndicates Ltd*.<sup>571</sup>

## Williams v Natural Life Health Foods Ltd and Mistlin

<sup>177</sup> The importance of *Henderson v Merrett Syndicates Ltd*, and more particularly, the significance of Lord Goff’s exposition there of the principle of “assumption of responsibility” can be seen in the decision of the House of Lords in 1998 in *Williams v Natural Life Health Foods Ltd and Mistlin*.<sup>572</sup> In that case, the second defendant, M, who had worked in the health food trade for several years, formed a company, the first defendant, to franchise the concept of health food shops. M was the company’s managing director and principal shareholder, having only two employees. The plaintiffs approached the company with the view to acquiring a franchise, dealing with one of the employees, but also relying on a brochure produced by the company which advertised M’s

experience in the trade. The plaintiffs entered a franchise agreement with the company, but the turnover of the shop was substantially less than predicted by the company and they traded for only 18 months and at a loss. The question before the House of Lords was whether M owed the plaintiffs a duty of care so as to allow him to be liable personally in damages for the loss caused by their entering the contract of franchise. According to Lord Steyn, who gave judgment on behalf of the House, the governing principles for the case were to be found in the “extended *Hedley Byrne* principle” to be found in Lord Goff’s speech in *Henderson v Merrett Syndicates Ltd*, which Lord Steyn saw as a:

“... rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services.”<sup>573</sup>

He noted that the test of “assumption of responsibility” is an objective one and this means that the primary focus of the courts should be on what was said or done by the defendant or on his behalf in dealings with the plaintiff. This meant that the question for the House was:

“... whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees.”<sup>574</sup>

However, applying this principle to the facts, Lord Steyn held that there was not enough to show a personal assumption of responsibility in M to the plaintiffs: while the brochure produced by the company made clear that its expertise came from M’s experience, in the absence of more and in particular of personal dealings with the plaintiffs, no duty of care arose.<sup>575</sup>

- Lord Steyn in *Williams v Natural Life Health Foods Ltd and Mistlin* accepted the view expressed by Lord Goff in *Henderson* that once a court finds that a defendant has “accepted responsibility” towards the claimant in the relevant sense, there is no need to investigate whether it is “just, fair and reasonable” to impose liability for pure economic loss.<sup>576</sup> This aspect of Lord Goff’s views has already been discussed,<sup>577</sup> but here a striking contrast can be noted with Lord Steyn’s own approach to the imposition of a duty of care not based on an “assumption of responsibility” taken earlier in *Marc Rich & Co AG v Bishop Rock Marine Co.*<sup>578</sup> In the latter case, the plaintiffs were cargo owners whose property was lost when the vessel in which it was carried sank. They claimed damages against the shipowners on the basis that the sinking had been caused by the latters’ failure to act with due diligence in relation to the seaworthiness of the vessel at the beginning of the voyage, but they also claimed damages from a classification society, one of whose surveyors had inspected the vessel during its voyage and had recommended that its voyage should continue. Lord Steyn,<sup>579</sup> considered that since *Dorset Yacht Co Ltd v Home Office*<sup>580</sup> it had been settled law that considerations of fairness, justice and reasonableness as well as the elements of foreseeability

and proximity are relevant to the imposition of a duty of care in the tort of negligence, whatever the nature of the harm sustained by the plaintiff and, therefore, including the situation where the plaintiff has sustained damage to property.<sup>581</sup> On the facts before the House in *Marc Rich*, Lord Steyn considered that the property damage suffered by the cargo owners was only indirect as it was the shipowners rather than the classification society which were primary responsible for the vessel's sailing in an seaworthy condition nor was there any direct contact between the plaintiffs and the classification society and therefore no element of reliance so as to give rise to an assumption of responsibility in the sense explained by Lord Goff in *Henderson v Merrett Syndicates Ltd.*<sup>582</sup> Even so, Lord Steyn was prepared to assume that there was sufficient proximity between the cargo owners and the classification society, but considered that it was not "fair, just and reasonable" to impose a duty of care. First, such a duty would outflank the bargain between the shipowners and the cargo-owners. He stated:

"The dealings between shipowners and cargo owners are based on a contractual structure, the Hague Rules, and tonnage limitation on which the insurance of international trade depends ... Underlying it is the system of double or overlapping insurance of the cargo. Shipowners take out liability risks insurance in respect of breaches of their duties of care in respect of the cargo. The insurance system is structured on the basis that the potential liability of shipowners to cargo owners is limited under the Hague Rules and by virtue of tonnage limitation provisions. And insurance premiums payable by owners obviously reflect such limitations on the shipowners' exposure."<sup>583</sup>

While Lord Steyn found various other policy factors which argued against imposing a duty of care, including the non-profit-making nature of the defendant, the scale of the classification society's potential liability and the added complication to the settlement of proceedings concerning lost or damaged cargo of such societies' involvement, clearly the limited nature of the rights of A (the cargo owners) under a contract with B (the shipowners) was significant in the House of Lords' decision not to impose a duty of care in the tort of negligence on C to A, even in respect of damage to property.<sup>584</sup>

## Subsequent cases

**D** 179 There have been many subsequent cases determining whether or not liability based (in part) on an assumption of responsibility may establish liability in the tort of negligence beyond privity of contract.

<sup>585</sup>

**U** Of these, *Briscoe v Lubrizol*<sup>586</sup> is a good example of the way in which the contractual structure of the parties' relations may still argue for the rejection of an "assumption of responsibility" in

the tort of negligence. In that case, under the terms of a contract of employment, L, the employer, undertook to B, their employee, to arrange a disability insurance scheme, subject to “acceptance by insurers”. B was registered under the scheme, and later became incapable of work, but L’s claim in respect of B’s disability was rejected by their insurer, P. B then claimed, *inter alia*, damages in the tort of negligence against P on the basis that they were negligent in rejection of the claim (it being accepted that there was no privity of contract between these parties). The insurer’s contention that this claim should be struck out was accepted both at first instance and by the Court of Appeal. Giving judgment, Roch LJ denied the existence of a duty of care on the facts before him, by whichever legal approach this was canvassed, whether in terms of the three-fold test of foreseeability, proximity and “justice and reasonableness”, an assumption of responsibility or taking an “incremental approach”.<sup>587</sup> Roch LJ agreed with the court below that the contractual provisions between the employer and insurer showed completely the reverse of any “assumption of responsibility”: “[t]here was a very carefully structured contractual framework [which] imposed a curtain between the [employee] and the [insurer]”.<sup>588</sup> While Roch LJ accepted that:

“... the existence of a contractual regime is not necessarily fatal to a claim such as the [employee’s]; ... it is nevertheless a powerful indication against the existence of a duty.”<sup>589</sup>

The assumption of responsibility by the insurer was to the employer, not to the employees under the scheme: a finding of a duty of care would therefore (in the words of counsel for the insurer) “spell the end of the doctrine of privity of contract”.<sup>590</sup> Nor did the Court of Appeal consider that recognition of a duty of care was required as a matter of justice and reasonableness or appropriate as an incremental development. Moreover, the more eclectic approach to deciding whether or not a duty of care should be imposed in the tort of negligence (especially as regards pure economic loss) seen in *Briscoe v Lubrizol*, and which looks in turn at “assumption of responsibility”, the “three-fold test” in *Caparo Industries Plc v Dickman*<sup>591</sup> and the “incremental approach”, was taken by the House of Lords in *Customs and Excise Commissioners v Barclays Bank Plc*<sup>592</sup> though the third approach was seen as “of little value as a test in itself” and as “an important cross-check”.<sup>593</sup> In that case, the House of Lords unanimously held that a third party (here, the bank) with notice of a “freezing order” (formerly known as a *Mareva* injunction) who nevertheless released the property subject to the order did not owe a duty of care to the person for whose benefit the order had been made (here, the Customs and Excise). While the grounds of the decisions of the five members of the House differed, the principal points can be summarised as follows. First, the involuntary nature of the position of the bank as recipient of the order was inconsistent with any assumption of responsibility, even if this were understood to mean the undertaking of a task for another person.<sup>594</sup> Secondly, the courts had developed a very powerful means for protecting those who fear that their legitimate claims are to be thwarted by disposal of available assets by the development of freezing orders and these are buttressed by the sanction of contempt of court. In this respect, a distinction is drawn between the strict liability of the person against whom an order has been made, and the requirement that a third party with notice of an order is liable for contempt only if he knowingly

takes a step to frustrate the court's purpose. It would be inconsistent with this to impose the higher standard of reasonable care by means of a duty of care in tort.<sup>595</sup> Thirdly, their Lordships were concerned with the practical effects of the imposition of liability in damages for negligence by third parties with notice of a freezing order. While it may appear reasonable in this respect to impose liability for negligence in a business such as a bank, the new duty of care would also apply to any non-business with notice of such an order which would be unreasonable.<sup>596</sup> In *BSkyB Ltd v HP Enterprise Services UK Ltd*,<sup>597</sup> the court determined the existence of a duty of care in the tort of negligence in respect of pure economic loss under the "three-fold test" in *Caparo Industries Plc v Dickman*,<sup>598</sup> holding that where corporate parties to a wider group have between them chosen the parties with whom to have a contract, it would not be fair, just and reasonable to recognise the existence of a duty of care so that another member of the group can pursue a claim which circumvents these contractual arrangements.<sup>599</sup>

<sup>180</sup> More recently, in *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA*

<sup>600</sup>

**U** the Supreme Court held that a bank which had given a credit reference about one of its customers to a named company (A Co) where (unknown to the bank) the reference was to be used by another company (B Co, a casino in the same group) had not assumed responsibility for the reference to B Co. The Supreme Court affirmed that the defendant's voluntary assumption of responsibility is the foundation of liability under the line of authority starting with *Hedley Byrne*, but this assumption of liability is "to an identifiable (although not necessarily identified) person or group of persons, and not to the world at large or to a wholly indeterminate group".

<sup>601</sup>

**U** The Supreme Court therefore distinguished the case before it from the situation in *Hedley Byrne* itself (where the defendant bank understood that the credit reference would be relied on by the unidentified, but readily identifiable, client on behalf of whom the bank to which it was given was acting).

<sup>602</sup>

**U** Moreover, the Supreme Court rejected the claimant B Co's argument that its relationship with the defendant bank who gave the credit reference was, in Lord Devlin's phrase in *Hedley Byrne*, "equivalent to contract" so as to justify a holding of an assumption of responsibility

<sup>603</sup>

**U** because in contract B Co would have been entitled (as undisclosed principal) to declare itself and assume the benefit of the contract on the ground, *inter alia*, that the effect of the doctrine of the undisclosed principal is a "purely legal construct" and "not a legal conclusion from any factual relationship" between the parties: "[s]uch a relationship is by definition not proximate. Nor is it in any relevant sense voluntary or consensual so as to give rise to an assumption of responsibility".

604

**U** Moreover, in *NRAM Ltd v Steel* the Supreme Court held that where assumption of responsibility was claimed as the basis of liability in the tort of negligence in respect of a misrepresentation, the misrepresentor would not be held to have assumed responsibility unless it was reasonable for the misrepresentee to have relied on the representation and the misrepresentor should reasonably have foreseen that he would do so.

605

**U** Finally, in *Royal Bank of Scotland International Ltd v JP SPC 4*

606

**U** the Privy Council held that, while a bank owes a duty of care to its customer in relation to payments made by the bank on the customer's instructions (whether this is put in terms of an implied contractual duty or a co-extensive duty of care in tort),

607

**U** in the circumstances before it the bank did not owe a duty of care in tort to the beneficial owner of monies held by a customer in an account in respect of payments made by its customer, whether this duty was sought to be recognised as a matter of direct authority,

608

**U** by way of incremental development from the authorities,

609

**U** or under the principle of assumption of responsibility. As regards the last of these, the Privy Council reaffirmed that the test for determining assumption of responsibility is an objective one and this "means that it will generally be important to focus on exchanges which cross the line between the defendant and the claimant (or the group of persons of which the claimant is an identifiable member)".

610

**U** The Privy Council agreed with Clerk and Lindsell on Torts that:

"the factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care."

611

**U**

In the case before it, the Privy Council held that there were no pleaded facts which supported the existence of an assumption of responsibility, given in particular that it was not alleged that the bank undertook to perform any task or service for the beneficial owners of the monies, nor that there were any exchanges crossing the line between them; nor was there any evidence of reliance on the bank by those owners.

<sup>612</sup>

 More generally, the Privy Council observed that:

“There is nothing in principle or in the cases to support the idea that the tortious duty of care owed by a bank to its customer to exercise reasonable care and skill, which is co-extensive with the contractual duty of care owed by a bank to its customer, can be extended across to a third party with whom the bank has no contractual relationship even if the bank knew or ought to have known that the third party was the beneficial owner of the moneys in the customer’s account.”

<sup>613</sup>



## The effect of contractual terms on established torts beyond privity

- 181 In general, a term in a contract between A and B will not affect liability in A to C under an established tort since to allow it to do so would contravene the principle of privity of contract.<sup>614</sup> However, the courts have allowed exceptions to be developed to this general rule and these are particularly clear where the term in question expressly allocates the risk of some event, often by way of an exemption clause. Two situations ought to be distinguished.

## Clauses in contract between tortfeasor and another

- 182 First, although in general A’s contractual exclusion of liability to B will not affect A’s liability to C,<sup>615</sup> it has been held to do so in certain circumstances. Thus, where a court relies on a defendant’s “assumption of responsibility” for the imposition of a duty of care, any disclaimer of liability will apparently affect any third party who wishes to rely on breach of that duty,<sup>616</sup> though in the case of liability for negligent misstatements, it appears that such a disclaimer will only be effective if notice of it has come to the third party.<sup>617</sup> So too, where an owner of property entrusts it to a bailee and expressly or implicitly consents to the latter sub-contracting work to a sub-bailee subject to

certain exemption conditions, the owner will not be able to sue that sub-bailee in tort except subject to these conditions.<sup>618</sup>

## Clauses in contract between injured party and another

- 183 Secondly, where A contracts with B on terms that A will not be able to sue C, the courts found various ways to give effect to this agreement despite privity of contract, even before this was made overtly possible by the *Contracts (Rights of Third Parties) Act 1999*.<sup>619</sup> In *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)*<sup>620</sup> the Privy Council found that a stevedore engaged to unload goods by a carrier was protected from liability to their shipper in the tort of negligence for damage to the goods by a clause in the contract between the shipper and the carrier which was expressed to exempt the stevedore from liability and to be made by the carrier as his agent. Here, then, an exemption clause was given effect by the finding of a collateral contract between A and C, through the agency of B. However, on occasion the courts have instead refused to recognise the existence of a duty of care in the tort of negligence where to do so would disrupt the “contractual structure” in which the parties worked, not only in the context of pure economic loss,<sup>621</sup> but also in one of physical damage to the claimant’s property. In *Norwich City Council v Harvey*,<sup>622</sup> the plaintiff owned a building, which it wished to have extended and it employed building contractors to do so on standard terms according to which the “existing structures” should be at its own risk as regards loss or damage by fire while the works were in progress and should be insured against these risks. The building contractors engaged sub-contractors to undertake the roofing of the extension on this basis and owing to the negligence of one of the latter’s employees, a fire was started which spread to and damaged the plaintiff’s existing building. The Court of Appeal rejected the plaintiff’s claim for this damage to its property, refusing to recognise the existence of a duty of care in these circumstances. “On the basis of what is just and reasonable”<sup>623</sup> May LJ did not think that:

“... the mere fact that there is no strict privity between the employer and the subcontractor should prevent the latter from relying on the clear basis on which all the parties contracted in relation to damage to the employer’s building caused by fire, even when due to the negligence of the contractors or sub-contractors.”<sup>624</sup>

However, after the *Contracts (Rights of Third Parties) Act 1999*, parties to a contract may make provision for the protection from liability of third parties in tort, subject to that Act’s requirements as to the parties’ intention and more generally.<sup>625</sup>

## Footnotes

- 492 See above, para.3-003. cf. below, paras 3-074—3-080 on liability in the tort of negligence beyond privity on the basis of an “assumption of responsibility”.
- 493 See below, para.3-066.
- 494 See below, para.3-067. Contracts may have other consequences for the incidence of liability in tort. For example, where A has sold goods to B, who has resold them to C, the question whether the contract between A and B is void for mistake or merely voidable for fraud determines whether title to the property has passed to B and therefore whether C is liable to A in the tort of conversion: see *Ingram v Little* [1961] 1 Q.B. 31; *Lewis v Avery* [1973] 1 W.L.R. 510; *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919.
- 495 See below, paras 3-069—3-073.
- 496 See below, paras 3-074—3-080.
- 497 See below, paras 3-081—3-083.
- 498 (*1853*) 2 E.B. 216.
- 499 A’s intention must be to induce such a breach and so a person who sets out to protect their own interests in the belief that they have a lawful right to do what they are doing does not have the requisite intention for these purposes: *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] 2 W.L.R. 904 at [124], [137], [174], [181]–[182].
- 500 As was the case in *Lumley v Gye* (1853) 2 E.B. 216 itself.
- 501 As was the case in *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch. 106 (although as explained in the text the extended view of the tort in this case will not be followed after *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1).
- 502 *Lumley v Gye* (1853) 2 E.B. 216 at 234.
- 503 *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 especially at [44] and [189] not following *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch. 106; *Merkur Island Shipping Corp v Laughton* [1983] 2 A.C. 570, 607–610.
- 504 *Law Debenture Trust Corp Plc v Ural Caspian Oil Corp Ltd* [1994] 3 W.L.R. 1221 especially at 1231–1232.
- 505 For “two-party” intimidation see above, para.3-030 and see Clerk & Lindsell on Torts, 23rd edn (2020) para.23-75.
- 506 See, though, *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 at [6]–[10] where the terminology of “tort of intimidation” was criticised. See generally Clerk & Lindsell on Torts, 23rd edn (2020), paras 23-62 et seq.
- 507 [1964] A.C. 1129.
- 508 This position is consistent with the interpretation of “unlawful means” in *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21 at [49]–[51], [162], [266]–[270], [302], [320].
- 509 *Rookes v Barnard* [1963] 1 Q.B. 623, 695, per Pearson LJ.

- 510 *Rookes v Barnard* [1963] 1 Q.B. 623.
- 511 [1964] A.C. 1129, 1207, per Lord Devlin.
- 512 [1964] A.C. 1129, 1200–1201, per Lord Hodson and see also 1168, 1234–1235.
- 513 cf. *Wedderburn* (1964) 27 M.L.R. 257 at 263–267.
- 514 See below, paras 20-091 et seq.
- 515 Pollock, The Law of Torts, 1st edn (1887), pp.448–449.
- 516 Notably *Winterbottom v Wright* (1842) 10 M.W. 109 and see below, para.3-069.
- 517 Pollock at p.450.
- 518 See above, para.3-067.
- 519 cf. above, para.3-067. In either case, this tort is clearly restricted to situations where A has acted intentionally to cause loss to C: *Rookes v Barnard* [1964] A.C. 1129, 1183; *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 and see Clerk & Lindsell on Torts, 23rd edn (2020) paras 23-79—23-81.
- 520 Winfield and Jolowicz on Tort, 13th edn (1989), pp.404–405.
- 521 Winfield and Jolowicz at pp.404–405 and see *Russell v Shenton* (1842) 3 Q.B. 449, 457.
- 522 *Payne v Rogers* (1794) 2 H. Bl. 350, 351; *Wringe v Cohen* [1940] 1 K.B. 229.
- 523 *St Anne's Well Brewery Co v Roberts* (1929) 140 L.T. 1, 8. cf. Defective Premises Act 1972 ss.1, 4; and see *Spencer* (1974) C.L.J. 307, (1975) C.L.J. 48 and *Andrews v Schooling* [1991] 1 W.L.R. 783.
- 524 It has been held to be a breach of contract for an agent to disclose a document which is libellous: *Weld-Blundell v Stephens* [1920] A.C. 956.
- 525 In *Weld-Blundell v Stephens* [1920] A.C. 956 the principal had been held liable in libel personally for publishing the defamatory statement, which had then been republished by the agent.
- 526 See also below, paras 20-020 et seq.
- 527 (1842) 10 M.W. 109.
- 528 (1842) 10 M.W. 109, 111, 114. See also *Tollit v Sherstone* (1839) 5 M.W. 283, 289 where Maule B. considered it: “[C]lear that an action of contract cannot be maintained by a person who is not a party to the contract; and the same principle extends to an action of tort arising out of a contract.” Pollock, Law of Torts, 1st edn (1887), p.449 supported the decision in *Winterbottom v Wright* (1842) 10 M.W. 109 on the ground that no bad faith or negligence in the defendant had been shown and cf. *Donoghue v Stevenson* [1932] A.C. 562, 589. cf. also Atiyah, The Rise and Fall of Freedom of Contract (1979), pp.501–505.
- 529 The approach was not universal: see *Payne v Rogers* (1794) 2 H. Bl. 350 (landlord liable to third party injured on highway owing to poor state of repair of premises as long as landlord had covenanted to repair) and *Gladwell v Steggall* (1839) 5 Bing. (N.C.) 733 (medical practitioner liable to patient where fees had been paid by patient's father).
- 530 [1932] A.C. 562. cf. the dissent of Lord Buckmaster on this ground at 568, 577–578 and see *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85, 101–102.
- 531 [1932] A.C. 562, 610.
- 532 (1842) 10 M.W. 109.

- 533 See *Greene v Chelsea BC* [1954] 2 Q.B. 127, 138 and as late as 1983, *Rimmer v Liverpool City Council* [1985] Q.B. 1, 11.
- 534 [1964] A.C. 465.
- 535 [1964] at 525–526, 529 and cf. at 538.
- 536 [1964] A.C. 465 at 529.
- 537 The statement in question had been made by A (the defendants) to B at the latter's request (who had in turn been asked to do so by C), A knowing that the statement would be passed on to B's customer, C (the plaintiff). In these circumstances, A could only be considered in privity with C if B were treated as C's agent for this purpose.
- 538 [1983] 1 A.C. 520 and see below, para.20-021.
- 539 As the case came to the House of Lords by way of a preliminary issue, it was not necessary to consider what damages would be recoverable nor whether the sub-contractor was negligent.
- 540 [1983] 1 A.C. 520, 533, per Lord Fraser of Tullybelton and cf. 542.
- 541 See *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210; *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785; *Candlewood Navigation Corp Ltd v Mitsui O.S.K. Lines Ltd* [1986] A.C. 1; *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507; *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177; *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758; *Yuen Kun Yeu v Att-Gen of Hong Kong* [1988] A.C. 175; *Business Computers International Ltd v Registrar of Companies and Alex Lawrie Factors* [1988] Ch. 229; *Pacific Associates v Baxter* [1990] 1 Q.B. 993; *Parker-Tweedale v Dunbar Bank Plc* [1991] Ch. 12; *Murphy v Brentwood DC* [1991] 1 A.C. 398; *Department of Environment v Thomas Bates & Son Ltd* [1991] 1 A.C. 499; *Punjab National Bank v De Boinville* [1992] 3 All E.R. 104; *Saipem SpA v Dredging VO2 BV* [1993] 2 Lloyd's Rep. 315.
- 542 See *Stapleton* (1991) 107 L.Q.R. 249.
- 543 The relevant terms of neither this contract nor the subcontract were presented to the House of Lords: [1983] 1 A.C. 520, 538.
- 544 [1983] 1 A.C. 520 at 546.
- 545 [1983] 1 A.C. 520 at 533–534.
- 546 [1983] A.C. 520, 550–552 and see *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd* [1989] Q.B. 71, 96 where Purchas LJ noted that Lord Brandon's speech had subsequently achieved greater significance. This approach avoids the difficult question whether liability arising on breach of a recognised duty of care in respect of pure economic loss may be modified or excluded by either: (i) an exemption clause in A's contract with B restricting A's liability to C (*Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758, 782–783; 785–786); or (ii) an exemption clause in A's contract with B which attempts to exclude C's liability to A (Southern Water *Authority v Carey* [1985] 2 All E.R. 1077, 1093–1094) and see below, paras 3-082—3-083.
- 547 [1984] 1 W.L.R. 951 and see *Whittaker* (1985) 48 M.L.R. 86.
- 548 This is to be found in Lord Wilberforce's speech in *Anns v Merton London BC* [1978] A.C. 728, 751–752. This principle itself has been subject to very considerable judicial reservation: see *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210 at 240–241; *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 618.

- 549 [1984] 1 W.L.R. 951, 959–960.
- 550 [1988] Q.B. 758. cf. *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507.
- 551 [1988] Q.B. 758, 782 and cf. *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd* [1989] Q.B. 71, 99 and *Pacific Associates v Baxter* [1990] 1 Q.B. 993.
- 552 *Pacific Associates v Baxter* [1990] 1 Q.B. 993 at 1023. And see *Macmillan v AW Knott Becker Scott* [1990] 1 Lloyd's Rep. 98 at 110–111; *Parker-Tweedale v Dunbar Bank Plc (No.1)* [1991] Ch. 12 (no duty of care in tort owed by mortgagor to beneficiary under trust of property subject to mortgage); *Verderame v Commercial Union Assurance Co Plc, The Times*, 2 April 1992 (no duty of care owed by insurance brokers employed by a company to the directors of that company); *Hemmens v Wilson Browne* [1994] 2 W.L.R. 323, 334–335 (no duty of care owed by solicitor to beneficiary of ineffective inter vivos transaction where the situation was not irremediable).
- 553 *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch. 560, 570–571, in which the court held that there is in normal conveyancing transactions no duty of care in the solicitor of a vendor of land to the buyer in respect of misstatements. On the facts, the court accepted that the duty owed by A, the vendor, to B, the buyer could be put equally in terms of contract or the tort of negligence: at 569, relying on *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801.
- 554 Joined with the decision in *Harris v Wyre Forest DC* [1990] 1 A.C. 831. cf. *Preston v Torfaen BC* [1993] N.P.C. 111; *Scullion v Bank of Scotland* [2011] EWCA Civ 693, [2011] 1 W.L.R. 3212.
- 555 s.2(2) on which see below, paras 17-085 and 17-099 et seq.
- 556 [1990] 1 A.C. 831 at 862. cf. at 846, per Lord Templeman.
- 557 [1964] A.C. 465.
- 558 Sometimes the courts have chosen instead to treat the various approaches to the imposition of a duty of care as alternative routes, to be tried in turn in relation to the facts before them: see *Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Price Waterhouse* [1998] P.N.L.R. 564, 583–586, per Sir Brian Neill; *Briscoe v Lubrizol* [2000] P.I.Q.R. P39; *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2006] 3 W.L.R. 1 and see below, para.3-079. Moreover, where the defendant's liability arises in respect of a negligent misstatement (as in the case of a surveyor's certification of property), the Court of Appeal has held that no distinct duty of care based on any assumption of responsibility should be held to have existed in respect of the work of inspection preparatory to making the statement: *Hunt v Optima (Cambridge) Ltd* [2014] EWCA Civ 714, [2015] 1 W.L.R. 1346 at [90]–[92], [107]–[119] (distinguishing the contractual duty owed by the surveyor to the builder).
- 559 The doctrine of “assumption of responsibility” had been relied on by Lord Goff in *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 324 but it had not been argued before the House and his fellow judges chose to rely on other grounds for their decisions. For cases discussing “assumption of responsibility” between parties to a contract, see above, paras 3-022 et seq.
- 560 [1995] 2 A.C. 145 and see *Whittaker* (1996) 16 O.J.L.S. 191, especially 204–205, 219 et seq.
- 561 [1995] 2 A.C. 145 at 195.
- 562 [1995] 2 A.C. 145 at 196.

- 563 [1991] 1 A.C. 398.
- 564 [1995] 2 A.C. 207. For subsequent “disappointed beneficiary cases” see *Martin v Triggs Turner Burtons* [2009] EWHC 1920 (Ch), [2010] P.N.L.R. 3; cf. *Marquess of Aberdeen and Temair v Turcan Connell* [2008] CSOH 183 at [48] and [49].
- 565 [1995] 2 A.C. 207 at 266.
- 566 [1995] 2 A.C. 207 at 268.
- 567 [1995] 2 A.C. 207 at 294.
- 568 [1995] 2 A.C. 207 at 270, 275–276.
- 569 [1995] 2 A.C. 207 at 251.
- 570 See, notably, *Williams v Natural Life Health Foods Ltd and Mistlin* [1998] 1 W.L.R. 830, 837, per Lord Steyn.
- 571 cf. the approach of the High Court of Australia in *R.F. Hill & Associates v Van Erp* [1997] 14 A.L.R. 687.
- 572 [1998] 1 W.L.R. 830.
- 573 [1998] 1 W.L.R. 830 at 834.
- 574 [1998] 1 W.L.R. 830 at 836.
- 575 [1998] 1 W.L.R. 830 at 837–838.
- 576 [1998] 1 W.L.R. 830, 834.
- 577 See above, para.3-027.
- 578 [1996] A.C. 211.
- 579 Lords Keith of Kinkel, Jauncey of Tullichettle and Browne-Wilkinson agreed; Lord Lloyd of Berwick dissented.
- 580 [1970] A.C. 1004.
- 581 [1996] A.C. 211, 235.
- 582 [1996] A.C. 211 at 237–238.
- 583 [1996] A.C. 211, 239.
- 584 See similarly *Norwich City Council v Harvey* [1989] 1 W.L.R. 828, below para.3-083; *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2008] 1 All E.R. 180 at [38]–[42].
- 585 These include *Siddell v Smith Cooper & Partners* [1999] P.N.L.R. 511; *Barex Brokers Ltd v Morris Dean & Co* [1999] P.N.L.R. 344, 349; *A.J. Fabrication (Batley) Ltd v Grant Thornton* [1999] B.C.C. 807; *Electra Private Equity Partners v KPMG Peat Marwick* [1999] 1 Lloyd's Rep. P.N. 670; *Connolly-Martin v Davis*, *The Times*, 8 June 1999; *Yorkshire Bank Plc v Lloyds Bank Plc* [1999] 2 All E.R. (Comm.) 153; *Hamble Fisheries Ltd v L. Gardner and Sons Ltd* [1999] 2 Lloyd's Rep. 1; *Gorham v British Telecommunications Plc* [2000] 1 W.L.R. 2129; *B.D.G. Roof-Bond v Douglas* [2000] 1 B.C.L.C. 401; *European Gas Turbines Ltd v MSAS Cargo International Inc* [2002] C.L.C. 880; *Killick v PricewaterhouseCoopers (A Firm)* [2001] 1 B.C.L.C. 65; *Merrett v Babb* [2001] 3 W.L.R. 1; *Weldon v GRE Linked Life Assurance Ltd* [2000] 2 All E.R. (Comm.) 914; *Dean v Allin and Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep. 249; *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC 1425 (Comm.), [2002] All E.R. (D) 206; *European International Reinsurance*

*Co Ltd v Curzon Insurance Ltd* [2003] EWCA Civ 1074, [2003] *Lloyd's Rep. I.R.* 793; *BP Plc v Aon Ltd* [2006] EWHC 424 (Comm), [2006] 1 All E.R. (Comm.) 789; *Riyad Bank Plc v Ahli United Bank Plc* [2006] EWCA Civ 780, [2006] 2 *Lloyd's Rep.* 292; *Galliford Try Infrastructure Ltd v Mott MacDonald Ltd* [2008] EWHC 1570 (TCC), [2009] P.N.L.R. 9; *Scullion v Bank of Scotland* [2011] EWCA Civ 693, [2011] 1 W.L.R. 3212; *Argos Ltd v Leather Trade House Ltd* [2012] EWHC 1348 (QB), [2012] E.C.C. 34 at [42]; *Hunt v Optima (Cambridge) Ltd* [2014] EWCA Civ 714, [2015] 1 W.L.R. 1346; *Swynson Ltd v Lowick Rose LLP* [2014] EWHC 2085 (Ch), [2014] P.N.L.R. 27; *Summit Advances Ltd v Bush* [2015] EWHC 665 (QB), [2015] P.N.L.R. 18; *Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas* [2017] EWHC 3182 (Comm) esp. at [162]–[208]; *CGL Group Ltd v The Royal Bank of Scotland* [2017] EWCA Civ 1073, [2017] C.T.L.C. 97 at [62]–[105]; *P & P Property Ltd v Owen White & Caitlin LLP* [2018] EWCA Civ 1082, [2019] Ch. 273 at [75]–[82] and [122]–[124]; *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd* [2021] EWHC 590 (TCC) at [115]–[186]; *Beattie Passive Norse Ltd v Canham Consulting Ltd* [2021] EWHC 1116 (TCC), [2021] P.N.L.R. 22; *McClean v Thornhill* [2022] EWHC 457 (Ch), [2022] S.T.C. 1110 at [67]–[157]; *Royal Bank of Scotland International Ltd v JP SPC 4* [2022] UKPC 18, [2022] 3 W.L.R. 361 (on which see below, para.3-080); and *Avantage (Cheshire) Ltd v GB Building Solutions Ltd (In Administration)* [2022] EWHC 171 (TCC), [2022] P.N.L.R. 13 at [33]–[61].

586 [2000] P.I.Q.R. P39.

587 He accepted the description of the three approaches to the finding of a duty of care in the tort of negligence found in the judgment of Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Price Waterhouse* [1998] P.N.L.R. 564, 583–586. The “incremental approach” was famously advocated by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 C.L.R. 424 at 481.

588 [2000] P.I.Q.R. P39 at P44.

589 [2000] P.I.Q.R. P39 at P48.

590 [2000] P.I.Q.R. P39 at P50.

591 [1990] 2 A.C. 605 at 618.

592 [2006] UKHL 28, [2006] 3 W.L.R. 1. The Supreme Court has reaffirmed that these various “tests” (including the Caparo test) are to be used only where there is no relevant existing authority or where that authority is being challenged: *Robinson v West Yorkshire Chief Constable* [2018] UKSC 4, [2018] 2 W.L.R. 595 at [21] and [26] (Lord Reed, with whom Baroness Hale of Richmond and Lord Hodge agreed); [83] (Lord Mance); and [100] (Lord Hughes).

593 [2006] UKHL 28 at [7] and [93].

594 [2006] UKHL 28 at [14], [65], [74].

595 [2006] UKHL 28 at [61]–[64].

596 [2006] UKHL 28 at [23], [61], [77] and [102].

597 [2010] EWHC 86 (TCC), [2010] B.L.R. 267.

598 [1990] 2 A.C. 605 at 618.

599 [2010] EWHC 86 (TCC) at [536]–[543].

- ❶600 [2018] UKSC 43, [2018] 1 W.L.R. 4041; Grower (2019) 135 L.Q.R. 177.
- ❶601 [2018] UKSC 43 at [7] per Lord Sumption (with whom Baroness Hale of Richmond, Lords Reed and Briggs agreed). Lord Mance gave a concurring speech: at [18]–[27].
- ❶602 [2018] UKSC 43 at [6] and [10].
- ❶603 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 at 529–530.
- ❶604 [2018] UKSC 43 at [14] per Lord Sumption.
- ❶605 [2018] UKSC 13, [2018] 1 W.L.R. 1190 esp. at [23] and see *McClean v Thornhill* [2022] EWHC 457 (Ch), [2022] S.T.C. 1110 at [67]–[157]; *McConnell v Dass Legal Solutions (MK) Law Ltd (t/a DLS Law)* [2022] EWHC 991 (QB) at [196]–[199].
- ❶606 [2022] UKPC 18, [2022] 3 W.L.R. 361.
- ❶607 [2022] UKPC 18 at [44], referring to *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All E.R. 363.
- ❶608 [2022] UKPC 18 at [57], holding that the decision to the contrary of Gibson J in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 W.L.R. 509 at [349]–[353] cannot stand as good law.
- ❶609 [2022] UKPC 18 at [69] et seq., esp. at [80].
- ❶610 [2022] UKPC 18 at [63] per Lord Hamblen and Lord Burrows JJSC (with whom Lord Briggs JSC, Lord Kitchen JSC and Lady Rose agreed) referring to *Williams v Natural Life Health Foods Ltd and Mistlin* [1998] 1 W.L.R. 830, 835, on which see above, para.3-077.
- ❶611 [2022] UKPC 18 at [64], referring to Clerk and Lindsell on Torts 23rd edn (2020), paras 7-113—7-137.
- ❶612 [2022] UKPC 18 at [65]–[68].
- ❶613 [2022] UKPC 18 at [94]. This observation was made in the context of the pleaded case of the beneficial owners which argued for the existence of a duty of care simply on the basis that the Bank knew or ought to have known that the funds in the accounts were beneficially their property or alternatively the property of some unidentified beneficiary.
- 614 Below, paras 17-042 et seq. Distinguish the case where A and B agreed that C will be protected from liability against A: see below, paras 17-045—17-061.
- 615 See *Haseldine v C.A. Daw & Son Ltd* [1941] 2 K.B. 343, 397 and see below, para.17-043.

- 616 *Pacific Associates v Baxter* [1990] 1 Q.B. 993, 1022–1023, 1033; *White v Jones* [1995] 2 A.C. 207, 268.
- 617 In *Smith v Eric S. Bush, Harris v Wyre Forest DC* [1990] 1 A.C. 831, the House of Lords considered the validity of such a disclaimer under the **Unfair Contract Terms Act 1977 s.2(2)** which concerns the effect of contract terms and *notices*. **1977 Act s.2** was amended by the **Consumer Rights Act 2015 Pt 2** so as no longer to apply to terms of consumer contracts or to “consumer notices”, the **2015 Act** providing rules to govern these cases: **2015 Act ss.62** and **65–66** on which see below, para.17-071 and Vol.II, paras 40-223 and esp. para.40-423.
- 618 *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 729 and see also *Johnson Matthey Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215; *The Pioneer Container* [1994] 2 A.C. 324 and below, para.17-057.
- 619 s.1(6) and see below, paras 17-046—17-047.
- 620 [1975] A.C. 154 and see below, paras 17-051—17-052.
- 621 Above, paras 3-072—3-073.
- 622 [1989] 1 W.L.R. 828 and see similarly *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2008] 1 All E.R. 180 at [38]–[42] and (in a different context) *Marc Rich & Co AG v Bishop Rock Marine Co* [1996] A.C. 211, above, para.3-078. But cf. *British Telecommunications Plc v James Thomson & Sons (Engineers) Ltd* [1999] 1 W.L.R. 9.
- 623 The phrase “just and reasonable” is a reference to the approach recommended to the finding of a duty of care by Lord Keith of Kinkel in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210, 240–241, which May LJ had previously quoted.
- 624 [1989] 1 W.L.R. 828, 837, per May LJ and cf. the approach of the House of Lords in *Marc Rich & Co AG v Bishop Rock Marine Co* [1996] A.C. 211, above, para.3-078.
- 625 s.1(1) and (6) and see below, paras 17-046—17-047.

## Section 2. - Contract, Trust and Property

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 2. - Contract, Trust and Property

### Contract and trust

<sup>184</sup> It is sometimes important to distinguish a contract, which creates rights in personam, from a trust which creates equitable rights indistinguishable in practice from rights in rem.  
<sup>D</sup> <sup>626</sup>

**U** Until the [Contracts \(Rights of Third Parties\) Act 1999](#), a crucial difference lay in the possibility or otherwise of creating rights in third parties to an agreement. So, it used to be the case that if A agreed with B to pay money to C in return for valuable consideration furnished by B, C could not in his own right sue A for failure to pay the money, owing to the application of privity of contract  
<sup>627</sup>

**U** ; but he could do so if he established that a trust had been created in his favour.  
<sup>628</sup>

**U** While this difference has been considerably eroded by the [Contracts \(Rights of Third Parties\) Act 1999](#), which allows parties to a contract to make provision for the existence of a right of enforcement of a term of their contract in a third party, the third party's right so created is subject to the conditions of that Act and these differ from those applicable to the creation of a right under a trust.  
<sup>629</sup>

**U** Again, if A, the owner of a chattel, first agrees that B shall have the right to use it, and then, during the currency of the agreement, sells or charges it to C, who takes with notice of B's rights, B can sue A for breach of contract if C refuses to honour the agreement, and he may be able to recover damages from C for the tort of knowingly inducing a breach of contract. The question

whether B is able to restrain C by injunction from using the chattel in such a way as to prevent A from performing his contractual obligations is more difficult. The better view appears to be that there are three bases on which to ground such an injunction. The first is found in the equitable doctrine in *De Mattos v Gibson*,

<sup>630</sup>

 and the second in the tort of inducing breach of contract.

<sup>631</sup>

 The third basis is for B to establish an equitable interest in or charge over the chattel or that C is in the position of constructive trustee.

<sup>632</sup>



<sup>185</sup> Moreover, in some cases the courts have found a trust relationship between the parties in parallel to their established contractual one.<sup>633</sup> Thus, for example, in *Barclays Bank Ltd v Quistclose Investments Ltd*,<sup>634</sup> A Ltd loaned a sum of money to B Ltd on condition that it would be used to pay the latter's share dividends. The money was paid into a separate account specially opened for this purpose with and to the knowledge of a bank, C Ltd. On B Ltd's voluntary liquidation, the House of Lords held A Ltd entitled to the money held by C Ltd and not paid out as dividend: the loan arrangements showed a clear intention:

“... to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend could not be carried out.”

<sup>635</sup>



<sup>D</sup> On the other hand, in *Lipkin Gorman v Karpnale Ltd*<sup>636</sup> the Court of Appeal accepted an approach to the relationship between contract and trust which echoes that already examined in relation to contract and tort.<sup>637</sup> In that case a partner in a firm of solicitors drew cheques on a client account and then gambled away the proceeds. The solicitors sued, inter alia,<sup>638</sup> the bank, claiming that the latter was liable under a constructive trust. The Court of Appeal took the view that a bank would be subject to a constructive trust to its customer in respect of the running of an account only in circumstances where the bank would also be in breach of its contractual duty of care.<sup>639</sup> Moreover, the content of this duty had to be set in the context of the bank's primary contractual duty which was to honour its customer's cheques in accordance with its mandate<sup>640</sup> and so should be limited to cases where there is a “serious or real possibility, albeit not amounting to a probability, that its

customer might be being defrauded".<sup>641</sup> *Lipkin Gorman v Karpnale Ltd* therefore concerned the requisite degree of knowledge for liability in a third party "accessory" to a breach of trust and is to be distinguished from *Barclays Bank Ltd v Quistclose Investments Ltd* where the bank (C Ltd) had received the money in respect of which the constructive trust was imposed and had actual notice of the purpose for which it was intended.<sup>642</sup> Finally, in *Prickly Bay Waterside Ltd v British American Insurance Co Ltd* the Privy Council considered the requirements for establishing a *Quistclose* trust<sup>643</sup>

**U** in the context of contractual arrangements which it held were inconsistent with such the recognition of such a trust.

<sup>644</sup>

**U** In this respect, the Board recognised that claims in contract and for breach of trust can co-exist and "a lender who can establish a trust is not prevented from exercising remedies in contract as well".

<sup>645</sup>

**U** However, the Board added that:

"In a commercial setting, there must be clear evidence that parties intended a trust to arise in circumstances where a trust would not normally exist and particularly if a trust would be contrary to settled commercial practice."

<sup>646</sup>

**U**

## Contract and conveyance

**186** A contract, which creates rights in personam, must be distinguished from a conveyance of property, which creates rights in rem. Yet sometimes a contract operates, to some extent at any rate, as a conveyance of property. For instance, a specifically enforceable contract for the sale of land constitutes the vendor a trustee of the property for the purchaser, and thus conveys equitable rights which are scarcely distinguishable in practice from rights in rem. Again, a contract for the sale of goods passes the property in the goods to the buyer under s.18 of the Sale of Goods Act 1979. But in both cases the vendor has a lien on the property for unpaid purchase money; and in the case of goods, as the rubric to the group of sections containing s.18 indicates, the property passes only as between the seller and the buyer: as regards third parties the seller in possession has powers of disposition which may defeat the buyer's title, notwithstanding the maxim nemo dat quod non habet.<sup>647</sup>

## Contractual rights as property

- 187 Although contracts create only rights in personam, these rights are treated by the law as themselves items of property, an example of things in action or choses in action.<sup>648</sup> So, a right under a contract may be assigned, subject to the conditions which are explained in Ch.22. And a person may constitute himself trustee of a contractual promise, giving rise to a trust of the right under the contract: the conditions for such a constitution (in particular relating to the person's intention) are explained in Ch.20 in the context of privity of contract.<sup>649</sup> More generally, as will be explained later in the present chapter, a party to a contract may invoke the Human Rights Act 1998 so as to claim the protection of property rights under art.1 of the First Protocol to the European Convention on Human Rights.<sup>650</sup> However, while not rejecting the proprietary character of contractual rights, in *OBG Ltd v Allan* a majority of the House of Lords refused to assimilate them to chattels (things or choses in possession) for the purpose of the tort of conversion<sup>651</sup>; for the minority, by contrast, "once the law recognises something [here, a contractual right] as property, the law should extend a proprietary remedy to protect it".<sup>652</sup>

## Footnotes

- 626 This is the generally accepted view, despite Maitland's opinion to the contrary: *Equity (1909), Lect. IX*. See *Scott (1917) 17 Col. L.R. 269*; Winfield, Province of the Law of Tort (1931), pp.108–112; Glister and Lee (eds), Hanbury & Martin, Modern Equity, 22nd edn (2021), para.2-004. See also *Binions v Evans [1972] Ch. 359*; *Re Sharpe [1980] 1 W.L.R. 219*; *Tinsley v Milligan [1993] 3 W.L.R. 126, 147–148* (although *Tinsley v Milligan* was disapproved on other grounds by *Patel v Mirza [2016] UKSC 42, [2016] 3 W.L.R. 399*; see below, para.18-237). See generally Snell's Equity, 34th edn (2019), Ch.2 and paras 21–037—21–039.
- 627 *Tweddle v Atkinson (1861) 1 B. & S. 393*; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] A.C. 847* (although B can obtain an order for specific performance in favour of C: *Beswick v Beswick [1968] A.C. 58*); and see below, Ch.20.
- 628 See below, paras 20-080 et seq.
- 629 For example, the power of the parties to a contract to vary or rescind the contract so as to extinguish or alter the third party's rights are subject to the conditions provided the Contracts (Rights of Third Parties) Act 1999 by s.2; the variation of a trust is governed by different rules: Glister and Lee (eds), Hanbury & Martin, Modern Equity, 22nd edn (2021), Ch.23.

- ❶630 (1858) 4 De G. & J. 276, 282; and see *Lord Strathcona S.S. Co Ltd v Dominion Coal Co Ltd* [1926] A.C. 108; *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 Q.B. 146; *Swiss Bank Corp v Lloyds Bank Ltd* [1982] A.C. 584. See also below, paras 20-155—20-157.
- ❶631 *Gardner* (1982) 98 L.Q.R. 279; *Tettenborn* (1982) 41 C.L.J. 58, 82. cf. *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch. 548, 573 where the court considered that the law in *De Mattos v Gibson* (1858) 4 De G. & J. 276 is to be understood merely as the “equitable counterpart of the tort of interference with contract”. See further below, paras 20-158—20-164.
- ❶632 *Swiss Bank Corp v Lloyds Bank Ltd* [1982] A.C. 584 at 613 and see below, para.20-157.
- 633 For example, where a solicitor is employed by a mortgagee lending a sum to a mortgagor for the purchase of property and pays the mortgage money which he has received before his authority to do so, he is liable for breach of trust in respect of that money unless he can justify this action: *Target Holdings Ltd v Redfearn* [1996] A.C. 421; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2014] 3 W.L.R. 1367 and see generally McKendrick (ed.), Commercial Aspects of Trusts and Fiduciary Obligations (1992); Burrows in Burrows and Peel (eds), Commercial Remedies (2003), Ch.4.
- 634 [1970] A.C. 567. cf. *Re E. Dibbens & Sons Ltd* [1990] B.C.L.C. 577.
- ❶635 [1970] A.C. 567, 582. See also *Re Kayford* [1975] 1 W.L.R. 279; *Goodhart and Jones* (1980) 43 M.L.R. 489; Hanbury & Martin, Modern Equity, 22nd edn (2021), paras 2-009—2-011; *Twinsectra v Yardley* [2002] 2 A.C. 164; *Charity Commission v Framjee* [2014] EWHC 2507 (Ch), [2015] 1 W.L.R. 16 (contract between donors and trustees of charitable trust); *Prickly Bay Waterside Ltd v British American Insurance Co Ltd* [2022] UKPC 8, [2022] 1 W.L.R. 2087 and cf. *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111, 120 and *Swain v The Law Society* [1983] 1 A.C. 598.
- 636 [1989] 1 W.L.R. 1340. The claim against the bank was not pursued in the House of Lords: [1991] 2 A.C. 548.
- 637 See above, paras 3-010 et seq.
- 638 The solicitors also claimed against the casino where the money was lost: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548.
- 639 [1989] 1 W.L.R. 1340, 1373. This point had been conceded by the solicitors early in argument: at 1349.
- 640 [1989] 1 W.L.R. 1340 at 1356.
- 641 [1989] 1 W.L.R. 1340 at 1378, per Parker LJ and cf. at [1356] and see *Birks* (1989) 105 L.Q.R. 352, 355.
- 642 On this distinction see Glister and Lee (eds) Hanbury & Martin, Modern Equity, 21st edn (2018), Ch.25.
- ❶643 [2022] UKPC 8, [2022] 1 W.L.R. 2087 at [1]–[2] and [23]–[35].
- ❶644 [2022] UKPC 8 at [35] and [40]–[47].

❶645 [2022] UKPC 8 at [47], per Lady Arden giving the judgment of the Board.

❶646 [2022] UKPC 8 at [47], per Lady Arden.

647 See Vol.II, paras 46-193 et seq.

648 See also Insolvency Act 1986 s.436 including thing in action within its definition of “property”.

649 Below, paras 20-080—20-090.

650 Below, paras 3-109—3-111.

651 *OBG Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 especially at [95]—[106].

652 [2007] UKHL 21 at [310], per Baroness Hale of Richmond, and see also [220]—[240] (Lord Nicholls of Birkenhead).

## Section 3. - Contract Law and the Law of Unjust Enrichment

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 3. - Contract Law and the Law of Unjust Enrichment

### An independent ground of recovery

188

“The highest courts have now conclusively recognised that unjust enrichment is a distinct source of rights and obligations in English private law that ranks alongside contract and civil wrongs in importance.”<sup>653</sup>

Claims based on unjust (sometimes unjustified) enrichment are not dependent upon the existence of any contract, express or implied, between the person enriched and the person at whose expense the enrichment has occurred. From the seventeenth century, the same form of action, *indebitatus assumpsit*, was used to remedy breaches of contract and to enforce claims which we would nowadays consider to be claims in restitution, e.g. for money had and received, for money paid to the use of another, and on a quantum meruit. In these cases the obligation to make restitution was deemed to arise on an implied promise or implied contract (*quasi ex contractu*) in order to render them enforceable by a court in *indebitatus assumpsit*. This fiction has long been discredited. The nature of restitutive recovery and its significance for contracts will be discussed in Ch.32.

### Footnotes

<sup>653</sup> Goff and Jones, The Law of Unjust Enrichment, 8th edn (2011), para.105.

## Section 4. - Contract Law and Public Law

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 4. - Contract Law and Public Law

### Public law and private law

- 189 Contracts have often been seen as the expression of individual and private autonomy and therefore to be contrasted with the expressions of public powers.<sup>654</sup> Since the rise in prominence of the distinction between public and private law from the early 1980s, spurred on first by the House of Lords in its separation of the procedures for judicial review under RSC Ord.53 and for ordinary claims based on private rights,<sup>655</sup> the presence of a contract has often been seen as a significant element in, if not the touchstone of, the private nature of a person's activity. At the same time, though, there has been an increasing awareness of the importance of contract as a basis for governmental action, leading to calls for the development of the adaptation of the ordinary and private law principles of the law of contract so as to take into account public law considerations<sup>656</sup>: a need for a public law of contract, rather than a law of public contracts. In the following paragraphs, some of the issues arising from these significances of contract for the borderline between public and private law will be identified.

### RSC Ord.53 and CPR Pt 54

- 190 In 1982 in *O'Reilly v Mackman* the House of Lords held that the procedure for judicial review under RSC Ord.53 was an exclusive one.<sup>657</sup> Thus, if a plaintiff's case was a matter of "private right" he could not proceed by way of judicial review,<sup>658</sup> whereas if it was a matter of "public right" this was the only appropriate way of commencing proceedings.<sup>659</sup> While there were good reasons for the protection of the special features of the public law procedure, this led to a good deal

of waste of time and of money in purely procedural disputes. In the words of Wade and Forsyth, the decision in *O'Reilly v Mackman*:

“... turned the law in the wrong direction, away from flexibility of procedure and towards the rigidity reminiscent of the bad old days of the forms of action a century and a half ago.”<sup>660</sup>

However, since the early 1990s, judges made clear that a more flexible approach should be taken to the line between proceeding by way of an application for judicial review and an action in private law. This process was given support by the replacement of Ord.53 by **Pt 54 of the Civil Procedure Rules**, which are to be interpreted according to their “overriding objective” of dealing with cases justly, as part of which a court is to consider in its duties of case management considerations of time and cost.<sup>661</sup>

## Earlier case law under RSC Ord.53

- 191 It was clear that the mere existence of a contractual relationship between an applicant for judicial review and the respondent did not make the case a matter of private law, nor conversely were all issues arising from a public authority’s contracts matters of public law, and the courts used a range of criteria to determine where to draw the line between private and public law for the purposes of Ord.53.<sup>662</sup> However, in the employment context, the source of the power or duty challenged was for some time prominent. Thus, in *Ex p. Walsh* the applicant was a nurse who had been dismissed on grounds of misconduct.<sup>663</sup> His claim under Ord.53 argued that his dismissal was ultra vires and decided upon in breach of natural justice. To support this, he alleged a breach of particular conditions of his employment which had been incorporated into his contract in compliance with regulations made under statute. However, this statutory background was not enough to give him “public law rights”. According to the Court of Appeal, these would only arise if Parliament had directly restricted his employer’s freedom to dismiss him, rather than requiring his employer to contract on particular terms, otherwise his claim was purely contractual.<sup>664</sup> The applicant was therefore left to his private law remedies for unfair dismissal and breach of contract.<sup>665</sup> By contrast, in *Ex p. Benwell* the applicant, who had been a prison officer, based his application for the judicial review of his dismissal on the failure to observe a code of discipline of prison officers in the Prison Rules, themselves made under a statutory power.<sup>666</sup> The court held that this basis gave his claim “sufficient statutory under-pinning” for it to be properly a matter of public law,<sup>667</sup> although the lack of any other remedy in the context appeared to weigh in the applicant’s favour.<sup>668</sup> The courts also refused to allow the use of the public law procedure to challenge the decisions of certain types of domestic tribunal, in part on the ground that the relationship between the association and its members was “wholly contractual”.<sup>669</sup> However, a decision of the Take-Over and Mergers

Panel was held susceptible to judicial review despite the self-regulatory and private form of its control, because *inter alia* it operated as an integral part of a governmental framework for the regulation of financial activity.<sup>670</sup>

## A more flexible approach

- 192 On the other hand, by 1992 a more flexible approach was taken to the resolution of this type of procedural dispute by the House of Lords in *Roy v Kensington & Chelsea and Westminster Family Practitioner Committee*.<sup>671</sup> In that case, a doctor who worked for the defendant committee as a general practitioner under a statutory scheme claimed by writ sums allegedly owing to him which had been denied him because the Committee had come to the view that he had not devoted a “substantial amount of time to general practice” within the meaning of the relevant regulations. The Committee claimed that his action should be struck out as an abuse of the process of the court, arguing that his proper recourse was by judicial review alone. The House of Lords rejected this argument, holding that, whether or not the doctor worked under a contract for the committee, his claim for payment was a matter of “private right”. According to Lord Bridge:

“... where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence,<sup>672</sup> the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private right in proceedings brought against him.”<sup>673</sup>

Moreover, Lord Lowry noticed that Lord Diplock in *O'Reilly v Mackman*<sup>674</sup> had acknowledged that there may be exceptions to the principle that cases involving public law issues should proceed only by way of judicial review:

“... particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law.”<sup>675</sup>

Lord Lowry recommended that a “liberal attitude” be taken to the ambit of such exceptions,<sup>676</sup> and approved a broad approach according to which judicial review would be reserved for cases where private rights were not at stake.<sup>677</sup> Clearly, the House of Lords intended to mould the distinction between private and public law according to the appropriateness of the different procedures in a particular case (for example, whether the case required oral evidence and discovery<sup>678</sup>), rather than according to the formal source of the plaintiff’s claim.<sup>679</sup>

## CPR Pt 54

<sup>193</sup> In 2000, Ord.53 was revoked and replaced by [Pt 54 of the CPR](#).

<sup>680</sup>

 Under [Pt 54](#), a claim for judicial review is defined as a claim to:

“... review the lawfulness of: (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function.”<sup>681</sup>

It is provided that the judicial review procedure must be used for applications for certain types of order (mandatory orders, prohibiting orders, quashing orders, and injunctions under [s.31 of the Senior Courts Act 1981](#)),<sup>682</sup> and may be used in certain other cases, though not as regards claims solely for damages.<sup>683</sup> The court has power to order a claim to continue as if it had not been started by way of judicial review and, where it does so, to give directions about the future management of the claim.<sup>684</sup> In common with applications under RSC Ord.53, the court’s permission to proceed is required in a claim for judicial review<sup>685</sup> and applications for leave must be made promptly and in any event within three months of when the grounds arose.<sup>686</sup> These features of claims for judicial review remain distinctive and this means that the courts still need to resolve whether a claim is sufficiently public to be appropriately dealt with under [Pt 54](#) or whether it is private and to be dealt with by ordinary action.<sup>687</sup> In deciding this, the courts sometimes see claims based on the contract as being appropriate for ordinary action. So, for example, as regards disputes between students and their universities it has been said that the normal procedure will be judicial review, but where claims are based on the contract between them, then ordinary action is appropriate.<sup>688</sup> But the courts have made clear that their approach to the differences in procedure and the exercise of their power to transfer claims between the two routes will be flexible and subject to the overriding objective of the [CPR](#).<sup>689</sup> As Lord Woolf CJ observed, [Pt 54](#) was intended to avoid wholly unproductive disputes as to when judicial review is or is not appropriate.<sup>690</sup> So:

“... in a case ... where a bona fide contention is being advanced (although incorrect) that [a private sector provider of services for a local authority] was performing a public function, that is an appropriate issue to be brought to the court by way of judicial review.”<sup>691</sup>

The Court of Appeal wished:

“... to make clear that the CPR provide a framework which is sufficiently flexible to enable all the issues between the parties to be determined.”<sup>692</sup>

## Contracts made by public bodies: capacity

- 194 The nature and limits of the capacity of the Crown and of public authorities is treated at length in Ch.13.<sup>693</sup>

## Contracts made by “public authorities” and the Human Rights Acts 1998

- 195 The Human Rights Act 1998 has had important effects on the law of contract itself as well as on the law governing contracts made by “public authorities”. These effects will be discussed together in the following section.<sup>694</sup>

## Public contractors and the Human Rights Act 1998

- 196 The question whether a commercial company providing a service to a person under a contract was acting as someone “certain of whose functions are functions of a public nature” within the meaning of s.6 of the 1998 Act where it did so under a contract with a public authority made by it in furtherance of its statutory duties will also be discussed in the following section.<sup>695</sup>

## The law of public procurement

- 197 Important consequences attach to the categorisation of a contracting-party or would-be contracting-party as a “contracting authority” within the meaning of the law of public procurement.<sup>696</sup>

## Contracts made by public bodies: other differences in rule

- 198 There are also circumstances in which the public nature of a party's contractual capacity (or contract-making power) affects the substantive rules applicable.<sup>697</sup> For example, the general rule, based on the principle of freedom of contract, is that a person can choose with whom to contract and with whom not to contract.<sup>698</sup> However, a local authority's decision not to contract with a company which had indirect trading links with South Africa was successfully challenged by way of judicial review: although the policy was not itself unreasonable, it had been adopted partly in order to penalise the company in question and not solely in order to further racial harmony within the borough.<sup>699</sup> Another example of difference in substantive rule may be found in *Swain v The Law Society*<sup>700</sup> in which the rules as to accountability of an agent were held inapplicable to the Society's arrangement of liability insurance on behalf of its members. The insurance scheme was made under statutory powers and the Society and its Council acted thereby "in a public capacity and what they do in that capacity is governed by public law".<sup>701</sup>

## Footnotes

654 *Whittaker* (2001) 21 O.J.L.S. 103, 193.

655 *O'Reilly v Mackman* [1983] 2 A.C. 237; *Cocks v Thanet DC* [1983] 2 A.C. 286.

656 Leyland and Woods, Textbook on Administrative Law, 8th edn (2016), Ch.19; A. Davies, The Public Law of Government Contracts (2008) and see Craig, Administrative Law, 8th edn (2016), Ch.5.

657 [1983] 2 A.C. 237; *Cocks v Thanet DC* [1983] 2 A.C. 286 and see Craig, Administrative Law, 8th edn (2016), Ch.27.

658 *R. v East Berkshire Health Authority, Ex p. Walsh* [1985] Q.B. 152. In *Council of Civil Service Trade Unions v Minister for the Civil Service* [1985] A.C. 374, Crown service was held susceptible to judicial review, although the contractual issues involved were not argued before the House of Lords: see *Wade* (1985) 101 L.Q.R. 180, 194-197 and cf. *Fredman and Morris* (1988) P.L. 58.

659 *O'Reilly v Mackman* [1983] 2 A.C. 237.

660 Wade and Forsyth, Administrative Law, 11th edn (2014), p.580.

661 CPR Pt 1.

662 *Beatson* (1987) 103 L.Q.R. 34.

663 *R. v East Berkshire Health Authority Ex p. Walsh* [1985] Q.B. 152.

664 [1985] Q.B. 152 at 165. cf. *R. v Crown Prosecution Service Ex p. Hogg* (1994) 6 Admin. L.R. 778.

- 665 Employment Rights Act 1996 Pt X, as amended. In some employment cases the courts have considered issues typical of public law, such as the reasonableness of the exercise of a discretion and relating to observance of natural justice, as a matter of contract law and in the course of private law proceedings: *R. v British Broadcasting Corp Ex p. Lavelle [1983] 1 W.L.R. 23; Dietman v Brent LBC [1987] I.C.R. 737, 752; Hughes v Southwark LBC [1988] I.R.L.R. 55.*
- 666 *R. v Secretary of State for the Home Department Ex p. Benwell [1984] 3 All E.R. 854.*
- 667 *[1984] 3 All E.R. 854, 867.*
- 668 *[1984] 3 All E.R. 854, 866, 868.*
- 669 *Law v National Greyhound Racing Club Ltd [1983] 1 W.L.R. 1302*, following *R. v Criminal Injuries Compensation Board Ex p. Lain [1967] 2 Q.B. 864; R. v BBC Ex p. Lavelle [1983] 1 W.L.R. 23; R. v Fernhill Manor School Ex p. A. [1993] 1 F.L.R. 620; R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan [1993] 2 All E.R. 853; R. v Insurance Ombudsman Bureau Ex p. Aegon Life Assurance Ltd [1995] L.R.L.R. 101.* cf. *Modahl v British Athletic Federation [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192.*
- 670 *R. v Panel of Take-Overs and Mergers Ex p Datafin Plc [1987] 1 Q.B. 815* and see *R. v East Berkshire Authority Ex p. Walsh [1985] Q.B. 152* and *Wandsworth LBC v Winder [1985] A.C. 461.*
- 671 *[1992] 1 A.C. 624* and see *Cane (1992) P.L. 193.*
- 672 See *Wandsworth LBC v Winder [1985] A.C. 461.*
- 673 *[1992] 1 A.C. 624, 628–629.*
- 674 *[1983] 2 A.C. 237.*
- 675 *[1983] 2 A.C. 237, 285*, quoted in *Roy [1992] 1 A.C. 624, 642.*
- 676 *[1992] 1 A.C. 624, 654.*
- 677 *[1992] 1 A.C. 624, 653.*
- 678 *[1992] 1 A.C. 624, 647*, per Lord Lowry, approving the approach of Woolf LJ in *R. v Derbyshire CC Ex p. Noble [1990] I.C.R. 808, 813.*
- 679 This approach was followed by the Court of Appeal in *Trustees of the Dennis Rye Pension Fund v Sheffield City Council [1997] 4 All E.R. 747*. The need for flexibility in approach to the distinction between the public and private procedures was noted by the HL in *Mercury Communications Ltd v Director General of Telecommunications [1996] 1 W.L.R. 48* and by the Court of Appeal in *Clark v The University of Lincolnshire and Humberside [2000] 1 W.L.R. 1988.*
- 680 Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) rr.54.1, 54.22, which came into force on 2 October 2000. See generally Craig, Administrative Law, 9th edn (2021), Ch.27; Wade and Forsyth, Administrative Law, 11th edn (2014), Ch.18.
- 681 CPR r.54.1(2).
- 682 CPR r.54.2.
- 683 CPR r.54.3(2).
- 684 CPR r.54.20.
- 685 CPR r.54.4.

- 686 CPR r.54.5, which also provides that these time limits may not be extended by agreement between the parties.
- 687 It has been noticed that under the CPR delay is also relevant to claims by ordinary action: *Clark v The University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988, 1997.
- 688 *Clark v The University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988, 1996 and see Feldman (ed.), English Public Law, 2nd edn (2009), paras 17.72–17.90 (Craig); cf. *R. (Holmcroft Properties Ltd) v KPMG LLP* [2016] EWHC 323 (Admin), [2017] Bus. L.R. 932 esp. at [23] et seq., applying *R. v Panel on Takeovers and Mergers, Ex p. Datafin Plc* [1987] Q.B. 815 (the mere fact that the source of a body's powers is contract does not necessarily mean that public law principles do not apply, though it remains important: [2016] EWHC 323 (Admin) at [43]). See also the cases discussed below at paras 3-117—3-119 on the distinction between public and private acts for the purposes of the Human Rights Act 1998 s.6. These cases were considered relevant to the context of the availability of judicial review in *R. (Bevan and Clarke LLP) v Neath Port Talbot CBC* [2012] EWHC 236 (Admin), [2012] B.L.G.R. 728 at [47]–[48] and *R. (Davis) v West Sussex CC* [2012] EWHC 2152 (Admin), [2013] P.T.S.R. 494, especially at [76]–[89] (the latter applying the approach of the CA in *R. (Supportways Community Services Ltd) v Hampshire CC* [2006] EWCA Civ 1035, [2006] B.L.G.R. 836 at [42]–[43], [56], [61]).
- 689 *Clark v University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988, 1997.
- 690 *R. (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All E.R. 936 at [38].
- 691 [2002] 2 All E.R. 936 at [38].
- 692 [2002] 2 All E.R. 936 at [39].
- 693 Paras 13-005, 13-018 et seq.
- 694 See below, paras 3-103 et seq.
- 695 See below, paras 3-116—3-118 concerning *YL v Birmingham City Council* [2007] UKHL 27, [2007] 3 W.L.R. 112.
- 696 See below, paras 13-057—13-059.
- 697 And see *Freedland* (1994) P.L. 86.
- 698 See above, paras 2-012, 2-013.
- 699 *R. v Lewisham LBC Ex p. Shell UK Ltd* [1988] 1 All E.R. 938, applying *Wheeler v Leicester City Council* [1985] A.C. 1054 and see Local Government Act 1988 ss.17–23.
- 700 [1983] 1 A.C. 598.
- 701 [1983] 1 A.C. 598 at 608.

## Section 5. - The Human Rights Act 1998 and Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 5. - The Human Rights Act 1998 and Contracts

### Introduction

<sup>199</sup> The Human Rights Act 1998 (“the 1998 Act”)

<sup>702</sup>

**D** <sup>U</sup> was enacted in order to “bring home” the human rights declared by the European Convention on Human Rights (“the Convention”) into the domestic legal systems of the United Kingdom.<sup>703</sup> In order to do so, it put in place two main mechanisms. First, there are controls on legislation. So, under [s.3 of the 1998 Act](#) it is provided that:

#### Section 3

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

<sup>704</sup>

And under [s.4 of the 1998 Act](#), where a court is unable to “read down” primary legislation in this way, and where a court<sup>705</sup> is satisfied that the legislation is incompatible with Convention rights, it may make a “declaration of incompatibility”.<sup>706</sup> As a result, the duty of compatible interpretation and the possibility of a declaration of incompatibility may arise in any proceedings in which the compatibility of primary legislation is challenged, whether or not a “public authority” is party. Secondly, the Act declares it unlawful for “public authorities” to act in a way which is incompatible

with a “Convention right”, and for this purpose “public authority” includes a court or tribunal and “any person certain of whose functions are functions of a public nature”.<sup>707</sup>

## Temporal impact of the Human Rights Act on contracts

- 100 In determining the impact of these provisions on contracts and, indeed, also upon the law of contract itself, a distinction must be drawn between contracts made before and after the coming into force of the operative provisions of the [1998 Act](#), i.e. 2 October 2000.<sup>708</sup>

## Footnotes

- 702 The Bill of Rights Bill 2022 was introduced to Parliament in June 2022. If enacted, it would, inter alia, repeal the [Human Rights Act 1998](#) (cl.1(1)) and replace it with a new legislative framework for the recognition of “Convention rights” (set out by cl.2 and Sch.1). Clause 1(2) of the Bill states that it “clarifies and re-balances the relationship between courts in the United Kingdom, the European Court of Human Rights and Parliament” and cl.1(3) affirms that “judgments, decisions and interim measures of the European Court of Human Rights—(a) are not part of domestic law, and (b) do not affect the right of Parliament to legislate”. The new regime would seek to change the way in which Convention rights are interpreted in the UK (cls 3–7) and would remove (and not replace) the duty of courts to read and give effect to UK legislation in a way which is compatible with Convention rights set out in [s.3 of the 1998 Act](#). The Bill would retain the possibility of certain courts making a declaration of incompatibility of legislation with a Convention right (cl.10) and the rule which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right (cl.12). The Bill makes new provision (cl.13) governing the procedural protection of “a person who—(a) claims that a public authority has acted (or proposes to act) in a way which is made unlawful by [cl.]12(1), and (b) is (or would be) a victim of the act (or proposed act)”. It should be noted that these summary propositions must be read in the context of the considerable qualification and nuance which the Bill sets out in its detailed provisions.
- 703 Not all the rights contained in the European Convention and its protocols were included in this process, but only those defined by the Act as “Convention rights”: [Human Rights Act 1998 s.1](#).
- 704 [Human Rights Act 1998 s.3\(1\)](#).
- 705 The courts which are so entitled are listed in [s.4\(5\)](#).
- 706 [Human Rights Act 1998 s.4\(1\)](#) and [\(2\)](#).

- 707 Human Rights Act 1998 s.6(1) and (3). Section 6(5) further provides that “[i]n relation to a particular act, a person is not a public authority by virtue only of subs.3(b) if the nature of the act is private” and see below, paras 3-116—3-119.
- 708 Human Rights Act 1998 (Commencement No.2) Order 2000 (SI 2000/1851).

# **(i) - The Construction and Review of Legislation Governing Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 5. - The Human Rights Act 1998 and Contracts**

**(a) - Contracts Made before 2 October 2000**

**(i) - The Construction and Review of Legislation Governing Contracts**

**The impact of ss.3 and 4 of the 1998 Act on accrued contractual rights**

<sup>101</sup> In *Wilson v First County Trust Ltd (No.2)*,<sup>709</sup> the question arose whether provisions in the **Consumer Credit Act 1974** which had the effect of denying the enforceability of a creditor's rights under the contract and its accompanying security for lack of fulfilment of some of its requirements as to proper execution<sup>710</sup> were "incompatible" with the creditor's "Convention rights". The effect of the relevant provisions of the **1974 Act** was to deprive the court of any power to enforce a regulated agreement from which a prescribed term has been omitted for the benefit of the creditor, notwithstanding that no prejudice has been caused to anyone by that omission.<sup>711</sup> The Court of Appeal held that a court, as itself a "public authority",<sup>712</sup> must not act in a way which is incompatible with Convention rights.<sup>713</sup> In its view, the provisions in the **1974 Act** in question which required a court to deny any possibility of enforcement for the benefit of the creditor infringed to a disproportionate and unexplained extent its right to a fair and public hearing under art.6(1) of the Convention.<sup>714</sup> The Court of Appeal therefore exercised its discretion in favour of declaring the relevant provision of the **1974 Act** incompatible with the Convention.<sup>715</sup> However, this decision was reversed by the House of Lords in a ruling of fundamental importance for the temporal application of the Human Rights Act to private transactions, including contracts.<sup>716</sup> Unlike the Court of Appeal, whose starting point was the duty of a court under **s.6 of the 1998 Act**, the House of Lords started by asking whether **ss.3 and 4 of the 1998 Act** apply retrospectively to

the facts before them, the contract of consumer credit having been made and having been due to have been performed before the coming into force of the operative provisions of the [1998 Act](#) on 2 October 2000. The House of Lords held unanimously that in the circumstances of the case [ss.3](#) and [4](#) should not be held to apply to a contract made and to be performed before the coming into force of the [1998 Act](#). For a majority of their lordships this position was reached by holding that while [ss.2–4 of the 1998 Act](#) may clearly apply to enactments made before its coming into force,<sup>717</sup> they should not be interpreted so as to allow the challenge of primary legislation affecting “transactions that have created rights and obligations which the parties seek to enforce against each other”.<sup>718</sup> In the words of Lord Scott of Foscote:

“The legal consequences under the civil law of a transaction or of events ought to be established by reference to the law at the time they take place. When events apt to create rights or obligations take place citizens affected by the events need to be able to ascertain the extent of their rights or obligations. They cannot do so if subsequent legislation may add to or diminish those rights or obligations.”<sup>719</sup>

Given their lordships’ view of the lack of impact of [ss.3](#) and [4](#) on the contract before them, it followed that the Court of Appeal’s reliance on [s.6 of the 1998 Act](#) was misplaced, since [s.6](#) cannot make unlawful a court’s lawful action in giving effect to pre-Act rights and obligations.<sup>720</sup> As a result, the Court of Appeal should not have considered the question of the compatibility with Convention rights of the Consumer Credit Act’s provisions which denied the enforceability of the contract for the benefit of the creditor.<sup>721</sup> While Lord Rodger of Earlsferry agreed with this decision on the facts before the House, he did so explicitly on the narrower ground that [ss.3](#) and [4 of the 1998 Act](#) did not apply to pending proceedings so as to protect the Convention rights enshrined in art.1 of the First Protocol to the Convention protecting a person’s right to the peaceful enjoyment of his possessions.<sup>722</sup>

<sup>102</sup> On the other hand, in *PW & Co v Milton Gate Investments Ltd*<sup>723</sup> Neuberger J (as he then was) was prepared to accept that [s.3 of the Human Rights Act](#) could apply to an issue arising from a lease made before its coming into force. There, the learned judge had held that, apart from the operation of [s.3](#), the exercise of a “break clause” in a head-tenancy did not determine the sub-tenancies entered into by the tenant as permitted under the head-lease even though the head-landlord was unable to recover rent under the sub-tenancy covenants.<sup>724</sup> Having referred to a number of passages in the speeches of their lordships in *Wilson v First County Trust (No.2)*,<sup>725</sup> Neuberger J concluded that their reasoning did not preclude the application of [ss.3 or 4 of the 1998 Act](#) to issues arising out of contracts made before its coming into force as long as this did not impair “vested rights” or otherwise create unfairness.<sup>726</sup> In particular, he noted as “very much in point” Lord Scott of Foscote’s reference in *Wilson’s* case to the example of the impact of legislation intervening between the creation of a lease and its expiry where the legislation could affect the

rights and obligations arising under the transaction.<sup>727</sup> On the facts before him, Neuberger J considered that:

“... the earliest that any ‘vested rights’ could be said to have arisen under [the break clause in the head-lease], was the date of the service of the notice under that clause. Unless and until [the break clause] was operated, the rights and obligations of any of the parties as a result of the exercise were merely contingent and not vested.”<sup>728</sup>

Since this notice had been served after the coming into force of [s.3 of the 1998 Act](#) there were no vested rights at the relevant time so as to prevent its operation on the legislative provisions whose application allegedly prejudiced the head-landlord’s right to property under art.1 of the First Protocol of the European Convention. Moreover, in the learned judge’s view, it was not more generally unfair to apply [s.3](#) in this way even though the notice had been served only four days after its coming into force given, in particular, that the [1998 Act](#) had been on the statute book for around two years before it came into force.<sup>729</sup>

## Footnotes

- 709 [\[2003\] UKHL 40](#), [\[2003\] 3 W.L.R. 568](#), reversing [\[2001\] EWCA Civ 633](#), [\[2002\] 2 Q.B. 74](#).
- 710 Consumer Credit Act 1974 ss.65(1) and 127(3). Section 127(3) of the 1974 Act was repealed by the Consumer Credit Act 2006 s.15: see Vol.II, para.41-095.
- 711 [\[2001\] EWCA Civ 633](#) at [9].
- 712 Human Rights Act 1998 s.6(3)(a).
- 713 [\[2001\] EWCA Civ 633](#) at [17]–[18].
- 714 [\[2001\] EWCA Civ 633](#) at [28]–[29].
- 715 Human Rights Act 1998 s.4(2).
- 716 [\[2003\] UKHL 40](#), [\[2003\] 3 W.L.R. 568](#).
- 717 [\[2003\] 3 W.L.R. 568](#) at [17], per Lord Nicholls.
- 718 [\[2003\] 3 W.L.R. 568](#) at [98] and see at [101]–[102] (Lord Hope of Craighead); [26] (Lord Nicholls of Birkenhead); [145] (Lord Hobhouse of Woodborough); [161]–[162] (Lord Scott of Foscote).
- 719 [\[2003\] 3 W.L.R. 568](#) at [161].
- 720 [\[2003\] 3 W.L.R. 568](#) at [157]–[158] (Lord Scott of Foscote).
- 721 See below, paras 3-108—3-111 on the substantive issues of compatibility of the then provisions of the Consumer Credit Act 1974 with the [Human Rights Act 1998](#), putting aside the issue of retroactivity.
- 722 [\[2003\] UKHL 40](#), [\[2003\] 3 W.L.R. 568](#) at [215]–[220]. For a straightforward application of the HL’s approach see *Laws v Society of Lloyd’s* [\[2003\] EWCA Civ 1887](#) at [32]–[33] (Lloyd’s enjoyed statutory immunity barring bad faith prior to coming into force of [1998 Act](#)).

- 723 [2003] EWHC 1994 (Ch), [2004] Ch. 142.
- 724 [2003] EWHC 1994 (Ch) at [103]–[104].
- 725 [2003] UKHL 40, [2004] 1 A.C. 816, above, para.3-101.
- 726 [2003] EWHC 1994 (Ch) at [107]–[115].
- 727 [2003] UKHL 40 at [161]; [2003] EWHC 1994 (Ch) at [110] and [114].
- 728 [2003] EWHC 1994 (Ch) at [114].
- 729 [2003] EWHC 1994 (Ch) at [115].

## **(ii) - Contracts Made by “Public Authorities”**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 5. - The Human Rights Act 1998 and Contracts**

**(a) - Contracts Made before 2 October 2000**

**(ii) - Contracts Made by “Public Authorities”**

**Section 6 and accrued contractual rights**

- 103 The making of a contract by a person or body may sometimes constitute an “act” by a “public authority” within the meaning of [s.6 of the 1998 Act](#).<sup>730</sup> While the decision in *Wilson v First County Trust Ltd (No.2)*<sup>731</sup> was directly concerned with the application of [ss.3](#) and [4 of the 1998 Act](#) to transactions which created rights accruing before its coming into force, it is submitted that a similar approach would be taken so as to deny the application of [s.6 of the 1998 Act](#) to contracts made by “public authorities” before its coming into force. As Lord Nicholls observed in setting out the general framework of the [1998 Act](#):

“On a natural reading [[s.6](#)] is directed at post-Act conduct. The context powerfully supports this interpretation. One would not expect a statute promoting human rights values to render unlawful acts which were lawful when done.”<sup>732</sup>

Lord Scott of Foscote agreed, observing that:

“It is plain that section 6 is looking to the future. It is not purporting to make unlawful a pre 2 October 2000 act of a public authority.”<sup>733</sup>

The approach of the majority of the House of Lords in *Wilson v First County Trust Ltd (No.2)* therefore clearly indicates that s.6 of the 1998 Act will not be applied so as to make unlawful the making of contracts by public authorities before its coming into force on 2 October 2000. And while Lord Rodger of Earlsferry took a more nuanced approach to the distinct types of “retroactivity” which he identified according to the different Convention rights protected by the 1998 Act,<sup>734</sup> he also proceeded on the basis that:

“Parliament must have intended all the operative provisions [which include s.6] of this particular statute to take effect in the same way in respect of any given Convention right.”<sup>735</sup>

## The later performance of contracts made by “public authorities”

- 104 A further question relating to contracts made before the coming into effect of s.6 of the 1998 Act concerns a public authority’s “act” of performance of a contract rather than its “act” in making one.<sup>736</sup> For if a public authority has made a contract before the coming into effect of the 1998 Act, but *after* its coming into effect performs one of its obligations in a way required by the contract but incompatible with a Convention right, such a performance could be thought itself to constitute an “act” made unlawful by s.6 of the 1998 Act. On the other hand, against this line of reasoning it could be contended that s.6 of the 1998 Act should not be interpreted so as to render illegal the performance of existing contractual obligations since this would have the correlative effect of prejudicing the existing rights of the other party under the contract. In resolving these arguments, observations made in *Wilson v First County Trust Ltd (No.2)* concerning the retroactive effect of legislation in general and the 1998 Act in particular may be helpful, even though that decision was concerned with the incompatibility with Convention rights of primary legislation as applied to facts occurring before the 1998 Act’s coming into force.<sup>737</sup> In this respect, Lord Rodger of Earlsferry noted that:

“Retroactive provisions alter the existing rights and duties of those whom they affect. But not all provisions which alter existing rights and duties are retroactive. The statute book contains many statutes which are not retroactive but alter existing rights and duties —only prospectively, with effect from the date of commencement.”<sup>738</sup>

While Lord Rodger quoted with approval the words of Dickson J to the effect that “[n]o-one has a vested right to continuance of the law as it stood in the past”,<sup>739</sup> he observed that:

"Often ... a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be presumed that Parliament did not intend the new legislation to affect them in that respect."<sup>740</sup>

Although he added that "in practice the presumption against legislation altering vested rights is regarded as weaker than the presumption against legislation having retroactive effect".<sup>741</sup> What these observations suggest is that s.6 of the 1998 Act should be interpreted so as not to make unlawful the "acts of performance" of public authorities of contractual obligations created before its coming into force even if these acts are incompatible with Convention rights, since such an illegality would prejudice the existing rights of other parties under those contracts. However, a future court could prefer to follow the more nuanced approach adopted by Lord Rodger for this purpose, distinguishing between the various Convention rights<sup>742</sup> in assessing the effect of the operative provisions of the 1998 Act.<sup>743</sup>

## **Effect of any unlawful performance by a public authority**

- |05 If a court were to hold that a public authority would act unlawfully within the meaning of s.6 of the 1998 Act by performing an obligation arising under a contract made before the coming into force of that Act, then either the performance of the contractual obligation in question would be excused or the contract as a whole would be frustrated by this supervening illegality, this depending on the illegality's significance for the main purpose of the contract as a whole.<sup>744</sup>

## **Unlawful manner of performance by public authority**

- |06 Different considerations apply where a public authority's action in performing an obligation arising under a contract made before the coming into force of the 1998 Act is incompatible with a Convention right, but where this incompatibility is not required by the obligation itself, but rather reflects the chosen manner of its performance by the public authority. In these circumstances, the arguments as to the effect of s.6 of the 1998 Act would differ from those exposed earlier,<sup>745</sup> as ex hypothesi the other party to the contract would not have any accrued rights to the action of the public authority in purported performance of the contract. It is submitted, therefore, that in these circumstances a public authority could be held to act unlawfully within the meaning of s.6, even though the contract predated the 1998 Act's coming into force. Where this is the case, then the courts are likely to look to their general approach to illegality in performance to determine the effects of this "unlawful act" on the contractual rights of the parties inter se.<sup>746</sup>

## Footnotes

- 730 On the application of the definition of “public authority” under ss.6(3) and (5) of the 1998 Act to the making of contracts, see below, para.3-116—3-119.
- 731 [2003] 3 W.L.R. 568, (2003) 3 W.L.R. 568.
- 732 [2003] 3 W.L.R. 568 at [12].
- 733 [2003] 3 W.L.R. 568 at [156].
- 734 See above, para.3-101.
- 735 [2003] UKHL 40, [2003] 3 W.L.R. 568 at [204].
- 736 For the purposes of the present discussion, it will be assumed that the public authority fulfils the criteria required by the 1998 Act s.6(3) and (4), on which see below, paras 3-116—3-119.
- 737 [2003] UKHL 40, [2003] 3 W.L.R. 568. Lord Rodger of Earlsferry explicitly stated that ss.3–9 of the 1998 Act should be interpreted so as to apply retroactively or only from commencement as a whole: at [204], [206].
- 738 [2003] 3 W.L.R. 568 at [188]. On the restricted basis for Lord Rodger’s decision, see above, para.3-101. Lord Rodger drew on the discussion in P.A. Coté, *The Interpretation of Legislation in Canada*, 3rd edn (2000), Ch.2, s.1 and referred to *West v Gwynne* [1911] 2 Ch. 1. Lord Hobhouse adopted Lord Rodger’s observations on the various usages of the word “retrospective”: [2003] UKHL 40, [2003] 3 W.L.R. 568 at [145]. See also the observations of Lord Scott of Foscote at [161], who noted that: “Where transactions calculated to continue for some considerable period are entered into, intervening legislation may in some respect or other affect the rights or obligations that accrue after the legislation has come into force”. He illustrated this by reference to contracts of lease and landlord and tenant legislation.
- 739 [2003] UKHL 40, [2003] 3 W.L.R. 568 at [192]; *Gustavson Drilling* (1964) Ltd v Minister of National Revenue [1977] 1 S.C.R. 271, 282–283.
- 740 [2003] UKHL 40, [2003] 3 W.L.R. 568 at [193].
- 741 [2003] 3 W.L.R. 568 at [195].
- 742 [2003] 3 W.L.R. 568 at [209]–[210]. He distinguished in particular between the procedural rights protected by art.6 of the Convention and other, substantive rights. For Lord Rodger the proper question was therefore whether the 1998 Act gave effect to art.1 of the First Protocol to the Convention so as to affect vested rights or pending proceedings: [2003] 3 W.L.R. 568 at [215].
- 743 i.e. *Human Rights Act* 1998 ss.3–9.
- 744 cf. Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), paras 19-052—19-053 and see below, paras 26-096—26-099.
- 745 Above, paras 3-104—3-105.
- 746 See below, paras 18-189 et seq.

### **(iii) - The Duty of Courts as “Public Authorities” in Relation to Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 5. - The Human Rights Act 1998 and Contracts**

**(a) - Contracts Made before 2 October 2000**

**(iii) - The Duty of Courts as “Public Authorities” in Relation to Contracts**

### **The construction of contracts**

<sup>107</sup> In *Biggin Hill Airport Ltd v Bromley LBC*<sup>747</sup> (which concerned a contract made between a local authority and a private company), it was held that the *1998 Act* did not require a court as itself a public authority<sup>748</sup> to interpret a contract made *before* the coming into effect of the same Act in such a way as to be compatible with the Convention rights of third parties to the contract, since common law authority established that a court should look to the factual circumstances at the time of a contract’s conclusion for the resolution of issues of its construction.<sup>749</sup> This decision may be seen as reflecting in the context of the control and application of the common law a similar principle of non-retroactivity as was applied by the House of Lords in its later decision in *Wilson v First County Trust Ltd (No.2)* for the purposes of the control and application of primary legislation.<sup>750</sup> On the other hand, in *Biggin Hill Airport* it was accepted that even in respect of a contract made before the coming into force of the *1998 Act*, where the contract was *made* by a public authority the protection of people’s Convention rights might form an element in its decision-making process, although on the facts the court found that it had not done so.<sup>751</sup> If a court were to find such an element to have been the case, then its decision protecting the Convention right would not have any true retroactive impact: it would merely be giving effect to the existing common law principle

of interpretation of a contract by reference to the common intentions of the parties as construed in their factual matrix.<sup>752</sup>

## Footnotes

- 747 (2001) 98(3) L.S.G. 42, *The Times*, 9 January 2001 reversed on other grounds [2001] EWCA Civ 1089, *The Times*, 13 August 2001, (2001) 98(33) L.S.G. 30.
- 748 Human Rights Act 1998 s.6(3)(a).
- 749 *Prenn v Simmonds* [1971] 1 W.L.R. 1381; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 and see below, paras 15-047 et seq.
- 750 Above, para.3-101.
- 751 *Biggin Hill Airport Ltd v Bromley LBC* (2001) 98(3) L.S.G. 42, *The Times*, 9 January 2001 at [173], reversed on other grounds [2001] EWCA Civ 1089, *The Times*, 13 August 2001, (2001) 98(33) L.S.G. 30.
- 752 See below, paras 15-055—15-056.

## **(i) - The Construction and Review of Legislation Governing Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 5. - The Human Rights Act 1998 and Contracts**

**(b) - Contracts Made on or after 2 October 2000**

**(i) - The Construction and Review of Legislation Governing Contracts**

**Sections 3 and 4 of the 1998 Act: primary or secondary legislation governing the contract and Convention rights**

<sup>108</sup> While it was not necessary for its decision in *Wilson v First County Trust Ltd (No.2)*,<sup>753</sup> four members of the House of Lords considered there the substantive questions of compatibility with Convention rights of the then provisions of the *Consumer Credit Act 1974* (putting aside the retroactive element found on the facts), and this makes clear their general view that questions of compatibility with Convention rights of legislation governing contracts made on or after the date of their coming into force, viz 2 October 2000, would arise for the purposes of ss.3 and 4 of the 1998 Act. The substantive questions raised in *Wilson v First County Trust Ltd (No.2)* itself were whether the denial of any possibility of enforcement of the contract of consumer credit or its attendant security by the creditor against the consumer was incompatible either with the creditor's right to a fair trial under art.6 of the European Convention or with the creditor's right to the peaceful enjoyment of his possessions under art.1 of the First Protocol to the Convention. The issue of compatibility with art.6 was fairly quickly dealt with by the House of Lords as art.6(1) is concerned to ensure a fair civil process and "does not itself guarantee any particular content for civil rights and obligations in the substantive law of the contracting states".<sup>754</sup> The effect of the Consumer Credit Act was to deny the creditor any substantive legal rights under the contract or in relation to the security and did not concern its procedural rights.<sup>755</sup> While their lordships also agreed that (putting aside the question of the temporal application of the 1998 Act) the creditor's

right to its possessions was not denied by the relevant provisions of [Consumer Credit Act 1974](#),<sup>756</sup> their reasons for coming to this conclusion differed. Here, there were two issues: (i) did the facts of the case engage the application of art.1 of the First Protocol; (ii) if so, did the provisions of the Consumer Credit Act put in place a legitimate, proportionate and sufficiently certain restriction on the creditor's rights? The following paragraphs will examine the treatment of these issues in *Wilson v First County Trust Ltd (No.2)* itself and in the subsequent case law.

## Unenforceable contractual rights and engaging art.1 of the First Protocol

- [109] The four members of the House of Lords who expressed their views were divided in their response to the question whether the facts of *Wilson v First County Trust Ltd (No.2)*<sup>757</sup> engaged the application of art.1 of the First Protocol.<sup>758</sup> For Lord Nicholls, “‘possessions’ in Article 1 is apt to embrace contractual rights”,<sup>759</sup> and the provisions of the [1974 Act](#) which denied any rights of enforcement of the contract to the creditor would engage art.1 as they are:

“... more readily and appropriately to be characterised as a statutory deprivation of the lender’s rights of property in the broadest sense of that expression than as a mere delimitation of the extent of the rights granted by a transaction.”<sup>760</sup>

- [110] Lord Hobhouse of Woodborough agreed that art.1 could be engaged, but on the narrower ground that the [1974 Act](#) was able to operate so as to deprive the creditor of its special title to possession of the security under a contract of pledge; conversely, if a creditor had not taken possession of any security, art.1 would not be engaged as the creditor would be left merely with “the purported enforcement of a claimed contractual right which the lenders had never in truth validly acquired”.<sup>761</sup> By contrast, Lords Hope and Scott agreed that art.1 would not be engaged on the facts before them: art.1 of the First Protocol is directed to interference with existing possessions or property rights, whereas the creditor never had any rights of enforcement or possession against the borrower owing to the application of the provisions of the [1974 Act](#).<sup>762</sup> In the words of Lord Hope, art.1:

“... does not confer a right of property as such nor does it guarantee the content of any rights of property. What it does is to guarantee the peaceful enjoyment of the possessions that a person already owns ... [I]t is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into.”<sup>763</sup>

According to Lord Scott:

“No authority has been cited ... for the proposition that a statutory provision which prevents a transaction from having the quality of legal enforceability can be regarded as an interference for article 1 purposes with the possessions of the party who would have benefited if the transaction had had that quality.”<sup>764</sup>

Implicit in Lord Nicholls’ view is an understanding that even in a context such as consumer credit where statute defines the circumstances in which the parties’ rights arise, it is the parties’ agreement (possibly as recognised by the common law) which forms the source of their contractual rights, which are then eligible for protection under art.1. For Lords Hope and Scott, it is the statute itself which defines the circumstances when the parties’ agreement will or will not give rise to rights in them: the law creates the parties’ rights, it does not curtail pre-existing rights.<sup>765</sup>

- |11 It is submitted that whatever the general theoretical validity of either view of the nature and origin of contractual rights in the modern law, the approach of Lord Nicholls is to be preferred for the purposes of art.1 of the First Protocol.<sup>766</sup> For the overall function of art.1 is to prevent states from depriving persons of their possessions illegitimately and for this purpose legislation which denies a right which would otherwise arise (i.e. under the general law) can be seen to have such a depriving effect. This approach may be supported by reference to the case law of the European Court of Human Rights<sup>767</sup> and especially its later decision in *Stretch v UK*<sup>768</sup> in which it held that art.1 of the First Protocol was engaged where a person’s option to renew a lease was subsequently found to be void as ultra vires the lessor public authority’s powers, the Court observing that:

“... according to the established case law of the Convention organs, ‘possessions’ can be ‘existing possessions’ or assets, including claims, in respect of which the applicant can argue that he has at least a ‘legitimate expectation’ of obtaining effect enjoyment of a property right.”<sup>769</sup>

This decision is therefore incompatible with an approach to art.1 which views the existence of a property right as contingent on its recognition by the national law of contract unmitigated by the influence of Convention rights.

## Subsequent cases

- |12 In subsequent English decisions, Lord Nicholls’ distinction in *Wilson v First County Trust Ltd (No.2)* between an Act’s deprivation of a person’s contractual rights and its mere delimitation of them has sometimes been taken up and applied.<sup>770</sup> So, for example, in *Pennycook v Shaws (EAL) Ltd*,<sup>771</sup> the Court of Appeal considered whether a tenant’s statutory right to renew a business

tenancy conferred by Pt II of the Landlord and Tenant Act 1954 is a “possession” for the purposes of art.1. Arden LJ (with whom Thorpe LJ and Sir Martin Nourse agreed) found “the most detailed guidance” as to how to approach this question in Lord Nicholls’s speech in the *Wilson* case,<sup>772</sup> with the result that the court needed to look:

“... at the substance of the claimed right to see whether the bar to the exercise of the tenant’s right is a delimitation of the right or whether it represents a deprivation of right.”<sup>773</sup>

On the facts before her, Arden LJ held that the 1954 Act deprived the tenant of a right.<sup>774</sup> By the time of *PW & Co Ltd v Milton Gate Investments Ltd*,<sup>775</sup> however, Neuberger J was able to take into account the decision of the European Court of Human Rights in *Stretch v UK*<sup>776</sup> in deciding whether art.1 was engaged. Neuberger J there accepted that the Human Rights Act required ss.139 or 141 of the Law of Property Act 1925 to be interpreted so as to prevent a head-landlord from being deprived of rent under the covenants of sub-tenancies which had not determined by the exercise of a “break clause” by the head-tenant. In these circumstances, art.1 of the First Protocol to the European Convention was engaged: if the underleases would survive the determination of the head-lease without the tenant’s covenants being enforceable, the head-landlord would be kept out of the premises in question for the remainder of the sub-leases without being able to recover any rent whatever: “[t]hat is scarcely ‘peaceful enjoyment of [its] possessions’.”<sup>777</sup> In *Horsham Group Properties Ltd v Clark*<sup>778</sup> the questions arose whether the exercise of the right by a mortgagee to appoint a receiver under s.101(1)(i) of the Law of Property 1925 and to sell the property under a term of the mortgage deed engaged art.1 of the First Protocol of the Convention by reason of its effect on the mortgagor’s interest and, if it did, whether it infringed that article. Briggs J held that a mortgagor’s equity of redemption was a “possession” for the purposes of art.1 First Protocol,<sup>779</sup> relying on *Pennycook v Shaws (EAL) Ltd*.<sup>780</sup> However, he further held that the particular mortgagor before him “lost her equity of redemption by virtue of the exercise of powers conferred purely by contract” rather than as a result of the legislative powers, and therefore “without any state intervention at all” so as to engage art.1 First Protocol.<sup>781</sup> Moreover, he preferred to rest his decision on the broader ground that “section 101 serves to implement rather than override the private bargain between mortgagor and mortgagee”, being “in substance a form of conveyancing shorthand designed to implement the ordinary expectations of mortgagors and mortgagees while reducing the costs and delays of conveyancing”.<sup>782</sup> Section 101 was subject to contrary intention and was “as far removed from the concept of state intervention into private rights through overriding legislation, which lies behind article 1, as it is possible for legislation to get”.<sup>783</sup> As a result, the exercise of the statutory power under s.101 did not constitute a deprivation of possessions within the meaning of art.1 First Protocol so as to engage that provision.<sup>784</sup> On the other hand, in *K Ltd v National Westminster Bank Plc*<sup>785</sup> Longmore LJ (with whom Ward and Laws LJJ agreed) doubted whether the exception creation by ss.328, 333, 335 and 338 of the Proceeds of Crime Act 2002 to a bank’s customer’s right to have the contract of mandate performed is “the

kind of possession which art.1 [of the First Protocol] contemplates will be peaceably enjoyed” as the legislation did not cancel the debt but merely deferred performance of the contract for a number of days during which the bank’s suspicion of money-laundering was investigated.<sup>786</sup>

- <sup>113</sup> By contrast, in *Salat v Barutis*<sup>787</sup> the Court of Appeal saw the majority opinion in *Wilson v First County Trust Ltd (No.2)*. as being found in the speeches of Lords Hobhouse, Scott and Hope rather than Lords Nicolls and Roger<sup>788</sup> and held that *Wilson* is therefore authority for the proposition that there is no violation of a contracting party’s rights under art.1 of the First Protocol to the Convention where that party did not acquire any effective rights against the other contracting party as a result of the application of UK statute.<sup>789</sup> The Court of Appeal applied this proposition to a case where a contracting party’s rights under a contract of credit hire agreement were unenforceable against the consumer hirer by operation of the *Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008*.<sup>790</sup> In the Court of Appeal’s view, this position was not affected by the decision of the European Court of Human Rights in *Stretch v UK*<sup>791</sup> at least in the context before it, as the credit hire company must be taken to have been aware of the effect of the *2008 Regulations* at the time it entered into the agreement and so could not have had a legitimate expectation of being able to enforce the agreement against the consumer hirer if it did not comply with the relevant regulation.<sup>792</sup>

## The legitimacy, certainty, and proportionality of the legislative interference with a person’s property

- <sup>114</sup> If a court decides that art.1 of the First Protocol is engaged, it must then address the question whether the law’s interference with the right of property is legitimate, sufficiently certain and proportionate.<sup>793</sup> In this respect, in *Wilson v First County Trust Ltd (No.2)*<sup>794</sup> those judges who expressed a view on the matter considered that if the provisions of the *Consumer Credit Act 1974* were properly held to interfere with the creditor’s right of property, then this interference was both “legitimate” and “proportionate” given the importance of the social policy of protection of borrowers which lay behind them.<sup>795</sup> And while Lord Nicholls expressed some hesitation on the issue of certainty, he concluded that he was “not persuaded [that] the degree of uncertainty involved ... [was] unacceptably high”.<sup>796</sup> Therefore, there was no incompatibility between the relevant provisions of the *Consumer Credit Act 1974* and creditors’ Convention rights. Similarly, in *K Ltd v National Westminster Bank Plc*<sup>797</sup> the Court of Appeal held that even if the exception created by the *Proceeds of Crime Act 2002* to a bank’s customer’s right to have the contract of mandate performed attracted the application of art.1, any interference with the customer’s common law rights under the mandate did not impair its right of access to the courts in anything more than a short

suspensory manner and, given the purposes of the [2002 Act](#), did so in pursuance of a legitimate aim in a proportionate manner.<sup>798</sup>

## Examples of other Convention rights

- 115 Examples of the application of [ss.3 and 4 of the 1998 Act](#) may arise in relation to other Convention rights.<sup>799</sup> So, it has been argued that [s.11\(1\)\(a\) of the Landlord and Tenant Act 1985](#) imposing an obligation “to keep in repair the structure” of the dwelling house must be construed by operation of [s.3\(1\) of the 1998 Act](#) so as to give effect to the tenant’s rights under art.8 of the European Convention and thereby must be read as imposing an obligation “to put and keep [the structure] in good habitable repair”.<sup>800</sup> However, this argument was rejected by the Court of Appeal on the basis that this was not a possible reading of the relevant provisions of the [Landlord and Tenant Act 1985](#), given the interpretation to them previously established by the Court of Appeal.<sup>801</sup> It has also been argued that the system of adjudication set up by the [Housing Grants Construction and Regeneration Act 1996 s.108\(2\)](#) is incompatible with art.6 of the European Convention.<sup>802</sup> Furthermore, in *Ghaidan v Godin Mendoza*<sup>803</sup> a majority of the House of Lords relied on [s.3 of the Human Rights Act 1998](#) to “read and give effect” to the provisions of the [Rent Act 1977](#)<sup>804</sup> which grants a statutory tenancy to “[t]he surviving spouse (if any) of the original tenant if residing in the dwelling-house immediately before the death of the original tenant” so as to include homosexual cohabitantes, so as to give effect to their Convention right not to be discriminated against on the ground of sexual orientation in respect of their right to respect for a person’s home.<sup>805</sup>

## Footnotes

- 753 [\[2003\] UKHL 40, \[2003\] 3 W.L.R. 568](#). These observations were obiter given their decision on the non-retroactive impact of [ss.3 and 4 of the 1998 Act](#): see above, paras 3-101—3-102. Lord Rodger expressed no views on these hypothetical issues: [\[2003\] 3 W.L.R. 568](#) at [220].
- 754 [\[2003\] UKHL 40, \[2003\] 3 W.L.R. 568](#) at [33], per Lord Nicholls.
- 755 [\[2003\] 3 W.L.R. 568](#) at [104]–[105] (Lord Hope); [132] (Lord Hobhouse); [165]–[166] (Lord Scott); [215] (Lord Rodger agreeing with Lord Nicholls). This approach was applied in *Winstanley v Sleeman* [\[2013\] EWHC 4792 \(QB\)](#) at [58]–[59] (rule against scrutiny of academic judgments in claims for breach of contract does not bar access to the courts).
- 756 [Consumer Credit Act 1974 ss.65, 106, 113](#) and especially [127\(3\)](#). [Section 127\(3\) of the 1974 Act](#) was repealed by the [Consumer Credit Act 2006 s.15](#): see Vol.II, para.41-095.
- 757 [\[2003\] UKHL 40, \[2003\] 3 W.L.R. 568](#). These observations were obiter given their decision on the non-retroactive impact of [ss.3 and 4 of the 1998 Act](#): see above, para.3-101.

- 758 As has been noted, Lord Rodger of Earlsferry did not decide the point: [2003] 3 W.L.R. 568 at [220].
- 759 [2003] UKHL 40, [2003] 3 W.L.R. 568 at [39]. This view may be supported from the Strasbourg case law, e.g. *Stran Greek Refineries & Stratis Andreadis v Greece* (1995) 19 E.H.R.R. 293 at [60]–[62] (right under arbitration award); *Stretch v UK* (2004) 38 E.H.R.R. 12 especially at [32] (option to renew lease later considered void as ultra vires the public authority lessor's power). For discussion as to which contractual rights can constitute “possessions” for the purposes of art.1 of the First Protocol see *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2009] I.N.L.R. 180 at [30]–[32], [43]–[58] (“touchstone ... is whether the rights and interests can be regarded as constituting ‘assets’”: at [47] per Lewison J); *Breyer Group Plc v Department of Energy and Climate Change* [2015] EWCA Civ 408, [2015] 1 W.L.R. 455 at [22]–[23], [28]–[46] and [49]; and *Solaria Energy UK Ltd v Department for Business Energy and Industrial Strategy* [2020] EWCA Civ 1625, [2021] 1 W.L.R. 2349 at [24]–[41], esp. at [34], [36] and [38] (the starting point is that a signed and part-performed commercial contract is, *prima facie*, a possession; assignability is a factor in considering whether a contract so qualifies but is not a test in itself).
- 760 [2003] 3 W.L.R. 568 at [44].
- 761 [2003] 3 W.L.R. 568 at [137].
- 762 [2003] 3 W.L.R. 568 at [107] (Lord Hope) and [168] (Lord Scott).
- 763 [2003] 3 W.L.R. 568 at [106].
- 764 [2003] 3 W.L.R. 568 at [168].
- 765 While the context of this discussion was the application of s.4 of the 1998 Act to primary legislation, similar questions would arise in relation to any review or development of the common law undertaken by the courts as “public authorities” under s.6 of the 1998 Act. On this see below, para.3-128.
- 766 See further McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification*, 2nd edn (2011), paras 9.17 et seq.; Allen, *Property and the Human Rights Act 1998* (2005), Ch.8.
- 767 See cases cited above, paras 3-109—3-110.
- 768 (2004) 38 E.H.R.R. 12.
- 769 (2004) 38 E.H.R.R. 12 at [32], and see also [34] and [35].
- 770 [2003] UKHL 40, [2004] 1 A.C. 816 at [137].
- 771 [2004] EWCA Civ 100, [2004] Ch. 296 at [30]–[42]. See also *C A Webber (Transport) Ltd v Railtrack Plc* [2003] EWCA Civ 1167, [2004] 1 W.L.R. 320 at [59]–[61]; *Re T & N Ltd* [2005] EWHC 2870 (Ch), [2006] 1 W.L.R. 1728 at [171]; *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 E.H.R.R. 3 at [52].
- 772 [2004] EWCA Civ 100 at [34].
- 773 [2004] EWCA Civ 100 at [35].
- 774 [2004] EWCA Civ 100 at [38].
- 775 [2003] EWHC 1994 (Ch), [2004] Ch. 142.
- 776 (2004) 38 E.H.R.R. 12 especially at [32].
- 777 [2003] EWHC 1994 (Ch) at [126], per Neuberger J.

- 778 [2008] EWHC 2327 (Ch), [2009] 1 W.L.R. 1255.
- 779 [2008] EWHC 2327 (Ch) at [25].
- 780 [2004] EWCA Civ 100, [2004] Ch. 296 at [30]–[42].
- 781 [2008] EWHC 2327 (Ch) at [33] and [38].
- 782 [2008] EWHC 2327 (Ch) at [35].
- 783 [2008] EWHC 2327 (Ch) at [36].
- 784 [2008] EWHC 2327 (Ch) at [40].
- 785 [2006] EWCA Civ 1039, [2007] 1 W.L.R. 311.
- 786 [2006] EWCA Civ 1039 at [25].
- 787 [2013] EWCA Civ 1499, [2013] C.T.L.C. 250.
- 788 [2003] UKHL 40, [2004] 1 A.C. 816 at [107] (Lord Hope); [137] (Lord Hobhouse); [168] (Lord Scott) and cf. [44] (Lord Nicholls). While Lord Rodger agreed with Lord Nicholls as to the application of the Human Rights Act 1998 to the facts of *Wilson* (i.e. to a contract made before the 1998 Act), he did not express a view on the engagement of art.1, First Protocol ECHR to the Consumer Credit Act): [2003] UKHL 40 at [215] and [220]. See above, paras 3-101 and 3-103.
- 789 [2013] EWCA Civ 1499 at [27] (Moore-Bick LJ giving judgment for the court).
- 790 SI 2008/1816; [2013] EWCA Civ 1499 at [27]. The 2008 Regulations were revoked and replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) on which see Vol.II, paras 40-064 et seq.
- 791 (2004) 38 E.H.H.R. 12 discussed above, para.3-111 where it is argued that it supports the view of Lord Nicholls in *Wilson v First County Trust Ltd (No.2)*.
- 792 [2013] EWCA Civ 1499 at [27].
- 793 *Sporrong and Lönnroth v Sweden* (1983) 5 E.H.R.R. 35 at [69]–[73]. See also *Hutten-Czapska v Poland App. No.35014/97* (2006) 42 E.H.R.R. 15 at [151]; *Edwards v Malta App. No.17647/04* at [69]–[71]; *Gauci v Malta App. No.47045/06* (2011) 52 E.H.R.R. 25 at [58] where the ECtHR held that the extent to which a State interferes with an owner of property's freedom of contract relating to the property is relevant to the assessment of its compliance with its duties in respect of the right to property under 1st Protocol art.1.
- 794 [2003] UKHL 40, [2003] 3 W.L.R. 568.
- 795 [2003] UKHL 40, [2003] 3 W.L.R. 568 at [62], [74]–[75] (Lord Nicholls, with whom Lord Hope agreed at [109]); [138] (Lord Hobhouse of Woolborough); [169]–[170] (Lord Scott).
- 796 [2003] UKHL 40 at [77]. See also *Horsham Group Properties Ltd v Clark* [2008] EWHC 2327 (Ch), [2009] 1 W.L.R. 1255 at [44] (on which see above, para.3-112), where it was held that any deprivation of possession constituted by the exercise by a mortgagee of its powers under s.101 of the Law of Property Act after a relevant default by the mortgagor is justified in the public interest, and requires no “case-by-case exercise of a proportionality discretion by the court”.
- 797 [2006] EWCA Civ 1039 [2007] 1 W.L.R. 311.
- 798 [2006] EWCA Civ 1039 at [24].
- 799 On the possible impact of the Human Rights Act on arbitral proceedings see Vol.II, paras 34-015—34-019 referring, inter alia, to *Stretford v Football Association Ltd* [2007] EWCA

*Civ 238, [2007] 2 Lloyd's Rep. 31* (where it was held that an arbitration clause and any arbitration made under it which was subject to the provisions of the Arbitration Act 1996 did not constitute an infringement of a person's rights under art.6 of the European Convention); *Sumukan Ltd v The Commonwealth Secretariat [2007] EWCA Civ 243, [2007] 2 Lloyd's Rep. 87* at [53]–[62] (where it was held that an agreement not to appeal an arbitration award under s.69 of the Arbitration Act 1996 did not constitute an infringement of a person's rights under art.6 of the European Convention).

- 800 *Lee v Leeds City Council [2002] EWCA Civ 6, [2002] 1 W.L.R. 1488* at [56].
- 801 [2002] 1 W.L.R. 1488 at [56]–[59], referring to *Quick v Taff Ely BC [1986] Q.B. 809*. See also *McDonald v McDonald [2016] UKSC 28, [2017] A.C. 273* at [61]–[70], noted below, para.3-135.
- 802 *Austin Hall Building Ltd v Buckland Securities Ltd [2001] B.L.R. 272* at [18]. No determination was made under s.4 of the Act as no notice had been given to the Crown pursuant to s.5 of the Human Rights Act 1998.
- 803 [2004] UKHL 30, [2004] 2 A.C. 557.
- 804 Rent Act 1977 Sch.I paras 2 and 3 (as amended).
- 805 European Convention on Human Rights arts 8 and 14.

## **(ii) - Contracts Made by “Public Authorities”**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 5. - The Human Rights Act 1998 and Contracts**

**(b) - Contracts Made on or after 2 October 2000**

**(ii) - Contracts Made by “Public Authorities”**

### **“Public authorities” within the meaning of s.6 of the 1998 Act**

- <sup>116</sup> An important preliminary question is whether, when or to what extent contracts made (or not made)<sup>806</sup> by public authorities or by other persons attract the application of [s.6 of the 1998 Act](#). According to [s.6\(1\)](#) “[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right”. [Section 6\(3\)](#) provides for this purpose that “public authority includes (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature”; [s.6\(5\)](#) then explains that:

“In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private.”

This provision therefore recognises two categories of person: “core public authorities” (sometimes termed “pure public authorities”), that is, those persons or bodies which are public authorities for all purposes, such as government ministers, local authorities, and the police<sup>807</sup>; and “hybrid” bodies which may act either publicly or privately depending on the nature of the act or omission.  
<sup>808</sup>

- U** As regards “core public authorities”, *all* their “acts” (including apparently their acts in making, performing or breaking their contracts) are subject to the test of illegality found in [s.6](#), however

"private" they may appear.<sup>809</sup> As regards "hybrid" bodies, it is a much more difficult question whether their conclusion of a contract constitutes an act "the nature of [which] is private", rather than public.

## "Hybrid bodies" and "functions of a public nature"

- <sup>117</sup> The way in which s.6 applies to "hybrid bodies" has arisen in a series of important decisions.

<sup>810</sup>

 In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*<sup>811</sup> the House of Lords considered that there is no single test to determine whether or not a particular function exercised by a "hybrid body" is "public" within the meaning of s.6(3)(b), though factors to be taken into account include:

"... the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."<sup>812</sup>

In this respect, although the domestic case law on judicial review may provide some assistance as to what does and does not constitute a "function of a public nature" within the meaning of s.6(3)(b), this case law must be examined in the light of the jurisprudence of the European Court of Human Rights as to those bodies which engage the responsibility of the state for the purposes of the Convention.<sup>813</sup>

- <sup>118</sup> Subsequently in *R. (West) v Lloyd's of London*<sup>814</sup> the Court of Appeal held that decisions by Lloyd's of London under powers contained in its byelaws to approve minority buy-outs of four syndicates of which the applicant was a member (and which he complained were prejudicial to his rights of due process and of possession of this property under art.6 of the Convention and under art.1 of its First Protocol) were not subject to challenge by way of judicial review, whether by virtue of s.6 of the 1998 Act or more generally. In the view of the Court of Appeal, the relationship between Lloyd's and its members was entirely voluntary and contractual and their rights to participate in a syndicate governed exclusively by the terms of their contracts with their managing agents.<sup>815</sup> Applying the approach of the House of Lords in *Aston Cantlow*, the Court of Appeal held that for the purposes of s.6 of the 1998 Act the objectives of Lloyd's were "wholly commercial" and "not governmental even in the broad sense of that expression": it was rather the Financial Services Authority acting under the Financial Services and Markets Act 2000 "which is the governmental organisation which will be answerable to the Strasbourg court".<sup>816</sup>

[19]

D Thirdly, in the important and controversial decision in *YL v Birmingham City Council*<sup>817</sup> a majority of the House of Lords held that a commercial company providing residential and nursing care to a person under a contract was not acting as someone "certain of whose functions are functions of a public nature" within the meaning of s.6(3)(b) of the 1998 Act, even though in so doing the company acted under a contract with a local authority which concluded it in furtherance of its statutory duties to make arrangements for providing residential accommodation for persons in need of care and attention not otherwise available to them. The grounds of their lordships' decisions were complex, but of key significance for the majority were the nature of the body providing the care ("a private, profit-earning company"<sup>818</sup>); the nature of the obligation which the person in receipt of nursing care was seeking to enforce, namely "a private law contract"<sup>819</sup>; and, more widely, a concern for the widespread effect of the opposite decision, which was seen as requiring any commercial company (and its employees) which carried on an operation of a similar nature to an operation carried on by a local authority under statutory powers also to be covered by the 1998 Act.<sup>820</sup> For the minority (Baroness Hale of Richmond, with whom Lord Bingham of Cornhill agreed) the meaning of s.6 had to be seen in the context of the case law of the European Court of Human Rights which has sometimes placed responsibility on a state for the acts of a private body, notably imposing positive obligations on it to prevent violations of an individual's human rights.<sup>821</sup> So, for the purposes of s.6 of the 1998 Act in Baroness Hale's view:

"The contrast is between what is 'public' in the sense of being done for or by or on behalf of people as a whole and what is 'private' in the sense of being done for one's own purposes."<sup>822</sup>

and:

"... while there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest."<sup>823</sup>

This led the minority to hold that the company undertook functions "of a public nature" in providing residential care to persons in need under a contract with the local authority which discharged thereby its statutory duty to make arrangements for this purpose.<sup>824</sup> The minority's position has been cogently supported by Professor Craig on the basis that:

"If it is decided that a core public authority is performing a public function pursuant to a statutory duty or power cast upon it, then that should be decisive"

825



of the question of its performing a public function and so there should be no assessment of factors (as undertaken by the majority):

“... the nature of the function does not change if the task is contracted out to a body that is nominally private. ... It cannot be correct as a matter of principle for the availability of Convention rights to be dependent upon the fortuitous incidence as to how the core public authority chooses to discharge its functions.”<sup>826</sup>

A bill was proposed which would have reflected this position, but it did not come into law.<sup>827</sup>

A rather more liberal approach to “public act” was taken by the Court of Appeal in *R. (Weaver) v London and Quadrant Housing Trust*.<sup>828</sup> There, the Court of Appeal considered whether the termination of a tenancy by a registered social landlord constituted a “private act” within the meaning of s.6(5) of the Human Rights Act 1998, it having been conceded that some of the landlord’s functions were public functions. A majority of the Court of Appeal (Lord Collins of Mapesbury, Elias LJ; Rix LJ dissenting) held that it was necessary to focus on the context in which the act occurs and, for this purpose, both the course and nature of the activities need to be considered when deciding whether or not an act is a private act within s.6(5), as they would in determining whether or not a function is public. In the context, it was held that there were a number of features which brought the act of terminating a social tenancy within the purview of the Human Rights Act as a public act.<sup>829</sup> According to Elias L.J (with whom Lord Collins of Mapesbury agreed)

“... if an act were necessarily a private act because it involved the exercise of rights conferred by private law [including contract], that would significantly undermine the protection which Parliament intended to afford to potential victims of hybrid authorities.”<sup>830</sup>

## Unlawful refusal to contract by public authority

<sup>120</sup> Section 6(6) of the 1998 Act provides that “[a]n act’ includes a failure to act”. In *R. (Haggerty) v St. Helen’s BC*<sup>831</sup> Silber J was prepared to assume that a local authority’s decision not to enter a new contract with a private sector provider for the provision of places in a nursing home in

fulfilment of a statutory duty,<sup>832</sup> did fall within s.6 so as to require its effects to be assessed as to their compatibility with the Convention rights of the existing residents of the home (who had to move to other accommodation provided by the local authority as a result of its decision not to enter the contract).<sup>833</sup> However, on the facts the learned judge held that this act of the local authority did not infringe any of their Convention rights.

## Unlawful conclusion of contract

- [21] Where a "public authority",<sup>834</sup> concludes a contract after the coming into force of the operative provisions of the [1998 Act](#), then the "act" of so doing would engage [s.6 of the 1998 Act](#). Where this "act" is itself incompatible with a Convention right (either of the other party or of a third party) then it is rendered "unlawful". So, for example, it has been said that a local authority must bear in mind the Convention rights of the residents of accommodation to be provided in performance of its functions under the [National Assistance Act 1948 s.21](#) in making their contracts with private sector providers.<sup>835</sup> Similarly, where a "public authority" concludes a contract of employment, it should bear in mind its employees' Convention rights, notably, to freedom of expression and privacy.<sup>836</sup>

## Unlawful manner of performance of contract

- [22] [Section 6 of the 1998 Act](#) may also affect the way in which a "public authority" ought to act in performance of, or in relation to a situation created by, a contract. An example may be found in the actions of a public employer, which must not act inconsistently with the Convention rights of its employees, for instance, as regards the secret monitoring of their telephone conversations.<sup>837</sup> An important series of examples can be found in the context of public sector housing.<sup>838</sup> In *Lee v Leeds City Council*,<sup>839</sup> the Court of Appeal proceeded on the basis that a local authority acted as a "public authority" in relation to the provision of public sector housing and that this therefore imposed on it a statutory duty to take steps to ensure that the condition of the houses which they provided was such that their tenants' rights to respect of their private and family life under art.8 of the European Convention were not infringed.<sup>840</sup> However, according to the Court of Appeal:

"The steps which a public authority will be required to take in order to ensure compliance with Article 8 ... must be determined, in each case, by having due regard to the needs and resources of the community and of individuals, [having regard to the fact that] [t]he allocation of resources to meet the needs of social housing is very much a matter for democratically determined priorities."<sup>841</sup>

In relation to the cases before it, the Court of Appeal held that no breach of the statutory duty which it had identified had been established, in part owing to the proceedings being by way of preliminary issues without any determination of the relevant facts.<sup>842</sup> In two important decisions, the Supreme Court considered the implications of more recent case law of the European Court of Human Rights on the protection of a person's right to respect of his home under art.8 of the Convention in relation to claims for possession of a person's home by a public authority landlord.<sup>843</sup> In *Manchester City Council v Pinnock* the Supreme Court held that this case-law made clear that "where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact"<sup>844</sup> and that this "unambiguous and consistent approach"<sup>845</sup> in the European Court of Human Rights should be followed by the Supreme Court, despite three previous decisions of the House of Lords to the contrary.<sup>846</sup> Where, therefore, a local authority which had obtained a court order to "demote" a secured tenant on the ground that he or persons living with him were engaged in housing-related anti-social conduct or conduct which used the premises for unlawful purposes, then sought a court order for possession of the premises under s.143D(1) of the Housing Act 1996, the provisions of the Act which required the court to grant the order subject to certain procedural requirements<sup>847</sup> could and should be interpreted as requiring the court to consider whether the local authority landlord had considered its tenant's art.8 rights.<sup>848</sup> The Supreme Court considered that its decision would have implications beyond the special context of claims for possession against "demoted tenants", although it noted that, as regards public sector "secured tenants",<sup>849</sup> there would be "no difficulties of principle or practice" since "no order for possession can be made against a secure tenant unless, inter alia, it is reasonable to make the order": given that<sup>850</sup>

"... reasonableness involves the trial judge 'tak[ing] into account all relevant circumstances ... in a broad common-sense way' ... [i]t therefore seems highly unlikely, as a practical matter, that it could be reasonable for a court to make an order for possession in circumstances in which it would be disproportionate to do so under art.8."<sup>851</sup>

In *Hounslow LBC v Powell, Leeds CC v Hall, Birmingham CC v Frisby* the Supreme Court applied its earlier approach to court orders for possession in favour of a public authority landowner and art.8 rights in *Manchester City Council v Pinnock* to the position of residential occupiers of property granted a licence under the homelessness regime in Pt VII of the Housing Act 1985 and to tenants of residential properties under the regime for "introductory tenancies" in Ch.1 of Pt V of the Housing Act 1996.<sup>852</sup> In the view of the Supreme Court, in all cases where a local authority seeks possession in respect of a property that constitutes a person's home for the purposes of art.8, the court must have the power to consider whether the order is necessary in a democratic society, meaning that it must be proportionate to a legitimate aim that the local authority is seeking to achieve.<sup>853</sup> However, in those cases where domestic law does not subject the making

of a possession order to a requirement of reasonableness, as a general rule the court will have to consider whether the making of such an order is proportionate only if the issue has been raised by the occupier<sup>854</sup> and if it has crossed the high threshold of being seriously arguable<sup>855</sup>:

“... [i]n seeking an order for possession, the local authority is not required to advance a positive case that this will accord with the requirements of article 8(2). This will be presumed by reason of the authority’s ownership of the property and duties in relation to the management of the housing stock.”<sup>856</sup>

- <sup>123</sup> However, in *Sims v Dacorum BC*<sup>857</sup> the Supreme Court considered how this law affected the position of a tenant in a public sector joint tenancy where the other tenant has served a notice to quit. At common law, in the absence of a contractual term to the contrary, such a tenancy will be validly determined by service on the landlord of a notice to quit by only one of the joint tenants, thereby bringing the tenancy to the end against the wishes or even without the knowledge of his or her co-tenants.<sup>858</sup> In *Sims* this rule was reflected in an express term of the lease taken, to the effect that the tenancy would be lost if a notice to quit were served by his joint tenant, though the lease also provided that the local authority landlord would consider whether to let him remain or to find other accommodation for him. The claimant tenant argued that the loss of his tenancy by the notice to quit by his joint tenant (his then wife) breached his Convention rights under art.8 or under art.1 of the First Protocol, but this was firmly rejected by the Supreme Court. First, as regards his right to property, in the view of the Supreme Court:

“... the property which [the claimant] owned and of which he complains to have been wrongly deprived, whether one characterises it as the tenancy or an interest in the tenancy, was acquired by him on terms that (i) it would be lost if a notice to quit was served by [the other joint tenant], and (ii) if that occurred, [his landlord] could decide to permit him to stay in the house or find other accommodation for him.”<sup>859</sup>

The claimant’s property was therefore lost as a result of his joint tenant serving a notice to quit, and by the fact that the landlord considered whether to let him remain and decided not to let him do so. Given that he therefore was deprived of his interest:

“... in a way, which was specifically provided for in the agreement which created it, his A1P1 claim is plainly very hard to sustain.”<sup>860</sup>

Moreover, the contract term under which the tenancy was determined was not unreasonable, as it reflected the common law rule (which was not itself challenged) and someone’s interest has to suffer when one of two joint tenants serves a notice to quit; nor was the landlord’s decision against him staying in the property unreasonable or disproportionate.<sup>861</sup> Secondly, as regards his

rights under art.8, while the claimant was entitled to raise the question of the proportionality of the landlord’s pursuit of its claim for possession in the light of its earlier case-law on art.8, this would not help the claimant as the landlord had considered carefully this decision in a lawful and proportionate manner.<sup>862</sup> Moreover, the service of the notice to quit did not in itself violate the claimant’s art.8 rights as full respect was given to those rights by the fact that his tenancy had been determined in accordance with its contractual terms to which he had agreed, he was to be considered for rehousing, and he could be evicted only by a court order in accordance with domestic law and with an opportunity to argue that the eviction was disproportionate.<sup>863</sup>

## Effect on the contract

- <sup>124</sup> Where [s.6 of the 1998 Act](#) renders the making or performance of a contract unlawful as incompatible with Convention rights it creates a new head of contractual illegality. In the absence of special provision on this issue in the [1998 Act](#), the contractual and restitutive consequences for the parties to the contract of this “unlawfulness” fall to be governed by the common law’s approach to illegality exposed and analysed in [Ch.18](#). In this respect, difficult questions may arise as to whether the “unlawful act” of the public authority renders the whole contract illegal (and with what effects for its parties) or whether it merely renders a term or terms illegal by application of the doctrine of severance.<sup>864</sup>

## Construction of contracts made by a “public authority”

- <sup>125</sup> In *Biggin Hill Airport Ltd v Bromley LBC*<sup>865</sup> it was held that the [1998 Act](#) did not require a court as itself a public authority<sup>866</sup> to interpret a contract made *before* the coming into effect of the same Act in such a way as to be compatible with the Convention rights of third parties to the contract.<sup>867</sup> On the other hand, where a contract is made after the coming into force of the [1998 Act](#) by a “public authority”<sup>868</sup> and another person (whether or not a public authority), it may be argued that there is a presumption that such a public authority intends in making and performing the contract to avoid acting unlawfully under [s.6 of the 1998 Act](#), without any need for reliance on the position of courts as themselves “public authorities”. For such a presumption could be supported by reference to the maxim *ut res magis valeat quam pereat*, since a construction of compatibility with Convention rights in these circumstances would avoid the threat of contractual illegality.<sup>869</sup> Moreover, as regards “terms implied in law” it may be argued that a court should imply terms in a contract so as to allow a public authority to perform its duty to act consistently with Convention rights, as “necessary” for the efficacy of the particular type of contract in question (viz a contract

made by a public authority whose performance would have otherwise potentially prejudicial effect on a person’s Convention rights).<sup>870</sup>

## Footnotes

806 See below, para.3-120.

807 For the HL in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 A.C. 546* at [6]–[7], [52], [88], [171] the purpose of s.6(1) is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall be subject to a domestic law obligation not to act incompatibly with Convention rights and the phrase “a public authority” for the purpose of s.6(1) is therefore “essentially a reference to a body whose nature is governmental in the broad sense of the expression”.

808 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 A.C. 546* at [8]–[11], [35], [85]. Craig, Administrative Law, 9th edn (2021), paras 20-023 et seq. (who notes that this categorisation reflects the parliamentary debates of the Human Rights Act and accords with the approach adopted by the European Court of Human Rights).

809 *YL v Birmingham City Council [2007] UKHL 27, [2007] 3 W.L.R. 112* at [131] (Lord Neuberger).

810 See further HL and HC Joint Committee on Human Rights, The Meaning of Public Authority under the Human Rights Act 2006–2007 (2007) (published before the decision in *YL v Birmingham City Council [2007] UKHL 27, [2007] 3 W.L.R. 112*); Craig, Administrative Law, 9th edn (2021), paras 20-023—20-032.

811 [2003] UKHL 37, [2004] 1 A.C. 546.

812 [2003] UKHL 37 at [12]. The approach taken by the HL was applied in *TH v Chapter of Worcester Cathedral [2016] EWHC 1117 (Admin)* (decision by the chapter of a cathedral affecting the claimant’s ability to perform his hobby of bell ringing was held not to be an act of a “hybrid” public authority within s.6(3) of the Human Rights Act 1998).

813 [2003] UKHL 37 at [52].

814 [2004] EWCA Civ 506, [2004] 3 All E.R. 251.

815 [2004] EWCA Civ 506 at [8]–[9].

816 [2004] EWCA Civ 506, at [38], per Brooke LJ.

817 [2007] UKHL 27, [2007] 3 W.L.R. 112 noted by Landu (2007) P.L. 630.

818 [2007] UKHL 27, per Lord Mance at [115] with whom Lord Neuberger of Abbotsbury agreed at [126].

819 [2007] UKHL 27, per Lord Scott of Foscote at [34], although cf. Lord Mance at [117]–[118] and Lord Neuberger at [151] who saw the absence of any relevant difference between a resident staying privately under a contract with the company and one staying under an

arrangement between the company and a local authority as a reason for treating both as unable to rely on Convention rights against the company.

- 820 [2007] *UKHL* 27 at [30] and [82] (Lord Mance using the example of private contractors cleaning the windows of premises let to council tenants).
- 821 [2007] *UKHL* 27 at [56]–[57], per Baroness Hale of Richmond.
- 822 [2007] *UKHL* 27 at [62], per Baroness Hale of Richmond.
- 823 [2007] *UKHL* 27 at [66] and see also [7]–[12] (Lord Bingham of Cornhill).
- 824 A private Members' Bill was introduced to Parliament, the Human Rights Act 1998 (Meaning of Public Authority) Bill 2007 cl.1 of which provided that: “[F]or the purposes of section 6(3)(b) of the Human Rights Act 1998 (c.42), a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function.” The Bill was not, however, passed into law.
- 825 Craig, Administrative Law, 9th edn (2021), para.20-031.
- 826 Craig at para.20-031 (with other arguments to the same effect).
- 827 Craig at para.20-032 noting the Human Rights Act 1998 (Meaning of Public Authority) Bill 2007.
- 828 [2009] *EWCA Civ* 587, [2010] 1 *W.L.R.* 363. The decision was applied in *R. (on the application McIntyre) v Gentoo Group Ltd* [2010] *EWHC* 5 (*Admin*), [2010] 2 *P. & C.R. DG6* (where, however, judicial review was refused partly on the basis of the existence of other remedies open to the claimants). The decision in *Weaver* was distinguished by *Southward Housing Co-operative Ltd v Walker* [2015] *EWHC* 1615 (*Ch*) at [220]–[225] (fully mutual housing co-operative not a public authority or acting as such for the purposes of s.6 of the 1998 Act).
- 829 [2009] *EWCA Civ* 587 at [66]–[82].
- 830 [2009] *EWCA Civ* 587 at [77], per Elias LJ with whom Lord Collins of Mapesbury agreed (especially at [100]–[101]).
- 831 [2003] *EWHC* 803 (*Admin*), The Times, 30 April 2003.
- 832 National Assistance Act 1948 s.21.
- 833 [2003] *EWHC* 803 (*Admin*) at [25]–[26].
- 834 Above, paras 3-116—3-119.
- 835 *R. (Heather) v Leonard Cheshire Foundation* [2002] *EWCA Civ* 366, [2002] *H.R.L.R.* 30 at [34]. cf. *YL v Birmingham City Council* [2007] *UKHL* 27, [2007] 3 *W.L.R.* 112 in relation to the position of the private sector providers themselves: above, para.3-119.
- 836 See further *Morris* (1998) *I.L.J.* 293 and *Palmer* [2000] *C.L.J.* 168.
- 837 *Halford v UK* (1997) 24 *E.H.R.R.* 523; *Copland v UK* (2007) 45 *E.H.R.R.* 37.
- 838 cf. below, para.3-135 on the position of private sector tenancies.
- 839 [2002] *EWCA Civ* 6, [2002] 1 *W.L.R.* 1488 at [26].
- 840 [2002] 1 *W.L.R.* 1488 at [48].
- 841 [2002] 1 *W.L.R.* 1488 at [49], per Chadwick LJ.
- 842 [2002] 1 *W.L.R.* 1488 at [51].

- 843 *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 3 W.L.R. 1441 at [30] et seq. (Lord Neuberger, to whose judgment all seven members of the Court contributed). The relevant Strasbourg Court’s jurisprudence is: *Connors v UK* [2004] ECHR 66746/01; *Blečić Croatia* [2004] ECHR 59532/00; *McCann v UK* [2008] ECHR 19009/04; *Ćosić v Croatia* [2009] ECHR 28261/06; *Zehentner v Austria* [2009] ECHR 20082/02; *Paulić v Croatia* [2009] ECHR 3572/06; *Kay v UK* [2010] ECHR 37341/06.
- 844 [2010] UKSC 45 at [49].
- 845 [2010] UKSC 45 at [46].
- 846 *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 A.C. 983; *Lambeth LBC v Kay, Leeds City Council v Price* [2006] UKHL 10, [2006] 2 A.C. 983; *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] A.C. 367.
- 847 Housing Act 1996 s.143D(2).
- 848 [2010] UKSC 45 at [79].
- 849 The Supreme Court explicitly stated that nothing they said was “intended to bear on cases where the person seeking the order for possession is a private landowner”: [2010] UKSC 45 at [50]. On this, see below, para.3-135 and *McDonald v McDonald* [2016] UKSC 28, [2017] A.C. 273.
- 850 [2010] UKSC 45 at [55]; Housing Act 1985 s.84(2)(a).
- 851 [2010] UKSC 45 at [56], quoting Lord Greene MR in *Cumming v Danson* [1942] 2 All E.R. 653 at 655.
- 852 [2011] UKSC 8, [2011] 2 A.C. 186.
- 853 [2011] UKSC 8 at [2]–[3] (Lord Hope of Craighead DP); [73]–[75] (Lord Phillips P with whom Lord Rodger, Lord Walker, Lady Hale, Lord Brown and Lord Collins agreed).
- 854 *Manchester City Council v Pinnock* [2010] UKSC 45 at [40] citing *Paulić v Croatia* [2009] ECHR 3572/06 at [43] at [63].
- 855 [2011] UKSC 8 at [33], [34] and [44]–[45] (Lord Hope of Craighead DP).
- 856 [2011] UKSC 8 at [88], per Lord Phillips of Worth Matravers PSC. *Manchester CC v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell* [2011] UKSC 8 were applied by the CA in *Thurrock BC v West* [2012] EWCA Civ 1435, [2013] H.L.R. 5 to the context of persons living in a house the subject of a public sector secured tenancy but who were not entitled to become its tenants as survivors of deceased tenants under the Housing Act 1985 ss.87–90. See also *Fareham BC v Millar* [2013] EWCA Civ 159, [2013] H.L.R. 22 and *Canal & River Trust v Jones* [2017] EWCA Civ 135, [2018] Q.B. 305 (termination under statutory power by canal and river authority of license of owner of boat used as home).
- 857 [2014] UKSC 63, [2014] 3 W.L.R. 1600.
- 858 *Hammersmith and Fulham LBC v Monk* [1992] 1 A.C. 478; [2014] UKSC 63 at [2].
- 859 [2014] UKSC 63 at [15].
- 860 [2014] UKSC 63 at [15].
- 861 [2014] UKSC 63 at [16]–[18].
- 862 [2014] UKSC 63 at [21] referring to *Manchester CC v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell* [2011] UKSC 8.
- 863 [2014] UKSC 63 at [23].

- 864 See below, Ch.18 and especially paras 18-252 et seq.
- 865 (2001) 98(3) L.S.G. 42, *The Times*, 9 January 2001 at [171]; reversed on other grounds [2001] EWCA Civ 1089, *The Times*, 13 August 2001, (2001) 98(33) L.S.G. 30.
- 866 Human Rights Act 1998 s.6(3)(a) and see below, para.3-126.
- 867 See above, para.3-107.
- 868 See above, paras 3-116—3-119.
- 869 On the maxim see below para.15-089.
- 870 cf. *Lee v Leeds City Council* [2002] EWCA Civ 6, [2002] 1 W.L.R. 1488 at [62]–[63] (no implied term in public sector residential tenancy inconsistent with limited express terms). On the general law as to the implication of terms, see below, Ch.16.

## **(iii) - The Duty of Courts as “Public Authorities” in Relation to Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 1 - Introduction**

**Chapter 3 - Contract Law and Other Legal Categories**

**Section 5. - The Human Rights Act 1998 and Contracts**

**(b) - Contracts Made on or after 2 October 2000**

**(iii) - The Duty of Courts as “Public Authorities” in Relation to Contracts**

### **Introduction**

- <sup>126</sup> The way in which the terms of [s.6 of the 1998 Act](#) are drafted demonstrate that actions by public authorities are the primary focus of its protection of Convention rights. However, “courts and tribunals” are specifically included as “public authorities” for these purposes<sup>871</sup> and as a result a number of questions arise as to how their duty as “public authorities” may affect their functions in relation to disputes concerning contracts where neither party is itself a “public authority”.<sup>872</sup> A very clear application of this duty is found in relation to issues arising from the courts’ supervision and management of the civil process, applicable to proceedings arising from contracts as to other civil proceedings. However, other questions arising from the application of [s.6](#) in this way are less straightforward.

### **The exercise of judicial discretions**

- <sup>127</sup> Where the law in certain circumstances grants a true discretion to a court then its exercise of that discretion can be seen as an “act” so as to engage [s.6 of the 1998 Act](#), with the result that the court must exercise the discretion in a way which is compatible with Convention rights. Both statute and common law confer discretions on courts in a number of situations affecting the relationship

between parties to a contract. Examples of such statutory discretions may be found in the power to award damages in lieu of rescission for misrepresentation<sup>873</sup> or the determination of the “just sum” for the purposes of relief on frustration.<sup>874</sup> Rather more likely to involve the consideration of Convention rights, though, are the discretions enjoyed by courts in relation to the equitable remedies of specific performance and injunction.<sup>875</sup>

## The development of the common law

- D** 128 The question has arisen whether the courts as “public authorities” have a duty to protect Convention rights in their work in the development of the substantive common law as between two persons neither of whom are themselves “public authorities” within the meaning of the 1998 Act.<sup>876</sup> This “highly controversial topic” is often referred to as the possible “indirect horizontal effect” of s.6 of the 1998 Act.

877

**U** An important context in which this question has arisen has been the development of the law of breach of confidence so as to reflect the Convention rights to a private life and to freedom of expression, this having proved possible owing to the relative flexibility of the established law of breach of confidence.<sup>878</sup> It remains to be seen how far the courts will be willing to mould existing common law rules or principles or, more radically, to create entirely new legal remedies so as to give effect to Convention rights.<sup>879</sup> In the context of the law of contract, the general question is particularly likely to arise in the following contexts.<sup>880</sup>

## The existence of an intention to create legal relations

- D** 129 In *President of the Methodist Conference v Preston (formerly Moore)*, the Court of Appeal considered that, at common law, ministers of religion are appointed on a basis which does not give rise to a rebuttable presumption that there is no intention to create legal relations and it therefore held that, under the general law, a Methodist minister acted under a contract of employment with the President of the Methodist Conference so as to gain the benefit of the law of unfair dismissal, a decision reversed on appeal to the Supreme Court.<sup>881</sup> However, the Court of Appeal then considered how ECHR’s art.9 provision on “freedom of thought, conscience and religion” could affect its view on the existence of such a contract.<sup>882</sup> The Court concluded that art.9’s role here is a modest one, approving a dictum of Arden LJ in *New Testament Church of God v Stewart* according to whom:

“... the fact that in an employment dispute one party to the litigation is a religious body or that the other party is a minister of religion does not itself engage article 9. There must be religious beliefs that are contrary to or inconsistent with the implications of the contract or a contract of employment. It follows that the implication of a contract of employment is not automatically an interference with religious beliefs.”<sup>883</sup>

In the view of the Court of Appeal in *Preston*, the dispute between the parties as to whether a Methodist minister worked for the President of the Methodist Conference under a contract of employment did not include a religious doctrinal element so as to engage art.9, nor would the court’s finding that such a contract existed interfere with the right of Methodists to manifest their religious belief.<sup>884</sup>

## Implied contracts

- [30] In *Smith v Carillion*<sup>885</sup> the Employment Appeal Tribunal considered the question whether a court should imply a contract so as to give effect to Convention rights. There the question arose as to whether the relationship between an agency worker and the end-user of his services was based on an implied contract and, in particular, a contract under which he worked as a “worker”. The Employment Appeal Tribunal held that, according to “generally applicable contractual principles”, the reality of the arrangements before it did not attract the implication of a contract between the agency worker and the end-user.<sup>886</sup> It rejected the argument that the **Human Rights Act 1998** required it to apply the common law as to the existence of a contract compatibly with Convention rights. In its view:

“HRA and Convention rights do not require or permit the implication of a contract of employment between the agency worker and the end-user in circumstances in which domestic law would not ... [T]he doctrine of necessity in implying contracts applies to all contracts not just to agency contracts. Applying the common law rule that a contract will only be implied between two parties where the relevant facts are capable of interpretation both for and against such a conclusion if such a result is necessary is not demonstrably incompatible with a Convention right. Further to disapply a rule would be likely to lead to uncertainty and inconsistency.”<sup>887</sup>

The Court of Appeal upheld the Employment Appeal Tribunal’s decision on the implication of a contract in the circumstances, though it did so without consideration of the relevance of the agency worker’s Convention rights for this purpose as this had not been argued before it.<sup>888</sup>

## The construction of contracts

- [31] As regards contracts made after the coming into force of the [Human Rights Act](#), ought courts as “public authorities” to interpret contracts (where neither party is a “public authority”),<sup>889</sup> so as to be compatible with Convention rights, either of the parties or of third parties? While there is no provision in the [1998 Act](#) requiring courts to construe *contracts* so as not to be incompatible with Conventions rights,<sup>890</sup> in contrast to the position as regards legislation which must be so read “in so far as it is possible”,<sup>891</sup> this silence may not rule out such a duty arising from [s.6](#) and stemming from the courts’ functions either in finding of facts or in the development of the common law. As to the former, it is established at common law that the purpose of construction of the contract is to give effect to the parties’ intentions as objectively determined, this involving issues both of fact and law, and that, at least where the express terms of the contract are ambiguous, the court should look to the factual matrix of the contract for guidance.<sup>892</sup> It may be argued that a court should “interpret” the contract so as to ensure that performance of its obligations is compatible with Convention rights, at least, perhaps, where such an interpretation is possible on the natural meaning of the words used. On the other hand, it may be countered that if it appears either from the terms of the contract on their natural meaning or from the factual matrix of the contract that the parties intended to agree to something which *would* be incompatible with a person’s Convention rights, then the courts should hold to this interpretation, rather than impose on the parties something to which they did not agree. Indeed, for the courts to do otherwise in such a situation could be thought to be a misuse of their powers of “fact-finding” in a way itself vulnerable under art.6(1) of the Convention, for the court would be imposing its view of what should have been agreed by the parties and deliberately “mistaking” the facts of a case as generally understood and determined in order to do so. A similar set of arguments would apply to the implication of terms “in fact”.<sup>893</sup> A more robust argument would be that the courts should develop the common law governing the construction of the express terms of contracts so that it builds within it a requirement of interpretation “whenever possible” which makes performance compatible with Convention rights, this being an example of the “horizontal effect” of [s.6](#). However, such a development would fly in the face of existing contractual principles of construction which have been established in the interests of commercial certainty and fairness to the parties: this would not be an example of Convention rights suffusing existing common law principles, but rather of their subverting them.<sup>894</sup> Moreover, the decision of the Employment Appeal Tribunal in *Smith v Carillion*<sup>895</sup> which refused to imply a contract so as give effect to Convention rights suggests that the courts are unlikely to read down the general rules on construction of contracts to do so.

## New implied terms

[32]

Similar lines of argument may be developed for the implication of terms “in law” as have been just exposed in relation to the construction of express terms, so as to contend that a court should imply a term in a contract so as to give protection to the Convention rights of parties or of non-parties.<sup>896</sup> However, under the established test for the implication of such terms that they are necessary as well as reasonable,<sup>897</sup> and where neither party to the contract is a public authority<sup>898</sup> it is difficult to see the genuine necessity of the implication of such a term. Again, though, if the courts as themselves “public authorities” have a duty under the [1998 Act](#) to adapt and develop the common law so as to protect Convention rights, then the proper approach to the implication of terms could itself fall to be interpreted or adapted so as to promote the protection of Convention rights.<sup>899</sup> In support of this, it may be argued that the courts have historically taken a more or a less liberal approach to the implication of terms so as to give effect to their own views of the proper balance of interest between the parties and to create thereby the incidents of particular types of contract.<sup>900</sup> At least as regards the protection of the Convention rights of the parties to the contract, use of an implied term to achieve compatibility may not be alien to the spirit of the common law technique. On the other hand, the technique of implication of terms does have its limits, given that they must be fitted around the express terms and legal regulation of the contract in question. So, for example, it has been held that no term to maintain the dwelling in good condition should be implied in a residential tenancy which contains only an express term to keep the *structure* in good repair or which contains no express repairing obligation on the landlord as this would “invite the criticism that the court is seeking to make for the parties a bargain which they have not themselves made”.<sup>901</sup>

## Open-textured norms governing the contract

- <sup>133</sup> The courts may also protect or promote Convention rights in the process of the interpretation and application of broad or “open-textured” norms applicable to particular types of contract, whether these norms are expressed as implied terms or as common law rules,<sup>902</sup> even where neither party is a “public authority” so as to be caught directly by [s.6 of the 1998 Act](#).<sup>903</sup> So, for example, at common law it has been held that contracts of employment contain as their incident an implied term of mutual trust and confidence between the parties.<sup>904</sup> Such a term could be used by a court as a vehicle for the protection of an employee’s rights under the Convention, for example, his right to privacy or freedom of expression, by treating a disregard by an employer of his employee’s rights as a breach of his obligation of trust and confidence.<sup>905</sup> Such a development could be seen as reflecting a positive, indirect impact of the Human Rights Act on contractual relations, positive in that it would increase the practical duties of employer or employee, even if under the cover of an existing general implied term. Moreover, in *Telchadder v Wickland (Holdings) Ltd*<sup>906</sup> the Court of Appeal accepted that in considering the reasonableness of termination by a private landowner of the licence of a mobile-home owner (as provided for by the [Mobile Homes Act 1983](#)), a court should consider, *inter alia*, the competing rights of the parties under art.8 and art.1 of the First Protocol of the Convention, accepting an argument to this effect based on the decision of the

Supreme Court in *Manchester City Council v Pinnock*,<sup>907</sup> even though the latter concerned the impact of the Human Rights Act on a public sector landlord.<sup>908</sup>

## Open-textured controls on express contract terms

- [34] Rather differently, and “negatively” as it could lead to the striking down of contract terms, it may be argued that the judicial control of the fairness of terms in consumer contracts under the *Consumer Rights Act 2015 Pt 2*,<sup>909</sup> may properly take into account in determining whether a term “contrary to the requirement of good faith, … causes a significant imbalance in the parties rights and obligations arising under the contract, to the detriment of the consumer”,<sup>910</sup> whether or not that term is incompatible with Convention rights.<sup>911</sup> In this respect, it should be noted that the preamble to the EC Directive which the *2015 Act* implemented suggests that the function of the “requirement of good faith” is to ensure that a court makes “an overall evaluation of the different interests involved”, and it then refers to matters which appear to relate to the public interest.<sup>912</sup> So, for example, where rules governing the legal relationship between a university and its students find their basis in terms of the contract between them, the question of the fairness of these rules within the meaning of the *2015 Act Pt 2*, could take into account their impact on the student’s Convention rights (for example, their rights to privacy or freedom of expression).<sup>913</sup>

## Private sector possession orders and article 8 of the Convention

- [35] The question has arisen whether a tenant, former tenant or other possessor of land may rely on art.8’s right to respect of a person’s home against a claim for possession by a *private* land-owner. The Supreme Court has held that a possessor of a dwelling may so rely in relation to claims made by a public authority, and while it explicitly took no view of the position as regards claims by private persons, it recognised that “[c]onflicting views have been expressed both domestically and in Strasbourg” on the latter situation.<sup>914</sup> So, although comments in the House of Lords in its earlier decision in *Qazi* suggest that a distinction should be drawn between claims by a private landowner and by a public landowner,<sup>915</sup> in *Belchikova v Russia*,<sup>916</sup> the European Court of Human Rights:

“… seems to have considered that article 8 was relevant, even when the person seeking possession was a *private* sector landlord … [p]resumably … on the basis that the court making the order was itself a public authority.”<sup>917</sup>

However, in *McDonald v McDonald*<sup>918</sup> the Supreme Court held that, although it may well be that art.8 of the Convention is engaged when a court makes an order for possession of a tenant’s home at the suit of a private sector landlord under s.21(4) of the Housing Act 1988, art.8 cannot:

“... justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interest of private sector landlords and residential tenants.”<sup>919</sup>

A court considering whether to make such an order is therefore not required to assess the proportionality of evicting the occupier in the light of s.6 of the Human Rights Act 1998 and art.8 of the Convention.<sup>920</sup> In the view of the Supreme Court,

“... [t]o hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is ... to protect citizens from having their rights infringed by the State. To hold otherwise would also mean that the Convention could be invoked to interfere with the A1P1 [art.1, 1st Protocol] rights of the landlord, and in a way which was unpredictable.”<sup>921</sup>

The Supreme Court contrasted this situation where there are “legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants”<sup>922</sup> with situations where the relationship between two private parties is “tortious or quasi-tortious” rather than contractual and where the legislature has “expressly, impliedly or through inaction, left it to the courts to carry out the balancing exercise”, for example, where a person is seeking to rely on her art.8 rights to restrain a newspaper from publishing an article in breach of her privacy and where the newspaper relies on art.10 of the Convention.<sup>923</sup>

## Footnotes

871 Human Rights Act 1998 s.6(3)(a).

872 See, however, *McDonald v McDonald* [2016] UKSC 28, [2017] A.C. 273 (below para.3-135) where the SC observed that, while a court is a public authority for the purposes of the 1998 Act, when it makes an order for possession against a private sector tenant it does so “merely as the forum for determination of the civil right in dispute between the parties” and that “once it concludes that the landlord is entitled to possession, there is nothing further to investigate”: at [44], quoting Lord Millett in *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 A.C. 983 at [108].

- 873 Misrepresentation Act 1967 s.2(2) and see below, paras 9-112, 9-118.
- 874 Law Reform (Frustrated Contracts) Act 1943 s.1(3) and see below, para.26-120.
- 875 See below, paras 30-046 et seq. and 30-075 et seq.
- 876 For discussion of these other “public authorities”, see above, paras 3-116—3-119.
- 877 *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40, [2003] 3 W.L.R. 568 at [25], per Lord Nicholls and see similarly at [174] (Lord Rodger). See for an introduction to this question: Craig, Administrative Law, 9th edn (2021) at paras 20-033—20-036 and see further *Hunt* [1998] P.L. 423; *Markesinis* (1998) 114 L.Q.R. 47; *Bamforth* [1999] C.L.J. 159; *Buxton* (2000) 116 L.Q.R. 48; *Wade* (2000) 116 L.Q.R. 217; *Morgan* (2002) L.S. 259; *Phillipson* (2003) 66 M.L.R. 726; *Phillipson & Williams* (2011) 74 M.L.R. 878.
- 878 *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967; *A v B Plc* [2002] EWCA Civ 337, [2003] Q.B. 195; *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] E.M.L.R. 4; *Douglas v Hello! Ltd (No.6)* [2003] EWHC 786 (Ch), (2003) 153 N.L.J. 595; *Lady Archer v Williams* [2003] EWHC 1670, [2003] E.M.L.R. 38; *Douglas v Hello! Ltd (No.3)* [2005] EWCA Civ 595, [2006] Q.B. 125; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457; *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 W.L.R. 194 and see below, para.3-138.
- 879 cf. the observations on the creation of an independent tort of privacy in *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967, 997 et seq. (Sedley LJ) and the denial of any general tort of invasion of privacy at common law by the House of Lords in *Wainwright v Home Office* [2003] UKHL 53, [2003] 3 W.L.R. 1137 (though on facts preceding the coming into effect of the 1998 Act and involving a claim against a public authority).
- 880 cf. *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch), [2009] Ch. 173 at [47]–[48], where Lewison J declined to follow the earlier dictum of Walton J in *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No.2)* [1979] 1 W.L.R. 936, 943 to the effect that a sole surviving member of an unincorporated association (whose members hold the assets of the association according to the terms of the contract between them while the association exists), cannot claim the association's assets and that they vest in the Crown as bona vacantia: “for one of an unincorporated association to be deprived of his share of the association by reason of the death of the other of them, and without any compensation, appears to be a breach” of ECHR art.1 First Protocol.
- 881 [2011] EWCA Civ 1581, [2012] 2 W.L.R. 1119 at [21]–[28]; [2013] UKSC 29, [2013] 2 A.C. 163 on which (and on further case-law) see below, para.4-250.
- 882 [2011] EWCA Civ 1581, [2012] 2 W.L.R. 1119 at [29]–[34]. The Supreme Court held that, in the context of the constitution of the Methodist Church, the requirement of contractual intention was not satisfied; no reference was made for this purpose to the possible relevance of the minister's Convention rights.
- 883 [2008] I.C.R. 282 at [62] and see also, per Lawrence Collins LJ at [66].
- 884 [2011] EWCA Civ 1581 at [33]–[34], per Maurice Kay LJ with whom Longmore LJ and Sir David Keene agreed.
- 885 [2014] I.R.L.R. 344.

- 886 [2014] I.R.L.R. 344 at [57]–[63], applying *James v London Borough of Greenwich* [2008] I.C.R. 302 and *Tilson v Alstrom Transport* [2011] I.R.L.R. 169 at [8].
- 887 [2014] I.R.L.R. 344 at [64] per Slade J relying on *The Aramis* [1989] 1 Lloyd's Rep. 213.
- 888 [2015] EWCA Civ 209, [2015] I.R.L.R. 467. The CA rejected the relevance of s.3 of the Human Rights Act 1998 to the interpretation of the legislation conferring the rights claimed by the agency-worker on the basis that the end-user’s actions took place before the coming into force of that Act: [2015] EWCA Civ 209 at [49].
- 889 For discussion of how the 1998 Act may affect construction of contracts made by a “public authority”, see above, para.3-125.
- 890 *Biggin Hill Airport Ltd v Bromley LBC* (2001) 98(3) L.S.G. 42, *The Times*, 9 January 2001 [171], reversed on other grounds [2001] EWCA Civ 1089, *The Times*, 13 August 2001, (2001) 98(33) L.S.G. 30.
- 891 Human Rights Act 1998 s.3(1).
- 892 See below, paras 15-047 et seq.
- 893 See below, paras 16-005—16-006 and 16-008 (“obvious inference from agreement”).
- 894 cf. below, para.3-138 concerning the law of confidentiality.
- 895 [2014] I.R.L.R. 344, above, para.3-130.
- 896 On implied terms generally, see below, Ch.16.
- 897 *Liverpool City Council v Irwin* [1977] A.C. 239; see below, para.16-014.
- 898 For the position where one of the parties is a public authority, see above, para.3-125.
- 899 On this wider question, see above, para.3-128.
- 900 See above, para.2-017 and below, para.16-005.
- 901 *Lee v Leeds City Council* [2002] EWCA Civ 6, [2002] 1 W.L.R. 1488 at [62], per Chadwick LJ. The context of this decision was a claim that the existing interpretation of a “public authority” landlord’s obligations to his residential tenants was incompatible with their Convention rights, on which see above, para.3-122.
- 902 Where an open-textured rule which governs a contract is legislative, then courts are under a duty to interpret the legislation itself “so far as it is possible to do so” in a way which is compatible with Convention rights: Human Rights Act 1998 s.3(1) and see above, para.3-108.
- 903 On which see above, paras 3-116—3-119.
- 904 See Vol.II, paras 42-064—42-068; 42-154—42-157 and *Johnson v Unisys Ltd* [2001] 2 W.L.R. 1076.
- 905 Hepple, Amicus Curiae (8 June 1998), pp.19–23; *Palmer* [2000] C.L.J. 168, 181. cf. the moulding of the existing law of breach of confidence rather than the direct creation of a law of privacy so as to give effect to Convention rights of privacy noted, below, paras 3-136—3-138.
- 906 [2012] EWCA Civ 635, [2012] H.L.R. 35.
- 907 [2010] UKSC 45, [2010] 3 W.L.R. 1441, on which see above, para.3-122.
- 908 [2012] EWCA Civ 635 at [42], [56], [58]–[59]. cf. below, para.3-135. The decision of the CA upholding the landlord’s termination was reversed on other grounds by the Supreme Court: [2014] UKSC 57, [2014] 1 W.L.R. 4004.

- 909 On which see Vol.II, paras 40-223 et seq.
- 910 *Consumer Rights Act 2015* s.62(4).
- 911 A similar argument could be run as regards the application of the “reasonableness test” under the *Unfair Contract Terms Act 1977* s.11(1), though this test does not explicitly draw attention to the relevance of issues of public interest for its assessment.
- 912 Directive 93/13 on unfair terms in consumer contracts, preamble, recital 16 and see Vol.II, paras 40-278—40-279.
- 913 *Whittaker* (2001) 21 O.J.L.S. 193, 210–213.
- 914 *Manchester City Council v Pinnock* [2010] UKSC 45 at [50].
- 915 *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 A.C. 983 at [23] (Lord Bingham); [26] (Lord Steyn) (both expressing no view on the question) and [52]–[53] (Lord Hope who contrasts the position as regards art.6 and art.1 of the First Protocol and art.8, on the basis that the Strasbourg jurisprudence on the latter is to the effect that “the object of article 8 is to protect the individual against arbitrary interference by the public authorities with his right to privacy and that it is not concerned, as such, with the protection of his right to own or to occupy property”).
- 916 *App. No.2408/06 (Unreported 25 March 2010)*.
- 917 [2010] UKSC 45 at [50].
- 918 [2016] UKSC 28, [2017] A.C. 273.
- 919 [2016] UKSC 28 at [40]. The SC expressed these views conditionally on there being no Strasbourg jurisprudence to the contrary, which it later held was the case: see [2016] UKSC 28 at [48]–[59].
- 920 [2016] UKSC 28 at [40]–[46], [59] and [76]. The SC also said, obiter, that if a proportionality assessment were required, it would not be possible to read this into s.21(4) of the 1988 Act by way of application of s.3(1) of the 1998 Act, the only remedy therefore being a declaration of incompatibility under s.4 of the 1998 Act: [2016] UKSC 28 at [69]–[70]; and that, even were a proportionality assessment required, the claimant tenant’s circumstances were not such as to justify refusing an order for possession and thereby postponing indefinitely the right of the landlord’s mortgagee/lender (acting through appointed receivers): [2016] UKSC 28 at [71], [74]–[75].
- 921 [2016] UKSC 28 at [41] per Lord Neuberger of Abbotbury and Baroness Hale of Richmond (with whom Lord Kerr of Tonaghmore, Lord Reed and Lord Carnwath agreed). See further at [42]–[47]. The SC held that there was no support in the case law of the European Court of Human Rights for the proposition that a court must consider the proportionality of the order in the context of claims for possession by private sector landlords: see at [48]–[59] (where the relevant case-law was reviewed).
- 922 [2016] UKSC 28 at [40] per Lord Neuberger of Abbotbury and Baroness Hale of Richmond.
- 923 [2016] UKSC 28 at [46] per Lord Neuberger of Abbotbury and Baroness Hale of Richmond. See further below, para.3-136.

## **(iv) - Contractual Confidentiality and s.12 of the 1998 Act**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 1 - Introduction

Chapter 3 - Contract Law and Other Legal Categories

Section 5. - The Human Rights Act 1998 and Contracts

**(b) - Contracts Made on or after 2 October 2000**

**(iv) - Contractual Confidentiality and s.12 of the 1998 Act**

### **Section 12 and “horizontal effect”**

- 136 Section 12 of the 1998 Act makes special provision for the protection of freedom of expression after the general coming into effect of the Act, on the basis that otherwise this right (which is itself found in art.10 of the Convention) may be unduly curtailed as the result of developments giving effect to the right to a private life contained in art.8 of the Convention. Section 12 therefore constrains in certain ways the granting by a court of relief which, if granted, might affect the exercise of the Convention right to freedom of expression. In this respect, s.12(4) provides that:

#### **Section 12:(4)**

“The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

**(a)** the extent to which

**(i)** the material has, or is about to, become available to the public; or

**(ii)** it is, or would be, in the public interest for the material to be published;

**(b)** any relevant privacy code.”

According to Sedley LJ, this provision:

“... puts beyond question the direct applicability of at least one Article of the Convention as between one private party to litigation and another—in the jargon, its horizontal effect.”<sup>924</sup>

<sup>137</sup> In *Ashworth v The Royal National Theatre*,<sup>925</sup> the claimants had been employed as musicians for a particular production by the defendant theatre, which had purported to terminate their contracts of employment on alleged grounds of redundancy as it had decided to produce the play without live music. They applied to the High Court for an interim injunction, or alternatively specific performance, to continue to engage them in the production until trial of their claim. In assessing the balance of convenience in relation to the award of specific relief, Cranston J held that art.10 of the European Convention on Human Rights:

“... has a significant role in the application of the *American Cyanamid test*,<sup>926</sup> not only in considering the claimants’ prospect at trial but also in deciding where the balance of convenience lies.”<sup>927</sup>

In the learned judge’s view, there was a serious issue to be tried on the question whether the defendant was contractually entitled to terminate the claimants’ contracts and that the claimants’ prospects in claiming that it did so in breach of contract were strong.<sup>928</sup> However, he noted that s.12(1) and (4) of the Human Rights Act 1998:

“... provides that, in considering whether to grant any relief which may affect the right of freedom of expression in Article 10 of the European Convention on Human Rights, the court must have particular regard to the importance of that right. Section 12(4) refers to artistic and related material and the Strasbourg jurisprudence is clear that Article 10 protects artistic expression ... The decisions of producers and artistic teams in staging plays are protected by Article 10. Here the effect of the order sought would be to interfere with the National Theatre’s right of artistic freedom.”<sup>929</sup>

This would be a clear interference with the defendant’s right under art.10 and would not be necessary or proportionate to the *claimants’ rights* under art.10(2), which were not interfered with by the dismissal (as they can play their instruments elsewhere) and their contractual rights could

be adequately protected by an award of damages.<sup>930</sup> Overall, therefore, Cranston J refused the interim relief sought.<sup>931</sup>

## The impact of s.12 on duties of confidentiality

- |38 Before the coming into force of the [Human Rights Act](#), English law recognised the existence of duties of confidentiality arising from express or implied contractual agreement or from the nature of a non-contractual relationship between the parties and saw the basis of these duties in very broad concepts of good faith, loyalty and fair dealing.<sup>932</sup> The application of [s.12 of the 1998 Act](#) has arisen in the context of both contractual and non-contractual duties of confidentiality in a number of cases since its coming into force.<sup>933</sup> It has been observed that:

“... these cases ... represent a fusion between the pre-existing law of confidence and rights and duties arising under the [Human Rights Act](#).”<sup>934</sup>

In the result, “the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence”.<sup>935</sup> In applying [s.12](#), the court evaluates and weighs up duties of confidentiality, competing rights of privacy and of free expression and more general considerations of the public interest.<sup>936</sup> In this respect, it has been observed that:

“... it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the restriction of the right of freedom of expression, than a duty of confidentiality not buttressed by express agreement.”<sup>937</sup>

## Footnotes

924 *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967 at [133].

925 [2014] EWHC 1176 (QB), [2014] 4 All E.R. 238.

926 *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396.

927 [2014] EWHC 1176 (QB) at [3].

928 [2014] EWHC 1176 (QB) at [15].

929 [2014] EWHC 1176 (QB) at [27].

930 [2014] EWHC 1176 (QB) at [27] and [30]–[31].

931 [2014] EWHC 1176 (QB) at [31]–[33].

- 932 *Fraser v Evans* [1969] 1 Q.B. 349, 361; *AG v Guardian Newspaper* (No.2) [1990] 1 A.C. 109, 269; *Douglas v Hello! Ltd* (No.6) [2003] EWHC 786, (2003) 153 N.L.J. 595 at [181].
- 933 *Douglas v Hello! Ltd* (No.1) [2001] Q.B. 967; *A v B Plc* [2002] EWCA Civ 337, [2003] Q.B. 195; *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] E.M.L.R. 4; *Douglas v Hello! Ltd* (No.6) [2003] EWHC 786 (Ch), (2003) 153 N.L.J. 595; *Lady Archer v Williams* [2003] EWHC 1670, [2003] E.M.L.R. 38; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457; *Douglas v Hello! Ltd* (No.3) [2005] EWCA Civ 595, [2006] Q.B. 125; *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 W.L.R. 194; *Ntuli v Donald* [2010] EWCA Civ 1276, [2011] 1 W.L.R. 294; *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] A.C. 1081.
- 934 *Douglas v Hello! Ltd* (No.6) above at [186], per Lindsay J.
- 935 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457 at [17], per Lord Nicholls of Birkenhead.
- 936 *A v B Plc* [2002] EWCA Civ 337, [2003] Q.B. 195 at [6]; *Douglas v Hello! Ltd* (No.1) [2001] Q.B. 967 at [135]; *Lady Archer v Williams* [2003] E.M.L.R. 38 at [59] and note s.12(4)(a) (ii)'s reference to the significance of the public interest.
- 937 *Campbell v Frisbee* [2002] EWCA Civ 1374, [2003] I.C.R. 141 at [22], per Lord Phillips MR (who noted, however, conflicting dicta on this point in *London Regional Transport v Mayor of London* [2003] E.M.L.R. 4 at [46]; *AG v Barker* [1990] 3 All E.R. 257, 260–261) (no comment was made by members of the HL on appeal in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457). cf. *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 W.L.R. 194 at [43], where in the circumstances Buxton LJ considered that: “the provision of the written contract did not add much to the obligations that the first defendant owed in equity by reason of the closeness of her personal relationship with the first claimant”.

## Section 1. - Preliminary

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 1. - Preliminary

*Mindy Chen-Wishart*

### Introduction

- ¶01 The first requirement for the formation of a contract is that the parties should have reached agreement. Generally speaking,<sup>1</sup> the law regards an agreement as having been reached when an offer made by one of the parties (the offeror) is accepted by the other to whom the offer is addressed (the offeree or acceptor). However, such an agreement may still lack contractual force because it is incomplete,<sup>2</sup> because its terms are not sufficiently certain,<sup>3</sup> because its operation is subject to a condition which fails to occur<sup>4</sup> or because it was made without any intention to create legal relations.<sup>5</sup> An agreement may also lack contractual force for want of consideration. The requirement of consideration is discussed in [Ch.6](#).

### The objective test

- ¶02 In deciding whether the parties have reached agreement, the courts normally apply the objective test,<sup>6</sup> which is further discussed at para.[4-003](#) below. Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject-matter,<sup>7</sup> then neither can, generally, rely on some unexpressed qualification or reservation to show that they had not in fact agreed to the terms to which they had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract.<sup>8</sup> Equally, a party who completes and signs a

contractual document “cannot avoid its consequences by saying that they did not read it or did not understand it”.<sup>9</sup> The rule just stated does not apply, however, in favour of a party who knows,<sup>10</sup> or ought to have known,<sup>11</sup> that the other does not assent to the terms proposed in a notice displayed by the former party: e.g. where an offer is expressed in a language which the offeree, to the offeror’s knowledge, does not understand<sup>12</sup>; or where the course of dealing shows that the offeree must have known that the offeror did not mean what they had said<sup>13</sup>; or, arguably, where the offeree ought to have known that the offeror’s offer contained an error.<sup>14</sup> Likewise, the objective test applies when determining the identity of the parties to the contract.

15



## Footnotes

- 1 The analysis of the process of reaching agreement in terms of the steps of offer and acceptance gives rise to difficulties in a number of situations to be discussed in paras 4-143 —4-144 below.
- 2 Below, paras 4-145—4-184.
- 3 Below, paras 4-185—4-193.
- 4 Below, paras 4-194—4-205.
- 5 Below, paras 4-206—4-237.
- 6 *Howarth* (1984) 100 L.Q.R. 265; *Vorster* (1987) 103 L.Q.R. 247; *Howarth* (1987) 103 L.Q.R. 527; *Smith v Hughes* (1871) L.R. 6 Q.B. 597, 607.
- 7 See *Falck v Williams* [1900] A.C. 176; *Pagnan SpA v Fenal Products Ltd* [1987] 2 Lloyd’s Rep. 601 at 610; *Guernsey v Jacob UK Ltd* [2011] EWHC 918 (TCC), [2001] 1 All E.R. (Comm) 175 at [41]; *Global 5000 Ltd v Wadhawan* [2011] EWHC 853 (Comm), [2011] 2 All E.R. (Comm) 190 at [45]; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 1 All E.R. 1296 at [140]. The objective test can apply, not only for the purpose of establishing the existence of a contract, but also to determine the contents of an admitted contract: see *Thake v Maurice* [1986] Q.B. 644; *Eyre v Measday* [1986] 1 All E.R. 488 and *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd’s Rep. 357 at [15], [25], and [30]; and to determine whether a contract had been affirmed by agreement between the parties after the occurrence of an event which had discharged both or one of them: *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm) at [55], [56].
- 8 See, e.g. *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 Lloyd’s Rep. 614; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 at [10]; *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd’s Rep. 63 at [5]; *Newbury v Sun Microsystems Ltd* [2013] EWHC 2180 (QB) where Lewis J held that it is neither legitimate nor helpful to take into

account subsequent communications to determine whether documents gave rise to a binding agreement.

- 9     *Coys of Kensington Automobiles Ltd v Pugliese [2011] EWHC 655 (QB), [2011] 2 All E.R. (Comm) 664* at [40] (where the reason for the signer's inability to understand the document was alleged to be that "she was an Italian speaker and the form was in English" (at [38])).
- 10    Below, para.5-022.
- 11    Below, para.5-023.
- 12    *Geier v Kujawa, Weston and Warne Bros (Transport) Ltd [1970] 1 Lloyd's Rep. 364.*
- 13    *Hartog v Shields [1939] 3 All E.R. 566.* See also below, para.4-004 (note). cf. in cases of mistake, below, para.5-022.
- 14    *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd [1983] Com. L.R. 158; O.T. Africa Line Ltd v Vickers Plc [1996] 1 Lloyd's Rep. 700, 703*, where Mance J said that the objective principle would be displaced if a party knew or ought to have known of the mistake. But see below, para.5-023.
- 15    *Lumley v Foster & Co Group Ltd [2022] EWHC 54 (TCC)* at [6].

## **(a) - Offer Defined**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 2. - The Offer**

**(a) - Offer Defined**

### **Intention to be bound by specified terms**

- 103 An offer is an expression of willingness to contract on specified terms made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed.<sup>16</sup> Under the objective test of agreement,<sup>17</sup> an apparent intention to be bound may suffice, i.e. the alleged offeror (A) may be bound if their words or conduct<sup>18</sup> are such as to induce a reasonable offeree to believe that he intends to be bound, even though in fact he has no such intention. This was, for example, held to be the case where a university had made an offer of a place to an intending student as a result of a clerical error<sup>19</sup>; and where a solicitor, who had been instructed by his client to settle a claim for \$155,000, by mistake offered to settle it for the higher sum of £150,000.<sup>20</sup> Similarly, if A offers to sell a book to B for £10 and B accepts the offer, A cannot escape liability merely by showing that his actual intention was to offer the book to B for £20, or that he intended the offer to relate to a book other than that specified in the offer.<sup>21</sup>

### **State of mind of alleged offeree**

- 104 Whether an offeror (A) is actually bound by an acceptance of their apparent offer depends on the state of mind of the alleged offeree (B); to this extent, the test of agreement can be said to be not “wholly objective”.<sup>22</sup> If B actually and reasonably believes that A has the requisite intention, the objective test is satisfied so that B can hold A to their apparent offer even though A did not,

subjectively, have the requisite intention.<sup>23</sup> However, if B knows that, in spite of the objective appearance, A does not have the requisite intention, A is not bound; the objective test does not apply in favour of B as they know the truth about A's actual intention.<sup>24</sup>

- 105 There are other permutations. If B does not know, but ought to have known that A does not have the requisite intention, English law gives no clear answer.<sup>25</sup> However, there are suggestions that B will not be able to hold A to his apparent offer.<sup>26</sup> It is also possible, although highly unlikely, that A and B, unknown to each other, both have the same requisite intention but a reasonable third party would not have thought they did, or would have thought that they had the requisite intention in respect of a different term. There is no authority on such a case, but it is submitted that where A and B reach agreement on term X but the unexpressed intention of both is that this means Y, the parties should be held to a valid contract for Y although a third party's objective interpretation is that the agreement is for X.<sup>27</sup> Otherwise, the law would bind the parties to a contract that neither wanted.
- 106 Lastly, B may have simply formed no view on the question of A's intention, so that B neither believes that A has the requisite intention nor knows that A does not have this intention. This situation has given rise to a conflict of judicial opinion. One view is that A is not bound: in other words, the objective test is satisfied only if A's conduct is such as to induce a reasonable person to believe that A had the requisite intention *and* if B actually held that belief.<sup>28</sup> The opposing view is that A is bound: in other words, the objective test is satisfied if A's words or conduct would induce a reasonable person to believe that A had the requisite intention, so long as B does not actually know that A does *not* have any such intention.<sup>29</sup> However, it is hard to see why B should be protected in this situation. Where B has no positive belief in A's (apparent) intention to be bound, he cannot be prejudiced by acting in reliance on it. It is therefore submitted that the objective test should not apply to the last situation. For this purpose, it should make no difference whether B's state of mind amounts to ignorance of, or merely to indifference to, the truth.

## To whom may an offer be addressed?

- 107 An offer may be addressed to a specified person or to a specified group of persons or to the world at large. This is particularly clear where the offer is part of an unilateral contract.<sup>30</sup> In *Carll v Carbolic Smoke Ball Co* Bowen LJ said:

“... why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement.”<sup>31</sup>

## Oral contracts

- 107A Contracts can be made entirely orally.

D 32

- U In determining whether there is an enforceable contract, the court:

“must look at the witnesses’ evidence through the prism of the contemporaneous documents; of their subsequent actions; of those events which are accepted or clearly demonstrated to have happened; and of inherent likelihood. The impression made by the demeanour of a witness must be set against those matters and to the extent that the contemporaneous documents in particular show a picture different from that depicted by a particular witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened.”

33



## Conduct as offer

- 108 An offer may be made expressly (by words) or by conduct.<sup>34</sup> A supplier makes an offer by conduct when they send suitable goods in response to a customer’s inquiry.<sup>35</sup> Offers by conduct to abandon arbitration proceedings have been concluded from one party’s silence or inactivity, combined with other actions, such as the destruction of relevant documents.<sup>36</sup> At common law, a person who had contracted to sell goods and tendered different goods (or a different quantity) might be considered to make a new offer by conduct to sell the goods which he had tendered.<sup>37</sup> It seems that an offer to sell can still be made in this way, though by legislation against “inertia selling” the dispatch of goods “without any prior request” may amount to a gift to the recipient, rather than to an offer to sell.<sup>38</sup>

## Inactivity as an offer

- <sup>109</sup> A number of cases raise the further question whether the “conduct” from which an offer may be inferred can take the form of inactivity. The issue in these cases was whether an agreement to submit a dispute to arbitration could be said to have been “abandoned” by long delay, where, over a long period of time, neither party had taken any steps in the arbitration proceedings.<sup>39</sup> Mere inactivity by one party is unlikely,<sup>40</sup> when standing alone, to amount to an offer of abandonment, for it is equivocal and generally explicable on other grounds, such as inertia or forgetfulness, or the tactical consideration that the party alleged to have made the offer does not wish to reactivate his opponent’s counterclaims.<sup>41</sup> Consequently, it will not normally suffice to induce a reasonable person in the position of the other party to believe that an offer is being made<sup>42</sup>; and the mere fact that the other party nevertheless had this belief cannot suffice to turn the former party’s inactivity into such an offer.<sup>43</sup> However, the arbitration cases indicate that, on the objective test,<sup>44</sup> inactivity may amount to an offer of abandonment when combined with other circumstances (such as the destruction of relevant files),<sup>45</sup> where such circumstances are known to the other party.<sup>46</sup>

## Footnotes

- 16 *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd’s Rep. 349 at [75]; *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] 1 All E.R. (Comm) 513 at [59] (communication an offer as “intended to be capable of acceptance with a binding contract being thereby concluded” ([cf. at [67]])); *Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd* [2010] EWCA Civ 1331 at [24] and [26]. Contrast *Schuldenfrei v Hilton (Inspector of Taxes)* [1998] S.T.C. 404 (statement that something *had* been done, not an offer). For other illustrations of statements held not to amount to offers, see *Destiny 1 Ltd v Lloyd’s TSB Bank Plc* [2010] EWHC 1233 (proposal forming part of a negotiating “package”); *UK Learning Academy Ltd v Secretary of State for Education* [2018] EWHC 2915 (Comm) at [241], [245].
- 17 Above, para.4-002; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd’s Rep. 566, 571; *Bowerman v ABTA Ltd* [1995] N.L.J. 1815; *Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd’s Rep. 748 at [43].
- 18 For offers made by conduct, see below, para.4-008; *The Aramis* [1989] 1 Lloyd’s Rep. 213 (where the objective test was not satisfied); *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd’s Rep. 25, 27.
- 19 *Moran v University College Salford (No.2)*, *The Times*, 23 November 1993.
- 20 *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd’s Rep. 700.

- 21 cf. *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd [1983] Com. L.R. 158*; cited with approval in *Whittaker v Campbell [1984] Q.B. 318, 327*, in *Food Corp of India v Antclizo Shipping Corp (The Antclizo) [1987] 2 Lloyd's Rep. 130, 146, affirmed [1988] 1 W.L.R. 603* and in *O.T. Africa Line Ltd v Vickers Plc [1996] 1 Lloyd's Rep. 700, 702*.
- 22 *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 A.C. 854, 924*.
- 23 *André & Cie SA v Marine Transocean Ltd (The Splendid Sun) [1981] 1 Q.B. 694*, as explained in *The Hannah Blumenthal*, above; *Challoner v Bower (1984) 269 E.G. 725*; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multitank Holsatia) 2 Lloyd's Rep. 486, 493* (“subjective understanding”).
- 24 *Ignazio Messina & Co v Polskie Linie Oceaniczne [1995] 2 Lloyd's Rep. 566, 571*; *O.T. Africa Line Ltd v Vickers Plc [1996] 1 Lloyd's Rep. 700, 703*; *Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 748* at [45] (“Subject only to actual knowledge on the part of the buyer [the offeree] that no offer was intended”); *HSBC Bank Plc v 5th Avenue Partners Ltd [2007] EWHC 2819 (Comm)* at [117] (objective principle “not engaged” where absence of any intention to vary an existing contract was known to both parties, affirmed on other issues *[2009] EWCA Civ 296*). See also *Attrill v Dresdner Kleinwort Ltd [2012] EWHC 1189 (QB)* at [128], affirmed *[2013] EWCA Civ 394*, [86], where Owen J cited with approval a passage from the 30th edition of this book which stated that the objective test “does not apply in favour of a party who knows the truth”. See further on the mistake of term known to the other party at paras 5-018, 5-022, 5-035, and rectification for unilateral mistake as to terms at paras 5-070—5-078.
- 25 In *Merrill Lynch International v Amorim Partners Ltd [2014] EWHC 74 (QB)* at [54] Hamblen J said that a mistake will only give rise to relief if it was known to the other party, but the point does not appear to have been argued and the mistake was in any event not as to the terms of the contract, see below, para.5-023.
- 26 See *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd [1983] Com. L.R. 158*; *O.T. Africa Line Ltd v Vickers Plc [1996] 1 Lloyd's Rep. 700* at 703, where Mance J said that the objective principle would be displaced if a party knew or ought to have known of the mistake.
- 27 See below, para.5-065.
- 28 *The Hannah Blumenthal*, above, as interpreted in *Allied Marine Transport v Vale de Rio Doce Navegacao SA (The Leonidas D.) [1985] 1 W.L.R. 925*; *Beatson (1986) 102 L.Q.R. 1*; *Atiyah (1986) 102 L.Q.R. 363*; *Gebr. van Weelde Scheepvaart Kantoor BV v Homeric Marine Services (The Agrabele) [1987] 2 Lloyd's Rep. 223*, especially at 235; cf. *Cie Française d'Importation, etc., SA v Deutsche Continental Handelsgesellschaft [1985] 2 Lloyd's Rep. 592, 597*; *Amherst v James Walker Goldsmith and Silversmith Ltd [1983] Ch. 305*. The view that, in the third of the situations described in the text above, there is no contract is referred to with approval by Andrew Smith J in *Maple Leaf Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475* at [228], affirmed *[2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788* where Longmore LJ at [22] paid “tribute to the careful and thorough judgment of Andrew Smith J”.

- 29 *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The Golden Bear)* [1987] 1 Lloyd's Rep. 330, 341 (doubted on another point in para.4-088 (note) below, and see para.4-009 (note)); this view was approved in *The Antclizo* [1987] 2 Lloyd's Rep. 130, 143 but doubted at 147 (affirmed [1988] 1 W.L.R. 603 without reference to the point); and semble in *Floating Dock Ltd v Hong Kong and Shanghai Bank Ltd* [1986] 1 Lloyd's Rep. 65, 77; *The Multitank Holsatia* [1988] 2 Lloyd's Rep. 486, 492 ("at least did not conflict with [B's] subjective understanding"); *Thai-Europe Tapioca Service Ltd v Seine Navigation Inc (The Maritime Winner)* [1989] 2 Lloyd's Rep. 506, 515 (using similar language). A dictum in *Furness Withy (Australia) Pty Ltd v Metal Distribution (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep. 236, 242 goes even further in suggesting that there may be a contract even though "neither [party] intended to make a contract".
- 30 See below, paras 4-019 and 4-051.
- 31 *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 Q.B. 256, 268 (Bowen LJ).
- 32 *Wells v Devani* [2019] UKSC 4.
- 33 *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2972 (TCC) at [55] (Eyre J).
- 34 *Compagnie Francaise d'Importation et de Distribution SA v Deutsche Conti-Handels GmbH* [1985] 2 Lloyd's Rep. 592; *The Aramis* [1989] 1 Lloyd's Rep. 213; *Allied Marine Transport v Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 W.L.R. 925 at 936 (Robert Goff LJ, approving Lord Brightman's reasoning in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 A.C. 854, 924).
- 35 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 Q.B. 433, 436.
- 36 *Allied Marine Transport v Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 W.L.R. 925 at 936 (Robert Goff LJ, approving Lord Brightman's reasoning in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 A.C. 854, 924).
- 37 In *Hart v Mills* (1846) 15 L.J. Ex. 200 the defendant ordered four dozen bottles of wine. The plaintiff delivered eight dozen bottles of which the defendant kept 13 bottles. Since the correct amount was not delivered, the defendant could refuse the whole order. When the defendant kept some of the order, this created a new contract as to the part the defendant kept. This also was an offer made by conduct; cf. *Steven v Bromley & Son* [1919] 2 K.B. 722 when charterers agreed to load a cargo ship with steel billets, but also loaded general merchandise, there was an implied offer by the charterer to load general merchandise at a higher rate; *Greenmast Shipping Co SA v Jean Lion et Cie. SA (The Saronikos)* [1986] 2 Lloyd's Rep. 277 a contract was implied to adequately remunerate a shipowner for performing services at the charterer's request going beyond the terms of the charterparty; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 (Ch), [2003] E.M.L.R. 35 at [96]; *Datec Electronic Holdings Ltd v United Parcels Ltd* [2007] UKHL 23, [2007] 1 W.L.R. 1325 ("offer carriage of goods" subject to specified restrictions did not prevent a new offer when goods tendered for carriage not in conformity with restrictions and accepted by carrier's collection of the goods).

- 38 “Inertia selling”, according to the Consumer Protection from Unfair Trading Regulations 2008/1277 (“CPCTR”), Sch.1 para.29, is the practice of “[d]emanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer”. This practice is prohibited under reg.3(4)(d) and Sch.1 para.29 of CPCTR. Reg.27M stipulates that if a trader sends unsolicited goods, the consumer is not obliged to provide any consideration for them (reg.27M(2)). If a consumer does not respond to the seller, this is not agreement to provide consideration for the goods, return the goods, or keep the goods safe (reg.27M(3)). As between seller and consumer, the consumer can use the goods as though they were a conditional gift (reg.27M(4)). See below, Vol.II, paras 40-007 and 40-067.
- 39 In cases of “inordinate and inexcusable delay” of this kind, arbitrators now have a statutory power to dismiss the claim for want of prosecution: Arbitration Act 1996 s.41(3), replacing Arbitration Act 1950 s.13A. Under s.13A, it had been held that the court could take into account delay occurring before the section came into force: *Yamashita-Shinnihon S.S. Co Ltd v L'Office Cherifien des Phosphate (The Boucraa)* [1994] 1 A.C. 486, and that the court would (mutatis mutandis) apply the same principles to the power to dismiss arbitration proceedings as those which govern the dismissal of an action for want of prosecution: *James Lazenby & Co v McNicholas Construction Co Ltd* [1995] 1 W.L.R. 615. The parties can also expressly provide for “lapse” of the claim if steps in the proceedings are not taken within a specified period: the GAFTA arbitration rules referred to in *Cargill SpA v Kadinopoulos SA* [1992] 1 Lloyd's Rep. 1. Conversely, however, the statutory power to dismiss the claim for want of prosecution may be excluded by agreement: Arbitration Act 1996 s.41(2). Where it is so excluded the question of abandonment can still arise in the present context. Such a question could also arise in the context of the alleged abandonment of some other type of right or remedy: cf. *Amherst Ltd v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305; *Collin v Duke of Westminster* [1985] Q.B. 581; *M.S.C. Mediterranean Shipping SA v B.R.E. Metro Ltd* [1985] 2 Lloyd's Rep. 239; *Fenton Ins. Ltd v Gothaer Versicherungsbank VVaG* [1991] 1 Lloyd's Rep. 172, 180; *Indescon Ltd v Ogden* [2004] EWHC 2326 (TCC), [2005] 1 Lloyd's Rep. 31 (right to appoint arbitrator not lost by lapse of time); *Blindley Health Investments Ltd v Bass* [2014] EWHC 1366 (Ch) at [117]–[125] (rejecting the argument that there had been an “abandonment” of a right of pre-emption).
- 40 *Unisys International Services Ltd v Eastern Counties Newspaper Group Ltd* [1991] 1 Lloyd's Rep. 538, 553 suggests that the possibility cannot be wholly ruled out; cf. *The Boucraa* [1994] 1 A.C. 486, 521 (describing the “abandonment” approach as “largely useless in practice”).
- 41 *Unisys* [1991] 1 Lloyd's Rep. 538 at 553.
- 42 *The Leonidas D.* [1985] 1 W.L.R. 925; *Cie Française d'Importation, etc., SA v Deutsche Conti Handelsgesellschaft* [1985] 2 Lloyd's Rep. 592; *The Antclizo* [1988] 1 W.L.R. 603; *The Agrabele* [1987] 2 Lloyd's Rep. 223; *The Maritime Winner* [1989] 2 Lloyd's Rep. 506; contra, *The Golden Bear* [1987] 1 Lloyd's Rep. 330 (sed quaere: the decision was in part based on the decision at first instance in *The Agrabele* [1985] 2 Lloyd's Rep. 496, but this was reversed on appeal: [1987] 2 Lloyd's Rep. 223); *Ulysses Compania Naviera SA v Huntingdon Petroleum*

*Services (The Ermoupolis) [1990] 1 Lloyd's Rep. 160, 166* see also below, para.4-088 (note); *Unisys [1991] 1 Lloyd's Rep. 538*.

43 *The Antclizo*, above; *Davenport* (1988) 104 L.Q.R. 493.

44 Above, paras 4-003—4-006.

45 *The Splendid Sun* [1981] Q.B. 694, as explained in *The Hannah Blumenthal* [1983] 1 A.C. 854 (though this explanation was doubted in *Cie Française d'Importation, etc., SA v Deutsche Conti Handelsgesellschaft* [1985] 2 Lloyd's Rep. 592, 599); *Tracomin SA v Anton C. Nielsen* [1984] 2 Lloyd's Rep. 195 (as to which see below, para.4-093 (note)); *The Multitank Holsatia* [1988] 2 Lloyd's Rep. 486; for the question whether such an offer can be accepted by inactivity, see below, para.4-087.

46 See *The Hannah Blumenthal* [1983] 1 A.C. 854, 924–925 (Lord Brightman).

## **(b) - Offer and Invitation to Treat**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 2. - The Offer**

**(b) - Offer and Invitation to Treat**

### **The distinction between offer and invitation to treat**

- )10 A party seeking to deny contractual liability may argue that what the other party purported to accept was not an offer, but something less, so that no contract came into being. When parties negotiate with a view to making a contract, many preliminary communications may pass between them before a definite offer is made. One party may simply ask, or respond to, a request for information, or he may invite the other to make an offer. An offer was discussed above (paras 4-003—4-009). In contrast, a communication by which a party is invited to make an offer is commonly called an invitation to treat. It is distinguishable from an offer primarily because it is *not* made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates their assent to its terms. Thus, a statement is clearly not an offer if it expressly provides that the person who makes it is not to be bound merely by the other party's notification of assent but only when they themselves have signed the document in which the statement is contained.<sup>47</sup>
- )11 Whether a party's words or conduct amounted to an offer can be difficult to determine. An important factor will be whether the language used was committal or non-committal. For example, in *Harvey v Facey*<sup>48</sup> the claimants telegraphed to the defendants, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price". The defendants replied, "Lowest cash price for Bumper Hall Pen £900". The claimants then telegraphed, "We agree to buy Bumper Hall Pen for £900 asked for by you". The Judicial Committee of the Privy Council held that the defendants' telegram was not an offer but merely a statement as to the price for which they might be prepared to sell; that

the claimants' second telegram was an offer to buy but that, as this had never been accepted by the defendants, there was no contract. Similarly, in *Gibson v Manchester City Council*<sup>49</sup> it was held that a letter in which a local authority stated (in reply to an enquiry from the tenant of a council house) that it "may be prepared to sell" the house to him at a specified price, was not an offer to sell the house: its purpose was simply to invite the making of a "formal application", amounting to an offer, from the tenant. Moreover, the letter did not contain sufficient detail to constitute an offer; it made: "no mention at all of the special conditions which were undoubtedly in due course going to be included in the formal contract and the conveyance".<sup>50</sup>

- ¶12 This points to a second important factor in distinguishing between an offer and an invitation to treat, namely, whether it is reasonable for the other party to expect further negotiations. Where it is, the statement cannot be an offer. Thus, it has been held that a draft document, sent in the course of contractual negotiations with the clear intention of eliciting further comment from the recipient, was not an offer.<sup>51</sup> Where goods are requested, there are two possible interpretations.<sup>52</sup> The first is that the delivery of the goods is an offer which can be accepted<sup>53</sup>; the second, is that the delivery constitutes the acceptance of the offer that took the form of the request. The appropriate analysis will depend on whether the communication or conduct evinces the appropriate degree of commitment, and of certainty and finality as to terms.<sup>54</sup>

## Wording not conclusive

- ¶13 Apart from cases of the kind just described, the wording of a statement does not conclusively determine the distinction between an offer and an invitation to treat. Thus, a statement may be an invitation to treat although it contains the word "offer"<sup>55</sup>; while a statement may be an offer although it is expressed as an "acceptance,"<sup>56</sup> or although it requests the person to whom it is addressed to make an "offer"<sup>57</sup> or although the subject matter is described as a "gift".<sup>58</sup>

## Footnotes

47 *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184.

48 [1893] A.C. 552. See also *Clifton v Palumbo* [1944] 2 All E.R. 497; *Scancarriers A/S v Aotearoa International Ltd (The Barranduna)* [1985] 2 Lloyd's Rep. 419 (quotation of freight rates not an offer). But see *Philip & Co v Knoblauch*, 1907 S.C. 994 (Harvey v Facey distinguished).

49 [1979] 1 W.L.R. 294 and see *Kyte v Revenue and Customs Commissioners* [2018] EWHC 1146 (Ch); [2018] B.T.C. 20 at [57] where no offer, but only an invitation to treat was found because the suggestion that there was a "settlement opportunity" used language which was

a “considerable distance from the type of language which could be described as ‘promissory language’ or the language of commitment”. cf. *Michael Gerson (Leasing) Ltd v Wilkinson [2000] Q.B. 514* at 540 (“I am willing to make an outright sale [of specified machinery] for £319,000 …”) not an offer and, even if it was, it had not been accepted: below, para.4-031. cf. *Dana UK Axle Ltd v Freudenberg FST GmbH [2021] EWHC 1751 (TCC)* at [80]–[86] where the defendant’s quotation for goods did not amount to an offer but the claimant’s subsequent purchase order did because only the latter could be deemed an expression of willingness to contract on specific terms.

- 50 Such as “a restrictive covenant that the house shall be used as a private dwelling house only, that there shall be no advertising, that the purchaser shall not obstruct accesses, and so on”. The quote is from Geoffrey-Lane LJ dissenting in the Court of Appeal, *[1978] 1 W.L.R. 520* at 530. It was approved by Lord Edmund-Davies in the House of Lords, *[1979] 1 W.L.R. 294* at 302; Lord Diplock makes the same point at 299.
- 51 *McNicolas Construction Holdings v Endemol UK Plc [2003] EWHC 2472, [2003] E.G.C.S. 136.*
- 52 *Photolibrary Group Ltd v Burda Senator Verlag GmbH 2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 811* at [63].
- 53 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 Q.B. 433, 436.*
- 54 *Transformers and Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC); Proton Energy Group SA v Orlen Lietuva [2013] EWHC 2872 (Comm).*
- 55 *Spencer v Harding (1870) L.R. 5 C.P. 561; Clifton v Palumbo [1944] 2 All E.R. 497; iSoft Group Plc v Misys Holdings Ltd [2003] EWCA Civ 229, [2003] All E.R. (D) 438 (Feb).*
- 56 *Bigg v Boyd Gibbins Ltd [1971] 1 W.L.R. 913, (1987) 87 L.Q.R. 307.*
- 57 *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd [1986] A.C. 207.*
- 58 *Evergreen Timber Frames Ltd v Harrington [2021] 3 WLuk 167:* according with common sense and the industrial reality of the situation, the transaction described as a “gift” was construed as an offer. See below paras 4-210—4-211, 4-215.

## **(c) - Distinction between Offer and Invitation to Treat in Typical Situations**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 2. - The Offer**

**(c) - Distinction between Offer and Invitation to Treat in Typical Situations**

### **Default rules**

- ¶14 As the discussion in para.4-013 above shows, the distinction between offer and invitation to treat is often hard to draw, as it is said to depend primarily on the elusive criterion of the intention of the person making the statement in question. But, in certain stereotyped situations, the distinction is determined, at least *prima facie*, by default rules of law. Such rules can be displaced by evidence of contrary intention; but in the absence of such evidence they will determine the distinction between offer and invitation to treat, and they will do so without reference to the intention of the maker of the statement. This is true, for example, in the cases of auction sales and shop window displays. These and other illustrations of the distinction are discussed in paras 4-015—4-029 below.

### **Display of goods for sale: general rule**

- ¶15 As a general rule, a display of goods at a fixed price in a shop window<sup>59</sup> or on a shelf in a self-service store<sup>60</sup> is an invitation to treat and not an offer. The display is an invitation to the customer to make an offer, which the retailer may then accept or reject. In the case of a self-service shop, acceptance of any offer that might be made by the terms of the display would normally take place, not when the customer took the goods off the shelf, but only when they did some less equivocal act, such as presenting them for payment.<sup>61</sup> There is judicial support for the view that an indication of the price at which petrol is to be sold at a filling station is likewise only an invitation to treat,<sup>62</sup>

the offer to buy being made by the customer and accepted by the seller's conduct in putting the petrol into the tank.<sup>63</sup> But this analysis hardly fits the now more common situation in which the station operates a self-service system<sup>64</sup>; for once the customer has put petrol into his tank, the seller has no effective choice of refusing to deal with him. One approach is to distinguish between (i) the display on a sign outside the garage, which may not be an offer, and (ii) the price on the pump, which is part of the offer; the offer is made when the seller empowers the customer to fill up from the pump.

## Display of goods for sale: exceptional cases

- ¶16 The general rule stated in para. 4-015 above relating to shop and similar displays is well established; but it can be excluded by special circumstances: e.g. if the retailer has stated unequivocally that he will sell to the first customer who tenders the specified price.<sup>65</sup> The distinction between an offer and an invitation to treat, in the last resort, is said to depend on the intention of the maker of the statement<sup>66</sup>; and where his intention to be bound immediately on acceptance is sufficiently clear, a shop window or shelf display may be an offer. For example, a notice in a shop window stating that "We will beat any TV price by £20 on the spot" has been described as "a continuing offer".<sup>67</sup> The customer may, indeed, still lose his bargain since the offer can be withdrawn at any time before it is accepted<sup>68</sup>; but if it is so withdrawn the person displaying the notice may incur criminal liability under legislation passed for the protection of consumers.<sup>69</sup>

## Other displays

- ¶17 The principles stated in paras 4-015 and 4-016 above can also apply to other displays. There is no perfectly general answer to the question whether such displays are offers or invitations to treat; the answer depends in each case not only on the intention with which the display was made, but also on practical considerations and fairness.<sup>70</sup> Thus, where a menu is displayed outside a restaurant, or handed to a customer, it seems that the proprietor only makes an invitation to treat,<sup>71</sup> the offer coming from the customer. On the other hand, a notice at the entrance to an automatic car park that is accessed by the motorist taking a ticket from a machine may be an offer which can be accepted by driving in. Lord Denning explained that there is no expectation or opportunity for negotiation; once the consumer drives in, there is no scope for withdrawal since the ticket cannot be easily returned.<sup>72</sup> For a similar reason, a notice on a car park ticketing machine that overpaid sums would be accepted with no change given was held to be an offer to provide parking for whatever sum, equal to or over the stipulated sum, that the customer put into the machine.<sup>73</sup> In *Chapelton v Barry UDC*<sup>74</sup> a display of deck-chairs for hire was held to be an offer which was accepted

by the customer taking a chair. This meant that the ticket issued, containing a harsh exclusion of liability, was not part of the contract and did not prevent the customer from seeking compensation.

In *University of Edinburgh v Onifade*<sup>75</sup> a notice displayed by a landowner on its land stated that any persons parking their cars there without permit would be liable to a “fine” of £30 per day. A motorist who had so parked his car was held liable for the specified amount as his conduct amounted to an acceptance<sup>76</sup>; so that it must have been assumed that the notice was an offer.<sup>77</sup>

## Advertisements: bilateral contracts

- ¶18 Advertisements intended to lead to the making of bilateral contracts tend to be regarded as invitations to treat. Thus a newspaper advertisement that goods are for sale is not generally an offer<sup>78</sup>; an advertisement that a scholarship examination will be held is not an offer to a candidate<sup>79</sup>; and the circulation of a price list by a wine merchant has been held only to be an invitation to treat.

80

¶ U It has been said that, if such statements were offers, a merchant could be liable to everyone who purported to accept his offer even though his stocks were insufficient to meet the requirements of all the “acceptors”.<sup>81</sup> But this result would not necessarily follow; for it can be construed as an offer that is “subject to availability”, and so expires as soon as the merchant’s stock is exhausted.<sup>82</sup> There is, again, no absolute rule determining the character of advertisements of bilateral contracts: they are normally invitations to treat, but they may be offers if the advertiser’s intention to be bound immediately on acceptance is sufficiently clear.<sup>83</sup> Two reasons support the position that advertisements intended to lead to the making of bilateral contracts are commonly regarded as invitations to treat. First, such advertisements often lead to further bargaining, e.g. where a house is advertised for sale. Secondly, the advertiser may legitimately wish, before becoming bound, to assure himself that the other party is able (financially or otherwise) to perform his obligations under any contract which may result.

## Advertisements: collateral unilateral contracts

- ¶19 The reasons supporting the general position that advertisements lead to the formation of a bilateral contract mentioned in para.4-018 above do not apply in the case of a unilateral contract<sup>84</sup>; and advertisements of such contracts are therefore commonly held to be offers. In the leading case of *Carll v Carbolic Smoke Ball Co Ltd*,<sup>85</sup> for example, the defendants issued an advertisement promising to pay £100 to any person who, in accordance with certain directions, used a carbolic

smoke ball made by them and then caught influenza. This was held to be an offer, the defendants' intention to be bound<sup>86</sup> being made particularly clear by their statement that they had deposited £1,000 with their bankers "shewing our sincerity in the matter". An offer was also found in *Bowerman v Association of British Travel Agents Ltd*<sup>87</sup> where a package holiday had been booked with a tour operator who was a member of the defendant association (ABTA). A notice displayed on the tour operator's premises stated, inter alia, that in the event of the financial failure of an ABTA member before commencement of the holiday, "ABTA arranges for you to be reimbursed the money you have paid for your holiday". The Court of Appeal held that these words constituted an offer since, on the objective test,<sup>88</sup> they would reasonably be regarded as such by a member of the public booking a holiday with an ABTA member. A statement about goods made by the manufacturer in response to a direct enquiry from the ultimate purchaser has sometimes been held to amount to a collateral contract. Thus, in *Shanklin Pier Ltd v Detel Products Ltd*<sup>89</sup> the defendant stated to the plaintiff that its paint was suitable for painting the plaintiff's pier and would last seven to ten years. Although the plaintiff did not buy the paint directly from the defendant, but rather instructed its contractor to use the defendant's paint, the plaintiff successfully sued on the basis of a collateral unilateral contract whereby the defendant's statement in relation to the paint was an offer, accepted by the plaintiff's directing its contractor to buy the paint. No such collateral unilateral contract can be founded on a general advertisement by the manufacturer.<sup>90</sup>

## Rewards

- 120 Advertisements of rewards for the return of lost or stolen property, or for information leading to the capture or conviction of a criminal, are commonly regarded as unilateral offers.<sup>91</sup> Some difficulty arises if, in cases of this kind, the information is given by several persons in succession. In one case it was held that the first person to give the information was alone entitled to the reward<sup>92</sup> as the offeror did not intend to pay more than once. This is no doubt the most likely construction since it is implied from the facts; but an advertisement could be so worded as to impose a more extensive liability. The defendants' liability in *Carlill's*<sup>93</sup> case would not have been limited to 10 persons merely because the advertisement stated that they had deposited only £1,000.

## Other liability in connection with advertisements

- 121 A person who issues an advertisement may be under some form of liability even though the advertisement does not amount to an offer. For example, a person who indicates by such an advertisement that he intends to sell goods when he in fact has no such intention might be liable in deceit to someone who suffered loss by acting in reliance on the statement; and he might incur criminal liability under legislation passed for the protection of consumers,<sup>94</sup> or even of

traders who are misled by statements made by their suppliers in the course of marketing.<sup>95</sup> He may also be liable for false statements in advertisements relating to the characteristics of the subject-matter, or to the terms on which it is to be supplied.<sup>96</sup> Two further possibilities arise where the advertisement leads to the making of a contract for the sale or supply of goods to a consumer. First, the advertisement may amount to a “consumer guarantee” and so take effect as a “contractual obligation” owed by the guarantor by virtue of the **Sale and Supply of Goods to Consumers Regulations 2002**.<sup>97</sup> The **Consumer Rights Act 2015** revokes the **2002 Regulations**<sup>98</sup>; but stipulates that when a trader supplies goods to a consumer<sup>99</sup>:

“... the guarantee takes effect, at the time the goods are delivered, as a contractual obligation owed by the *guarantor* under the conditions set out in the guarantee statement and in any *associated advertising*”(italics added).<sup>100</sup>

Liability in connection with advertisements can also arise under a “commercial guarantee” within the **Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013**.<sup>101</sup> Regulation 5 defines such a guarantee as:

“... an undertaking given by the trader *or producer* to the consumer ... to reimburse the price paid or to replace, repair or service goods ... if they do not meet the specifications or any other requirements ... set out in the guarantee statement or in the relevant *advertising* available at the time of the contract or before it is entered into” (italics added).

When such an undertaking is given by the “trader” to the “consumer”, then the undertaking (i.e. the guarantee) will take effect as a term<sup>102</sup> in the “sales contract”, defined in reg.5 as a contract between these parties. But this reasoning cannot apply where the undertaking is given by the *producer* in *advertising* where there is no “sales contract” between the producer and the consumer.

## Timetables and passenger tickets

- 122 There is a remarkable diversity of views on the question just when a contract of carriage is concluded between a carrier and an intending passenger. The authorities yield no single rule; one can only say that the exact time of contracting depends in each case on the wording of the relevant document and on the circumstances in which it was issued. Early authorities held that railway carriers made offers by issuing advertisements stating the times and conditions under which trains would run<sup>103</sup>; and that a road carrier made offers to intending passengers by the act of running buses.<sup>104</sup> Such offers could be accepted by an indication on the part of the passenger that he wished to travel: e.g. by applying for a ticket or getting on the bus. In relation to railway at least, this

position may be explained by the fact that rail companies could not refuse to carry a passenger,<sup>105</sup> something which is alluded to in the judgment.<sup>106</sup>

- 123 It has been held in later cases that the carrier makes the offer at a later stage, by issuing the ticket; and that this offer is accepted by the passenger's retention of the ticket without objection,<sup>107</sup> or even later, when he claims the accommodation offered in the ticket.<sup>108</sup> On this view, the passenger makes no more than an invitation to treat when he asks for a ticket to be issued to him; and the offer contained in the ticket may be made to, and accepted by, the passenger even though the fare is paid by a third party (e.g. the passenger's employer).<sup>109</sup> The reasoning is that the passenger must have the opportunity to be made aware of the terms on the ticket and to accept them.
- 124 Where the booking is made in advance, e.g. through a travel agent, the view has been expressed that it is the passenger who makes the offer, and the contract is concluded when the carrier indicates, even before issuing the ticket, that it "accepts" the booking,<sup>110</sup> or when it issues the ticket.<sup>111</sup>

## Auctions

- 125 A mere advertisement of an auction is not an offer to hold it.<sup>112</sup> At an auction sale the general rule is that the auctioneer's request for bids is not an offer that can be accepted by the highest bidder.<sup>113</sup> Instead, it is a bid that constitutes an offer, which the auctioneer may, but generally<sup>114</sup> is not bound to, accept. Accordingly, s.57(2) of the Sale of Goods Act 1979 provides that a sale by auction is completed<sup>115</sup> when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and that until then the bidder may retract his bid. Similarly, the auctioneer can generally<sup>116</sup> withdraw the lot before he accepts the bid. It seems, moreover, that the offer made by each bidder lapses<sup>117</sup> as soon as a higher bid is made. Thus, if a higher bid is made and then withdrawn, the auctioneer can no longer accept the next highest.

## Auctions with and without reserve

- 126 When property is put up for auction subject to a reserve price, there is no contract if the auctioneer by mistake purports to accept a bid lower than the reserve price.<sup>118</sup> Where the auction is without reserve, it has been said that the transaction should be analysed as two separate contracts<sup>119</sup>: (a) a unilateral collateral contract by which the auctioneer is obliged to accept the highest bid (the auctioneer can be liable for failing to accept the bid); and (b) the main contract for the subject matter

between the highest bidder and the owner (there is no contract of sale if the auctioneer refuses to accept the highest bid). In *Barry v Davies*<sup>120</sup> two machines worth £28,000 were auctioned without reserve. When the auctioneer refused to accept the plaintiff's bids of £200 each, it was liable to the plaintiff for £27,600 for breach of the collateral contract between the auctioneer and the highest bidder that the auctioneer would sell to that bidder. The justice of such an approach is explained in terms of the question of consideration<sup>121</sup> since there is:

“... detriment to the bidder, since his bid can be accepted unless and until it is withdrawn, and benefit to the auctioneer as the bidding is driven up. Moreover, attendance at the sale is likely to be increased if it is known that there is no reserve.”<sup>122</sup>

## Provision for resale in case of dispute

- 127 An auction sale may be conducted subject to the express stipulation that:

“... if any dispute<sup>123</sup> arises between two or more bidders, the lot in dispute shall be immediately put up again and resold.”

If the dispute arises after the lot has been knocked down to one bidder, it seems that there is a contract<sup>124</sup> with them, subject to the condition subsequent that the sale may be annulled if a dispute immediately breaks out between two or more bidders.

## Tenders

- 128 At common law, a statement that goods are to be sold by tender is not normally an offer to sell to the person making the highest tender<sup>125</sup>; it merely indicates a readiness to receive offers. Similarly, an invitation for tenders for the supply of goods or for the execution of works is, generally, not an offer,<sup>126</sup> even though the preparation of the tender may involve very considerable expense. The person who submits the tender makes the offer and there is no contract until the person asking for the tenders accepts one of them. These rules may, however, be excluded by evidence of contrary intention: e.g. where the person who invites the tenders states in the invitation that he binds himself to accept the highest offer to buy<sup>127</sup> (or, as the case may be, the lowest offer to sell or to provide the specified services).<sup>128</sup> In such cases, the invitation for tenders may be regarded: (a) as itself an offer or (b) as an invitation to submit offers coupled with a collateral undertaking to accept the highest (or, as the case may be, the lowest) offer; and the contract is concluded as soon as the

highest offer to buy (or lowest offer to sell, etc.) is communicated<sup>129</sup> There is also an intermediate possibility. This is illustrated by *Blackpool and Fylde Aero Club Ltd v Blackpool BC*<sup>130</sup> in which an invitation to submit tenders was sent by a local authority to seven selected parties; the invitation stated that tenders submitted after a specified deadline would not be considered. It was held that the authority was contractually bound to consider (though not to accept) a tender submitted before the deadline. The collateral unilateral offer to consider conforming tenders was accepted when a conforming tender was submitted. The trial judge accepted that the authority would have accepted the overlooked bid had it been considered, leaving quantum to be decided.

## Share offers

- <sup>129</sup> A company which, in commercial language,<sup>131</sup> makes an “offer to the public” of new shares does not in law “offer” to allot the shares. It invites members of the public to apply for them, reserving the right to decide how many, if any, to allot to any particular applicant.<sup>132</sup> On the other hand a letter informing an existing shareholder of his entitlement under a “rights” issue of new shares is regarded as an offer.<sup>133</sup> This type of communication will set out the precise rights of the persons to whom it is addressed, so that it may be inferred that the company intends to be bound in relation to any shareholder who takes up his rights.

## Footnotes

- 59 *Timothy v Simpson* (1834) 6 C. & P. 499, 500; *Fisher v Bell* [1961] 1 Q.B. 394 (actual decision reversed by *Restriction of Offensive Weapons Act 1961* s.1; contrast *Criminal Justice Act 1988* s.141A(1), as inserted by *Offensive Weapons Act 1996* s.6: this refers only to selling). Dicta in *Wiles v Maddison* [1943] 1 All E.R. 315, 317 may perhaps suggest that a shop window display is an offer. See also *Winfield* (1939) 55 L.Q.R. 499, 516–518.
- 60 *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 Q.B. 401; cf. *Lacis v Cashmarts Ltd* [1969] 2 Q.B. 400; *Davies v Leighton* [1978] Crim. L.R. 575. For the contrary view, see *Ellison Kahn* (1955) 72 S.A.L.J. 246, 250–253; *Lasky v Economic Grocery Stores*, 319 Mass. 224; 65 N.E. 2d 305 (1946).
- 61 See *Lasky v Economic Grocery Stores* 319 Mass. 224; 65 N.E. 2d 305 (1946). An alternative possibility is that the acceptance may take place before such presentation of the goods but be subject until then to the customer’s power to cancel: see *Gillespie v Great Atlantic & Pacific Stores*, 187 S.E. 3d 441 (1972); *Sheeskin v Giant Food Inc*, 318 A 2d 874 (1974). cf. *R. v Morris* [1984] A.C. 320 where taking goods off the shelf of a self-service store and changing the price labels was held to be an “appropriation” within the *Theft Act 1968* s.3(1); but it does not follow that at this stage there would for the purpose of the law of contract be

an acceptance even if the shelf-display amounted to an offer: see *R. v Morris [1984] A.C. 320*, 334.

62 *Esso Petroleum Ltd v Commissioners of Customs & Excise [1976] 1 W.L.R. 1, 5, 6, 11; Richardson v Worrall [1985] S.T.C. 693, 717.*

63 *Re Charge Card Services [1989] Ch. 497, 512*; for acceptance by conduct, see below, paras 4-034—4-035.

64 cf. below, para.4-017 (note).

65 *Lefkowitz v Great Minneapolis Surplus Store Inc (1957) 86 N.W. 2d. 689.*

66 Above, para.4-010.

67 *R. v Warwickshire CC Ex p. Johnson [1993] A.C. 583, 588.*

68 Below, para.4-114.

69 Under the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.3(4)(d) and Sch.1 para.6, a trader (as defined in reg.2, as amended by reg.2 the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)) commits an offence if he “makes an invitation to purchase products at a specified price” and then refuses to show the advertised item to consumers or refuses to take orders for it, though only if he does so “with the intention of promoting a different product (bait and switch)”. A misleading price indication could also conceivably amount to deceit. And see below, para.4-021.

70 cf. the cases discussed below, paras 4-022—4-024.

71 cf. *Guildford v Lockyer [1975] Crim. L.R. 235.*

72 *Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163, 169.*

73 *National Car Parks Ltd v Revenue and Customs Commissioners [2019] EWCA Civ 854, [2019] 3 All E.R. 590* at [18].

74 *Chapelton v Barry UDC [1940] 1 K.B. 532.*

75 2005 S.L.T. (Sh Ct) 63.

76 See below, paras 4-031, 4-034—4-035.

77 However, it is open to question whether the landowner had any objective intention to enter into a contract with persons parking without permit. Rather, the landowner’s intention seems to have been to deter unauthorised parking. The point could be significant if an action had been brought against the landowner, e.g. in respect of loss of or damage to the car.

78 *Partridge v Crittenden [1968] 1 W.L.R. 1204*; contrast *Lefkowitz v Great Minneapolis Surplus Stores, 86 N.W. 2d. 689 (1957).*

79 *Rooke v Dawson [1895] 1 Ch. 480.*

80 *Grainger & Son v Gough [1896] A.C. 325*. See also *LNT Aviation Ltd v Airbus Helicopters UK Ltd [2022] EWHC 309 (Comm)* at [103]–[105] (an Alert Service Bulletin issued by Airbus requiring purchasers of its helicopters to replace a part, which was clearly subject to agreement of specific contract terms between Airbus or its relevant subsidiary and the owner of the relevant helicopter(s), was not an offer make by the subsidiary but only an invitation to treat).

81 *Grainger & Son v Gough [1896] A.C. 325* at 334.

82 Although there may be problems over what stock is to be taken into account.

- 83 cf. the cases discussed below, paras 4-022—4-024.
- 84 For the distinction between unilateral and bilateral contracts, see below, para.4-102.
- 85 *[1893] 1 Q.B. 256*.
- 86 Contrast *Lambert v Lewis* [1982] A.C. 225, 262, per Stephenson LJ, affirmed without reference to the point [1982] A.C. 271, below, para.4-217.
- 87 (1995) 145 N.L.J. 1815.
- 88 Above, paras 4-002 and 4-003.
- 89 [1951] 2 K.B. 854, [1951] 2 All E.R. 471; see also *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd* [1965] 2 Q.B. 170.
- 90 *Lambert v Lewis*, also known as *Lexmead (Basingstoke) Ltd v Lewis* [1982] A.C. 225, [1981] 2 W.L.R. 713 at 262: “the difficulty is to show that what the manufacturers stated in the literature advertising and accompanying their products as to their safety and suitability was intended to be a contractual warranty or binding promise. It is one thing to express or imply it in a contract of sale, another to treat it as expressed or implied as a contract, or a term of a contract, collateral to a contract of sale”.
- 91 e.g. *Gibbons v Proctor* (1891) 64 L.T. 594; *Williams v Carwardine* (1833) 5 C. & P. 566; 4 B. & Ad. 621.
- 92 *Lancaster v Walsh* (1838) 4 M. & W. 16. Where two persons together supply the information, they may share a single reward: *Lockhart v Barnard* (1845) 14 M. & W. 674.
- 93 Above, para.4-019.
- 94 e.g. under Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) regs 2–4, reg.3(4)(d) and Sch.1 para.6, above, para.4-016 (note). See also Consumer Credit Act 1974 s.45.
- 95 Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276).
- 96 Below, Ch.9.
- 97 SI 2002/3045 reg.15 (as amended by Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2 para.97); for definition of “consumer” and “consumer guarantee”, see reg.2.
- 98 See s.60 and Sch.1 para.53 of the Consumer Rights Act 2015. The Act applies to contracts made on or after 1 October 2015.
- 99 See s.3(1) of the Consumer Rights Act 2015.
- 100 See s.30(3) of the Consumer Rights Act 2015. And see below, para.4-219.
- 101 SI 2013/3134.
- 102 regs 9(3), 10(5) and 13(6) of SI 2013/134.
- 103 *Denton v G.N. Ry* (1856) 5 E. & B. 860; *Thompson v L.M.S. Ry* [1930] 1 K.B. 41, 47.
- 104 *Wilkie v L.P.T.B.* [1947] 1 All E.R. 258, 259.
- 105 See the current position in the Railways Act 1993 s.123.
- 106 *Denton v G.N. Ry* (1856) 5 E. & B. 860, 868; Crompton J noted that public “carriers of goods must carry according to his public profession”. While there was no equivalent authority for passengers, Crompton J took the view that the same rule would apply. Campbell J said at 865: “if the Company promised to give tickets for a train, running at a particular hour to a

particular place, to any one who would come to the station and tender the price of the ticket, it is a good contract with any one who so comes. I take it to be clear that the issuing of the time tables in this way amounts in fact to such a promise"; Wightman J, said at 867: "the publication of these time tables amounted to a promise to any one of the public who would come to the station and pay for a ticket, that he shall have one by the train at seven". Other cases also note this aspect: *MacRobertson-Miller Airline Services v Commissioner of State Taxation* [1975] A.L.R. 131 at [5].

- 107 *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450; the acceptance in such cases would be by conduct rather than by "silence": cf. below, para.4-093.
- 108 *MacRobertson-Miller Airline Services v Commissioner of State Taxation* [1975] A.L.R. 131; the principle resembles that stated in *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, 1037 in relation to the time of formation of a contract for the carriage of goods by sea; Carver on Bills of Lading, 4th edn (2017), para.3-001 n.7.
- 109 *Hobbs v L. & S.W. Ry* (1875) L.R. 10 Q.B. 111, 119, as explained in the *MacRobertson-Miller* [1975] A.L.R. 131 at 147; consideration for the promises of both parties would be provided on the principle of *Gore v Van der Lann* [1967] 2 Q.B. 31, below, para.6-217.
- 110 *Hollingworth v Southern Ferries Ltd (The Eagle)* [1977] 2 Lloyd's Rep. 70; *Daly v Gen. Steam Navigation Co Ltd (The Dragon)* [1980] 2 Lloyd's Rep. 415; affirming [1979] 1 Lloyd's Rep. 257; *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 C.L.R. 97; cf. (in cases of carriage of goods by sea) *Gulf Steel Co Ltd v Al Khalifa Shipping Co (The Anwar al Sabar)* [1980] 2 Lloyd's Rep. 261, 263. See also *British Airways Board v Taylor* [1976] 1 W.L.R. 13.
- 111 *Dillon v Baltic Shipping Co (The Mikhail Lermontov)* [1991] 2 Lloyd's Rep. 155, 159; reversed on other grounds (1993) 176 C.L.R. 344.
- 112 *Harris v Nickerson* (1873) L.R. 8 Q.B. 286.
- 113 *Payne v Cave* (1789) 3 T.R. 148; *British Car Auctions v Wright* [1972] 1 W.L.R. 1519, (1973) 89 L.Q.R. 7.
- 114 For the position where the auction is "without reserve", see below, para.4-026.
- 115 i.e. concluded: *Coys of Kensington Automobiles Ltd v Pugliese* [2011] EWHC 655 (QB), [2011] 2 All E.R. (Comm) 664 at [15] (where no reference was made to s.57(2)).
- 116 Subject to the qualification where the auction is "without reserve", see below, para.4-026.
- 117 Below, para.4-125.
- 118 *McManus v Fortescue* [1907] 2 K.B. 1; on a sale of land, it must be expressly stated whether the sale is with reserve or not: *Sale of Land by Auction Act 1867* s.5.
- 119 *Warlow v Harrison* (1859) 1 E. & E. 309; cf. *Johnston v Boyes* [1899] 2 Ch. 73, 77; *Barry v Davies* [2000] 1 W.L.R. 1962, 1967, citing a previous edition of this book with approval. Contra, *Fenwick v Macdonald, Fraser & Co Ltd* (1904) 6 F. (Ct. of Sess.) 850; *Slade* (1952) 68 L.Q.R. 238; *Gower*, (1952) 68 L.Q.R. 457; *Slade* (1953) 69 L.Q.R. 21. Under the American Uniform Commercial Code (hereinafter referred to as the "UCC") the goods may not be withdrawn once they have been put up, if the auction is without reserve: ss.2-328(3). This position is restated, though in different terminology, in ss.2-328(3) of the American Law Institute's proposed revisions of art.2 of the UCC (2003; at present it seems to be unlikely that this proposal will be implemented).

- 120 *Barry v Davies* [2000] 1 W.L.R. 1962, 1965.
- 121 Below, para.6-205.
- 122 *Barry v Davies* [2000] 1 W.L.R. 1962, 1967.
- 123 See *Richards v Phillips* [1969] 1 Ch. 39.
- 124 This seems to follow from use of the word “resold” in the stipulation quoted at para.4-027.
- 125 *Spencer v Harding* (1870) L.R. 5 C.P. 561.
- 126 *Spencer v Harding* (1870) L.R. 5 C.P. 561, 564.
- 127 *Spencer v Harding* (1870) L.R. 5 C.P. 561, 563.
- 128 See *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932, 939. See also *MJB Enterprises Ltd v Defence Construction Ltd* (1999) 15 Const. L.J. 455: promise to accept lowest compliant tender broken by accepting lowest non-compliant one (Supreme Court of Canada).
- 129 *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd* [1986] A.C. 207, 224–225.
- 130 [1990] 1 W.L.R. 1195. No decision was reached on the quantum of damages. See also *Fairclough Building v Port Talbot BC* (1992) 62 B.L.R. 82.
- 131 And indeed in the language of Financial Services and Markets Act 2000 s.103(4) and of Companies Act 2006 ss.551(7), 578 and 756.
- 132 e.g. *Hebb's Case* (1867) L.R. 4 Eq. 9; *Harris' Case* (1872) L.R. 7 Ch. App. 587; *Wall's Case* (1872) 42 L.J. Ch. 372; cf. *Wallace's Case* [1900] 2 Ch. 671; *National Westminster Bank Plc v IRC* [1995] 1 A.C. 119, 126; cf. *Rust v Abbey Life Insurance Co* [1979] 2 Lloyd's Rep. 334 (property bonds).
- 133 *Jackson v Turquand* (1869) L.R. 4 H.L. 305.

## **(d) - Place of Making an Offer**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 2. - The Offer**

**(d) - Place of Making an Offer**

### **Place of making an offer**

- 130 It may be important to know exactly *where* an offer has been made: for example, in order to determine whether a contract can be sued on in a particular court.<sup>134</sup> For this purpose it has been held that an offer sent through the post had been made where it was posted.<sup>135</sup> Since requirements of this kind are generally imposed by legislation, it is unsafe to lay down any general rule. The question where an offer was made must, in the last resort, turn on the construction of the relevant legislation.

### **Footnotes**

134 *Taylor v Jones* (1875) 1 C.P.D. 87; cf. in criminal law, *Treacy v DPP* [1971] A.C. 537 (blackmail); contrast *R. v Baxter* [1972] 1 Q.B. 1 (attempt to obtain by deception).

135 *Taylor v Jones* (1875) 1 C.P.D. 87.

## (a) - Definition

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 3. - The Acceptance

### (a) - Definition

#### Acceptance defined

- <sup>131</sup> An acceptance is a final and unqualified <sup>136</sup> expression of assent, whether by words or conduct, <sup>137</sup> to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer.<sup>138</sup> On this test, a mere acknowledgement of the receipt of an offer does not amount to an acceptance; nor is there acceptance if a person, to whom an offer to sell goods had been made, merely replies that it is his “intention to place an order”<sup>139</sup> or asks for an invoice.<sup>140</sup> Likewise, where a prospective buyer asked what would happen if there were snagging defects, and the builder replied that he had an obligation under the NHBC scheme to remedy defects, there was no contract to repair any defects.<sup>141</sup> But an “acknowledgement” may by its express terms or, in a particular context by implication, contain a statement that the sender had agreed to the terms of the offer and that he was therefore accepting it. Where an offer makes alternative proposals, the acceptance must make it clear to which set of terms the assent is directed. In *Peter Lind & Co Ltd v Mersey Docks & Harbour Board*<sup>142</sup> an offer to build a freight terminal was made by a tender quoting in the alternative a fixed, and a “cost-plus” price. The offeree purported to accept “your tender” and it was held that there was no contract.

#### Continuing negotiations <sup>143</sup>

When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands, and the parties may disagree in the end as to whether they had ever agreed at all. The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms.<sup>144</sup> If so, there is a contract even though both parties, or one of them, had reservations not expressed in the correspondence.<sup>145</sup> The court will be particularly anxious to hold that continuing negotiations have resulted in a contract where the performance which was the subject-matter of the negotiations has actually been rendered. In one such case a building subcontract was held to have come into existence (even though agreement had not yet been reached when the contractor began work) as during its progress outstanding matters were resolved by further negotiations.<sup>146</sup> The contract may then be given retrospective effect, so as to cover work done before the final agreement was reached.<sup>147</sup>

## Negotiation after apparent agreement

- <sup>143</sup> The significance of an acceptance is that it immediately binds both parties to the contract. Thereafter, neither party can vary its terms without making a new contract. Businessmen do not, any more than the courts, find it easy to say precisely when they have reached agreement, and may continue to negotiate after they appear to have agreed to the same terms. The court will then look at the entire course of negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement.<sup>148</sup> If it did, the fact that the parties continued negotiations after this point does not affect the existence of the contract between them<sup>149</sup>: for example, in one such case the subsequent negotiations showed “only that the parties wished to discuss the *implementation* of the agreement<sup>150</sup> and that [one of them] wished to improve the terms that *had been agreed*”. The position would, of course, be different if the continued negotiations could be construed<sup>151</sup> as an agreement to rescind the contract. A fortiori, the binding force of an oral contract is not affected or altered merely by the fact that, after its conclusion, one party sends to the other a document containing terms significantly different from those which had been orally agreed.<sup>152</sup>

## Acceptance by conduct<sup>153</sup>

- <sup>144</sup> An offer may be accepted by conduct. For example, an offer to buy goods can be accepted by supplying them,<sup>154</sup> although the facts may show that the initial request is merely an invitation to treat, the supply of the goods constitutes the offer, and the unequivocal acceptance of then constitutes the acceptance, as in *Interfoto v Stilleto*.<sup>155</sup> An offer to sell goods made by sending them to the offeree can be accepted by using them,<sup>156</sup> unless the goods are “unsolicited” within the

legislation against “inertia selling”<sup>157</sup>; an offer contained in a request for services can be accepted by beginning to render them<sup>158</sup>; an offer of services may be accepted by the offeree’s conduct in arranging an appointment in certain circumstances<sup>159</sup>; where a customer of a bank draws a cheque which will, if honoured, cause their account to be overdrawn, the bank, by deciding to honour the cheque, impliedly accepts the customer’s implied request for an overdraft on the bank’s usual terms<sup>160</sup>; and when a car park ticketing machine displays a notice that overpaid sums would be accepted with no change given, the offer is accepted by the customer paying the stipulated sum or more, and pressing a green button to obtain a ticket.<sup>161</sup>

- 135 But conduct will only amount to acceptance if it is clear that the offeree’s alleged act of acceptance was done with the intention (ascertained in accordance with the objective principle<sup>162</sup>) of accepting the offer. Thus, a buyer’s taking delivery of goods after the conclusion of an oral contract of sale will not amount to his acceptance of written terms which differ significantly from those orally agreed, and which are sent to him by the seller after the oral contract was made but before taking delivery.<sup>163</sup> That conduct is then referable to the oral contract rather than to the later attempted variation. Nor is a company’s offer to insure a car accepted by taking the car out on the road, if there is evidence that the driver intended to insure with another company.<sup>164</sup> Nor is a managing director’s proposal of an employment contract accepted by the company paying him at the stated rate, if there is doubt over whether the company accepted the other terms.<sup>165</sup> Nor is payment indicative of acceptance where this payment “cannot be explained only as performance of that alleged agreement”.<sup>166</sup> A fortiori, there is no acceptance where the offeree’s conduct clearly indicates an intention to reject the offer. This was the position in a Scottish case where a notice on a package containing computer software stated that opening the package would indicate acceptance of the terms on which the supply was made, and the customer returned the package unopened.<sup>167</sup>

## Establishing the terms of contracts made by conduct

- 136 Where an offer or an acceptance or both are alleged to have been made by conduct, the terms of the agreement may be more difficult to ascertain than where the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all.<sup>168</sup> But sometimes (where there is a gap, rather than a conflict)<sup>169</sup> the court can resolve the uncertainty by applying the standard of reasonableness<sup>170</sup> or by reference to another contract (whether between the same parties or between one of them and a third party<sup>171</sup>), or even to a draft agreement between them, which had never matured into a contract. In *Brogden v Metropolitan Ry*<sup>172</sup> a railway company submitted to a merchant a draft agreement for the supply of coal. The merchant returned it marked “approved” but also made a number of alterations to it, to which the railway company did not expressly assent; but the company accepted deliveries of

coal under the draft agreement for two years. It was held that once the company began to accept these deliveries there was a contract on the terms of the altered draft agreement.<sup>173</sup> Where the parties are negotiating the terms of the agreement, and one party makes a counter-offer, this can be accepted by conduct, such as handing over the subject matter of the contract.<sup>174</sup>

## Footnotes

- 136 In *Dana UK Axle Ltd v Freudenberg FST GmbH [2021] EWHC 1751 (TCC)* at [82] a communication which contained a statement of intent to negotiate the final terms of the contract in due course was not an acceptance.
- 137 *Brogden v Metropolitan Railway Co (1877) 2 App. Cas. 666; Taylor v Allon [1966] 1 Q.B. 304, 311*; *Nissan UK Ltd v Nissan Motor Manufacturing (UK) Ltd [1994] Lexis Citation 1710*.
- 138 Above, para.4-003; *Inland Revenue Commissioners v Fry [2001] S.T.C. 1715* at [6], [7]; *Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm)*, [2012] 1 Lloyd's Rep. 349 at [79]. For an application of the objective test to an acceptance, see *University of Edinburgh v Onifade 2005 S.L.T. (Sh Ct) 63*, above para.4-017. The motorist was there held to have accepted the landowner's offer by parking his car on the owner's land and it was "nothing to the purpose that he did not intend to pay" (at 6) the "fine" specified in the offer.
- 139 *O.T.M. Ltd v Hydranautics [1981] 2 Lloyd's Rep. 211, 214*. And see *Kyte v Revenue and Customs Commissioners [2018] EWHC 1146 (Ch); [2018] B.T.C. 20* at [59] where the alleged offeree stated that it would like to "go ahead with the settlement".
- 140 *Michael Gerson (Leasing) Ltd v Wilkinson [2000] Q.B. 514* at 530 (where there was probably no offer: see above, para.4-011 (note)).
- 141 *Secker v Fairhill Property Services Ltd [2017] EWHC 69 (QB)*.
- 142 [1972] 2 Lloyd's Rep. 234.
- 143 Paras 4-032 and 4-033 are referred to with apparent approval by Males J in *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc [2012] EWHC 3162 (QB)*, [2013] 1 Lloyd's Rep. 63 at [5].
- 144 See *Glencore Energy Ltd v Cirrus Oil Services Ltd [2014] EWHC 87 (Comm)*, [2014] All E.R. (Comm) 513, where a communication forming part of continuing email exchanges was held on its true construction to be a "clear acceptance" (at [60], [62]) of the relevant offer contained within a prior email; in *Parsadoust v Hanging Gardens Ltd [2021] EWHC 1594 (Comm)* transcripts of multiple telephone calls between the parties demonstrated a clear failure to reach an agreement such that the "draft agreement" subsequently circulated did not merely formalising an earlier agreement, but was rather in the nature of a written offer (at [85]).
- 145 *Kennedy v Lee (1817) 3 Mer. 441*; cf. *Cie de Commerce, etc. v Parkinson Stove Co [1953] 2 Lloyd's Rep. 487, B.S.E., 17 M.L.R. 476*; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons [1977] 2 Lloyd's Rep. 5; Thoresen Car Ferries Ltd v Weymouth Portland BC [1977] 2 Lloyd's Rep. 614*; *O.T.M. Ltd v Hydranautics [1981] 2 Lloyd's Rep. 211, 215*; *Manatee*

- Towing Co v Oceanbulk Maritime SA (The Bay Ridge) [1999] 2 All E.R. (Comm) 306; David de Jongh Weill v Mean Fiddler Holdings [2003] EWCA Civ 1058; Allianz Insurance Co of Egypt v Agaion Insurance Co SA [2008] EWCA Civ 1455, [2009] 2 All E.R. (Comm) 745.*
- 146 *G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep. 25*. Peter Lind's case (above, para.4-031) shows that the factor of performance of work is not decisive, though it may (as in that case) give the performing party a restitutionary claim.
- 147 *G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep. 25*; and see below, para.4-166.
- 148 *Hussey v Horne-Payne (1878) 4 App. Cas. 311; Bristol, Cardiff & Swansea Aerated Bread Co v Maggs (1890) 44 Ch. D. 616; British Guiana Credit Corp v Da Silva [1965] 1 W.L.R. 248; Container Transport International Inc v Oceanus Mutual, etc., Association [1984] 1 Lloyd's Rep. 476; Asty Maritime Co Ltd v Rocco Giuseppe & Figli (The Astyanax) [1985] 2 Lloyd's Rep. 109, 112; Hofflinghouse & Co Ltd v C. Trade SA (The Intra Transporter) [1986] 2 Lloyd's Rep. 132; Pagnan SpA v Granaria BV [1986] 2 Lloyd's Rep. 547; Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep. 601, 619; Ignazio Messina & Co v Polskie Linie Oceaniczne [1995] 2 Lloyd's Rep. 566 (no contract); Frota Oceanica Brasileira SA v Steamship Mutual Underwriting Association (The Frotanorte) [1996] 2 Lloyd's Rep. 461 (no contract as matters of substance remained unresolved); Cockett Marine DMCC v ING Bank NV [2019] EWHC 1533 (Comm) (no contact as the claimant's purported acceptance included additional terms and a request for a copy of the defendant's terms and conditions). The same principle has been applied in the context of the question whether a contract had been rescinded: Drake Insurance Plc v Provident Insurance Plc [2003] EWCA Civ 1834, [2004] Q.B. 601 at [100]. See also Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA (The Athena) [2011] EWHC 589 (Admly) at [44], citing the above text with apparent approval.*
- 149 *Perry v Suffields Ltd [1916] 2 Ch. 187; Davies v Sweet [1962] 2 Q.B. 300; Cranleigh Precision Engineering Ltd v Bryant [1965] 1 W.L.R. 1293; Harmony Shipping Co SA v Saudi-Europe Line Ltd (The Good Helmsman) [1981] 1 Lloyd's Rep. 377, 409, 416.*
- 150 cf. para.4-152 below.
- 151 *Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [230], affirmed [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 786 without reference to this point, but see above, para.4-006 (note).*
- 152 *Jayaar Impex Ltd v Toaken Group Ltd [1996] 2 Lloyd's Rep. 437*. cf. *Cockett Marine DMCC v ING Bank NV [2019] EWHC 1533 (Comm)*.
- 153 This paragraph and para.2-031 of the 31st edition were cited with approval in *Iliffe v Feltham Construction Ltd [2014] EWHC 2125* at [80] (decision to grant summary judgment overturned on appeal on other grounds, [2015] EWCA Civ 715).
- 154 *Harvey v Johnson (1848) 6 C.B. 305*; cf. *Steven v Bromley & Son [1919] 2 K.B. 722, 728; Greenmast Shipping Co SA v Jean Lion et Cie (The Saronikos) [1986] 2 Lloyd's Rep. 277; Re Charge Card Services [1989] Ch. 497 (above, para.4-015); Carlyle Finance Ltd v Pallas Industrial Finance Ltd [1999] 1 All E.R. (Comm) 659 at 670; and see below, para.4-093; Photolibrary Group Ltd v Burda Senator Verlag GmbH [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 811; Finmoon Ltd v Baltic Reefers Management Ltd [2012] EWHC 920*

- (*Comm*), [2012] 2 *Lloyd's Rep.* 388, where para.2-030 of the 30th edition of the Main Work is cited at [22] with apparent approval; *Hamad M Aldrees & Partners v Rotex Europe Ltd* [2019] EWHC 574 (TCC), 184 C.L.R. 145; contrast *Capital Finance Co Ltd v Bray* [1964] 1 W.L.R. 323. As to counter-offers, see below, paras 4-121, 4-123.
- 155 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, at 436, 445 (acceptance by opening the bag and telephoning the offeror to express satisfaction).
- 156 *Brogden v Metropolitan Ry* (1877) 2 App. Cas. 666, below, para.4-036 (note); cf. *Hart v Mills* (1846) 15 L.J. Ex. 200; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274, *The Times*, 12 June 2003.
- 157 Above, para.4-008.
- 158 *Smit International Singapore Pte Ltd v Kurnia Dewi Shipping SA (The Kurnia Dewi)* [1997] 1 *Lloyd's Rep.* 553; cf. *Datec Electronics Holdings Ltd v United Parcels Ltd* [2007] UKHL 23, [2007] 1 W.L.R. 1325 at [23], discussed in para.4-013 above.
- 159 *Aroca Seiquer & Asociados v Adams* [2018] EWCA Civ 1589 at [35]–[37]. And see *Anchor 2020 Ltd v Midas Construction Ltd* [2019] EWHC 435 (TCC), [2019] 1 All E.R. (Comm) 421 at [113] (continued performance of the agreement indicated the parties' intention to create legal relations).
- 160 *Lloyds Bank v Voller* [2000] 2 All E.R. (Comm) 978.
- 161 *National Car Parks Ltd v Revenue and Customs Commissioners* [2019] EWCA Civ 854, [2019] 3 All E.R. 590.
- 162 Above, paras 4-002, 4-003. For the application of the objective principle to an acceptance by conduct, see *University of Edinburgh v Onifade* 2005 S.L.T. (Sh Ct) 63, above para.4-031 (note).
- 163 *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 *Lloyd's Rep.* 437.
- 164 *Taylor v Allon* [1966] 1 Q.B. 304. The objective principle (above, paras 4-002, 4-003) could not apply in this case, as the conduct alleged to constitute the acceptance had never come to the notice of the offeror. cf. *Picardi v Cuniberti* [2002] EWHC 2933, (2003) 19 Const. L.J. 350: payments made under another contract held not to amount to acceptance of an offer to enter into the alleged new contract; and see, in another context, *Re Leyland Daf Ltd* [1994] 4 All E.R. 300, affirmed sub nom. *Powdrill v Watson* [1995] 2 A.C. 394.
- 165 *Arley Homes North West Ltd v Cosgrave* Unreported 14 April 2016, EAT.
- 166 *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2020] EWHC 1844 (Comm) at [703], and see at [681]: “it is possible to make a payment without entering into contract”; [702] on the facts, there was no “complete and unconditional acceptance”.
- 167 *Beta Computers (Europe) v Adobe Systems (Europe)* 1996 S.L.T. 604; even opening the package would not necessarily be an acceptance so as to incorporate the printed terms: see Tapper in (ed. Rose) *Consensus ad Idem, Essays in the Law of Contract in Honour of Guenter Treitel*, 287–288.
- 168 *Capital Finance Co Ltd v Bray* [1964] 1 W.L.R. 323.
- 169 Where different terms are alleged, the problem of “battle of forms” arises; see below paras 4-037 et seq.
- 170 Sale of Goods Act 1979 s.8(2); Supply of Goods and Services Act 1982 s.15(1); below, paras 4-146—4-148; cf. *Steven v Bromley & Son* [1919] 2 K.B. 722.

- 171 e.g. *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 Q.B. 402.
- 172 (1877) 2 App. Cas. 666; see also *Jones v Daniel* [1894] 2 Ch. 332; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep. 5; cf. *D. & M. Trailers (Halifax) Ltd v Stirling* [1978] R.T.R. 468; *UK Safety Group Ltd v Heane* [1998] 2 B.C.L.C. 208.
- 173 See also *Parker v South Eastern Railway* [1877] 2 C.P.D. 416, 421, where Mellish LJ states that: “if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract ... the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are”. Contrast *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd's Rep. 437, where the conduct of the buyer was referable, not to the draft sent by the seller, but to the earlier oral agreement (discussed above at para.4-035) between the parties; and *UK Safety Group Ltd v Heane* [1998] 2 B.C.L.C. 208 (company director not bound by terms of a draft agreement which was under the company’s Articles required to be, but had not been, authorised by the board). cf. *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1751 (TCC) at [86]–[88] where the defendant’s failure to challenge the claimant’s terms, coupled with its subsequent delivery of the goods, resulted in the claimant’s terms being incorporated into the contract.
- 174 *British Road Services Ltd v Arthur V Crutchley & Co Ltd (No.1)* [1968] 1 Lloyd's Rep. 271, 273.

## **(b) - Correspondence between Acceptance and Offer**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 3. - The Acceptance

**(b) - Correspondence between Acceptance and Offer**

### **Correspondence between acceptance and offer**

- 137 A communication may fail to take effect as an acceptance because it attempts to vary the terms of the offer. Thus an offer to sell 1,200 tons of iron is not accepted by a reply asking for 800 tons<sup>175</sup>; an offer to pay a *fixed* price for building work cannot be accepted by a promise to do the work for a *variable* price<sup>176</sup>; and an offer to *supply* goods cannot be accepted by an “order” for their “*supply and installation*”.<sup>177</sup> Nor, generally, can an offer be accepted by a reply which varies one of its other terms (e.g. that specifying the time of performance),<sup>178</sup> or by a reply which introduces an entirely new term,<sup>179</sup> or only partially accepts the offer.<sup>180</sup> Such a reply is not an acceptance; but it may, rather, be a counter-offer,<sup>181</sup> which the original offeror can then accept or reject and the new offeror can revoke prior to its acceptance.
- 138 On the other hand, statements that are not intended to vary the terms of the offer, or to add new terms, do not disqualify the acceptance, even where they do not precisely match the words of the offer.<sup>182</sup> It is, moreover, submitted that, if the introduced term merely makes express what would otherwise be implied, it does not destroy the effectiveness of the acceptance.<sup>183</sup> Nor will the introduced term have this effect if it is merely a declaration by the acceptor that he is prepared to grant some indulgence to the offeror, e.g. to condone late payment in return for specified interest.<sup>184</sup> Similarly, it is submitted that an acceptance which asks for some indulgence to the offeree is, nevertheless, effective, so long as it is clear that the offeree is prepared to perform even if the indulgence is not granted: e.g. to buy for cash if his request for credit is refused. For example,

in *Stevenson, Jacques & Co v McLean*<sup>185</sup> the defendant offered to sell the plaintiff iron at “40s per ton net cash”. The plaintiff then asked whether the defendant “would accept forty for delivery over two months, or if not, longest limit you would give”. Hearing nothing, S accepted the original offer by telegram before M’s revocation reached S. The court held that this inquiry was not a counteroffer extinguishing the original offer, so that the plaintiff could bind the defendant with his subsequent acceptance.

- 139 The line between a counteroffer and a request for information can be a fine one. The test in each case is whether the offeror reasonably regarded the purported acceptance “as introducing a new term into the bargain and not as a clear acceptance of the offer”.<sup>186</sup> In the case of continuing negotiations, the court must look at the whole correspondence between the parties.<sup>187</sup> It is also possible for a communication which contains new terms to amount at the same time: (1) to a firm acceptance of the offer; and (2) to a new offer to enter into a further contract.<sup>188</sup> In such a case, there will be a contract on the terms of the original offer, but none on the terms of the new offer, unless that, in turn, is accepted.<sup>189</sup>

## Subsequent formal document inaccurate

- 140 After parties have reached agreement, the offer and acceptance may be set out in formal documents. The purpose of such documents may be merely to record the agreed terms<sup>190</sup>; and where one of the documents performs this function accurately while the other fails to do so, the discrepancy between them will not prevent the formation of a contract. In such a case, the court can rectify the document which fails to record the agreed terms, and the contract will be on those agreed terms.<sup>191</sup>

## The “battle of forms”

- 141 The rule that offer and acceptance must correspond gives rise to problems where one or both of the parties wish to contract by reference to a “standard form” contractual document. Two situations (described in paras 4-042 and 4-043 below) call for discussion.

## One party’s “usual conditions”

- 142 First, A may make an offer to B by asking for a supply of goods or services. B may reply that he is willing to supply the goods or services “on terms stated in the reply” or on his “usual conditions”.

Prima facie, B's statement is a counter-offer which A is free to accept or reject. A may accept it by accepting the goods or services, thereby concluding a contract with B on B's terms. A will be so bound unless any of these terms are unfair under s.62 of the Consumer Rights Act 2015 because, e.g. it binds the consumer to terms which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.<sup>192</sup>

## Each party refers to own conditions

- 143 Secondly, *each* party may purport to contract with reference to his own set of standard terms and these terms may conflict. In *B.R.S. v Arthur V. Crutchley Ltd*<sup>193</sup> the claimants delivered a consignment of whisky to the defendants for storage. Their driver handed the defendants a delivery note purporting to incorporate the claimants' "conditions of carriage". The note was stamped by the defendants: "Received under [the defendants'] conditions". It was held that this amounted to a counter-offer which the claimants had accepted by conduct<sup>194</sup> in handing over the goods, and that the contract therefore incorporated the defendants' and not the claimants' conditions.

## "Last shot" doctrine

- 144 *B.R.S. v Arthur V. Crutchley Ltd*<sup>195</sup> gave some support to the so-called "last shot" doctrine: i.e. to the view that, where conflicting communications are exchanged, each is a counter-offer, so that if a contract results at all (e.g. from an acceptance by conduct) it must be on the terms of the final document in the series leading to the conclusion of the contract.<sup>196</sup> This view was, for example, applied in *Tekdata Interconnections Ltd v Amphenol Ltd*,<sup>197</sup> where a contract for the sale of goods was made by: (1) the buyer's sending a purchase order on its own terms and conditions to the seller (2) the seller's sending an acknowledgement on its own terms to the buyer and (3) receipt of the goods by the buyer.<sup>198</sup> Applying the "traditional offer and acceptance analysis",<sup>199</sup> it was held that the contract was on (2) the seller's terms, which excluded or limited the seller's liability.

## Exception to the "last shot" doctrine

- 145 In *Tekdata Interconnections Ltd v Amphenol Ltd*,

200

D  it was recognised that the "last shot" doctrine, might be

201

 (although in this case it was not)

202

 displaced by evidence of the parties' "objective intention" that the "last shot" should not prevail. There may be an express agreement to that effect, as where a customer signed a supplier's "customer file" (a master or framework agreement for future deliveries) in which "conditions were deliberately and carefully drafted to protect [the suppliers] against the last shot doctrine" by stating "expressly that they would continue to apply even if [the suppliers] delivered the goods without reserving their position or referring back to their own General Conditions".

203

 In *Sterling Hydraulics Ltd v Dichtomatik Ltd*,

204

 a buyer placed a purchase order subject to its own conditions, and the seller acknowledged the order by a fax containing the words "Delivery based on our general conditions of sale". These were not attached and, mainly for this reason, it was held that the seller's acknowledgement was not a counter-offer but an acceptance, so that the resulting contract was on the buyer's conditions even though the seller's acknowledgement was the last shot in the exchange of messages. It has been emphasised that a party's standard terms and conditions will not be incorporated unless that party has given reasonable notice of them to the other party. In a case involving a continuing commercial relationship,

205

 the buyer's purchase order sent by email or fax, did not, on its face, refer to the terms and conditions on the back; neither were the terms and conditions sent separately. The seller's acknowledgement *did* refer to its terms but these were neither included nor were in common use in the industry.

206

 Neither party's terms and conditions were incorporated in the contract. However, where both parties *had* attached its terms and conditions but there had been no acceptance of either set of terms, there may be a contract where performance had commenced, but on neither party's terms.

207



## Butler Machine Co Ltd v Ex-Cell-O Corp (England) Ltd

208 A more complex situation arose in *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd*,<sup>208</sup> where sellers had offered to supply a machine for a specified sum. The offer (document (1))

was expressed to be subject to certain terms and conditions, including a “price escalation clause” by which the amount actually payable by the buyers was to depend on “prices ruling upon date of delivery”. In reply, the buyers placed an order for the machinery on a form setting out their own terms and conditions (2), which differed from those of the sellers in containing no price-escalation clause and also in various other respects.<sup>209</sup> It also contained a tear-off slip to be signed by the sellers and returned to the buyers, stating that the sellers accepted the buyers’ order “on the terms and conditions stated therein”. (3) The sellers did sign the slip and returned it with a letter (4) saying that they were “entering” the order “in accordance with” their offer.

- ¶47 This communication from the sellers (3) was held to be an acceptance of the buyers’ counter-offer<sup>210</sup> so that the resulting contract was on the buyers’ terms (in document (2)), and the sellers were not entitled to the benefit of the price escalation clause. It was held that the sellers’ reply to the buyers’ order, (4), did not prevail (though it was the “last shot” in the series) because the reference in it to the sellers’ original offer (1) was made, not for the purpose of reiterating all its terms, but only for the purpose of identifying the subject-matter. It would, however, have been possible for the sellers to have turned their final communication into a counter-offer by explicitly referring in it not only to the subject-matter of the original offer, but also to all its other terms. In that case no contract would have been concluded, since the buyers had made it clear before the machine was delivered that they did not agree to the “price escalation” clause.<sup>211</sup> Thus, it is possible by careful draftsmanship to avoid losing the battle of forms, but not (if the other party is equally careful) to win it. In the *Butler Machine Tool* case, for example, the sellers’ conditions included one by which their terms were to “prevail over any terms and conditions in Buyer’s order”; but this failed (in consequence of the terms of the buyers’ counter-offer) to produce the effect desired by the sellers.<sup>212</sup> The most that the draftsman can be certain of achieving is the stalemate situation in which there is no contract at all. Such a conclusion will often be inconvenient,<sup>213</sup> though where the goods are nevertheless delivered it may lead to a liability on the part of the buyers to pay a reasonable price, but as a matter of restitution rather than contract.<sup>214</sup>

## Documents sent after contract made

- ¶48 The discussion in paras 4-044—4-047 above is concerned with the effect of the transmission of a document or documents containing terms *before* the alleged contract is made. The transmission of such a document by one party *after* the making of the contract will not affect the existence of the contract<sup>215</sup>; nor will the terms of the document form part of the contract unless they are, in turn, accepted as variations of the contract, either expressly or by conduct.

## Acceptance of tenders

- <sup>149</sup> The submission of a tender normally amounts to an offer<sup>216</sup>; and the effect of a purported “acceptance” of such a tender turns on the construction of the acceptance and the tender in each case. Where a tender is submitted, e.g. for the erection of a building, a binding contract will normally arise from acceptance of the tender, unless it is expressly stipulated that there is to be no contract until certain formal documents have been executed.<sup>217</sup> But greater difficulty arises in construing an “acceptance” of a tender for an indefinite amount, for example, of one to supply “such quantities (not exceeding a specified amount) as you may order”. The person to whom such a tender is submitted does not incur any liability merely by “accepting” it: he becomes liable only when he places an order for goods,<sup>218</sup> and he would not be bound to place any order at all<sup>219</sup> unless he had (expressly or by necessary implication<sup>220</sup>) indicated in his invitation for tenders that he would do so.<sup>221</sup> The party submitting the tender also becomes bound, once a definite order has been placed, to fulfil it.<sup>222</sup> Whether he can withdraw before this point, or avoid liability with respect to future orders, depends on the interpretation of the tender. He can do so if the tender means “I will supply such quantities as you may order”,<sup>223</sup> because the agreement is interpreted as a standing offer by the seller to supply the goods as and when the buyer places an order. A seller may withdraw this offer at any point before an order is placed, and will incur no contractual liability for doing so. The seller submitting the tender will not be entitled to withdraw if the tender means “I hereby bind myself to execute orders which you may place”, and if this promise is supported by some consideration.<sup>224</sup> In this case, the agreement is interpreted as obliging the seller to supply all the goods required by the buyer over a given period. The seller is contractually bound to supply the goods on request and is consequently unable to withdraw.
- <sup>150</sup> An invitation for tenders may, exceptionally, amount to an offer, e.g. where the person issuing the invitation binds himself to accept the highest or, as the case may be, the lowest tender.<sup>225</sup> The acceptance then takes the form of the submission of the relevant tender; but difficulties can arise where several tenders are made and one (or more) of them takes the form of a so-called “referential bid”. In *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd*<sup>226</sup> an invitation for the submission of “offers” to buy shares was addressed to two persons, it stated that the prospective sellers bound themselves to accept the “highest offer”. One of the persons to whom the invitation was addressed made a bid of a fixed sum while the other submitted a “referential bid” undertaking to pay either a particular fixed sum or a specified amount in excess of the bid made by the other, whichever was the higher amount. It was held that the “referential bid” was ineffective and that the submission of the other person’s bid had concluded the contract for the sale of the shares. In reaching this conclusion, the House of Lords stressed that the bids were, by the terms of the invitation, to be confidential, so that neither bidder would know the amount bid by the other. In these circumstances the object of the invitation, which was to ascertain the highest amount that

each of the persons to whom it was addressed was willing to pay, would have been defeated by allowing it to be accepted by a “referential bid”.

## Acceptance in ignorance of offer: unilateral contracts

- 151 In some jurisdictions it has been held that a person who gives information for which a reward has been offered cannot claim the reward if he did not know of the offer at the time of giving the information,<sup>227</sup> or where that person once knew of the offer but had, at the time of the alleged acceptance, forgotten it.<sup>228</sup> The English case of *Gibbons v Proctor*<sup>229</sup> is sometimes thought to support the contrary view, but the actual decision can probably be explained on the ground that the claimant *was* aware of the offer of reward by the time the information was given on his behalf to the recipient named in the advertisement.<sup>230</sup> To allow recovery where the claimant did *not* know of the offer when he gave the information raises the doctrinal difficulty that, in such cases, the parties’ wishes merely coincide; they have not reached any agreement.<sup>231</sup>

## Acceptance in ignorance of offer: bilateral contracts

- 152 Different considerations may apply where a person who does acts alleged to amount to acceptance of an offer of a bilateral contract does those acts in ignorance of the offer. For, if those acts are construed to amount to an acceptance, the actor may not only acquire rights but also incur liabilities under the contract. It may be unfair to subject him to these if at the time of the alleged acceptance he was not aware of the fact that an offer had been made to him, and thus had no intention of entering into a contract. This calls into question the decision of *Upton RDC v Powell*.<sup>232</sup> There, the defendant, whose house was on fire, telephoned the Upton police and asked for “the fire brigade”. He was entitled to the services of the Pershore fire brigade free of charge as he lived in its district; but the police called the Upton fire brigade, in the belief that the defendant lived in that district. The Upton fire brigade for a time shared this belief and thought “that they were rendering gratuitous services in their own area”.<sup>233</sup> It was held that the defendant was contractually bound to pay for these services. But even if the defendant’s telephone call was an offer, it is hard to see how the Upton fire brigade’s services, given with no thought of reward, could be an acceptance. It would have been better to have given the claimants a restitutionary remedy than to hold that there was a contract.<sup>234</sup> The case was concerned only with the rights of the fire brigade, but, if there was a contract, the fire brigade would also have owed more extensive duties than they would have owed, had they been volunteers. It may well be unfair to subject a person who thinks he is a volunteer to the more stringent duties of a contractor.<sup>235</sup> Similar reasoning applies where the effect of an alleged bilateral contract is not to impose liabilities on a party but simply to deprive him of rights. It has accordingly been held that an alleged offer to abandon arbitration proceedings cannot be

accepted unless the persons claiming to have accepted it understood or believed at the time of the alleged acceptance that such an offer was being made.<sup>236</sup> The *Upton* case can therefore be doubted, not only on this basis of a lack of nexus between the parties, but also because the objective test applied to ascertain the parties' intentions is inaccurate; the test is not wholly objective; rather the question is the way in which the individual parties would reasonably understand each other's conduct.<sup>237</sup>

## Motive for the acceptance

- 153 A person who knows of the offer may perform the act required for acceptance with some motive other than that of accepting the offer. In *Williams v Carwardine*<sup>238</sup> the defendant offered a reward of £20 to anyone who gave information leading to the conviction of the murderers of Walter Carwardine. The plaintiff knew of the offer but gave a "voluntary statement to ease my conscience, and in hopes of forgiveness hereafter" because she thought she had not long to live. This statement resulted in the conviction of the murderers. It was held that the plaintiff had brought herself within the terms of the offer and was entitled to the reward. Patteson J added: "We cannot go into the plaintiff's motives."<sup>239</sup> Similarly, in *Carlill v Carbolic Smoke Ball Co.*<sup>240</sup> the claimant recovered the £100, although her predominant motive in using the smoke ball was (presumably) to avoid catching influenza. But in the Australian case of *R. v Clarke*<sup>241</sup> a reward had been offered for information leading to the arrest and conviction of the murderers of two police officers. Clarke was suspected of the crime and gave information leading to the conviction of the culprits in order to clear himself of the charge; he admitted that he gave the information with no thought of claiming the reward. Although two of the judges found that he knew of the offer (the third denied his claim on the basis that he had forgotten it when he gave the information),<sup>242</sup> his claim for the reward failed as he had not given the information "in exchange for the offer".<sup>243</sup> The cases may be reconciled on the basis that an act which is *wholly* motivated by factors other than the existence of the offer cannot amount to an acceptance<sup>244</sup>; but if the existence of the offer plays some part, however small, in inducing a person to do the required act, there is a valid acceptance of the offer. Thus, the informant succeeded in her claim in the *Williams* case because:

"... the motive of the informant was not inconsistent with, and did not in that case displace, the *prima facie* inference arising from the fact of knowledge of the request and the giving of the information it sought."<sup>245</sup>

## Cross-offers

- 154 It seems that there is generally no contract if two persons make identical cross-offers, neither knowing of the other's offer when he made his own: e.g. if A writes to B offering to sell B his car for £5,000 and B simultaneously writes to A offering to buy the car for £5,000. The most natural reaction to letters which cross in this way would be for one of the parties to communicate with the other to make sure that there was indeed an agreement between them. To hold that there was a contract without some such further communication might cause considerable surprise to one of the parties, or possibly to both. The view that "cross-offers are not an acceptance of each other"<sup>246</sup> can therefore be supported not only on the theoretical ground that the requirements of offer and acceptance are not satisfied, but also on the practical grounds that it accords with normal commercial expectations and that it promotes certainty.

## Footnotes

- 175 *Tinn v Hoffman & Co* (1873) 29 L.T. 271; cf. *Holland v Eyre* (1825) 2 Sim. & St. 194; *Jordan v Norton* (1838) 4 M. & W. 155; *Harrison v Battye* [1975] 1 W.L.R. 58.
- 176 *North West Leicestershire DC v East Midlands Housing Association* [1981] 1 W.L.R. 1396. And see *China Export and Credit Insurance Corp v Emerald Energy Resources Ltd* [2018] EWHC 1503 (Comm), [2018] 2 Lloyd's Rep. 179 at [39], where the claimant's letters stated that "interest continues to accrue but it may consider waiving this interest", while the defendant's letters stated that "no additional interest will be due".
- 177 *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401.
- 178 *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401; *North West Leicestershire DC v East Midlands Housing Association* [1981] 1 W.L.R. 1396; cf. *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 A.C. 34.
- 179 *Jackson v Turquand* (1869) L.R. 4 H.L. 305; *Jones v Daniel* [1894] 2 Ch. 332; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284; *Love & Stewart Ltd v S. Instone & Co Ltd* (1917) 33 T.L.R. 475; *Northland Airliners v Dennis Ferranti Meters Ltd* (1970) 114 S.J. 845; *Lark v Outhwaite* [1991] 2 Lloyd's Rep. 132, 139; *Bircham & Co Nominees (No.2) v Worrell Holdings Ltd* [2001] EWCA Civ 775, (2001) 82 P. & C.R. 427 at [11]; *Beazley Underwriting Ltd v Travellers Companies Inc* [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241 at [73]; *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm) at [43].
- 180 *Evergreen Timber Frames Ltd v Harrington* [2021] 3 WLuk 167 at [30], citing with approval this paragraph in Chitty on Contracts, 33rd edn (2019), and approving *Gibbs v Lakeside Developments Ltd* [2016] EWHC 2203 (Ch).
- 181 Below, para.4-121; *Guernsey v Jacobs UK Ltd* [2011] EWHC 918 (TCC), [2011] 2 All E.R. (Comm) 175 at [45] and see *Bonner Properties Ltd v McGurran Construction Ltd* [2009]

*NICA 49, [2010] N.I. 97*, where, to the extent that the relevant communication amounted to a counter-offer, that counter-offer had, in turn, been rejected: see below, para.4-121. *Beazley Underwriting Ltd v Travellers Companies Inc [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241* at [184].

- 182 *Clive v Beaumont (1847) 1 De G. & Sm. 397; Simpson v Hughes (1897) 66 L.J. Ch. 334; Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1979] 1 W.L.R. 401; Midgulf International Ltd v Groupe Chimiche Tunisien [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep. 543*, where the above text (para.2-033 at n.153 in the 30th edition of this book) was cited with approval (at [43]) and a communication was accordingly held to be an acceptance even though there was no precise verbal correspondence between it and the offer.
- 183 *Lark v Outhwaite [1991] 2 Lloyd's Rep. 132, 139.*
- 184 *Harris's Case (1872) L.R. 7 Ch. App. 587.*
- 185 *[1880] 5 Q.B.D. 346.*
- 186 *Global Tankers Inc v Amercoat Europa NV [1975] 1 Lloyd's Rep. 666, 671*; cf. *G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep. 25, 28; Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475* at [247] and [245], referring to the above text with apparent approval; affirmed without reference to this point *[2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788* and see above, para.4-006 (note).
- 187 For example in *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63*, a prospective seller of goods, to whom an offer to buy them had been sent, sent two communications to the offeror: the first stating that “[i]f you are successful in your bid”, the selling process would be “conducted by the issuing of an invoice on our standard terms” and the second expressed to be a “confirmation that your bid has been successful” (at [40]). It was held that the first communication was “not a counter offer and did not change the basis on which the parties were negotiating” (at [70]).
- 188 This sentence was cited with approval and applied by Edwards-Stuart J in *AB v CD Ltd [2013] EWHC 1376 (TCC), [2013] B.L.R. 435* at [28], so that the communication in question was held not to amount to a counter-offer.
- 189 *Monrovia Motorship Corp v Keppel Shipyard (Private) Ltd (The Master Stelios) [1983] 1 Lloyd's Rep. 356; Society of Lloyd's v Twinn, The Times, 4 April 2000; Crest Nicholson (Londonium) Ltd v Akaria Investments Ltd [2010] EWCA Civ 1331* at [27] (in the reference at [24] to para.2-003 of the “Thirteenth Edition” of this book—“Thirteenth” is an evident misprint for “Thirtieth”).
- 190 e.g. *O.T.M. Ltd v Hydranautics [1981] 2 Lloyd's Rep. 211, 215*; cf. below, paras 4-155—4-158.
- 191 *Domb v Isoz [1980] Ch. 548, 559*. Below, paras 5-057 et seq.
- 192 See Vol.II, paras 40-273—40-313, 40-337.
- 193 *[1968] 1 All E.R. 811*; cf. *A. Davies & Co (Shopfitters) v William Old (1969) 113 S.J. 262; O.T.M. Ltd v Hydranautics [1981] 2 Lloyd's Rep. 211; Muirhead v Industrial Tank Specialities Ltd [1986] Q.B. 507, 530; Souter Automation v Goodman Mechanical Services (1984) 34 Build. L.R. 81; Dana UK Axle Ltd v Freudenberg FST GmbH [2021] EWHC 1751 (TCC)*.

- 194 *A E Yates Trenchless Solutions v Black & Veatch Ltd* [2008] EWHC 3183 (TCC), 124 Con. L.R. 188 at [60]; cf. *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2010] EWHC 2567 (Comm), [2011] 2 All E.R. 38, where general conditions in an order form sent by the buyer to the seller contained a Hungarian arbitration and choice of law clause, while the seller in an email message to the buyer proposed a variation containing an English choice of law and exclusion jurisdiction clause; the latter was held to be a counter-offer, which the buyer accepted by “performance”, i.e. presumably by taking delivery of the goods (for further proceedings in this case, see [2011] EWHC 345, [2011] 2 All E.R. (Comm) 128); *Hamad M Aldrees & Partners v Rotex Europe Ltd* [2019] EWHC 574 (TCC), 184 Con. L.R. 145 at [173] (the defendant provided a quotation and the claimant buyer made a purchase order in response, which contained provisions that conflicted with those of the quotation; the order was held to be a counter-offer, which the defendant accepted by supplying the products ordered).
- 195 [1968] 1 All E.R. 811.
- 196 As in *Zambia Steel & Building Supplies v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep. 225.
- 197 [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357, where Dyson LJ at [23] referred with apparent approval to the “last shot” doctrine as stated in the text above; the case was followed on this point in *Trebor Bassett Holdings Ltd v ADT Security Plc* [2011] EWHC 1936 (TCC), [2011] B.L.R. 661 at [173].
- 198 [2009] EWCA Civ 1209 at [7]; cf. at [25].
- 199 [2009] EWCA Civ 1209 at [9], [25]. And see *Brookes (t/a Brookes & Co) v Atlantic Marine & Aviation LLP* [2018] EWHC 1168 (Comm).
- 200 [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357.
- 201 [2009] EWCA Civ 1209 at [9], [25], [39]. See also *Brookes (t/a Brookes & Co) v Atlantic Marine & Aviation LLP* [2018] EWHC 1168 (Comm).
- 202 [2009] EWCA Civ 1209 at [15], applying the test of the parties’ “objective intention”.
- 203 *TRW Ltd v Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558 at [44]–[45] and [66].
- 204 [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep. 8.
- 205 *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC) at [42]–[55].
- 206 *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC) at [49] (“Mere reference to the terms will not be enough where the terms are non-standard. ... [T]he seller must give reasonable notice of the conditions ... by printing them on the reverse of the acknowledgement and printing a statement on the front that the order is subject to the conditions on the back” (at [51]); *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209 was distinguished as the parties had printed the terms on the other side of

the document and drew attention to these on the face of the document, moreover the orders were placed in the same way each time.

•207 *John Graham Construction Ltd v FK Lowry Piling Ltd [2015] NIQB 40* at [38]. The terms remained to be determined.

208 *[1979] 1 W.L.R. 401*, especially at 405; *Adams (1979) 94 L.Q.R. 481*; *Rawlings (1979) 42 M.L.R. 715*.

209 Above, para.4-037 (notes).

210 Per Lawton and Buckley LJ; Lord Denning MR also uses this analysis, but prefers the alternative approach of considering “the documents … as a whole”: see 405 and cf. above, para.4-032. In the *Tekdata* case *[2009] EWCA Civ 1209* it was “not contended on behalf of [the seller] that there was no contract between it and [the buyer]”; the issue was as to the terms of an admitted contract.

211 At 406, per Lawton LJ.

212 cf. *Matter of Doughboy Industries Inc*, 233 N.Y.S. 2d 488, 490 (1962): “The buyer and seller accomplished a legal equivalent to the irresistible force colliding with the immoveable object”.

213 It seems to have been rejected for this reason in *Johnson Matthey Bankers Ltd v State Trading Corp of India [1984] 1 Lloyd's Rep. 427*.

214 cf. *Peter Lind & Co Ltd v Mersey Docks & Harbour Board [1972] 2 Lloyd's Rep. 234*, above, para.4-031; *McKendrick (1988) 8 O.J.L.S. 197*. See below para.4-234.

215 *Jayaar Impex Ltd v Toaken Group Ltd [1996] 2 Lloyd's Rep. 437*; cf. below, paras 4-155 —4-158.

216 Above, para.4-028.

217 Below, paras 4-155—4-158.

218 *Percival Ltd v London CC Asylums, etc., Committee (1918) 87 L.J. K.B. 677*.

219 cf. *Churchward v R. (1865) L.R. 1 Q.B. 173*; *R. v Demers [1900] A.C. 103*.

220 e.g. *Sylvan Crest Sand & Gravel Co v US*, 150 F.2d 642 (1945).

221 cf. *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd [1986] A.C. 207*.

222 *Great Northern Ry v Witham (1873) L.R. 9 C.P. 16*; cf. the similar rule applied to “declarations” under an “open cover” insurance in *Citadel Insurance Co v Atlantic Union Insurance Co [1982] 2 Lloyd's Rep. 543*.

223 *G.N. Ry v Witham (1873) L.R. C.P. 16, 19–20*.

224 *Percival Ltd v London CC Asylums, etc., Committee (1918) 87 L.J. K.B. 677, 678*; *Miller v F. A. Sadd & Son Ltd [1981] 3 All E.R. 265*. For an exception to the requirement of consideration in the law of insurance, see the *Citadel case [1982] 2 Lloyd's Rep. 543* at 546; below, para.6-204.

225 Above, para.4-028.

226 *[1986] A.C. 207*.

227 *Bloom v American Swiss Watch Co (1915) App.Div. 100 (S. Afr.)*; American authorities are divided: see Corbin, Contracts, para.59.

- 228 *R. v Clarke* (1927) 40 C.L.R. 277, 241 (Higgins J). But Isaacs ACJ and Starke J decided against the claimant on the different basis that he was not acting in order to accept the offer; see below, para.4-053.
- 229 (1891) 64 L.T. 594; 55 J.P. 616; cf. *Neville v Kelly* (1862) 12 C.B.(N.S.) 740.
- 230 “The information ultimately reached Penn at a time when the plaintiff knew that the reward had been offered”: 55 J.P. 616.
- 231 The view that, in the case of a unilateral contract, may be “constituted” by the relevant advertisement “whether or not it is read by anyone” derives some (at least hesitant) support from *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243, [2012] 1 Lloyd’s Rep. 349 at [75].
- 232 [1942] 1 All E.R. 220; *Mitchell*, (1997) 12 J.C.L. 78; for the extent of the fire brigade’s duty apart from contract, see *John Monroe (Acrylics) Ltd v London Fire & Civil Defence Authority* [1997] 2 Lloyd’s Rep. 161.
- 233 At 221.
- 234 Substantially the same point is made in *TTMI SARL v Statoil SA (The Sibohelle)* [2011] EWHC 1150 (Comm), [2011] 2 Lloyd’s Rep. 220 at [44]. But on the facts of *The Sibohelle* there was no need to invoke any restitutionary remedy since both parties there believed that they were “performing under a contract” (at [44]) and their conduct, coupled with that belief, gave rise to the inference that a contract had indeed been concluded between them (see below, para.4-186 (note)). In the *Upton* case ([1942] 1 All E.R. 220) there was no such shared belief.
- 235 cf. *B.S.C. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504, 510; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243, [2012] 1 Lloyd’s Rep. 349 at [75]. The position where one party thinks that he is giving or getting a gratuitous service while the other thinks that he is contracting (i.e. if the fire brigade had intended from the beginning to charge for their services) will depend on the objective test and the law on mistake as to terms, see below at paras 5-014, 5-022—5-035.
- 236 *Tracomin SA v Anton C. Nielsen* [1984] 2 Lloyd’s Rep. 195, 203; and see above, para.4-009, below, para.4-088.
- 237 See below, para.5-018.
- 238 (1833) 5 C. & P. 566; 4 B. & Ad. 621; it must be assumed that the claimant knew of the offer; *Carlill v Carbolic Smoke Ball Co Ltd* [1892] 2 Q.B. 484, 489. See also *England v Davidson* (1840) 11 A. & E. 856; *Smith v Moore* (1845) 1 C.B. 438; and cf. *Bent v Wakefield Bank* (1878) 4 C.P.D. 1; *Fallick v Barber* (1813) 1 M. & S. 108. See also the Theft Act 1968 s.23, penalising advertisements of rewards for stolen goods which state that no questions will be asked, etc.
- 239 (1833) 4 B. & Ad. 621 at 623.
- 240 [1893] 1 Q.B. 256; above, para.4-019.
- 241 (1927) 40 C.L.R. 227; contrast *Simonds v US*, 308 F. 2d 160 (1962).
- 242 Above, para.4-051.
- 243 (1927) 40 C.L.R. 227, 233; *Tracomin SA v Anton C. Nielsen* [1984] 2 Lloyd’s Rep. 195, 203.
- 244 *Lark v Outhwaite* [1991] 2 Lloyd’s Rep. 132, 140.
- 245 *R. v Clarke* (1927) 40 C.L.R. 227, 232.

246 *Tinn v Hoffman & Co (1873) 29 L.T. 271, 278.*

---

End of Document

© 2022 SWEET & MAXWELL

## **(c) - Communication of Acceptance**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 3. - The Acceptance**

**(c) - Communication of Acceptance**

### **General requirement of communication**

- 155 The general rule is that an acceptance has no legal effect until it is communicated to the offeror.<sup>247</sup> Accordingly, no contract is concluded by: a person who writes an acceptance on a piece of paper which he simply keeps<sup>248</sup>; a company that resolves to accept an application for shares but does not communicate the resolution to the applicant<sup>249</sup>; a person who decides to accept an offer to sell goods to him and instructs his bank to pay the offeror but neither he nor the bank gives notice of this fact to the offeror<sup>250</sup>; and a person who communicates the acceptance only to his own agent.<sup>251</sup> The main reason for the rule is that it would be unfair to bind the offeror before he knows that his offer had been accepted. So long as the offeror knows of the acceptance, a contract may be concluded even though the acceptance was not brought to his notice *by the offeree*.<sup>252</sup> However, there will be no contract if the communication is made by a third party without the offeree's authority in circumstances indicating that the offeree's decision to accept was not yet regarded by him as irrevocable.<sup>253</sup>

### **What amounts to communication**

- 156 For an acceptance to be "communicated" it must normally be brought to the notice of the offeror. Thus there is no contract if the words of acceptance are "drowned by an aircraft flying overhead"; or if they are spoken into a telephone after the line has gone dead or become so indistinct

that the offeror does not hear them.<sup>254</sup> However, in some circumstances, the requirement of “communication” may be satisfied even though the acceptance has not actually come to the notice of the offeror: e.g. where a written notice of acceptance is left by the offeree at the offeror’s address.<sup>255</sup>

## Exceptions to requirement of communication of acceptance

- 157 In the following situations an acceptance is, or may be, effective although it is not communicated to the offeror.

### (1) Terms of the offer

- 158 The offer may expressly or impliedly<sup>256</sup> waive the requirement of communication of acceptance.<sup>257</sup> This may arise when an offer invites acceptance by conduct. For example, where an offer to supply goods is made by sending them to the offeree it may be accepted by simply using them<sup>258</sup>; and where an offer to buy goods is made by ordering them, it may sometimes be accepted by simply despatching them.<sup>259</sup> Similarly a tenant can accept an offer of a new tenancy by simply staying on the premises<sup>260</sup>; and an employer’s offer to pay an employee a bonus may be accepted simply by the employee’s staying in the employment.<sup>261</sup>

### (2) Unilateral contracts

- 159 In the case of a unilateral contract,<sup>262</sup> the requirement of communication of acceptance is almost always waived. For this reason, performance of the required act or abstention normally suffices, without any previous intimation of acceptance.<sup>263</sup> Thus in *Carlill v Carbolic Smoke Ball Co*<sup>264</sup> the court rejected the argument that the claimant should have notified the defendants of her acceptance of their offer. The contract which arises<sup>265</sup> between a bank which has issued a credit card to one of its customers and the retailer to whom the customer presents the card has also been described as unilateral,<sup>266</sup> so that the bank’s offer can be accepted by the retailer’s dealing with the customer without any need for the retailer’s acceptance to be communicated to the bank.<sup>267</sup> Another situation in which notification of acceptance was said to be unnecessary in the case of a unilateral contract arose in *Argo Fund Ltd v Esser Steel Ltd.*<sup>268</sup> Notification of acceptance of a standing offer was not necessary since no such requirement was stated in the

original loan agreement and this fact was apparently regarded as a waiver of the requirement of communication of acceptance.<sup>269</sup>

### **(3) “Fault” of offeror**

- )60 The offeror may be precluded from denying that the acceptance was communicated if it was “his own fault that he did not get it”; e.g. “if the listener on the telephone does not catch the words of acceptance but nevertheless does not … ask for them to be repeated”.<sup>270</sup> If an acceptance is sent and duly received during business hours by telex or fax but is simply not read by anyone in the offeror’s office when it is there transcribed or printed out on his machine, it is probably taken to have been communicated at that time<sup>271</sup>; if such a message is received out of business hours, it probably takes effect at the beginning of the next business day.<sup>272</sup>

### **(4) Email acceptance**

- )61 While the issue has received no judicial determination, it is submitted that the time of acceptance by email should be when the email is received by the offeror,<sup>273</sup> and an email acceptance should be treated as having been received when it arrives on the offeror’s email server,<sup>274</sup> even if the offeror has not, or perhaps cannot, access it.

### **(5) Communication to offeror’s agent**

- )62 The acceptance may be communicated, not to the offeror personally, but to his agent. The effect of such a communication depends on the agent’s authority.<sup>275</sup> The communication concludes a contract if the agent is authorised to *receive* the acceptance, but not if he is authorised only to *transmit* it to the offeror: e.g. if a written acceptance is handed to a messenger sent to the offeree by the offeror. In the latter case the acceptance takes effect only when it is communicated to the offeror (unless the case falls within one of the other exceptions to the general rule requiring the acceptance to be communicated to the offeror).

### **(6) Acceptance sent by post**

- )63 An acceptance sent by post often takes effect before it is communicated. The exact effects of such an acceptance are discussed in paras 4-064—4-078 below.

## Footnotes

- 247 *McIver v Richardson* (1813) 1 M. & S. 557; *Mozley v Tinkler* (1835) 1 C.M. & R. 692; *Ex p. Stark* [1897] 1 Ch. 575; *Holwell Securities Ltd v Hughes* [1974] 1 W.L.R. 155, 157; *Allied Marine Transport Ltd v Vale do Rio Doce Navegação SA (The Leonidas D.)* [1985] 1 W.L.R. 925, 937. In *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 *Lloyd's Rep* 349 Cooke J said at [81], that “[t]here is an act of total unreality ... in considering offer and acceptance in the abstract, as notional concepts divorced from communication”.
- 248 *Kennedy v Thomassen* [1929] 1 Ch. 426; *Brogden v Metropolitan Ry* (1877) 2 App. Cas. 666, 692.
- 249 *Best's Case* (1865) 2 D.J. & S. 650; cf. *Gunn's Case* (1867) L.R. 3 Ch. App. 40. And see *UK Learning Academy Ltd v Secretary of State for Education* [2018] EWHC 2915 (Comm) (no contract as the defendant had not communicated acceptance, and the claimant had not waived the requirement of communication).
- 250 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 A.C. 34.
- 251 *Hebb's Case* (1867) L.R. 4 Eq. 9; *Kennedy v Thomassen* [1929] 1 Ch. 426.
- 252 *Bloxham's Case* (1864) 33 Beav. 529; (1864) 4 D.J. & S. 447; *Levita's Case* (1867) L.R. 3 Ch. App. 36.
- 253 This appears to be the best explanation of *Powell v Lee* (1908) 99 L.T. 284.
- 254 *Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327, 332.
- 255 cf. below, paras 4-117—4-120. The Scottish Law Commission Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses (Scot Law Com No 252) Contract (Scotland) Bill s.13(3) states that: “A notification reaches a person when it is made available to the person in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay.” In particular, (4): “a notification is to be taken to reach a person—(a) when it is delivered to the person, (b) when it is delivered to the person’s place of business, (c) in a case where either the person does not have a place of business or the notification does not relate to a business matter, when it is delivered to the person’s habitual residence, or (d) in the case of a notification transmitted by electronic means, when it becomes available to be accessed by the person”.
- 256 See the first analysis of the situation in *Photolibrary Group Ltd v Burda Senator Verlag GmbH* [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 811 at [63], discussed in paras 4-010—4-011 above. There is no reference to any communication of the acceptance; presumably the conduct of the parties gave rise to an inference that this requirement had been waived.
- 257 *Attrill v Kleinwort Benson Ltd* [2012] EWHC 1189 (QB) at [164].
- 258 *Minories Finance Ltd v Afribank Nigeria Ltd* [1995] 1 *Lloyd's Rep.* 134, 140; it is assumed that the goods are not “unsolicited” within the legislation against “inertia selling” (above, para.4-008).

- 259 *Port Huron Machinery Co v Wohlers*, 207 Iowa 826, 221 N.W. 843 (1928); cf. UCC, s.2-206(1)(b); *Smit International Singapore Pte Ltd v Kurnia Dewi Shipping SA (The Kurnia Dewi)* [1997] 1 Lloyd's Rep. 553, 559; and see the second analysis of the situation in the *Photolibrary case* [2008] EWHC 1343 (QB) at [64], where there was (as in the first analysis at [63]) no reference to any communication of the acceptance.
- 260 *Roberts v Hayward* (1828) 3 C. & P. 432; but not if the tenant disclaims the intention to accept: *Glossop v Ashley* [1921] 2 K.B. 451.
- 261 *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1468 (QB) at [177].
- 262 See above, para.1-073; below para.4-102.
- 263 *Shipton v Cardiff Corp* (1917) 87 L.J. K.B. 51; *Davies v Rhondda UDC* (1917) 87 L.J. K.B. 166; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243, [2012] 1 Lloyd's Rep. 349 at [79]; *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1189 (QB) was affirmed by the Court of Appeal [2013] EWCA Civ 394 where the contract was described as a unilateral one, so that the requirement of communication of acceptance was waived (at [94]).
- 264 [1893] 1 Q.B. 256, above, para.4-019.
- 265 Below, paras 6-041—6-042.
- 266 *First Sport Ltd v Barclays Bank Plc* [1993] 1 W.L.R. 1229, 1234 (where the card had been stolen and been presented to the retailer by the thief).
- 267 *First Sport Ltd v Barclays Bank Plc* [1993] 1 W.L.R. 1229 at 1234–1235.
- 268 [2005] EWHC 600 (Comm), [2006] 1 All E.R. (Comm) 56; affirmed on other grounds [2006] EWCA Civ 241, [2006] 2 All E.R. (Comm) 104.
- 269 *Argo Fund Ltd v Esser Steel Ltd* [2005] EWHC 600 (Comm) at [53] (“perhaps this is the right analysis”).
- 270 *Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327, 333.
- 271 cf. *Tenax Steamship Co Ltd v The Brimnes (Owners) (The Brimnes)* [1975] Q.B. 929; and see below, paras 4-117—4-120.
- 272 *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep. 249, 252; *Galaxy Energy International Ltd v Novorossiysk Shipping Co (The Peter Schmidt)* [1998] 2 Lloyd's Rep. 1.
- 273 See below, para.4-098.
- 274 See below, paras 4-099—4-100.
- 275 *Henthorn v Fraser* [1892] 2 Ch. 27, 33.

## **(d) - Posted Acceptance**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 3. - The Acceptance**

**(d) - Posted Acceptance**

### **The posting rule <sup>276</sup>**

- )64 An acceptance sent by post could take effect: (a) when it is posted, (b) when it would in the ordinary course of post have reached the offeror, (c) when it arrives at their address, or (d) when it is actually communicated to the offeror. Each of these solutions could cause inconvenience or injustice to one of the parties, especially when the acceptance is lost or delayed in the post. In English law, the general rule <sup>277</sup> is that a postal acceptance takes effect when <sup>278</sup> and where <sup>279</sup> the letter of acceptance is posted ((a) above). A letter is “posted” for this purpose when it is put in the control of the Post Office <sup>280</sup> or of one of its employees authorised to *receive* letters. Handing letters to a postman authorised to *deliver* letters is not posting. <sup>281</sup> The same principle applied to the case of an acceptance by telegram: such an acceptance takes effect when the telegram is communicated to a person authorised to receive it for transmission to the addressee <sup>282</sup>; and it seems that this rule would apply to telemessages, which have replaced inland telegrams. The “posting” rule, which generally favours the offeree, has been explained as one of convenience for the reasons stated in paras 4-070—4-0074 below.

### **Doubts about the posting rule**

- )65 The posting rule has had its fair share of criticism. Taken to its logical conclusion, it can give rise to absurdities. For example, an offeree who accepts by post is bound if he changes his mind

and communicates his rejection by a speedier method that arrives before the postal acceptance.<sup>283</sup> Further, if the offeror relies on the speedier rejection and disposes of the subject matter of the contract to a third party, the offeror would be in breach if the offeree subsequently chooses to rely on his postal acceptance. The postal acceptance rule took shape when the postal system was the only practical means of communication between distant parties. In the 21st century, the wide range of alternative and speedier means of communication available has reduced the need to protect negotiating parties from the risks inherent in the time lag between the sending and receiving of a letter. The Scottish Law Commission has therefore recommended the abolition of the postal acceptance rule.<sup>284</sup> In contrast, the UK Supreme Court has recently affirmed its validity.<sup>285</sup> Lord Sumption (with whom Lord Hughes agreed) supports the rules associated with posting, which:

“... were adopted for reasons of pragmatic convenience, and provide a perfectly serviceable test for determining whether a contract has been concluded at all.”<sup>286</sup>

## Conditions of applicability

- ¶66 The posting rule applies only if it is reasonable to use the post. This will normally be the case if the offer itself is made by post. It may also be reasonable to use the post even though the offer was made orally if immediate acceptance was not contemplated and the parties lived at a distance.<sup>287</sup> On the other hand it would not normally be reasonable to attempt to reply by a posted letter of acceptance to an offer made by telex<sup>288</sup> or by telephone, fax or email. Nor would it be reasonable to accept by post if the postal service was, to the acceptor’s knowledge, disrupted.<sup>289</sup>

## Instantaneous communications

- ¶67 The posting rule does not apply to acceptances made by some “instantaneous” mode of communication, e.g. by telephone or by telex.<sup>290</sup> The reason is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so that he has the opportunity of making a proper communication.<sup>291</sup> In contrast, a person who accepts by a letter that goes astray, may not know of the loss or delay until it is too late to make another communication. Such instantaneous communications are therefore governed by the general rule<sup>292</sup> that an acceptance must be actually communicated, subject to the other exceptions to that rule stated in paras 4-057—4-063 above. We noted at para.4-064 that a postal acceptance takes effect when and where the letter of acceptance is posted.

## Dictated telegrams and faxes

- 168 It is now uncommon for acceptances to be made by telegram or telemessage dictated over the telephone and there is no authority on the question whether such an acceptance takes effect when the message is dictated by the sender or when it is communicated to the addressee. It is submitted that such an acceptance should, in accordance with the above reasoning,<sup>293</sup> take effect as soon as it is dictated<sup>294</sup>; for if it later goes astray, the acceptor is unlikely to have any means of knowing this fact until it is too late to make a further communication. Fax messages seem to occupy an intermediate position between postal and instantaneous communications. The sender will know at once if his message has not been received at all, or if it has been received only in part, and in such situations the mere sending of the message should not amount to an effective acceptance.<sup>295</sup> However, it is also possible for the entire message to have been received, but in such a form as to be wholly or partly illegible.<sup>296</sup> Since the sender is unlikely to know, or to have means of knowing, this at once, the above reasoning would suggest that an acceptance sent by fax might well be effective in such circumstances.

## Excluding the posting rule

- 169 The posting rule can be excluded by the terms of the offer. For this purpose, it is not necessary to say expressly that the acceptance will take effect only when it has been actually communicated. In *Holwell Securities Ltd v Hughes*<sup>297</sup> an offer to sell a house was made in the form of an option “to be exercisable by notice in writing to the Intending Vendor”. Such a notice was posted but did not arrive. It was held that there was no contract of sale as the offer, on its true construction, required actual communication of acceptance.

## Operation of the posting rule

- 170 The posting rule is essentially one of convenience.<sup>298</sup> The English authorities support its application in three situations discussed in paras 4-071—4-072 below. It should not, however, be thought that the rule will be mechanically applied to all situations which it might, by a process of apparently logical deduction, be thought to govern. It has been said that the rule will not be applied where it would lead to “manifest inconvenience and absurdity”<sup>299</sup>; so that the question of its application to a further group of situations discussed in paras 4-074—4-078 below depends on practical considerations and on the balance of convenience.

## Posted acceptance preceded by uncommunicated withdrawal

- 171 A posted acceptance prevails over a withdrawal of an offer which was posted before the acceptance but which had not yet reached the offeree when the acceptance was posted.<sup>300</sup> It also operates as a restriction on the otherwise unfettered power<sup>301</sup> of the offeror to withdraw his offer. These are the logical consequences of the general rule that postal acceptance takes effect when it is posted, while the revocation of an offer only takes effect when it actually reaches the offeree.<sup>302</sup> In practice, these are the most important applications of the rule.

## Acceptance lost or delayed in the post

- 172 A posted acceptance takes effect even though it never reaches the offeror because it is lost through an accident in the post<sup>303</sup>; and the same rule probably applies where the acceptance is merely delayed through an accident in the post,<sup>304</sup> i.e. the contract is concluded at the time of posting of the acceptance. In *Household Fire Insurance Co Ltd v Grant*,<sup>305</sup> for example, the defendant had applied for shares in a company: this application amounted to an offer by him to subscribe for the shares.<sup>306</sup> An acceptance, in the form of a letter of allotment, was posted to him but never received. Some three years later, the company went into liquidation, and it was held that the defendant was a shareholder and so liable for calls on the shares. The case has certain unusual features: namely that the initial deposit on application for the shares was not actually paid, the defendant being instead credited with an equivalent sum due to him from the company; and that dividends declared by the company were not actually paid out to the defendant but simply credited to his account with the company. But for these features the defendant would necessarily have become aware (long before the end of the three years) of the fact that he was regarded by the company as a shareholder.
- 173 The decision in *Household Fire Insurance Co Ltd v Grant* was reached only by a majority and involved the overruling of a previous contrary decision.<sup>307</sup> This indicates that the arguments of convenience for and against applying the posting rule to such a situation are finely balanced. On the one hand, it may be hard to hold an offeror liable on an acceptance which, through no fault of his own, was never received by him; on the other it may be equally hard to deprive the offeree of the benefit of an acceptance if he had taken all reasonable steps to communicate it. Moreover, each party may act in reliance on his (perfectly reasonable) view of the situation: the offeror may enter into other contracts, believing that his offer had not been accepted, while the offeree may refrain from doing so, believing that he had effectively accepted the offer. In this situation, English law favours the offeree on the grounds that it is the offeror who “trusts to the post”<sup>308</sup> and that the offeror can safeguard himself by stipulating in the offer that the acceptance must be actually

communicated to him.<sup>309</sup> These arguments are not wholly convincing. The offer may be a counter-offer, in which case it will be the ultimate offeree who originally “trust[ed] to the post”. Or the offer may be made on a form prepared by the offeree,<sup>310</sup> in which case he and not the offeror will, for practical purposes, be in control of its terms. It may be that there are no really convincing reasons to support the weight of the postal acceptance rule. However, since the law cannot avoid preferring either the offeror or the offeree, it must simply choose one in the interest of certainty.

## Priorities

- 174 A contract is taken to be made at the time when the acceptance was posted, so as to take priority over another contract affecting the same subject-matter made after the posting of the first acceptance.<sup>311</sup>

## Fault and misdirected letter of acceptance

- 175 A letter of acceptance may be lost or delayed because it bears a wrong or an incomplete address, or because it is not properly stamped. Normally such defects will be due to the carelessness of the offeree; and, although there is no English authority precisely in point,<sup>312</sup> it is submitted that the posting rule should not apply to such cases. Although an offeror may have to take the risk of accidents in the post, it would be unreasonable to impose on him the further risk of the offeree’s carelessness. These arguments do not apply where the misdirection is due to the fault of the *offeror*—e.g. where his own address is incompletely or illegibly given in the offer itself.<sup>313</sup> In such a case, the offeror should not be allowed to rely on the fact that the acceptance was misdirected (except perhaps where his error in stating his own address was obvious to the offeree; for in such a case the offeror’s fault would not be the effective cause of the misdirection of the acceptance). It is submitted that a misdirected acceptance should take effect (if at all) at the time that is least favourable to the party responsible for the misdirection.
- 176 In *L.J. Korbetis v Transgrain Shipping BV* Toulson J said that he agreed with the above “general approach” to the problem of misdirected acceptances “because it seems to me to correspond with principle and justice”.<sup>314</sup> The question in that case was whether shipowners and charterers had agreed on the nomination of a sole arbitrator to whom a dispute, which had arisen under a charterparty between them, was to be referred. The charterers sent a fax inviting the shipowners to choose one of three names; in reply, the shipowners sent a fax from their office in Piraeus, agreeing to one of those names. This fax was intended for the charterers in the Netherlands, but it never reached them because the appropriate international dialling code had not been entered. It was held

that the misdirected acceptance was not effective to conclude an agreement for the appointment of the arbitrator.

## Garbled messages

- 177 A message may be garbled as a result of some inaccuracy in transmission for which neither the sender nor the recipient is responsible or aware. In *Henkel v Pape*<sup>315</sup> the claimant invited the defendant to make an offer to buy 50 rifles; and the defendant, not wanting this number, telegraphed “send *three* rifles”. The telegram reached the claimant in the form “send *the* rifles” and the claimant despatched 50 rifles. It was held that the defendant was not bound to accept more than three.

## Revocation of posted acceptance

- 178 There is no English authority on the question whether a posted acceptance can be revoked by a later communication (such as a telex or an email message), which reaches the offeror before, or at the same time as, the acceptance. One view is that the offeree’s revocation has no effect since, once a contract has been concluded by the posting of the acceptance, it cannot be dissolved by the act of one party.<sup>316</sup> But this apparently “logical” deduction from the “posting rule” overlooks the fundamental point that that rule is only one of convenience.<sup>317</sup> Hence the issue is whether the offeror could be unjustly prejudiced by allowing the offeree to rely on the subsequent revocation which nevertheless comes to his actual notice at the same time as, or before, the acceptance. On the one hand, it can be argued that the offeror cannot be prejudiced since he was not entitled to have his offer accepted and cannot have relied on its having been accepted if he did not yet know of the acceptance. On the other hand, it can be argued that, since the offeror can no longer withdraw his offer after the acceptance has been posted by the offeree,<sup>318</sup> reciprocity demands that the offeree should likewise not be allowed to withdraw his acceptance.<sup>319</sup> Otherwise, the offeree could speculate, without risk to himself, at the offeror’s expense. He could post an acceptance and hold the offeror bound if the market moved in his own favour, but retract the acceptance by an overtaking communication if the market moved against him, while the offeror had no similar freedom of action. While the offeror may take the risks of accidents in the post, it is submitted that he should not have to bear the risk of the offeree’s revocation.<sup>320</sup>

- 179 In para.4-078 above, it is assumed that the offeror wants to hold the offeree to the contract notwithstanding the revocation of the acceptance. But to hold an acceptance binding as soon as it was posted, in spite of an overtaking communication purporting to revoke it, might also cause hardship to the offeror, particularly where he had acted in reliance on the revocation; e.g. by selling the subject-matter of the original offer to a third party. In such a case it is submitted that the

offeree should not be entitled to change his mind yet again and rely on his letter of acceptance with the object of claiming damages from the offeror. The offeree's subsequent purported revocation could in such a case be regarded as an offer to rescind the contract, accepted by the offeror's conduct in relation to subject-matter; communication of such acceptance could be deemed to have been waived. Alternatively, the purported revocation could be regarded as a repudiation in breach of contract, giving the offeror the power to put an end to his obligations under the contract by "accepting" the breach.<sup>321</sup> On the latter view, the offeror who sells to the third party for less than was to be paid by the original offeree, would be able to claim the difference from the offeree as damages.<sup>322</sup>

## International sales

- 180 The Vienna Convention on Contracts for the International Sale of Goods<sup>323</sup> (which has not been ratified by the United Kingdom) governs not only the rights and duties of the parties to, but also the formation of, such contracts. Under the Convention an offer takes effect when it "reaches" the offeree<sup>324</sup> and an acceptance when it "reaches" the offeror,<sup>325</sup> i.e. (in both cases) when it is communicated to the addressee or delivered to his address.<sup>326</sup> Thus there is no contract if the acceptance is lost in the post; but if the acceptance is delayed in transmission, an intermediary position has been adopted; the delayed acceptance is effective, unless the offeror informs the offeree promptly on its receipt that he regards the offer as having lapsed.<sup>327</sup> Once an offer has become effective, it cannot be revoked after the offeree has dispatched his acceptance<sup>328</sup>: this preserves the English position that a posted acceptance prevails over a previously posted withdrawal (referred to in the Convention as a revocation). An acceptance may be withdrawn by a communication that reaches the offeror before (or at the same time as) the acceptance would have become effective<sup>329</sup> if there had been no such withdrawal.

## Consumer's right to cancel distance and off-premises contracts

- 181 Part 3 of the Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013<sup>330</sup> applies to "distance and off-premises contracts between a trader and a consumer"<sup>331</sup> and in the circumstances specified in that Part gives the consumer a "right to cancel" such contracts.<sup>332</sup> A contract made by, for example, exchange of letters, faxes or email message, or in website trading, falls within the definition of a "distance contract" within the 2013 Regulations if it is one for the supply of goods or services by a "trader" to a "consumer" and the contract is made:

“... without the simultaneous presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.”<sup>333</sup>

The Regulations do not specify when such a contract is made,<sup>334</sup> but if it has been made, they give the consumer the right to cancel it<sup>335</sup> by notice within a cancellation period specified in the Regulations (e.g. a period beginning when the contract is made<sup>336</sup> and ending 14 days after the day on which the goods which are the subject-matter of the contract come into the physical possession of the consumer<sup>337</sup>). In relation to the argument put forward in para.4-078 above (that, if the revocation were effective, the offeree could speculate without risk to himself at the offeror’s expense), it is significant that the “right to cancel” given to the consumer by Pt 3 of Regulations “does not apply as regards” the supply of goods or certain services “for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur during the cancellation period.”<sup>338</sup> Under the 2013 Regulations, this “right to cancel” extends also to “off-premises contracts” such as contracts made in the simultaneous presence of the trader and the consumer in a place that is not the business premises of the trader.<sup>339</sup> Cancellation of the contract “ends the obligations of the parties to perform the contract”<sup>340</sup> and gives rise to obligations that are designed, broadly speaking, to restore the parties to their pre-contract position.<sup>341</sup> The effect of the exercise of the right to cancel is therefore not the same as the effect of saying that no contract has been concluded by (e.g.) exchange of letters under the common law rules of offer and acceptance discussed in paras 4-064—4-078 above<sup>342</sup>; on the contrary, the very concept of the consumer’s “right to cancel” is based on the assumption that, as a matter of common law, a contract has come into the existence. Moreover, *the supplier* has no right to cancel under the Regulations, so that the question whether he has entered into the contract continues to be governed by the common law rules.

## Footnotes

- <sup>276</sup> *Winfield* (1939) 55 *L.Q.R.* 499; *Nussbaum* (1926) 36 *Col.L.Rev.* 920; *Ellison Kahn* (1955) 72 *S.A.L.J.* 246; *Evans* (1966) 15 *I.C.L.Q.* 553; *Gardner* (1992) 12 *O.J.L.S.* 170.
- <sup>277</sup> But see below, paras 4-070 et seq.
- <sup>278</sup> *Henthorn v Fraser* [1892] 2 *Ch.* 27, 33; *Adams v Lindsell* (1818) 1 *B. & Ald.* 681; *Potter v Sanders* (1846) 6 *Hare 1*; *Harris' Case* (1872) *L.R.* 7 *Ch. App.* 587.
- <sup>279</sup> *Brinkibon Ltd v Stahag Stahl and Stahlwarenhandelsgesellschaft mbH* [1983] 2 *A.C.* 34, 41. It is also possible for a contract to be made in more than one place. In *Conductive Interjet Technology Ltd v Uni-Pixel Displays Inc* [2013] *EWHC* 2968 (*Ch.*), [2014] 1 *All E.R. (Comm)* 655, contractual negotiations were conducted between parties in different countries. One copy of the agreed terms was signed by A in the first country; another was

sent by A as an email attachment to B in the second country who, there, signed that copy. In these circumstances Roth J said at [73] that it would “be wholly artificial to determine the place of the making of the contract by applying the traditional posting rule, dependent upon which party happened to send the fully executed document”; and that there was “a good arguable case that the contract was made in” both countries. In the case of instantaneous communication, Lord Sumption (with whom Lord Hughes agreed) has noted, in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 W.L.R. 192 at [16], the artificial and unsatisfactory nature of the rule since it requires the pinpointing of “who uttered the words which marked the point at which the contract was concluded and where the counterparty was physically located when he or she heard them”. The “analysis of an informal conversation in terms of invitation to treat, offer and acceptance will often be impossible without a recording or a total recall of the sequence of exchanges and the exact words used at each stage, in order to establish points which are unlikely to have been of any importance to either party at the time”.

- 280 *Brinkibon Ltd v Stahag Stahl and Stahlwarenhandelsgesellschaft mbH* [1983] 2 A.C. 34, 41; the *Post Office* here refers to the provider of the universal postal service under the *Postal Services Act 2011*, by whatever name that provider may from time to time be known.
- 281 *Re London & Northern Bank* [1900] 1 Ch. 220.
- 282 *Bruner v Moore* [1904] 1 Ch. 305; cf. *Stevenson Jacques & Co v McLean* (1880) 5 Q.B.D. 346. See also *Cowan v O'Connor* (1888) 20 Q.B.D. 640 (place of acceptance).
- 283 See below paras 4-078 and 4-079.
- 284 Scottish L Commission Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses (Scot Law Com No 252) Contract (Scotland) Bill s.13(3) states that: “A notification reaches a person when it is made available to the person in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay”. In particular, (4): “a notification is to be taken to reach a person—(a) when it is delivered to the person, (b) when it is delivered to the person’s place of business, (c) in a case where either the person does not have a place of business or the notification does not relate to a business matter, when it is delivered to the person’s habitual residence, or (d) in the case of a notification transmitted by electronic means, when it becomes available to be accessed by the person”.
- 285 *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 W.L.R. 192.
- 286 [2017] UKSC 80 at [16]. But a notice of dismissal by written notice occurs when it has or should reasonably have come to the recipient’s notice; delivery of the letter it is not enough, see *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood* [2018] UKSC 22; [2018] 1 W.L.R. 2073 at [39].
- 287 e.g. in *Henthorn v Fraser* [1892] 2 Ch. 27. Such a written acceptance of an oral offer does not, however, create a “contract by correspondence” within the *Law of Property Act 1925* s.46: *Stearn v Twitchell* [1985] 1 All E.R. 631.
- 288 cf. *Quenerduaine v Cole* (1883) 32 W.R. 185 (telegram).
- 289 *Bal v Van Staden* [1902] T.S. 128.
- 290 *Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327; *Brinkibon Ltd v Stahag Stahl und Stahlwarengesellschaft mbH* [1983] 2 A.C. 34; *NV Stoomv Maats “De Maas” v Nippon*

*Yusen Kaisha (The Pendrecht)* [1980] 2 *Lloyd's Rep.* 56, 66; *Gill & Duffus Landauer Ltd v London Export Corp GmbH* [1982] 2 *Lloyd's Rep.* 627; cf. *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 *Lloyd's Rep.* 249, 252 (telexed notice withdrawing ship from charterparty); and (in tort) *Diamond v Bank of London & Montreal* [1979] *Q.B.* 333.

- 291 See the *Entores case* [1955] 2 *Q.B.* 327 at 333 and the *Brinkibon case* [1983] 2 *A.C.* 34 at 43.
- 292 Above, para.4-055.
- 293 Above, para.4-067.
- 294 Contra *Winfield* (1939) 55 *L.Q.R.* 499, 515.
- 295 *JSC Zestafoni Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] *EWHC* 245 (*Comm*), [2004] 2 *Lloyd's Rep.* 335, where a fax message was classified at [75] as an “instantaneous communication” and to take effect only on full receipt as the sender’s machine would usually indicate whether the message had been received “effectively” (as distinct from having been received only in part). cf. also *Korbetis v Transgrain Shipping BV* [2005] *EWHC* 1345 (*QB*) (misdirected fax acceptance, below, paras 4-075—4-076).
- 296 This possibility is not considered (as it did not arise) in the *JSC Zestafoni case* [2004] *EWHC* 245 (*Comm*).
- 297 [1974] 1 *W.L.R.* 155; cf. *New Hart Builders Ltd v Brindley* [1975] *Ch.* 342.
- 298 *Brinkibon case* [1983] 2 *A.C.* 34 at 41; *Gill & Duffus Landauer case* [1982] 2 *Lloyd's Rep.* 627 at 631; *Brownlie v Four Seasons Holdings Inc* [2017] *UKSC* 80, [2018] 1 *W.L.R.* 192 at [16].
- 299 *Holwell Securities Ltd v Hughes* [1974] 1 *W.L.R.* 155, 161.
- 300 *Harris' Case* (1872) *L.R.* 7 *Ch. App.* 587; *Byrne & Co v Leon van Tienhoven* (1880) 5 *C.P.D.* 344; *Henthorn v Fraser* [1892] 2 *Ch.* 27; *Re London & Northern Bank* [1900] 1 *Ch.* 220.
- 301 Below, paras 4-114, 6-202—6-203.
- 302 Below, para.4-115.
- 303 *Household Fire Insurance Co Ltd v Grant* (1879) 4 *Ex. D.* 216.
- 304 See *Dunlop v Higgins* (1848) 1 *H.L.C.* 381, which would probably be followed in England though it is expressly restricted (at 402) to Scots law.
- 305 (1879) 4 *Ex. D.* 216.
- 306 Above, para.4-029.
- 307 *British & American Telegraph Co v Colson* (1871) *L.R.* 6 *Ex. 108.*
- 308 *Household Insurance case* (1879) 4 *Ex. D.* 216, 223.
- 309 *Household Insurance case* (1879) 4 *Ex. D.* 216, 223.
- 310 Below, para.4-086.
- 311 *Potter v Sanders* (1846) 6 *Hare 1.*
- 312 But, see, by way of analogy, *Getreide-Import Gesellschaft v Contimar* [1953] 1 *W.L.R.* 207 and 793.
- 313 cf. *Townsend's Case* (1871) *L.R.* 13 *Eq.* 148 (the actual reasoning of which is obsolete since *Household Fire Insurance Co Ltd v Grant* (1879) 4 *Ex. D.* 216).
- 314 [2005] *EWHC* 1345 (*QB*) at [15].
- 315 (1870) 6 *Ex. 7.*

- 316 This view is sometimes said to be supported by *Wenkheim v Arndt* (N.Z.) 1 J.R. 73 (1873), where the defendant had by letter accepted an offer of marriage: her mother then sent a telegram purporting to cancel the acceptance. The actual decision was that the mother had no authority to act on behalf of her daughter in this way, so that the claimant recovered damages (of no more than one farthing). The view stated in the text is supported by *Morrison v Thaelke* 155 So. 2d 889 (1963) and by *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* (1974) (4) S.A. 392 (c) (discussed by *Turpin* [1975] C.L.J. 25); but contradicted by *Dick v US*, 82 F.Supp. 326 (1949). It is also sometimes said to be contradicted by *Dunmore v Alexander* (1830) 9 Shaw 190, but there the first letter was probably an offer; only the dissenting judge regarded it as an acceptance. See generally *Hudson* (1966) 82 L.Q.R. 169, cf. *Kinch v Bullard* [1999] 1 W.L.R. 423 (notice which, by virtue of **Law of Property Act 1925 s.196(3)**, had taken effect on being left at a person's place of abode, but without having been actually communicated to him, could not thereafter be withdrawn by sender).
- 317 Above, para.4-064.
- 318 Above, para.4-071.
- 319 For similar reasoning in the case of a misdirected acceptance (above, paras 4-075—4-076) see *L.J. Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB) at [11].
- 320 cf. above, paras 4-075—4-076. Contrast *Hudson* (1966) 82 L.Q.R. 169.
- 321 Below, para.27-001.
- 322 cf. *Kinch v Bullard* [1999] 1 W.L.R. 423, 430 (purported withdrawal by sender of a notice was held to be ineffective against addressee by virtue of **Law of Property Act 1925 s.196(3)**).
- 323 Below, Vol.II, para.46-012.
- 324 art.15(1).
- 325 art.18(2).
- 326 art.24.
- 327 art.21(2).
- 328 art.16(1); “dispatch” is not defined.
- 329 art.22.
- 330 SI 2013/3134. These Regulations have replaced the **Consumer Protection (Distance Selling) Regulations 2000** with effect from 13 June 2014. For amendments of the **Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)** see **Consumer Protection Regulations 2014 (SI 2014/870)** regs 2 to 4. For further discussion of the 2013 Regulations see Vol.II, paras 40-062—40-165.
- 331 SI 2013/3134 reg.27; for definitions of these expressions see **regs 4 and 5**.
- 332 SI 2013/3134 reg.29.
- 333 SI 2013/3134 reg.5.
- 334 This is also true of the **Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013)** (implementing Directive 2000/31/EC) which merely provide that in the case of, for example, a contract made on a website, “the order and the acknowledgement of receipt [of the order] will be deemed to be received when the parties to whom they are addressed are able to access them” (**reg.11(2)(a)**). The effect of acknowledgement of receipt of an order falls to be determined as a matter of common law: see the definition of acceptance in

para.4-031 above. The provision of reg.11(2)(a) quoted in this note does *not*, in any event apply to “contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications”: reg.11(3).

- 335 SI 2013/3134 reg.29(1); for limits of the right to cancel, see reg.28.
- 336 SI 2013/3134 reg.29(2).
- 337 SI 2013/3134 reg.30(3).
- 338 SI 2013/3134 reg.28(1)(a). Other transactions to which Pt 3 does not apply are listed in reg.28(1)(b) to (h); the operation of Pt 3 is further restricted by reg.28(2) and (3); and by the fact that the Regulations do not apply to a contract “to the extent that it is for” transactions of the kinds listed in reg.6(1) and 6(2), subject to reg.6(3).
- 339 SI 2013/3134 reg.5.
- 340 SI 2013/3134 reg.33(1)(a); “ancillary contracts” (as defined in reg.38(3)) are “automatically terminated”.
- 341 SI 2013/3134 regs 33(1)(b) and 34–36.
- 342 Here, it is interesting to note that regs 33, 34 and 38 of the 2013 Regulations treat “withdrawal” of an offer (under Pt 3) and “cancellation” of a contract as distinct concepts.

## **(e) - Prescribed Mode of Acceptance**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 3. - The Acceptance**

**(e) - Prescribed Mode of Acceptance**

**Method must generally be complied with**

- )82 An offer which requires the acceptance to be expressed or communicated in a specified way<sup>343</sup> can generally<sup>344</sup> be accepted only in that way. Thus, if the offeror asks for the acceptance to be sent to a particular place, one sent elsewhere will not bind him<sup>345</sup>; nor will he be bound by an oral acceptance if he has asked for one to be expressed in writing.<sup>346</sup> This rule is particularly strict where the offer is contained in an option.<sup>347</sup>

**Non-complying acceptance as counter-offer**

- )83 It is sometimes possible for a purported acceptance which does not comply with the prescribed method to be regarded as a counter-offer and for a contract to come into existence when that counter-offer is in turn accepted.<sup>348</sup> Since such acceptance may be effected by conduct,<sup>349</sup> the contract may be concluded without any further communication between the parties after the original, ineffective, acceptance.

**Other equally efficacious mode**

- )84

Stipulations as to the mode of acceptance are usually made by the offeror with some particular object in view, e.g. to obtain a speedy acceptance, or one expressed (for the sake of certainty) in a particular form. It seems that an acceptance which accomplishes that object just as well as, or better than, the stipulated method may bind the offeror. For this purpose, the court must first decide, as a matter of construction, what object it was that the offeror had in view. For example, a requirement that the acceptance must be sent by letter by return of post may “fix the time for acceptance and not the manner of accepting”.<sup>350</sup> An acceptance by telex could then suffice. But such an acceptance would not be effective if the offeror’s object (on the true construction of the offer) was to have a full, accurate and signed record of the acceptance.

## Method of acceptance waived

- 185 Even if the prescribed method of acceptance is not complied with, the offeror would no doubt be bound by,<sup>351</sup> and apparently entitled to enforce,<sup>352</sup> the contract if he had acquiesced in a different mode of acceptance and had so waived the stipulated mode. But a waiver by the offeror alone of a stipulation as to the method of acceptance would not entitle him to enforce the contract if the stipulation was, on its true construction, one for the benefit of both parties.<sup>353</sup>

## Terms of offer drawn up by offeree

- 186 The rules relating to failure to use a prescribed mode of acceptance are traditionally based on two assumptions: that the offer was drawn up by the offeror; and that stipulations as to the mode of acceptance were made by him for his own benefit. It is, however, also possible for the offer to be made on a form drawn up by the offeree: e.g. where a customer submits to a finance company a proposal to enter into a hire-purchase agreement; or where an offer is made by tender on a form of tender issued by the offeree. Stipulations as to the mode of acceptance in such documents are usually intended for the benefit and protection of the *offeree*. If the offeree accepts in some other way, this will often be evidence that he has waived the stipulation; and it is submitted that the acceptance should be treated as effective unless it can be shown that failure to use the stipulated mode has prejudiced the offeror.<sup>354</sup> In one case,<sup>355</sup> for example, an offer to enter into a conditional sale agreement was made by the buyer on a form provided by the offeree (a finance company). It was held that the offer had been accepted by delivery of the subject matter in spite of a provision in the offer to the effect that this was *not* to constitute acceptance, that provision having been held to be waived by the offeree. In another case,<sup>356</sup> the Court of Appeal, approving this and the previous paragraphs of the 32nd edition of the Main Work, set out the rules in play here<sup>357</sup> and found a concluded contract despite the contract document remaining unsigned by the offeree as required by the contract, because<sup>358</sup>: the contract was on the offeree’s standard form and the signature

requirement was for its benefit; the requirement was waived by the offeree performing the contract as contemplated; there was no prejudice to the offeror, who had benefitted from and had actively facilitated the offeree's performance; subsequent conduct on both sides confirmed the existence of the contract; and finding a contract "accords with what would be the reasonable expectations of Lord Steyn's honest, sensible business people". Nevertheless, the Court acknowledged that the offeree's failure to sign "was at the expense of certainty as to the precise date the contract was formed", although this was not significant on the facts.<sup>359</sup>

## Footnotes

- 343 There is no "prescribed" mode of acceptance in the sense under consideration here merely because "the agreement envisages a signature [by each party] and leaves a space for these signatures": *Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788* at [16]. Even if the offer expressly refers to a method of acceptance (such as signature by the offeree) that method need only be complied with if, on the true construction of the offer, it is intended to be the *only* method of acceptance: *Mulcaire v News Group Newspapers Ltd [2011] EWHC 3469 (Ch), [2012] Ch. 435* at [11].
- 344 See qualifications in para.4-084 below.
- 345 *Frank v Knight (1937) O.P.D. 113*; cf. *Eliason v Henshaw 4 Wheat. 225 (1819); Walker v Glass [1979] N.I. 129*.
- 346 *Financings Ltd v Stimson [1962] 1 W.L.R. 1184*, 1186. Contrast *Hitchens v General Guarantee Corp [2001] EWCA Civ 359, The Times, 13 March 2001* (where there was *no* requirement that the acceptance must be in writing).
- 347 *Holwell Securities Ltd v Hughes [1974] 1 W.L.R. 157*.
- 348 *Wettern Electricity Ltd v Welsh Development Agency [1983] Q.B. 796*.
- 349 As in the *Wettern Electricity* case, above; provided, however, that such conduct is accompanied by the requisite contractual intention: see *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd [1986] A.C. 207* and below, para.4-207; for counter-offers, see above paras 4-037—4-039; below, para.4-121.
- 350 *Tinn v Hoffmann & Co (1873) 29 L.T. 271, 278*; cf. *Manchester Diocesan Council for Education v Commercial & General Investments Ltd [1970] 1 W.L.R. 241; Edmund Murray v B.S.P. International Foundations (1994) 33 Con. L.R. 1; A Ltd v B Ltd [2015] EWHC 137 (Comm)*.
- 351 *A Ltd v B Ltd [2015] EWHC 137 (Comm)*.
- 352 On the analogy of the reasoning of *Oceanografia SA de CV v DSND Subsea AS (The Botnica) [2006] EWHC 1360 (Comm), [2007] 1 All E.R. (Comm) 28*, below paras 4-155—4-158, 6-089.
- 353 *MSM Consulting Ltd v Tanzania [2009] EWHC 121 (QB), 123 Con. L.R. 154* at [120].
- 354 See *Robophone Facilities v Blank [1966] 1 W.L.R. 1428* and cf. the *Manchester Diocesan case [1970] 1 W.L.R. 241*; from this point of view these cases are, it is submitted, to be preferred to *Financings Ltd v Stimson [1962] 1 W.L.R. 1184*.

- 355 *Carlyle Finance Ltd v Pallas Industrial Finance Ltd* [1999] All E.R. (Comm) 659, approving the reasoning now contained in para.4-086 above.
- 356 *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443.
- 357 [2016] EWCA Civ 443 at [40]–[41].
- 358 [2016] EWCA Civ 443 at [53].
- 359 [2016] EWCA Civ 443 at [53].

---

End of Document

© 2022 SWEET & MAXWELL

## (f) - Silence

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 3. - The Acceptance

(f) - Silence

### Offeree generally not bound

- 187 As a general rule, an offeree who does nothing in response to an offer is not bound by its terms. This is so even though the offer provides that it can be accepted by silence. Thus in *Felthouse v Bindley*<sup>360</sup> an uncle offered to buy a horse from his nephew for £30 15s., adding “If I hear no more about him I shall consider the horse is mine at £30 15s”. The uncle brought an action for conversion against an auctioneer who had by mistake included the horse in a sale of the nephew’s property. It was held that, the auctioneer was not liable because:

“The uncle had no right to impose upon the nephew the sale of his horse ... unless he chose to comply with the condition of writing to repudiate the offer ...”<sup>361</sup>

The reason for the rule is that it is, in general, undesirable to impose on an offeree the trouble and expense of rejecting an offer which he does not wish to accept. But in *Felthouse v Bindley* this was not the position. The nephew had, before the auction, told the auctioneer that he “intended to reserve” the horse for his uncle, and later correspondence showed that the nephew did at the time of the auction intend to sell the horse to the uncle. In spite of this, it was held that there was no contract because the nephew “had not communicated his intention to the uncle”.<sup>362</sup> But the need to communicate an acceptance can be waived by the terms of the offer<sup>363</sup> and it seems clear that the uncle’s letter did waive that need. The actual decision is, in view of these facts, hard to support, but this is no criticism of the general rule laid down in the case.

## Silence generally equivocal

- 188 The question whether silence may amount to an acceptance binding the offeree has also arisen in the arbitration cases (discussed in para. 4-009 above) in which the issue was whether an agreement to abandon an earlier agreement to submit a claim to arbitration could be inferred from inactivity in the form of long delay in prosecuting the claim. Such delay can, in certain circumstances, be a statutory ground for dismissing the claim.<sup>364</sup> In other cases, common law principles developed in arbitration cases apply to questions of agreement to abandon. Thus, it had been held that, even if one party's inactivity could be regarded as an offer to abandon the arbitration,<sup>365</sup> the mere silence or inactivity of the other did not normally amount to an acceptance. For one thing, such inactivity was often<sup>366</sup> equivocal,<sup>367</sup> being explicable on other grounds (such as forgetfulness or delay on the part of the offeree's solicitors).<sup>368</sup> For another, acceptance could not, as a matter of law, be inferred from silence alone<sup>369</sup> "save in the most exceptional circumstances".<sup>370</sup>

## Can offeree exceptionally be bound?

- 189 As the above reference to "exceptional circumstances" suggests, there may be exceptions to the general rule that an offeree is not bound by silence. First, if the offer has been solicited by the offeree, the argument that he should not be put to the trouble of rejecting it<sup>371</sup> loses much of its force,<sup>372</sup> especially if the offer is made on a form provided by the offeree<sup>373</sup> and that form stipulates that silence may amount to acceptance.<sup>374</sup> Secondly, if there is a course of dealing between the parties, the offeror may be led to suppose that silence amounts to acceptance: e.g. where his offers to buy goods have in the past been accepted as a matter of course by the despatch of the goods in question.<sup>375</sup> In such a case it may not be unreasonable to impose on the offeree an obligation to give notice of his rejection of the offer, especially if the offeror, in reliance on his belief that the goods would be delivered in the usual way, had forborne from seeking an alternative supply. It has been held that one party's wrongful repudiation of a contract may be accepted by the other party's failure to take such further steps in the performance of that contract as he would have been expected to take, if he were treating the contract as still in force<sup>376</sup>; and similar reasoning might be applied in the present context. Thirdly, there may also be "an express undertaking or implied obligation to speak"<sup>377</sup> arising out of the course of negotiations between the parties, e.g. "where the offeree himself indicates that an offer is to be taken as accepted if he does not indicate the contrary by an ascertainable time."<sup>378</sup> The offeree's failure to perform such an "obligation to speak" could thus be treated by the *offeror* as an acceptance by silence. But it is not normally open to the *offeree* in such cases to treat his own silence (in breach of his duty to speak) as an acceptance.<sup>379</sup> This course would be open to him only in situations such as that in *Felthouse v*

*Bindley*,<sup>380</sup> in which the offeror had indicated (usually in the terms of the offer) that he would treat silence as an acceptance. Fourthly, it is also possible that silence may constitute an acceptance by virtue of a custom of the trade or business in question.<sup>381</sup> Fifthly, parties may have entered into a binding contract but have left some of its terms to be settled in later negotiations; where one party then made a proposal as to the contents of such a term or terms, it was held that “lack of objection to those terms is to be regarded as an acceptance of them”.<sup>382</sup> An “implied obligation to speak”<sup>383</sup> could in such a case be said to have arisen out of the antecedent negotiations between the parties. Lastly, the offeree can accept by conduct, which can, in principle, take the form of a forbearance.<sup>384</sup>

## Liability of offeree based on estoppel?

- 190 Even where silence of the offeree does not amount to an acceptance, it is arguable that they might be liable on a different basis. In *Spiro v Lintern* it was said that:

“If A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with such an obligation, which would be to B’s disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the non-existence of the supposed obligation.”<sup>385</sup>

Although this statement was made with reference to wholly different circumstances, it could also be applied to certain cases in which an offeror had, to the offeree’s knowledge,<sup>386</sup> acted in reliance on the belief that their offer had been accepted by silence. The liability of the offeree would then be based on a kind of estoppel.<sup>387</sup> But the application of this doctrine to cases of alleged acceptance by silence gives rise to the difficulty that such an estoppel can arise only out of a “clear and unequivocal”<sup>388</sup> representation. For this purpose, mere inactivity is not generally sufficient,<sup>389</sup> so that silence in response to an offer will not normally give rise to an estoppel. It is likely to do so only in cases of the kind discussed above,<sup>390</sup> in which there are special circumstances which give rise to a “duty to speak,” and in which it would be unconscionable for the party under that duty to deny that a contract had come into existence.<sup>391</sup>

## Performance by offeror benefiting offeree

- 191 Where the offeror, to the offeree’s knowledge, actually performs in accordance with their offer and so confers a benefit on the offeree, the offeree should be required to restore the benefit or be subject to a claim for unjust enrichment.<sup>392</sup>

## Can offeror be bound?

- 192 There is some authority for saying that the offeror cannot, any more than the offeree, be bound where the offeree simply remains silent in response to an offer,<sup>393</sup> and the case is not one of the exceptional ones, discussed in para.4-089 above, in which an offer can be accepted by silence.<sup>394</sup> But it is submitted that the general rule in *Felthouse v Bindley*<sup>395</sup> does not lead invariably to such a conclusion. For the object of this rule is to protect the *offeree* from having to incur the trouble and expense of rejecting the offer so as to avoid being bound. No similar argument can be advanced for protecting the *offeror*. They may, indeed, be left in doubt on the point whether their offer has been accepted; but this is a matter about which they cannot legitimately complain where they have drawn their offer so as to permit (and even to induce) acceptance by silence.<sup>396</sup> Thus, it is submitted that the uncle in *Felthouse v Bindley* might have been bound if the nephew had resolved to accept the offer and had, in reliance on its terms, forborne from attempting to dispose of the horse elsewhere. This possibility has, indeed, been doubted<sup>397</sup>; but in the case in which the doubt was expressed there was no express stipulation in the offer that silence would be regarded as acceptance. Where the offer does contain such a stipulation, it is submitted that silence in response to it by the offeree should be capable of binding the offeror.

## Silence and conduct

- 193 The general rule that there can be no acceptance by silence does not mean that an acceptance always has to be given in so many words. An offer can be accepted by conduct; and this is never thought to give rise to any difficulty where the conduct takes the form of a positive act.<sup>398</sup> In principle, conduct can also take the form of a forbearance<sup>399</sup>: for example, a debtor's offer to give additional security for a debt can be accepted by the creditor's forbearing to sue for the debt.<sup>400</sup> Similarly, a tenant can accept an offer of a new tenancy by simply not vacating the premises. In one such case it was said that the offer had been accepted by "silence"<sup>401</sup>; but it seems better to say that it was accepted by conduct<sup>402</sup> and that the landlord had waived notice of acceptance. Similarly an offer made to a landowner to occupy land under a licence containing specified terms may be accepted by the landowner's permitting the offeror to occupy the land.<sup>403</sup> An offer by a contractor to carry out building work on the offeree's land may also sometimes be accepted by the offeree's allowing the work to proceed.<sup>404</sup> The possibility of acceptance by conduct is, yet again, illustrated by the arbitration cases already mentioned, in which an agreement to abandon the proceedings was alleged to have arisen from delay in prosecuting them. As already noted, legislation has now dealt with the practical problems which used to arise from delay in the pursuit of arbitration claims,<sup>405</sup>

but the reasoning of the arbitration cases could still apply where the legislative provisions have been excluded by agreement<sup>406</sup> or where it was alleged that some other type of claim or remedy had been abandoned by tacit agreement. According to those cases, an offer of abandonment can be accepted by reacting to it, not merely by inactivity,<sup>407</sup> but also by some further conduct: e.g. by closing, or disposing of, the relevant files.<sup>408</sup> On the same principle, the wrongful repudiation of an arbitration agreement (by repeatedly denying its existence) can be accepted by starting court proceedings to enforce the injured party's substantive claim.<sup>409</sup>

- <sup>194</sup> In *Rust v Abbey Life Insurance Co*<sup>410</sup> the plaintiff applied and paid for a "property bond" which was allocated to her on the terms of the defendants' usual policy of insurance. After having retained this document for some seven months, she claimed the return of her payment, alleging that no contract had been concluded. The claim was rejected on the ground that her application was an offer which had been accepted by issue of the policy.<sup>411</sup> But it was further held that, even if the policy constituted a counter-offer, that counter-offer had been accepted by "the conduct of the plaintiff in doing and saying nothing for seven months ...".<sup>412</sup> Thus, mere inaction was said to be sufficient to constitute acceptance; but it is submitted that this conclusion may be justified by reference to the special circumstances of the case. The negotiations had been started by the plaintiff (the counter-offeree)<sup>413</sup> and, in view of this fact, it was reasonable for the defendants to infer from her silence over a long period that she had accepted the terms of the policy which had been sent to her and which she must be "taken to have examined".<sup>414</sup> The case thus falls within one of the suggested exceptions<sup>415</sup> to the general rule that an offeree is not bound by silence where this alone is alleged to amount to an acceptance.<sup>416</sup>

## Footnotes

- 360 (1862) 11 C.B.(N.S.) 869; affirmed (1863) 1 N.R. 401; Miller (1972) 35 M.L.R. 489; cf. *Financial Techniques (Planning Services) v Hughes* [1981] I.R.L.R. 32.
- 361 (1862) 11 C.B.(N.S.) 869 at 875.
- 362 (1862) 11 C.B.(N.S.) 869 at 876.
- 363 Above, paras 4-057—4-063.
- 364 Arbitration Act 1996 s.41(3). However, the statutory power to dismiss claims on this ground can be excluded by contrary agreement: s.41(2).
- 365 Above, para.4-009.
- 366 But not always: see para.4-089 (note).
- 367 e.g. *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd's Rep. 437, 445.
- 368 For acceptance by silence and conduct, see below, para.4-093.
- 369 *Allied Marine Transport Ltd v Vale do Rio Doce Navegação SA (The Leonidas D.)* [1985] 1 W.L.R. 925, 927; *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) Plc*

- [1992] *1 Lloyd's Rep.* 513, 542; *Exmar NV v BP Shipping Ltd (The Gas Enterprise)* [1993] *2 Lloyd's Rep.* 352, 357, affirmed without reference to this point, at 364; *Vitol SA v Norelf Ltd* [1996] *A.C.* 800, 812; *Front Carriers Ltd v Atlantic and Orient Shipping Corp (The Archimidis)* [2007] *EWHC* 421; [2007] *2 Lloyd's Rep.* 131 at [45]–[46].
- 370 *The Leonidas D.* [1985] *1 W.L.R.* 925 at 927; *Cie Française d'Importation, etc. v Deutsche Continental Handelsgesellschaft* [1985] *2 Lloyd's Rep.* 592, 598; *Gebr. van Weelde Scheepvaart Kantoor BV v Compania Naviera Orient SA (The Agrabele)* [1987] *2 Lloyd's Rep.* 223, 234–235. *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The Golden Bear)* [1987] *1 Lloyd's Rep.* 330 is hard to reconcile with these cases and was apparently doubted in *The Antclizo* [1987] *2 Lloyd's Rep.* 130 at 147. Such “exceptional circumstances” may be illustrated by *André & Cie SA v Marine Transocean Ltd (The Splendid Sun)* [1981] *Q.B.* 694 (where the acceptance may have been by conduct: below, para.4-093 (note)), though it has been said that this case is hard to reconcile with *The Leonidas D*, above: see *Food Corp of India v Antclizo Shipping Corp (The Antclizo)* [1987] *2 Lloyd's Rep.* 130, 149, affirmed [1988] *1 W.L.R.* 607.
- 371 Above, para.4-087.
- 372 cf. *Rust v Abbey Life Insurance Co* [1979] *2 Lloyd's Rep.* 334, below, para.4-094.
- 373 cf. above, para.4-086.
- 374 As in *Alexander Hamilton Institute v Jones* 234 *Ill.App.* 444 (1924).
- 375 As in *Cole-McIntyre-Norfleet Co v Holloway* 141 *Tenn.* 679, 214 *S.W.* 87 (1919).
- 376 *Vitol SA v Norelf Ltd* [1996] *A.C.* 800.
- 377 *Gebr. van Weelde Scheepvaart Kantor BV v Compania Naviera Orient SA (The Agrabele)* [1985] *2 Lloyd's Rep.* 496, 509, per Evans J, whose statement of the relevant principles was approved on appeal though the actual decision was reversed on the facts: [1987] *2 Lloyd's Rep.* 223, 225. The case concerned an alleged “abandonment” by delay of an agreement to submit a claim to arbitration and would now be governed by *Arbitration Act 1996 s.41(3)* (above, para.4-009).
- 378 *Re Selectmove* [1995] *1 W.L.R.* 474, 478 (where the point was left open).
- 379 *Yona International Ltd v La Réunion Française, etc.* [1996] *2 Lloyd's Rep.* 84, 110.
- 380 Above, para.4-087; further discussed in para.4-092 below.
- 381 *Minories Finance Ltd v Afribank Nigeria Ltd* [1995] *1 Lloyd's Rep.* 134 (where a contract between two banks for the collection of drafts and remittance of their proceeds arose in this way).
- 382 *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] *EWHC* 2257 (*Comm*), [2008] *2 Lloyd's Rep.* 685 at [82], also referring at [70] to *Pagnan SpA v Feed Products Ltd* [1987] *2 Lloyd's Rep.* 601 at 614, where the further requirement is stated that “the other party does not object to [the term] *when asked if it has objections*” (italics added).
- 383 *The Agrabele case* [1985] *2 Lloyd's Rep.* 496, 509, per Evans J (relevant legal principles approved on appeal though decision reversed on the facts: [1987] *2 Lloyd's Rep.* 223, 225).
- 384 See below para.4-093.
- 385 [1973] *1 W.L.R.* 1002, 1011.
- 386 See *Yona International Ltd v Law Réunion Française, etc.* [1996] *2 Lloyd's Rep.* 84, 107 (where this requirement of knowledge was not satisfied).

- 387 Below, para.6-111; and cf. *The Stolt Loyalty* [1993] 2 *Lloyd's Rep.* 281, 289–291; affirmed, without reference to this point, [1995] 1 *Lloyd's Rep.* 598. The case put in the text above would not be one of estoppel by convention (below, para.6-116); for such estoppel is based on an *agreed* assumption, while in cases of the present kind the question is whether there was any agreement.
- 388 Below, para.6-098.
- 389 Below, para.6-100.
- 390 *The Agrabele case* [1985] 2 *Lloyd's Rep.* 496, 509, per Evans J.
- 391 See *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] EWHC 1360 (TCC), [2007] B.L.R. 499.
- 392 See below, paras 32-017 et seq.
- 393 *Fairline Shipping Corp v Anderson* [1975] Q.B. 180, 189.
- 394 Even in such exceptional cases, the offeror is not *invariably* bound by the offeree's silence: see *The Agrabele case* [1985] 2 *Lloyd's Rep.* 496, 509, per Evans J which was reversed on the facts: [1987] 2 *Lloyd's Rep.* 223, 225.
- 395 Above, para.4-087.
- 396 This argument would not apply where the terms of the offer had been drafted by the offeree: cf. above, para.4-086.
- 397 *Fairline Shipping Corp v Anderson* [1975] Q.B. 180, 188–189. In part this doubt was based on the argument that this would be using an estoppel to found a cause of action. However, this is not correct on the facts. The action would have been in contract, the estoppel merely providing an otherwise missing element.
- 398 cf. above, paras 4-034—4-035.
- 399 This statement is cited with apparent approval in *Vis Trading v Nazarov* [2014] EWCA Civ 313 at [40]. The actual decision in this case was based on a provision of the Russian Civil Code, which did “not wholly rule out silence as acceptance”.
- 400 Below, para.6-056.
- 401 *Roberts v Hayward* (1828) 3 C. & P. 432.
- 402 See *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2010] EWHC 2567 (Comm), [2011] 2 All E.R. (Comm) 38 (above, para.4-043 (note)), when Gloster J said (at [52]) that there was “some artificiality in the concept of an implied agreement to the counter-offer by non-responsive silence”, but concluded at [55] that the buyer had “accepted [the seller’s] counterproposal by its subsequent performance”, i.e. by conduct rather than by silence.
- 403 *Wettern Electric Ltd v Welsh Development Agency* [1983] Q.B. 796. For acceptance by conduct (as opposed to mere silence) see also *Aspinall's Club Ltd v Al Zayat* [2007] EWCA Civ 1001 at [19], [30] (acceptance of alleged terms on which a cheque was given by the recipient's accepting the cheque and returning “scrip” cheques previously given in respect of gambling losses).
- 404 See *Westminster Building Co Ltd v Beckingham* [2004] EWHC 138, [2004] B.L.R. 163; contrast *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International OAPIL (No.2)* [2004] EWHC 1750, 97 Con. L.R. 1. In these cases the point at issue related to the terms, rather than to the existence, of the contract.
- 405 Arbitration Act 1996 s.41(3); above, para.4-009.

- 406 Arbitration Act 1996 s.41(2).
- 407 cf. *Collin v Duke of Westminster [1985] Q.B. 581*.
- 408 See *André & Cie v Marine Transocean Ltd (The Splendid Sun) [1981] Q.B. 694, 712, 713* (“closed their file”), cf. 706 (“did so act”). *Tracomín SA v Anton C. Nielsen A/S [1984] 2 Lloyd's Rep. 195* can be supported on the same ground even though it was in part based on the decision at first instance in *Allied Marine Transport Ltd v Vale do Rio Doce Navegação SA (The Leonidas D.)* which was reversed on appeal [1985] 1 W.L.R. 925; above para.4-069; cf. *Tankrederei Ahrenkeil GmbH v Frahui SA (The Multitank Holsatia) [1988] 2 Lloyd's Rep. 486, 493* (where the offeree had destroyed relevant files, so that the case was not one of mere inaction). There seems to have been no “conduct” amounting to an acceptance in *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The Golden Bear) [1987] 1 Lloyd's Rep. 330*.
- 409 *Downing v Al Tameer Establishment [2002] EWCA Civ 545; [2002] 2 All E.R. (Comm) 545.*
- 410 [1979] 2 Lloyd's Rep. 334.
- 411 cf. above, para.4-029.
- 412 [1979] 2 Lloyd's Rep. 334, 340; affirming [1978] 2 Lloyd's Rep. 386, 393. For another illustration of acceptance by silence and conduct, see *AC Yule & Son Ltd v Speedwell Roofing and Cladding Ltd [2007] EWHC 1360 (TCC), [2007] B.L.R. 499.*
- 413 cf. above, para.4-086 and *Vitol SA v Norelf Ltd [1996] A.C. 800* (above, para.4-089).
- 414 *Yona International Ltd v La Réunion Française, etc. [1996] 2 Lloyd's Rep. 84, 110* (where no inference of assent was drawn from silence).
- 415 Above, para.4-089.
- 416 See *Cooper v National Westminster Bank Plc [2009] EWHC 3055 (QB), [2010] 1 Lloyd's Rep. 490*, distinguishing *Rust v Abbey Life Insurance Co [1979] 2 Lloyd's Rep. 334* and applying the general rule that “acceptance notoriously cannot, in ordinary circumstances, be inferred from silence” (at [69]).

## Section 4. - Electronic Contract Formation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 4. - Electronic Contract Formation

### Electronic communication<sup>417</sup>

- 195 The internet has changed the way that many people communicate and conduct business. How do the rules of offer and acceptance apply to intentions manifested through electronic messages (email), and interactions with websites? The basic structure of email communications is the same as that concluded by an exchange of letters via the post so that the basic principles determining what constitutes an offer<sup>418</sup> and what constitutes an acceptance<sup>419</sup> remain the same. The additional difficulties with respect to contract formation by email communications relate to the time at which an email acceptance takes effect and the consequences of failures of communication, which are discussed below.<sup>420</sup> In contrast, contract formation through interaction on websites usually raises no problems of timing since communications are usually instantaneous and any failures of communication should be immediately apparent.<sup>421</sup> However, contract formation through interaction on websites is significantly different from contract formation through letters exchanged by the post and this can raise some difficulties in determining what words or conduct amount to offer or acceptance, although the basic principles on contract formation remain the same.

### Digital purchases online

- 196 One common scenario involves contracts for digital products such as music, videos or software. In these cases, the websites are like virtual vending machines, which are generally regarded as offers<sup>422</sup> because there is no expectation or opportunity to negotiate, and no practical scope for withdrawal because the product or service is delivered immediately and cannot be easily returned.

In the usual course of such transactions, the customer selects the digital content, provides payment details and confirms the order, whereupon the digital content will immediately download onto the customer's device (e.g. computer, smartphone or tablet). In these circumstances, it is submitted that the website is a standing offer, which the customer accepts by confirming his order. Under the Consumer Contracts (Information, Cancellation and Additional Charges) [Regulations 2013](#)<sup>423</sup> the consumer who makes a "contract for the supply of digital content which is not supplied on a tangible medium" may cancel the contract before "the end of 14 days after the day on which the contract is entered into".<sup>424</sup> However, the consumer's right to cancel will be lost if the consumer has expressly consented to the supply of the digital content before the end of the cancellation period and has "acknowledged that the right to cancel the contract ... will be lost".<sup>425</sup>

## Non-digital purchases online

- 197 Where the website transaction involves goods and services, rather than digital content, the trader's performance does not immediately follow the customer's confirmation of his order, so that a different analysis is appropriate. Neither the [Consumer Protection \(Information, Cancellation and Additional Charges\) Regulations 2013](#)<sup>426</sup> nor, the [Electronic Commerce \(EC Directive\) Regulations](#)<sup>427</sup> specify when such a contract is made, referring instead to "order",<sup>428</sup> and "acknowledgement of receipt" of the order.<sup>429</sup> The effect of an acknowledgement of receipt of an order, therefore, falls to be determined as a matter of common law. Accordingly, it is submitted that websites are analogous to virtual shop displays or virtual advertisements. Therefore, in the absence of clear intention to the contrary, the general rule should be that the content of the websites constitutes invitations to treat.<sup>430</sup> In exceptional cases, the objective intention evinced by a website will be that it contains an offer; thus, the result in *Carlill v Carbolic Smoke Ball Co Ltd*,<sup>431</sup> namely that the advertisement contained a unilateral offer to pay £100 to any person catching influenza despite using the smoke ball as instructed, should be the same even if the advertisement had been made online rather than on paper. But, in the absence of such exceptional circumstances, the customer makes the offer when he confirms his payment details and order, usually by clicking an appropriate "button" on the website.<sup>432</sup> The trader may respond in a number of ways to the customer's offer. First, the trader may send the customer an email acknowledging receipt of the order (as required by the [Electronic Commerce \(EC Directive\) Regulations 2002](#))<sup>433</sup> or stating that the customer's order is being processed. These are insufficient to constitute an acceptance by the trader who may yet have good reasons not to accept the customer's offer; he may have insufficient stock to fulfil the order, he may pick up a pricing error on the website, or there may be a problem with the customer's payment or the customer may be in a different jurisdiction. Second, the trader may, in addition, send one of or a combination of emails stating that the order has been successfully processed, or that the items have been despatched, or that the item has been delivered, or the trader may simply deliver the item without sending an email. Subject to the precise content of the email message, any of these emails may amount to an acceptance; actual delivery would certainly do so.

## The time of email acceptances

- 198 Although the general rule is that an acceptance must be communicated to the offeror,<sup>434</sup> the posting rule discussed above provides a notable exception.<sup>435</sup> The similarity of email communications to communications by an exchange of letters raises the question of whether the posting rule should also be applied to acceptances sent by email. It is submitted that the exceptional posting rule should not be so extended. The Court of Appeal in *Entores v Miles Far East Corp*<sup>436</sup> and the House of Lords in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH*<sup>437</sup> refused to extend the posting rule to acceptances made by telex, holding instead that acceptance takes effect when the telex arrives on the offeror's machine. Both courts attached importance to the fact that any failure of communication (e.g. where the line goes dead or the offeror notifies the offeree that ink on the receiving end has run out) would be apparent to the offeree. Likewise, the offeree sending the acceptance is more likely than the offeror (the intended recipient) to know that the email delivery has failed since he will usually receive a message informing him of this. This contrasts with the post where the offeree sender usually has no means of knowing that his acceptance letter has been delayed or lost. Therefore, in general, the time of acceptance by email should be when the email is received by the offeror.

## When an email acceptance is received

- 199 Although email communication is sufficiently unlike post so that it should not be governed by the posting rule,<sup>438</sup> it is also sufficiently different from the core examples of instantaneous communications (e.g. face-to-face and telephone conversations) that a question arises as to when an email acceptance should be regarded as having been *received*. In the *Brinkibon* case Lord Wilberforce accepted the rule on instantaneous communication "where the condition of simultaneity is met".<sup>439</sup> The assumption is that both parties are present, so that there is no time lag between the sending and receiving of the acceptance and any failures of communication are usually detectable and immediately rectifiable.<sup>440</sup> However, the condition of simultaneity cannot be assumed in the case of email and other similar instantaneous methods of communication (e.g. texts, telephone answering machines, faxes, telexes); the message arrives almost instantaneously, but the recipient may not, at that moment, be at the other end and ready to receive the message. Lord Wilberforce has said that:

"No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie."<sup>441</sup>

- 100 One possibility is to treat an email acceptance as having been received when it arrives on the offeror's email server. This is supported by a number of international conventions, restatements and national laws,<sup>442</sup> and has the merit of certainty since that time is recorded in the email. A second possibility is to treat an email acceptance as received when the addressee can access it. There is some support for this position,<sup>443</sup> but, it is not only more uncertain, it may also seem unfair because the causes of the offeror's lack of access to the email will usually be, broadly speaking, within the offeror's sphere of control (e.g. problems with the offeror's computer or server or the connection between them, or the operation of spam filters or firewalls), and those risks should not be borne by the offeree.<sup>444</sup> A third possibility is to treat the acceptance email as received when, in all the circumstances, a reasonable offeror would have accessed the message (e.g. during normal business hours) or when the offeror actually accessed the message if earlier.<sup>445</sup> However, the authorities consistent with this position<sup>446</sup> relate to the "quite different"<sup>447</sup> question of when notice of withdrawal of a charterparty is deemed to have occurred. Moreover, this approach would create a great deal of uncertainty where, for example, business hours vary within the same business or across different businesses, or as between the offeror and offeree, or where the offeror may reasonably be expected to check his email in the evenings and at weekends, or where the parties do not negotiate in a business context, or where the offeror sends an automatic email response about his limited access to his email during certain periods of time. Therefore, subject to the reasonableness of the parties' conduct and fault discussed in the next paragraph, it is submitted that the first option should be adopted as the default position; that is, an email acceptance should be treated as having been received when it arrives on the offeror's email server, unless the parties or the context indicate to the contrary.

## Failure of email communication

- 101 Email communications may fail; for example, they may not arrive, arrive in garbled form or be blocked by antivirus programmes or spam filters. Three principles can be derived from the judgments of Denning LJ in *Entores v Miles Far East Corp*<sup>448</sup> and Lord Frazer in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH*<sup>449</sup>:
- (1) If the offeree knows or should know that the communication has failed,<sup>450</sup> or the failure is due to an occurrence for which the offeree is responsible, then there is no contract. This would be the case where, for example, the offeree sender has received an error message, the offeree has mistyped the offeror's email address, the email that is sent is blocked because it contains a virus or has not come to the offeror's notice because it was sent to an unexpected email address.
- (2) If (1) does not apply, the offeror will be bound by the email acceptance if his failure to receive the email is due to his fault or to an occurrence for which he is responsible.<sup>451</sup> This

would be the case if, for example, the offeror has given the offeree the wrong or incorrect email address; the incoming email is blocked because the offeror's inbox is full, because of a problem with the offeror's server, or because of the operation of the offeror's firewall or spam filter.

(3) Where neither is at fault nor responsible for the failure of communication, then there is no contract.

Denning LJ said:

"... if there should be a case where the offeror without any fault on his part does not receive the message of acceptance—yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract."<sup>452</sup>

## Footnotes

- 417 See D. Nolan, "Offer and Acceptance in the Electronic Age", in A.S. Burrows and E. Peel (eds), *Contract Formation and Parties*, (2010), 61; J. Hill, *Cross-Border Consumer Contracts* (2008).
- 418 See above paras 4-003—4-017.
- 419 See below paras 4-031—4-054.
- 420 See below paras 4-098—4-101.
- 421 See below paras 4-096—4-097.
- 422 See *Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163* at 169, Lord Denning held that an automatic machine outside a car park stating charge rates makes an offer, which the motorist accepts by putting money into the slot and driving in.
- 423 SI 2013/3134.
- 424 reg.30(2)(b).
- 425 reg.37(1).
- 426 SI 2013/3134. These Regulations replaced the *Consumer Protection (Distance Selling) Regulations 2000* with effect from 13 June 2014. For amendments of the *Consumer Protection from Unfair Trading Regulations 2008* (SI 2008/1277) see the *Consumer Protection Regulations 2014* (SI 2014/870) regs 2—4. For further discussion of the 2013 Regulations see Vol.II, paras 40-062—40-165.
- 427 SI 2002/2013 (implementing Directive 2000/31/EC) which merely provides that in the case of a contract made on a website, "the order and the acknowledgement of receipt [of the order] will be deemed to be received when the parties to whom they are addressed are able to access them" (reg.11(2)(a)).
- 428 SI 2002/2013 reg.12 states that the word "‘order’ may be but need not be the contractual offer" for the purposes of regs 9 and 11, except in relation to reg.9(1)(c) and reg.11(1)(b). However, SI 2013/3134 reg.14 (3) stipulates: "The trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay."

Regulation 14(4) stipulates: “If placing an order entails activating a button or a similar function, the trader must ensure that the button or similar function is labelled in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader.” These are consistent with treating the customer’s order as the acceptance that concludes the contract. On the other hand, room is made for the alternative view that the consumer’s order is merely the offer by the last two words of reg.14(5), which stipulates that if the trader fails to comply with regs 14(3)–(4), “the consumer is not bound by the contract or order”.

- 429 SI 2002/2013 regs 9, 11(2)(a).
- 430 See above paras 4-015 and 4-018. This is consistent with art.11 of the United Nations Convention on the Use of Electronic Communications in International Contracts. The [Electronic Commerce \(EC Directive\) Regulations \(SI 2002/2013\)](#) regs 9 and 11(1) requires the trader to clearly set out for their customers, prior to orders being placed, the procedure for concluding a contract and to allow consumers to “identify and correct input errors prior to the placing of an order”.
- 431 [\[1893\] 1 Q.B. 256](#). [Electronic Commerce \(EC Directive\) Regulations 2002 \(SI 2002/2013\)](#) (partly implementing Directive 2000/31/EC) reg.12 states that an “‘order’ may be, but need not be, the contractual offer ...” for certain purposes specified in regs 9 and 11.
- 432 See [Electronic Commerce \(EC Directive\) Regulations 2002 \(SI 2002/2013\)](#) (partly implementing Directive 2000/31/EC) regs 9(1)–(2), 11 and 12.
- 433 SI 2002/2013 (implementing Directive 2000/31/EC) reg.11(1)(a). Under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134](#), replacing the [Consumer Protection \(Distance Selling\) Regulations 2000 \(SI 2000/2334\)](#) for contracts made on or after 13 June 2014) the customer will almost certainly have the right to cancel at this stage under regs 30–31.
- 434 See above para.4-055.
- 435 See above para.4-064.
- 436 [\[1955\] 2 Q.B. 327](#).
- 437 [\[1983\] 2 A.C. 34](#).
- 438 See above paras 4-064—4-079, 4-098.
- 439 [\[1983\] 2 A.C. 34](#) at 42.
- 440 In *Entores v Miles Far East Corp* [\[1955\] 2 Q.B. 327](#) Denning LJ gives the examples of face-to-face and telephone communication and communication by telex.
- 441 [\[1983\] 2 A.C. 34](#) at 42.
- 442 See the UN Convention on Contracts for the International Sale of Goods art.24 as interpreted in CISG Advisory Council Opinion No.1, Electronic Communications under CISG (15 August 2003), Opinion on art.24 and Opinion on art.18(2); UNIDROIT Principles of International Commercial Contracts art.1.303(3); US Restatement of Contact (1981) §68; Uniform Commercial Code §1-201(26); UN Model Law on Electronic Commerce art.15(2); US Uniform Computer Information Transactions Act s.102(a)(52)(B)(II); Australian Electronic Transactions Act 1999 (Cth) s.14(3).

- 443 See UN Convention on the Use of Electronic Communications in International Contracts art.10(2); the [Electronic Commerce \(EC Directive\) Regulations 2000 \(SI 2002/2013\)](#) reg.11(2)(a).
- 444 Although the offeror's lack of access may also result from the operation of processes outside the offeror's sphere of control (e.g. the offeror's mail-client may not be able to process and display a message composed on the offeree's mail-client), or due to the justifiable operation of the offeror's anti-virus software.
- 445 See the Scottish Law Commission Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses (Scot Law Com No 252) Contract (Scotland) Bill s.13(3) which states that: "A notification reaches a person when it is made available to the person in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay". In particular, (4): "a notification is to be taken to reach a person—(a) when it is delivered to the person, (b) when it is delivered to the person's place of business, (c) in a case where either the person does not have a place of business or the notification does not relate to a business matter, when it is delivered to the person's habitual residence, or (d) in the case of a notification transmitted by electronic means, when it becomes available to be accessed by the person".
- 446 See *Tenax S.S. Co Ltd v The Brimnes (The Owners) (The Brimnes)* [1974] EWCA Civ 15, [1975] 1 Q.B. 929 (CA) and *Schelde Delta Shipping BV v Astart Shipping Ltd (The Pamela)* [1995] 2 Lloyds' Rep. 249 (QB).
- 447 *Schelde Delta Shipping BV v Astart Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep. 249, 252.
- 448 [1955] 2 Q.B. 327.
- 449 [1983] 2 A.C. 34 at 43.
- 450 [1955] 2 Q.B. 327 at 332; he states that if a face-to-face oral acceptance is drowned out by a noisy aircraft flying overhead, the offeree must repeat his acceptance once the aircraft has passed if he wishes to make a contract; likewise, if the telephone goes "dead" before the acceptance is completed, the offeree must telephone back to complete the acceptance.
- 451 [1955] 2 Q.B. 327 at 333; Denning LJ states that if the offeree does not know that his communication has failed but the offeror knows or has reason to know e.g. because the ink of the receiving teleprinter runs out, the offeror recipient should alert the offeree sender of the problem, failing which, the offeror should be bound.
- 452 [1955] 2 Q.B. 327 at 333.

## Section 5. - Unilateral Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 5. - Unilateral Contracts

### Introduction

- [102] An offer of a unilateral contract is made when one party promises to pay the other a sum of money (or to do some other act, or to forbear from doing something) if the other will do (or forbear from doing) something without making any promise to that effect<sup>453</sup>: for example where A promises to pay B £100 if B will walk from London to York<sup>454</sup> or find and return A's lost dog or give up smoking for a year.<sup>455</sup> The contract in these cases is called "unilateral" because it arises without B's having made any counter-promise to perform the stipulated act or forbearance; it is contrasted with a bilateral contract under which each party undertakes an obligation. The distinction between the two types of contract is not always clear-cut<sup>456</sup>; but once a promise is classified as an offer of a unilateral contract, a number of rules apply to the acceptance of such an offer. First, the offer can be accepted by fully performing the required act or forbearance.<sup>457</sup> Secondly, there is no need to give advance notice of such acceptance to the offeror.<sup>458</sup> Thirdly, the offer can be accepted *only* by performance and not by a counter-promise, since such a counter-promise would not be what the promisor had bargained for. And fourthly, the offer can, like all offers, be withdrawn before it is accepted.<sup>459</sup> It is the application of this fourth rule which gives rise to the greatest difficulty, for it raises the issue of fairness to the offeree who has embarked on, but not completed, performance when the offeror attempts to withdraw his offer.

### Acceptance by part performance

[103]

It is disputed whether an offer of a unilateral contract can be withdrawn after the offeree has *partly* performed the stipulated act or forbearance. The first question (to be discussed here) is whether at this stage the offeree has accepted the offer; the second (to be discussed in Ch.6) is whether (before full performance) he has provided any consideration for the offeror's promise.<sup>460</sup> With regard to the first question, one possible view is that there is no acceptance until the stipulated act or forbearance has been completely performed. This may, indeed, be the position where the offeror clearly intends to have a locus poenitentiae until then, and the offeror commences performance on that understanding.

- [04] But in most cases the offeree will not intend to expose himself to the risk of withdrawal when he has partly performed,<sup>461</sup> intends to complete performance and is able to do so.<sup>462</sup> In such cases, the offeree's position can be protected in two ways. The first is by distinguishing between two stages: (1) that at which the offer is accepted and (2) that at which the offeree has satisfied the conditions which must be satisfied before he can enforce the offeror's promise.<sup>463</sup> Where the contract is unilateral, the second stage is not reached until performance of the stipulated act has been completed.<sup>464</sup> But it may be that the first stage (of acceptance) can be reached as soon as the offeree has unequivocally begun performance of the stipulated act or abstention. If so, the part performance can amount to an acceptance so that the offer can no longer be withdrawn. Of course, it may be difficult in fact to tell when performance has begun, particularly where the offer amounts to a promise in return for an abstention. But once the conduct of the offeree has gone beyond mere preparation to perform, and amounts to actual part performance, then it can amount to an acceptance, so that as a general rule<sup>465</sup> the offer can no longer be withdrawn.<sup>466</sup>
- [05] Support for this view is to be found in *Errington v Errington*,<sup>467</sup> where a father bought a house, subject to a mortgage, allowed his son and daughter-in-law to live in it, and told them that if they paid the mortgage instalments the house would be theirs when the mortgage was paid off. The couple started to live in the house and paid some of the mortgage instalments; but they did not bind themselves to go on making the payments. It was held that the arrangement amounted to a contract which could not, after the father's death, be revoked by his personal representatives. Denning LJ said:

“The father's promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on the performance of the act, but it would cease to bind him if they left it incomplete and unperformed.”<sup>468</sup>

This dictum was cited with approval in *Soulsbury v Soulsbury*<sup>469</sup> where a husband (H) promised his former wife (W) to leave her £100,000 in his will if (1) during their joint lives, she did not enforce or seek to enforce a maintenance order which she had obtained against him in divorce

proceedings and (2) she survived him.<sup>470</sup> Longmore LJ described this promise as “a classic unilateral contract” and said that, in the case of such a contract,

“... [o]nce the promisee acts on the promise by inhaling the smoke ball, by starting the walk to York or (as here) by not suing for the maintenance to which she was entitled, the promisor cannot revoke or withdraw his offer.”<sup>471</sup>

He added that the present case was “stronger than *Errington* since on [H’s] death [W] had completed all possible performance of the act required for the enforcement of [H’s] promise.”<sup>472</sup>

- <sup>106</sup> An alternative analysis for the substantive position that the offeror cannot revoke once the offeree commences performance is contained in *Daulia Ltd v Four Millbank Nominees Ltd*.<sup>473</sup> Goff LJ said that while the general rule is that an offeror “is entitled to require full performance of the condition which he has imposed and short of that he is not bound”, this is:

“... subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer.”<sup>474</sup>

On this analysis, the offeror makes two offers; first, the main offer to pay (or otherwise perform) on the offeree’s completion of performance, and second, a separate collateral unilateral offer not to revoke the main offer once the offeree’s performance has commenced.

## Continuing guarantees

- <sup>107</sup> The view that the offeree’s part performance of a unilateral contract can amount to an acceptance, either of the main offer or of a collateral offer not to revoke the main offer once the offeree commences performance of the condition of the main offer, and so deprive the offeror of the power to withdraw, is also supported by the law relating to continuing guarantees. These may be divisible, where each advance constitutes a separate transaction; or indivisible, e.g. where, on A’s admission to an association, B guarantees all liabilities which A may incur as a member of the association.<sup>475</sup> If the guarantee is divisible, it can be revoked at any time with regard to future advances,<sup>476</sup> but an indivisible guarantee cannot be revoked once the creditor has begun to act on it by giving credit to the principal debtor.<sup>477</sup> This rule applies even though the contract of guarantee is unilateral, in

the sense that the creditor has not made any promise to the guarantor (in return for the guarantee) to give credit to the principal debtor.

## Bankers' irrevocable credits

- [108] The issue (or confirmation) by a bank of an irrevocable credit amounts to a promise to pay to the beneficiary a sum of money on certain conditions, usually if the beneficiary will present specified documents to the bank.<sup>478</sup> Often the beneficiary is a seller of goods who will have done some act of part performance, e.g. in manufacturing or shipping the goods. As he makes no promise *to the bank*, its liability to him might at first sight seem to be based on a unilateral contract between them. But the bank's promise is regarded as binding as soon as it is communicated to the seller, i.e. before he has done any act of part performance or indeed done any other act of acceptance. The binding force of the promise is therefore not explicable in terms of acceptance of an offer of a unilateral contract.<sup>479</sup>

## Estate agents' contracts

- [109] A unilateral contract may arise where an estate agent is engaged to negotiate the sale of a house. In one case of this kind it was said that "No obligation is imposed on the agent to do anything".<sup>480</sup> If he succeeds in negotiating a sale, his claim for the agreed commission could be regarded as a claim based on a unilateral contract. However, it is well settled that the client may revoke his instructions, or sell through another agent, or without any agent, in spite of the fact that the first agent has made considerable efforts to find a purchaser.<sup>481</sup> It could be argued that this line of cases supports the view that, where a contract is unilateral, the offeror (i.e. in cases of the present kind, the client) can withdraw after part performance by the offeree (the agent). Alternatively, these cases can be regarded as one of the exceptional types of case in which, on the true construction of the offer, a locus poenitentiae is intended to be reserved to the client even after part performance by the agent. A commission is payable, however, where a defendant seller breaches an implied term that it would not do anything to prevent the claimant agent from earning the commission.<sup>482</sup> This was the case where the defendant seller and the purchaser had got together, formed a new vehicle, transferred the benefit of the sale to that vehicle, for the sole or dominant motive of depriving the claimant of commissions.<sup>483</sup>

## Estate agents appointed "sole agents"

[110]

There is a further group of cases in which persons appointed “sole agents” have been held entitled to damages when the client sold through another agent.<sup>484</sup> However, these have been treated as cases of bilateral contracts, on the ground that the agents promised to use their best endeavours to effect a sale,<sup>485</sup> or to bear advertising expenses.<sup>486</sup> Such promises may be (and, it seems, commonly are) made by agents who are not sole agents at all, though the question whether a promise to use best endeavours is sufficiently certain to have any legal effect may still be an open one.<sup>487</sup> The rules as to the revocability of the client’s promise would, it seems, apply whether the contract is regarded as a unilateral or as a bilateral one and accordingly it is doubtful whether the estate agency cases shed any light on the problems of acceptance in unilateral contracts.

## Unilateral contract becoming bilateral

- [11] A contract may be in its inception unilateral but become bilateral in the course of its performance.<sup>488</sup> In the examples given in para.4-102 above, a bilateral contract would not indeed arise merely because the promisee had promised to perform the stipulated act or abstention (e.g. to walk to York). This is because the promisor has not bargained for a counter-promise, so that his offer cannot be accepted by promising to perform but only by actually performing (or by beginning to do so). But if A promises to pay B a sum of money in return for some service to be rendered by B (such as repainting A’s house) it is possible that B may, by beginning to render the service (e.g. by stripping off the old paint), impliedly promise<sup>489</sup> to complete it.<sup>490</sup> In such a case, the contract would at this stage become bilateral, so that neither party could withdraw with impunity.

## Extent of liability

- [12] It is generally assumed that, where a unilateral contract takes the form of a promise to pay money, an offeror who purports to withdraw after part performance by the offeree must either be liable in full or not be liable at all. There, is, however, also an intermediate possibility. If, for example, the offer is withdrawn after the offeree has walked halfway to York, it is arguable that, on being notified of the withdrawal, he should desist and recover damages<sup>491</sup> amounting to his expenses, or to the value of the chance of completing the walk,<sup>492</sup> less the expenses saved by not completing it.

## Footnotes

453 *Rollerteam Ltd and another v Riley (Decoteau, Pt 20 defendant) [2016] EWCA Civ 1291, [2017] 2 W.L.R. 870* at [45], citing Chitty on Contracts, 32nd edn (2015), para.1-107.

- 454 *Rogers v Snow* (1573) *Dalison* 94; *Great Northern Ry v Witham* (1873) *L.R.* 9 *C.P.* 16, 19.
- 455 cf. *Hamer v Sidway* 124 *N.Y.* 538 (1881).
- 456 See below, para.4-111.
- 457 See *Daulia Ltd v Four Millbank Nominees Ltd* [1978] *Ch.* 231, 238; *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd* [1986] *A.C.* 207, 229.
- 458 *Carlill v Carbolic Smoke Ball Co* [1893] 1 *Q.B.* 256; *Bowerman v Association of British Travel Agents* [1995] *N.L.J.* 1815.
- 459 Below, para.4-114.
- 460 Below, para.6-200.
- 461 Lord Diplock in *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd* [1986] *A.C.* 207, 224 can be read as depriving the offeror of the power to withdraw as soon as his offer is communicated (i.e. before any performance by the offeree); but in that case the offeree had completely performed the required act by making the requested bid.
- 462 cf. *Soulsbury v Soulsbury* [2007] *EWCA Civ* 969 at [49]–[50].
- 463 Pollock, Principles of Contract, 13th edn (1950), p.19.
- 464 For a quasi-exception, see para.4-112 below.
- 465 i.e. so long as no locus poenitentiae has been reserved and so long as performance remains within the offeree's power: see *Morrison S.S. Co v The Crown* (1924) 20 *L.L. Rep.* 283 (where the House of Lords held that the offer could be withdrawn, in spite of the fact that the offeree had taken steps towards performance, as the acts of foreign governments had made it impossible for the offeree to complete performance).
- 466 The corresponding paragraph of the above text in the 29th edition of this book is (among others) cited with approval in *Schwepp v Harper* [2008] *EWCA Civ* 442 at [41] by Waller LJ in a dissenting judgment, but the issue on which he dissented was the different one, whether the agreement lacked contractual force for want of certainty: see below, para.4-188 (note). Dyson LJ at [62] treated the alleged contract as bilateral, while Sir Robin Auld at [77] left open the question whether, if it had come into existence, the contract would have been “bilateral or unilateral”. See also the American Law Institute’s Restatement of the Law, Contracts (hereinafter called Restatement, Contracts), § 45, and Restatement of the Law, 2d, Contracts (hereinafter called Restatement 2d, Contracts), § 45. The Restatement 2d, Contracts, § 12 abandons the distinction between bilateral and unilateral contracts, and in § 45 substitutes “option contract” where formerly “unilateral contract” had been used. See also below, para.6-011.
- 467 [1952] 1 *K.B.* 290; doubted on other points in *National Provincial Bank Ltd v Ainsworth* [1965] *A.C.* 1175, 1239–1240, 1251–1252 and in *Ashburn Anstalt v Arnold* [1989] *Ch.* 1, 17 (overruled on another ground in *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 *A.C.* 386). For another possible illustration, see *Beaton v McDivitt* (1988) 13 *N.S.W.L.R.* 162, 175.
- 468 [1952] 1 *K.B.* 290, 295. cf. *Daulia Ltd v Four Millbank Nominees Ltd* [1978] *Ch.* 231, 239.
- 469 [2007] *EWCA Civ* 969 [2008] 2 *W.L.R.* 874 at [50].
- 470 [2007] *EWCA Civ* 969 at [10]; cf. at [22], where the condition of survivorship is not expressly stated.
- 471 [2007] *EWCA Civ* 969 at [49].

- 472 [2007] EWCA Civ 969 at [50].
- 473 [1978] Ch. 231.
- 474 [1978] Ch. 231 at 239.
- 475 As in *Lloyd's v Harper* (1880) 16 Ch. D. 290.
- 476 As in *Offord v Davies* (1862) 12 C.B.(N.S.) 748. An obscure passage in the argument at 753 is inconclusive on the general question of acceptance in unilateral contracts.
- 477 *Lloyd's v Harper* (1880) 16 Ch. D. 290. cf. *National Merchant Building Society v Bellamy* [2013] EWCA Civ 452, [2013] 2 All E.R. (Comm) 674, distinguishing between (i) a guarantee of a debtor's liability under a specific contract and (ii) a guarantee of obligations arising out of a course of dealing between debtor and creditor and not linked to the debtor's credit limit under the contract between debtor and creditor when the guarantee was given. The Court of Appeal held that a guarantee of "all sums which are or may hereafter be owing" was, on its true construction, of the second of the above two kinds. No issue arose in this case as of the revocability of the guarantee.
- 478 See below, Vol.II, para.36-454.
- 479 Vol.II, para.36-512.
- 480 *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 124. But, in fact, he may promise to do something: see below, para.4-110; cf. *Murdoch* (1975) 91 L.Q.R. 357. "Obligation" in the dictum quoted in the text above refers to obligations under any contract between agent and client (as distinct from obligations that may be imposed on the agent by legislation).
- 481 Below, paras 21-154, 21-165.
- 482 *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] Q.B. 290.
- 483 *C Christo & Co Ltd v Marathon Advisory Service Ltd* [2015] EWHC 1971 (QB).
- 484 *Hampton & Sons v George* [1939] 3 All E.R. 627; *Christopher v Essig* [1958] W.N. 461; and see below, para.21-165.
- 485 *Christopher v Essig* [1958] W.N. 461; *John McCann & Co v Pow* [1974] 1 W.L.R. 1643, 1647. In *Wood v Lucy, Lady Duff-Gordon* 222 N.Y. 88; 118 N.E. 214 (1917) it was held that such a promise could be implied.
- 486 cf. *Bentall, Horsley & Baldry v Vicary* [1931] 1 K.B. 253 (where it was held that the owner committed no breach of a "sole agency" agreement by selling it without the intervention of a second agent).
- 487 Below, paras 4-168—4-169.
- 488 *New Zealand Shipping Co Ltd v A.N. Satterthwaite Ltd (The Eurymedon)* [1975] A.C. 154, 167–168 ("a bargain initially unilateral but capable of becoming mutual"); cf. *The Mahkutai* [1996] A.C. 650, 664, treating the contract in *The Eurymedon* as "nowadays bilateral"; but this description should not be understood as meaning that the contract imposed on the offeree any executory obligations to the offeror: *Hombourg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [34], [59], [93], [153] and [196], where the contract is described as "unilateral". See also Treitel, Carver on Bills of Lading, 3rd edn (2011) para.7-053.
- 489 It has, indeed, been suggested that it is "impossible to imply terms ... which impose legal obligations ... into a unilateral contract" (*Little v Courage* (1995) 70 P. & C.R. 469, 474). The reason for this view seems to be that such an implication would destroy the unilateral

character of the contract by imposing an obligation on the promisee. But there is, it is submitted, no good reason why an intention to undertake such an obligation should not be inferred from the conduct of the promisee *after* the unilateral contract has come into existence. This possibility is recognised in the dictum from *The Euryomedon [1975] A.C. 154, 167–168.*

- 490 See *The Unique Mariner [1979] 1 Lloyd's Rep. 37, 51–52; Smit International Singapore Pte Ltd v Kurnia Dewi Shipping SA (The Kurnia Dewi) [1997] 1 Lloyd's Rep. 553, 559;* contrast *B.S.C. v Cleveland Bridge & Engineering Co Ltd [1984] 1 All E.R. 504, 510–511*, where such an implied promise was negatived by the fact that the terms of a bilateral contract were still under negotiation and were never agreed. It is not clear whether the situation discussed in *Offord v Davies (1862) 12 C.B.N.S. 748, 753* falls into the category of a unilateral or into that of a bilateral contract.
- 491 Unless the offeree has a “substantial or legitimate interest” in completing the walk, this may be the law under the principles laid down in *White & Carter (Councils) Ltd v McGregor [1962] A.C. 413.*
- 492 The suggestion made in the text above is adopted in *Schweppes v Harper [2008] EWCA Civ 442* at [51]–[54] by Waller LJ who dissented on the different issue, whether the agreement was sufficiently certain to have contractual force: see below, para.4-188 (note).

## **Section 6. - Termination of the Offer**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 6. - Termination of the Offer**

### **Introduction**

- [13] An offer may be terminated by withdrawal, rejection, lapse of time, occurrence of a condition, death and supervening incapacity. These methods of termination will be discussed in the paragraphs that follow.

## **(a) - Withdrawal**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 6. - Termination of the Offer**

**(a) - Withdrawal**

### **General rule**

- <sup>114</sup> The general rule is that an offer may be withdrawn at any time before it is accepted.<sup>493</sup> The rule applies even if the offeror has promised to keep the offer open for a specified time,<sup>494</sup> for such a promise is unsupported by consideration<sup>495</sup> and is therefore not binding. Thus, in *Routledge v Grant*<sup>496</sup> the defendant offered to buy a house, giving the offeree six weeks for a definite answer; and it was held that the defendant was free to withdraw at any time before acceptance even though the six weeks had not expired. Likewise, in *Dickinson v Dodds*<sup>497</sup> the defendant offered to sell land to the offeree and said that the offer was to be “left over till Friday”. It was held that he could nevertheless withdraw before Friday.

### **Communication of withdrawal generally required**

- <sup>115</sup> An offer cannot be withdrawn merely by acting inconsistently with it: for example, an offer to sell goods to A is not withdrawn by selling them to B.<sup>498</sup> If A accepts the offer before he has notice of the subsequent sale, he will be entitled to damages (though not to the goods themselves). To be effective in law, a withdrawal must, in general, be communicated to the offeree: that is, notice of the withdrawal must actually reach the offeree.<sup>499</sup> This requirement of communication applies to withdrawals sent through the post and by telegram as well as to those sent by other methods. In *Byrne & Co v Van Tienhoven*<sup>500</sup> an offer to sell tinplates was posted in Cardiff on 1 October

and reached the offerees in New York on 11 October; on the same day, the offerees accepted the offer by a telegram, which they confirmed by a letter posted on 15 October. Meanwhile, on 8 October, the offerors had posted a letter withdrawing their offer; this letter reached the offerees on 20 October. It was held that this withdrawal did not take effect on posting: it took effect only when it reached the offerees on 20 October. As the acceptance had been posted on 15 October, there was a binding contract<sup>501</sup> even though the parties were demonstrably never in agreement; for when the offerees first learnt (on 11 October) of the defendants' offer the defendants had already (on 8 October) ceased to intend to deal with the offerees.

## Communication need not come from offeror

- <sup>116</sup> Although the withdrawal of an offer must, in general, be communicated *to the offeree*,<sup>502</sup> the communication need not come *from the offeror*: it is sufficient if the offeree knows from any reliable source that the offeror no longer intends to deal with him. In *Dickinson v Dodds*<sup>503</sup> it was accordingly held that an offer to sell land could not be accepted after a third party informed the offeree that the offeror had been offering or agreeing to sell the land to another third party. The judgments stress the fact that there is, in such circumstances, no agreement between the parties; but this would also be true even if the offeree had accepted the offer in ignorance of the offeror's change of mind. Yet in the latter case there can be a contract, as *Byrne & Co v Van Tienhoven*<sup>504</sup> shows. The rule that communication of withdrawal need not come from the offeror can be a source of uncertainty, making it hard for the offeree to tell exactly when the offer is withdrawn. For example, in *Dickinson v Dodds* it is not clear whether such acceptance was precluded when the offeree knew that the offeror had (a) sold the land to a third party, (b) started negotiations for its sale to a third party, or (c) had simply decided not to sell it to the offeree.

## Exceptions to the requirement of communication

- <sup>117</sup> If the general rule means that notice of withdrawal must actually be "brought to the mind of" the offeree, convenience requires its qualification in a number of situations.

### (1) Letter to commercial organisation

- <sup>118</sup> Where the offer has been made to a commercial organisation, it seems probable that the offer would be withdrawn when the letter of withdrawal "was opened in the ordinary course of business or would have been so opened if the ordinary course of business was followed"<sup>506</sup>; it need not be brought to the actual notice of the officer responsible for the matter.

## (2) Offeree's conduct displacing general rule

- [119] A withdrawal which was delivered to the offeree's last known address could be effective if he had moved without notifying the offeror. Similarly, a withdrawal which had reached the offeree could be effective even though he had simply failed to read it after it had reached him: this would be the position where a withdrawal by telex or fax arrived in the offeree's office during business hours<sup>507</sup> even though it was not actually read by the offeree or by any of his staff till the next day.<sup>508</sup> But the withdrawal would not be effective, in such a case, if it had been sent to the offeree at a time when he and all responsible members of his staff were, to the offeror's knowledge, away on holiday or on other business.<sup>509</sup>

## (3) Offers made to the public

- [120] The requirement that a withdrawal must be actually communicated does not apply to offers made to the public, e.g. of rewards for information leading to the arrest of the perpetrator of a crime. As it is impossible for the offeror to ensure that the notice of withdrawal comes to the attention of everyone who knew of the offer, it seems to be enough for him to take reasonable steps to bring the withdrawal to the attention of such persons, even though it does not in fact come to the attention of them all.<sup>510</sup>

## Footnotes

- 493 See, e.g. *Payne v Cave* (1789) 3 T.R. 148; *Routledge v Grant* (1828) 4 Bing. 653; *Offord v Davies* (1862) 12 C.B.(N.S.) 748; *Hebb's Case* (1867) L.R. 4 Eq. 9; *Tuck v Baker* [1990] 2 E.G.L.R. 195; *Scammel v Dicker* [2001] 1 W.L.R. 631, applying the principle to an offer to settle an action under CPR Pt 36 (for further proceedings in this case, see [2005] EWCA Civ 405, [2005] 3 All E.R. 838, below para.4-191; for the method of withdrawal of such an offer, see below, para.4-121 (note)); *Bircham Nominees (No.2) Ltd v Worrell Holdings Ltd* [2001] EWCA Civ 775; (2001) 82 P. & C.R. 472 at [24], [35]; *Beazley Underwriting Ltd v Travellers Companies Inc* [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241 at [184], quoted in para.4-037 (note). cf. *Defamation Act 1996* s.2(6). Contrast Vienna Convention on Contracts for the International Sale of Goods (above, para.4-080) art.16(2).
- 494 An offer is assumed to be open for a reasonable time if no time limit is expressed in it: see *Ramsgate Victoria Hotel Co Ltd v Montefiore* (1866) L.R. 1 Ex. 109; below, para.4-126.
- 495 Below, paras 6-198—6-199.
- 496 (1828) 4 Bing. 653. See also *Cooke v Oxley* (1790) 3 T.R. 653.

- 497 (*1876*) 2 Ch. D. 463.
- 498 *Adams v Lindsell* (*1818*) 1 B. & Ald. 681; *Stevenson, Jacques & Co v Maclean* (*1880*) 5 Q.B.D. 346; it is submitted that contrary dicta in *Dickinson v Dodds* (*1876*) 2 Ch. D. 463, 472 would no longer be followed.
- 499 For a statutory exception to the rule stated in the text, see Consumer Credit Act 1974 s.69(1) (ii) and (7), as substituted by Consumer Credit Act 1974 (Electronic Communications) Order 2004 (SI 2004/3236) art.2(5).
- 500 (*1880*) 5 C.P.D. 44. See also *Stevenson Jacques & Co v McLean* (*1880*) 5 Q.B.D. 346; *Henthorn v Fraser* [*1892*] 2 Ch. 27; *Raeburn & Verel v Burness & Son* (*1895*) 1 Com. Cas. 22.
- 501 The same result would be reached under Vienna Convention on Contracts for the International Sale of Goods art.16(1) (see above, para.4-080), even though under arts 18(2) and 24 the contract would not be made until the acceptance was communicated to the offeror or delivered to his address.
- 502 A salesperson who obtains consumer credit for the consumer is also the financier's agent to receive communication of the consumer's withdrawal of offer: see *CF Asset Finance Ltd v Okonji* [*2014*] EWCA Civ 870; *Financings Ltd v Stimson* [*1962*] 1 W.L.R. 1184.
- 503 (*1876*) 2 Ch. D. 463; cf. *Cartwright v Hoogstoel* (*1911*) 105 L.T. 628.
- 504 (*1880*) 5 C.P.D. 344; above, para.4-115.
- 505 *Henthorn v Fraser* [*1892*] 2 Ch. 27, 32.
- 506 *Eaglehill Ltd v J. Needham (Builders) Ltd* [*1973*] A.C. 992, 1011, discussing notice of dishonour of a cheque; cf. *Curtice v London City & Midland Bank* [*1908*] 1 K.B. 293, 300–301 (notice to countermand a cheque); *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [*1995*] 2 Lloyd's Rep. 249, 252; *NV Stoomv Maats "De Maas" v Nippon Yusen Kaisha (The Pendrecht)* [*1980*] 2 Lloyd's Rep. 56, 66 (telex notice of arbitration) and *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)* [*2005*] EWHC 3020 (Comm), [*2006*] 1 Lloyd's Rep. 537 at [30], [37]; according to these passages, it is not necessary for such notices to arrive during business hours. Quaere whether a notice withdrawing an offer must so arrive; there seems to be no good reason for distinguishing between such a notice and an acceptance by telex, as to which see above, para.4-060 (notes).
- 507 For the effect of such messages when sent *out* of business hours, see above, para.4-060 (acceptance received out of business hours).
- 508 cf. *Tenax Steamship Co Ltd v Brimnes (Owners) (The Brimnes)* [*1975*] Q.B. 929 (notice withdrawing ship from charterparty). The common law principle stated in para.4-115 above does not apply for the purpose of determining “the effective date of termination” within s.97(1)(b) of the Employment Rights Act 1996. It was held in *Gisda Cyf v Barratt* [*2010*] UKSC 41, [*2010*] S.C.R. 475 that this “effective date” was not the date when a letter notifying an employee of her dismissal was delivered at her address, but was the date when she read the letter or had a reasonable opportunity of learning its contents; cf. *Vasella Ltd v Eyre UKEATS/0039/11/BL*, applying similar reasoning to an employee's notice of resignation. And see *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood* [*2018*] UKSC 22 on notice periods in employment cases. See also below, Vol.II, para.42-229.
- 509 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [*1983*] 2 A.C. 34, 42.

510 *Shuey v US* 92 U.S. 73 (1875).

---

End of Document

© 2022 SWEET & MAXWELL

## **(b) - Rejection**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 6. - Termination of the Offer**

**(b) - Rejection**

### **Rejection and counter-offer <sup>511</sup>**

- <sup>121</sup> A rejection terminates an offer, so that it can no longer be accepted.<sup>512</sup> For this purpose, an attempt to accept an offer on new terms (not contained in the offer) may be a rejection accompanied by a counter-offer.<sup>513</sup> Thus in *Hyde v Wrench*<sup>514</sup> the defendant offered to sell a farm for £1,000. The offeree replied offering to buy for £950, and when that counter-offer was rejected, purported to accept the defendant's original offer to sell for £1,000. It was held that there was no contract as the offeree had, by making a counter-offer of £950, rejected, and so terminated, the original offer. A communication can amount to a counter-offer only if it relates to the subject matter of the original offer. Where, for example, A offered to indemnify B in respect of legal costs incurred in litigation against both of them, it was held that this offer was not rejected by B's seeking compensation from A for loss of employment in return for B's co-operating with A in the litigation to an extent beyond that which B was already bound to give.<sup>515</sup> The negotiations for such compensation were said to be "collateral"<sup>516</sup> to the offer of indemnity and therefore not to amount to a rejection, by way of counter-offer, of the original offer. This offer accordingly remained open for acceptance and had been accepted by conduct.<sup>517</sup>
- <sup>122</sup> A rejection of an offer is not prevented from having the effect of terminating the offer by reason of being contained in a communication expressed to be "subject to contract". The effect of these words is that the negotiations will lead to the conclusion of a legally binding agreement only

on the execution of a formal contract.<sup>518</sup> They have no bearing on the question whether the communication amounts to a rejection of the offer, as to preclude its subsequent acceptance.<sup>519</sup>

## Inquiries and requests for information

- |23 A communication from the offeree *may* be construed as a counter-offer (and hence as a rejection) even though it takes the form of a question as to the offeror's willingness to vary the terms of the offer.<sup>520</sup> But such a communication is not *necessarily* a counter-offer: it may be a mere inquiry or request for information made without any intention of rejecting the terms of the offer.<sup>521</sup> Whether the communication is a counter-offer or a request for information depends on the intention, objectively ascertained,<sup>522</sup> with which it was made. In *Stevenson, Jacques & Co v McLean*<sup>523</sup> an offer was made to sell iron to offerees who asked by telegram whether they might take delivery over a period of four months. It was held that this telegram was not a counter-offer but only a request for information as it was "meant ... only as an inquiry" and as the offeror "ought to have regarded it" in that sense.<sup>524</sup> Similarly, if an offer is made to sell a house at a specified price, an inquiry whether the intending vendor is prepared to reduce that price will not amount to a rejection of the offer if the inquiry is "merely exploratory".<sup>525</sup> In another case,<sup>526</sup> the defendant's submission of a Risk Register to be included as part of the contract documents did not amount to a counter-offer because the evidence was "not clear as to [the Risk Register's] importance and ... appeared, objectively, simply to suggest that it would be included for the sake of completeness".

## Rejection must be communicated

- |24 A rejection takes effect when it is communicated to the offeree. There is no reason to apply the posting rule here; the offeree will not act in reliance on posting his rejection as he derives no rights or liabilities from it; and the offeror will not know that he is free from the offer until the rejection is actually communicated to him. Hence if the rejection is overtaken by a subsequently despatched acceptance, which reaches the offeror first, the latter should take effect so long as the offeree has made his intention to accept (in spite of his original rejection) clear to the offeror. If, however, the rejection has reached the offeror, it is submitted that he would not be bound by an acceptance posted after the rejection and also reaching him after the rejection. To apply the "posted acceptance" rule<sup>527</sup> here could expose the offeror to hardship particularly where he had acted on the rejection, e.g. by disposing of the subject-matter elsewhere. An offeree who has posted a rejection and then wishes, after all, to accept the offer should ensure that the subsequently posted acceptance comes to the notice of the offeror before the latter has received the rejection.

## Footnotes

- 511 Cited by *Publity AG v Chesterhill Properties Ltd* [2016] EWHC 1994 (Ch) at [110] and applied at [118].
- 512 *Tinn v Hoffmann & Co* (1873) 29 L.T. 271, 278; *Grant v Bragg* [2009] EWCA Civ 1228, [2010] 1 All E.R. (Comm) 1166 at [17], [22]. The above common law rule does not apply where an offer to settle a claim is made under CPR Pt 36. Such an offer can be withdrawn only by serving a notice of withdrawal on the offeree in accordance with that Part: *Gibson v Manchester City Council* [2010] EWCA Civ 726, [2010] 1 W.L.R. 2081 at [16]; *Carillion JM Ltd v PHI Group Ltd* [2011] EWHC 1581 (TCC), [2011] B.L.R. 504 at [12]–[14].
- 513 Above, paras 4-037—4-039; for an exception see Vienna Convention on Contracts for the International Sale of Goods (above, para. 4-080) art.19(2).
- 514 (1840) 3 Beav. 334; cf. *O.T.M. Ltd v Hydranautics* [1981] 2 Lloyd's Rep. 211, 214; *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep. 8 at [17]; *Withers LLP v Langbar International Ltd* [2011] EWCA Civ 1419, [2012] 2 All E.R. 619 at [47].
- 515 *Mulcaire v News Group Newspapers Ltd* [2011] EWHC 3469 (Ch), [2012] Ch. 435.
- 516 *Mulcaire v News Group Newspapers Ltd* [2011] EWHC 3469 (Ch) at [27].
- 517 *Mulcaire v News Group Newspapers Ltd* [2011] EWHC 3469 (Ch) at [35].
- 518 See below, paras 4-159—4-161; for the further requirement of “exchange of contracts”, see below, para. 4-162.
- 519 *Bonner Properties Ltd v McGurran Construction Ltd* [2009] NICA 49, [2010] N.I. 97 at [13].
- 520 See the treatment in *Tinn v Hoffmann* (1873) 29 L.T. 271, 278 of the claimant’s letter of 27 November. For recognition of the distinction between a counter-offer and a request for information, see *Grant v Bragg* [2009] EWCA Civ 1228, [2010] 1 All E.R. (Comm) 1166 at [22] (where the relevant communication was held to amount to a rejection of the offer).
- 521 cf. above, paras 4-037—4-039.
- 522 Above, paras 4-002, 4-003.
- 523 (1880) 5 Q.B.D. 346.
- 524 (1880) 5 Q.B.D. 346 at 349–350; in fact the offeror did not so regard it but sold the iron to a third party.
- 525 *Gibson v Manchester City Council* [1979] 1 W.L.R. 294, 302.
- 526 *Anchor 2020 Ltd v Midas Construction Ltd* [2019] EWHC 435 (TCC) at [94].
- 527 Above, para. 4-064.

## **(c) - Lapse of Time**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 6. - Termination of the Offer**

**(c) - Lapse of Time**

### **Specified time**

- |25 An offer which expressly states that it will last only for a specified time cannot be accepted after that time; and the same is true where the time limit is set, not in the offer itself, but in the course of later negotiations between the parties to the alleged contract.<sup>528</sup> The most common application of the present rule is to offers that take the form of options,<sup>529</sup> which obviously cannot be accepted after the expiry of the period during which the option is expressed to be exercisable. On a similar principle, an offer that stipulates for acceptance “by return of post” must be accepted either in the specified way or by some other no less expeditious method.<sup>530</sup>

### **Reasonable time**

- |26 Where the duration of an offer is not limited in one of the ways described in para.4-124 above, the offer comes to an end after the lapse of a reasonable time.<sup>531</sup> What is a reasonable time depends on all the circumstances: for example on the nature of the subject-matter and on the means used to communicate the offer. An offer to sell a perishable thing, or a thing subject to sudden price fluctuations, would terminate after a relatively short time; and this would often also be true of an offer made by telegram<sup>532</sup> or by other equally speedy means of communication such as email, telex or fax.

## Effect of conduct of offeree known to offeror

- [27] The period which would normally constitute a reasonable time for acceptance may be extended if the conduct of the offeree within that period indicates an intention to accept and this is known to the offeror. Often on such facts there would be an acceptance by conduct, but this possibility may be ruled out by the terms of the offer, which may require the acceptance to be by written notice sent to a specified address.<sup>533</sup> In such a case the offeree's conduct, though it could not *amount* to an acceptance, could nevertheless prolong the time for giving a proper notice of acceptance. For the offeree's conduct to have this effect, it must be known to the offeror; for if this were not the case the offeror might reasonably suppose that the offer had not been accepted within the normal period of lapse, and act in reliance on that belief: e.g. by disposing elsewhere of the subject-matter.

## Offer delayed

- [28] If there has been some delay in the transmission of an offer that contains a time limit for its acceptance, the question *when* the offer was made may arise. In *Adams v Lindsell*<sup>534</sup> the offeror sent a letter containing an offer to sell wool that required an acceptance by return post. The offer letter was misdirected by the offerors and consequently delayed by two days. On receipt of the letter, the offeree immediately posted an acceptance. It was held that there was a binding contract as the delay arose "entirely from the mistake of the" offerors. However, if the delay had been of such length as to make it clear to the offeree that the offer was "stale," it seems unlikely that the offeree could still have accepted; a fortiori, he could not have done so if the offer had reached him only after an expiry date specified in it. The emphasis placed in *Adams v Lindsell* on the fault of the offerors also makes it possible to argue for a different result in that case if the delay had been due to some other factor, such as an accident in the post. The time within which the offer could be accepted might then have run, not from the time of the offeree's receipt of the offer, but from the time at which the offer would, but for the accident, have been communicated<sup>535</sup> to the offeree.

## Footnotes

- 528 *Grant v Bragg* [2009] EWCA Civ 1228, [2009] 1 All E.R. (Comm) 1166 at [25]. The concept that an offer is terminated by lapse of time does not apply to an offer made under CPR Pt 36. It was held in *C v D* [2011] EWCA Civ 646, [2012] 1 All E.R. 302 at [40], [70] and [83] that such an offer remains open for acceptance until it is formally withdrawn, in accordance with the provisions of Pt 36.
- 529 For the legal nature of an enforceable option, see below, para.6-202 (note).

- 530 cf. above, paras 4-082, 4-084.
- 531 *Ramsgate Victoria Hotel Co v Montefiore* (1866) *L.R. 1 Ex. 109*; see also *Reynolds v Atherton* (1922) *127 L.T. 189*; *Chem Co Leasing SpA v Rediffusion* [1987] *1 F.T.L.R. 201*. And cf. *L.J. Korbetis v Transgrain Shipping BV* [2005] *EWHC 1345 (QB)* (offer to appoint an arbitrator to whom disputes under a charterparty were to be referred held to have lapsed after eight months; the fact that the charterparty required agreement on the appointment to be made “forthwith” was said at [18] to connote “some urgency”). Semble, the offeror could waive the delay. See also Vienna Convention on Contracts for the International Sale of Goods (above, para.4-080) art.21(1).
- 532 *Quenerduaine v Cole* (1883) *32 W.R. 185*.
- 533 As in *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1970] *1 W.L.R. 241*.
- 534 (1818) *1 B. & Ald. 681*; *Winfield* (1939) *55 L.Q.R. at 499, 503–504*.
- 535 As to the meaning of “communicated” cf. above, paras 4-056, 4-115.

## **(d) - Occurrence of Condition**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 6. - Termination of the Offer**

**(d) - Occurrence of Condition**

### **Provision for termination of offer**

- 129 An offer which expressly provides that it is to determine on the occurrence of some condition cannot be accepted after that condition has occurred; and a similar provision for determination may be implied. If an offer to buy, or hire-purchase, goods is made after the offeror has examined them, it may be subject to the implied condition that they should, at the time of the acceptance, still be in substantially the same state as that in which they were when the offer was made. Such an offer could not be accepted after the goods had been seriously damaged.<sup>536</sup> Similarly, an offer to insure the life of a person cannot be accepted after he has suffered serious injuries by falling over a cliff.<sup>537</sup> On the same principle, it is submitted that the offer which is made by bidding at an auction impliedly provides that it is to lapse as soon as a higher bid is made.<sup>538</sup>

### **Footnotes**

536 *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184.

537 *Canning v Farquhar* (1885) 16 Q.B.D. 727; *Looker v Law Union Insurance Co Ltd* [1928] 1 K.B. 554.

538 Above, para.4-025.

## **(e) - Death**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 6. - Termination of the Offer**

**(e) - Death**

### **In general**

- |30 It has been suggested that the death of either party terminates the offer as it is, thereafter impossible for the parties to reach agreement.<sup>539</sup> But there may be a contract in spite of a demonstrable lack of agreement, if this result is required by considerations of convenience<sup>540</sup>; and such considerations might in some circumstances support the view that an offer should be capable of acceptance after the death of one party. This would, in particular, be the case if the death of one of the parties was unknown to the other at the relevant time; or where a person who had validly contracted not to revoke an offer for a fixed period died during that time. More generally, unless the offer is one to enter into a contract of a “personal” nature, it is doubtful that there are any grounds of convenience for holding that the death of either party should of itself terminate an offer.<sup>541</sup>

### **Death of the offeror**

- |31 The effect of the death of the offeror has been considered in a number of cases concerning continuing guarantees. Such a guarantee (e.g. of a bank overdraft) is, in general, divisible: it is a continuing offer, accepted from time to time as the bank makes further loans to its customer. It seems that a guarantee of this kind is not terminated merely by the death of the guarantor.<sup>542</sup> But it is terminated if the creditor knows that the guarantor is dead and that his personal representatives have no power under his will to continue the guarantee<sup>543</sup>; or if for some other reason it is

inequitable to charge the guarantor's estate.<sup>544</sup> If the guarantee expressly provides that it can be terminated only by notice given by the guarantor or his personal representatives, the death of the guarantor (even if known to the creditor) will not terminate the guarantee; only express notice will have this effect.<sup>545</sup> In so far as any general statement can be based on this special group of cases, it seems that the death of the offeror determines an offer only if the offer on its true construction so provides.

## Death of the offeree

- <sup>132</sup> Two cases have some bearing on the effect of the death of the offeree. In *Reynolds v Atherton*<sup>546</sup> an offer to sell shares was made in 1911 to "the directors of" a company. An attempt to accept the offer was made in 1919 by the survivors of the persons who were directors in 1911 and by the personal representatives of those who had since died. The purported acceptance was held to be ineffective; and Warrington LJ said:

"The offer having been made to a living person who ceases to be a living person before the offer is accepted, there is no longer an offer at all. The offer is not intended to be made to a dead person or to his executors, and the offer ceases to be an offer capable of acceptance."

The actual ground for the decision, however, was that the offer had, on its true construction, been made to the directors of the company for the time being, and not to those who had happened to hold office in 1911. In *Kennedy v Thomassen*<sup>547</sup> acceptance by solicitors of the offeree in ignorance of her death was held ineffective on the grounds that their authority to act on her behalf had been revoked by her death<sup>548</sup> and that they had acted under a mistake. Neither case supports the view that an offer can never be accepted after the death of the offeree. It is submitted that, where an offer related to a contract that was not "personal",<sup>549</sup> it might, on its true construction, be held to have been made to the offeree or to his executors, and that such an offer could be accepted after the death of the original offeree.

## Footnotes

539 *Dickinson v Dodds* (1876) 2 Ch. D. 463, 475.

540 As, for example, in *Byrne & Co v Van Tienhoven* (1880) 5 C.P.D. 344 (above, para.4-115), where the offeree did not know that the offeror intended to contract with him until after the offeror had ceased to have any such intention.

- 541 Even in such cases the legal effects of saying that the offer was determined, so that there was never any contract, would be likely to differ from those of saying that there had been a contract which had been terminated: e.g. the [Law Reform \(Frustrated Contracts\) Act 1943](#) could apply to the latter, but not to the former, situation.
- 542 *Bradbury v Morgan* (1862) 1 H. & C. 249; *Harriss v Fawcett* (1873) L.R. 8 Ch. App. 866, 869; *Coulthart v Clementson* (1879) 5 Q.B.D. 42, 46.
- 543 *Coulthart v Clementson* (1879) 5 Q.B.D. 42.
- 544 *Harriss v Fawcett* (1873) L.R. 8 Ch. App. 866.
- 545 *Re Silvester* [1895] 1 Ch. 573.
- 546 (1921) 125 L.T. 690, 695; affirmed (1922) 127 L.T. 189; cf. *Somerville v N.C.B.*, 1963 S.L.T. 334.
- 547 [1929] 1 Ch. 426.
- 548 See para.[21-182](#).
- 549 “Personal” is here used in the same sense as in the law relating to termination of a contract by the death of a party: see para.[4-130](#), above.

## **(f) - Supervening Personal Incapacity**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 6. - Termination of the Offer**

**(f) - Supervening Personal Incapacity**

### **Mental incapacity**

- <sup>133</sup> If, after making an offer, the offeror suffers from “an impairment of, or a disturbance in the functioning of, the mind or brain” <sup>550</sup> and for that reason “lacks capacity”, <sup>551</sup> then he will not be bound by an acceptance made after this fact has become known to the offeree, or after the offeror’s property has been made subject to the control of the court. But the offeror could hold the other party to the acceptance; and an offer made to a person who later became so incapacitated could be accepted so as to bind the other party. These rules can readily be deduced from the law as to contracts with persons who lack mental capacity. <sup>552</sup>

### **Footnotes**

<sup>550</sup> Mental Capacity Act 2005 s.2.

<sup>551</sup> Mental Capacity Act 2005 s.2.

<sup>552</sup> Below, paras 11-075—11-105.

## **(g) - Supervening Corporate Incapacity**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 6. - Termination of the Offer**

**(g) - Supervening Corporate Incapacity**

### **Supervening corporate incapacity**

- |34 In discussing the effect on an offer of supervening corporate incapacity, a distinction must be drawn between companies incorporated under the Companies Acts (and now governed by the [Companies Act 2006](#)) and other corporations.

### **Companies incorporated under the Companies Acts**

- |35 In these Acts, the expression “company” generally means a company formed and registered under the [Companies Act 2006](#) or under earlier Companies Acts.<sup>553</sup> The legal capacity of such a company depends on the company’s constitution, an expression which includes the company’s articles<sup>554</sup>; and, in particular, on any statement of the company’s objects in the articles,<sup>555</sup> which may be amended by special resolution.<sup>556</sup> Unless the articles specifically restrict the objects of a company, its objects are (in general) unrestricted.<sup>557</sup> Our present concern is with cases in which a special resolution amends the articles by either restricting originally unrestricted objects or imposing further restrictions on originally restricted objects. If the company nevertheless entered into a transaction which fell within the newly imposed restrictions on its objects, that transaction would formerly have been ultra vires and void.<sup>558</sup> The [Companies Act 2006](#) does not abolish this ultra vires doctrine but it contains a number of provisions which significantly restrict its operation. Of these, the following are of particular importance for the purposes of the discussion that follows

in paras 4-135—4-139 below. First, s.31(3) provides that, in general,<sup>559</sup> “Any such amendment does not affect any rights or obligations of the company”; the phrase *such amendment* here refers to an amendment of the company’s “articles so as to add, remove or alter a statement of the company’s objects”.<sup>560</sup> Secondly, s.39(1) provides that, in general<sup>561</sup>:

“... the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s constitution.”<sup>562</sup>

Further problems can, however, arise from the fact that a contract which violated a restriction on the company’s objects would on that ground be beyond the power of its directors. Section 40(1) therefore provides, thirdly, that, in general<sup>563</sup>:

“In favour of a person dealing with the company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitations under the company’s constitution.”

Section 40(4), however, provides that, in general,<sup>564</sup> s.40 “does not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors”; but that “no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.” Our concern here is with the effect of these provisions where an offer is made either to or by a company which then changes its articles by restricting its objects so as to deprive itself of the power of entering into the contract that would, but for such changes, have resulted from an acceptance of the offer.<sup>565</sup>

## Company as offeree

- <sup>136</sup> A company may receive an offer to enter into a contract and then amend its articles so as to restrict its objects in such a way as to deprive itself of its capacity to enter into that contract. If the company nevertheless then (whether by oversight or for good commercial reasons) accepts the offer, two provisions of the Companies Act 2006 referred to in para.4-135 above may determine the effect of the acceptance. The first is s.31(3), by which “any such amendment does not affect the rights or obligations of the company”. The second is s.40(1), by which:

“... in favour of a person dealing with the company in good faith, the power of the directors to bind the company ... is deemed to be free of any limitation under the company’s constitution.”<sup>566</sup>

Both these provisions can lead to the conclusion that the acceptance is effective; but they give rise, in the present context, to the problem that the scope of s.40(1) differs in several respects from that of s.31(3).

- [37] The scope of s.40(1) of the Companies Act 2006 is narrower than that of s.31(3). First, the requirement in s.40(1) of “dealing … in good faith” has no counterpart in s.31(3). Secondly, s.40(1) applies only “in favour of a person dealing with the company” while s.31(3) can apply also in favour of the company itself; this view is reinforced by the reference in s.31(3) to “the *rights or obligations of the company*”. Thirdly, s.40(4) provides that “*this section* does not affect any right of a member of a company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors …”; and this subsection of s.40 (further provisions of which are discussed in para.4-139 below) has no counterpart in s.31. Fourthly, ss.31(3) and 40(1) lay down general rules but the qualifications to which these rules are subject are not the same. Section 31 is subject only to one qualification, which applies where the company is a charity<sup>567</sup>; s.40 is subject to two qualifications which apply to certain transactions with directors and where the company is a charity.<sup>568</sup>
- [38] Where there is a conflict between s.31(3) and s.40(1) of the Companies Act 2006 it is by no means obvious which subsection would prevail. One possible view is that, in the present context, s.31(3) should prevail since it deals specifically with the effect of an *amendment* of the articles. But s.40(1) is expressed to apply to limitations on the directors’ powers deriving “from a resolution of the company …”<sup>569</sup> and “from any agreement between the members of the company …”; and such resolutions and agreements can form part of the company’s “constitution”,<sup>570</sup> to which s.40(1) applies. A second possible view is that the words “rights or obligations of the company” in s.31(3) refer to rights already in existence at the time of the amendment of the articles, and not to rights which are alleged to have come into existence after that time. It is submitted, though not without hesitation, that this second view is to be preferred as it avoids what would be a conflict between the two subsections; and that accordingly the rights of the offeror would, in the situation discussed in this paragraph, be governed, not by s.31(3), but by s.40. The rights of the company itself would be governed by the general principle, stated in s.39(1), that the validity of an act done by it was not to be “called into question by reason of anything in the company’s constitution”. At the relevant time (i.e. that of the acceptance) the “constitution” would include the amendment of the articles.<sup>571</sup> Hence the company would be able to enforce the contract by virtue of s.39(1) and its right to do so would not be subject to the restrictions placed by s.40 on the rights of the offeror to do so.

## Company as offeror

[39]

A company may make an offer to enter into a contract, amend its articles so as to restrict its objects in such a way as to deprive itself of the capacity to enter into that contract, and the offeree may then (perhaps in ignorance of the amendment) accept the offer. If the reasoning in paras 4-113—4-138 is correct, such a case would not be governed by s.31(3) of the Companies Act 2006 since at the time of the amendment of the articles the company would not have acquired any rights or been subjected to any liabilities by reason of the then unaccepted offer. Nor (subject to a possible argument to be discussed below) would the case be governed by s.40 since, when the offer was made, there was no relevant “limitation under the company’s constitution” on “the power of the directors to bind the company” within s.40(1); or by s.39(1) since, when the offer was made, the company suffered from no “lack of capacity [to make it] by reason of anything in the company’s constitution”. It is, however, arguable that holding the offer open was a continuing act; and if that argument were accepted two consequences could follow. First, the offeree could acquire rights against the company by virtue of s.40(1) if he accepted the offer in good faith, i.e. (presumably) in ignorance of the amendment of the articles. But, secondly, it would appear to be open to a member of the company to bring proceedings to “restrain the doing of an action that is beyond the powers of the directors” (i.e. the continued making of the offer) at any time before the offer had been accepted. The company could also normally withdraw the offer at any time before it had been accepted<sup>572</sup> and would be likely to do so in pursuance of the policy which had led it to amend its articles in the way described at the beginning of this paragraph. But this possibility would not be open to the company where it had bound itself not to withdraw the offer, i.e. where it had granted a legally enforceable option.<sup>573</sup> In such a case, it is clear that a member of the company could not take proceedings to prevent the conclusion of the contract since “no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company”<sup>574</sup> i.e. in the case put, from the grant of the option.

- <sup>140</sup> A further problem that arises in the situation described in para.4-139 above is whether, if the company’s offer were accepted when the company no longer had the capacity to enter into the contract, and were accepted by the offeree in good faith so as to confer rights under it on the offeree, the company would also be entitled to enforce the contract. No doubt, if the offeree sought to enforce the contract, then he could normally do so only on condition of performing his own obligations under it. But there is also the possibility that, having accepted the offer, the offeree might nevertheless refuse to perform its part and that the company might then seek to enforce the contract (e.g. by claiming damages for its breach) even though by the time of the acceptance of its offer it no longer had the capacity to enter into the contract. Section 40(1) of the Companies Act 2006 would not support such a claim since it applies only “in favour of a person dealing with the company ...” and not in favour of the company itself; nor could the claim be brought under s.31(3) if, as has been suggested in paras 4-136—4-138 above, that section refers only to rights and obligations already in existence when the company amended its constitution. An attempt by the company to enforce the contract under s.39(1) would run into a difficulty similar to that discussed in para.4-139 above. The difficulty arises because s.39(1) provides that “The validity of an *act done by the company* shall not be called into question” by reason of anything in the company’s constitution. If the “act done by the company” were the making of the offer, then s.39(1) would, at

first sight, be irrelevant since, when the offer was made, it was, ex hypothesi, within the company's capacity. It would be the validity of an act done by the offeree (i.e. the acceptance), rather than any act by the company, that would be in question. The outcome would depend on s.39(1) only if a suggestion similar to that put forward in para.4-139 above were accepted: i.e. if the making of the offer were regarded as a continuous act. If that argument failed, the company would be driven back on argument that a contract outside its capacity was *at common law*<sup>575</sup> enforceable *by*, even though not *against*, it. This argument would not prevail if, as is sometimes said, ultra vires contracts were at common law "wholly void",<sup>576</sup> but the authorities give no clear guidance on the point.<sup>577</sup>

## Other corporations

- [41] Companies may also be incorporated by Royal Charter or by special legislation. Charter corporations have the legal capacity of a natural person so that an alteration of the charter would not affect the validity of an offer or acceptance made by the corporation.<sup>578</sup> The legal capacity of corporations incorporated by special statute is governed by the statute, and acts not within that capacity are ultra vires and void.<sup>579</sup> An alteration of the statute could therefore prevent the corporation from accepting an offer made to it, and from being bound by the acceptance of an offer made by it, where the offer was made before the alteration came into effect. In practice, the problem is likely to be dealt with in the statute which changes the capacity of the corporation.

## Limited liability partnerships

- [42] Limited liability partnerships incorporated under the **Limited Liability Partnerships Act 2000**<sup>580</sup> are bodies corporate<sup>581</sup> but problems of the kind discussed in paras 4-134—4-140 above cannot arise with regard to them as they have "unlimited capacity".<sup>582</sup>

## Footnotes

553 Companies Act 2006 s.1.

554 Companies Act 2006 s.17(a).

555 See Companies Act 2006 s.31.

556 Companies Act 2006 s.21; such a resolution is also part of the company's constitution: see ss.17(b), 29.

- 557 Companies Act 2006 s.31(1); for special rules applicable to companies that are charities, see s.31(4); Charities Act 2011 ss.197, 198; cf. in the case of Charitable Incorporated Organisations (as defined in ss.204 and 205 of that Act), Pt 11 Ch.3 of the Act.
- 558 See below, para.12-020.
- 559 For the position of charitable companies, see Companies Act 2006 s.31(4); Charities Act 2011 ss.197, 198; cf. in the case of Charitable Incorporated Organisations (as defined in ss.204 and 205 of that Act), Pt 11 Ch.3 of the Act.
- 560 Companies Act 2006 s.31(2).
- 561 For special rules applicable to companies that are charities, see Companies Act 2006 ss.39(2), 42.
- 562 Companies Act 2006 s.39(1).
- 563 i.e. subject to Companies Act 2006 s.40(6) (certain transactions with directors: see s.41 and companies that are charitable: see s.42).
- 564 i.e. subject to Companies Act 2006 s.40(6).
- 565 The text will be concerned only with the effect of the general rules stated in this paragraph.
- 566 The company's constitution includes its articles and any resolution amending them: see Companies Act 2006 ss.17, 29.
- 567 Companies Act 2006 s.31(4), as amended by Charities Act 2011 s.354 and Sch.7 para.114.
- 568 Companies Act 2006 s.40(6), referring to ss.41 and 42.
- 569 Companies Act 2006 s.40(3)(a).
- 570 Companies Act 2006 ss.17, 29.
- 571 Companies Act 2006 ss.17, 29.
- 572 See above, para.4-114.
- 573 For the nature of legally enforceable options, see below, paras 6-202—6-203.
- 574 Companies Act 2006 s.40(4).
- 575 i.e. apart from s.39(1); no doubt in a case *within* s.39(1), the contract could be enforced by the company.
- 576 See below, para.12-021.
- 577 For a discussion of policy considerations which should govern the outcome in such cases, see Treitel, The Law of Contract 13th edn (2011), para.12–080.
- 578 Below, para.12-004; but a member of the corporation could bring proceedings to restrain the conclusion of the contract.
- 579 Subject to mitigations provided for, in the case of contracts with “local authorities”, by Local Government (Contracts) Act 1997.
- 580 See Limited Liability Partnerships Act 2000 ss.2 and 3.
- 581 Limited Liability Partnerships Act 2000 s.1(2).
- 582 Limited Liability Partnerships Act 2000 s.1(3).

## Section 7. - Special Cases

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 7. - Special Cases

### Difficulty of offer and acceptance analysis in certain cases

- <sup>143</sup> The analysis of the process of reaching agreement into the elements of offer and acceptance can give rise to considerable difficulties. In *A.N. Satterthwaite & Co Ltd v New Zealand Shipping Co Ltd (The Eurymedon)*<sup>583</sup> Lord Wilberforce notes that this is the case:

“... in many situations of daily life, e.g., sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of rewards; acceptance by post; warranties of authority by agents; manufacturers’ guarantees; gratuitous bailments; bankers’ commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.”

In one case,<sup>584</sup> the Court of Appeal held that “where there is agreement, it is unnecessary to identify the precise mechanics of offer and acceptance”. The following situations pose particular difficulties for the offer and acceptance analysis.

#### (1) Multilateral contracts:

Where participants in a competition address their entries to the organiser, it is then hard to say whether a particular entry constitutes an offer or an acceptance (or both), or whether two entry forms put into the post by different competitors at the same time constituted cross-offers. Yet in spite of such difficulties it has been held that the competitors enter into multilateral contracts binding each to the others to observe the rules of the competition.<sup>585</sup> Similar reasoning would seem to apply to the multilateral contract which governs the legal relations between members

of an unincorporated association.<sup>586</sup> Such decisions are based on the assumption that all the parties to the alleged multilateral contract were willing to agree to the same terms. Where one of the negotiating parties had refused to accept one of the terms of the proposed contract, no multilateral contract would arise between that party and any of the others, unless the others agreed to be bound to that party on terms excluding the one rejected by him.<sup>587</sup>

## (2) Reference to third party:

It is, secondly, hard to apply the offer and acceptance analysis where negotiations have reached deadlock and the parties simultaneously agree to a solution proposed by a third party whom they have asked to resolve their differences.<sup>588</sup> The same is true where parties negotiate through a single broker acting for both parties who eventually obtains their consent to the same terms.<sup>589</sup>

## (3) Agreements subject to contract:

There is, thirdly, some difficulty, in applying the offer and acceptance analysis to transactions such as sales of land where parties agree “subject to contract”, so that they are not bound until formal contracts are exchanged.<sup>590</sup> Strictly, an “offer” expressed to be “subject to contract” does not satisfy the legal definition of an offer,<sup>591</sup> since the person making such an “offer” has *no* intention to be bound immediately on its acceptance.<sup>592</sup> However, the *agreement* is generally made by the usual, process; the reason why the parties to it are not bound until they exchange formal contracts is that the terms of the agreement negative, until then, the intention to enter into legal relations.<sup>593</sup> Alternatively, a party could be regarded as making an offer when he submits a signed contract for exchange,<sup>594</sup> and this would be accepted when the exchange took place.

<sup>144</sup> The difficulties described in para.4-143 above have given rise to the view that the analysis of the process of reaching agreement in terms of offer and acceptance is “out of date”<sup>595</sup> and that “you should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement.”<sup>596</sup> But such an outright rejection of the traditional analysis is open to the objection that it provides too little guidance for the courts (or for the parties or for their legal advisers) in determining whether an agreement has been reached.<sup>597</sup> For this reason the cases described above are best regarded as exceptions

<sup>598</sup>

**U** to a general requirement of offer and acceptance. This approach is supported by cases in which it has been held that there was no contract precisely because there was no offer and acceptance<sup>599</sup>; and by those in which the terms of the contact have been held to depend on the analysis of the negotiations into offer, counter-offer and acceptance.<sup>600</sup> In one case of the latter kind,<sup>601</sup> the Court of Appeal applied “the traditional offer and acceptance analysis”<sup>602</sup> and one reason given

by Dyson LJ was that this approach had “the great merit of providing a degree of certainty which is both desirable and necessary in order to promote commercial relationships.”<sup>603</sup>

## Footnotes

583 [1975] A.C. 154, 167.

584 *Premier Paper Group Ltd v Buchanan McPherson Ltd* [2018] EWCA Civ 15 at [29]. And see below para.4-144.

585 *The Satanita* [1895] P. 248, affirmed sub nom. *Clarke v Dunraven* [1897] A.C. 59; *Phillips*, 92 L.Q.R. 499. cf. *Kingscroft Insurance Co Ltd v Nissan Fire and Marine Insurance Co Ltd* [2000] 1 All E.R. (Comm) 272 at 291 (admission of new members to an existing insurance pool analysed in terms of offer and acceptance). But in *Bony v Kacou* [2017] EWHC 2146 (Ch) at [43], Pelling J rejected the submission that the court will imply in effect by operation of law a contract between participants in an organised sport based on the rules that govern that sport. *The Satanita* was distinguished since each party had entered the race by express reference to the rules and there was no express contract between the competitors. In *Bony*, there were express contracts between the parties.

586 See *Artistic Upholstery Ltd v Art Forma (Furniture) Ltd* [1999] 4 All E.R. 277, 285; though breach of the rules by one member may not, on their true construction, be actionable in damages at the suit of another: *Anderton v Rowland*, *The Times*, 5 November 1999. For the question whether a member of an unincorporated association is liable to a person outside the association on contracts made on behalf of the association, see below para.12-064 and (for example) *Davies v Barnes Webster & Sons Ltd* [2011] EWHC 2560 (Ch).

587 *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159 at 165.

588 See Pollock, Principles of Contract, 13th edn (1950), p.5.

589 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601, 616.

590 Below, paras 4-159—4-162. *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch), [2014] 1 All E.R. (Comm) 655, the facts of which (so far as they are here relevant) are summarised in para.4-064, bears some resemblance to the “subject to contract” cases discussed here. Roth J regarded the case as one which did “not fit easily into the normal analysis of a contract being constituted by offer and acceptance” (at [72]). The contract seems to have been one which was not intended to be binding until formal documents incorporating the (previously agreed) terms were executed by both parties: see below paras 4-155—4-158.

591 Above, para.4-003. cf. the statement in *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 that a communication “was not an offer capable of being accepted because it was expressed to be ‘subject to contract’”.

592 Below, para.4-162.

593 Below, paras 4-214—4-215.

594 See *Christie Owen & Davies v Rapacioli* [1974] Q.B. 781; cf. *Commission for the New Towns Ltd v Cooper (Great Britain) Ltd* [1995] Ch. 259 at 285.

- 595 *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401, 404; cf. *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep. 5, 10; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multitank Holsatia)* [1988] 2 Lloyd's Rep. 486, 491–492; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Ch. 433, 443.
- 596 *Gibson v Manchester City Council* [1978] 1 W.L.R. 520, 523; reversed [1979] 1 W.L.R. 294; *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [247]; affirmed [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 without further reference to the present point. The case fell within the category of continuing negotiations (above, paras 4-032 and 4-033) rather than within any of the special situations discussed in para.4-143 above. For the view that the law does not invariably require strict compliance with the “offer and acceptance” analysis of contract formation, see also *Finmoon Ltd v Baltic Reefer Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd's Rep. 388 at [22]. And see the Scottish Law Commission Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses (Scot Law Com No 252) at para.2.7: “offer and acceptance is not the only method by which a contract is formed. The governing principle is that a contract is an agreement between parties which they intend to have legal effect, which contains all the essentials of the kind of contract they are seeking to conclude, and which is sufficiently certain in its content to be legally enforceable”.
- 597 See *Gay Choon Ing v Loh Sze T: Terence Peter* [2009] SGCA 3 at [63] (Singapore Court of Appeal), adopting the “traditional approach” while favouring a “less mechanistic or dogmatic application of” the concepts of offer and acceptance.
- 598 *Gibson v Manchester City Council* [1979] 1 W.L.R. 294, 297; cf. *Harmony Shipping Co SA v Saudi-Europe Line Ltd (The Good Helmsman)* [1981] 1 Lloyd's Rep. 377, 409; *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25, 29–30; *LNT Aviation Ltd v Airbus Helicopters UK Ltd* [2022] EWHC 309 (Comm) at [119]–[121].
- 599 *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos N.L.)* [1987] 2 Lloyd's Rep. 321, 331 (“What was the mechanism of offer and acceptance?”); *The Aramis* [1989] 1 Lloyd's Rep. 213; *Treitel* [1989] L.M.C.L.Q. 162; *Taylor v Dickens* [1998] F.L.R. 806, 818 (doubted on another point in *Gillett v Holt* [2001] Ch. 210); *Schuldenfrei v Hilton* [1999] S.T.C. 821; *Assuranceforeningen Gard Gjensidig v International Oil Pollution Compensation Fund* [2014] EWHC 3369 (Comm); *Price v Euro Car Parks Ltd* [2015] EWHC 3253 (QB); and *Burgess v Lejonvarn* [2016] EWHC 40 (TCC); [2016] T.C.L.R. 3. The “offer and acceptance” analysis is also used in many of the arbitration cases discussed above, paras 4-009, 4-093 though it is viewed with scepticism in *The Multitank Holsatia* [1988] 2 Lloyd's Rep. 486 at 491 and in *Thai-Europe Tapioca Service Ltd v Seine Navigation Inc (The Maritime Winner)* [1989] 2 Lloyd's Rep. 506, 515.
- 600 e.g. the “battle of forms” cases discussed above, paras 4-041 et seq.
- 601 *Tekdata Intercommunications Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357 (above, paras 4-044—4-047).
- 602 [2009] EWCA Civ 1209 at [20], [25]; it was recognised that this approach could be displaced but held that it had not been displaced by the existence of “a long term relationship” (at

[21]), not amounting to “a prior overarching contract” (at [6]). For other “battle of forms” cases, also applying the “traditional offer and acceptance” analysis, see *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2010] EWHC 2567 (Comm), [2011] 2 All E.R. (Comm) 38 (above, para.4-043 (note)) at [55] and *Trebور Bassett Holdings Ltd v ADT Fire & Security Plc* [2011] EWHC 1936 (TCC), [2011] B.L.R. 661, where Coulson J said (at [155]) that, in such a case, it would be “difficult” to displace the traditional “offer and acceptance” analysis.

- 603 [2009] EWCA Civ 1209 at [25]. The passage suggesting that such an outright rejection of the traditional offer and acceptance analysis provides too little guidance for the courts, as then contained in the 30th edition of this book, were cited with apparent approval by Longmore LJ (at [20]) and Dyson LJ at [25].
-

## (a) - Agreement in Principle Only Not Binding

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 8. - Incomplete Agreement

### (a) - Agreement in Principle Only Not Binding <sup>604</sup>

<sup>145</sup> Parties may reach agreement on essential matters of principle, but leave important points unsettled so that their agreement is incomplete,<sup>605</sup> and therefore not binding. It has, for example, been held that there was no contract where an agreement for a lease failed to specify the date on which the term was to commence

<sup>606</sup>

**U**; that an agreement “in principle” for the redevelopment and disposal of residential property, which specified core terms but left important matters, such as the timing of the project, for future discussion was an “incomplete agreement” and so did not amount to a binding contract<sup>607</sup>; that an agreement for sale of land by instalments was not a binding contract where it provided for conveyance of “a proportionate part” as each instalment of the price was paid, but failed to specify which part is to be conveyed on each payment<sup>608</sup>; that where, though agreement had been reached “covering some significant matters”,<sup>609</sup> there was no contract because “many fundamental matters remained to be resolved”,<sup>610</sup> that an agreement to transfer money and property conditional on the transferee’s retraction of comments in an affidavit, an undertaking of confidentiality and the transferor’s satisfaction, was not intended to be binding until the conditions were fulfilled, the conditions being, anyway, too uncertain,<sup>611</sup> that any agreement reached by the parties was not binding as it failed to cover “significant” and “essential” issues such as the division of profits and the distribution of the risk of litigation between parties,<sup>612</sup> and that an agreement to design a racing car was not binding as it failed to deal with numerous matters of considerable commercial importance, including who would have ownership over the relevant intellectual property rights.<sup>613</sup> An agreement is also incomplete if it expressly provides that it is “subject to” specified points<sup>614</sup>;

there is no contract in such a case until either those points are resolved or the parties agree that their resolution is no longer necessary for the agreement to enter into contractual force.<sup>615</sup>

## Footnotes

- 604 This paragraph was cited in *Harb v Aziz* [2018] EWHC 508 (Ch) at [192]. And see *Lücke* (1967) 3 *Adelaide L.Rev.* 46.
- 605 Referred to with apparent approval in *Western Broadcasting Services v Seaga* [2007] UKPC 19, [2007] E.M.L.R. 18 at [19].
- 606 *Harvey v Pratt* [1965] 1 W.L.R. 1025; and see *Re Day's Will Trusts* [1962] 1 W.L.R. 1419; *Kyte v Revenue and Customs Commissioners* [2018] EWHC 1146 (Ch); [2018] B.T.C. 20 at [60] where a date for settling tax liabilities was missing; *Pretoria Energy Co v Blankney Estates Ltd* [2022] EWHC 1467 (Ch) at [36] where the document did not specify whether the plant would be removed from the site at the end of the lease.
- 607 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [15]; see also at [7], [88].
- 608 *Bushwall Properties Ltd v Vortex Properties* [1976] 1 W.L.R. 591; cf. *Hillreed Land v Beautridge* [1994] E.G.C.S. 55; *Avintar v Avill* 1995 S.C.L.R. 1012; *Hadley v Kemp* [1999] E.M.L.R. 589 at 628; *London & Regional Development v TBI Plc* [2002] EWCA Civ 355; *Spectra International Plc v Tiscali Ltd* [2002] EWHC 2084 (Comm); [2002] All E.R. (D) 2009 (Oct); *Morgan Grenfell Development v Arrows Autosport Ltd* [2003] EWHC 333 (Ch); [2003] All E.R. (D) 417 (Feb); *Jordan Grand Prix Ltd v Vodafone Group Plc* [2003] EWHC 1956 (Comm); [2003] 2 All E.R. (Comm) 864; *Compagnie Noga D'Importation et D'Exportation SA v Abacha* [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915. It may sometimes be possible to resolve uncertainty as to the subject-matter of the contract by extrinsic evidence, as in *Westvilla Properties Ltd v Dow Properties Ltd* [2010] EWHC 30 (Ch), [2010] 2 P & C.R. 19.
- 609 *Bols Distilleries BV v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 W.L.R. 12 at [32].
- 610 *Bols Distilleries BV v Superior Yacht Services Ltd* [2006] UKPC 45 at [35]. cf. *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at [14] (no express contract as important terms were still being negotiated; nor, for reasons given in paras 4-208—4-209 below could any contract be implied); *Haden Young Ltd v Laing O'Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) at [87], [116] and [138] (no contract between the relevant parties as essential terms had not been agreed); *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at [52] (no enforceable contract where essential terms had not been agreed).
- 611 *Harb v Aziz* [2018] EWHC 508 (Ch) at [192], [197]–[199], [211].
- 612 *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG)* [2018] EWHC 2765 (Comm) at [154].

- 613 *CRS GT Ltd v McLaren Automotive Ltd* [2018] EWHC 3209 (Comm) at [135].  
614 e.g. see below, paras 4-155, 4-159, 4-161 and 4-197.  
615 *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Co* [2002] EWHC 1993 (Comm); [2002] 2 All E.R. (Comm) 1064 at [24]; *Nautica Marine Ltd v Trafigura Trading LLC* [2020] EWHC 1986 (Comm), [2021] 1 All E.R. (Comm) 1157 at [53]–[60] where a charterparty that was agreed in principle subject to four specified points was held not to be binding.

## **(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 8. - Incomplete Agreement

### **(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

- <sup>146</sup> An agreement may be complete although it is not worked out in meticulous detail if any gap can be filled.<sup>616</sup> Typical examples are discussed in the following paragraphs.

### **Footnotes**

- 616 *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 *Lloyd's Rep.* 195, 205; cf. *de Jongh Weill v Mean Fiddler Holdings Ltd* [2003] EWCA Civ 1058; *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [48]; *Attrill v Dresdner Kleinwort Ltd* [2011] EWCA Civ 229, [2011] I.R.L.R. 613 at [29] at [28], [31] (promise by employer to employees to establish a minimum bonus pool held legally binding through an individual employee could not point to any specific amount payable to him out of the pool). On appeal in the *Attrill* case, see [2012] EWHC 1189 (QB), the Court of Appeal affirming the decision, rejected the argument that the agreement was too uncertain to be enforced, even though “there were some loose ends”: [2013] EWCA Civ 394 at [60]. And see *Proton Energy Group SA v Orten Lietuva* [2013] EWHC 2872 (Comm), [2014] 1 *Lloyd's Rep.* 100 at [39]: “This was a classic spot deal where the speed of the market requires that the parties agree the main terms and leave the details, some of which may be important, to be agreed later.” Accordingly, a contract was held to have been made as soon as each party regarded itself as committed to the other even though the agreement stated that “other contractual terms not indicated in the offer shall be discussed and mutually agreed between the parties upon contract negotiations” (at [17]). See also *Singh v Redford* [2018] EWHC 2390 (Ch) at [71], [72] and [77]; *Anchor 2020 Ltd v*

*Midas Construction Ltd [2019] EWHC 435 (TCC)* at [93]–[108]; and *Abberley v Abberley [2019] EWHC 1564 (Ch)*.

## **(i) - Sale of Goods or Services**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 8. - Incomplete Agreement**

**(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

**(i) - Sale of Goods or Services**

**Incomplete agreements for goods or services may be cured by law**

- <sup>147</sup> An agreement for the sale of goods may be complete as soon as the parties have agreed to buy and sell, where the remaining details can be determined by the standard of reasonableness or by law.<sup>617</sup> Even failure to agree the price is not necessarily fatal in such a case. [Section 8\(2\) of the Sale of Goods Act 1979](#) provides that, if no price is determined by the contract, a reasonable price must be paid. Under [s.15\(1\) of the Supply of Goods and Services Act 1982](#), a reasonable sum must similarly be paid where a contract for the supply of services fails to fix the remuneration to be paid for them.<sup>618</sup> These statutory provisions assume that the agreement amounts to a contract in spite of its failure to fix the price or remuneration. The very fact that the parties have not reached agreement on this vital point may indicate that there is *no* contract, e.g. because the price or remuneration is to be fixed by further agreement.<sup>619</sup> In such a case, the statutory provisions for payment of a reasonable sum do not apply. The same applies to the date of delivery left to be mutually agreed where the inclusion of a “best efforts” clause implicitly recognised that both sides could have regard to their own interests and so precludes fixing a delivery date by reference to what would be “reasonable”.<sup>620</sup>

## Incomplete agreements for goods or services cured by the standard of reasonableness

[48] In one case<sup>621</sup> a buyer and seller of corn feed pellets had reached agreement on the “cardinal terms of the deal: product, price, quantity, period of shipment, range of loading ports and governing contract terms”.<sup>622</sup> The agreement was held to have contractual force even though the parties had not yet reached agreement on a number of other important points, such as the loading port,<sup>623</sup> the rate of loading and certain payments (other than the price) which might in certain events become payable under the contract. The gaps can be filled by implications of reasonableness and commercial practice.<sup>624</sup> Where an estate agent and a seller reached an oral agreement without specifying the event which would trigger the agent’s entitlement to a commission, the Supreme Court held the agreement to be binding as “a reasonable person would understand that the parties intended the commission to be payable on completion and from the proceeds of sale”.<sup>625</sup> Likewise, where parties had, in negotiations for the manufacture by the claimants of machinery to be delivered to the defendants, reached agreement on “all essential terms”<sup>626</sup> and “substantial works were then carried out”,<sup>627</sup> the Supreme Court found a concluded contract, even though a few points had been left unresolved<sup>628</sup>; and even though those points were of “economic or other significance”.<sup>629</sup>

[49] In another case:

“the essentials of each of the heads of terms were set out in the signed document with sufficient certainty to be capable of amounting to a binding contract”

although technical difficulties meant that the agreement was handwritten by the mediator, the division of farmland referred to differently coloured portions but was recorded only by pencil, and the parties subsequently attempted to negotiate details and submit documentation.<sup>630</sup> An even more striking illustration of this approach is provided by a case<sup>631</sup> in which parties had reached an oral agreement by telephone for the sale of notes evidencing “distressed debt” of a company which was in liquidation. The agreement identified the subject matter and specified the price; and it was held to be contractually binding even though it did not specify the settlement date and left many other important points to be resolved by further agreement. In all these cases, the courts took the view that the parties intended to be bound at once in spite of the fact that further significant terms were to be agreed later and that even their failure to reach such agreement would not invalidate the contract unless without such agreement it was unworkable or too uncertain<sup>632</sup> to be enforced. Moreover, the Supreme Court has stated, in obiter, that an incomplete bargain can be turned into a binding one by adding implied terms to expressly agreed terms:

“... it is possible to imply something that is so obvious that it goes without saying into anything, including something the law regards as no more than an offer. If the offer is accepted, the contract is made on the terms of the words used and what those words imply.”<sup>633</sup>

## Liability to pay for goods or services received even if contract incomplete

- <sup>150</sup> There may, however, be a claim for payment of a reasonable sum at common law: for example, where work is done in the belief that there was a contract or in the expectation that the negotiations between the parties would result in the conclusion of a contract.<sup>634</sup> Such liability is based on the need to deprive the recipient of the services of unjust enrichment that may result from his having benefited from the services without being required to pay for them<sup>635</sup>; and it arises in spite of the fact that there was *no* contract.<sup>636</sup> It follows that the party doing the work, though he is entitled to a reasonable sum, is not liable in damages, e.g. for failing to do the work within a reasonable time.<sup>637</sup> If the claim arose under a contract by virtue of s.15(1) of the 1982 Act, the party doing the work would be both entitled and liable.

## Footnotes

<sup>617</sup> See *Bear Stearns Bank Plc v Forum Global Equity Ltd [2007] EWHC 1576 (Comm)* (below, para.4-159), where the fact that no settlement date had been agreed did not prevent the conclusion of a contract since, in the absence of express agreement on this point, there was “an implied term of the agreement that the parties would execute it within a reasonable time” (at [164]; cf. at [169]); *SK Properties (Midlands) Ltd v Byrne [2018] UKUT 394 (LC)*, where an agreement for the sale of property was not void for uncertainty, despite not stipulating a time limit for the completion of relevant formalities. The court held that there was an implied term to complete the formalities “as soon as reasonably possible”, which is “necessary to give business efficacy to the contract and ... represents the obvious but unexpressed common intention of the parties” (at [43]).

<sup>618</sup> cf. at common law, *Way v Latilla [1937] 3 All E.R. 759*; *Furmans Electrical Contractors Ltd v Elecref Ltd [2009] EWCA Civ 170* at [32], where the claim was described as “not strictly a quantum meruit claim”, presumably because it arose *under* a contract and not (as in the situations discussed at para.4-150) in spite of the absence of one; and see, as to agents’ commissions, *British Bank of Foreign Trade v Novinex [1949] 1 K.B. 623*; *Powell v Braun [1954] 1 W.L.R. 401*.

- 619 e.g. *May & Butcher v R.* [1934] 2 K.B. 17, below, para.4-173; *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 W.L.R. 297; *Dugdale and Lowe* [1976] J.B.L. 312; *Chamberlain v Boodle & King* [1982] 1 W.L.R. 1443; *Pagnan SpA v Granaria BV* [1986] 2 Lloyd's Rep. 547; *Russell Bros. (Paddington) Ltd v John Elliott Management Ltd* (1995) 11 Const. L.J. 377; *Southwark LBC v Logan* (1996) 8 Admin. L.R. 315.
- 620 *Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd* [2017] EWHC 253 (Comm) at [175]–[210].
- 621 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601.
- 622 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601, 611.
- 623 cf. below, para.4-188.
- 624 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601 at [164] and [166].
- 625 *Wells v Devani* [2019] UKSC 4, [2019] 2 W.L.R. 617.
- 626 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 (before [70]); and at [61]. And see *Malcolm Charles Contracts Ltd v Crispin* [2014] EWHC 3898 at [55]–[59], [67]–[74]; *Bieber v Teathers Ltd (In Liquidation)* [2014] EWHC 4205 at [50]–[58].
- 627 [2010] UKSC 14, [2010] 1 W.L.R. 753 at [61].
- 628 In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [50], [63]–[67], the Supreme Court referred to what would make “commercial sense”, and concluded that it would have been “inconceivable” for the parties not to agree on a certain point, as it made no sense. Such “unequivocal agreement can in principle be inferred from communications between the parties and conduct of one party known to the other”. There is more scope for terms to be implied to resolve uncertainty with an executed, rather than executory, transaction. The further argument that no contract had come into existence because a requirement for the execution of formal contractual documents had not been complied with was also rejected: see below, paras 4-155—4-158.
- 629 *RTS case* [2010] UKSC 14 at [61]; *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(f)].
- 630 *Abberley v Abberley* [2019] EWHC 1564 (Ch) at [54]; and see at [45], where Judge Jarman QC refers to: (a) the judicial reluctance to find a contract void for uncertainty; (b) the importance of contextual and objective interpretation; and (c) the admissibility of parol evidence to resolve uncertainty.
- 631 *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm).
- 632 Below, paras 4-180, 4-181—4-182, 4-185.
- 633 *Wells v Devani* [2019] UKSC 4, [2019] 2 W.L.R. 617 at [30].
- 634 Below, paras 4-275, 32-077—32-080. For the availability of a restitutionary remedy where no contract was concluded, see also *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at [48] (where, for reasons given in paras 4-145 above and 4-155—4-158 and 4-208—4-209 below, the negotiations did not lead to the conclusion of a contract).
- 635 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [40]–[45], [93]. In *Hughes v Pendragon Sabre Ltd (t/a Porche Centre Bolton)* [2016] EWCA Civ 18 the Court of Appeal held that a customer had entered into a binding contract with a car dealership to buy a limited edition Porsche, even though the contract did not stipulate the

price, specification or delivery date of the vehicle. These could be resolved by reference to the [Sale of Goods Act 1979](#).

- 636 For the distinction between cases in which a claim for a reasonable sum arises *under* a contract in spite of failure to agree on details and cases in which such a claim arises on restitutionary principles in spite of the fact that *no* contract was formed because of the parties' failure to reach a sufficient measure of agreement, see [\*Benourad v Compass Group Plc \[2010\] EWHC 1182 \(QB\)\*](#) at [106(g) to (l)]. In that case, Beatson J concluded that, while in principle such a restitutionary claim might be available, there was no evidence on which he could determine its amount (see at [132], [134] and [135]). Contrast [\*Haden Young v Laing O'Rourke Midlands Ltd \[2008\] EWHC 1016 \(TCC\)\*](#), allowing a restitutionary claim of the kind here described where work had been done in anticipation of a contract which, for reasons given in paras 4-145 above and 4-155—4-158 below, never came into existence.
- 637 [\*B.S.C. v Cleveland Bridge & Engineering Co Ltd \[1984\] 1 All E.R. 504\*](#).

## **(ii) - Land**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 8. - Incomplete Agreement**

**(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

### **(ii) - Land**

- <sup>151</sup> Even an agreement for sale of land dealing only with the bare essentials may be regarded as complete if that was the clear intention of the parties. Thus, in *Perry v Suffields Ltd*<sup>638</sup> an offer to sell a public house with vacant possession for £7,000 was accepted without qualification. It was held that there was a binding contract even though many important points, e.g. the date for completion<sup>639</sup> and the question of paying a deposit, were left open. Lord Cozens-Hardy MR stated that:

“Mere arrangements which in the ordinary course of business are left to the legal advisers to settle, such as the date for completion, are subsequent matters which do not prevent the two letters constituting a concluded agreement.”<sup>640</sup>

However, it was stated in *Pretoria Energy Co v Blankney Estates Ltd* that:

“there is a significant difference between the sale of an existing property and the creation of a new property interest in the form of a commercial lease. Terms may be readily implied into a contract for the former: in relation to the latter, it is much more difficult to know what the provisions of the lease – which the parties will have anticipated would run to many pages – must be, without express agreement.”

<sup>641</sup>



## Footnotes

- 638 [1916] 2 Ch. 187; cf. *Elias v George Sahely & Co (Barbados) Ltd* [1982] 3 All E.R. 801.
- 639 cf. *Storer v Manchester City Council* [1974] 1 W.L.R. 1403.
- 640 [1916] 2 Ch. 187 at 191.
- 641 *Pretoria Energy Co v Blankney Estates Ltd* [2022] EWHC 1467 (Ch) at [36] per Joanne Wicks QC.

### **(iii) - Agreement Required for Continued Operation of Contract**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 8. - Incomplete Agreement

**(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

**(iii) - Agreement Required for Continued Operation of Contract**

- <sup>152</sup> A distinction must be drawn between cases in which agreement on such matters as the price is required for the *making*, and those in which it is required for the *continued operation*, of a contract. A binding contract was found in a case <sup>642</sup> in which an agreement for the supply of services for 10 years fixed the fee to be paid only for the first two of those years. On the parties' failure to fix the fee in later years, it was held that they had intended to enter into a 10-year contract and that a term was to be implied into that contract for payment of a reasonable fee in those later years. Likewise, in another case <sup>643</sup> an agreement for the use of the claimant's airport by the defendant airline for a period of ten years provided for the parties to "liaise and consult" about specified matters relating to the defendant's use of the airport. It was held that this provision did not deprive the agreement of its contractual force.

### **Footnotes**

- 642 *Mamidoil-Jetoil Arab Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 [2001] 2 Lloyd's Rep. 76; for further proceedings in this case, see [2003] EWCA Civ 1031, [2003] 2 All E.R. (Comm) 640, below, para.4-180. cf. *Scammell v Dicker* [2005] EWCA Civ 405, [2005] 3 All E.R. 838 at [40] per Rix LJ ("The world is full of perfectly sound contracts which require further agreement for the purpose of their implementation").

643 *Durham Tees Valley Airport Ltd v Bmibaby Ltd [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep. 68. Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417* (below para.4-169 (note)) could be regarded as a further illustration of the principle discussed in the present paragraph.

## **(iv) - Insurance**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 8. - Incomplete Agreement**

**(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

### **(iv) - Insurance**

- <sup>153</sup> A contract of insurance is generally regarded as complete as soon as the insurer initials a slip setting out the main terms of the contract. This is so even though the execution of a formal policy is contemplated<sup>644</sup> and even though the contract, if it is one of marine insurance, is “inadmissible in evidence” unless it is embodied in a policy signed by the insurer and containing particulars specified by statute.<sup>645</sup>

### **Footnotes**

<sup>644</sup> *Ionides v Pacific Insurance Co* (1871) L.R. 6 Q.B. 674, 684; *Cory v Patton* (1872) L.R. 7 Q.B. 304; *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856; *Hadenfayre Ltd v British National Insurance Soc. Ltd* [1984] 2 Lloyd's Rep. 393; *G.A.F.L.A.C. v Tanter (The Zephyr)* [1984] 1 Lloyd's Rep. 58, 69–70; reversed in part on other grounds [1985] 2 Lloyd's Rep. 529; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127, 140–141; *HIH Casualty & General Insurance v New Hampshire Insurance* [2001] EWCA Civ 735; [2001] 2 All E.R. (Comm) 39 at [86], [87]. Under an “open cover” arrangement, it is not the initialling of the slip but the declaration of the insured which creates the obligation of the insurer: *Citadel Insurance Co v Atlantic Union Insurance Co* [1985] 2 Lloyd's Rep. 543.

<sup>645</sup> See *Marine Insurance Act 1906 ss.22, 23 and 24*.

## **(v) - Stipulation for the Execution of a Formal Document**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 8. - Incomplete Agreement**

**(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

**(v) - Stipulation for the Execution of a Formal Document**

- <sup>154</sup> The effect of a stipulation that an agreement is to be embodied in a formal written document <sup>646</sup> depends on its purpose. <sup>647</sup> Four possibilities can be identified, as discussed in the following paragraphs.

### **Agreement may not be binding**

- <sup>155</sup> One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, <sup>648</sup> until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement (e.g. by signature). <sup>649</sup> This is generally the position where “solicitors are involved on both sides, formal written agreements are to be produced and arrangements are made for their execution”. <sup>650</sup> Moreover:

“... [t]he more complicated the subject matter, the more likely the parties are to want to enshrine their contract in a written document, thereby enabling them to review all the terms before being committed to any of them.” <sup>651</sup>

The normal inference will then be that “the parties are not bound unless and until both of them sign the agreement”. <sup>652</sup>

## Agreement may be binding

**D** 156 A second possibility is that such a document is intended only as a solemn record of an already complete and binding agreement.

[653](#)

**U** This was the conclusion where the terms of the agreement strongly indicated the parties' intention to become legally bound; the terms set out were not vague or uncertain and included terms specifying which law would govern the agreement and which courts would have jurisdiction; there was nothing on the face of those provisions to indicate that any further agreement was required before they became enforceable; and the parties' conduct and email correspondence before and after the date originally set for the execution of the contractual document showed that they did not regard it as determining the bindingness of their agreement.<sup>654</sup> Likewise, an agreement was legally binding despite certain parts of it being left incomplete, and its stipulation that the parties would "agree a formal contract 'within 90 days of commencement'" of the relationship; the parties intended to create legal relations since the agreement was formally executed, it was the product of lengthy negotiations, and the parties had acted in reliance on the agreement.<sup>655</sup> An agreement to "enter into a separation deed containing the following clauses" (of which a summary was then given) was held to be a binding contract.<sup>656</sup>

## Agreement not binding but preliminary contract found

**D** 157 Yet a third possibility is that the main agreement lacks contractual force for want of execution of the formal document but that, nevertheless, a separate preliminary contract comes into existence at an earlier stage, e.g. when one party begins to render services requested by the other, so that under this contract the former party will be entitled to a reasonable<sup>657</sup> or agreed<sup>658</sup> remuneration for those services. This may even take the form of a letter of intent,<sup>659</sup> so long as the words "subject to contract" are absent.<sup>660</sup>

## Agreement became binding

**D** 158 The fourth possibility is that an agreement that originally lacked contractual force for want of execution of the formal document may acquire such force by reason of supervening events. This could, for example, be the position where "it can be objectively ascertained that the continuing

intention [sc. not to be bound until execution of the document] has changed or ... subsequent events have occurred whereby the non-executing party is estopped from relying on his non-execution”<sup>661</sup>; or where the party resisting the enforcement of the contract had “waive[d] ... [the] requirement” of “a formal written contract”.<sup>662</sup> An oral agreement for the sale of land was enforceable in equity under a constructive trust despite not being in writing where both parties had considered it to be immediately binding upon them, and where the prospective buyer had then acted to his detriment in reliance upon it.<sup>663</sup> Where an agreement for the joint acquisition of property lacks contractual force for want of execution of a formal document and one of the parties then acquires the property for himself, he may also be liable to hold a share of that property for the other party by virtue of a constructive trust.<sup>664</sup>

## Footnotes

- 646 The mere fact that a document about the terms of which the parties had negotiated contained spaces for their signatures does not amount to a stipulation for its execution by signature: *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWCA 1334, [2010] 2 All E.R. (Comm) 788; the claimants’ wish to have the matter put in writing did not imply that the oral agreement reached was not already binding: *Johal v Johal* [2021] EWHC 1315 (Ch) at [44].
- 647 *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284, 288–289.
- 648 *B.S.C. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504; *Manatee Towing Co v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 All E.R. (Comm) 306 at 329 (“no intention to create legal relations”); *Eurodata Systems Plc v Michael Gershon (Finance) Plc*, *The Times*, 25 March 2003; *Emcor Drake & Scull Ltd v Sir Robert McAlpine Ltd* [2004] EWCA Civ 1733, 98 Con. L.R. 1; *Haden Young Ltd v O’Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) at [115]; *JD Cleverly Ltd v Family Finance Ltd* [2010] EWCA Civ 1477, [2011] R.T.R. 22; *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm) at [32]–[33]; cf. the wording of the “Total Price Box” in *Smith Glaziers (Dunfermline) v Customs & Excise Commissioners* [2003] UKHL 7, [2003] 1 W.L.R. 656; *Jamp Pharma Corp v Unichem Laboratories Ltd* [2021] EWHC 1712 (Comm) at [61].
- 649 *Okura & Co Ltd v Navara Shipping Corp SA* [1982] 2 Lloyd’s Rep. 537 at 542; *Hofflinghouse & Co Ltd v C-Trade SA (The Intra Transporter)* [1985] 2 Lloyd’s Rep. 158, 163; affirmed [1986] 2 Lloyd’s Rep. 132; *Debattista* [1985] L.M.C.L.Q. 241; *Atlantic Marine Transport Corp v Coscol Petroleum Corp (The Pina)* [1992] 2 Lloyd’s Rep. 103, 107; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] 1 Lloyd’s Rep. 20 at [64] (affirmed on other grounds [2002] EWCA Civ 548, [2002] 2 All E.R. (Comm) 321); *Service Power Asia Pacific Pty Ltd v Service Power Business Solutions Ltd* [2009] EWHC 179 (Ch), [2010] 1 All E.R. (Comm) 238 at [20] (stipulation for outcome of negotiations to be reduced to writing containing detailed terms); *Benourad v Compass Group Plc* [2010] EWHC 1882 at [110] (draft providing that it would become effective from signature); *CRS GT Ltd v McLaren Automotive Ltd* [2018] EWHC 3209 (Comm) at [135] (the agreement, which expressly

provided for the preparation and signing of a formal contract, was not binding). For a borderline case, see *Grant v Bragg [2009] EWCA Civ 1228, [2010] 1 All E.R. (Comm) 1166*, where Lord Neuberger concluded that, “contrary to ... [his] initial impression”, there was to be no contract before formal signature of the draft (at [32]); *Investec Bank (UK) Ltd v Zulman [2010] EWCA Civ 536* at [16], citing with approval an earlier edition of Chitty on Contracts; *IMS SA v Capital Oil and Gas Industries Ltd [2018] EWHC 894 (Comm)* at [58]–[61]; *Rosalina Investments Ltd v New Balance Athletic Shoes (UK) Ltd [2018] EWHC 1014 (QB)* at [42].

- 650 *Chevyny Consulting Ltd v Whitehead Mann Ltd [2006] EWCA Civ 1303; [2007] 1 All E.R. (Comm) 124* at [45], per Sir Andrew Morritt C.; the above statement was accepted at [81] by Carnwath LJ, who dissented in the result. And see *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG) [2018] EWHC 2765 (Comm)* at [148], where “it was implicit in the discussions ... that to the extent that matters were the subject of agreement between those present, they would be embodied in the formal agreement which was being negotiated, so that the parties could then review all the terms before being committed to any of them”.
- 651 *Paul David Allen (Trustee in Bankruptcy of Michelle Danique Young) v Michelle Danique Young [2017] B.P.I.R. 1116* at [77]. And see *Chevyny Consulting Ltd v Whitehead Mann Ltd [2006] EWCA Civ 1303; Benourad v Compass Group Plc [2010] EWHC 1882 (QB)* at [106(a)]; *Elleray v Bourne [2018] UKUT 3 (LC)* at [69]–[71]; *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG) [2018] EWHC 2765 (Comm)* at [148].
- 652 *Chevyny Consulting Ltd v Whitehead Mann Ltd [2006] EWCA Civ 1303* at [45]; *Kyte v Revenue and Customs Commissioners [2018] EWHC 1146 (Ch); [2018] B.T.C. 20* at [64]; *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG) [2018] EWHC 2765 (Comm)* at [176] and [179]; *Broomhead v National Westminster Bank Plc [2018] EWHC 1574 (Ch)* at [282]; cf. *Crossco No.4 Unlimited v Jolan Ltd, Note [2011] EWCA Civ 1619, [2012] 2 All E.R. 754* at [106], where similar reasoning was said at [108] to be “fatal to the claim to a constructive trust”, even though there was *no* stipulation for the execution of a formal document.
- 653 *Rossiter v Miller (1878) 3 App. Cas. 1124* (below, para.4-160); *Filby v Hounsell [1896] 2 Ch. 737; Branca v Cobarro [1947] K.B. 854* (below, para.4-160); *E.R. Ives Investments Ltd v High [1967] 2 Q.B. 379; Elias v George Sahely & Co (Barbados) Ltd [1982] 3 All E.R. 801; Damon Cie Naviera SA v Hapag-Lloyd International SA (The Blankenstein) [1985] 1 W.L.R. 435; Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone) [1987] 1 Lloyd's Rep. 547; Malcolm v Chancellor, Masters and Scholars of the University of Oxford, The Times, 19 December 1990; Ateni Maritime Corp v Great Marine Ltd (The Great Marine) (No.2) [1990] 2 Lloyd's Rep. 250; affirmed (without reference to this point) [1991] 1 Lloyd's Rep. 421; Jayaar Impex Ltd v Toaken Group Ltd [1996] 2 Lloyd's Rep. 437; The Kurnia Dewi [1997] 1 Lloyd's Rep. 553 at 559; Harvey Shopfitters Ltd v ADI Ltd [2004] EWCA Civ 1752, [2004] 2 All E.R. 982; Bryen & Langley Ltd v Boston [2005] EWCA Civ 973, [2005] B.L.R. 508; Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions*

(UK) Ltd [2008] EWHC 1301 (TCC), 119 Con. L.R. 155 at [55], [56]; *Whitney v Monster Worldwide Ltd* [2010] EWCA Civ 1312, [2011] Pens. L.R. 1; *Immingham Storage Co Ltd v Clear Plc* [2011] EWCA Civ 89 at [18]; *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA (The Athena)* [2011] EWHC 589 (Admly) at [45]; *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [70]; and *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542 at [30], where the actual decision turned on the question whether the formal requirement of signature imposed by *Statute of Frauds 1677 s.4* had been satisfied; cf. *Crowden v Aldridge* [1993] 1 W.L.R. 433, applying the same principle to a document which was not a contract but a direction by beneficiaries to executors; *Crabbe v Townsend* [2016] EWHC 2450 (Ch) at [12]; *Ely v Robson* [2016] EWCA Civ 774 at [41]; *Paul David Allen (Trustee in Bankruptcy of Michelle Danique Young) v Michelle Danique Young* [2017] B.P.I.R. 1116 at [30]; *Mena Energy DMCC v Hascol Petroleum Ltd* [2017] EWHC 262 (Comm) at [169]; *Harvil Roofing Ltd v Lakehouse Contracts Ltd* [2017] EWHC 3310 (TCC) at [36]–[37]; *Edge Tools and Equipment Ltd v Greatstar Europe Ltd* [2018] EWHC 170 (QB) at [20]; *Johnson v Spooner* [2022] EWHC 735 (Ch) at [8] and [181] (“the court’s task is to determine the facts and then to consider whether objectively, and taking into account that [‘subject to contract’] banner, there was a sufficiently-determined agreement effective before being contained in writing”).

- 654 *Edge Tools and Equipment Ltd v Greatstar Europe Ltd* [2018] EWHC 170 (QB) at [40]–[46]. See also *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753, see below, para.4-161; *Anchor 2020 Ltd v Midas Construction Ltd* [2019] EWHC 435 (TCC), 184 Con. L.R. 215 at [94], where the court found that the parties’ agreement to enter into a novation agreement was not a condition precedent to the contract coming into force.
- 655 *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC 507 (Ch), [2019] 2 All E.R. (Comm) 191 at [98].
- 656 *Morton v Morton* [1942] 1 All E.R. 273.
- 657 *Smit International Singapore Pte Ltd v Kurnia Dewi Shipping SA (The Kurnia Dewi)* [1997] 1 Lloyd's Rep. 553; *Galliard Homes Ltd v Jarvis Interiors Ltd* [2000] C.L.C. 411, where an incomplete agreement expressly provided for a reasonable remuneration to be paid in the events which happened. The “third possibility” described in the text above (para.2-117 in the 30th edition of this book) is referred to with apparent approval by Beatson J in *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(f)]. For the possible availability of a restitutionary remedy where no contract was concluded, see above, paras 4-146—4-147; on the facts of the *Benourad* case, no such remedy was available: see above, para.4-150 (note).
- 658 *Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd)* [2016] EWHC 2509 (TCC).
- 659 See below, paras 4-223—4-225.
- 660 *Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd)* [2016] EWHC 2509 (TCC) at [53] and [56]. And see *Harvil Roofing Ltd v Lakehouse Contracts Ltd* [2017] EWHC 3310 (TCC) at [34]–[38] where the agreement did not provide that it would have no legal effect until signed.

- 661 *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303, [2007] 1 All E.R. (Comm) 124 at [46]; *Benourad v Compass Group Plc* [2010] EWHC 1882 at [106(b)]. These dicta envisage that the non-executing party may be *bound* by the “estoppel”. *The Botnica* [2006] EWHC 1300 (Comm), [2007] 1 All E.R. (Comm) 28 envisages the further possibility that the non-executing party may, by “waiver” or “a kind of election” (at [90]) *acquire rights* under the unexecuted document. For this possibility, see further para.6-089 below.
- 662 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [86]; for the facts of this case, see below paras 4-155—4-158 and 4-166; *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, where the respondent had clearly and unequivocally represented by its conduct that it was bound by the deal memorandum and had waived the requirement to sign; *Singh v Redford* [2018] EWHC 2390 (Ch) at [70], where the parties’ initial agreement for the sale of a business was not binding due to lack of formal documentation, but it became binding when the seller handed over running of the business to the buyer evidencing their intention to be bound. Contrast *JD Cleverly Ltd v Family Finance Ltd* [2010] EWCA Civ 1477, [2011] R.T.R. 22, when there was no conduct from which a waiver could be inferred (at [26]).
- 663 *Matchmove Ltd v Dowding* [2016] EWCA Civ 1233; see below, paras 6-158 and 7-049.
- 664 *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch. 372; contrast *London & Regional Investments Ltd v TBI Plc* [2000] EWCA Civ 355, where the joint venture agreement was expressly “subject to contract” (below, paras 4-159—4-161), thus reserving a right to withdraw. In *Crossco No.4 Unlimited v Jolan Ltd Note* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 Arden and Mcfarlane LJ took the view that the decision in the *Banner Homes* case was based on constructive trust (at [129], [119], [124]) while Etherton LJ took the view that it rested on breach of fiduciary duty (at [88], [93]). This difference of judicial opinion did not affect the outcome of the *Crossco* case and further discussion of it is beyond the scope of this chapter.

## **(vi) - Agreement “Subject to Contract”**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 8. - Incomplete Agreement**

**(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

**(vi) - Agreement “Subject to Contract”**

### **Land agreements “subject to contract”**

<sup>159</sup> Agreements for the sale of land by private treaty are usually <sup>665</sup> made “subject to contract”. Such agreements are normally <sup>666</sup> regarded as incomplete until the terms of a formal contract have been settled and approved by the parties. Thus, in *Winn v Bull*<sup>667</sup> an agreement to take a lease of a house for a specified time at a stated rent, “subject to the preparation and approval of a formal contract” was held not to have given rise to an enforceable contract. Jessell MR said that:

“... where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared.”<sup>668</sup>

The same principle has been applied to an agreement to purchase freehold land “subject to a proper contract to be prepared by the vendor’s solicitors”<sup>669</sup>; to an agreement to take a flat “subject to suitable agreements being arranged between your solicitors and mine”<sup>670</sup>; to an agreement to grant a lease “subject to the terms of a lease” (because this meant “subject to the terms to be contained in a lease executed by the lessor”<sup>671</sup>); and to an agreement to purchase a house “subject to formal contract to be prepared by the vendors’ solicitors if the vendors shall so require.”<sup>672</sup> In each of these cases the court held that the agreement gave rise to no legal liability.<sup>673</sup>

## Land agreements may be immediately binding

- <sup>160</sup> Even in the case of an ordinary sale of land, the agreement is not invariably made “subject to contract”,<sup>674</sup> and the court may on construction find that the parties have made an immediately binding agreement, even though this is later to be superseded by a formal contract. Thus, in *Rossiter v Miller*<sup>675</sup> the defendant offered to purchase land and was informed that he must purchase subject to certain conditions; his offer remained open and was accepted “subject to the conditions and stipulations printed on the plan”. It was held that the acceptance gave rise to a binding contract and Lord Blackburn said<sup>676</sup>:

“... the mere fact that the parties have expressly stipulated that there shall be a formal agreement prepared ... does not, by itself, show that they continue merely in negotiation.”

And in *Branca v Cobarro*<sup>677</sup> an agreement for the sale of a farm provided that it was “a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed”. It was held that the provisional agreement was binding until it was superseded when the formal agreement was drawn up and signed; execution of the formal agreement was not a condition which had to be fulfilled before the parties were bound.

## Non-land agreements “subject to contract”

- <sup>161</sup> The principle that agreements “subject to contract” are not legally binding, though most frequently applied to contracts for the sale of land, is not restricted to such contracts. It has, for example, been held that an agreement to pay a fee to an estate agent was not legally binding where it was expressed to be “subject to contract”<sup>678</sup>

 ; that an arbitration claim under a shipbuilding contract had not been settled in without prejudice correspondence between the parties’ solicitors because of terms requiring board approval and the use of the language “subject to contract”<sup>679</sup>

 ; and that an agreement about how to divide ringfenced assets from the sale of property was not legally binding as it was expressed “subject to contract”.

680

**U** By a process of further analogous extension, the same reasoning has been applied to an agreement which was neither one for the sale of land nor one which was expressly "subject to contract". In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* 681

682

**U** the principle was discussed in connection with a draft contract for the supply of goods, clause 48 of which provided that the proposed contract "shall not become effective until each party has executed a counterpart and exchanged it with the other". This was described

683

**U** as "the subject to contract clause" and, if matters had rested there, the draft would not have had any contractual force. But the actual decision was that, in view of the parties' subsequent conduct, the objective interpretation of the parties' words and conduct at formation,

683

**U** the fact that substantial works were then carried out and thereafter, the basis for the work done varied,

684

**U** failure to comply with the requirements of clause 48 did not prevent the formation of a binding contract.

## Footnotes

665 Not always: see *Storer v Manchester City Council* [1974] 1 W.L.R. 1403; *Tweddell v Henderson* [1975] 1 W.L.R. 1496, 1501–1502; *Elias v Group Sahely & Co (Barbados) Ltd* [1982] 3 All E.R. 801.

666 See the qualifications discussed in paras 4-163—4-166, below.

667 (1877) 7 Ch. D. 29. See also *Santa Fé Land Co v Forestal Land Co* (1910) 26 T.L.R. 534.

668 (1877) 7 Ch. D. 29, 32.

669 *Chillingworth v Esche* [1924] 1 Ch. 97.

670 *Lockett v Norman-Wright* [1925] Ch. 56.

671 *Raingold v Bromley* [1931] 2 Ch. 307. See also *Berry Ltd v Brighton and Sussex Building Society* [1939] 3 All E.R. 217.

672 *Riley v Troll* [1953] 1 All E.R. 966.

673 See also *Kingston-upon-Hull (Governors) v Petch* (1854) 10 Ex. 610; *Chinnock v Marchioness of Ely* (1865) 4 De G.J. & S. 638; *Harvey v Barnard's Inn* (1881) 50 L.J. Ch. 750; *May v Thomson* (1882) 20 Ch. D. 705; *Hawkesworth v Chaffey* (1886) 55 L.J. Ch. 335; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284 (disapproving *North v Percival* [1898] 2 Ch. 128); *Rossdale v Denny* [1921] 1 Ch. 57; *Looker v Law Union Insurance Co Ltd* [1928] 1 K.B. 554; *Brilliant v Michaels* [1945] 1 All E.R. 121; *Lowis v Wilson* [1949]

*Ir.R. 347; Graham & Scott (Southgate) Ltd v Oxlade [1950] 2 K.B. 257; Bennett, Walden & Co v Wood [1950] 2 All E.R. 134; Christie, Owen and Davies Ltd v Stockton [1953] 1 W.L.R. 1353.*

674 *Storer v Manchester City Council [1974] 1 W.L.R. 1403; Tweddell v Henderson [1975] 1 W.L.R. 1496, 1501–1502; Elias v George Sahely & Co (Barbados) Ltd [1982] 3 All E.R. 801.*

675 *(1878) 3 App. Cas. 1124.* For other examples of a completed agreement, see *Lewis v Brass* (1877) 3 Q.B.D. 667; *Bonnewell v Jenkins* (1878) 8 Ch. D. 70; *Bolton Partners v Lambert* (1888) 41 Ch. D. 295; *Gray v Smith* (1889) 43 Ch. D. 208; *Filby v Hounsell* [1896] 2 Ch. 737; *Lever v Koffler* [1901] 1 Ch. 543; *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379; cf. *Willis v Baggs and Salt* (1925) 41 T.L.R. 453; *Morton v Morton* [1942] 1 All E.R. 273; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293.

676 *(1878) 3 App. Cas. 1124, 1151.*

677 *[1947] K.B. 854.*

678 *Ronald Preston & Partners v Markheath Securities* [1988] 2 E.G.L.R. 23. For the potential applicability of the principle that an agreement “subject to contract” is not legally binding to an offer “subject to contract” to buy goods, see *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd’s Rep. 63 at [70], quoted in para.4-143 (note). And see *Elleray v Bourne* [2018] UKUT 3 (LC) regarding the sale of a mobile home.

679 *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm) at [32]–[33]. See *Jones v Lydon* (No.2) [2021] EWHC 2322 (Ch) (email not marked “without prejudice” in a chain of “without prejudice” communications did not amount to a waiver).

680 *Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541 at [34].

681 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* (UK Production) [2010] UKSC 14, [2010] 1 W.L.R. 753 at [48]; see also *Christie v Canaccord Genuity Ltd* [2022] EWHC 1130 (QB) at [79] (no agreement reached where it was “objectively apparent” (and, in fact, “subjectively apparent”) to the claimant that any award would be “subject to further confirmation, consideration or approval … and/or would only be granted by way of an award agreement in writing subject to terms and conditions”).

682 *[2010] UKSC 14* at [86].

683 *[2010] UKSC 14* at [45]–[48]: “The parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later”.

684 *[2010] UKSC 14* at [61], and see below at para.4-166 (note). cf. *Nautica Marine Ltd v Trafigura Trading LLC* [2020] EWHC 1986 (Comm), [2021] 1 All E.R. (Comm) 1157 at [77] the waiver a “subject to contract” or similar clause must be objectively clear from the

conduct, is not to be lightly inferred, and that it would be a rare short of performance of the agreement.

---

End of Document

© 2022 SWEET & MAXWELL

## **(vii) - “Exchange of Contracts”**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 8. - Incomplete Agreement**

**(b) - Agreement Complete Despite Lack of Detail if Gap Can Be Filled**

**(vii) - “Exchange of Contracts”**

### **General requirement of “exchange of contracts”**

- <sup>162</sup> Even after the terms of the formal contract for the sale of land have been agreed, there is, where the agreement is “subject to contract”, generally<sup>685</sup> no binding contract until there has been an “exchange of contracts”.<sup>686</sup> It is also necessary (though not sufficient) for the formal requirements for contracts for the sale of land (which are described in Ch.7) to be satisfied.<sup>687</sup> The formal requirement in cases of the present kind is that each party must sign a document containing all the terms which have been expressly agreed<sup>688</sup>; and the requirement of exchange traditionally refers to the handing over by each party to the other of one of these documents, or to their despatch by post; if the latter method is adopted, the process is completed on the receipt of the second of the posted documents.<sup>689</sup> Such an exchange may be effected by telephone or by telex.<sup>690</sup> It has been held in Australia that, once an exchange has taken place, there can be a binding contract even though the two parts do not match precisely (unless it is clear that the parties only intended to be bound by an exchange of precisely corresponding parts).<sup>691</sup> The discrepancy can then be remedied by rectification. No doubt the mechanics of “exchange” will be suitably modified when the proposed system of electronic conveyancing is brought into operation.<sup>692</sup> Before “exchange” (or whatever requirement may be substituted for it under that system), there is no uncertainty as to the terms of the agreement, but the agreement has no contractual force because, at this stage, neither party intends to be legally bound.<sup>693</sup>

## Mitigations of the requirement of “exchange of contracts”

- ¶63 The rules stated in paras 4-159—4-162 above enable either party to a concluded agreement to go back on it with impunity. This position has been described as “a social and moral blot on our law”<sup>694</sup> and there are indications that the courts are prepared to mitigate the former strictness of the requirement of “exchange of contracts”. Thus it has been held that certain technical slips in the process of exchange may be disregarded<sup>695</sup>; and that exchange is not necessary where both parties use the same solicitor.<sup>696</sup> The parties may also create a binding contract by a subsequent agreement to remove the effect of the words “subject to contract”, thus indicating their intention henceforth to be legally bound.<sup>697</sup> Likewise, in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*<sup>698</sup> Lord Briggs drew an analogy between NOM (no oral modification) clauses and “subject to contract” clauses, stating that an express agreement to depart from the previous agreement is normally needed.
- ¶64 Subsequent conduct may also give rise to liability on other grounds: where one party to the agreement encourages the other to believe that he will not withdraw, and the other acts to his detriment in reliance on that belief, the former may, exceptionally, be liable on the basis of “proprietary estoppel”.<sup>699</sup> In “a very strong and exceptional context”<sup>700</sup> the court may infer that the parties had an intention to be legally bound by the original document, even though it is expressed to be “subject to contract”. This was held to be the position where a document containing these words laid down an elaborate timetable, imposed a duty on the purchaser to approve the draft contract (subject only to reasonable amendments) and required him then to exchange contracts.<sup>701</sup> In these exceptional circumstances, the words “subject to contract” were taken merely to mean that the parties had not yet settled all the details of the transaction and therefore not to negative the intention to be bound.

## Exceptions to requirement of execution and exchange of formal contracts

- ¶65 Agreements for the sale of land by auction or by tender are not normally made “subject to contract”. The intention of the parties in such cases is to enter into a binding contract as soon as an offer has been accepted; and the terms of that contract are usually set out, or referred to, in a document signed to provide a written record of the fact of agreement. In one case of this kind,<sup>702</sup> however, the words “subject to contract” were, by a clerical error, added to the acceptance. It was held that there was nevertheless a binding contract since the tender documents set out in full the description of the property and the terms of the transaction. In these highly exceptional<sup>703</sup> circumstances, the words “subject to contract” were treated as meaningless and disregarded.<sup>704</sup> Presumably this reasoning

could also apply where the sale was by auction. The same reasoning has also been applied where a notice exercising an option to purchase land was expressed to be "subject to contract": this phrase was again held to be meaningless as the notice was clearly intended to give rise to a binding contract.<sup>705</sup>

## Acting on agreement subsequently completed

<sup>166</sup> The parties may begin to act on the terms of an agreement before it has contractual force. When it is later given such force, the resulting contract may then, if it expressly or by implication so provides, have retrospective effect so as to apply to work done or goods supplied before it was actually made.<sup>706</sup> But where parties have negotiated "subject to contract" (or used expressions to the same effect),<sup>707</sup> then the fact that the contemplated work is begun before the execution of a formal contract, will not (in the words of Lord Clarke SCJ in the *RTS* case) "always or even usually"<sup>708</sup> give rise to a binding contract.

<sup>709</sup>

**U** The facts of that case, however, illustrate an exception to this general approach; for one of the factors mentioned in support of the conclusion that a contract had there come into existence was that, after "essentially all the terms were agreed ... substantial works were then carried out".<sup>710</sup> The resulting contract was one for the supply of goods, a type of contract to which the further requirement of an "exchange of contracts" (which as a matter of law normally applies to a contract for the sale of land)<sup>711</sup> does not normally extend, though in the *RTS* case such a requirement was imposed by one of the express terms of the draft which formed the basis of the negotiations in that case.<sup>712</sup> It seems that the mere carrying out of "substantial works" *before* agreement had been reached on "essentially all the terms" would not have sufficed to give rise to a binding contract on such terms as had been agreed, unless the conduct of the parties supported the inference of an implied contract between them.<sup>713</sup>

## Footnotes

<sup>685</sup> i.e. subject to the qualifications discussed in paras 4-163—4-166 below.

<sup>686</sup> *Eccles v Bryant & Pollock [1948] Ch. 93*; *Sante Fé Land Co Ltd v Forestal Land Co Ltd (1910) 26 T.L.R. 534*; cf. *Coope v Ridout [1921] 1 Ch. 291*; *Chillingworth v Esche [1924] 1 Ch. 97*; *Raingold v Bromley [1931] 2 Ch. 307*; *Cohen v Nessdale [1982] 2 All E.R. 97*; *Secretary of State for Transport v Christos [2003] EWCA Civ 1073, [2004] 1 P. & C.R. 17*; *Bolton MBC v Torkington [2003] EWCA Civ 1634, [2004] Ch. 66* at [53], where mere

sealing (without delivery) of a counterpart lease by a local authority was held not to give rise to a contract binding the authority.

687 Below, para.[7-014](#). A document setting out all the terms expressly agreed and signed by both parties would satisfy the formal requirements; but if it were expressed to be "subject to contract" it would not give rise to a contract until "exchange" had taken place.

688 [Law of Property \(Miscellaneous Provisions\) Act 1989 ss.2\(1\), \(3\)](#).

689 See *Commission for the New Towns v Cooper (Great Britain) Ltd [1995] Ch. 259, 285, 289*, cf. at 293, 295.

690 *Domb v Izoz [1980] Ch. 548*. This relaxation refers only to the process of exchange; the formal requirements referred to in this paragraph must also be satisfied.

691 *Sindel v Georgiou (1984) 154 C.L.R. 661*.

692 On the making of orders under the [Land Registration Act 2002](#).

693 Below, paras [4-214](#)—[4-215](#).

694 *Cohen v Nessdale [1981] 3 All E.R. 118, 128; affirmed [1982] 2 All E.R. 97*; cf. Law Commission Paper No.65.

695 *Harrison v Battye [1975] 1 W.L.R. 58*.

696 *Smith v Mansi [1963] 1 W.L.R. 26*; exchange is also unnecessary in the case of a deed which takes effect on execution and delivery: see above, paras 1-080 et seq.; *Vincent v Premo Enterprises Ltd [1969] 2 Q.B. 609*.

697 *Law v Jones [1974] Ch. 112*, as explained in *Daulia v Four Millbank Nominees [1978] Ch. 231, 250; Cohen v Nessdale [1981] 3 All E.R. 118, 127, [1982] 2 All E.R. 97, 104*; see also *Tiverton Estates Ltd v Wearwell [1975] Ch. 146*, followed in *Irani v Irani [2006] EWHC 1811, [2006] W.T.L.R. 1561*; cf. *Secretary of State for Transport v Christos [2003] EWCA Civ 1073, [2004] 1 P. & C.R. 17* at [36]–[37] (statement that a party would "not renege" insufficient). For the present purpose, agreement of both parties is required: a "unilateral" waiver by one party will not suffice: *Haq v Island Homes Housing Association [2011] EWCA Civ 805, [2011] 2 P & C.R. 17* at [72]. Any subsequent agreement would now have to satisfy more stringent requirements, imposed by [Law of Property \(Miscellaneous Provisions\) Act 1989 s.2](#) (below, para.[7-014](#)) than those which were in force at the time of the first four of the decisions cited in this note, though these requirements would not apply if the subsequent agreement could take effect as a collateral contract. The requirement of a subsequent agreement by *both* parties to remove the normal effect of the words "subject to contract" also does not apply where an offer to buy goods is qualified by these words. In *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63* such an offer was so qualified and it was said at [70] that "this qualification was removed" by the buyer's later statement that [o]ur offer is not conditional, "whereupon the offer was an offer capable of being accepted".

698 *[2018] UKSC 24* at [29]. On the facts of this case, only a written variation would suffice.

699 See the discussion at para.[6-163](#) below of *Att-Gen of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] A.C. 114*. However, in *Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55, [2008] 1 W.L.R. 1752* Lord Scott said that in a "subject to contract" case proprietary estoppel "cannot ordinarily arise" (at [25]) and that in such a case it would be "very difficult" (at [26]) to establish a proprietary estoppel. The difficulty is illustrated

by *Haq v Island Housing Association* [2011] EWCA Civ 805, [2011] 2 P. & C.R. 17, where merely allowing a prospective lessee to enter the premises while the agreement was still "subject to contract" was not sufficient to give rise to a proprietary estoppel (at [73]).

700 *Alpenstow Ltd v Regalian Properties Ltd* [1985] 1 W.L.R. 721, 730; *Harpum* [1986] C.L.J. at 356.

701 *Alpenstow Ltd v Regalian Properties Ltd*, above.

702 *Michael Richards Properties Ltd v St Saviour's* [1975] 3 All E.R. 416; *Emery* [1976] C.L.J. 28.

703 See *Munton v G.L.C.* [1976] 1 W.L.R. 649.

704 cf. below, para.4-190.

705 *Westway Homes v Moore* (1991) 63 P. & C.R. 480.

706 *Trollope & Colls Ltd v Atomic Power Construction Ltd* [1963] 1 W.L.R. 333. The same principle can apply also where the parties act on an informal agreement which does not have contractual force and that agreement is later superseded by the execution of a formal contract: see *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC), [2014] B.L.R. 150 at [18], [45].

707 As in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753; for the "subject to contract clause" (at [86]) in that case, see above, paras 4-159—4-161.

708 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14 at [47].

•709 See *Pretoria Energy Co v Blankney Estates Ltd* [2022] EWHC 1467 (Ch) at [44], where the claimant's mistaken substantial reliance on the existence of a binding contract was insufficient to displace the clear indicators that there was no binding contract.

710 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14 at [61]; cf. at [84]. A further reason for the decision was that the parties had agreed to vary the agreement even though the requirements of the "subject to contract" clause (above, paras 4-159—4-161) had not been satisfied; and that a variation would make no sense if there was "nothing to vary" (at [61]). The point is perhaps overstated since the concept of varying a draft before it has acquired contractual force is not an obviously empty one.

711 Above, para.4-162.

712 See the words of clause 48, quoted in para.4-161 above.

713 See the reasoning at first instance in *Rugby Group Ltd v Pro Force Recruit Ltd* [2005] EWHC 70 (QB) at [16], reversed on other grounds [2006] EWCA Civ 69.

## **(i) - Contract to Make a Contract**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 8. - Incomplete Agreement**

**(c) - Agreements to Agree**

**(i) - Contract to Make a Contract**

<sup>167</sup> In some cases of incomplete agreements it is said that there is a “contract to make a contract”. <sup>714</sup> This expression may refer to a number of different situations; these are discussed in paras [4-168](#) — [4-169](#) below.

### **Agreement to negotiate not binding**

<sup>168</sup> Where the parties have simply agreed to negotiate, in spite of dicta to the contrary, <sup>715</sup> it has been held that an express agreement merely to negotiate is not a contract “because it is too uncertain to have any binding force”. <sup>716</sup> It therefore does not impose any obligations to negotiate, or to use best endeavours to reach agreement <sup>717</sup> or to accept proposals that “with hindsight appear to be reasonable”. <sup>718</sup> Nor, where an agreement fails to satisfy the requirement of certainty, can this defect be cured by *implying* into it a term to the effect that the parties must continue to negotiate in good faith.

<sup>169</sup> In *Walford v Miles*, <sup>719</sup> the parties agreed that if the claimant provided a letter of comfort from their bank confirming the loan facilities to raise the £2 million purchase price, then the defendant would “terminate negotiations with any third party”. The House of Lords held that a “lock-out” agreement collateral to negotiations for the sale of a business lacked sufficient certainty because it failed to specify the period of time during which the vendors were not to negotiate with third parties. The

House of Lords also unanimously rejected the argument that a term should be implied requiring the vendors to continue to negotiate in good faith with the purchaser for as long as the vendors continued to desire to sell, since such a term was itself too uncertain to be enforced. The uncertainty lay in the fact that the alleged duty was “inherently inconsistent with the position of a negotiating party”<sup>720</sup> who must normally<sup>721</sup> be free to advance their own interests during the negotiations. The point is well illustrated by the facts of *Walford v Miles* itself, where the defendants had agreed, subject to contract, to sell a property to the purchasers for £2 million and had (in breach of the above ineffective “lock-out” agreement) sold it to a third party for the same sum. The purchasers then claimed damages of £1 million on the basis that the property was (by reason of facts known to them but not to the defendants) worth £3 million. If a duty to negotiate in good faith exists, it must be equally incumbent on both parties, so that it can hardly require a vendor to agree to sell a valuable property for only two thirds of its true value when the facts affecting that value are known to the purchaser and not disclosed (as good faith would seem to require) to the vendor. The actual result in *Walford v Miles* was an award of £700 to the purchasers for their wasted expenses as damages for the vendor’s misrepresentation,<sup>722</sup> that he was not dealing with a third party and an implied misrepresentation that he would only deal with the purchaser. The denial of the purchaser’s claim of £1 million as damages for breach of contract<sup>723</sup> seems, with respect, to be entirely appropriate on the facts, especially because the vendors reasonably believed themselves to be protected from liability in the principal negotiation by the phrase “subject to contract”.

<sup>170</sup> In *Cobbe v Yeomans Row Management Ltd*<sup>724</sup> Mummery LJ said that “Under English law there is no general duty to negotiate in good faith”; but he added that there were:

“... plenty of other ways of dealing with particular problems of unacceptable conduct occurring in the course of negotiations without unduly hampering the ability of the parties to negotiate their own bargains without the intervention of the courts.”<sup>725</sup>

In the *Cobbe* case itself, the Court of Appeal had relied on the doctrine of proprietary estoppel to this end; and although on further appeal this doctrine was held not to apply on the facts of the case,<sup>726</sup> the House of Lords did provide other relief, by way of quantum meruit, to the party prejudiced by performing services in anticipation of a contract which did not materialise because of the other party’s withdrawing from the agreement which required further negotiations to acquire contractual force. In *Walford v Miles* the award of damages for misrepresentation may illustrate the same point.<sup>727</sup> It should be emphasised that, in neither of these cases, did the claimants recover the full damages for loss of their bargains to which they would have been entitled if the defendant’s failure to negotiate in good faith had amounted to a breach of contract.

<sup>171</sup> In *Walford v Miles* Lord Ackner, with whom all the other members of the House agreed, described as “unsustainable” the view expressed in an American case<sup>728</sup>:

“... that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and, as the latter is enforceable so is the former.”<sup>729</sup>

He went on to say that:

“the reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours.”<sup>730</sup>

If (as appears to be the case) the reference in this passage is to an agreement to use best endeavours to reach agreement, then the passage gives rise to a number of difficulties. The first arises from dictum in an English case<sup>731</sup> (which is cited with approval in *Walford v Miles*<sup>732</sup>) to the effect that an agreement to negotiate does not impose any obligation to use best endeavours to reach agreement; and this dictum certainly supports the view that an agreement to negotiate contains no *implied* term to use such endeavours. It may be that Lord Ackner’s reference was to an *express* term to use best endeavours to reach agreement, or that he was simply prepared to assume (without deciding) that an agreement (express or implied) to use such endeavours might be legally enforceable and that he was concerned only to make the point that, even on that assumption, the same was not true of an agreement to negotiate in good faith. That explanation of Lord Ackner’s statement in turn gives rise to the difficulty of distinguishing between the two types of agreement. One possibility is that an agreement to negotiate in good faith refers to the *formation* and one to use best endeavours to the *performance* of a contract, e.g. where an admitted contract between A and B requires A to use their best endeavours to make a computer software system work, or to procure C to enter into a contract with B. There is no doubt that a term of this kind can impose a legal obligation on A.<sup>733</sup> But such cases are not concerned with the legal effect (if any) of an agreement to use best endeavours to *reach agreement*; and where the question is whether, in consequence of such an agreement, any contract has come into existence, later decisions support the view that an express agreement to use best or reasonable endeavours to agree on the terms of a contract is no more than an agreement to negotiate, lacking contractual force.<sup>734</sup> An alternative explanation of Lord Ackner’s statement may be that, while an agreement to use best endeavours to reach agreement could be interpreted as referring to the *machinery* of negotiation, one to negotiate in good faith is more plausibly interpreted as referring to its *substance*. A promise to use such endeavours might, for example, oblige a party to make themselves available for negotiations, or at least not (e.g. by deliberately failing to pick up the telephone) to prevent the other from communicating with them.<sup>735</sup> A promise to negotiate in good faith, on the other hand, would oblige a party not to take unreasonable or exorbitant positions during the negotiations; and it is the difficulty of giving precise content to this obligation, while maintaining each party’s freedom to pursue their own interests, that makes such a promise too uncertain to be enforced.

## Duty to negotiate outstanding details

172

In *Walford v Miles*

173

**U** the principal agreement was not legally binding because it was subject to contract, and the lock-out agreement was not legally binding because it specified no duration.

174

**U** The case does not exclude the possibility of a different conclusion where the parties have reached agreement on all essential points so as to show that they do intend to be legally bound by the agreement, but have left other points open. The court may then imply a term that they are to negotiate in good faith so as to settle outstanding details which are to be incorporated in the formal document setting out the full terms of the contract between them.

175

**U** An express term in an agreement that is intended to be legally binding to negotiate outstanding matters in good faith may likewise have contractual force.

176

**U**

## Footnotes

- 714 *Von Hatzfeld-Wildenburg v Alexander* [1912] 1 Ch. 284, 284, 288–289 (“contract to enter into a contract”).
- 715 *Chillingworth v Esche* [1924] 1 Ch. 97, 113; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 L.T. 503, 515. See F.P. (1932) 48 L.Q.R. 141, F.W.M.C. (1932) 48 L.Q.R. 310; *Williams* (1943) 6 M.L.R. 81.
- 716 *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 W.L.R. 297, 301; cf. *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284, 249; *Malozzi v Carapelli SpA* [1976] 1 Lloyd's Rep. 407; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 432; affirmed without reference to this point [1983] 2 A.C. 694; *Nile Co for the Export of Agricultural Crops v H. & J.M. Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep. 555, 587; *Paul Smith Ltd v H. & S. International Holdings* [1991] 2 Lloyd's Rep. 127, 131; *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep. 76 at [53], [59]; *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2005] EWCA Civ 806, [2005] 2 Lloyd's Rep. 597 at [24], [26]; *Covington Marine Corp v Xiamen Shipbuilding Co Ltd* [2005] EWHC 2912 (Comm),

- [2006] *1 Lloyd's Rep.* 278 at [52]; *Rosalina Investments Ltd v New Balance Athletic Shoes (UK) Ltd* [2018] EWHC 1014 (QB) at [45]–[49].
- 717 *The Scaptrade* [1981] *2 Lloyd's Rep.* 425; *Star Steamship Society v Beogradska Plovidba (The Junior K.)* [1988] *2 Lloyd's Rep.* 583. cf. in the United States, *Hoffman v Red Owl Stores Inc* 133 N.W. 2d 267 (1965).
- 718 *Pagnan SpA v Granaria BV* [1985] *2 Lloyd's Rep.* 256, 270; affirmed [1986] *2 Lloyd's Rep.* 547.
- 719 [1992] *2 A.C.* 128; *Neill* (1992) *108 L.Q.R.* 405.
- 720 [1992] *2 A.C.* 128, 138; cf. *Surrey CC v Bredero Homes Ltd* [1993] *1 W.L.R.* 1361, 1368 (doubted on other grounds in *Att-Gen v Blake* [2001] *1 A.C.* 268 at 283); *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] *1 All E.R. (Comm)* 303 at 311; *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] *1 All E.R. (Comm)* 737 (below, para.4-188) where an alleged duty to deal with the claimants in good faith was held to be insufficiently certain to form a basis for an implied contract. See also *Shaker v VistaJet Group Holding SA* [2012] EWHC 1329 (Comm), [2012] *2 Lloyd's Rep.* 93, where the unenforceability of an agreement “to use reasonable endeavours to agree or to negotiate in good faith” was based, inter alia, on the fact that a “duty to negotiate in good faith” is “inherently inconsistent with the position of a negotiating party” (at [7]).
- 721 For an exception, see *Re Debtors (Nos 4449 and 4450 of 1998)* [1999] *1 All E.R. (Comm)* 149 at 158 (Lloyd's bound to negotiate in good faith with its “names” on the terms of a “hardship agreement” since for this purpose it was “performing functions in the public interest within a statutory framework”, so that its freedom of action was restricted).
- 722 See [1992] *2 A.C.* 128, 136.
- 723 [1992] *2 A.C.* 128 at 135.
- 724 [2006] EWCA Civ 1139, [2006] *1 W.L.R.* 2964.
- 725 [2006] EWCA Civ 1139 at [4].
- 726 [2008] UKHL 55, [2008] *1 W.L.R.* 1752, below paras 6-173—6-176.
- 727 See above, para.4-168.
- 728 *Channel Home Centers Division of Grace Retail Corp v Grossman* 795 F. 2d 291 (1986).
- 729 [1992] *2 A.C.* 128, 138.
- 730 [1992] *2 A.C.* 128, 138.
- 731 *Scandinavian Trading Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] *2 Lloyd's Rep.* 425, 432 (and see above para.4-168); cf. *Star Steamships Society v Beogradska Plovidba (The Junior K.)* [1988] *2 Lloyd's Rep.* 583. See also *Covington Marine Corp v Xiamen Shipping Co Ltd* [2005] EWHC 2912 (Comm), [2006] *1 Lloyd's Rep.* 745 at [52], where it was not argued that an agreement to use best endeavours to reach agreement had any greater legal effect than an agreement to agree.
- 732 [1992] *2 A.C.* 128, 137.
- 733 See *Watford Electronics Ltd v Sanderson Ltd* [2001] EWCA Civ 317, [2001] *1 All E.R. (Comm)* 696 at [45], and the cases discussed in para.4-180; cf. *Lambert v HTV Cymru (Wales) Ltd, The Times, 17 March 1998; Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417, where the dispute seems to have been, not about the existence of the contract but about its contents (see at [18], [29]). The Court of Appeal held, by a majority, that a clause in

the contract, requiring the defendant airport authority to “use all reasonable endeavours to promote” (clause 1, para.[6]) the claimant airline’s services from the defendant’s airport, was not too uncertain to be enforced. cf. in Scotland, *R&D Construction Group Ltd v Hallam Land Management Ltd* [2010] CSIH 96, 2011 S.L.T. 236, where agreement for the sale of land part of which the vendor expected to acquire from a third party was conditional on vendor’s agreeing a price “wholly acceptable” to him with the third party and the vendor undertook to use “all reasonable endeavours” in that regard. It was held that this term was enforceable but that the vendor was not in breach of it. In contrast, see *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB), [2014] Bus L.R. (D) 11, where A and B entered into an agreement to settle a dispute over their contract, by which A had agreed to sell a vintage car to B and to recondition the car. The settlement agreement required B to use reasonable efforts to enter into a contract with C to carry out the reconditioning work. The settlement agreement between A and B was not legally binding since, although it specified the object to be attained by the contract between B and C (i.e. the reconditioning of the car), it left open the price and other terms of that contract, which envisaged future negotiation between B and C when there were “no objective criteria by which the court could evaluate whether it was reasonable or unreasonable for [B] to refuse to agree to any particular terms on offer” (at [38]). It followed that the agreement between A and B was “no better than an agreement to agree” (at [46]). Andrews J reached this conclusion with regret since she regarded it as “obvious that this [i.e. the settlement agreement] was objectively intended by the parties to be a binding and enforceable obligation” (at [47]).

- 734 See *Little v Courage* (1995) 70 P. & C.R. 469 at 475; *London & Regional Investments Ltd v TBI Plc* [2002] EWCA Civ 355 at [39]; *Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd* [2006] EWHC 1341 (TCC), 107 Con. L.R. 1; *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at [44]. For the distinction between an undertaking to use “best” and one to use “reasonable” endeavours, see *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), [2007] 2 Lloyd’s Rep. 325 at [34]–[35].
- 735 Example based on *Nissho Iwai Petroleum Co Inc v Cargill International SA* [1993] 1 Lloyd’s Rep. 80, where such conduct was held to amount to a breach of a party’s duty to co-operate in the performance (not in the formation) of a contract. cf. *Re Debtors (Nos 4449 and 4450 of 1998)* [1999] 1 All E.R. (Comm) 149 at 158 (implied obligation to use “best endeavours” to conclude an agreement requires the party “not unreasonably to frustrate” its conclusion).
- 736 [1992] 2 A.C. 128.
- 737 Above, para.4-168. cf. *Pretoria Energy Co v Blankney Estates Ltd* [2022] EWHC 1467 (Ch) at [34], where the lock-out agreement had an end date and so was binding.
- 738 *Donwin Productions Ltd v EMI Films Ltd, The Times, 9 March 1984* (not cited in *Walford v Miles* [1992] 2 A.C. 128).
- 739

*Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 at [115]–[125], distinguishing *Walford v Miles*, above para.4-169, on the ground that, in the latter case, there was “no concluded agreement since everything was subject to contract” and that there was “no express agreement to negotiate in good faith” (at [120]). In the *Petromec* case, the point was “not essential to the disposition of the appeal” (at [115]). See further below, para.4-176. For further proceedings in the *Petromec* case, see above, para.4-176 (note). cf. *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] B.L.R. 265 where clause 3.5 of the contract (set out at [14]) required the parties to “co-operate with each other in good faith”. On the true construction of that clause there had been no breach of it (at [120], [143]; cf. at [153]). See also *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* [2021] EWHC 3015 (Ch) at [100]–[106] (“courts will now be willing to recognise an obligation to negotiate on some matter using reasonable endeavours, or in good faith, where it is found in a binding agreement”).

## **(ii) - Terms “To Be Agreed”**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 8. - Incomplete Agreement**

**(c) - Agreements to Agree**

### **(ii) - Terms “To Be Agreed”**

<sup>173</sup> The parties to an agreement may be reluctant to commit themselves to a rigid long-term arrangement, particularly when prices and other circumstances affecting performance are likely to fluctuate. They sometimes attempt to introduce an element of flexibility by providing that certain terms are to be agreed later, or from time to time. The result of such a provision may be to make the agreement so uncertain that it cannot be enforced. In *May & Butcher v R.*<sup>740</sup> an agreement for the sale of tentage provided that the price, dates of payment and manner of delivery should be agreed from time to time. The House of Lords held that the agreement was incomplete as it left vital matters to be settled. Had the agreement simply been silent on these points, they could perhaps have been settled in accordance with the provisions of the *Sale of Goods Act 1979*<sup>741</sup> or by the standard of reasonableness<sup>742</sup>; but the parties' agreement precluded this by providing that such points were to be settled by further agreement between them.<sup>743</sup> Similarly, a lease at “a rent to be agreed” is not a binding contract.<sup>744</sup> In the above cases, the most natural inference to be drawn from the fact that the parties left such an important matter as the price to be settled by further agreement was that they did not intend to be bound until they had agreed on the price. Even where the points left outstanding are of relatively minor importance, there will be no contract if it appears from the words used or other circumstances that the parties did not intend to be bound until agreement on these points had been reached.<sup>745</sup> A fortiori parties are not bound by a term requiring outstanding points to be agreed if that term forms part of an agreement which is itself not binding because it was made without any intention of entering into contractual relations.<sup>746</sup>

## Options and rights of pre-emption

- <sup>174</sup> It follows from the principle stated in para.4-173 above that an option to sell land “at a price to be agreed” is not a binding contract <sup>747</sup>; but such an option must be distinguished from a “right of pre-emption” <sup>748</sup> by which a landowner agrees to give the purchaser the right to buy “at a figure to be agreed” should the landowner wish to sell. <sup>749</sup> An *option* has at least some of the characteristics of an offer <sup>750</sup> in that it can become a contract of sale when the purchaser accepts it by exercising the option <sup>751</sup>; and it cannot have this effect where it fails to specify the price. A *right of pre-emption*, on the other hand, is not itself an offer <sup>752</sup> but an undertaking to make an offer in certain specified future circumstances. <sup>753</sup> An agreement conferring such a right is, therefore, not void for uncertainty merely because it fails to specify the price. It obliges the landowner to offer the land to the purchaser at a price at which he is in fact prepared to sell; and if the purchaser accepts that offer there is no uncertainty as to price. <sup>754</sup> This is so even though the parties have described the right as an “option” when its true legal nature is that of a right of pre-emption. <sup>755</sup>

## Agreements not incomplete merely because further agreement is required

- <sup>175</sup> Because the courts are “reluctant to hold void for uncertainty any provision that was intended to have legal effect”, <sup>756</sup> they may sometimes give effect even to an agreement which provides for further terms “to be agreed”. This was the position in *Foley v Classique Coaches Ltd.* <sup>757</sup> The claimant owned a petrol-filling station and adjoining land. He sold the land to the defendants on condition that they should enter into an agreement to buy petrol for the purpose of their motor-coach business exclusively from him. This agreement was duly executed, but the defendants broke it, and argued that it was incomplete because it provided that the petrol should be bought “at a price to be agreed by the parties from time to time”. The Court of Appeal rejected this argument and held that, in default of agreement, a reasonable price must be paid. <sup>758</sup> *May & Butcher v R.* <sup>759</sup> was distinguished on a number of grounds: the agreement in *Foley's* case was contained in a stamped document; it was believed by both parties to be binding and had been acted upon for a number of years <sup>760</sup>; it contained an arbitration clause in a somewhat unusual form which was construed to apply “to any failure to agree as to the price” <sup>761</sup>; and it formed part of a larger bargain under which the defendants had acquired the land at a price which was no doubt based on the assumption that they would be bound to buy all their petrol from the claimant. <sup>762</sup> While none of these factors is in itself conclusive, <sup>763</sup> their cumulative effect seems to be sufficient to distinguish the two cases. <sup>764</sup>

Moreover, in *Petromec Inc v Petroleo Brasileiro SA Petrobras* Longmore LJ did “not consider that *Walford v Miles*

765

 binds us to hold that the express obligation to negotiate is completely without legal substance.”  
766

 He distinguished *Walford* on a number of grounds. First, in *Petromec*, the agreement to negotiate in good faith was contained in an otherwise legally enforceable agreement (in *Walford*, there was no concluded agreement at all; everything was “subject to contract”

767

 ). Second, the agreement to negotiate in *Petromec* was an express term (in *Walford* it was implied),  
768

768

 which was, moreover, “part of a complex agreement drafted by City of London solicitors” and:

“... [i]t would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered ... To decide that it has ‘no legal content ... would be for the law deliberately to defeat the reasonable expectations of honest men.”

769



Third, the agreement to negotiate in *Petromec* related only to a particular cost, which was

“... comparatively easy to ascertain ... If there are any ascertainable losses which arise from a failure to negotiate in good faith, they will likewise be ascertainable with comparative ease.”

770



This contrasted with the absence of objective criteria in *Walford v Miles*. Longmore LJ concluded that, while “the concept of bringing negotiations to an end in bad faith is somewhat elusive”, this should not mean a “blanket unenforceability of this obligation”.

771



|77

Similarly, a dispute resolution clause in an existing and enforceable contract which requires the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute may be referred to arbitration is enforceable. It is not incomplete; not uncertain (it has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute, the difficulty of proving a breach in some cases does not mean that the clause lacks certainty); and not inconsistent with the position of a negotiating party, since the parties voluntarily accepted a restriction upon their freedom not to negotiate. Moreover, it is in the public interest, since courts should enforce freely agreed obligations and because it may avoid expensive and time-consuming arbitration.<sup>772</sup>

- <sup>178</sup> Thus, an agreement is not incomplete *merely* because it calls for some further agreement between the parties. The parties' later failure to agree on the matters left outstanding may then avoid the contract only if it makes it "unworkable or void for uncertainty".<sup>773</sup> Often, the failure will not have this effect, for it may be possible to resolve the uncertainty in one of the ways already discussed, e.g. by applying the standard of reasonableness<sup>774</sup>; or the matter to be negotiated may be of such subsidiary importance<sup>775</sup> as not to negative the intention of the parties to be bound by the more significant terms to which they have agreed. Thus, in *Neilson v Stewart*<sup>776</sup> a contract for the sale of shares provided that part of the price payable by the buyer was to be lent back to him and to a third party on repayment terms to be negotiated after one year. The House of Lords held that there was nevertheless a binding contract for the sale of the shares as the parties had not intended the validity of this contract to depend on the outcome of the negotiations as to the repayment of the loan. In *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd*,<sup>777</sup> the parties' agreement was held to be legally binding despite certain parts of it being left incomplete and despite its stipulation that the parties would "agree a formal contract 'within 90 days of commencement'" of the relationship. This was because<sup>778</sup>: (a)

"… the formality of the document itself tends to indicate that it was seen as being more than merely a guide for the lawyers who would draw up the formal contract and was itself an effective agreement",

(b) the references to forming a contract within 90 days allowed parties to "reach a binding agreement in the expectation that it will hold the ring until a more comprehensive agreement is put in place", (c) The "Heads of Terms" to be agreed merely indicated "what would go in the formal contract but had not yet been agreed", moreover, they were sufficiently complete, and (d) the parties had acted in reliance on the Heads of Terms as the governing contract and "felt no need to seek a further agreement".

- <sup>179</sup> In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)*<sup>779</sup> the Supreme Court held that a contract had come into existence when "essentially all the terms

were agreed between the parties",<sup>780</sup> even though other terms were still the subject of further negotiations between them.<sup>781</sup> In *Toptip Holding Pte Ltd v Mercuria energy Trading Pte Ltd (The "Pan Gold")*<sup>782</sup> a binding contract was found despite the offer being made "Subject to review" of the charterer's pro forma charterparty "with logical amendment" because all essential terms were agreed, the context indicated that the clause was not intended to prevent a binding contract from arising and the parties' conduct indicated the existence of a binding contract. The clause should be regarded merely as a condition subsequent.<sup>783</sup> There can be no doubt as to the commercial convenience of the judicial approach described in this paragraph. Commercial agreements are often intended to be binding in principle even though the parties are not at the time able or willing to settle all the details. For example, contracts of insurance may be made "at a premium to be arranged" when immediate cover is required but there is no time to go into all the details at once: such agreements are perfectly valid and a reasonable premium must be paid.<sup>784</sup> All this is not to say that the courts will hold parties bound when they have not yet reached substantial agreement,<sup>785</sup> but once they have reached such agreement it is not fatal that some points (even important ones) remain to be settled by further negotiation.<sup>786</sup>

## Criteria laid down in the agreement

- 180 The courts have less difficulty in upholding agreements which lay down *criteria* for determining matters which are left open.<sup>787</sup> For example, in *Hillas & Co Ltd v Arcos Ltd*<sup>788</sup> an option to buy timber was held binding even though it did not specify the price, since it provided for the price to be calculated by reference to the official price list. Similarly, an option to renew a lease "at a rent to be fixed having regard to the market value of the premises" has been held binding as it provided a criterion (though not a very precise one<sup>789</sup>) for resolving the uncertainty.<sup>790</sup> Even a provision that hire under a charterparty was in certain specified events to be "equitably decreased by an amount to be mutually agreed" has been held (by reason of its reference to what was equitable) "to provide a sufficient criterion to enable the appropriate reduction ... to be determined".<sup>791</sup> It was said that "equitably" meant "fairly and reasonably" and that "a purely objective standard has been prescribed".<sup>792</sup> On the other hand, where an agreement provided for payment of a fixed percentage of the "open market value" of shares in a *private* company, it was held that these words did not provide a sufficiently precise criterion since there was more than one formula for calculating the market value of shares in such a company.<sup>793</sup> An agreement may also lack contractual force where, though it lays down a criterion for resolving matters which are left open, it goes on to provide that the principles for determining the application of that criterion are to be settled by further negotiations between the parties.<sup>794</sup>

## Machinery laid down in the agreement

- 181 An agreement is not incomplete where it provides *machinery* for resolving matters originally left open.<sup>795</sup> Perhaps the most striking illustration of this possibility is provided by cases in which such matters are to be resolved by the decision of one party: for example a term by which interest rates are expressed to be variable on notification by the creditor, is in principle valid.<sup>796</sup> However, the creditor's power to set interest rates under such a contract is limited by an implied term that he must not exercise it "dishonestly, for an improper purpose, capriciously or arbitrarily".<sup>797</sup> Similarly, an arbitration clause can validly provide for the arbitration to take place at one of two or more places to be selected by one of the parties<sup>798</sup>; a compromise agreement can provide that one party is to have the right to choose which assets are to be transferred under it<sup>799</sup>; and a "staff handbook" can allow an employer unilaterally to vary terms of a contract of employment.<sup>800</sup> Agreements are a fortiori not incomplete merely because they provide that outstanding points shall be determined by arbitration<sup>801</sup> or other dispute resolution procedure,<sup>802</sup> or by the decision or valuation<sup>803</sup> of a third party<sup>804</sup>; though the *Sale of Goods Act 1979* provides that if the third party "cannot or does not make the valuation, the agreement is avoided".<sup>805</sup>

## Failure of machinery

- 182 An agreement is not, however, ineffective merely because such machinery fails to work. Thus, in *Sudbrook Trading Estate Ltd v Eggleton*<sup>806</sup> a lease gave a tenant an option to purchase the premises "at such price as may be agreed upon by two valuers, one to be nominated by" each party. Although the landlord refused to appoint a valuer, the House of Lords held that the option did not fail for uncertainty. It amounted, on its true construction, to an agreement to sell at a reasonable price to be determined by valuers. The stipulation that each party should nominate one of the valuers was merely "subsidiary and inessential"<sup>807</sup>; and where the agreed machinery (which fails to operate) is of this character,<sup>808</sup> the court can, on its failure to operate, substitute other machinery: for example, the court can itself fix the price with the aid of expert evidence. This is so not only where the agreed machinery fails because of one party's failure<sup>809</sup> or refusal to operate it,<sup>810</sup> but also where it fails for some other reason, such as the refusal of a designated valuer to make the valuation.<sup>811</sup> However, where the designated machinery that fails is regarded as "essential", the agreement will be unenforceable. Thus, where one party agreed to pay compensation to the other for increased water-flow rates from flooding incidents, and the parties failed to identify a site at which water-flow rates could be gauged via their engineers or via arbitration, the court refused to substitute other machinery, and refused to allow the gauging site to be determined retrospectively by the engineers or arbitration.<sup>812</sup>

## Rent review clauses

- <sup>183</sup> Problems regarding terms “to be agreed”, discussed in paras 4-173—4-175 above, have arisen in a number of cases involving rent review clauses in leases. A provision in a lease that, after an initial period for which the rent is specified, the tenant shall pay “such rent as may be agreed” is *prima facie* ineffective.<sup>813</sup> It does not follow that the lease is, or becomes, void on failure to agree the new rent; indeed, it is unlikely that the court would so hold where the parties had acted during the initial period in the belief that the lease was binding for its full term; nor is it likely that the court would hold that, in default of agreement, no rent at all need be paid.<sup>814</sup> Failure to agree a new rent will therefore lead to one of two results: that the old rent continues<sup>815</sup> or that a reasonable rent must be paid. The first of these solutions is open to the objection that it makes the rent review clause inoperative since under it the party in whose interest it was to maintain the old rent would have no incentive to agree to a new one.<sup>816</sup> The better view, therefore, is that a reasonable rent must be paid.<sup>817</sup> The lease may, of course, contain an express provision to this effect,<sup>818</sup> or provide for the rent to be determined by arbitration or by a valuer.<sup>819</sup> The original rent may, however, continue to govern for some reason *other* than the fact that the clause provides that the new rent is to be agreed or to be fixed by a third party: for example, because the party who wishes to vary it has not complied with the conditions laid down by the contract as a prerequisite to the operation of the rent review clause.<sup>820</sup>

## Facts to be ascertained

- <sup>184</sup> An agreement is not ineffective for uncertainty merely because the facts on which its operation is to depend are not known when it is made. The requirement of certainty will be satisfied if those facts become ascertainable and are ascertained, without the need for further negotiation, after the making of the agreement. Thus, a finance agreement which depended on the merchantability of goods dealt with under it was held not to be invalid for uncertainty merely because it was not known, when the agreement was made, whether the goods were in fact merchantable.<sup>821</sup>

## Footnotes

740 [1934] 2 K.B. 17; cf. *British Homophone Ltd v Kunz* (1935) 152 L.T. 589; *Mmecen SA v Inter Ro-Ro SA (The Samah)* [1981] 1 Lloyd's Rep. 40, 43; *Harmony Shipping Co SA v Saudi-Europe Line Ltd (The Good Helmsman)* [1981] 1 Lloyd's Rep. 377, 409; *Pancommerce SA v*

*Veecheema BV* [1983] 2 *Lloyd's Rep.* 304, 307; *Cedar Trading Co Ltd v Transworld Oil Ltd (The Gudermes)* [1985] 2 *Lloyd's Rep.* 623; *iSoft Group Plc v Misys Holdings Ltd* [2003] EWCA Civ 229, [2003] All E.R. (D) 438 (Feb); *Minter v Julius Baer Investments Ltd* [2004] EWHC 2472, [2005] Pens. L.R. 73; *Scottish Coal Co Ltd v Danish Forestry Co Ltd* [2010] CSJH 56, 2010 S.C. 729, referring at [8] to *May & Butcher v R.* [1934] 2 K.B. 17.

- 741 Above, paras 4-146—4-150; cf. *Supply of Goods and Services Act 1982* s.15(1).
- 742 cf. *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 *Lloyd's Rep.* 76, especially at [73]; *Malcolm v Chancellor, Masters & Scholars of the University of Oxford, The Times*, 19 December 1990.
- 743 cf. *Willis Management (Isle of Man) Ltd v Cable & Wireless Plc* [2005] EWCA Civ 806, [2005] 2 *Lloyd's Rep.* 597 at [33].
- 744 *King's Motors (Oxford) Ltd v Lax* [1970] 1 W.L.R. 426; cf. *King v King* (1981) 41 P. & C.R. 311 (rent review clause).
- 745 *Metal Scrap Trade Corp v Kate Shipping Co Ltd (The Gladys)* [1994] 2 *Lloyd's Rep.* 402; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 *Lloyd's Rep.* 566. cf. *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC 507 (Ch), [2019] 2 All E.R. (Comm) 191 at [98], see below para.4-178.
- 746 *Orion Insurance Plc v Sphere Drake Insurance Plc* [1992] 1 *Lloyd's Rep.* 239.
- 747 See *The Messiniaki Bergen* [1983] 1 *Lloyd's Rep.* 424, 426. In *Brown v Gould* [1972] Ch. 53, where the option was upheld as it specified criteria for determining the price: see below, para.4-180. cf. below, para.6-202 (note) for the nature of an option. In The *Messiniaki* case, the charter party gave the parties an option to arbitrate. Bingham J found that the clause was not just an agreement to make an agreement to arbitrate. Once the option to arbitrate had been validly elected, no further agreement was needed.
- 748 The word “pre-emption” would not be appropriate where the object of the term in question was to confer a right on a seller to be given the first opportunity of making a supply of goods to a buyer, as in *Astra Zeneca UK Ltd v Albemarle International Corp* [2011] EWHC 1574; and this point may account for the use in that case of the expression “first opportunity and right of refusal” to refer to the opportunity of this kind there conferred by the contract on the seller. It may also account for the statement at [24] that “a right of pre-emption” was “essentially another name for a right of first refusal”. What seems to be meant is that the nature of these two rights is similar. As a matter of terminology, it is hard to see how a seller can have the first right to buy the subject-matter (or, in other words, a right of pre-emption). The phrase “right of first refusal” is more equivocal and seems to be just as capable of referring to a right conferred on a seller as to one conferred on a buyer: that is to a right of one party to an agreement to receive an offer from the other in priority to other potential offerees.
- 749 *Pritchard v Briggs* [1980] Ch. 338. For the purposes of Landlord and Tenant (Covenants) Act 1995, *option* includes “a right of first refusal”: s.1(6).
- 750 Below, para.6-202 (note). See also *Bircham & Co Nominees (No.2) Ltd v Worrell Holdings Ltd* [2001] EWCA Civ 775, (2001) 82 P. & C.R. 427 at [41]; *Re Gray* [2004] EWHC 1538 (Ch), [2005] 1 W.L.R. 815 at [25]. On the exercise of a right of pre-emption, the right may

acquire characteristics of an option; see *Cottrell v King* [2004] EWHC 397, [2004] B.C.C. 309.

- 751 See *Coaten v PBS Corp* [2006] EWHC 1781, [2006] 3 E.G.L.R. 43 (agreement held to be an option, not a right of pre-emption, as the exercise of the right conferred by it on the grantee imposed on the grantor an “immediate obligation to sell … if [the grantee] wished that to happen” (at [35])).
- 752 *Coaten v PBS Corp* [2006] EWHC 1781 at [16], [23]; *Speciality Shops Ltd v Yorkshire & Metropolitan Estates Ltd* [2002] EWHC 2969, [2003] 2 P. & C.R. 410 at [28]; for other types of rights of pre-emption, in which the offer comes from the grantee, see [2002] EWHC 2969 at [26], [27]. For the distinction between options and rights of pre-emption, see also *Tiffany Investments Ltd v Bircham & Co Nominees (No.2)* [2003] EWCA Civ 1759, [2002] 2 P. & C.R. 10 and *Coaten v PBS Corp* [2006] EWHC 1781, [2006] 3 E.G.L.R. 43 at [35].
- 753 Similarly, a “lock-out” agreement does not bind the promisor to sell to the promisee; it merely restricts his freedom to sell to someone else: see *Tye v House* [1997] 2 E.G.L.R. 171.
- 754 *Smith v Morgan* [1971] 1 W.L.R. 803; cf. *Snelling v John G. Snelling Ltd* [1973] 1 Q.B. 87, 93; *Fraser v Thames Television Ltd* [1984] Q.B. 44, 57; *Miller v Lakefield Estates Ltd, The Times*, 16 May 1988; *Astra Zeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm) at [30].
- 755 See *Fraser v Thames Television Ltd* [1984] Q.B. 44.
- 756 *Brown v Gould* [1972] Ch. 53, 57–58; cf. *Smith v Morgan* [1971] 1 W.L.R. 803, 807; *Snelling v John G. Snelling Ltd* [1973] 1 Q.B. 87, 93; *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd’s Rep. 205, 210; *Global Container Lines Ltd v State Black Sea Shipping Co* [1999] 1 Lloyd’s Rep. 127, 155; *Scammell v Dicker* [2005] EWCA Civ 405, [2005] 3 All E.R. 838 at [31], [40]; *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 Lloyd’s Rep. 68 at [54] (and see para.4-152 above and para.4-189 below); *Astra Zeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm) at [31]; *Re Lehman Brothers International (Europe) (In Administration)* [2012] EWHC 2997 (Ch) at [193].
- 757 [1934] 2 K.B. 1.
- 758 cf. *British Bank for Foreign Trade v Novinex* [1949] 1 K.B. 623; *Beer v Bowden* [1981] 1 W.L.R. 522; *Thomas Bates & Son Ltd v Wyndham’s (Lingerie) Ltd* [1981] 1 W.L.R. 505, 518–519; *Tropwood AG of Zug v Jade Enterprises (The Tropwind)* [1982] 1 Lloyd’s Rep. 232, 236; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd’s Rep. 601; *Granit SA v Benship International SA* [1994] 1 Lloyd’s Rep. 526; *Mitsui Babcock Engineering Ltd v John Brown Engineering Ltd* (1996) 51 Const. L.R. 129; *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd’s Rep. 76; for further proceedings, see [2002] EWHC 2210 (Comm), [2003] 1 Lloyd’s Rep. 1 and [2003] EWCA Civ 1031, [2003] 2 All E.R. (Comm) 640.
- 759 [1934] 2 K.B. 17; above, para.4-173.
- 760 cf. *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD (No.3)* [2003] EWCA Civ 1031, [2003] 2 All E.R. (Comm) 640 at [38].
- 761 [1934] 2 K.B. 1, 10; the clause covered disputes as to “the subject-matter or construction of this agreement”, while the arbitration clause in *May & Butcher v R.* covered “disputes with

reference to or arising out of this agreement". For the distinction between the two forms of clause, see *Heyman v Darwins* [1942] A.C. 356, 385, 392. cf. also *Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep. 53; *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1985] 2 Lloyd's Rep. 547; and see *Vosper Thorneycroft Ltd v Ministry of Defence* [1976] 1 Lloyd's Rep. 58 where the existence of a contract was admitted and the arbitration clause referred to "any dispute or difference ...".

- 762 Scrutton LJ said at 7 that he was glad to decide in favour of the claimant "because I do not regard the appellants' [defendants'] contention as an honest one".
- 763 *R.S.T.C.* (1933) 49 L.Q.R. at 316.
- 764 *Foley's case* [1934] 2 K.B. 1 was approved by the House of Lords in *G. Scammell & Nephew Ltd v Ouston* [1941] A.C. 251.
- ⑦65 [1992] 2 A.C. 128; *Neill* (1992) 108 L.Q.R. 405.
- ⑦66 *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891 at [121].
- ⑦67 [2005] EWCA Civ 891 at [120].
- ⑦68 [2005] EWCA Civ 891 at [120].
- ⑦69 [2005] EWCA Civ 891 at [121].
- ⑦70 [2005] EWCA Civ 891 at [117]. Likewise, in *Tramtrack Croydon Ltd v London Bus Services Ltd* [2006] EWCA Civ 1743, the good faith obligation was enforced since it was not abstract but linked to requirements of reasonableness and a mechanism for making the determination.
- ⑦71 [2005] EWCA Civ 891 at [119]. See also *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* [2021] EWHC 3015 (Ch) at [100].
- 772 *Emirates Trading Agency v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), [2015] 1 W.L.R. 1145 at [63]–[64].
- 773 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601, 619.
- 774 Above, paras 4-147—4-150; below, para.4-188; or by imposing on one party the duty to resolve the uncertainty: below, para.4-189; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601.
- 775 Though this point is not decisive: see above, para.4-173 (note).
- 776 (1991) S.L.T. 523.
- 777 *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC 507 (Ch), [2019] 2 All E.R. (Comm) 191.
- 778 *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC 507 (Ch), [2019] 2 All E.R. (Comm) 191 at [98]. And see *Morton v Morton* [1942] 1 All E.R. 273.
- 779 [2010] UKSC 14, [2010] 1 W.L.R. 753.
- 780 [2010] UKSC 14 at [61].

- 781 [2010] UKSC 14 at [61]. And see *MRI Trading AG v Erdenet Mining Corp LLC* [2013] EWCA Civ 156, [2013] 1 Lloyd's Rep. 638. In that case a "Settlement Agreement" left a number of issues (such as shipping schedules, treatment charges (TC) and refining charges (RC)) "to be agreed" between the parties. Tomlinson LJ held the settlement to be enforceable since "the language used by the parties" showed that "they did not intend that" "they should remain free to agree or disagree" about the points which were "to be agreed"; rather, a term was "to be implied that the TC / RC and shipping schedule shall be reasonable, and that in the event of any dispute ... [the matter was] to be determined by arbitration" (at [19]). At [20]–[22] Tomlinson LJ expressed his agreement with Eder J who had, in the court below [2012] EWHC 1988, [2012] 2 Lloyd's Rep. 638 at [30] and [31] relied on the mandatory language and other expressions used by the parties to show that the parties intended the agreements in question to be legally binding. For the application of the standard of reasonableness, cf. para.4-175 (note). See also *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] 1 All E.R. (Comm) 513 at [61], [64], where acceptance of an offer (see paras 4-003, 4-032) was held to have concluded a contract even though the acceptance envisaged further "fine tuning" of detailed terms.
- 782 [2017] SGCA 64, [2018] 1 Lloyd's Rep. 316 at [41]–[57], [61].
- 783 See below para.4-196.
- 784 *Gliksten & Son Ltd v State Assurance Co* (1922) 10 Ll.L. Rep. 604; cf. *Marine Insurance Act* 1906 s.31(2); and *American Airline Inc v Hope* [1973] 1 Lloyd's Rep. 233; affirmed [1974] 2 Lloyd's Rep. 301 ("at an additional premium and geographical area to be agreed").
- 785 e.g. *Shakleford's Case* (1866) L.R. 1 Ch. App. 567; *Bertel v Neveux* (1878) 39 L.T. 257; *Loftus v Roberts* (1902) 18 T.L.R. 532; *Hofflinghouse SpA v C-Trade SA (The Intra Transporter)* [1986] 2 Lloyd's Rep. 132; *Pagnan SpA v Granaria BV* [1986] 2 Lloyd's Rep. 547; *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] EWCA Civ 485, (2001) 76 Con. L.R. 224 at [35]; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66 at [40] ("It is not commercially sensible to suppose that the parties can have intended to enter into a contract of this size for sulphur of indeterminate quantity, to be delivered over an indeterminate period and with no provision as to payment." At a later stage an agreement not open to this objection was reached: see at [48]).
- 786 *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd's Rep. 547; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [223]; affirmed without further reference to this point [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 (for this case, see also above, para.4-006 (note)); *Mahmood v The Big Bus Co* [2017] EWHC 3582 (QB) at [30] where Laing J held that the claimant had a real prospect of showing that a "Head of Agreement" comprised of both terms dealing with the shape of the parties' future joint venture agreement, and other clauses that "govern and are intended to govern in a binding way" the parties' relationship, which "would continue to exist unless and until the joint venture agreement had been entered into".
- 787 *Openwork Ltd v Forte* [2018] EWCA Civ 783 at [24]–[28], [30]–[33].
- 788 (1932) 147 L.T. 503; cf. *Miller v F.A. Sadd & Son Ltd* [1981] 3 All E.R. 265; *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD (No.3)* [2003] 1 Lloyd's Rep. 1 at [161]–[165]; affirmed [2003] EWCA Civ 1031, [2003] 2 All E.R. (Comm) 640 at [36]–[41].

- 789 cf. *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47, [2011] 1 All E.R. 175 for a difficult question of construction arising from the obscurity of a formula by which the price at which an option to purchase became exercisable was to be determined. The Supreme Court's decision was unanimous with regard to the outcome but (arguably) not with respect to the reasons for that outcome.
- 790 *Brown v Gould* [1972] Ch. 53.
- 791 *Didymi Corp v Atlantic Lines & Navigation Co Inc* [1987] 2 Lloyd's Rep. 166, 169; *Reynolds* (1988) 104 L.Q.R. 353; affirmed [1988] 2 Lloyd's Rep. 108; cf. below, para.4-187.
- 792 At 117.
- 793 *Gillatt v Sky Television Ltd* [2000] 1 All E.R. (Comm) 461.
- 794 *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2005] EWCA Civ 1287; [2005] 2 Lloyd's Rep. 597; below para.4-187.
- 795 The requirement of certainty may be satisfied even though the operation of the machinery still lay in the future when the agreement was made. In *Anderson v London Fire and Emergency Planning Authority* [2012] I.R.L.R. 888, EAT, a collective agreement incorporated into individual employment contracts (see para.4-229) provided for pay to be increased by 2.5 per cent or by the amount of a National Joint Committee (NJC) settlement plus 1 per cent. The fact that the agreement left open which of these two alternatives was to apply did not deprive it of contractual force. Maurice Kay LJ said at [9], it "was an agreement for pay to be determined in accordance with agreed terms, properly construed". Nor did the existence of choice render the agreement too uncertain to be enforced if (as was the case here) "the choices are clear" (at [10]). *Machinery* for resolving matters left open must be distinguished from *mechanism* in the sense of an agreed formula for determining the price (or other matters): e.g. where work is done on a "cost plus" basis. The purpose of such a "mechanism" is not to resolve matters originally left open. The already agreed mechanism merely has to be *applied* to determine the matter governed by it. It is in this sense that the word "mechanism" is used in *Coaten v PBX Corp* [2006] EWHC 1781 (Ch), [2006] 3 E.G.L.R. 43 at [13].
- 796 *Lombard Tricity Finance Ltd v Paton* [1989] 1 All E.R. 918. Such terms may be unenforceable for unfairness under the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) reg.5(5) and Sch.2 para.2(b). These Regulations are replaced by the Consumer Rights Act 2015: s.75 and Sch.4 para.34, s.63 and Sch.2 paras 11, 22–24.
- 797 *Paragon Finance Ltd v Staunton* [2001] EWCA Civ 1466, [2001] 1 W.L.R. 685 at [36]; the power (to maintain interest rates at a level above that charged by other lenders) had in that case been validly exercised. For similar restrictions on the exercise of contractually reserved discretions, see also *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [48] (below, paras 4-226—4-227); cf. *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151, [2007] 2 All E.R. (Comm) 825; *McCarthy v McCarthy & Stone Plc* [2007] EWCA Civ 664, [2008] 1 All E.R. (Comm) 221 at [54]; *Socimer International Bank Ltd v Standard Bank (London) Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558 at [60], [66]; *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394 at [57] (where one party's contractual rights depend, at least to some extent, on the exercise by the other of a discretion, then it is "implied that the exercise of discretion shall not be carried out arbitrarily or in bad faith").

- 798 *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas) [1993] 2 Lloyd's Rep. 445*. See also the *Anderson case [2012] I.R.L.R. 888* at [10], an employment contract was not deprived of contractual force by a provision for pay to be increased by 2.5 per cent or the amount of a National Joint Committee (NJC) settlement plus 1 per cent; the agreement gave the employer a choice between two methods of calculating the pay increases (at [25]; see also [28], [32]).
- 799 *Halpern v Halpern [2007] EWCA Civ 291, [2007] 3 All E.R. 478* at [50].
- 800 *Bateman v Asda Stores Ltd [2010] I.R.L.R. 370* (where the question was not whether a contract had been made, but was whether an undoubtedly existing contract had been varied).
- 801 *Arcos Ltd v Aronson (1930) 36 Ll.L. Rep. 108*; cf. *Campbell v Edwards [1976] 1 W.L.R. 403*; *Buber v Kenwood Mfg Co Ltd [1978] 1 Lloyd's Rep. 175*; *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd [1989] 1 Lloyd's Rep. 205*.
- 802 *Cable & Wireless Plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm), [2002] 2 All E.R. (Comm) 1041*; *Alstom Signalling Ltd v Jarvis Facilities Ltd [2004] EWHC 1232, 95 Con. L.R. 55*; *Holloway v Chancery Mead Ltd [2007] EWHC 2495 (TCC), [2008] 1 All E.R. (Comm) 653* at [66]–[85].
- 803 *Halpern v Halpern [2007] EWCA Civ 291, [2007] 3 All E.R. 478* at [50] (“machinery for valuation”).
- 804 *Premier Telecom Communications Group Ltd v Webb [2014] EWCA Civ 994* (“expert valuer”).
- 805 Sale of Goods Act 1979 s.9(1); cf. *Pym v Campbell (1856) 6 E. & B. 370, [1982] 1 A.C. 444*; *Robertshaw (1982) 46 M.L.R. at 493*.
- 806 *Re Malpas [1985] Ch. 42, 50*; cf. *Tito v Waddell (No.2) [1877] Ch. 106, 314*; *Didymi Corp v Atlantic Lines & Navigation Co Ltd [1988] 2 Lloyd's Rep. 108, 115*.
- 808 i.e. not if it is “an integral and essential part of the definition of the payments to be made”: *Gillatt v Sky Television Ltd [2000] 1 All E.R. (Comm) 461* at 419. In that case, the machinery was of this kind so that, neither party having taken any steps to bring it into operation, it was held that the court could not intervene by making its own valuation.
- 809 *Herbert v Doyle [2010] EWCA Civ 1095* at [87] (court applying “objective criteria which the parties had agreed” for making a choice left by the contract to one of them, who had failed within a reasonable time to make it). For this case, see also para.6-172 below.
- 810 cf. *Sudbrook Trading Estate Ltd v Eggleton [1982] 1 A.C. 444*.
- 811 As in *Re Malpas*, above; cf. *Royal Bank of Scotland v Jennings [1996] E.G.C.S. 168*; *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA [2011] EWHC 1822 (Ch), [2011] 2 Lloyd's Rep. 538* at [72].
- 812 *Manchester Ship Canal Co Ltd v Environment Agency [2017] EWHC 1340 (QB)*.
- 813 *King v King (1981) 41 P. & C.R. 311*.
- 814 See *Beer v Bowden [1981] 1 W.L.R. 522, 525*.
- 815 *King v King*, above.
- 816 *Beer v Bowden*, above.
- 817 *Beer v Bowden*, above; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 W.L.R. 505*; cf. above, para.4-152.
- 818 See *Brown v Gould [1972] Ch. 53*.

- 819 In *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd*, above, the lease was rectified to include such a term.
- 820 *Weller v Akehurst [1981] 3 All E.R. 411* (where the rent review clause was invoked too late and time was expressly made of the essence of the contract); contrast *Metrolands Investment Ltd v J.H. Dewhurst Ltd [1986] 3 All E.R. 659* (where time was not of the essence).
- 821 *Welsh Development Agency v Export Finance Co Ltd [1992] B.C.L.C. 148.*

## Section 9. - Certainty of Terms

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 9. - Certainty of Terms

### Requirement of certainty

<sup>185</sup>

An agreement may lack contractual force because it is so vague or uncertain that no definite meaning can be given to it without adding further terms. For example, in *G. Scammell & Nephew Ltd v Ouston*,<sup>822</sup> the House of Lords held that an agreement to acquire goods “on hire-purchase” was too vague to be enforced since there were many kinds of hire-purchase agreements in widely different terms, so that it was impossible to specify the terms on which the parties had agreed. In *Blue v Ashley*<sup>823</sup> the court denied the existence of an enforceable contract because, inter alia, the alleged agreement to pay £15 million if the claimant raised the company share price to £8 failed to stipulate the period for achieving this. There was no objective standard the court could invoke to imply that the obligation would be performed within a reasonable period.

<sup>824</sup>

**U** In *Kyte v Revenue and Customs Commissioners*<sup>825</sup> the alleged contract was held to be “insufficiently precise” to be a binding settlement of the claimant’s tax liabilities, given that the “claimant’s tax liabilities were plainly complex”, the claimant sought a “settlement deed”, and the reference to the “the claimant’s tax affairs being ‘brought up to date’ [being] far too general to be of assistance”. In *George v Revenue and Customs Commissioners*,<sup>826</sup> an oral agreement for the enfranchisement of a party’s shares in a company was held to be insufficiently certain, as it did not specify, inter alia, the classes of shares to be enfranchised, and this could not be implied due to uncertainty. In *Broomhead v National Westminster Bank Plc*,<sup>827</sup> a bank’s alleged promise to renew overdraft facilities to if, inter alia, the customer “didn’t do anything silly” was too vague to have contractual effect. Similar reasoning may be applied where the agreement is expressed to

be subject to a condition that depends on the satisfaction of one of the parties<sup>828</sup>; the problems arising from such provisions are discussed in paras 4-201—4-202, below.

## Qualifications of the requirement of certainty<sup>829</sup>

**D** 186 The courts do not expect commercial documents to be drafted with strict legal precision. The cases provide many examples of judicial awareness of the danger that too strict an application of the requirement of certainty could result in the striking down of agreements intended by the parties to have binding force. The courts are reluctant to reach such a conclusion, particularly where the parties have acted on the agreement.

830

**U** 831 As Lord Wright said in *Hillas & Co Ltd v Arcos Ltd*

832

**U** :

“Businessmen 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*. 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 they are appropriate implications of law.”

In addition, so long as there is no “conceptual uncertainty”, it is no bar to finding a binding agreement that the matter may be difficult “to resolve in practice”; the latter is “a matter for interpretation”.

833

**U** Rix LJ said

834

**U** :

“... it is simply a non sequitur to argue from a disagreement about the meaning and effect of a contract to its legal uncertainty ... For that to occur—and it very rarely occurs

—it has to be legally or practically impossible to give to the parties' agreement any sensible content ... that is certain which can be rendered certain ...”

In accordance with these principles, the courts have developed a number of qualifications to the requirement of certainty; these qualifications are stated in paras 4-187—4-192, below.

## Custom and trade usage

- <sup>187</sup> Apparent vagueness may be resolved by custom. For example, a contract to load coal at Grimsby “on the terms of the usual colliery guarantee” was upheld on proof of the terms usually contained in such guarantees at Grimsby.<sup>834</sup> It has similarly been held that undertaking to grant a lease of a shop “in prime position” was not too uncertain to be enforced since the phrase was commonly used by persons dealing with shop property, so that its meaning could be determined by expert evidence.<sup>835</sup> On the other hand, agreements “subject to war clause”,<sup>836</sup> “subject to strike and lock-out clause”<sup>837</sup> and “subject to force majeure conditions”<sup>838</sup> have been held too vague, as there was no evidence in any of the cases of any customary or usual form of such clauses or conditions.

## Reasonableness

- <sup>188</sup> In *Hillas & Co Ltd v Arcos Ltd*<sup>839</sup> an agreement for the sale of timber “of fair specification” was made between persons well acquainted with the timber trade. The agreement was held binding on the grounds that, in these circumstances, the standard of reasonableness could be applied to give sufficient certainty to an otherwise vague phrase, since that phrase imported an objective standard for assessing the quality of the goods to be supplied. In contrast, in *Baird Textile Holdings Ltd v Marks & Spencer Plc*<sup>840</sup> the court rejected the claim of a supplier of clothing to a retail chain that there was an implied contract between them not to terminate their long-standing relationship except on reasonable notice. There were “no objective criteria by which the court could assess what would be reasonable either as to quantity or price”<sup>841</sup> : hence none of the essential terms governing the supply of the goods could be determined by such criteria. An agreement to pay a “fair” sum may also lack contractual force where it states that the principles for determining what amounts to such a sum are to be settled by further negotiations between the parties. In one such case,<sup>842</sup> a compromise agreement provided that A should pay to B a “fair” share of certain losses suffered by B and that the parties were to draw up a list of principles by which that “fair” share was to be determined. The description of the share as a “fair” one was said to be “simply the label which the parties put on the outcome which they hoped to achieve. There was no unqualified commitment

to pay a fair share.”<sup>843</sup> The compromise agreement was therefore merely an agreement to agree and had no contractual force.<sup>844</sup>

## Duty to resolve uncertainty

- <sup>189</sup> An agreement containing a vague phrase may be binding because one party is under a duty to resolve the uncertainty. In one case an agreement to sell goods provided for delivery “free on board ... good Danish port”. It was held that the agreement was not too vague: it amounted to a contract under which the buyer was bound to select the port of shipment.<sup>845</sup> Where delivery of goods was to be made “free on truck” in the country of destination and no place for delivery in that country was specified in the contract, it was again held that one of the parties was under a duty to specify that place; though in this case the duty was held to be on the seller since it was he who had made all the necessary arrangements with the ship on which the goods were to be carried to that country.<sup>846</sup> An analogous principle is illustrated by *Durham Tees Valley Airport Ltd v Bmibaby Ltd*<sup>847</sup> where the agreement provided that the defendant airline would support “a minimum ¥2 based aircraft operation ... operating exclusively from” the claimant’s airport. Significant losses were incurred by the airline in the performance of the agreement and it discontinued its operations from the airport. The airline argued that the agreement was too uncertain to be enforced as it specified no minimum number of flights to be undertaken under it and as many operational details (such as the number of flights and their destinations) were left to the airline’s discretion.<sup>848</sup> The Court of Appeal rejected these arguments and held that the agreement was sufficiently certain to be enforced and that the airline was in breach of it. The Court reached this result by construing the airline’s obligation to operate as being one to “fly commercially”<sup>849</sup>; by concluding that “Token flights or a complete absence of any flights (which is this case) clearly would not amount to operating the aircraft”<sup>850</sup>; by invoking the general principle that courts were reluctant to strike down what were obviously intended to be commercial agreements<sup>851</sup>; and by making the point that it was not uncommon for such agreements to give one party or the other “a large degree of discretion” as to the conduct of its operations.<sup>852</sup> This reasoning resembles, but is not identical with, that discussed in para.4-188 above, by which the standard of reasonableness may be applied to give certainty to otherwise vague phrases. The object of the process of construction applied in the present case is, strictly speaking, to give effect to the intention of the parties, while the standard of reasonableness would impose on them an external standard; but in practice the significance of this distinction is reduced by the reference to the commercial context in which the Court construed the obligation to “operate” the aircraft.

## Meaningless and self-contradictory phrases

<sup>190</sup>

The court will make considerable efforts to give meaning to an apparently meaningless phrase<sup>853</sup>; but even where these efforts fail, the presence of such phrases does not necessarily vitiate the agreement. In *Nicolene Ltd v Simmonds*<sup>854</sup> steel bars were bought on terms which were perfectly clear except for a clause which provided that the sale was subject to “the usual conditions of acceptance”. There being no such usual conditions, it was held that the phrase was meaningless, but that this did not vitiate the whole contract: the phrase was severable and could be ignored. A self-contradictory clause can be treated in the same way. Thus, where an arbitration clause provided for arbitration of “any dispute” in London and of “any other dispute” in Moscow the court disregarded the clause and determined the dispute itself.<sup>855</sup> Such cases show that the question whether the inclusion of a meaningless clause vitiates the contract, or can be ignored, depends on the importance which the parties may be considered to have attached to it. If it is simply verbiage, not intended to add anything to an otherwise complete agreement, or if it relates to a matter of relatively minor importance, it can be ignored. But if the parties intend it to govern some vital aspect of their relationship its vagueness will vitiate the entire agreement.

## Conflicting provisions

- |91 An agreement is not too uncertain to have contractual force merely because of a conflict between two of its terms if, as is often the case, the conflict can be resolved in the course of the normal adjudication of a contractual dispute. In *Scammell v Dicker*,<sup>856</sup> a consent order relating to a boundary dispute was alleged to be ineffective by reason of a conflict between the words of the order and a plan annexed to it. The Court of Appeal held that the order was not vitiated by uncertainty since it was “for the parties to resolve any disagreement as to interpretation” and if they failed to do so they would “go to tribunals and find the answer”.<sup>857</sup> The uncertainty can in such cases be resolved by the ordinary processes of construction.

## Vagueness in a subsidiary term

- |92 It has been held that vagueness in one of the terms of an agreement did not of itself vitiate the agreement as a whole.<sup>858</sup> The underlying assumption appears to be that the vague term related only to a subsidiary point<sup>859</sup> so that there was no practical difficulty in enforcing the rest of the agreement.

## Extrinsic evidence identifying the subject matter

- |93

Such evidence may cure an element of uncertainty on the face of a document. The point may be illustrated by an hypothetical example given by Lord Scott:

“A contract for the sale of Steart Farm, if in writing, signed by the parties and stating the price, would not lack contractual certainty provided that evidence were available to identify the agricultural unit that constituted Steart Farm.”<sup>860</sup>

## Footnotes

- 822 [1941] A.C. 251, described as “a rare case of uncertainty” in *Scammell v Dicker* [2005] EWCA Civ 405, [2005] 3 All E.R. 838 at [41]. See also *Davies v Davies* (1887) 36 Ch. D. 359; *Kingsley & Keith Ltd v Glynn Bros. (Chemicals) Ltd* [1953] 1 Lloyd’s Rep. 211; *Judge v Crown Leisure Ltd* [2005] EWCA Civ 571, [2005] I.R.L.R. 823 at [23]; *Landmark Brickwork Ltd v Sutcliffe* [2011] EWHC 1239 at [39]; and below, para.4-187 (note).
- 823 [2017] EWHC 1928 (Comm). And see *MacInnes v Gross* [2017] EWHC 46 (QB).
- 824 [2017] EWHC 1928 (Comm) at [136]. And see *Landmark Brickwork Ltd v Sutcliffe* [2011] EWHC 1239 at [39] (a covenant in a contract of employment restricting competition in two named counties and in others “to the south” of them was too uncertain to be enforced); *Christie v Canaccord Genuity Ltd* [2022] EWHC 1130 (QB) at [77] (a business “dangl[ing] the carrot of a prospective award of an indeterminate amount” in an effort to retain staff was not sufficiently certain to be enforced); and *Gray v Simpson Smith* [2022] EWHC 1153 (Ch) at [297]–[299] (putative implied joint venture agreement too “uncertain in its terms … so as to render it unworkable and void”).
- 825 [2018] EWHC 1146 (Ch); [2018] B.T.C. 20 at [62]–[63].
- 826 [2018] UKFTT 509 (TC) at [82] and [84].
- 827 [2018] EWHC 1574 (Ch). It was also unclear over what period the loan would be automatically renewed.
- 828 e.g. *Montreal Gas Co v Vasey* [1900] A.C. 595; *Hofflinghouse & Co Ltd v C. Trade SA (The Intra Transporter)* [1986] 2 Lloyd’s Rep. 132; *Shipping Enterprises Ltd v Eckhart & Co K G (The Nissos Samos)* [1985] 1 Lloyd’s Rep. 378, 385; *Stabilad Ltd v Stephens & Carter Ltd (No.2)* [1999] 2 All E.R. (Comm) 651, 659 (“void for uncertainty”).
- 829 This paragraph was cited with approval in *SK Properties (Midlands) Ltd v Byrne* [2018] UKUT 394 (LC) at [24].
- 830 *Brown v Gould* [1977] Ch. 53, 57–58; *Tito v Waddell (No.2)* [1977] Ch. 106, 314; *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 A.C. 444; *Anangel Atlas Compania Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co (No.2)* [1990] 2 Lloyd’s Rep. 526, 545–6; *Clement v Gibbs* [1996] C.L.Y. 1209; *Hanjin Shipping Co Ltd v Zenith Chartering Corp (The Mercedes Envoy)* [1995] 2 Lloyd’s Rep. 559, 564; *Hackney LBC v*

*Thompson [2001] L. & T. Rep. 7; Alstom Signalling Ltd v Jarvis Facilities Ltd [2004] EWHC 1232, 95 Con. L.R. 55; Whitecap v John H Rundle [2008] EWCA Civ 429 at [22]; Maple Leaf Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 257 at [235], approved on appeal [2010] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788, especially at [22]; Barbudev v Eurocom Cable Management Bulgaria EOOD [2012] EWCA Civ 548 at [32]; Benourad v Compass Plc [2010] EWHC 1882 (QB) at [106(d)]; and cf. TTMI SARL v Statoil SA (*The Sibohelle*) [2011] EWHC 1150 (Comm), [2011] 2 Lloyd's Rep. 222 at [43], [47] (where the reason why the express negotiations had failed to give rise to a contract was not want of certainty but mistake, and the conduct of the parties in performing the transaction nevertheless supported the inference that a contract had been concluded); Dhananiv Crasnianski [2011] EWHC 926 (Comm), [2011] 2 All E.R. (Comm) 799 at [70] (fact that work has been done under the contract a "relevant factor" but not a decisive one, so that in that case no contract had been concluded: below, para.4-220); Vinci Construction UK Ltd v Beumer Group UK Ltd [2017] EWHC 2196 (TCC); Openwork Ltd v Forte [2018] EWCA Civ 783; Abberley v Abberley [2019] EWHC 1564 (Ch) (there was sufficient certainty for a binding contract although technical difficulties resulted in the agreement being handwritten by the mediator, reference to coloured portions of land were recorded by pencil only, and subsequently, the parties attempted to agree further details); Johal v Johal [2021] EWHC 1315 (Ch) (where the claimants had agreed to give up any claims to an interest in the relevant business); Trebisol Sud Ouest SAS v Berkley Finance Ltd [2021] EWHC 2494 (QB) at [94]. The reluctance referred to in the text above may account for the lack of "enthusiasm" with which Dyson LJ and Sir Robin Auld in Schwegppee v Harper [2008] EWCA Civ 442 at [75] and [82] concluded that the agreement in that case was too uncertain to be enforced; and for Ward LJ's dissent in that case.*

•831

(1932) 147 L.T. 503, 514; cf. *Rahcassi Shipping Co v Blue Star Line* [1969] 1 Q.B. 173 (agreement for arbitration "by commercial men and not lawyers" upheld); *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] Q.B. 933; *Tropwood AG of Zug v Jade Enterprises Inc (The Tropwind)* [1981] 1 Lloyd's Rep. 232; *Deutsche Schachtbau und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1990] 1 A.C. 295, 306; reversed on other grounds, at 329 et seq.; *Grace Shipping Inc v C.F. Sharpe (Malaysia) Pte* [1987] 1 Lloyd's Rep. 207; *Didymi Corp v Atlantic Lines & Navigation Co Inc* [1987] 2 Lloyd's Rep. 166; affirmed [1988] 2 Lloyd's Rep. 108 (above, para.4-180); *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Corp (No.2)* [1990] 2 Lloyd's Rep. 526, 546; *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd's Rep. 445, 455; *Scammell v Dicker* [2005] EWCA Civ 405, [2005] 3 All E.R. 838 at [31]; *Halpern v Halpern* [2006] EWHC 603 (Comm), [2006] 2 Lloyd's Rep. 83 at [115], affirmed on this point [2007] EWCA Civ 291, [2007] 3 All E.R. 478 at [50]; *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep. 68 at [54], [88] (paras 4-152 above and 4-189 below); *Astra Zeneca UK Ltd v Albemarle International Corp* [2011] EWHC 1574 (Comm) at [31]; *Trebور Bassett Holdings Ltd v ADT Fire & Security Plc* [2011] EWHC 1936 (TCC), [2011] B.L.R. 661 at [150]; *Re Lehman Brothers International (Europe) (In Administration)* [2012] EWHC 2997 (Ch) at [193]–[196]; *Chaggar v Chaggar*

[2018] EWHC 1203 (QB) at [186]–[198] Morris J set out the general principles for a binding agreement; *Trebisol Sud Ouest SAS v Berkley Finance Ltd* [2021] EWHC 2494 (QB) at [94]. See also *Fridman* (1960) 76 L.Q.R. 521.

•832 *Re Lehman Brothers International (Europe) (In Administration)* [2012] EWHC 2997 (Ch) at [197]–[198]. And see *GLC v Connolly* [1970] 2 Q.B. 100, 108, 110; *Chaggar v Chaggar* [2018] EWHC 1203 (QB) at [187].

•833 *Scammell v Dicker* [2005] EWCA Civ 405 at [30] and [39].

834 *Shamrock S.S. Co v Storey & Co* (1899) 81 L.T. 413; cf. *Hart v Hart* (1881) 18 Ch. D. 670; *Bayham v Phillips Electronics (UK) Ltd*, *The Times*, 19 July 1995 where uncertainty in a long-term health insurance agreement was resolved by reference to circumstances existing at the time of its formation; *Nautica Marine Ltd v Trafigura Trading LLC* [2020] EWHC 1986 (Comm), [2021] 1 All E.R. (Comm) 1157 at [53] where the meaning of “subjects” in an agreement was resolved with reference to the customary usage of “subjects” in the context of a charterparty.

835 *Ashburn Anstalt v Arnold* [1989] Ch. 1, 27, overruled, on another ground, in *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 A.C. 386.

836 *Bishop & Baxter Ltd v Anglo-Eastern Trading Co* [1944] K.B. 12.

837 *Love & Stewart Ltd v S. Instone Ltd* (1917) 33 T.L.R. 475.

838 *British Electrical, etc., Industries v Patley Pressings Ltd* [1953] 1 W.L.R. 280.

839 (1932) 147 L.T. 503 (and see above, para.4-180); *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 Q.B. 699; cf. *G.L.C. v Connolly* [1970] 2 Q.B. 100; *Finchbourne v Rodriguez* [1976] 3 All E.R. 581; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601; *Malcolm v Chancellor, Masters and Scholars of the University of Oxford*, *The Times*, 19 December 1990; *Hackney LBC v Thompson* [2001] L.&T. Rep. 7 (agreement to pay “the due proportion of the reasonably estimated amount” held to impose an obligation to pay a “fair and reasonable” proportion); *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep. 76 (above, para.4-152); *Scammell v Dicker* [2005] EWCA Civ 405, [2005] All E.R. 838 at [42] (“reasonably certain”); *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) at [64], above paras 4-146—4-151, where the standard of reasonableness was invoked to deal with the failure of an agreement to specify the time of performance; *Furmans Electrical Contractors v Elecref Ltd* [2009] EWCA Civ 170 at [33], where the standard of reasonableness was used to make good the parties’ failure to specify the number of hours per day for which services were to be supplied; *K G Bunkergesellschaft für Mineralole m b h [sic] v Petroplus Marketing AG (The Mercini Lady)* [2009] EWHC 1088 (Comm), [2009] 2 All E.R. (Comm) 827 at [40], [41] (implied term not too uncertain because it made use of the standard of reasonableness; on appeal it was held, for other reasons, that no term such as that alleged could be implied: [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442). cf. the position where the terms of the agreement are such as to negative contractual intention: below, paras 4-226—4-227.

840 [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737.

- 841 [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 at [30]; cf. *Schweppes v Harper* [2008] EWCA Civ 442 at [72] (“the concept of reasonable finance is too uncertain to be given any practical meaning”), and at [66], [80], [81]. In that case, C had agreed with D to obtain an annulment of D’s bankruptcy in return for a fee of £50,000 to be paid by D. It was a “fundamental element” (at [59]) of the agreement that C should obtain the necessary finance from a third party. It was held by a majority that the agreement was too uncertain to have contractual force as the agreement did not specify the amount of the loan or the terms of repayment; and it was impossible for the court to determine these matters by applying the standard of reasonableness; and see below, para.4-216. See also *Dhanani v Crasnianski* [2011] EWHC 926, [2011] 2 All E.R. (Comm) 799 at [105] (“no objective criteria”).
- 842 *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2005] EWCA Civ 806, [2005] 2 Lloyd’s Rep. 597.
- 843 *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2005] EWCA Civ 806 at [24].
- 844 See above, para.4-173.
- 845 *David T. Boyd & Co v Louis Louca* [1973] 1 Lloyd’s Rep. 209; cf. *Siew Soon Wah v Yong Tong Hong* [1973] A.C. 836; *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 1 W.L.R. 591, above, para.4-145; *Palmer v East and North Herefordshire NHS Trust* [2006] EWHC 1997, [2006] Lloyd’s Rep. Med. 427 where an agreement between a consultant surgeon and the defendant Trust provided for his being found a “suitable medical attachment” at another hospital. Failure to identify that hospital in the agreement did not deprive it of contractual force since the identification was a contingency to be satisfied in the performance of the contract.
- 846 *Bulk Trading Corp Ltd v Zenziper Grains & Feedstuffs* [2001] 1 Lloyd’s Rep. 357.
- 847 [2010] EWCA Civ 485, [2011] 1 Lloyd’s Rep. 68.
- 848 [2010] EWCA Civ 485 at [90].
- 849 [2010] EWCA Civ 485 at [57].
- 850 [2010] EWCA Civ 485 at [57].
- 851 [2010] EWCA Civ 485 at [54].
- 852 [2010] EWCA Civ 485 at [91].
- 853 *Tropwood AG of Zug v Jade Enterprises Inc (The Tropwind)* [1982] 1 Lloyd’s Rep. 232.
- 854 [1953] 1 Q.B. 543; discussed in *Heisler v Anglo-Dal Ltd* [1954] 1 W.L.R. 1273 and applied in *Michael Richards Properties Ltd v St Saviour’s* [1975] 3 All E.R. 416; see also *Slater v Raw, The Times*, 15 October 1977.
- 855 *E.J.R. Lovelock v Exportles* [1968] 1 Lloyd’s Rep. 163. cf. *Star Shipping A/S v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd’s Rep. 445 where a clause for “arbitration in Beijing or London in defendant’s option” was upheld.
- 856 [2005] EWCA Civ 405, [2005] 3 All E.R. 838.
- 857 [2005] EWCA Civ 405 at [31].
- 858 *Pena v Dale* [2003] EWHC 3166 (Ch), [2004] 2 B.C.L.C. at 508 at [96].
- 859 In *Pena v Dale* [2003] EWHC 3166 (Ch) an option agreement which was otherwise clear provided that the grantor would “endeavour to issue these options ... in the most tax efficient

manner". The vagueness of this term was held to be no bar to the enforcement of the agreement.

- 860 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [18]. See also *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [73] and *Alhamrani v Alhamrani* [2014] UKPC 37 at [23]–[24] where the Privy Council said that "evidence of the context or factual matrix is admissible on the question whether the agreement is ambiguous". If it is ambiguous, the court would then consider all permissible evidence, including custom, which might bear on the underlying question of what the parties intended to agree.

## **(a) - Classification**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 10. - Conditional Agreements**

### **(a) - Classification**

#### **Introductory**

- 194 An agreement is conditional if its operation depends on an event which is not certain to occur. Discussions of this topic are made difficult by the fact that in the law of contract the word “condition” bears many senses: it is “a chameleon-like word which takes on its meaning from its surroundings”.<sup>861</sup> At this stage, we are concerned with only one of these meanings; but to clear the ground it is necessary to draw a number of preliminary distinctions.

#### **Contingent and promissory conditions**

- 195 The word *condition* may refer either to an *event*, or to a *term* of a contract (as in the phrase “conditions of sale”<sup>862</sup>). Where *condition* refers to an event, that event may be one of the following.

(1) It may refer to an occurrence which neither party undertakes to bring about. Where, for example, a contract requires A to work for B, and B to pay A £50, “if it rains tomorrow”, the obligations of both parties are contingent on the happening of the specified event. This may therefore be described as a *contingent* condition.

(2) It may refer to the performance by one party of his undertaking. Where, for example, A agrees to work for B at a weekly wage payable at the end of the week, the contract is immediately binding on both parties, but B is not liable to pay until A has performed his

promise to work. Such performance is a condition of B's liability, and, as A has promised to render it, the condition may be described as *promissory*.<sup>863</sup>

(3) An intermediate situation arises in the case of a unilateral contract, in which performance by the promisor becomes due on the performance by the promisee of the stipulated act (such as walking to York) or abstention (such as not smoking for a year), which is in the control of the promisee.<sup>864</sup> Since it follows from the nature of such a contract that the promisee has not promised to render the stipulated performance, the condition on which his entitlement depends<sup>865</sup> is properly classified as contingent. It differs from (1) because the condition there is contingent on some event which is neither party's control, while the condition in (3) is contingent on an event within the promisee's control.

Our concern here is with contingent conditions.

## Conditions precedent and subsequent

- <sup>196</sup> Contingent conditions may be precedent or subsequent.<sup>866</sup> A condition is precedent if it provides that the contract is not to be binding until the specified event occurs. A condition is subsequent if it provides that a previously binding contract is to determine on the occurrence of the specified event: e.g. where A contracts to pay an allowance to B until B marries.<sup>867</sup> A provision entitling a party to terminate a contract on the occurrence or non-occurrence of a specified event<sup>868</sup> would likewise amount to, or give rise, to a condition subsequent. Whether a condition precedent or subsequent exists is a matter of interpretation.<sup>869</sup> French law makes the same distinction.<sup>870</sup> A condition precedent is known as a "suspensive" condition; when it is fulfilled, the contract becomes unconditional. Conditions subsequent are also termed "resolutive" conditions. Fulfilment of a resolutive condition destroys the obligation.

## Footnotes

861 *Skips A/S Nordheim v Petrofina SA (The Varennia) [1984] Q.B. 599, 618.*

862 *Property and Bloodstock Ltd v Emerton [1968] Ch. 94, 118.*

863 For the distinction between *promissory* and *contingent* condition see Chalmers, Sale of Goods, 18th edn (1981), App.2, Note A; *Roadworks (1952) Ltd v Charman [1994] 2 Lloyd's Rep. 99, 103*; *Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd's Rep. 209, 215, 218*. The discussion in para.2-149 of the 30th edition of this book (para.4-195 of this edition) is cited with apparent approval in *UK Power GmbH v Kuok Oils and Grains Pte [2009] EWHC 1940, [2009] 2 Lloyd's Rep.* at [14]; see also at [15], [22]; it was there held that stipulations to requiring (1) a buyer of goods to open a transferable letter of credit and (2) the seller to provide a "Proof of Product" certificate were promissory, as opposed to contingent, conditions. Similarly, in *Vitol SA v Conoil Plc [2009] EWHC 1144 (Comm), [2009] 2 Lloyd's*

*Rep. 466* a contract of sale required a buyer to pay by letter of credit and provided that the seller was not obliged to discharge the goods before receipt of the letter; and it was held that the issue of the letter of credit was not “a condition precedent to the contract becoming enforceable” (at [16]). In the terminology of paras 4-195 and 4-196 of the text above, it was a promissory, not a contingent, condition.

- 864 See above, para.4-102.
- 865 e.g. *Soulsbury v Soulsbury* [2007] EWCA Civ 969 at [50]; above, para.4-105; below, para.4-196.
- 866 In *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 580 a condition there under discussion was said to be “a true condition subsequent or suspensive condition”. “Subsequent” here seems to be a misprint for “precedent”. Conversely, in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 A.C. 353 a time charter contained a war clause by which each party was to have a right to cancel if war broke out between specified countries. This clause was described at [59], [74] and [82] as a “suspensive” condition. With great respect, it is submitted that a clause of this kind (entitling parties to bring contractual obligations to an end) is more properly described as resolutive. For difficulties in drawing the distinction between the two types of condition, see Holmes (The Common Law (1881), 371); Treitel, Remedies for Breach of Contract (1988), 263–264, and below, para.4-200 (note) and para.4-199 (notes). cf. *Soulsbury v Soulsbury* [2007] EWCA Civ 969, above, para.4-105, where the analysis of the conditions as subsequent seems incorrect. For example, see *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd (The “Pan Gold”)* [2017] SGCA 64, [2018] 1 Lloyd's Rep. 316.
- 867 cf. *Brown v Knowsley BC* [1986] I.R.L.R. 102 (appointment to “last only as long as sufficient funds were provided” from specified sources); (semble) *Gyllenhammar & Partners International v Sour Brodogradevna Industria* [1989] 2 Lloyd's Rep. 403 (contract to “become null and void” if certain consents were not obtained) and *Jameson v CEGB* [2000] 1 A.C. 455 at 477 (settlement of tort claim immediately binding but subject to implied resolutive condition that it was to become void if the agreed amount was not paid); *Covington Marine Corp v Xiamen Shipbuilding Industry Corp* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 748 at [49] (contract to be “automatically rescinded” if parties to a shipbuilding contract could not reach agreement within 20 days as to the supplier of the main engine). The distinction between conditions precedent and subsequent was criticised by Holmes (The Common Law (1881), 371); for discussion of this criticism, see Treitel, Remedies for Breach of Contract (1988), 263–264. English authority recognises that the distinction is by no means always clear cut: see below, para.4-199 (note). cf. *Soulsbury v Soulsbury* [2007] EWCA Civ 969, above, para.4-105, where the analysis of the conditions as subsequent seems incorrect.
- 868 See the further provision in the contract in the *Vitol* case (above, para.4-195 (note)) giving the seller the right to terminate the contract if the letter of credit were not made operative by a specified date.
- 869 See *Peacock v Imagine Property Developments Ltd* [2018] EWHC 1113 (TCC) where payment of the deposit was found not to be a condition precedent to the valid exercise of an option to purchase, but merely payable “on” such exercise.

870 French Code Civil art.1304.

---

End of Document

© 2022 SWEET & MAXWELL

## **(b) - Degrees of Obligation**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 10. - Conditional Agreements

**(b) - Degrees of Obligation**

### **Effects of agreements subject to contingent conditions precedent: in general**

- <sup>197</sup> Where an agreement is subject to a contingent condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by them<sup>871</sup>: for example, a seller is not bound to deliver and a buyer is not bound to pay. Nor, in such a case, does either party undertake that the condition will occur. But an agreement subject to such a condition may impose some degree of obligation on both parties or on one of them. Whether it has this effect, and if so what degree of obligation is imposed, depends on the true construction of the term specifying condition.<sup>872</sup> Various possible degrees of obligation are discussed in paras 4-198 —4-203 below.

### **Unrestricted right to withdraw**

- <sup>198</sup> One possibility is that, before the event occurs, each party is free to withdraw from the agreement. In *Pym v Campbell*<sup>873</sup> an agreement for the sale of a patent was executed, but the parties at the same time agreed that it should not “be the agreement” unless a third party approved of the invention. He did not approve, and it was held that the buyer was not liable for refusing to perform. The written agreement was “not an agreement at all”.<sup>874</sup> If this is taken literally, either party could have withdrawn even before the third party had given his opinion.

## Restricted right to withdraw

- !99 A second possibility is that, before the event occurs, the main obligations have not accrued; but that, so long as the event can still occur, one (or both) of the parties cannot withdraw.<sup>875</sup> Thus in *Smith v Butler*<sup>876</sup> A bought land from B on condition that a loan to B (secured by a mortgage on the premises) would be transferred to A.<sup>877</sup> It was held that A could not withdraw before the time fixed for completion: he was bound to wait until then to see whether B could arrange the transfer. However, if it becomes clear that the condition has not occurred, or that it can no longer occur, within the time specified in the contract,<sup>878</sup> the parties will be under no further obligations under the contract. In such a case, the effect of the non-occurrence of the condition is that the parties are “no longer bound”<sup>879</sup> by the contract, or that the contract is “discharged”.<sup>880</sup> What the parties have called a “condition precedent” can thus operate as, or have the effect of, a condition subsequent.<sup>881</sup> The parties’ terminology makes no practical difference; “condition precedent” is sometimes used in the sense of a condition subsequent<sup>882</sup>; and there is no legal difference between “sale on approval” and “sale or return”.<sup>883</sup>

## Duty not to prevent occurrence of the event

- !00 A third possibility is that, before the event occurs, the main obligations have not accrued; but that in the meantime neither party must do anything to prevent the occurrence of that event. Thus, in *Mackay v Dick*<sup>884</sup> an excavating machine was sold on condition that it could excavate at a specified rate on the buyer’s property. The buyer’s refusal to provide facilities for a proper trial was held to be a breach. Similarly, the seller would have been in breach, had he refused to subject the machine to the proper test. A party’s refusal to perform an implied obligation to co-operate with the other has been held to be actionable on the same principle.<sup>885</sup> That principle is further illustrated by a case<sup>886</sup> in which a professional footballer was transferred for a fee, part of which was to be paid only after he had scored 20 goals. Before he had done so, the new club dropped him from their first team, and they were held to be in breach as they had not given the player a reasonable opportunity to score the 20 goals. The duty not to prevent the occurrence of the condition has been explained as resting on an implied term and this explanation limits the scope of the duty in a number of ways. For example, the implied term may be only to the effect that a party will not *deliberately* prevent the occurrence of the condition<sup>887</sup>; or (even more narrowly) that he will not *wrongfully* do so.<sup>888</sup> The latter type of implication may allow a party to engage in certain kinds of deliberate prevention but not in others: for example, it may allow a company which has promised an employee the opportunity of earning a bonus to deprive him of that opportunity by going out of business, but not, in general, by simply dismissing him, before the bonus has become due<sup>889</sup>;

but this general rule may be displaced by an express term of the contract: e.g. by one providing that the employee “must be employed by the [employer] in order to receive the bonus”.<sup>890</sup>

## Condition of “satisfaction”

- !01 The possibility of excluding the implied term discussed in para.4-199 above by an express contrary provision<sup>891</sup> is further illustrated by a provision making the operation of a contract depend on the “satisfaction” of one of the parties with the subject-matter or other aspects relating to the other’s performance.<sup>892</sup> Thus it has been held that there was no contract where a house was bought “subject to satisfactory mortgage”<sup>893</sup>; and where a boat was bought “subject to satisfactory survey”<sup>894</sup> it was held that the buyer was not bound if he expressed his dissatisfaction,<sup>895</sup> in spite of the fact that such expression was a deliberate act on his part which prevented the occurrence of the condition. The same is true where goods are bought on approval and the buyer does not approve them,<sup>896</sup> and where an offer of employment is made “subject to satisfactory references”, and the prospective employer does not regard the references as satisfactory.<sup>897</sup>
- !02 There is some apparent conflict in the authorities on the question whether the law imposes any restriction on the freedom of action of the party on whose satisfaction the operation of the contract depends. In one case<sup>898</sup> a proposed royalty agreement relating to the use by a manufacturer of an invention was “subject to detailed evaluation of production and marketing feasibility” by the manufacturer. It was held that his discretion whether to enter into the contract was “unfettered by any obligation to act reasonably or in good faith”<sup>899</sup> and that, as his satisfaction had not been communicated<sup>900</sup> to the other party, the agreement had not acquired contractual force. On the other hand, where a ship was sold “subject to satisfactory completion of two trial voyages” it was said that such a stipulation was to be construed as “subject to bona fides”.<sup>901</sup> The distinction between the two lines of cases turns, ultimately, on the construction of the agreement. Even if this requires the discretion to be exercised in good faith, it does not follow that it must be exercised reasonably; the matter may be left to the relevant party’s “subjective decision”.<sup>902</sup> It is enough that:

“... the discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can properly be categorised as perverse, the courts will not intervene.”<sup>903</sup>

It has also been held that the party on whose satisfaction the operation of the contract depends must at least provide facilities for, or not impede, the inspection referred to in the agreement.<sup>904</sup>

Of course if the result of the inspection is unsatisfactory, the principal obligation of the contract will not take effect.<sup>905</sup>

## Duty of reasonable diligence to bring about the event

- <sup>103</sup> A fourth possibility is that, before the event occurs, the main obligations do not accrue but that one of the parties undertakes to use reasonable efforts to bring the event about (without absolutely undertaking that his efforts will succeed). This construction was applied, for instance, where land was sold subject to the condition that the purchaser should obtain planning permission to use the land as a transport depot: he was bound to make reasonable efforts to obtain the permission, but he was free from liability when those efforts failed.<sup>906</sup> Similarly, where goods are sold “subject to export (or import) licence”, the party whose duty it is to obtain the licence<sup>907</sup> does not *prima facie* promise absolutely that a licence will be obtained<sup>908</sup>; but only undertakes to make reasonable efforts to that end.<sup>909</sup> The principal obligations to buy and sell will not take effect if no licence is obtained<sup>910</sup>; but if the party who should have made reasonable efforts has failed to do so he will be liable in damages,<sup>911</sup> unless he can show that any such efforts, which he should have made would (if made) have necessarily been unsuccessful.<sup>912</sup> The same principles have been applied where an agreement was made “subject to the approval of the court”; and where an agreement was made to assign a lease which could be assigned only with the consent of the landlord. In such cases the requisite approval or consent must be sought; but the main obligations do not accrue until the approval or consent is given,<sup>913</sup> and if it is refused the principal obligation will not take effect.<sup>914</sup>

## Principal and subsidiary obligations

- <sup>104</sup> It will be seen that, in cases falling within the categories discussed in paras 4-199—4-203 above, a distinction must be drawn between two types of obligation: the principal obligation of each party (e.g. to buy and sell) and a subsidiary obligation, i.e. one not to withdraw, not to prevent occurrence of the condition, or to make reasonable efforts to bring it about. One view is that the party who fails to perform the subsidiary obligation is to be treated as if the condition had occurred; and that he is then liable on the principal obligation. Thus in *Mackay v Dick*<sup>915</sup> the buyer was held liable *for the price*; but there was no discussion as to the remedy. In principle it seems wrong to hold him so liable, for such a result ignores the possibility that, in that case, the machine might have failed to come up to the standard required by the contract, even if proper facilities for trial had been provided. It is submitted that the correct result in cases of this kind is to award *damages* for breach of the subsidiary obligation: in assessing such damages, the court can take into account the possibility that the condition might not have occurred, even if there had been no such breach.<sup>916</sup> To hold the party in breach liable for the full performance promised by him, on the fiction that the

condition had occurred, seems to introduce into this branch of the law a punitive element that is inappropriate to a contractual action. The most recent authority rightly holds that such a doctrine of “fictional fulfilment” of a condition does not form part of English law.<sup>917</sup>

## Waiver of condition

- <sup>105</sup> Where a condition is inserted entirely for the benefit of one party, that party may waive the condition. If they do so, they can then sue<sup>918</sup> and be sued<sup>919</sup> on the contract as if the condition had occurred. Obviously this rule does not apply to cases falling within the category of cases discussed in para.4-198 above, in which there is no contract at all before the condition occurs. Nor can the party for whose benefit the condition was inserted waive it (so as to enforce the contract) after the other party has duly exercised a right, conferred by one of its other terms, to terminate the contract.<sup>920</sup>

## Footnotes

- 871 In *Schweppes v Harper [2008] EWCA Civ 442* Dyson LJ at [64] referred to the text above (in a previous edition of this book) with apparent approval.
- 872 For special difficulties where the condition precedent is implied, see *Bentworth Finance Ltd v Lubert [1968] 1 Q.B. 680*; *Carnegie 31 M.L.R. 78*. cf. *Nautica Marine Ltd v Trafigura Trading LLC [2020] EWHC 1986 (Comm), [2021] 1 All E.R. (Comm) 1157* at [47]–[54] where the distinction between pre-conditions (i.e. contingent condition) and performance conditions is discussed in the context of an agreement “subject to” specified points.
- 873 *(1856) 6 E. & B. 370*.
- 874 *(1856) 6 E. & B. 370* at 374.
- 875 A fortiori, a party cannot withdraw after the event has actually occurred. This was the position in *McGahon v Crest Nicholson Regeneration Ltd [2010] EWCA Civ 842, [2010] 2 E.G.L.R. 84* where a contract gave either party the right to rescind if a specified event had not occurred by 1 June. After that time, one of the parties gave a notice to rescind but at the time of the notice the event had occurred. It was held that the contract no longer allowed such a notice to be given after the specified event had occurred.
- 876 *[1900] 1 Q.B. 694*, cf. *Felixstowe Dock & Ry Co v British Transport Docks Bd [1976] 2 Lloyd's Rep. 656*; *Alan Estates Ltd v W.G. Stores Ltd [1982] Ch. 511, 520*; *Spectra International Plc v Tiscali UK Ltd [2002] EWHC 2084 (Comm)* at [119]. See also *Lomas v JFB Firth Rixon Inc [2012] EWCA Civ 419, [2012] 2 All E.R. (Comm) 1076* at [29]–[30] accepting the view of Austin J in *Simms v TXU Electricity Ltd [2003] NSWSC 1169, (2003) 204 A.L.R. 659* at [12] that, where a “payment obligation” was subject to a condition precedent, “it might be said (with only approximate accuracy) that the payment obligation is

‘suspended’ while the condition remains unfulfilled ...”; cf. *Gold Group Properties v BDW Properties Ltd [2010] EWHC 323, [2010] B.L.R. 235* at [58]: “a binding contract which suspends some or all of the obligations of one or both parties pending fulfilment of the condition” (italics supplied).

- 877 On agreements “subject to finance”, see *Coote*, 40 Conv. N.S. 37; *Furmston*, 3 O.J.L.S. 438, discussing *Meehan v Jones (1982) 149 C.L.R. 571*.
- 878 There is some judicial support for the view that if a conditional contract (of professional indemnity insurance) specified no time by or within which the condition (to which the insurer’s liability was subject) must occur, then the condition would have to be satisfied within a reasonable time: see *Beazley Underwriting Ltd v Travellers Companies Inc [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241* at [185]; though, as the same passage goes on to point out, “[t]hat would leave the assured in a somewhat precarious position”.
- 879 *North Sea Energy Holdings NV v Petroleum Authority of Thailand [1997] 2 Lloyd’s Rep. 418, 428–429; affirmed on other grounds [1999] 1 Lloyd’s Rep. 483; Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd’s Rep. 209, 215.*
- 880 *Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd’s Rep. 209* at 218.
- 881 *Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd’s Rep. 209* at 221, 224. And see *Mackay v Dick (1881) 6 App. Cas. 251*: cf. *Colley v Overseas Exporters [1921] 3 K.B. 302, 308.*
- 882 *Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd’s Rep. 209*, at 221.
- 883 Treitel, Remedies for Breach of Contract (1988), 265.
- 884 (1881) 6 App. Cas. 251. The condition is described as subsequent in *Colley v Overseas Exporters [1921] 3 K.B. 302, 308*. cf. also *Shipping Corp of India v Naviera Letasa [1976] 1 Lloyd’s Rep. 132* and *C.I.A. Barca de Panama SA v George Wimpey & Co Ltd [1980] 1 Lloyd’s Rep. 598; South West Trains Ltd v Wightman, The Times, 14 January 1998*. The “principle in *Mackay v Dick*” would not apply if the parties had not reached agreement on the matter alleged to have been prevented: see *Covington Marine Corp v Xiamen Shipbuilding Industry Co [2005] EWHC 2912 (Comm), [2006] 1 Lloyd’s Rep. 748* at [56] (where the actual decision was that such agreement had been reached). For exclusion of the duty by express contrary provision, see below, paras 4-201—4-202.
- 885 *Hudson Bay Apparel Brands LLC v Umbro International Ltd [2009] EWHC 2861 (Ch), [2010] E.T.M.R. 15* at [119], [128], [136] and [140].
- 886 *Bournemouth & Boscombe Athletic FC v Manchester United FC, The Times, 22 May 1980*. cf. *CEL Group Ltd v Nedlloyd Lines UK Ltd [2003] EWCA Civ 1716, [2004] 1 All E.R. (Comm) 689*, where the contract was not in terms conditional but the court applied a similar principle to that stated in the text above by virtue of the rule stated in para.16-027 below.
- 887 See *Blake & Co v Sohn [1969] 1 W.L.R. 1412*.
- 888 See *Thompson v ASDA-MFI Group Plc [1988] Ch. 241*. A party would not act “wrongfully” for the present purpose merely by reason of having failed to use its best endeavours to reach agreement on matters left outstanding: see the *Covington case [2005] EWHC 2912 (Comm)* at [56].
- 889 Example based on *Thompson v ASDA-MFI Group Plc*, above.

- 890 *Locke v Candy and Candy Ltd* [2010] EWCA Civ 1350, [2011] I.R.L.R. 163 at [43], [45]–[50].
- 891 See *Micklefield v S.A.C. Technology Ltd* [1990] 1 W.L.R. 1002; cf. *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep. 483; *Locke v Candy and Candy Ltd* [2010] EWCA Civ 1350, [2011] I.R.L.R. 163; and see below, paras 4-226—4-227.
- 892 This sentence (in a previous edition of this book) is cited with approval in *Schweppes v Harper* [2008] EWCA Civ 442 at [70]. In *Nautica Marine Ltd v Trafigura Trading LLC* [2020] EWHC 1986 (Comm), [2021] 1 All E.R. (Comm) 1157 at [52] Foxton J noted that a “subject to” clause was more likely to be a contingent condition if its fulfilment involved the exercise of a personal or commercial judgment by one of the contracting parties (e.g. as to whether that party is satisfied with the outcome of a survey).
- 893 *Lee-Parker v Izzet (No.2)* [1972] 1 W.L.R. 775; distinguished in *Janmohamed v Hassam*, *The Times*, 10 June 1976.
- 894 *Astra Trust Ltd v Adams & Williams* [1969] 1 Lloyd's Rep. 81 doubted in *Varverakis v Compagnia de Navegacion Artico SA (The Merak)* [1976] 2 Lloyd's Rep. 250, 254; and see *Ee v Kahar* (1979) 40 P. & C.R. 223 (where the sale was simply “subject to survey”—omitting the word “satisfactory”).
- 895 But if the buyer declared his satisfaction the seller would be bound even though the survey was not objectively satisfactory: *Graham v Pitkin* [1992] 1 W.L.R. 403, 405.
- 896 cf. Sale of Goods Act 1979 s.18 r.4.
- 897 *Wishart v National Association of Citizens' Advice Bureaux* [1990] I.C.R. 794.
- 898 *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651.
- 899 *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651, 662.
- 900 For the requirement of communication see *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651, 660; the requirement may be satisfied by conduct from which satisfaction can be inferred, e.g. where a buyer of goods on approval retains them without notifying rejection for more than the stipulated or a reasonable time: Sale of Goods Act 1979 s.18 r.4(b).
- 901 *Albion Sugar Co v William Tankers (The John S. Derbyshire)* [1977] 2 Lloyd's Rep. 457, 464; cf. *BV Oliehandel Jongkind v Coastal International Ltd* [1983] 2 Lloyd's Rep. 463; *The Nissos Samos* [1985] 1 Lloyd's Rep. 378, 385; cf. *Star Steamship Society v Beogradiska Plovidba (The Junior K)* [1988] 2 Lloyd's Rep. 583, 589 (where the words were held to negative contractual intention). See also *El Awadi v Bank of Credit & Commerce International SA* [1990] 1 Q.B. 606, 619; and, in an analogous context, *Abu Dhabi National Tanker Co v Product Star Shipping Co (The Product Star (No.2))* [1993] 1 Lloyd's Rep. 397, 404; *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151, [2007] 2 All E.R. (Comm) 825 at [42]–[45], [70].
- 902 *Stabilad Ltd v Stephens & Carter Ltd (No.2)* [1999] 2 All E.R. (Comm) 651 at 659; *Jani-King (GB) Ltd v Pula Enterprises* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 457 at [35]–[36]; cf. *Schweppes v Harper* [2008] EWCA Civ 442 at [71]–[72]; *Humphreys v Norilsk Nickel International (UK) Ltd* [2010] EWHC 1867 (QB), [2010] I.R.L.R. 976 at [38].

- 903 *Jani-King (GB) Ltd v Pula Enterprises* [2007] EWHC 2433 (QB) at [33], citing *Insurance Co Ltd v Citibank NA* [1998] *Lloyd's Rep. I.R.* 221 at [35].
- 904 *Varverakis v Compagnia de Navegacion Artico SA (The Merak)* [1976] 2 *Lloyd's Rep.* 250; cf. *Ee v Kahar* (1979) 40 *P. & C.R.* 223 (where the sale was simply “subject to survey”—omitting the word “satisfactory”—thus falling, it is submitted, within the principle of *Mackay v Dick* (1881) 6 *App. Cas.* 251).
- 905 As in *Albion Sugar Co v Williams Tankers (The John S. Darbyshire)* [1977] 2 *Lloyd's Rep.* 457.
- 906 *Hargreaves Transport Ltd v Lynch* [1969] 1 *W.L.R.* 215 (condition not satisfied); *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 *Ch.* 424 (similar condition satisfied); cf. *Fischer v Tomatousos* [1991] 2 *E.G.L.R.* 204; *Jolley v Carmel Ltd* [2000] 2 *E.G.L.R.* 153 (buyer who was required by the contract to make reasonable efforts to get planning permission under no duty to get it within a reasonable time). cf. *Tesco Stores Ltd v Gibson* (1970) 214 *E.G.* 835 (no obligation on purchaser to apply for planning permission).
- 907 As to which party has this duty, see *H.O. Brandt & Co v H.N. Morris & Co* [1917] 2 *K.B.* 784; *AV Pound & Co v M. W. Hardy & Co* [1956] *A.C.* 588; Bridge, Benjamin's Sale of Goods 8th edn (2010), paras 18–352—18–355.
- 908 The prima facie rule may be excluded by express words which, on their true construction, impose an absolute duty; e.g. *Peter Cassidy Seed Co Ltd v Osuustukkukauppa* [1957] 1 *W.L.R.* 273; *C. Czarnikow Ltd v Centrale Handlu Zagranicznego “Rolimpex”* [1979] *A.C.* 351, 371; *Congimex Companhia Geral, etc., SARL v Tradax Export SA* [1983] 1 *Lloyd's Rep.* 250; *Pagnan SpA v Tradax Ocean Transport SA* [1987] 3 *All E.R.* 565; *Yates and Carter*, 1 *J.C.L.* 57. See also *B.S. & N. Ltd (BVI) v Micado Shipping Ltd (The Seaflower)* [2000] 2 *Lloyd's Rep.* 37, a charterparty case in which the issue was whether failure to perform a “guarantee” that the shipowner would obtain a third party's approval amounted to a repudiation. A negative answer was given to this question, but it was held in further proceedings that the “guarantee” was a promissory condition, so that failure by the shipowner to obtain the approval justified rescission by the charterer: [2001] 1 *Lloyd's Rep.* 341. There was no issue as to the standard of the owner's duty, but it seems to have been assumed that the duty was strict (i.e. not merely one of diligence).
- 909 *Re Anglo-Russian Merchant Traders and John Batt & Co (London) Ltd* [1917] 2 *K.B.* 679; *Coloniale Import-Export v Loumidis & Sons* [1978] 2 *Lloyd's Rep.* 560; *Overseas Buyers Ltd v Granadex SA* [1980] 2 *Lloyd's Rep.* 608; *Gamerco SA v I.C.M./Fair Warning (Agency) Ltd* [1995] 1 *W.L.R.* 1226, 1231. Where the contract is expressly subject to the approval of a public authority, there may not even be a duty to make reasonable efforts to secure that approval: see *Gyllenhammar Partners International v Sour Brodegradevna Industria* [1989] 2 *Lloyd's Rep.* 403. For the standard of duty, see generally Bridge, paras 18–356—18–374.
- 910 *Charles H. Windschuegl Ltd v Alexander Pickering & Co Ltd* (1950) 84 *Ll.L. Rep.* 89, 92–93; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 *All E.R.* 497, 501; cf. the cases on sales of goods “to arrive” discussed in Bridge, paras 21–023—21–028.
- 911 e.g. *Malik v C.E.T.A.* [1974] 2 *Lloyd's Rep.* 279; *Agroexport v Cie. Européenne de Céréales* [1974] 1 *Lloyd's Rep.* 499.

- 912 See Bridge, para.18–363; *Overseas Buyers Ltd v Granadex SA* [1980] 2 *Lloyd's Rep.* 608 at 612.
- 913 *Smallman v Smallman* [1972] *Fam. 25*. Contrast *Soulsbury v Soulsbury* [2007] *EWCA Civ 969*, where the agreement, though subject to the conditions described in para.4-196 (note), above, was not subject to any further condition of approval by the court, and so became enforceable when “the events upon which payment depended came to be fulfilled” (at [46]).
- 914 *Shires v Brock* (1977) 247 *E.G. 127*.
- 915 (1881) 6 *App. Cas. 251*, above, para.4-199.
- 916 *Bournemouth & Boscombe Athletic FC v Manchester United FC*, *The Times*, 22 May 1980; cf. *The Blankenstein* [1985] 1 *W.L.R.* 435; *Alpha Trading Ltd v Dunshaw-Patten Ltd* [1981] *Q.B.* 290; *George Moundreas & Co SA v Navimpex Centrala Navala* [1985] 2 *Lloyd's Rep.* 515; *Orient Overseas Management & Finance Ltd v File Shipping Co Ltd (The Energy Progress)* [1993] 1 *Lloyd's Rep.* 355, 358.
- 917 *Thompson v ASDA-MFI Group Plc* [1988] *Ch.* 241, 266 (where the condition was said at 251 to be subsequent); and see *Little v Courage Ltd* (1995) 70 *P. & C.R.* 469, 474. In *Société Générale, London Branch v Geys* [2012] *UKSC 63*, [2013] 1 *A.C.* 523 Lord Sumption SCJ (dissenting) refers at [131] to: “the doctrine of deemed performance endorsed by the House of Lords in *Mackay v Dick* (1881) 6 *App. Cas. 251*, according to which a party who is prevented by the non-co-operation of the counter party from satisfying a condition precedent to his right to receive remuneration may be deemed to have earned it notwithstanding the condition”. But he refers to that doctrine only to make the point that “the courts have never applied [the doctrine] to contracts of employment” (*[2012] UKSC 63* at [131]); and his attention appears not to have been drawn to the rejection of the doctrine by the authorities cited in para.4-204 (note), in the text of which paragraph the doctrine is referred to as one of “fictional fulfilment”.
- 918 *Wood Preservation Ltd v Prior* [1969] 1 *W.L.R.* 1077; cf. *Heron Garages Properties Ltd v Moss* [1974] 1 *W.L.R.* 148. And see *Anchor 2020 Ltd v Midas Construction Ltd* [2019] *EWHC 435 (TCC)* at [94].
- 919 *McKillop v McMullan* [1979] *N.I. 85*.
- 920 *Irwin v Wilson* [2011] *EWHC 326 (Ch)*, [2011] 2 *P. & C.R.* 8.

## (a) - General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 11. - Intention to Create Legal Relations and Agreements in the Private Domain

### (a) - General<sup>921</sup>

- <sup>906</sup> In a number of situations, to be discussed in paras 4-207—4-235 below, it has been held that an agreement, though supported by consideration,<sup>922</sup> was not binding as a contract<sup>923</sup> because it was made without any intention of creating legal relations.<sup>924</sup> There are broadly two categories of cases. The first focuses on contractual intention in its substantive sense (paras 4-207—4-237), while the second deals with agreements in the social domain (paras 4-238—4-249).

### Footnotes

<sup>921</sup> paras 4-206—4-217, 4-251 were cited by Klein J with approval in *Broomhead v National Westminster Bank Plc [2018] EWHC 1574 (Ch)*.

<sup>922</sup> *R. v Civil Service Appeal Board Ex p. Bruce [1988] 3 All E.R. 686, 693, 698*; cf. *Re Beaumont [1980] Ch. 444, 453*: consideration may be provided “under a contract or otherwise”.

<sup>923</sup> For enforcement on other grounds, see *John Fox v Bannister King & Rigbeys [1988] Q.B. 925, 928* (court’s jurisdiction to enforce honourable conduct on the part of solicitors); *Xydhias v Xydhias [1999] 2 All E.R. 386, 394* (compromise of claim for ancillary relief in divorce proceedings).

<sup>924</sup> For recent statements of the requirement to create legal relations, see *Baird Textile Holdings Ltd v Marks & Spencer Plc [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737* at [30], [59]; below, paras 4-208—4-209. See also *Zakhem International Construction Ltd v Nippon Kohan KK [1987] 2 Lloyd’s Rep. 596*. For a denial of the requirement, see Williston, Contracts, para.21; cf. *Tuck, 21 Can. Bar Rev. 123 (1943); Shatwell (1954) 1 Sydney L.R. at*

293; *Unger* (1956) 19 M.L.R. 96; *Hepple* [1970] C.L.J. 122; *Hedley* (1985) 50 J.L.S. 391. There is also said to be a requirement of “mutuality”: see *Simpkins v Pays* [1955] 1 W.L.R. 975, 979; *Rajbenback v Mamon* [1955] 1 Q.B. 283, 286; but this expression here refers to consideration rather than to contractual intention: see *Lees v Whitcombe* (1828) 5 Bing. 34; *Sykes v Dixon* (1839) 9 Ad. & El. 693; *Westhead v Sproson* (1861) 6 H. & N. 728; *Treitel* (1961) 77 L.Q.R. 83.

## **(b) - Commercial Agreements**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 11. - Intention to Create Legal Relations and Agreements in the Private Domain**

**(b) - Commercial Agreements** <sup>925</sup>

**Burden of proof: express agreement**

- <sup>107</sup> In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations. <sup>926</sup> The onus of proving that there was no such intention “is on the party who asserts that no legal effect is intended, and the onus is a heavy one”. <sup>927</sup> In deciding whether the onus has been discharged, the courts will be influenced by the importance of the agreement to the parties, and by the fact that one of them acted in reliance on it. <sup>928</sup>

**Burden of proof: agreements inferred from conduct**

- <sup>108</sup> The rule as to burden of proof stated in para.4-206 above applies where the parties had entered into an express agreement, whether written or oral. <sup>929</sup>

**U** Claims or defences are, however, sometimes based on the allegation that parties between whom there was no express agreement had so conducted themselves in relation to each other that

an *implied* contract was to be inferred from their conduct; and in a number of cases of this kind the allegation has been rejected on the ground that there was no contractual intention.

930

**U** Such cases illustrate the judicial attitude that “contracts are not lightly to be implied” and that the courts must (in cases of this kind) be able “to conclude with confidence that … the parties intended to create contractual relations”,

931

**U** or that it must be “necessary” to imply a contract.

932

**U** Thus, the burden of proof on this issue appears, in cases of implied contracts, to be on the proponent of the contract, contrary to the rule which applies to express agreements regulating commercial relationships.

!09

**D** In *Modahl v British Athletics Federation*,<sup>933</sup> the burden was held to have been discharged so that a contract came into existence between an athlete and the Federation, under whose rules the athlete had for a long time competed. The rules of the Federation had contractual force by reason of the “continuous long-term relationship based on a programme and rules couched in language of a contractual character and purporting to impose mutual rights and obligations”.<sup>934</sup> Likewise, in *Re MF Global UK Ltd (In Special Administration)*<sup>935</sup> the court implied a contract between two companies in administration, pursuant to which one company paid the expenses of staff seconded to a second company within the same group. The established relationship between the companies was only explicable in the particular circumstances on the basis that it had a contractual foundation. In *Glencore Energy UK Ltd v OMV Supply & Trading Ltd*<sup>936</sup> the court implied a contract from one party’s request that the second party move the vessel carrying the oil to wait offshore until a berth was available, the latter accepted this by conduct and was entitled to remuneration for the time the vessel spent waiting. It was:

“… necessary for an implied contract to this effect

‘to give business reality to a transaction to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist’.”<sup>937</sup>

In contrast, the burden of proof was not discharged where, following a serious oil spill from an insured ship, the insurer asserted a contract with an international fund, set up to compensate for damage caused by oil pollution, to indemnify the insurer in respect of aspects of its liability.<sup>938</sup>

On the facts, it was impossible to construe the international fund's communications as making the offer alleged expressly or impliedly, let alone clearly and unequivocally.<sup>939</sup> Likewise, no implied contract was found between the claimant (a volunteer children's water polo instructor at a club) and the defendant national governing body.

<sup>940</sup>



## Intention judged objectively

- <sup>!10</sup> In deciding issues of contractual intention, the courts normally apply an objective test<sup>941</sup>: for example, where the sale of a house is *not* “subject to contract”,<sup>942</sup> both parties are likely to be bound even though one of them subjectively believed that he would not be bound until the usual exchange of contracts had taken place.<sup>943</sup> In *Edmonds v Lawson*,<sup>944</sup> the Court of Appeal similarly applied the objective test to hold that the requirement of contractual intention was satisfied where a pupil barrister accepted an offer of pupillage with a set of chambers. The resulting contract was between the pupil and all the members of the chambers—not between the pupil and the individual members of the chambers who acted as her pupil masters. In *Evergreen Timber Frames Ltd v Harrington*<sup>945</sup> a car described as a “gift” in the context of a redundancy negotiation was held to be an offer because it “reflected the industrial reality of the situation and accorded with common sense”. In *New Media Holding Co LLC v Kuznetsov*<sup>946</sup> the court found an intention to create legal relations in respect of a “Term Sheet” signed by both parties. On the one hand: the language of the document was brief and did not mention consideration; the document was prepared in a casual and informal way; further formalities were required; and the rights transferred were not capable of immediate enforcement. On the other hand: the parties were experienced and sophisticated businessmen; the document contained clear express terms; the language was consistent with a legally binding agreement; and the “Term Sheet” was consistent with an intention that this be part of a package agreement (with other terms, including the consideration, to be dealt with elsewhere) and with the parties’ pre-existing relationship, which itself raised a strong presumption that the parties intended to be legally bound. In *Dacy Building Services Ltd v IDM Properties Ltd*<sup>947</sup> it was held that the claimant builder had not made its oral agreement with the main contractor, but rather with the employer’s agent. This was based on an assessment of witness evidence, which made complete business and common sense, and because it would be “verging on the commercially suicidal” for the claimant to enter a contract with the main contractor since the latter already owed the claimant substantial sums.
- <sup>!11</sup> Where there has been substantial performance, courts are especially reluctant to reach the unrealistic conclusion that the parties lacked intention to be legally bound.<sup>948</sup> The objective test is, however, here (as elsewhere)<sup>949</sup> subject to the limitation that it does not apply in favour of a party

who knows the truth. Thus, in the house sale example given above, the party who did not intend to be bound would not be bound if his state of mind was actually known to the other party.<sup>950</sup> Nor could a party who did not in fact intend to be bound invoke the objective test so as to bind the other party to the contract<sup>951</sup>: to permit this would pervert the purpose of the objective test, which is to protect a party who has relied on the objective appearance of consent from the prejudice which he would suffer if the other party could escape liability on the ground that he had no real intention to be bound. The objective test, moreover, merely prevents a party from relying on his *uncommunicated* belief as to the binding force of the agreement. The test therefore does not apply where the parties have expressed their actual intention in the document alleged to constitute the contract: the question whether they intended the document to have contractual force then becomes one “of construction of the documents as a whole what effect is to be given to such a statement”<sup>952</sup>; and the general rule in cases of this kind is that a party who has signed the document is then bound by its terms, as so construed.<sup>953</sup>

## Sham contracts

- <sup>!12</sup> The general rule stated at the end of the previous paragraph is subject to an exception where the express terms of the document are a “sham”.<sup>954</sup> The parties may create a document that purports to show a contract between them when in fact there was none. This may be to perpetrate a fraud; for example, a sham charterparty was created by the parties for the sole purpose of ensuring that the claimant had the documents required to provide security to their bank,<sup>955</sup> or a sham contract purported to transfer ownership in a vessel, to defraud the claimant,<sup>956</sup> the High Court noting that neither the buyer nor the seller had the intention to “create bona fide legal relations”.<sup>957</sup>

## Intention to be bound by actual contract, not sham

- <sup>!13</sup> Another possibility is that the document is a sham in the sense of being designed by the parties to give “third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations … which the parties intend to create”.<sup>958</sup> In this case the parties do not intend the sham document to bind them, but they do intend to be bound by the “actual” agreement.<sup>959</sup> A sham contract of this second type may be designed to deprive one party of some protection or benefit given by law to a class of persons to which that other party belongs, most commonly as tenants or as employees. The ultimate issue facing the court is often one of the correct characterisation of the agreement,<sup>960</sup> but first the court must ascertain what its true terms are,<sup>961</sup> and for this purpose the courts may “disregard a written term which is not part of the true agreement.”<sup>962</sup> Thus, an agreement may take effect as a lease

even though it is expressed by the lessor to take effect only as a licence<sup>963</sup>; and an agreement may take effect as a contract of employment even though (contrary to the reality of the relationship created by it) it described the party who is in truth the other's employee as being an independent contractor and not an employee.<sup>964</sup> The focus of attention is on the substance of the agreement, rather than its precise form,<sup>965</sup> and the Court's task is to ascertain the "actual legal obligations of the parties"<sup>966</sup> with regard to the available evidence,<sup>967</sup> and then to characterise it. In these cases the issue is not whether the parties intend to be bound, but by what terms.

## Intention expressly negated

- <sup>114</sup> The agreement may contain an express provision negating contractual intention.<sup>968</sup> For example, in *Rose & Frank Co v J.R. Crompton & Bros Ltd*<sup>969</sup> an agency agreement provided:

"This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement ... but it is only a definite expression and record of the purpose and intention of the ... parties concerned, to which they each honourably pledge themselves."

It was held that this "honour clause" negated contractual intention. Similarly, agreements for the sale of land are generally made "subject to contract". These words negative contractual intention,<sup>970</sup> so that the parties are not normally bound until formal contracts are exchanged.<sup>971</sup> It is a crucial part of this process of "exchange" that the parties should intend by it to bring a legally binding contract into existence.<sup>972</sup> Football pool coupons also commonly contained words expressly negating contractual intention.<sup>973</sup>

- <sup>115</sup> Whether a particular phrase expressly negatives contractual intention is a question of construction.  
<sup>974</sup>

 In *Edwards v Skyways Ltd*

<sup>975</sup>

 employers promised to make an "ex gratia payment" to a dismissed employee. It was held that these words did not negative contractual intention but amounted merely to a denial of a pre-existing legal liability to make the payment.  
<sup>976</sup>

 This was approved in *Evergreen Timber Frames Ltd v Harrington*

977

**U** where a “gift” was held to be an offer. In the context of negotiating the terms on which employment will terminate, the word is “analogous to describing it as an ‘ex gratia’ payment” and capable of being enforced where it “reflected the industrial reality of the situation and accorded with common sense”. Contractual intention was, similarly, not negated where an arbitration clause in a reinsurance contract provided that “this treaty shall be *interpreted as* an honourable engagement rather than as a legal obligation ...”. The contract as a whole was clearly intended to be binding; and it was held that the purpose of the words quoted was merely to free the arbitrator “to some extent from strict legal rules”

978

**U** in interpreting the agreement. In *The Mercedes Envoy*

979

**U** the fact that a shipowner during negotiations for a charterparty said “we are fixed in good faith” was held not to negative contractual intention. In *Mansion Place Ltd v Fox Industrial Services Ltd*

980

**U** a party’s description of the agreement as a “gentleman’s agreement” did not preclude a finding that there was intention to create legal relations, because “[t]he legal effect of that agreement and whether there was an intention to enter legal relations are matters to be assessed objectively”. On the facts, the phrase was “a reference to the fact that [the agreement] was not in writing and not a suggestion that the arrangement was in some way not binding or that it was not intended to have legal effect”.

## Intention impliedly negated

16

**D** In *Baird Textile Holdings Ltd v Marks & Spencer Plc*<sup>981</sup> the claimants had for some 30 years been a principal supplier of clothing to the defendants, a leading retail chain. When the defendants terminated the arrangement with effect from the end of the then current production season, the claimants sought damages, basing their claim on, inter alia,<sup>982</sup> an alleged implied contract not to terminate the arrangement except on reasonable notice of three years. The claim was rejected because of “the absence of any intention to create legal relations”.<sup>983</sup> One factor<sup>984</sup> on which this conclusion was based was that the defendants had (as the claimants themselves had alleged in their points of claim)<sup>985</sup> deliberately abstained from entering into a long-term contractual relationship with the claimants in order to maintain the flexibility of the de facto long-term commercial relationship between the parties.<sup>986</sup> It followed that the claimants must be taken to have accepted the risk inherent in such a relationship “without specific contractual protection”.<sup>987</sup> Contractual

retention was, again, impliedly negated in *Cobbe v Yeoman's Row Management Ltd*<sup>988</sup> where an agreement “in principle” for the redevelopment and disposal of residential property left other aspects of the scheme to be settled by further negotiations between the parties. It was held that the agreement “in principle” lacked contractual force since, until those outstanding matters had been settled and embodied in a formal agreement between the parties, each regarded the other as bound in honour only.<sup>989</sup> There was no implied contract between a doctor and his patient’s partner in relation to the provision of accurate information about the patient’s condition in *Bot v Barnick*.<sup>990</sup> There were “strong reasons for concluding the necessity of [not implying a contract]”, as there would be a “risk of conflict” between the duty owed to the patient and the alleged duty owed to the partner. Such a contract would have a “potentially large scope” of liability which “the defendant would have declined to assume”, even if the partner had offered a fee. Implying such a contract would “go against common sense and business efficacy”.<sup>991</sup> In *Dieno George v Revenue and Customs Commissioners*,<sup>992</sup> the tribunal held that the parties did not intend to create legal relations. Not only was the agreement uncertain, but also it was made in the context of a “wide-ranging” discussion, where “many issues” were discussed. It was implausible that the parties intended the conclusions on the other issues discussed to be legally binding and there was no segregation or distinction made between those matters and the agreement reached. Accordingly, there was no legally enforceable contract. Likewise, where the parties

“deliberately elected not to formalise a joint partnership business, even though … the opportunity plainly presented itself, which largely negates the necessary intention to enter into contractual relations.”

<sup>993</sup>



## Statements inducing a contract

- !17 A statement inducing a contract may be a “mere puff” if the court considers that it was not seriously meant and that this should have been obvious to the person to whom it was made. In *Weeks v Tybald*,<sup>994</sup> for example, the defendant “affirmed and published that he would give £100 to him that should marry his daughter with his consent”. The court held that it was “not reasonable that the defendant should be bound by such general words spoken to excite suitors”. Similarly, in *Lambert v Lewis*,<sup>995</sup> a manufacturer stated in promotional literature that his product was “foolproof” and that it “required no maintenance”. These statements did not give rise to a contract between the manufacturer and a dealer (who had bought the product from an intermediary) as they were “not intended to be, nor were they, acted on as being express warranties”.<sup>996</sup>

- <sup>118</sup> Other statements which induce persons to enter into contracts have some effect in law, but exactly what that effect is often turns on whether they are “mere representations” or have contractual force. The distinction between these categories turns on the test of contractual intention. In cases concerning the effect of such statements, the test of intention generally determines the *contents* of a contract, the *existence* of which is not in doubt. But where the inducing statement for some reason cannot take effect as a term of the main contract it may, nevertheless, amount to a collateral contract; and whether it has this effect again depends on the test of contractual intention. For example, in *Heilbut, Symons & Co v Buckleton*<sup>997</sup> the claimant applied for shares in a company after a conversation with the defendants’ manager, which led the claimant to believe that the company (which the defendants were “bringing out”) was a rubber company. It was not a rubber company, and the claimant alleged that the defendants had warranted that it was a rubber company. It was held that nothing said by the manager was intended to have the effect of a collateral contract. Lord Moulton said:

“Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn.”<sup>998</sup>

It follows that an oral statement made in the course of negotiations will not take effect as a collateral contract where the terms of the main contract show that the parties did *not* intend the statement to have such effect. This was, for example, the position where the main contract contained an “entire agreement” clause: this showed that statements made in the course of negotiations were to “have no contractual force”.<sup>999</sup> Similarly, where a party during negotiations for a lease made a statement of its intention as to its future conduct under the lease, but the negotiations were then continued and the final agreement was inconsistent with the statement, it was held that these circumstances negated contractual intention with respect to the statement, so that it could not take effect as a collateral contract.<sup>1000</sup>

## Guarantees given to consumers

- <sup>119</sup> The *Sale and Supply of Goods to Consumers Regulations 2002*<sup>1001</sup> provide that, where goods are sold or supplied to a consumer and are offered with a “consumer guarantee”, that guarantee “takes effect as a contractual obligation owed by the guarantor”.<sup>1002</sup> It seems to take effect by virtue of the Regulations, without any separate requirement of contractual intention. This is replaced<sup>1003</sup> by a similar provision contained in *s.30 of the Consumer Rights Act 2015*, which applies where there is “(a) a contract to supply goods” and “(b) a guarantee in relation to the goods”,<sup>1004</sup> i.e. an undertaking by the “trader or producer” of the goods. Such a guarantee “takes effect ... as

a contractual obligation owed by the guarantor” “under the conditions set out in the guarantee statement or in any associated advertising”.<sup>1005</sup>

## Footnotes

- 925 This paragraph was cited with approval in *McInnes v Gross [2017] EWHC 46 (QB)* at [77].
- 926 Certain regulated agreements under the Consumer Credit Act 1974 must contain a signature in a “signature box” warning the signer to sign the agreement “only if you want to be legally bound by its terms”: *Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553)*, as amended by *Consumer Credit (Agreements) (Amendment) Regulations 2004 (SI 2004/1482)* reg.2. For amendment of the definition of a “regulated” consumer credit agreement, see *Consumer Credit Act 2006* s.2.
- 927 *Edwards v Skyways Ltd [1964] 1 W.L.R. 349, 355; Bahamas Oil Refining Co v Kristiansands Tankrederei A/S (The Polyduke) [1978] 1 Lloyd's Rep. 211; Financial Techniques (Planning Services) Ltd v Hughes [1981] I.R.L.R. 32; G.A.F.L.A.C. v Tanter (The Zephyr) [1985] 2 Lloyd's Rep. 529, 537* (disapproving [1984] 1 Lloyd's Rep. 58, 63–64); *Yani Haryanto v E.D. & F. Man (Sugar) Ltd [1986] 2 Lloyd's Rep. 44; Orion Insurance Plc v Sphere Drake Insurance Plc [1992] 1 Lloyd's Rep. 239* at 263, where the burden was discharged; *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD [2003] 1 Lloyd's Rep. 1* at [159]; cf. *Coastal Bermuda Petroleum Ltd v VTT Vulcan Petroleum SA (The Marine Star) (No.2) [1994] 2 Lloyd's Rep. 629, 632*, reversed on other grounds [1996] 2 Lloyd's Rep. 383. See also *Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394* at [79], indicating that this rule applies both where the alleged contract is a bilateral one, and where it is a unilateral one “at least where the parties are already in a contractual relationship when the unilateral promise is made” (at [80]).
- 928 cf. above, para.4-186; *Kingswood Estate Co v Anderson [1963] 2 Q.B. 169; South West Water Authority v Palmer (1982) 263 E.G. 438; Benourad v Compass Group Plc [2010] EWHC 1882 (QB)* at [106(d)]; *Maple Leaf Volatility Master Fund v Rouvroy [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788* at [21], citing *Trentham v Archital Luxfer Ltd [1993] 1 Lloyd's Rep. 25, 27; Delmergate Ltd v Patel, Chancery Division, 6 October 2017.*
- 929 *Bottrill v Harling [2015] EWCA Civ 564* at [14]–[16], [19]–[21], the Court of Appeal held that in deciding whether an oral agreement was made it is entirely acceptable to consider how the parties conducted themselves.
- 930 *Hispanica de Petroleos SA v Vencedora Oceana Navegacion SA (The Kapetan Markos N.L.) (No.2) [1987] 2 Lloyd's Rep. 321; The Aramis [1989] 1 Lloyd's Rep. 213; Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes) [1993] 1 Lloyd's Rep. 311*; in some of these cases rights and liabilities under the shipping documents would now arise by virtue of *Carriage of Goods by Sea Act 1992 ss.2 and 3.*
- 931

*Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 W.L.R. 1195, 1202; *Burnett v Barker* [2021] EWHC 3332 (Ch) at [38] and [88]; cf. *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 at [20], [21], [30], [62] where the argument that there was an implied contract was rejected for the reasons given in para.4-216 below; *Zymurgorium Ltd v Hammonds of Knutsford Plc* [2021] EWHC 2295 (Ch) at [150]–[151] (in the context of contractual variation, a common assumption that the obligation in issue already existed did not amount to proof of intention to vary the contract).

•932 *West Bromwich Albion Football Club v El Safty* [2006] EWCA Civ 1299, (2006) 92 B.M.L.R. 179 at [43], [48] (below, para.20-007); *Cairns v Visteon UK Ltd* [2007] I.R.L.R. 175 at [18], [23] and see below, para.20-008; *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at [17]; *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch) at [38]; *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2009] EWHC 1142 (Comm), [2010] 1 Lloyd's Rep. 69 at [9]; *CN Associates v Holbeton Ltd* [2011] EWHC 43 (TCC), [2011] B.L.R. 261; *Tod v Swim Wales* [2018] EWHC 665 (QB) at [94] and [100]; *Bot v Barnick* [2018] EWHC 3132 (QB) at [20], and see below para.4-216; *Bony v Kacou* [2017] EWHC 2146 (Ch) at [47]–[48]; *McDonnell v Dass Legal Solutions (MK) Law Ltd (t/a DLS Law)* [2022] EWHC 991 (QB) at [191]; *Zymurgorium Ltd v Hammonds of Knutsford Plc* [2021] EWHC 2295 (Ch) at [134]. Contrast *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54, [2006] 1 All E.R. (Comm) 501 at [66].

933 [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192; cf. recognition of the distinction, for the purpose of burden of proof, between express and implied agreements, drawn in paras 4-207–4-209 above, in *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 at [61]; and *JD Cleverly Ltd v Family Finance Ltd* [2010] EWCA Civ 1477, [2011] R.T.R. 22 at [28]–[32], where the proponent of the contract failed to discharge the burden as the conduct in question was not “consistent only” (at [36]) with an intention to enter into contractual relations; see also the *CN Associates case* [2011] EWHC 43 (TCC) at [36] and the *Classic Maritime case* [2009] EWHC 1142 (Comm) at [9] and [14]. And see *Re MF Global UK Ltd (In Special Administration)* [2015] EWHC 883 (Ch); [2015] Pens. L.R. 405 at [56]–[58] where an implied contract was found between companies in a group; one employed staff and seconded them to another which paid the associated costs, notwithstanding the absence of any express agreement between them as to the provision of staff.

934 [2001] EWCA Civ 1447 at [109], cf. at [52]. Jonathan Parker LJ dissented on this point. For discussion of factors which led to the conclusion that the requirement of contractual intention had been satisfied in *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1189 (QB), see that case [134] et seq., [2013] EWCA Civ 394 at [89]. The case was one of express agreement, not one of agreement inferred from conduct.

935 [2016] EWCA Civ 569.

936 [2018] EWHC 895 (Comm).

937 [2018] EWHC 895 (Comm) at [51] citing *The Aramis* [1989] 1 Lloyd's Rep 213, 224 per Bingham LJ approving May LJ in *The Elli 2* [1985] 1 Lloyd's Rep 107, 115.

- 938 *Assuranceforeningen Gard Gjensidig v International Oil Pollution Compensation Fund* [2014] EWHC 3369 (Comm).
- 939 [2014] EWHC 3369 at [102], [110], [114] and [123].
- 940 Tod v Swim Wales [2018] EWHC 665 (QB) at [94], distinguishing *Modahl v BAF* [2001] EWCA Civ 1447 (otherwise, the defendant “would owe contractual obligations to many thousands of club members (many of whom will be minors and therefore lacking in any capacity to contract) across the land” (at [97])). See also *McDonnell v Dass Legal Solutions (MK) Law Ltd (t/a DLS Law)* [2022] EWHC 991 (QB) at [186]–[192] (no implied retainer between the claimant and the defendant firm of solicitors in the context of a specific transaction).
- 941 See *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 579; *Bowerman v Association of British Travel Agents* [1995] N.L.J. 1815; *Manatee Towing Co v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 All E.R. (Comm) 306 at 327; *London Baggage (Charing Cross) Ltd v Railtrack Plc* [2000] E.G.C.S. 57; *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), 1 Lloyd's Rep. 475 at [223], [224] and [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 at [17] (affirming the decision below); *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [45], [46]; *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(b)]; *Dhanani v Crasnianski* [2011] EWHC 926 (Comm), [2011] 2 All E.R. (Comm) 799 at [80], [88] (“objectively assessed”); *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] EWHC 1560 (Comm), [2011] 2 All E.R. (Comm) 951 at [92]–[94], affirmed [2012] EWCA Civ 548, where the objective test is stated at [30]. For a statement of the objective test of contractual intention, see also *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm), above paras 4-147—4-151, where an oral acceptance of a “firm” offer (also made orally) was held to give rise to a contract although at the stage of that acceptance many important points remained unresolved; this was also the position in the *RTS* case, above: see at [61]; *Chaggar v Chaggar* [2018] EWHC 1203 (QB) at [186]–[198] Morris J set out the general principles for a binding agreement; cf. the *Benourad* case above, at [106(f)] and above, para.4-150 (note). And see *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394 at [61]: the Court of Appeal enforced the employer’s promise to their employees to maintain a “guaranteed minimum bonus pool” from which discretionary bonuses payable under the contracts of employment were to be distributed “no matter what” (at [22]). The Court relied, in particular, on the facts that it was made “in the context of a pre-existing legal relationship” (i.e. of employer and employee); that the promise was originally that of the employer’s Chief Executive Officer; that it was made as “part of a vitally important strategy to retain staff”; that it “related to pay, the most fundamental obligation under the employment contract”; and that by its terms “the promise assured staff that the fund was guaranteed come what may” (at [89]). cf. *Crowden v Aldridge* [1993] 1 W.L.R. 433, applying the objective test of intention to produce legal consequences to a noncontractual direction to executors in favour of a third party. Quaere whether, in the absence of reliance on the direction, the policy

which justifies the objective test in a contractual context extends to the situation which arose in this case.

- 942 Above, paras 4-159—4-161.
- 943 *Weddell v Henderson* [1975] 1 W.L.R. 1496; *Storer v Manchester City Council* [1974] 1 W.L.R. 1403, 1408.
- 944 [2000] Q.B. 501.
- 945 *Evergreen Timber Frames Ltd v Harrington* [2021] 3 WLUK 167 at [24]. See below, para.4-215.
- 946 [2016] EWHC 360 (QB).
- 947 [2018] EWHC 178 (TCC) at [54].
- 948 *Purton (t/a Richwood Interiors) v Kilker Projects Ltd* [2015] EWHC 2624 (TCC) at [7]; *Anchor 2020 Ltd v Midas Construction Ltd* [2019] EWHC 435 (TCC) at [113]. cf. *CRS GT Ltd v McLaren Automotive Ltd* [2018] EWHC 3209 (Comm) (although work had been carried out, the agreement was fundamentally incomplete, its language was casual and vague, the agreement provided for formal execution, and subsequent communication between the parties showed that neither understood a binding contract had come into force).
- 949 Above, paras 4-004—4-006. In contrast, no intention to be bound was concluded in *Price v Euro Car Parks Ltd* [2015] EWHC 3253 (QB) where the claimant put a business proposal and sent an “In Principle Heads of Agreement” that neither signed, to the defendant. The defendant never accepted any offer made by the claimant; it merely allowed the claimant to go ahead (at his own risk) to research his business proposal. Moreover, the “In Principle Heads of Agreement” was too indefinite. Nor was there intention to be bound in *Burgess v Lejonvarn* [2016] EWHC 40 (TCC), [2016] T.C.L.R. 3, where an architect, for no fee, had found a contractor to landscape her friends’ garden with a view to her providing subsequent design input for consideration. There was no contract to project manage the landscaping because the written discussions were simply too inchoate, there was no intention to be legally bound and there had been no consideration.
- 950 *Pateman v Pay* (1974) 263 E.G. 467; cf. *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394 at [86] where the requirement of contractual intention was satisfied.
- 951 *Lark v Outhwaite* [1991] 2 Lloyd’s Rep. 132, 141.
- 952 *R. v Lord Chancellor’s Department Ex p. Nangle* [1991] I.C.R. 743, 751.
- 953 See *L'Estrange v F Graucob Ltd* [1934] 2 K.B. 394; below, para.15-005.
- 954 See above, para.1-069.
- 955 *Harmony Shipping Co SA v Saudi-Europe Line Ltd (The Good Helmsman)* [1981] 1 Lloyd’s Rep. 377.
- 956 *Glatzer v Bradston Ltd (The Ocean Enterprise)* [1997] 1 Lloyd’s Rep. 449.
- 957 [1997] 1 Lloyd’s Rep. 449, 485.
- 958 *Snook v West Riding Investments Ltd* [1967] 2 Q.B. 786 at 802, quoted in full above, para.1-069.
- 959 An alternative approach is to infer a collateral contract that will result in the parties having the rights and obligations representing their actual agreement. For an example, see *Coleman v Mundell* [2020] EWHC 2852 (QB) (parties had signed agreement transferring shares from the claimant to the defendant, but claimant had done so on the assurance that this transfer

was security for an interest-free loan: held, collateral contract to that effect. The question of a sham does not appear to have been raised).

- 960 See above, para.1-069.
- 961 For the two-stage process used to decide questions of characterisation, see *Agnew v Inland Revenue Commissioners* [2001] UKPC 28, [2001] A.C. 170 at [32]: above, para.1-068.
- 962 *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] I.C.R. 1157 at [23], referring to the landlord and tenant cases of *Street v Mountford* [1985] AC 809 and *Antoniades v Villiers* [1990] 1 A.C. 417. See also *Uber BV v Aslam* [2021] UKSC 5, discussed above, para.1-071 and in Vol.II, para.42-009.
- 963 *Street v Mountford* [1985] A.C. 809; *A.G. Securities v Vaughan* [1990] 1 A.C. 417.
- 964 *Autoclenz case* [2011] UKSC 41; and see Davies (2009) 38 I.L.J. 318, cited with approval in that case at [38].
- 965 *Street v Mountford* [1985] A.C. 809 at 817; *A. G. Securities v Vaughan* [1990] 1 A.C. 417 at 453.
- 966 [2011] UKSC 41 at [32].
- 967 *Autoclenz Ltd v Belcher* [2011] UKSC 41 at [22]. See Bogg, “Sham self-employment in the Supreme Court”, I.L.J. 2012, 41(3), 328 at 333.
- 968 e.g. *Broadwick Financial Services Ltd v Spencer* [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 446 at [27].
- 969 [1925] A.C. 445; affirming [1923] 2 K.B. 261; *County Ltd v Girozentrale Securities* [1996] 3 All E.R. 834; *M&P Steelcraft Ltd v Ellis* [2008] I.R.L.R. 355, below, para.4-250.
- 970 They can have the same effect in other types of agreement: see *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274, *The Times*, 12 June 2003.
- 971 Above, paras 4-159—4-162; *Rose & Frank Co v J.R. Crompton & Bros Ltd* [1923] 2 K.B. 261, 294; *Ali v Ahmed* (1996) 71 P. & C.R. D39.
- 972 *Commission for the New Towns v Cooper (G.B.) Ltd* [1995] Ch. 259, 295.
- 973 See *Jones v Vernons Pools Ltd* [1938] 2 All E.R. 626; *Appleton v Littlewood Ltd* [1939] 1 All E.R. 464; *Guest v Empire Pools* (1964) 108 S.J. 98. In Scotland, it has been argued that such honour clauses in football coupons may be unreasonable and hence ineffective: *Ferguson v Littlewoods Pools* 1997 S.L.T. 309, 314–315.
- 974 R. v Lord Chancellor's Department Ex p. Nangle [1991] I.C.R. 743; above, paras 4-210—4-211.
- 975 [1964] 1 W.L.R. 349. It was admitted that there was consideration moving from the employee.
- 976 cf. *Glaxosmithkline UK Ltd v Department of Health* [2007] EWHC 1470, [2007] 2 All E.R. (Comm) 1140, where a “voluntary” scheme agreed between the Department and members of the pharmaceutical industry, containing “mandatory provisions” (at [13]), was held to have contractual force.
- 977 *Evergreen Timber Frames Ltd v Harrington* [2021] 3 WLuk 167 at [24]. See above, paras 4-037—4-039, 4-210—4-211.

- 978 *Home Insurance Co Ltd v Administratia Asigurarilor* [1983] 2 Lloyd's Rep. 674, 677; *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1989] 1 Lloyd's Rep. 473.
- 979 *Hanjin Shipping Co Ltd v Zenith Chartering Corp (The Mercedes Envoy)* [1995] 2 Lloyd's Rep. 559; it was held that, at most, the words amounted merely to a “collateral understanding” that account should be taken of damage to the vessel, of which both shipowner and charterer were aware.
- 980 *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2972 (TCC) at [64].
- 981 [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737.
- 982 For the alternative basis of the claim on the ground of estoppel, see below, para.6-106.
- 983 *Baird case* [2001] EWCA Civ 274 at [30], [47], [69].
- 984 For another such factor, see below, para.4-220.
- 985 *Baird case* [2001] EWCA Civ 274 at [10], [46], [73].
- 986 *Baird case* [2001] EWCA Civ 274 at [30], [47], [73], [74]; cf. *Alstom Transport v Tilson* [2010] EWCA Civ 1308, [2010] I.R.L.R. 169 at [50] (no implied contract where one party had actually refused to enter into an express contract with the other).
- 987 *Baird case* [2001] EWCA Civ 274 at [76]. For somewhat similar reasoning, see *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392, [2011] 1 Lloyd's Rep. 123 (oral assurances given by borrower to lender held not to be legally binding since to give them contractual force would have defeated their commercial objective, which made it “important that they should *not* have legal effect” (at [143])).
- 988 [2008] UKHL 55, [2008] 1 W.L.R. 1752.
- 989 [2008] UKHL 55 at [7], [71].
- 990 [2018] EWHC 3132 (QB).
- 991 [2018] EWHC 3132 (QB) at [20].
- 992 [2018] UKFTT 509 (TC) at [96] and [99].
- 993 *Burnett v Barker* [2021] EWHC 3332 (Ch) at [88(9)].
- 994 (1605) Noy 11; cf. *Dalrymple v Dalrymple* (1811) 2 Hag.Con. 54, 105.
- 995 [1982] A.C. 225 affirmed so far as the manufacturer's liability was concerned, but on other grounds at 271.
- 996 [1982] A.C. 225, 262; contrast *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 Q.B. 256 and *Bowerman v Association of British Travel Agents* [1995] N.L.J. 1815, above, para.4-020.
- 997 [1913] A.C. 30 criticised by Atiyah in The Rise and Fall of Freedom of Contract, p.772; but followed by the House of Lords in *IBA v EMI Electronics Ltd* (1980) 14 Build. L.R. 1; cf. *Strover v Harrington* [1988] Ch. 390, 410; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 581. The Regulations referred to in para.4-219 below would not apply on facts such as those of any of the cases cited in this note.
- 998 [1913] A.C. 30, 47; *Unit Construction Co Ltd v Liverpool Corp* (1972) 221 E.G. 459; *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos NL)* [1987] 2 Lloyd's Rep. 321, 332.

- 999 *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 *Lloyd's Rep.* 611 at 614. See to the contrary *Ryanair Ltd v SR Technics Ireland Ltd* [2007] EWHC 3089 (QB). This was doubted in *Mileform Ltd v Interserve Security Ltd* [2013] EWHC 3386 (QB) at [104]–[105], citing Lewison, stating “It may be thought that this decision [*Ryanair*] undermines the general purpose of an entire agreement clause”. This is now in Lewison’s 7th edition (2020), Ch.3, section 16, para.3.138, n.442. The position in *Ryanair* was disapproved in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 at [14].
- 1000 *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622, [2007] N.L.J. 1263.
- 1001 SI 2002/3045.
- 1002 SI 2002/3045 reg.15(1); for the definition of “consumer guarantee” see reg.2. In the present context, it is significant that this definition refers to such a guarantee as an “*undertaking*”; cf. the reference, in the definition in reg.2 of “consumer” to “*contracts* governed by these Regulations”.
- 1003 See s.60 and Sch.1 para.53 Consumer Rights Act 2015. The Act applies to contracts made on or after 1 October 2015.
- 1004 See s.30(1) Consumer Rights Act 2015; “guarantee” is defined in s.30(2).
- 1005 Consumer Rights Act 2015 s.30(3). And see above, para.4-021. The 2015 Act also provides that, where the trader is required by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) to provide information to the consumer, the information so provided “is to be treated as included as a term of the contract” (see Consumer Rights Act 2015 ss.12(2) (goods), 37(2) (digital content), 50(3) (services)). Where the trader itself gives the guarantee, these provisions seem merely to make it quite clear that what is undertaken by the trader in the guarantee forms a term of the contract for supply or services with the consumer. Where the information given by the trader relates to a commercial guarantee offered by the producer, and the information given is incorrect, the consumer will have the more limited remedy of recovering from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods: ss.19(2), 42(4); or, in the cases of a services contract, a price reduction (s.54(4)). See further Vol.II, paras 40-494—40-528, 40-548—40-567, 40-574—40-588.

## (c) - Vague Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 11. - Intention to Create Legal Relations and Agreements in the Private Domain

(c) - Vague Agreements

### Vagueness negating contractual intention

- <sup>120</sup> The parties may agree on terms that are sufficiently certain but also agree terms that deprive that agreement of contractual force.  
 1006
-  They may do so by express words, as in the “subject to contract” cases discussed earlier in this chapter.  
1007
-  Alternatively, the vagueness with which the agreement is expressed may negative any contractual intention. It has been held that a husband’s promise to let his deserted wife stay in the matrimonial home had no contractual force because it was not “intended by him, or understood by her, to have any contractual basis or effect”.  
1008
-  The promise was too vague: it did not state for how long or on what terms the wife could stay in the house.  
1009
-  So, too, the use of deliberately vague language was held to negative contractual intention where a property developer reached an “understanding” with a firm of solicitors to employ them in connection with a proposed development, but neither side entered into a definite commitment.

1010

**U** Likewise, the “possibility of a seven-figure sum” share award was too uncertain and was merely an “indication of ‘jam tomorrow’” that fell short of the necessary intention to create legal relations.

1011

**U** Again, the heads of terms of an agreement proposing that a farming business would lease some land to a plant operator was not binding because there were a number of clear indicators from the wording of the provisions that the parties had not objectively intended the document to be legally binding, except for an agreed period of exclusivity in which to conduct negotiations.

1012

**U** For the same reason, “letters of intent”

1013

**U** or “letters of comfort”

1014

**U** or a Memorandum of Understanding

1015

**U** may lack the force of legally binding contracts.

1016

**U** The assumption in all these cases was that the parties had reached agreement, but lack of contractual intention prevented that agreement from having legal effect.

## Vagueness preventing effective agreement

!21 An agreement may satisfy the requirement of contractual intention yet be too vague to enforce. Thus, vagueness or uncertainty may be a ground for concluding that the parties had never reached agreement at all.<sup>1017</sup> In *Dhanani v Crasnianski*<sup>1018</sup> Ramsay J held that an agreement to set up a private equity fund satisfied the requirement of contractual intention<sup>1019</sup> but nevertheless lacked contractual force because it was “in essence an agreement to agree”<sup>1020</sup> on terms which were “essential for such an agreement to be enforced”,<sup>1021</sup> and “[w]ithout such further agreement the fund could not be set up”,<sup>1022</sup> there being “no objective criteria”<sup>1023</sup> by which the outstanding points could be resolved.

!22

D

While the issues of contractual intention and vagueness are conceptually distinct, they may overlap in borderline cases

1024

**U**; “the more vague and uncertain an agreement is, the less likely it is that the parties intended it to be legally binding”.

1025

**U** The question whether an agreement exists will depend on the degree of vagueness, and on whether the vagueness can be resolved, e.g. by applying the standard of reasonableness. In one case “the absence of any intention to create legal relations”

1026

**U** was said to have been a ground for holding that no agreement ever came into existence. Thus, contractual intention may be negated on the ground of vagueness where the claim is based, not on an express agreement, but on one alleged to be implied from conduct.

1027

**U**

## Footnotes

1006 See *Re Goodchild [1997] 1 W.L.R. 1216* where it is said at 1226 that one of the parties to alleged mutual wills “regarded the arrangement as irrevocable, but … [the other] did not”; cf. *Taylor v Dickens [1998] 1 F.L.R. 806* (the reasoning of this case is doubted, but not on the issue of contractual intention, in *Gillett v Holt [2001] Ch. 210*). See also *Judge v Crown Leisure Ltd [2005] EWCA Civ 571, [2005] I.R.L.R. 823* (above, para.4-185) at [23], distinguishing between the two issues; and *Bear Stearns Bank Plc v Forum Global Equity Ltd [2007] EWHC 1576 (Comm)* at [152], [170] and [171], where certainty and intention to create legal relations were treated as separate requirements, both of which were satisfied.

1007 Above, paras 4-159—4-161, 4-214—4-215. The terms of such agreements may be elaborated in considerable detail, but contractual intention is generally negated until the requirement of “exchange of contracts” (above, paras 4-159—4-161) is satisfied.

1008 *Vaughan v Vaughan [1953] 1 Q.B. 762, 765*; cf. *Booker v Palmer [1942] 2 All E.R. 674; Horrocks v Forray [1976] 1 W.L.R. 230; Windeler v Whitehall [1990] 2 F.L.R. 505*.

1009 cf. *Jones v Padavatton [1969] 1 W.L.R. 328*; and see *Gould v Gould [1970] 1 Q.B. 275; Layton v Morris, The Times, 11 December 1985*.

1010

- 1011      *J.H. Milner & Son v Percy Bilton Ltd [1966] 1 W.L.R. 1582*. See also *Wright v Rowland [2017] EWHC 2478 (Comm)* at [73] and [74]. In *MacInnes v Gross [2017] EWHC 46 (QB)* at [77] this paragraph was cited with approval.  
*Christie v Canaccord Genuity Ltd [2022] EWHC 1130 (QB)* at [76]–[78].
- 1012      *Pretoria Energy Co v Blankney Estates Ltd [2022] EWHC 1467 (Ch)* at [32]–[44].
- 1013      Above, paras 4-223—4-225.
- 1014      *Kleinwort Benson Ltd v Malaysian Mining Corp [1989] 1 W.L.R. 379*; see also *Associated British Ports v Ferryways NV [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595*, above paras 4-223—4-225 (where a “letter of comfort” was held to have given rise to a legally binding contract, though that contract had later been discharged).
- 1015      *Avonwick Holdings Ltd v Azitio Holdings Ltd [2020] EWHC 1844 (Comm)* at [673]–[674], a draft Memorandum of Understanding did not have contractual force because it did not clearly set out the parties’ respective rights and obligations, the steps required to implement the agreement, the assets to be transferred, the mechanism of transfer, a time by which the transfer should be effected and the proportion of assets to be held by the respective parties. The draft was also self-contradictory.
- 1016      cf. *Snelling v John G. Snelling Ltd [1973] Q.B. 87, 93*; *Montreal Gas Co v Vasey [1900] A.C. 595*; *B.S.C. v Cleveland Bridge & Engineering Co Ltd [1984] 1 All E.R. 504*; cf. *Turiff Construction Ltd v Regalia Knitting Mills (1971) 222 E.G. 169* (letter of intent held to be a collateral contract to pay for preliminary work); *Diamond Build Ltd v Clapham Park Homes Ltd [2008] EWHC 1439 (TCC), 119 Con. L.R. 32* (binding letter of intent: above, para.4-166). *Wilson Smithett & Cope (Sugar) Ltd v Bangladesh Sugar Industries Ltd [1986] 1 Lloyd's Rep. 378* (letter of intent held to be an acceptance).
- 1017      Above, para.4-185.
- 1018      *Dhanani v Crasnianski [2011] EWHC 926 (Comm), [2011] 2 All E.R. (Comm) 799*. And, see *Barbudev v Eurocom Cable Management Bulgaria Eood [2012] EWCA Civ 548, [37], [44], [52]*.
- 1019      At [75], [80], [81], [89].
- 1020      *[2011] EWHC 926 (Comm)* at [95]; see above para.4-168 for such agreements.
- 1021      *[2011] EWHC 926 (Comm)* at [105].
- 1022      *[2011] EWHC 926 (Comm)* at [94].
- 1023      *[2011] EWHC 926 (Comm)* at [104]; for similar reasoning, see *Shaker v VistaJet Group Holding SA [2012] EWHC 1329 (Comm), [2012] 2 Lloyd's Rep. 93* at [7], where an “agreement to use reasonable endeavours to agree” was held to be unenforceable because there were “no objective criteria by which the court can decide whether a party has acted unreasonably” (i.e. in relation to those endeavours); for such criteria, cf. above, paras 4-159—4-161, 4-175, 4-188.

- 1024 This view is supported by passages in *Judge v Crown Leisure Ltd [2005] EWCA Civ 571* at [9] and [24]. For another borderline case, see *Monovan Construction Ltd v Davenport [2006] EWHC 1094 (TCC), 108 Con. L.R. 15* where an agreement to do building work for a “provisional guide price” of £100,000 failed to specify the exact scope of the work and was said not to be legally enforceable as it was not intended to have contractual effect (at [17]). And see *Wright v Rowland [2017] EWHC 2478 (Comm)* at [73] and [74].
- 1025 *Pretoria Energy Co v Blankney Estates Ltd [2022] EWHC 1467 (Ch)* at [26].
- 1026 *Baird Textile Holdings Ltd v Marks & Spencer Plc [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737* at [30]; and see above, paras 4-188, 4-216.
- 1027 As in the *Baird case [2001] EWCA Civ 274*.

## **(d) - Typical Agreements Raising Question of Contractual Intention**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 11. - Intention to Create Legal Relations and Agreements in the Private Domain**

**(d) - Typical Agreements Raising Question of Contractual Intention**

**Letters of intent; letters of comfort** <sup>1028</sup>

- <sup>123</sup> Issues of contractual intention have arisen in a number of cases concerned with the legal effects of the commercial practice whereby parties to a transaction issue or exchange “letters of intent” on which they act pending the preparation of formal contracts. One possibility is that such letters may, by their express terms or on their true construction, negative contractual intention. <sup>1029</sup> There is, similarly, judicial support for the view that “a letter of comfort, properly so called”, is “one that does not give rise to contractual liability”. <sup>1030</sup> This position is illustrated by a case <sup>1031</sup> in which a company issued a “letter of comfort” to a lender in respect of a loan to one of the company’s subsidiaries. The letter stated that “it is our policy that [the subsidiary] is at all times in a position to meet its liabilities”. This was held to be no more than a statement of the present policy of the company: it was not an undertaking that the policy would not be changed since the parties had not intended it to take effect as a contractually binding promise.
- <sup>124</sup> On the other hand, “[t]he label used by the parties is not necessarily determinative”, <sup>1032</sup> so that “sometimes a legal obligation may arise as a matter of construction, notwithstanding the rubric of a letter of comfort”. <sup>1033</sup> Hence where the language of such a document, or of a letter of intent, does not negative contractual intention, it is open to the courts to hold the parties bound by the document. <sup>1034</sup> They will, in particular, be inclined to do so where the parties have acted on the

document for a long period of time or have expended considerable sums of money in reliance on it.<sup>1035</sup> The fact that the parties envisage that the letter is to be superseded by a later, more formal, contractual document does not, of itself, prevent the letter from taking effect as a contract.<sup>1036</sup>

- !25 The final possibility is that a letter of intent may be so worded that one part of it has contractual force, while the rest of it does not. In *Shaker v VistaJet Group Holding SA*,<sup>1037</sup> one of the terms of a letter of intent (LOI) began with the words:

“Non-binding: other than the provisions relating to the application, payment and refund of the Deposit and the confidentiality provisions hereunder, it is specifically understood as agreed that this letter of intent does not constitute a binding agreement upon the Guarantor, Seller and Buyer to enter into the Transaction Documents.”

On this basis, it was held that the claimant buyer was contractually entitled to enforce the provisions of the LOI relating to the return of his deposit,<sup>1038</sup> even though other parts of the LOI, in particular, the buyer’s undertaking to negotiate in good faith, had no contractual force, because of the express terms of the LOI quoted above. In another case,<sup>1039</sup> a “letter of intent” was held to be binding since “where works have been carried out, it will usually be implausible to argue that there was no contract”. However, none of the three sets of competing contractual terms and conditions proposed between the parties purporting to limit liability were incorporated into the contract as they had been continually amended and were never finally agreed.

## Agreements giving discretion to one party whether to perform

- !26 An agreement may consist of mutual promises one of which gives a very wide discretion to one party. In such a case the discretionary promise may be too vague to constitute consideration for the other party’s promise which may therefore be unenforceable.<sup>1040</sup> But if the other party has actually performed (so that there can be no question that *they* have provided consideration), the further question may arise whether the discretionary promise can be enforced; and this raises an issue of contractual intention. In *Taylor v Brewer*<sup>1041</sup> the claimant agreed to do work for a committee who resolved that he should receive “such remuneration … as should be deemed right”. His claim for a reasonable remuneration for work done failed: the promise to pay was “merely an engagement of honour”.<sup>1042</sup> This case is now more often distinguished than followed,<sup>1043</sup> but its reasoning would still be applied if the wording made it clear that the promise was not intended to be legally binding.<sup>1044</sup> A fortiori, there is no contract where performance by *each* party was left to that party’s discretion.<sup>1045</sup> Where, however, an agreement is clearly intended to have contractual effect, there is judicial support for the view that a discretion conferred by it on one party cannot “however widely worded … be exercised for purposes contrary to those of the instrument by

which it is conferred".<sup>1046</sup> The court may also be able to control the exercise of such a contractual discretion by holding that it must be exercised "rationally and in good faith"<sup>1047</sup>; but, if these requirements are satisfied, there is no further requirement that the exercise of the discretion must be reasonable.<sup>1048</sup>

- !27 Even where an agreement does not, from its inception, impose any contractual obligation on either party, such obligations may arise from the subsequent conduct of the parties in pursuance of it. This was the position where a local authority engaged the claimant as home tutor for pupils who were unable to attend school.<sup>1049</sup> The arrangement did not bind the claimant to accept, or the authority to offer, any pupil but once the claimant had agreed to accept a particular pupil, she was obliged to fulfil her commitment to that pupil and the authority was bound to provide work in relation to that pupil until the engagement in relation to him had run its course. Thus, a series of contracts arose in relation to each pupil offered to, and accepted by, the claimant, even though the original arrangement in pursuance of which the pupils were sent had no contractual force.

## Agreements giving discretion to rescind

- !28 An agreement may give one party a discretion to rescind. That party will not be bound if their promise means "I will only perform if I do not change my mind".<sup>1050</sup> But the power to rescind may only be inserted as a safeguard in certain eventualities which are not exhaustively stated, for example, where a contract for the sale of land entitles the vendor to rescind if the purchaser persists in some requisition or objection which the vendor is "unable or *unwilling* to satisfy". In such a case there is a contract and the court will control the exercise of the power to rescind by insisting that the vendor must not rescind "arbitrarily, or capriciously, or unreasonably. Much less, can he act in bad faith".<sup>1051</sup>

## Collective agreements

- !29 The terms of collective agreements between trade unions and employers (or employers' associations) may be incorporated in individual employment contracts and so become binding on the parties to those contracts.<sup>1052</sup> But the general common law view was that such collective agreements were not legally binding between the parties to them. The **Trade Union and Labour Relations (Consolidation) Act 1992** goes further in providing that a collective agreement<sup>1053</sup> is "conclusively presumed not to have been intended by the parties to be a legally enforceable contract" unless it is in writing and expressly provides the contrary (in which case the agreement is conclusively presumed to have been intended by the parties to be a legally enforceable

contract).<sup>1054</sup> To displace the presumption that a collective agreement is not intended to be a legally binding contract, the agreement must provide that it was intended to be *legally* binding. The presumption is not displaced by a statement that the parties shall be “bound by the agreement” for this may mean that they are bound in honour only.<sup>1055</sup>

## Free travel passes

- !30 There are conflicting decisions on the question whether the issue and acceptance of a free travel pass amounts to a contract. In *Wilkie v L.P.T.B.*<sup>1056</sup> it was held that such a pass issued by a transport undertaking to one of its own employees did not amount to a contract. But the contrary conclusion was reached in *Gore v Van der Lann*<sup>1057</sup> where the pass was issued to an old-age pensioner. This conclusion was based on the ground that an application for the pass had been made on a form couched in contractual language; and *Wilkie's* case was distinguished on the ground that the pass there was issued to the employee “as a matter of course … as one of the privileges attaching to his employment”.<sup>1058</sup> But as the pass in Gore's case was issued expressly on the “understanding” that it constituted only a licence subject to conditions, the distinction seems, with respect, to be a tenuous one.

## Statements of governmental policy

- !31 In a case<sup>1059</sup> arising out of the First World War a statement was made, during the war, on behalf of the Government, to the effect that a certain neutral ship would be allowed to leave a British port if specified conditions were met. It was held that the statement did not amount to a contract: it was “merely an expression of intention to act in a particular way in a certain event”.<sup>1060</sup>

## Agreements giving effect to pre-existing rights

- !32 A number of cases support the view that an arrangement which is believed simply to give effect to pre-existing contractual rights is not a contract because the parties had no intention to enter into a *new* contract<sup>1061</sup>; this may be true even where the contract giving rise to those rights had been discharged, so long as the parties believed that it was still in existence.<sup>1062</sup> But other cases show that contractual intention is not negated where the conduct of the parties makes it clear that they intended not merely to give effect to their earlier contract but also to enter into a new contract

containing additional terms<sup>1063</sup>; or merely because the conduct of one party to the alleged new contract consisted of their performance of a contract between them and a third party.<sup>1064</sup>

## Statements made in jest or anger

- <sup>133</sup> Contractual intention may be negated by the fact that the statement is made in jest or anger, at least if this fact is obvious to the person to whom the statement is made.<sup>1065</sup> Thus in *Licences Insurance Corp v Lawson*<sup>1066</sup> the defendant was a director of Company A and of Company B. Company A held shares in Company B and resolved, in the defendant's absence, to sell them. At a later meeting this resolution was rescinded after a heated discussion, during which the defendant said that he would make good any loss which Company A might suffer if it kept the shares. It was held that the defendant was not liable on this undertaking. Nobody at the meeting regarded it as a contract; it was not recorded as such in the minute book; and the defendant's fellow-directors at most thought that he was bound in honour.

## Other cases

- <sup>134</sup> The cases in which there is no intention to create legal relations cannot be exhaustively classified. Contractual intention may, for example, be negated by evidence that "the agreement was a goodwill agreement ... made without any intention of creating legal relations",<sup>1067</sup>

**U** that it was a sham, made with "no intention ... to create bona fide legal relations",<sup>1068</sup> that it formed part of a course of conduct that was "just an act or a role-play",<sup>1069</sup> and that the parties had not yet completed the contractual negotiations.<sup>1070</sup> Many other disparate factors can lead to the same conclusion: for example, where an agreement was made that a landlord would not enforce an order for possession against a tenant who had fallen into arrears with her rent, it was held that this agreement did not create a new tenancy as the parties "plainly did not [so] intend"<sup>1071</sup>: the agreement merely had the effect of turning the tenant into a "tolerated trespasser".<sup>1072</sup>

- <sup>135</sup> The cases on this topic<sup>1073</sup> show that the question of contractual intention is, in the last resort, one of fact<sup>1074</sup>; and in doubtful cases its resolution depends, in particular, on the incidence of the burden of proof and on the objective test which generally determines the issue. These points have already been discussed<sup>1075</sup>; they help to explain two controversial decisions, in each of which there was a difference of judicial opinion on the issue of contractual intention.

- <sup>136</sup> The first is *Esso Petroleum Ltd v Commissioners of Customs and Excise*.<sup>1076</sup> Esso supplied garages with tokens called “World Cup coins”, instructing them to give away one coin with every four gallons of petrol sold. The scheme was advertised by Esso and also on posters displayed by garages. By a majority of four to one, the House of Lords held that there was no “sale” of the coins; but that majority was equally divided on the question whether there was any contract at all with regard to the coins. Those who thought that there was a contract<sup>1077</sup> relied on the incidence of the burden of proof, and on the argument that “Esso envisaged a bargain of some sort between the garage proprietor and the motorist”.<sup>1078</sup> On the other hand, Lords Dilhorne and Russell relied on the language of the advertisements (in which the coins were said to be “going free”), and on the minimal value of the “coins”, as negating contractual intention.
- <sup>137</sup> The second case is *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd*.<sup>1079</sup> The representative of a firm of forwarding agents told a customer (with whom the firm had long dealt) that his goods would henceforth be packed in containers, and that these would be carried under deck. About a year later, one such container was carried on deck and lost. At first instance,<sup>1080</sup> Kerr J held that the promise was not intended to be legally binding since it was made in the course of a courtesy call, not related to any particular transaction, and indefinite with regard to its future duration. The Court of Appeal, however, held<sup>1081</sup> that the promise did have contractual force, relying principally on the importance attached by the customer to the carriage of his goods under deck, and on the fact that he would not have agreed to the new mode of carriage in containers but for the promise. The case is no doubt a borderline one. While the objective test prevents the promisor from relying on his subjective intention not to enter into a contractual undertaking, it should equally prevent the promisee’s subjective intention (if not known to the promisor) from being decisive. The decision is explicable if it must have been clear to the promisor that, but for his promise, the promisee would not have agreed to the new mode of carriage in containers.

## Footnotes

- <sup>1028</sup> Lake and Draetta, Letters of Intent 2nd edn (1994); Furmston, Poole and Norinado, Contract Formation and Letters of Intent (1997).
- <sup>1029</sup> Below, para.4-220; cf. *Snelling v John G. Snelling Ltd [1973] Q.B. 87*; *Dana UK Axe Ltd v Freudenberg FST GmbH [2021] EWHC 1751 (TCC)* at [82] a letter of intent explicitly stating that “all costs, payment terms and conditions will be mutually agreed” in due course is not an acceptance of the alleged offer.
- <sup>1030</sup> *Associated British Ports v Ferryways [2008] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595* at [24], per Maurice Kay LJ; *Barbudev v Eurocom Cable Management Bulgaria EOOD [2011] EWHC 1560 (Comm)*, [2011] 2 All E.R. (Comm) 951, where it was said

at [93] that the relevant document was “not expressed to be a ‘letter of comfort’, though that is not conclusive”, and was held “as a matter of construction … not intended to be legally binding” (at [96]), and see para.4-220 below.

1031      *Kleinwort Benson Ltd v Malaysian Mining Corp* [1989] 1 All E.R. 785; *Reynolds* 104 L.Q.R. 353 (1988); *Davenport* [1988] L.M.C.L.Q. 290; *Prentice* (1989) 105 L.Q.R. 346; *Ayres and Moore* [1989] L.M.C.L.Q. 281; *Tyree* (1989) 2 J.C.L. 279, cf. *Chemco Leasing SpA v Rediffusion* [1987] 1 F.T.L.R. 201 (where such a letter was held to be an offer but to have lapsed before acceptance); *Monk Construction v Norwich Union Life Insurance Society* (1992) 62 B.L.R. 107.

1032      *Associated British Ports v Ferryways* [2008] EWCA Civ 189 at [24].

1033      *Associated British Ports v Ferryways* [2008] EWCA Civ 189 at [27]. See also *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10, [2014] B.L.R. 150, where a building contractor issued a letter of intent (LOI) to a flooring sub-contractor and the parties accepted that the LOI constituted a binding contract (at [23]) but disagreed as to which terms of the contemplated later formal contract were intended to be incorporated into the LOI agreement.

1034      In *Associated British Ports v Ferryways* [2008] EWCA Civ 189, a “letter of comfort” was held to be a legally binding guarantee, though this had been discharged by a later agreement.

1035      cf. *Turriff Construction Ltd v Regalia Knitting Mills* (1971) 22 E.G. 169 (letter of intent held to be a collateral contract for preliminary work); *Wilson Smithett & Cape (Sugar) Ltd v Bangladesh Sugar Industries Ltd* [1986] 1 Lloyd’s Rep. 378 (LOI held to be an acceptance); *Chemco Leasing SpA v Rediffusion* [1987] 1 F.T.L.R. 201 (LOI held to be an offer but to have lapsed before acceptance); *Spartafield Ltd v Penten Group Ltd* [2016] EWHC 2295 (TCC); 168 Con. L.R. 221 (LOI displaced by contract when the key principles for the contract were agreed; the contemplated execution of a formal contract was not a precondition to the existence of the contract); *Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd)* [2018] EWCA Civ 2222, [2019] 1 All E.R. (Comm) 421 (LOI held to be an offer, which was accepted by letters of response and subsequent conduct).

1036      Above, paras 4-155—4-158. For a combination of the factors described in the text above at para.4-158, see *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC), 119 Con. L.R. 33 where a LOI was held to have contractual force even though its provisions indicated that a formal contract was to be executed but the parties acted on the letter without executing any such contract; see also *Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd)* [2016] EWHC 2509 (TCC).

1037      [2012] EWHC 1329 (Comm), [2012] 2 Lloyd’s Rep. 93.

1038      [2012] EWHC 1329 (Comm) at [8].

1039      *Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd)* [2016] EWHC 2509 (TCC) at [51].

1040      Below, para.6-028; *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651 at 659–660.

- 1041      (*1813*) *1 M. & S.* 290; cf. *Shallcross v Wright* (*1850*) *12 Beav.* 558; *Roberts v Smith* (*1859*) *28 L.J. Ex.* 164; *Robinson v Commissioners of Customs and Excise*, *The Times*, *28 April 2000*.
- 1042      (*1813*) *1 M. & S.* 290, 291.
- 1043      Vol.II, para.42-081 in employment contracts which have no express or fixed provision for remuneration the law will imply a term to pay a reasonable sum; cf. *Re Brand's Estate* [*1936*] *3 All E.R.* 374.
- 1044      cf. *Re Richmond Gate Property Co Ltd* [*1965*] *1 W.L.R.* 335.
- 1045      *Carmichael v National Power Plc* [*1999*] *1 W.L.R.* 2042; contrast *Franks v Reuters Ltd* [*2003*] *EWCA Civ* 417, *The Times*, *23 April 2003*.
- 1046      *Equitable Life Assurance Society v Hyman* [*2002*] *1 A.C.* 408 at 460, per Lord Cooke, giving this as an alternative ground for the decision while also accepting the “implied term” reasoning of the majority.
- 1047      *Horkulak v Cantor Fitzgerald Ltd* [*2004*] *EWCA Civ* 1287, [*2005*] *I.C.R.* 402 at [48] (discretionary bonus on dismissal), cf. at [46]; contrast *Keen v Commerzbank AG* [*2006*] *EWCA Civ* 1536, [*2007*] *I.C.R.* 623, where an employer’s “very wide discretion” in relation to a bonus had not “been exercised irrationally” (at [59], [60]).
- 1048      *Ludgate Insurance Co Ltd v Citibank NA* [*1998*] *Lloyd's Rep. IR* 221 at [35]–[36]; *Jani-King (GB) Ltd v Pula Enterprises Ltd* [*2007*] *EHRC* 2433 (QB), [*2008*] *1 All E.R. (Comm)* 457 at [33]–[34].
- 1049      *Prater v Cornwall CC* [*2006*] *EWCA Civ* 102, [*2006*] *I.C.R.* 731.
- 1050      But note that consumer the right to cancel a distance or off-premises contract at any time during the cancellation period of 14 days (regs 29, 30) without incurring any liability except in several specified circumstances (reg.34(3), (9), 35(5), 36(4)). See the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013*, implementing Directive 2011/83/EU on Consumer Rights.
- 1051      *Selkirk v Romar Investments Ltd* [*1963*] *1 W.L.R.* 1415, 1422; cf. the authorities on agreements subject to a condition depending on the “satisfaction” of one party, discussed above, paras 4-201—4-202. A contract term giving a wide discretion to one party may be subject to the requirement of reasonableness under *Unfair Contract Terms Act 1977* s.3(2)(b)(ii), or may not be binding on a consumer under *Unfair Terms in Consumer Contracts Regulations 1999* (SI 1999/2083), especially Sch.2 para.1(c). In the cases of agreements subject to the “satisfaction” of one party, there is no general rule requiring that party to act in good faith or reasonably: see *Stabilad Ltd v Stephens & Carter Ltd* [*1999*] *2 All E.R. (Comm)* 651 at 622, above, paras 4-201—4-202. Such agreements can be distinguished from contracts which give one party a discretion to rescind since the exercise of such a discretion deprives the other party of rights under an existing contract, while in the “satisfaction” cases there is no such contract unless the party’s satisfaction is communicated to the other. Similar reasoning serves to distinguish a contractual discretion to rescind (here under discussion) from a contractual discretion of the kind discussed above in paras 4-226—4-227 (note).
- 1052      *Robertson v British Gas Corp* [*1983*] *I.C.R.* 351; *Marley v Forward Trust Group* [*1986*] *I.C.R.* 891; cf. *N.C.B. v N.U.M.* [*1986*] *I.C.R.* 736. Contrast *Kaur v MG*

- 1053      *Rover Group Ltd [2004] EWCA Civ 1507, [2005] I.C.R. 625*, where a term to the effect that there would be no compulsory redundancies was held not to have been incorporated in individual employment contracts as it was not intended to constitute a binding contractual commitment; and *Malone v British Airways Plc [2010] EWCA Civ 1225, [2011] I.R.L.R. 32*, where agreements were intended to be made with employees collectively and to be binding in honour only (at [58], [62]) and so were not legally binding between the employers and individual employees. And see Vol.II, para.42-052.
- 1054      As defined by s.178(1) and (2) of the 1992 Act.
- 1055      s.179(1) and (2); *Universe Tankships Inc v International Transport Workers' Federation (The Universe Sentinel) [1983] A.C. 366, 380*; *Monterosso Shipping Co Ltd v International Transport Workers' Federation (The Rosso) [1982] 2 Lloyd's Rep. 120*; *N.C.B. v N.U.M. [1986] I.C.R. 736*; cf. *Cheall v A.P.E.X. [1983] 2 A.C. 180, 189* (inter-union agreement). Provisions making collective agreements legally binding were said in *Commission of the European Communities v United Kingdom [1984] I.C.R. 192, 195* to be very rare.
- 1056      *N.C.B. v N.U.M. [1986] I.C.R. 736*; cf. *Malone v British Airways Plc [2010] EWCA Civ 1225* where, since the collective agreement was intended to be binding in honour only (at [58], [61]), it was not legally binding even between the employers and the union.
- 1057      *[1947] 1 All E.R. 258*.
- 1058      *[1967] 2 Q.B. 31*; *Odgers (1970) 86 L.Q.R. 69*.
- 1059      *[1967] 2 Q.B. at 41*.
- 1060      *Rederiaktiebolaget Amphitrite v R. [1921] 3 K.B. 500*.
- 1061      *Rederiaktiebolaget Amphitrite v R. [1921] 3 K.B. 500* at 503; see further below, paras 13-008—13-010.
- 1062      *Beesly v Hallwood Estates Ltd [1960] 1 W.L.R. 549, 558*; *the actual decision was affirmed on other grounds [1961] Ch. 105*, while dicta in the decision at first instance were disapproved, on a point not here under discussion, in *Bolton MBC v Torkington [2003] EWCA Civ 1634, [2004] Ch. 66*; cf. *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd [1986] A.C. 207*; *The Aramis [1989] 1 Lloyd's Rep. 213*; *Treitel; [1989] L.M.C.L.Q. 162*; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes) [1993] 1 Lloyd's Rep. 311*; *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day) [2002] EWCA Civ 1068, [2002] 2 Lloyd's Rep. 487* at [63].
- 1063      *G.F. Sharp & Co v McMillan [1998] I.R.L.R. 632*.
- 1064      *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia) [1990] 1 Lloyd's Rep. 236, 241–242*; cf. the *Stirling* case, below para.4-234 (note), where it was accepted that a new contract was created by virtue of a subsequent agreement increasing the monthly rent.
- 1065      *Pyrene v Scindia Navigation Co Ltd [1954] 2 Q.B. 402*; *A.M. Satterthwaite & Co Ltd v New Zealand Shipping Co Ltd (The Eurymedon) [1975] A.C. 154*; *Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No.2) [1990] 2 Lloyd's Rep. 395* (so far as it relates to BP's claim). cf. *Halifax Building Society v Edell [1992] Ch. 436*, discussed below, para.20-015.
- 1065      So that they cannot rely on the objective test: see above, paras 4-210—4-211.

- 1066 (1896) 12 T.L.R. 501. And see *Blue v Ashley* [2017] EWHC 1928 (Comm), citing paras 2-176, 2-195 and 2-196 in Chitty on Contracts, 32nd edn (2015), and: see above, paras 4-210—4-211.
- 1067 *Orion Ins. Co Plc v Sphere Drake Ins. Plc* [1990] 1 Lloyd's Rep. 465, 505; affirmed (by a majority) [1990] 1 Lloyd's Rep. 239; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311; cf. *County Ltd v Girozentrale Securities Ltd* [1996] 3 All E.R. 834, 837; *Clarke v Nationwide Anglia Building Society* (1998) 76 P. & C.R. D5; *LNT Aviation Ltd v Airbus Helicopters UK Ltd* [2022] EWHC 309 (Comm) at [132]–[135].
- 1068 *Glatzer v Bradston Ltd (The Ocean Enterprise)* [1997] 1 Lloyd's Rep. 449, 484; *Hitch v Stone* [2001] EWCA Civ 63; [2001] S.T.C. 214; contrast *Ashby v Kilduff* [2009] EWHC 2034, [2010] 3 F.C.R. 80, where the argument that the agreement was a sham failed on the facts. The question whether an agreement was a “sham” may also arise for the purpose of determining, not whether a contract has come into existence, but the nature of the legal relationship created by a contract, the existence of which is not in dispute: e.g. whether one party to the contract is the other’s tenant or employee. For discussion of such possibilities, see above, paras 4-210—4-211.
- 1069 *Sutton v Mishcon Reya* [2003] EWHC 3166 (Ch), [2004] Fam. Law 247 at [26].
- 1070 *Manatee Towing Co v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 All E.R. (Comm) 306, 329; *Jackson v Thakrar* [2007] EWHC 271 (TCC), [2007] B.P.I.R. 167.
- 1071 *Burrows v Brent LBC* [1996] 1 W.L.R. 1448, 1454; cf. *Stirling v Leadenhall Residential 2 Ltd* [2001] EWCA Civ 1011, [2001] 3 All E.R. 645: agreement as to rate at which payments under a court order for rent arrears were to be made held not to give rise to a new tenancy.
- 1072 *Burrows case* [1996] 1 W.L.R. 1448 at 1455; for discussion of this case, see *Knowsley Housing Trust v White* [2008] UKHL 70, [2009] 1 A.C. 636, where Lord Neuberger at [79] described the status of a “tolerated trespasser” as a “conceptually peculiar, even oxymoronic” one.
- 1073 Above, paras 4-206 et seq.
- 1074 See *Zakhem International Construction Ltd v Nippon Kohan KK* [1987] 2 Lloyd's Rep. 596.
- 1075 Above, paras 4-207—4-215.
- 1076 [1976] 1 W.L.R. 1; Atiyah (1976) 39 M.L.R. 335.
- 1077 Lords Simon and Wilberforce. Lord Fraser, who dissented on the main issue, took the same view.
- 1078 [1976] 1 W.L.R. 1, 6.
- 1079 [1976] 1 W.L.R. 1078; Adams (1977) 40 M.L.R. 227.
- 1080 [1975] 1 Lloyd's Rep. 162.
- 1081 [1976] 1 W.L.R. 1078; cited with apparent approval of the outcome in *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* [2003] EWCA Civ 451, [2003] 1 All E.R. (Comm) 801 at [19], [40].

---

End of Document

© 2022 SWEET & MAXWELL

## **(e) - Agreements in the Private Domain**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 4 - The Agreement**

**Section 11. - Intention to Create Legal Relations and Agreements in the Private Domain**

**(e) - Agreements in the Private Domain**

### **General**

- !38 Many arrangements made in the private domain of friends, family and other social relationships do not amount to contracts because they are not intended to be legally binding. “The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality.”<sup>1082</sup> Similarly it has been held that the winner of a competition held by a golf club could not sue for his prize where:

“... no one concerned with that competition ever intended that there should be any legal results flowing from the conditions posted and the acceptance by the competitor of those conditions”<sup>1083</sup>

that the rules of a competition organised by a “jalopy club” for charitable purposes did not have contractual force<sup>1084</sup>; that “car pool” and similar arrangements between friends or neighbours did not amount to contracts even though one party contributed to the running costs of the other’s vehicle<sup>1085</sup>; that an agreement between members of a group of friends relating to musical performances by the group was not intended to have contractual effect<sup>1086</sup>; that the provision of free residential accommodation for close friends did not amount to a contract as it was an act of bounty, done without any intention to enter into legal relations<sup>1087</sup>; and that a statement made during an informal meeting in a pub by the majority owner of a company that he would pay a consultant £15 million if he raised the company’s share price to £8 would not reasonably have

been understood as a serious offer capable of creating a legally binding contract.<sup>1088</sup> In the latter case, the Judge took into account<sup>1089</sup> the informal setting,<sup>1090</sup> the social purpose of the occasion, the nature and tone of the conversation, the lack of commercial sense of the alleged agreement, the vagueness of the “offer”, perceptions of the witness, the claimant’s inconsistent subsequent conduct, and the lack of certainty on a vital term.

- <sup>139</sup> On the other hand, agreements in the private domain may have binding force. An agreement between persons who share a common household may be a contract if it has nothing to do with the routine management of the household. Thus, in *Simpkins v Pays*<sup>1091</sup> three ladies who lived in the same house took part in a fashion competition run by a newspaper. They agreed to send in their entries on one coupon and to share the prize which any such entry might win; and the agreement to share was held to be legally binding. Contractual intention was also found in an agreement between an employer and employee to play the lottery and share any winnings.<sup>1092</sup> The same was concluded where a meeting between brothers was convened for the commercial purpose of resolving family disputes about ownership of the family business; there was a presumption of an intention to create legal relations.<sup>1093</sup>

## Domestic agreements between spouses

- <sup>140</sup> Many domestic arrangements between spouses lack contractual force because it is presumed that the parties lack the intention to be contractually bound. In *Balfour v Balfour*<sup>1094</sup> a husband who worked abroad promised to pay an allowance of £30 per month to his wife, who had to stay in England on medical grounds. The wife’s attempt to enforce this promise by action failed for two reasons: she had not provided any consideration, and the parties did not intend the arrangement to be legally binding. On the second ground alone, most domestic arrangements between husband and wife are not contracts. Atkin LJ said:

“Those agreements, or many of them, do not result in contracts at all ... even though there may be what as between other parties would constitute consideration for the agreement ... They are not contracts ... because the parties did not intend that they should be attended by legal consequences ... Agreements such as these are outside the realm of contracts altogether.”<sup>1095</sup>

It has been said that the facts of *Balfour v Balfour* “stretched the doctrine to its limits”<sup>1096</sup>; but the doctrine itself has not been judicially questioned and the cases provide many other instances of its application.<sup>1097</sup>

The doctrine does not, of course, prevent a husband from making a binding contract with his wife. For example, a husband can be his wife's tenant.<sup>1098</sup> Where a man before marriage promised his future wife to leave her a house if she married him she was able to enforce the promise although it was made informally and in affectionate terms.<sup>1099</sup> Binding separation agreements are often made when husband and wife agree to live apart.<sup>1100</sup> In such a situation:

“... when the parties are not living in amity but are separated, or about to separate ... [t]hey do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.”<sup>1101</sup>

## Domestic agreements between civil partners

- <sup>142</sup> The authorities relating to the effects of domestic agreements between spouses, discussed in paras 4-240—4-241 above, could, it is submitted, be applied by analogy to such agreements between persons of the same sex who had entered into a civil partnership under the Civil Partnership Act 2004.<sup>1102</sup> The Act is silent on the point but present submission derives support from the fact that it treats civil partnerships as analogous to marriages for many legal purposes, including (in particular) statutory provisions relating to the legal effects of agreements between the parties<sup>1103</sup> or for the benefit of one of them.<sup>1104</sup>

## Domestic agreements between other cohabitants

- <sup>143</sup> Issues of contractual intention can similarly arise where a couple make an agreement with regard to a house in which they live together in a quasi-marital relationship without being married or having entered into a civil partnership.<sup>1105</sup> Where, for example, a man and a woman so cohabited, it was said to be “part of the bargain between the parties expressed or to be implied that the [woman] should contribute her labour towards the reparation of the house in which she was to have some beneficial interest.”<sup>1106</sup> This “bargain” was enforceable, either by way of contract<sup>1107</sup> or by way of constructive trust.<sup>1108</sup> Formal requirements (imposed in 1989) for contracts for the creation of interests in land<sup>1109</sup> make it unlikely<sup>1110</sup> that such an arrangement could now take effect as such a contract, but they would not prevent it from taking effect by way of constructive trust<sup>1111</sup> or of proprietary estoppel.<sup>1112</sup> Even where (in a case of this kind) the woman did nothing to increase the value of the house (and so had no “proprietary interest in the property”<sup>1113</sup>) the man’s promise that the house should continue to be available for her and the couple’s children was held to be

enforceable as a contractual licence as she had acted in reliance on the promise by moving out of her rent-controlled flat in reliance on the promise.<sup>1114</sup> But in another case,<sup>1115</sup> in which there was no such element of reliance, it was held that the provision by a married man of a house for his mistress did not give rise to a legally binding promise that she should be allowed to stay in the house. Even when such a promise can be established, it would (whether or not the parties were spouses or civil partners) be more difficult to show that some less important promise, e.g. as to the amount of money to be provided by way of a dress or housekeeping allowance, was intended to have contractual effect.

## Pre-nuptial agreements

- <sup>144</sup> Until quite recently pre-nuptial and post-nuptial agreements (agreements that determine the financial consequences of divorce where no divorce was actually planned) were void as a matter of contract law<sup>1116</sup>; they were found to be contrary to public policy, due to their potential to encourage or make it easier for parties to divorce. In *Radmacher v Granatino*<sup>1117</sup> the Supreme Court held that henceforth:

“... the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.”<sup>1118</sup>

Their Lordships added that<sup>1119</sup>: “It is, of course, important that each party should intend that the agreement should be effective”; it may not have been right to infer from such an intention in the past because parties:

“... may have been advised that such agreements were void under English law and likely to carry little or no weight. That will no longer be the case ... Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be given to it.”

- <sup>145</sup> In practice, this means that, once it is shown that the agreement was freely entered into, there is a presumption that the agreement is enforceable. It will be up to the party seeking to avoid the agreement to prove that it would be unfair to give effect to it. The Supreme Court was keen to downplay this change since the “fairness” of holding the parties to their agreement on divorce requires consideration of a far wider range of factors than those which would vitiate a contract; e.g. it would include the parties’ emotional state at the time of their agreement, and also their age, maturity and relationship history.<sup>1120</sup> The Law Commission has recommended that a “qualifying nuptial agreement” should be enforceable by the court. This must: meet the financial needs of the

couple; meet any financial responsibilities to children; be informed by financial disclosure by both spouses; and be accompanied by independent legal advice for both parties.<sup>1121</sup>

## Other shared households

- <sup>146</sup> Where adult members of a family (other than husband and wife, persons living together as such or civil partners) share a common household, the financial terms on which they do so may well be intended to have contractual effect. This was for example held to be the position where a young couple were induced to sell their house, and to move in with their elderly relations, by the latters' promise to leave them a share of the proposed joint home. The argument that this promise was not intended to be legally binding was rejected as the young couple would not have taken the important step of selling their own house on the faith of a merely social arrangement.<sup>1122</sup> But while the common household was a going concern the parties must have made many arrangements about its day-to-day management which were not intended to be legally binding. In cases of this kind, it may often be clear that there is some contract, but the terms of the arrangement may be so imprecise that it is hard to say just what obligation it imposes. For example, in *Hussey v Palmer*<sup>1123</sup> a lady spent £600 on having a room added to her son-in-law's house, on the understanding that she could live there for the rest of her life. When she left voluntarily, about a year later, it was held that there was no contract of loan in respect of the £600<sup>1124</sup>; but it seems likely that there was a contract to allow her to live in the room for the rest of her life.

## Parents and children

- <sup>147</sup> Similar issues of contractual intention can arise from promises between parents and children. An informal promise by a parent to pay a child an allowance during study is not normally a contract.<sup>1125</sup> Similarly, there is not normally a contract where a mother agrees to nurse her child who has fallen ill or been injured, even though she has to give up her work to do so,<sup>1126</sup> or where a mother gifts a flat to her daughter on condition that the daughter should look after the mother.<sup>1127</sup> A dispute between mother and daughter was described as a "most unhappy case", "really deplorable" and "distressing that they could not settle their differences amicably and avoid the bitterness and expense".<sup>1128</sup> Such arrangements are not generally intended to have contractual force, hence the presumption against such an intention<sup>1129</sup>; rather, they are manifestations of the parent-child relationship. There is unlikely to be direct evidence of the parties' actual intention since the context will generally preclude reference to legal enforcement.<sup>1130</sup> Rather, the parties' intention to be bound is imputed from the relevant circumstances to determine what type of legal

arrangement, if any,<sup>1131</sup> is most appropriate.<sup>1132</sup> The onus of proving that there was an intention to create legal relations is on the one alleging there was such as agreement.<sup>1133</sup>

- <sup>148</sup> In *Jones v Padavatton*, a mother bought a house for her daughter to live in London and to maintain herself from the proceeds from letting the other rooms; the daughter agreed to give up her secretarial work in Washington to read for the Bar in London. Six years later, the daughter had still not passed the course. The parties fell out; the daughter resisted the mother's claim for possession of the house by claiming a contractual entitlement to remain. The Court of Appeal found no enforceable contract because: (a) there was no intention to create legal relations since the parties were on good terms when the arrangement was made<sup>1134</sup>; (b) the terms of the arrangement were too vague, particularly as to its duration<sup>1135</sup>; and (c) subsequently other terms were modified or left open, suggesting the agreement was not rigid and binding.<sup>1136</sup> The circumstances, viewed objectively, were insufficient to displace the presumption that agreements made between family members are not usually made with an intention to create legal relations.
- <sup>149</sup> *Shadwell v Shadwell*<sup>1137</sup> held that there "may be circumstances in which arrangements between close relatives are intended to have the force of law".<sup>1138</sup> An important factor that points towards an intention to be bound is the presence of consideration, which may include being induced to act in the manner requested by the other party.<sup>1139</sup> This explains the reasoning of Salmon LJ in *Jones v Padavatton* that there was a binding contract given that the daughter gave up her life in Washington to move to London with her young son.<sup>1140</sup> However, reaching the result that the contract was at an end because the implication that the arrangement would persist for a reasonable period of time had expired after six years. A binding contract was found in *Hardwick v Johnson* where a mother bought a house as a residence for her son and daughter-in-law on the terms that they should pay her £7 per week to pay off the purchase price, this was held to amount to a contractual licence which the mother could not revoke so long as either of the young couple kept up the payments.<sup>1141</sup> A binding agreement was also found in *Collier v Hollingshead*,<sup>1142</sup> where a mother allowed her son to occupy farmland for a "rent", because: (a) although the consideration paid was below market value, it was more than merely nominal, and the parties called this payment "rent"; (b) had the "rent" not been paid, then a claim for its payment would have most likely been successful, indicating the seriousness of the relationship; and (c) the parties' subsequent actions were consistent with the agreement being binding, the son acted as though he was there as of right, investing in significant improvements with no objection from the mother.

## Nature of relationship between the parties: clergy

Contractual intention may sometimes be negated by the nature of the relationship between the parties.<sup>1143</sup> This view was, for example, taken in a number of cases in which it was held that there was no contract between a minister of the church (or between a person holding a corresponding appointment in a similar religious institution) and the church (or other similar institution); the reason given for this conclusion was that the relationship was not one “in which the parties intended to create legal relations between themselves so as to make the agreement enforceable in the courts”.<sup>1144</sup> But in *Percy v Board of National Mission of the Church of Scotland*,<sup>1145</sup> the House of Lords held that the appointment of Ms Percy as an associate minister of the Church of Scotland had given rise to a “contract of employment”<sup>1146</sup> for the purpose of the statutory prohibition against sex discrimination in such a contract. One view is that *Percy's* case marks a change in the judicial approach to the question of contractual intention in cases of this kind. This view is supported by statements of Lord Nicholls in that case that “in this regard there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the church where this is not so”<sup>1147</sup>; and that in the context of statutory protection of employees it was “time to recognise that employment arrangements between the church and its ministers should not lightly be taken as intended to have no legal effect.”<sup>1148</sup> This is particularly so in respect of “arrangements which on their face were intended to give rise to legal obligations”<sup>1149</sup> such as the offer and acceptance of employment, specifying in some detail the rights and obligations of the parties.<sup>1150</sup> There is therefore no longer any presumption that, in cases of the kind discussed in this paragraph, there is no intention to create legal relations.<sup>1151</sup> On the other hand, it was accepted in *Percy's* case that “many arrangements … in church matters” were such that “viewed objectively … the parties [could] not be taken to have intended to enter into a legally binding contract” because of the “breadth and looseness [of the arrangements] and the circumstances in which they were undertaken”.<sup>1152</sup> In *President of the Methodist Conference v Preston*, the Supreme Court<sup>1153</sup> (reversing the Court of Appeal)<sup>1154</sup> held (by a majority, Lady Hale dissenting) that a minister of the Methodist Church could not prosecute a claim for unfair dismissal against the Church<sup>1155</sup> as she had not worked for the Church under a “contract of service”.<sup>1156</sup> Lord Sumption (with whose leading judgment Lords Wilson and Carnwath agreed) adopted a new approach to this problem. He said that:

“The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister.”<sup>1157</sup>

In the particular case, having regard to the constitution of the Methodist Church as contained in its Deed of Union and its standing orders, the rights and duties of its ministers arose “entirely from their status in the constitution of the Church and not from any contract” unless “some special arrangement is made with a particular minister”.<sup>1158</sup> Lord Sumption pointed, in particular, to:

“… the lifelong commitment of the minister, the exclusion of any right of unilateral resignation and the characterisation of the stipend as maintenance and support.”<sup>1159</sup>

In these circumstances, and in the absence of any special arrangements, the requirement of “contractual intention”<sup>1160</sup> was not satisfied. *Percy’s* case can be distinguished on the basis that it relates to a sex discrimination claim rather than a claim for unfair dismissal, the statutory requirements for which are expressed in different terms.<sup>1161</sup> Consistently, it was held in *E v English Province of our Lady of Charity*<sup>1162</sup> that the relationship between a Roman Catholic priest and the Diocesan Bishop who had appointed him was such as to give rise to the possibility of the Bishop’s being vicariously liable for the priest’s torts. It was said that the facts that there was no formal contract, no offer and acceptance, no terms and conditions, and no provision for payment of wages did not negative this possibility, though they might “have relevance in a different context”.<sup>1163</sup> Affirming this decision on appeal,<sup>1164</sup> Ward LJ discussed the authorities on the question whether there is a contract of service between a minister of religion and the Church (or other body) that has appointed him or her.<sup>1165</sup> He concluded that there was “no contract of service in this case” as the appointment of the priest by the Bishop “was made without any intention to create any legal relationship between them”.<sup>1166</sup> Davies LJ (concurring) found the employment cases “of relatively limited significance”<sup>1167</sup> in the vicarious liability context before the court. *E*’s case was extensively discussed in *Various Claimants v Catholic Child Welfare Society*<sup>1168</sup> where the Supreme Court held that the Institute of the Brothers of the Christian Schools was vicariously liable for acts of abuse of children committed by the Institute’s lay brothers who had acted as teachers in those schools but who were not in any contractual relations with the Institute. There is no reference to either of these two vicarious liability cases in the judgments of the Supreme Court in *President of the Methodist Conference v Prescott*<sup>1169</sup> discussed in this paragraph.

## Civil servants

- !51 At one time, it was thought that the legal relationship between the Crown and its civil servants was not contractual because the Crown did not, when the relationship was entered into, have the necessary contractual intention.<sup>1170</sup> But it was said in one of the cases which supported that view that there was evidence that the Crown was reconsidering its position on the point<sup>1171</sup>; and it has since been held<sup>1172</sup> that the requirement of contractual intention was satisfied in spite of the fact that the terms of appointment stated that “a civil servant does not have a contract of employment” but had rather “a letter of appointment”. These words were not sufficient to turn a relationship which, apart from them, had all the characteristics of a contract into one which was binding in honour only. For the purposes of Pt 5 of the Equality Act 2010 “employment” means (inter alia) “Crown employment”.<sup>1173</sup>

## Police constables

- <sup>152</sup> It has been said that a police constable is a person who “holds an office and is not therefore strictly an employee”<sup>1174</sup>; and that there is “no contract between a police officer and a chief constable”.<sup>1175</sup> But it does not follow that the relationship is binding in honour only: the resulting relationship is “closely analogous to a contract of employment”<sup>1176</sup> so that duties analogous to those arising out of such a contract may be owed to the constable. For the purposes of Pt 5 of the Equality Act 2010, “holding the office of constable is to be treated as employment ...”.<sup>1177</sup>

## Footnotes

- 1082     *Balfour v Balfour [1919] 2 K.B. 571, 578; Rose & Frank Co v J.R. Crompton & Bros Ltd [1923] 2 K.B. 261, 293; Wyatt v Kreglinger & Fernau [1933] 1 K.B. 793, 806.*
- 1083     *Lens v Devonshire Club, The Times, 4 December 1914*; referred to in *Wyatt's case [1933] 1 K.B. 793* from which the quotation in the text is taken.
- 1084     *White v Blackmore [1972] 2 Q.B. 651.*
- 1085     *Coward v M.I.B. [1963] 1 Q.B. 259*; overruled, but not on the issue of contractual intention, in *Albert v M.I.B. [1972] A.C. 301; Buckpitt v Oates [1968] 1 All E.R. 1145*, criticised on this point by *Karsten (1969) 32 M.L.R. 88*. The actual decisions are obsolete by reason of *Road Traffic Act 1988 ss.145, 149*; cf. also s.150; but an issue of contractual intention might still arise if one party to such an arrangement simply failed to turn up at the agreed time. For another context in which sharing of expenses did not give rise to an inference of contractual intention, see *Monmouth BC v Marlog, The Times, 4 May 1994*.
- 1086     *Hadley v Kemp [1999] E.M.L.R. 589; McPhail v Bourne [2008] EWHC 1235.*
- 1087     *Heslop v Burns [1974] 1 W.L.R. 1241*; cf. *Horrocks v Forray [1976] 1 W.L.R. 230.*
- 1088     *Blue v Ashley [2017] EWHC 1928 (Comm)*, citing paras 2-177, 2-194 and 2-195 in Chitty on Contracts, 32nd edn (2015).
- 1089     *[2017] EWHC 1928 (Comm)* at [80]–[112]. And see *MacInnes v Gross [2017] EWHC 46 (QB)*.
- 1090     In *MacInnes v Gross [2017] EWHC 46 (QB)* Coulson J said that the fact that discussions took place over dinner in a restaurant did not preclude a binding contract from coming into existence; however, the highly informal setting meant that the court should closely scrutinise whether there was an intention to create legal relations.
- 1091     *[1955] 1 W.L.R. 975.*
- 1092     *Kucukkoylu v Ozcan [2014] EWHC 1972.*
- 1093     *Johal v Johal [2021] EWHC 1315 (Ch)* at [42].

- 1094 [1919] 2 K.B. 571. cf. *Gould v Gould* [1970] 1 Q.B. 275, where there was a division of opinion on the issue of contractual intention, the majority holding that there was no such intention where a husband on leaving his wife promised to pay her £15 per week so long as he could manage it. And see generally *Ingman* [1970] J.B.L. 109.
- 1095 *Balfour v Balfour* [1919] 2 K.B. 571 at 578: it would clearly be undesirable to enforce such agreements in accordance with their original terms, however much the position of the parties had changed.
- 1096 *Pettitt v Pettitt* [1970] A.C. 777, 816.
- 1097 e.g. *Gage v King* [1961] 1 Q.B. 188; *Spellman v Spellman* [1961] 1 W.L.R. 921; cf. *Re Beaumont (deceased)* [1980] Ch. 444, 453; cf. *Lloyds Bank Plc v Rosset* [1991] A.C. 107.
- 1098 *Pearce v Merriman* [1904] 1 K.B. 80; cf. *Morris v Tarrant* [1971] 2 Q.B. 143.
- 1099 *Syng v Syng* [1894] 1 Q.B. 466, cf. *Jennings v Brown* (1842) 9 M. & W. 496 (promise to discarded mistress).
- 1100 e.g. *Merritt v Merritt* [1970] 1 W.L.R. 1211; cf. *Tanner v Tanner* [1975] 1 W.L.R. 1346 as explained in *Horrocks v Forray* [1976] 1 W.L.R. 230; *Re Windle* [1975] 1 W.L.R. 1628 (doubted in *Re Kumar* [1993] 1 W.L.R. 224); contrast *Vaughan v Vaughan* [1953] 1 Q.B. 762 (below, para.4-220).
- 1101 *Merritt v Merritt* [1970] 1 W.L.R. 1211, 1212.
- 1102 Civil Partnership Act 2004 s.1.
- 1103 Civil Partnership Act 2004 ss.1, 73.
- 1104 Civil Partnership Act 2004 ss.1, 70.
- 1105 Either because they have chosen not to enter into such a partnership or because, not being of the same sex, they were not eligible to do so: see Civil Partnership Act 2004 s.1(1).
- 1106 *Eves v Eves* [1975] 1 W.L.R. 1338, 1345.
- 1107 *Eves v Eves* [1975] 1 W.L.R. 1338, per Browne LJ and Brightman J.
- 1108 *Eves v Eves* [1975] 1 W.L.R. 1338 at 1342, per Lord Denning MR; for this basis of liability, see *Grant v Edwards* [1986] Ch. 638; cf. *Lloyds Bank Plc v Rosset* [1991] A.C. 107, 129, *Burns v Burns* [1984] Ch. 317; *Lowe and Smith* (1984) 47 M.L.R. 341; Dewar, 735.
- 1109 Law of Property (Miscellaneous Provisions) Act 1989 (“the 1989 Act”) s.2; below, para.7-014.
- 1110 cf. *Taylor v Dickens* [1998] F.L.R. 806, 819; the reasoning of this case was doubted, but not on the issue of contractual intention, in *Gillett v Holt* [2001] Ch. 210, 227; s.2(1) of the 1989 Act requires the contract to be made in writing incorporating all its “expressly agreed” terms in a document (or documents, where contracts are exchanged), and if the promise in *Eves v Eves* [1975] 1 W.L.R. 1338 was indeed implied, it could be argued that there were no “expressly agreed” terms.
- 1111 The formal requirements imposed by the 1989 Act do not apply to “the creation or operation of ... constructive trusts”: s.2(5).
- 1112 See below, para.6-158.
- 1113 *Tanner v Tanner* [1975] 1 W.L.R. 1346, 1351.

- 1114      *Tanner v Tanner*, above.
- 1115      *Horrocks v Forray* [1976] 1 W.L.R. 320; cf. *Coombes v Smith* [1986] 1 W.L.R. 808; *Windeler v Whitehall* [1990] 2 F.L.R. 505.
- 1116      *Cocksedge v Cocksedge* (1844) 14 Sim 244; 13 L.J. Ch. 384; *H v W* (1857) 3 K. & J. 382.
- 1117      *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 A.C. 534.
- 1118      [2010] UKSC 42 at [75] per Lord Phillips of Worth Matravers, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Collins of Mapesbury, Lord Kerr of Tonaghmore; Baroness Hale of Richmond dissenting. And see Law Commission report, Matrimonial Property Needs and Agreements (Law Com No.343) 2014.
- 1119      [2010] UKSC 42 at [70].
- 1120      [2010] UKSC 42 at [71]–[72].
- 1121      Matrimonial Property Needs and Agreements (Law Com No.343, 2014).
- 1122      *Parker v Clark* [1960] 1 W.L.R. 286; cf. *Schaefer v Schuhman* [1972] A.C. 572; *Lee* (1972) 88 L.Q.R. 320; *Tanner v Tanner* [1975] 1 W.L.R. 1346; *Nunn v Dalrymple*, *The Times*, 3 August 1989.
- 1123      [1972] 1 W.L.R. 1286.
- 1124      But she recovered the £600 on equitable grounds; below, para.6-157; cf. *Re Sharpe* [1980] 1 W.L.R. 219, where there was both a loan and an equitable right in the lender; *Briggs v Rowan* [1991] E.G.C.S. 6.
- 1125      *Jones v Padavatton* [1969] 1 W.L.R. 328, 336. And see *Fleming v Beevers* [1994] 1 N.Z.L.R. 385.
- 1126      If there is very clear evidence of contractual intention there may be a binding contract, as in *Haggar v de Placido* [1972] 1 W.L.R. 716. But in practice such “contracts” were made only as devices to enable the value of the mother’s services to be recovered from a tortfeasor who had injured the child, and for this purpose they are now unnecessary: *Donelly v Joyce* [1974] Q.B. 454.
- 1127      *Ellis v Chief Adjudication Officer* [1998] 1 F.L.R. 184, 188.
- 1128      *Jones v Padavatton* [1969] 1 W.L.R. 328, 328, 336.
- 1129      *Jones v Padavatton* [1969] 1 W.L.R. 328, 331.
- 1130      *Hardwick v Johnson* [1978] 1 W.L.R. 683 at 688 (Lord Denning MR).
- 1131      *Ellis v Chief Adjudication Officer* [1998] 1 F.L.R. 184, 188 (Staughton LJ).
- 1132      *Hardwick v Johnson* [1978] 1 W.L.R. 683, 688 (Lord Denning MR), citing *Pettitt v Pettitt* [1970] A.C. 777.
- 1133      *Jones v Padavatton* [1969] 1 W.L.R. 328, 332 (Salmon LJ).
- 1134      *Jones v Padavatton* [1969] 1 W.L.R. 328, at 337, where the daughter gave evidence that “a normal mother doesn’t sue her daughter in court. Anybody with normal feelings would feel upset by what was happening”. Fenton Atkinson LJ concluded that: “Those answers and the daughter’s conduct on that occasion provide a strong indication that she had never for a moment contemplated the possibility of her mother or herself going to court to enforce legal obligations, and that she felt it quite intolerable that a purely family”.
- 1135      *Jones v Padavatton* [1969] 1 W.L.R. 328, 333.

- 1136      *Jones v Padavatton* [1969] 1 W.L.R. 328, 333, 336–337.
- 1137      (1860) 9 C.B.(N.S.) 159.
- 1138      *Jones v Padavatton* [1969] 1 W.L.R. 328, 333.
- 1139      *Shadwell v Shadwell* (1860) 9 C.B.(N.S.) 159 and 174 and 178. See below, para.6-079.
- 1140      *Jones v Padavatton* [1969] 1 W.L.R. 328, 333–334. And at 336, Fenton Atkinson LJ said “this particular daughter undoubtedly gave up a great deal on the strength of the mother’s promise”.
- 1141      *Hardwick v Johnson* [1978] 1 W.L.R. 683, per Roskill and Browne LJJ; Lord Denning MR thought that there was no contract but reached the same conclusion on other grounds; cf. *Collier v Hollingshead* (1984) 272 E.G. 941.
- 1142      (1984) 272 E.G. 941. The question was whether an arrangement between a mother and son allowing occupation of farmland for a “rent” fell within the meaning of “agreement” in s.2(1) of the Agricultural Holdings Act 1948.
- 1143      See, in addition to the cases discussed in this and the two following paragraphs, *M&P Steelcraft Ltd v Ellis* [2008] I.RL.R 355 (relationship between a prisoner and a company for which he had worked under a work placement scheme organised by the Prison Service and recorded in a tripartite agreement stating that the agreement was not intended to create legally enforceable rights *held* not to have contractual force).
- 1144      *President of the Methodist Conference v Parfit* [1984] Q.B. 368 at 378; approved in *Davies v Presbyterian Church of Wales* [1986] 1 W.L.R. 323 (no contract of employment between pastor and Presbyterian church); *Woolman* (1986) 102 L.Q.R. at 356; *Santok Sing v Guru Nanak Gurdwara* [1990] I.C.R. 309; *Birmingham Mosque Trust v Alawi* [1992] I.C.R. 435; *Diocese of Southwark v Coker* [1998] I.C.R. 140.
- 1145      [2005] UKHL 73, [2006] 2 A.C. 28.
- 1146      Within Sex Discrimination Act 1975 s.82(1). This Act is repealed by Equality Act 2010 s.211(2) and Sch.27 Pt 1, subject to exceptions and transitional provisions which need not be discussed here. For sex discrimination, see now s.11 of the 2010 Act; for references to employment in that Act, see (e.g.) ss.42(1), 83(1).
- 1147      *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73 at [25], [151].
- 1148      [2005] UKHL 73 at [26].
- 1149      [2005] UKHL 73, [2006] 2 A.C. 28 at [23].
- 1150      [2005] UKHL 73 at [24]; cf. at [112] and [137].
- 1151      *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, [2008] I.C.R. 282 at [53], [63], [66].
- 1152      [2005] UKHL 73 at [23].
- 1153      [2013] UKSC 29, [2013] 2 A.C. 163.
- 1154      [2011] EWCA Civ 1581, [2012] 2 All E.R. 934.
- 1155      Under s.94 of the Employment Rights Act 1996.
- 1156      Within s.230 of the Employment Rights Act 1996.
- 1157      [2013] UKSC 29 at [26].
- 1158      [2013] UKSC 29 at [11] and [920].
- 1159      [2013] UKSC 29 at [20], see also at [19] for this characterisation.

- 1160 [2013] UKSC 29 at [26] see also Lord Hope's concurring judgment at [32].  
1161 Employment Rights Act 1996 ss.94(1), 230(1) and (2).  
1162 [2011] EWHC 2871 (QB), [2012] 1 All E.R. 723.  
1163 [2011] EWHC 2871 (QB) at [28], [30], [36].  
1164 [2012] EWCA Civ 938, [2012] 4 All E.R. 1152.  
1165 [2012] EWCA Civ 938 at [24]–[28].  
1166 [2012] EWCA Civ 938 at [29]–[30].  
1167 [2012] EWCA Civ 938 at [119].  
1168 [2012] UKSC 56, [2013] 2 A.C. 1 at [4], [56] and [57].  
1169 [2013] UKSC 29.  
1170 *R. v Civil Service Appeal Board Ex p. Bruce* [1988] I.C.R. 649; affirmed on other grounds [1989] I.C.R. 171; *McClaren v Home Office*, *The Times*, 18 May 1989.  
1171 *R. v Civil Service Appeal Board Ex p. Bruce* 1988] I.C.R. 649 at 659.  
1172 *R. v Lord Chancellor's Department Ex p. Nangle* [1991] I.C.R. 743; cf. *Trade Union and Labour Relations (Consolidation) Act 1992* ss.62(7), 245: “deemed [for certain purposes] to constitute a contract”.  
1173 s.83(2)(b); it is not entirely clear from the structure of s.83(2) whether the words in s.83(2)(a) apply for the purpose of s.83(2)(b).  
1174 *White v Chief Constable of the South Yorkshire Police* [1999] 2 A.C. 455 at 481. cf. *Essex Strategic Health Authority v David-John* [2003] Lloyd's Rep. Med. 586 (relationship between general practitioner and Health Authority not contractual).  
1175 *White v Chief Constable of the South Yorkshire Police* 2 [1999] A.C. 455 at 497.  
1176 *White v Chief Constable of the South Yorkshire Police* [1999] 2 A.C. 455 at 497; see also *Waters v Commissioner of Police to the Metropolis* [2000] 1 W.L.R. 1607, 1616.  
1177 s.42(1); employment in Pt 5 of the 2010 Act means (inter alia) “employment under a contract of employment”: s.83(2)(a).

## Section 12. - Liability when Negotiations do not Produce a Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 12. - Liability when Negotiations do not Produce a Contract

### General

- <sup>153</sup> Contracts of any complexity are likely to be negotiated through a series of communications with one side responding to the other's proposals. The starting point in English law is that, until the contract is concluded, either party is free to decide not to contract and to withdraw from further negotiations without incurring any liability. This position upholds freedom of contract (which includes freedom *from* contract) and assumes that parties must take the risk that negotiations may fail to progress to an enforceable contract. However, such a position may, in some cases, come into tension with considerations of good faith and fair dealing. This may be the case, for example, when the party refusing to proceed with the negotiations or claiming that the agreement reached lacks contractual force has induced the other party to believe that a contract will be concluded, and perhaps even to commence its performance. Many European continental civil law systems recognise a duty to negotiate in good faith.<sup>1178</sup> The Draft Common Frame of Reference<sup>1179</sup> states that:

“A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing.”

Likewise, the UNIDROIT Principles of International Commercial Contracts,<sup>1180</sup> state that while “[a] party is free to negotiate and is not liable for failure to reach an agreement”, he is “liable for the losses caused to the other party” if he “negotiates or breaks off negotiations in bad faith”; and:

“... [i]t is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.”

## Piecemeal approach

- <sup>154</sup> In contrast, English law imposes no general duty to negotiate in good faith.<sup>1181</sup> However, this is not to say that there is a bright line between liability when a contract has been concluded, and no liability before that point. For that would overlook the wide range of doctrines and principles that can be deployed by the courts to deal with contraventions of good faith and fair dealing in the pre-contractual period. As Bingham LJ observed in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*<sup>1182</sup>:

“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table’. It is in essence a principle of fair and open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness ... At one level they are concerned with a question of pure contractual analysis ... At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound.”

These “piecemeal solutions” are discussed in greater detail elsewhere in these two volumes and references will be made to them. They are brought together in this section to show how and to what extent the common law, in effect, implements a notion of good faith and fair dealing in the pre-contractual period.

## Footnotes

- <sup>1178</sup> Italian Codice Civile art.1337 and s.311(2) of the German Bürgerliches Gesetzbuch both impose the obligation of good faith during contract negotiations. And see above, paras 2-034 and 2-035.

- 1179 Principles, Definitions and Model Rules of European Private Law: Draft Common  
Frame of Reference (2009), art.II-3:301(1); cf. O. Lando and H. Beale (eds) Principles  
of European Contract Law (Parts I and II) (2000) art.2:301.
- 1180 UPICC art.2.1.15.
- 1181 See above, para.[2-036](#).
- 1182 *[1989] Q.B. 433; [1988] 2 W.L.R. 615*.

## **(a) - Main Agreements “Perfected” by the Court**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 12. - Liability when Negotiations do not Produce a Contract

**(a) - Main Agreements “Perfected” by the Court**

### **Objectivity and fault**

- !55 Contracts are premised on the agreement of the parties. But, while the common law adopts the objective test to agreement (the appearance of agreement is sufficient),<sup>1183</sup> some continental European civil law systems (e.g. France) purport to adopt a subjective approach. Accordingly, there may be no contract if an offeror no longer intended to enter make the contract but fails to inform the offeree,<sup>1184</sup> or the contract may be avoided, if the expression of agreement is tainted by mistake so that the mistaken party did not intend to enter that particular contract, despite appearances.<sup>1185</sup> However, in some civilian systems the notion of fault in the contracting process seems to have developed as a counter-weight to the requirement of subjective assent. Thus, it is suggested that the offeror in the French case, Cass. Civ. 17 December 1958, might be liable under art.1382 C.C. (delictual liability) for his failure to inform the offeree that the house was no longer available.<sup>1186</sup> The notion of culpa in contrahendo (fault in the conclusion of a contract) formally entered the BGB as a general principle in 2001 (§311) and deals with a number of circumstances that do not arise in English law because the objective approach means that there will simply be contractual liability. English law has also developed many other techniques to “perfect” an otherwise imperfect agreement, as paras 4-256—4-263 below illustrate.

### **Incomplete or vague agreements**

!56

Where the parties have reached agreement one party may allege that, for various reasons, the agreement lacks contractual force because the agreement is incomplete,<sup>1187</sup> is subject to formal execution of a contract,<sup>1188</sup> is too vague,<sup>1189</sup> or lacks contractual intent.<sup>1190</sup> The common law has many ways of countering a party’s unmeritorious attempt to withdraw from concluding a contract or to refute the existence of an enforceable contract, especially where the other party has engaged in significant acts of reliance on the existence of an enforceable contract.

## Overcoming incomplete agreement

- <sup>157</sup> Incomplete agreements may be cured by a statutory or common law implied term based on the standard of reasonableness,<sup>1191</sup> so long as the agreement did not anticipate further agreement on the matter.<sup>1192</sup> However, even where the agreement anticipates further terms “to be agreed”, the court may still give legal effect to it if there is evidence that the parties intended to be bound, for example, because both parties have acted on the basis that the agreement was binding.<sup>1193</sup> The matters left to be resolved may be regarded as subsidiary and so not to negative contractual intention, or may be resolved by reference to any criteria or machinery set out in the agreement,<sup>1194</sup> unless the criteria is too uncertain or the machinery fails and cannot be cured because it is not “subsidiary and inessential”.<sup>1195</sup>

## Duty to negotiate outstanding details

- <sup>158</sup> While the common law recognises no duty to negotiate in good faith<sup>1196</sup> in the formation of a contract, where a contract has been concluded<sup>1197</sup> because the parties have agreed on all essential points, the court may, in respect of other points left open, enforce any express term to negotiate in good faith, imply a term that they are to do so, or imply a term based on the standard of reasonableness.<sup>1198</sup> That is, the court may proceed on the basis that the parties intended to be bound at once in spite of the fact that further significant terms were to be agreed later and that even their failure to reach such agreement would not invalidate the contract, unless without such agreement, it was unworkable or too uncertain to be enforced.

## Overcoming vague agreement

- <sup>159</sup> Aside from the ordinary process of construction,<sup>1199</sup> apparent vagueness in the terms agreed may be resolved by reference to custom or trade usage,<sup>1200</sup> by the standard of reasonableness if the

words used import an objective standard of assessment,<sup>1201</sup> by requiring one party to resolve the vagueness,<sup>1202</sup> by severing or ignoring meaningless or self-contradictory phrases,<sup>1203</sup> or by reference to extrinsic evidence.<sup>1204</sup>

## Restraint on exercise of discretion

- !60 An agreement that confers a wide discretion on one or both parties may be too uncertain to enforce. However, where the agreement is clearly intended to have contractual effect, there is judicial support for the view that a discretion conferred by it on one party cannot "however widely worded ... be exercised for purposes contrary to those of the instrument by which it is conferred".<sup>1205</sup> The court may also be able to control the exercise of contractual discretions by holding that the party exercising the discretion must act "rationally and in good faith"<sup>1206</sup> and not "arbitrarily, or capriciously, or unreasonably. Much less, can he act in bad faith".<sup>1207</sup> Thus, the agreement is rendered sufficiently certain to enforce.

## Agreement subject to execution of formal document

- !61 An agreement that is made subject to the execution of a formal document may nevertheless be accorded legal force without such execution. The court may find, in the circumstances<sup>1208</sup>: that such a document is intended only as a solemn record of an already complete and binding agreement; or that while the main agreement lacks contractual force, nevertheless, a separate preliminary or interim contract had come into existence at an earlier stage, e.g. when one party begins to render services requested by the other, so that under this contract the former party will be entitled to a reasonable remuneration for those services<sup>1209</sup>; or that while the agreement originally lacked contractual force, it has acquired such force by reason of supervening events, e.g. where subsequent events have occurred whereby the non-executing party is estopped by relying on his non-execution; or that the non-executing party has waived the requirement of formal execution; or that the words "subject to contract" are meaningless and can be severed<sup>1210</sup>; or that there was a binding provisional agreement until it is superseded by the formal agreement.<sup>1211</sup> Where the parties have begun to act on an agreement before it has contractual force and the agreement subsequently acquires such force, the resulting contract may be regarded as expressly or impliedly having retrospective effect so as to apply to work done or goods supplied before it was actually made.<sup>1212</sup>

## Other conditional agreements

- !62 Where an agreement is subject to a contingent condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by him. Nevertheless, such an agreement may, on its true construction, impose some degree of obligation on one or both of the parties or on one of them.<sup>1213</sup> The agreement may: restrict the right of one (or both) of the parties from withdrawing before the occurrence of the condition, so long as it can still occur<sup>1214</sup>; impose a duty on both parties not to do anything to prevent the occurrence of the condition<sup>1215</sup>; or impose a duty on one of the parties to use reasonable efforts to bring the condition about.<sup>1216</sup> Where the operation of the contract depends on the "satisfaction" of one of the parties with the subject-matter or other aspects relating to the other's performance, the court may construe the term as "subject to bona fides".<sup>1217</sup> Where a condition is inserted entirely for the benefit of one party, the court may find that that party has waived the condition, so that the contract is binding as if the condition had been satisfied.<sup>1218</sup>

## Constructive trust

- !63 An agreement that lacks contractual force for want of execution of a formal document may nevertheless be enforceable in equity under a constructive trust where the prospective buyer had acted to his detriment in reliance upon it. Where an agreement for the joint acquisition of property lacks contractual force for want of execution of a formal document and one of the parties then acquires the property for himself, he may also be liable to hold a share of that property for the other party by virtue of a constructive trust.<sup>1219</sup>

## Proprietary estoppel

- !64 Courts may deploy the doctrine of proprietary estoppel<sup>1220</sup> to circumvent the absence of the execution of a formal document where a plaintiff has done acts in reliance on the defendant's promise that he (the claimant) has, or that he will acquire, rights in or over the defendant's land. There must be:

"... clarity as to what it is that the object of the estoppel [i.e. the defendant] is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat."<sup>1221</sup>

Neither of these requirements were satisfied in *Cobbe v Yeoman's Row Management Ltd*<sup>1222</sup> since the “agreement in principle”, was, as the plaintiff knew, incomplete and binding in honour only, so that he could not allege that the defendant was bound by it; and since the plaintiff was not asserting any expectation that he would acquire a proprietary right.<sup>1223</sup> Likewise, in another case,<sup>1224</sup> although it was accepted that proprietary estoppel should also apply to intellectual property rights, it did not arise on the facts since the claimant knew that the parties were not in agreement and the defendant made no representation that the contract would be concluded. In contrast, the claim for proprietary estoppel was upheld in *Thorner v Major*<sup>1225</sup> where the plaintiff had worked for 29 years without pay in reliance on his uncle’s assurance that he would inherit the land.

## Overcoming failure to comply with formal requirements regarding land

- <sup>165</sup> Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 Act renders any agreement for the acquisition of an interest in land that does not comply with the requisite formalities prescribed by the section.<sup>1226</sup> Section 2(5) expressly makes an exception for resulting, implied or constructive trusts.<sup>1227</sup> Moreover, despite the absence of any express saving provision in s.2 in respect of the doctrine of estoppel, there is support for allowing the doctrine to modify or counteract the effect of s.2.<sup>1228</sup> The doctrine of promissory estoppel, owing to its defensive nature, cannot create a new cause of action in substitution for the contractual action denied for want of formality.<sup>1229</sup> However, the Law Commission, in its work towards the 1989 Act, saw proprietary estoppel as a particularly attractive technique for avoiding the injustice caused by a rigid adherence to the new formality rules.<sup>1230</sup> Nevertheless, the judicial view on the appropriateness of recourse to proprietary estoppel where an agreement between the parties is void for failure of the formal requirements of s.2 has been mixed.<sup>1231</sup> In particular, Lord Scott has expressed the view in *Cobbe v Yeoman's Row Management Ltd* that “proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void”,<sup>1232</sup> although this may be confined to the commercial context where, moreover:

“... the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property”,

or where “further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified”, or where “the parties did not expect their agreement to be immediately binding”.<sup>1233</sup> In a non-proprietary context, the House of Lords concluded that an oral promise to guarantee payment, unenforceable under s.4 of the Statute of Frauds 1677, may be rendered enforceable by appeal to estoppel if the lender assumed that the guarantor would honour the guarantee, that assumption was induced or encouraged by the guarantor and the lender relied

on that assumption. There must be something more than the promise, such as some additional encouragement, inducement or assurance.<sup>1234</sup>

## Promissory estoppel in other jurisdictions

- !66 Where one party has made a promise or representation to the other party that he will not enforce his strict legal rights against the other, and this has induced reliance by the latter party, the former party will not be able to resile from his promise or representation if to do so would be inequitable.<sup>1235</sup> The English doctrine of promissory or equitable estoppel can only prevent the promisor from fully enforcing his previous rights against the promisee; it cannot confer new or additional rights on the promisee. Thus, the doctrine is said to act defensively, and not offensively; it is a “shield, but not as a sword”. However, other common law jurisdictions have allowed the doctrine of promissory estoppel to create new rights<sup>1236</sup> and so may operate where negotiations for a contract break down. In the United States, a promise that can be reasonably expected to induce, and does induce, reliance “is binding if injustice can be avoided only by enforcement of the promise” although enforcement of the promise is not automatic, for the remedy “may be limited as justice requires”.<sup>1237</sup> Likewise, a line of Australian cases supports the view that promises or representations that lack contractual force (for want of consideration or of contractual intention), may nevertheless be enforced via promissory estoppel. In *Waltons Stores (Interstate) Ltd v Maher*,<sup>1238</sup> a prospective lessor of business premises (A), did demolition and building work on the premises at the request of the prospective lessee (B) while the agreement for the lease was still subject to contract. A did so on the assumption, encouraged by B, that a binding contract would be concluded. When B withdrew from the agreement, B was estopped from denying that a contract had come into existence. On these facts, proprietary estoppel would not have availed A because the work was done on A’s (rather than on B’s) land and a quantum meruit claim would not have been available because B was not unjustly enriched by A’s work.

## Letters of intent

- !67 Where commercial parties to a transaction issue or exchange “letters of intent” on which they act pending the preparation of formal contracts, or issue a “letter of comfort”, such letters may, as a matter of construction, be held to bind the parties. The courts will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. The fact that the parties envisage that the letter is to be superseded by a later, more formal, contractual document does not, of itself, prevent the letter from taking effect as a contract.<sup>1239</sup>

## Contractual intention

- <sup>118</sup> A party may seek to escape an otherwise valid contract by alleging that an agreement was made without any intention of creating legal relations. In the case of ordinary commercial transactions, such an intention is presumed; a heavy onus is placed on the party who asserts that no legal effect is intended. The courts will be influenced by the importance of the agreement to the parties, and by the fact that one or both parties have acted in reliance on it.<sup>1240</sup> Whether any words apparently negating contractual intention has that effect is a question of construction.<sup>1241</sup> In contrast to commercial agreements, agreements made in the social or familial context are presumed to be attended by no intention to be legally bound.<sup>1242</sup> However, this presumption may be rebutted on the facts of the individual case.<sup>1243</sup> Where a couple make an agreement with regard to a house in which they live together in a quasi-marital relationship without being married or having entered into a civil partnership, the agreement may be enforced by way of contract, constructive trust, proprietary estoppel or contractual license.<sup>1244</sup>

## Footnotes

1183 See above, paras 4-004—4-006.

1184 Thus, in Cass. Civ. 17 December 1958, nD.1959.1.33, the French Cour de cassation seems to assume that an offer to sell a house could no longer be accepted after the house had been sold to a third person, even though the offeror had not informed the offeree of the sale.

1185 §119 BGB art.1109 Code Civile.

1186 H. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer (eds) *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law* (2019), 231: cf. Cass. Civ. 17 December 1958, nD.1959.1.33. Reflecting the same idea is §122 BGB; this only permits a party who is not at fault to seek compensation from the mistaken party.

1187 See above, paras 4-145, 4-173.

1188 See above, paras 4-155—4-158.

1189 See above, para.4-185.

1190 See above, para.4-086.

1191 See above, paras 4-146—4-151.

1192 See above, para.4-173.

1193 See above, paras 4-175—4-179.

1194 See above, paras 4-180—4-183.

1195 *Re Malpas* [1985] Ch. 42, 50; cf. *Tito v Waddell* (No.2) [1877] Ch. 106, 314; *Didymi Corp v Atlantic Lines & Navigation Co Ltd* [1988] 2 Lloyd's Rep. 108, 115.

- 1196 See above, para.2-036.
- 1197 *Petromec Inc v Petroleo Brasileiro SA Petrobras [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121* at [115]–[125], distinguishing *Walford v Miles*, above para.4-168, on the ground that, in the latter case, there was “no concluded agreement since everything was subject to contract” and that there was “no express agreement to negotiate in good faith” (at [120]). In the *Petromec* case, the point was “not essential to the disposition of the appeal” (at [115]). For further proceedings in the *Petromec* case, see above, para.4-155 (note). cf. *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 200, [2013] B.L.R. 265* where clause 3.5 of the contract (set out at [14]) required the parties to “co-operate with each other in good faith”. On the true construction of that clause there had been no breach of it (at [120], [143]; cf. at [153]).
- 1198 See above, paras 4-152, 4-170.
- 1199 See below, Ch.15, paras 15-047—15-121.
- 1200 See above, para.4-187.
- 1201 See above, para.4-188.
- 1202 See above, para.4-189.
- 1203 See above, paras 4-190, 4-192.
- 1204 See above, para.4-193.
- 1205 *Equitable Life Assurance Society v Hyman [2002] 1 A.C. 408* at 460, per Lord Cooke, giving this as an alternative ground for the decision while also accepting the “implied term” reasoning of the majority.
- 1206 *Horkulak v Cantor Fitzgerald Ltd [2004] EWCA Civ 1287, [2005] I.C.R. 402* at [48] (discretionary bonus on dismissal); cf. at [46]; contrast *Keen v Commerzbank AG [2006] EWCA Civ 1536, [2007] I.C.R. 623*, where an employer’s “very wide discretion” in relation to a bonus had not “been exercised irrationally” (at [59], [60]). And see above, paras 2-066 and 4-226—4-228.
- 1207 *Selkirk v Romar Investments Ltd [1963] 1 W.L.R. 1415, 1422*. And see above, paras 4-201—4-202.
- 1208 See above, paras 4-201—4-202.
- 1209 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC 14, [2010] 1 W.L.R. 753* at [61]; cf. at [84].
- 1210 See above, para.4-165.
- 1211 See above, para.4-160.
- 1212 See above, para.4-166.
- 1213 See above, para.4-197.
- 1214 See above, para.4-199.
- 1215 See above, para.4-200.
- 1216 See above, para.4-203.
- 1217 See above, paras 4-201—4-202.
- 1218 See above, para.4-205.
- 1219 *Banner Homes Group Plc v Luff Developments Ltd [2000] Ch. 372*; contrast *London & Regional Investments Ltd v TBI Plc [2000] EWCA Civ 355*, where the joint venture

agreement was expressly “subject to contract” (above, paras 4-159—4-161), thus reserving a right to withdraw. In *Crossco No.4 Unlimited v Jolan Ltd Note [2011] EWCA Civ 1619, [2012] 2 All E.R. 754*, Arden and Mcfarlane LJJ took the view that the decision in the *Banner Homes* case was based on constructive trust (at [129], [119], [124]) while Etherton LJ took the view that it rested on breach of fiduciary duty (at [88], [93]). This difference of judicial opinion did not affect the outcome of the *Crossco* case and further discussion of it is beyond the scope of this chapter.

1220 See below, paras 6-155—6-188.

1221 *Cobbe v Yeoman’s Row Management Ltd [2008] UKHL 55, [2008] 1 W.L.R. 1752* at [28].

1222 *Cobbe v Yeoman’s Row Management Ltd [2008] UKHL 55, [2008] 1 W.L.R. 1752* at [28].

1223 See below, para.6-164.

1224 *Motivate Publishing FZ LLC v Hello Ltd [2015] EWHC 1554 (Ch)* at [61]—[64], [66], [72]—[73].

1225 *[2009] UKHL 18, [2009] 1 W.L.R. 776.*

1226 See below, paras 7-016—7-048.

1227 See below, para.7-049.

1228 *McCausland v Duncan Lawrie Ltd [1997] 1 W.L.R. 38* at 45, 50; *Yaxley v Gotts [2000] Ch. 162*, at 174. And, see below, para.7-051.

1229 cf. below, paras 4-266, 6-093 et seq., especially para.6-106, and para.7-052. Neither can estoppel by convention circumvent the requirements of s.2 of the 1989 Act, see below, para.7-053.

1230 Law Com. No.164 (1987), para.5.5.

1231 See below, paras 7-054—7-059.

1232 *[2008] UKHL 55, [2008] 1 W.L.R. 1752* at [29].

1233 *Herbert v Doyle [2010] EWCA Civ 1095, [2010] N.P.C. 100* at [57]. And see *Pinisetty v Manikonda [2017] EWHC 838 (QB)*.

1234 *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA [2003] UKHL 17* at [8], although these were not satisfied on the facts.

1235 See below, paras 6-093—6-114.

1236 See below, para.6-115.

1237 Restatement, Contracts §90 and Restatement 2d, Contracts §90.

1238 (*1988*) 164 C.L.R. 387. See below, para.6-115.

1239 See above, paras 4-223—4-225.

1240 See above, para.4-207.

1241 See above, paras 4-214—4-215.

1242 See above, para.4-238.

1243 See above, paras 4-240—4-249.

1244 See above, paras 4-243, 4-263 and 4-264.

## **(b) - Negotiations Broken Off but Preliminary Agreement Exists**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 12. - Liability when Negotiations do not Produce a Contract

**(b) - Negotiations Broken Off but Preliminary Agreement Exists**

### **No main contract but ancillary contract**

- <sup>169</sup> We have seen that even if the parties do not successfully conclude a contract on the main subject matter of their negotiations (because their agreement is subject to formal execution or other condition), they may have made a preliminary or collateral contract that the court will enforce, or the courts may impose such an ancillary contract.<sup>1245</sup> Likewise, even where the parties have not reached agreement on the main subject matter of negotiations, the courts may enforce the parties' express agreed preliminary or collateral contract,<sup>1246</sup> or the courts may impose one, to uphold the integrity of the negotiation process.

### **Lock-out agreements**

- <sup>170</sup> In *Walford v Miles*<sup>1247</sup> the House of Lords refused to imply a duty to negotiate in good faith (a "lock-in" agreement) because, as Lord Ackner stated, "the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations ... [and] ... unworkable in practice."<sup>1248</sup> Hence, an *express* term requiring negotiations in good faith is also unenforceable. However, the parties' freedom of action in the negotiation period may be restricted by a preliminary or collateral contract. One instance of this is a "lock out" agreement<sup>1249</sup> whereby one party undertakes to the other not to negotiate a contract with a third party in respect of a particular subject matter. The "lock out" agreement must be sufficiently

certain as to duration. This was not the case in *Walford v Miles*<sup>1250</sup> because the agreement failed to specify the time for which the vendor's freedom to negotiate with third parties was to be restricted. In contrast, a promise not to negotiate with third parties for two weeks was sufficiently certain to enforce in *Pitt v PHH Asset Management Ltd.*<sup>1251</sup>

## Collateral contract

- <sup>171</sup> The courts have been prepared to find other collateral contracts to preserve the integrity of the negotiation process. For example, a refusal to accept the highest bid in an auction will generally attract no liability.<sup>1252</sup> But where the auction is "without reserve", it has been held that the *auctioneer* is liable on a collateral contract between him and the highest bidder that the sale will be without reserve.<sup>1253</sup> Likewise, an invitation to tender does not bind the party inviting the tender to accept the highest (or lowest, as the case may be) tender. But if the latter does so bind himself, the invitation for tenders may be regarded *either* as itself an offer *or* as an invitation to submit offers coupled with an undertaking to accept the highest (or, as the case may be, the lowest) offer; and the contract is concluded as soon as the highest offer to buy (or lowest offer to sell, etc.) is communicated.<sup>1254</sup> Along the same lines, in *Blackpool and Fylde Aero Club Ltd v Blackpool BC*,<sup>1255</sup> where an invitation to tender was sent by a local authority to seven selected parties stating that tenders submitted after a specified deadline would not be considered, it was held that the authority was contractually bound to consider (though not to accept) a tender submitted before the deadline. Where, before the main contract has been concluded, one party has embarked on preliminary work or performance of the main agreement, the court may find a collateral contract to the effect that such work would be paid for.<sup>1256</sup> Collateral contracts can also be used to give effect to the parties' objective intention where the written contract alone does reflect adequately do so and there is evidence that the parties intended to create a collateral contract.<sup>1257</sup>

## Footnotes

1245 See above paras 4-261—4-262.

1246 See above para.4-218.

1247 [1992] 2 A.C. 128, 138; *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 at [10]. See above para.4-168.

1248 [1992] 2 A.C. 128, 138. The agreement was also held to be unenforceable on the grounds of uncertainty, see above, paras 4-168—4-169.

1249 See above para.4-169.

1250 [1992] 2 A.C. 128. See further para.4-168.

1251 *Pitt v PHH Asset Management Ltd* [1994] 1 W.L.R. 327; cf. *Tye v House* [1997] 2 E.G.L.R. 171.

- 1252 Because the putting up of property for auction is generally only an invitation to treat, the offer coming from the bidder which the auctioneer is free to accept or reject, see above para.[4-025](#).
- 1253 See above, para.[4-026](#).
- 1254 See above, para.[4-028](#).
- 1255 *[1990] 1 W.L.R. 1195*. No decision was reached on the quantum of damages.
- 1256 See above, paras [4-261](#), [4-267](#), [4-269](#).
- 1257 *Coleman v Mundell [2020] EWHC 2852*. And see above, para.[4-212](#).

## (c) - Negotiations Broken Off without Preliminary Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 4 - The Agreement

Section 12. - Liability when Negotiations do not Produce a Contract

(c) - Negotiations Broken Off without Preliminary Agreements

### Fraud, negligent misrepresentation and non-disclosure

<sup>172</sup> *Walford v Miles*<sup>1258</sup> shows that English law recognises a duty of good faith in contract negotiation at least to the extent that parties are made liable for damages for deceit<sup>1259</sup> and negligent misrepresentation.<sup>1260</sup> In that case, the defendant's promise to terminate negotiations with any third party amounted to a misrepresentation for which an award of £700 for wasted expenditure was given and this was not challenged on appeal. Further, even if no contract is ultimately concluded, a party may be liable for misleading the other party by giving careless advice as to the probable outcome of the negotiations. For example, in *Box v Midland Bank Ltd*<sup>1261</sup> the plaintiff sought a large loan from his bankers; the bank manager told the plaintiff that the approval of head office would be required but led the plaintiff to believe that this was a mere formality. When head office refused the plaintiff's loan application, Lloyd J awarded £5,000 as loss suffered, in the form of an extended overdraft, in reliance on the negligent statement. The question is whether the law recognises a more onerous duty of good faith in the form of a duty to have regard to the legitimate interests of the other party by making disclosure of facts that are material to the transaction. The answer is no, unless: the contract is *uberrimae fidei*,<sup>1262</sup> the parties are in a fiduciary relationship<sup>1263</sup> or a relationship of trust and confidence,<sup>1264</sup> the failure to disclose some fact distorts a positive representation,<sup>1265</sup> or statute requires specific disclosure.<sup>1266</sup> The general picture is summarised by Rix LJ in *ING Bank NV v Ros Roca SA*<sup>1267</sup>:

“Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat

emptor reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune.”

## Manufacturer's statements that induce purchase of goods

- <sup>173</sup> A person who purchases goods in reliance on statements in a manufacturer's promotional literature is not, *for that reason alone*, entitled to claim for any loss occasioned by the manufacturer's misrepresentation.<sup>1268</sup> But if the manufacturer knows both the purchaser's identity and his purposes, the purchaser may have an action in deceit or negligent misrepresentation,<sup>1269</sup> or the information given by the manufacturer may constitute a contractual warranty.<sup>1270</sup> Where goods are sold or supplied to a consumer with a “consumer guarantee”, the consumer guarantee “takes effect ... as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and associated advertising”.<sup>1271</sup>

## Restitution for failure of consideration

- <sup>174</sup> Where money has been paid in anticipation of a contract that does not eventuate, the payor may be able to recover the sums paid for failure of consideration.<sup>1272</sup> In *Sharma v Simposh Ltd* Toulson LJ said<sup>1273</sup>:

“The agreement between the parties lacked formal validity and so had no contractual effect. It was no more than a mutual declaration of intent. An important part of the law of restitution is concerned with money paid or benefits conferred in respect of legally ineffective transactions. Goff & Jones' textbook on the Law of Restitution 7th. Ed. 2007, [states at paras 19-001 and 19-002]:

‘Transactions may be or become ineffective for a variety of reasons. But the reason the courts will award restitution is in each case fundamentally the same, namely, that the plaintiff's expectations have not been fulfilled.’

...

'If money has been paid under a contract which is or becomes ineffective, the recipient is evidently enriched. It is a distinct question whether that enrichment is an unjust enrichment ... In most of the situations, however, the ground of recovery is that the expected return for the payment, or consideration, as it is confusingly called, has failed.'"

## Quantum meruit

- <sup>125</sup> Where work has been done in anticipation of a contract that does not eventuate, the remedy of quantum meruit (the reasonable value of the services provided) may be awarded, as a form of restitution for unjust enrichment, provided that the services were requested or acquiesced in by the recipient and provided that the claimant did not take the risk of being reimbursed only if a contract was concluded. The court may also impose an obligation on the recipient of a benefit if they have behaved unconscionably in declining to pay for it.<sup>1274</sup> In *Cobbe v Yeomans Row Management Ltd*<sup>1275</sup> Mummery LJ said that "Under English law there is no general duty to negotiate in good faith"; but he added that there were:

"... plenty of other ways of dealing with particular problems of unacceptable conduct occurring in the course of negotiations without unduly hampering the ability of the parties to negotiate their own bargains without the intervention of the courts."<sup>1276</sup>

In the *Cobbe* case itself, quantum meruit was awarded to the party prejudiced by the other party's "unattractive"<sup>1277</sup> conduct in withdrawing from the agreement, which required further negotiations to acquire contractual force.

## Footnotes

1258 [1992] 2 A.C. 128, and see above, para.4-270.

1259 See below, paras 9-055—9-082.

1260 See below paras 9-082, 9-094—9-099. And see para.9-101 on the special relationship required to give rise to a duty of care between parties negotiating a contract.

1261 [1979] 2 Lloyd's Rep. 391, on appeal (as to costs only) [1981] 1 Lloyd's Rep. 434. And see below, para.9-104.

1262 See below, paras 9-167—9-192.

- 1263 See below, paras 9-086—9-097.
- 1264 See below, paras 10-105—10-119.
- 1265 See below, paras 9-024—9-025.
- 1266 See, e.g. para.9-181.
- 1267 [2011] EWCA Civ 353, [2011] All E.R. (D) 39 (Apr) at [92].
- 1268 *Lambert v Lewis* [1982] A.C. 225; this issue was not discussed on appeal to the House of Lords. And see below, para.9-103.
- 1269 See above, para.4-272, below, para.9-103, and further, paras 9-094—9-095.
- 1270 *Shanklin Pier v Detel Products Ltd* [1951] 2 K.B. 854; *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 Q.B. 170.
- 1271 Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.15(1). This is replaced by s.30 of the Consumer Rights Act 2015. This section applies where there is “(a) a contract to supply goods” and “(b) a guarantee in relation to the goods” (s.30(1); “guarantee” is defined in s.30(2)). Section 30(3) goes on to provide that such a guarantee “takes effect ... as a contractual obligation owed by the guarantor”. And see above, paras 4-021, 4-219.
- 1272 See below, Ch.32, section 2(f) on Failure of basis.
- 1273 [2011] EWCA Civ 1383, [2012] 3 W.L.R. 503 at [21]–[22]. And see *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG)* [2018] EWHC 2765 (Comm) at [185]–[197].
- 1274 See below, para.32-085.
- 1275 [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964.
- 1276 [2006] EWCA Civ 1139 at [4].
- 1277 [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [93].

## Section 1. - Introduction to Mistake

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 1. - Introduction to Mistake

*Hugh Beale*

### Types of mistake

- 101 The doctrine of mistake in the law of contract deals with two rather different situations. In the first, there is some mistake or misunderstanding in the communications between the parties which prevents there being an effective agreement (for instance, if the parties misunderstand each other) or at least means that there is no agreement on the terms apparently stated (for instance, if one party in an offer states terms which the other party knows the first party does not intend, but nonetheless the other purports to accept). This first category of mistake, which can generally be referred to as “mistake as to the terms or identity”, includes “mutual misunderstanding”, where each is mistaken as to the terms intended by the other,<sup>2</sup> and “unilateral mistake”, where only one of the parties is mistaken, over the terms of the contract<sup>3</sup> or the identity of the other party.<sup>4</sup> In the second situation, the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law.<sup>5</sup> Cases in this category are now usually referred to as “common” mistake,<sup>6</sup> for normally the mistake is legally relevant only if both parties have contracted under the same misapprehension.

### Mistakes as to terms and mistakes as to facts

- 102 In other words, the distinction between the two situations drawn in the previous paragraph is one between mistakes as to the terms and mistakes as to the facts. It is common to categorise the situations in which the doctrine of mistake affects a contract<sup>7</sup> into cases of “common mistake”,

“unilateral mistake” or “mutual misunderstanding”.<sup>8</sup> This is useful, but it highlights only one of the distinctions between the cases. For the purposes of the law, there is a second and vital distinction between common mistake on the one hand and on the other: namely, that unilateral mistakes or mutual misunderstandings are relevant only if the mistake is over the terms (or the identity of one party), while the doctrine of common mistake<sup>9</sup> concerns mistakes about the facts. Indeed, the law gives relief on the ground of a mistake as to the factual circumstances<sup>10</sup> in which the contract is made only if the mistake was common, i.e. both parties made substantially the same mistake—for example, when an agreement was made to rent a room overlooking the route of a coronation procession, that both parties believed that the procession was scheduled to take place on the date concerned when in fact it had been cancelled.<sup>11</sup> Common mistake cases are ones in which:

“... both parties make the same mistake of fact or law relating to the subject matter or the facts surrounding the formation of the contract.”<sup>12</sup>

(As will be seen, the mistake must also be fundamental.<sup>13</sup>) In contrast, where only one of the parties is mistaken as to the facts—a “unilateral” mistake as to the facts—there is no basis for relief under the doctrine of mistake.<sup>14</sup> A unilateral mistake or a mutual misunderstanding will only operate where the mistake or misunderstanding is about the terms of the contract—for example, the price or the contractual description of what is being sold. This category includes cases of mistaken identity, when one party thinks he is dealing with someone different to the person with whom he actually is dealing. Although mistaken identity cases do not involve a mistake over the terms of the contract, we shall see that they seem to depend on a parallel distinction between the terms of the offer or acceptance<sup>15</sup> and the surrounding facts. If the mistaken party’s offer was, by its express or implied terms, not made to anyone other than the person with whom the mistaken party thought he was dealing, no other person can accept it and no contract will result from a purported acceptance by anyone else. If however the offer or acceptance was not so confined, it will result in a contract with the other person, whoever he is, and the first party’s mistake is treated as merely being to the surrounding facts.<sup>16</sup>

## Treatment of the two kinds of mistake

- <sup>103</sup> As the principles applicable to mistakes as to the terms or the identity of the other party seem largely to mirror the rules on agreement dealt with in Ch.4, they are dealt with in the current chapter. Mistakes as to the facts and the doctrine of “common mistake” involve different principles and are dealt with in Ch.8.

## Non est factum

- 104 There is a third type of mistake which may be seen as a variant of unilateral mistake, but which for convenience will be placed in a separate section within this chapter. It is peculiar to the law of written contracts, and it allows a party who has executed a document under a fundamental misapprehension as to its nature to plead that it is “not his deed”. This is the defence of non est factum.<sup>17</sup>

## Rectification of written documents

- 105 This chapter also deals separately with the remedy of rectification, which may be available when the parties have signed a written document that does not state accurately the terms that were agreed between them.<sup>18</sup>

## Money paid under mistake of fact

- 106 Mistake may also entitle a party who has paid money under the mistake to recover it back on the basis of restitution (or unjust enrichment). The subject of the recovery of money paid under a mistake is principally dealt with in Ch.32 of this work.<sup>19</sup>

## “Mistake” implies a positive belief

- 107 Further, it seems that relief will only be granted under the doctrine of mistake if one or both parties entered the contract under a positive belief which was incorrect, rather than merely not having thought about a particular issue.

<sup>20</sup>

 Thus in all the cases in which a contract has been held to be void<sup>21</sup> for common mistake, it seems that the parties had a positive belief that X was the case when it was not, rather than merely making no assumptions about whether X was so or not. Similarly, in the cases of unilateral mistake over the terms, one party has positively thought the terms he has offered, or has been offered, are Y when Y is not what in fact was said or written. It is very doubtful whether relief can be given

on the ground of mistake when the party was simply unaware that the terms on offer included a particular clause, as opposed to positively believing that they were Y when they were not.<sup>22</sup> However, it seems that the positive belief may be that something is not the case, e.g. that the terms on offer do not include a particular clause or that the other party is not Z.<sup>23</sup>

## Mistakes that are not legally relevant

- ¶08 It can be seen there are many situations that may loosely be called cases of “mistake” in which the contract will nonetheless be binding. One example is the case considered earlier, in which one party enters the contract under a mistake as to the facts which the other party does not share.<sup>24</sup> Suppose I buy a ring mistakenly thinking it is a gold ring. Nothing is said by the vendor as to what the ring is made of<sup>25</sup>; but he knows that it is not gold. Even if he knows that I think the ring to be made of gold, I cannot avoid the contract on the ground of mistake, though I would never have entered into it had I known the true position. The mistake does not relate to the terms of the contract, which are simply to sell and buy the specific ring, so neither mutual nor unilateral mistake is relevant. Nor does the doctrine of common mistake apply: though the mistake may be fundamental, it is not shared.<sup>26</sup> A second example of a mistake that is not legally relevant is where the mistake is shared by both parties<sup>27</sup> but it is not sufficiently fundamental to render the contract void.<sup>28</sup>

## Effects of mistake

- ¶09 The first type of mistake (termed above “mistake as to the terms or as to identity”) is sometimes said to operate so as to negative consent, the second (termed above “common mistake”) so as to nullify consent.<sup>29</sup> In other words, in the first case, the parties may not have in fact reached an agreement; in the second, the mistake renders the agreement ineffective as a contract. In either case, if the mistake is operative the contract is said to be void ab initio. This is correct in cases of common mistake; although until very recently there was authority for the proposition that some common mistakes that would not make the contract void would nonetheless give either party the right to avoid it, the Court of Appeal has now disapproved this line of cases.<sup>30</sup> The proposition that in cases of unilateral mistake and of mutual misunderstanding the contract is also void ab initio must be treated with more reservation. It is certainly correct in cases of mutual misunderstanding<sup>31</sup> and in some cases of unilateral mistake. Thus a unilateral mistake as to the identity of the other party may prevent the formation of a contract, so that if the subject matter of the contract consists of goods, no property in the goods will pass under the contract, and they may be recovered by the true owner even from a bona fide purchaser for value.<sup>32</sup> In other cases of unilateral mistake, however, it seems more accurate to say that there is no contract on the terms apparently agreed.<sup>33</sup> If one party made a mistake in his offer and the other knew what the offer was meant to be but

purported to “snap up” the apparent offer, the result may be that there is a contract on the terms the first party intended.<sup>34</sup> If necessary the terms of any contractual document may then be “rectified” to correspond to this contract.<sup>35</sup>

## Common law and equity

- 10 Until the decision of the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* in 2002<sup>36</sup> it could be argued that what has been said above about the circumstances in which the law takes account of a mistake by one party, or both parties, to a contract represented the position at common law; and that the rules of equity “cut across this distinction”.<sup>37</sup> This referred to the line of cases to the effect that in some circumstances a common mistake would give either party the right to avoid a contract that was not void for mistake at common law,<sup>38</sup> based on a rule of equity. Those cases were disapproved by *The Great Peace*,<sup>39</sup> and if the interpretation of certain cases of unilateral mistake that will be offered in this chapter<sup>40</sup> is accepted, it seems that there is now no inconsistency between common law and equity. Equity will on occasion supplement the remedies available at common law: for example, a mistake may entitle a party to a contract that has been reduced to writing to have the document rectified if it is not expressed in accordance with the parties’ true intentions, or does not reflect the terms that the claimant intended and the other party knew him to intend.<sup>41</sup>
- 11 The only apparent “divergence” between the treatment of mistake cases in common law and in equity is that the hardship that would be caused by granting specific performance of a contract made under either type of mistake may lead to the court refusing specific performance as a matter of discretion, even though the mistake does not render the contract void or have any other effect at common law.<sup>42</sup> As this is merely the denial of a particular remedy, and the contract remains binding in other respects (e.g. the claimant would still be entitled to damages if the contract were not performed<sup>43</sup>) this is not a contradiction of the common law rules.<sup>44</sup> Thus in cases of contractual mistake, common law and equity are consistent and equity plays only a minor role, and in this edition of this work there is no separate treatment of “Mistake in Equity”.<sup>45</sup>

## Is there a separate doctrine of mistake?

- 12 Any “doctrine” of mistake in English contract law seems to have emerged only in the late nineteenth or even the twentieth century,<sup>46</sup> and from time to time commentators have argued that the doctrine is redundant or that the cases are better explained on some other basis.<sup>47</sup> Thus it

has been said that cases of common mistake may be explained as resting on the construction of the contract, and in particular on an implied condition precedent<sup>48</sup>; while cases of unilateral and mutual mistake may be no more than an application of the rules of offer and acceptance.<sup>49</sup> From a conceptual point of view there is force in these arguments, and it is certainly hard to discern a single “doctrine” of mistake when the two categories of case described above are subject to quite different rules. However in this work it is assumed that there are distinct rules on mistake dealing with each category. This is partly because, in each situation, the courts have recognised distinct rules of mistake<sup>50</sup> and partly because the various kinds of mistake are what may be called “functional categories”. In factual terms, a party may claim that he, or both he and the other party, made the contract under a misapprehension of some kind, whether it be as to some fact bearing on the contract, as to the terms he has included in his offer or as to the other party’s intentions or identity, when the mistake was self induced.<sup>51</sup> We need to know what self-induced “mistakes” or (to use a word that does not have legal connotations) “misapprehensions” the law will take account of and what the parties’ rights will be. Whether the rules that are applied are simply applications of more general rules, such as the doctrine of implied conditions or the rules of offer and acceptance, is from a functional viewpoint irrelevant; they are the rules that govern these types of mistake. On the other hand, when the relevant doctrine of mistake seems to be no more than an application of the principles used to decide whether the parties have reached an agreement, and if so on what terms, it seems helpful to maintain a close link between the two. This is why mistakes as to the terms and the identity of the other party are treated separately in this chapter, directly following the chapter on Agreement. Mistakes as to the facts are covered in Ch.8.

## Footnotes

- <sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright*, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022); *Macmillan*, *Mistakes in Contract Law* (2010).
- <sup>2</sup> See below, para.5-019.
- <sup>3</sup> Below, paras 5-002 and 5-022 et seq.
- <sup>4</sup> Below, paras 5-036 et seq. The composite phrase “mistake as to terms or identity” is used as the “mistake of identity” cases do not involve a mistake over the terms of the contract; but as will be seen, these cases depend on the terms of the offer or acceptance, so they are usefully considered in this chapter also.
- <sup>5</sup> On mistakes as to the law, see below, para.8-052.
- <sup>6</sup> The 29th and earlier editions of this work used the phrase “mutual mistake”, following the terminology used by Lord Atkin in *Bell v Lever Bros [1932] A.C. 161*, and until recently some other works adhered to this usage: e.g. *Beatson*, *Anson’s Law of Contract*, 28th edn (2002), Ch.8. It is now more common to refer to this type of mistake as “common

mistake” (e.g. Beatson, Burrows and Cartwright (eds) Anson’s Law of Contract, 31st edn (2020), Ch.8; Cheshire, Fifoot and Furmston, Law of Contract, 17th edn (2017), Ch.8). The courts have also referred to common mistake: e.g. *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace) [2002] EWCA Civ 1407, [2003] Q.B. 679*. One reason for using the phrase “common mistake” is to reduce the risk of confusion with what is termed here “mutual misunderstanding” (where the parties are at cross-purposes as to the terms of the contract): see below, para.5-019.

<sup>7</sup> Compare those cases in which the mistake is not legally relevant, below, para.5-008.

<sup>8</sup> Above, para.5-001.

<sup>9</sup> Note however that it is also customary to refer to cases in which the written contract does not accurately record the parties’ prior agreement and is therefore rectified as cases of “rectification for common mistake”: see below, para.5-057. Rectification depends on quite different principles to those applicable when the parties make a common mistake as to the facts. On the latter, see Ch.8.

<sup>10</sup> Or as to the law: see below, para.8-052.

<sup>11</sup> *Griffith v Brymer (1903) 19 T.L.R. 434*.

<sup>12</sup> Beatson, Burrows and Cartwright (eds), Anson’s Law of Contract, 31st edn (2020), p.296.

<sup>13</sup> Below, para.8-015.

<sup>14</sup> *Smith v Hughes (1871) L.R. 6 Q.B. 597; Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N) [2008] EWHC 2257 (Comm), [2008] 2 Lloyd’s Rep. 685*. See below, para.5-025.

<sup>15</sup> See below, para.5-038.

<sup>16</sup> See below, paras 5-036—5-039.

<sup>17</sup> See below, paras 5-049—5-056.

<sup>18</sup> See below, paras 5-057 et seq.

<sup>19</sup> See below, paras 32-037 et seq.

<sup>20</sup> cf. Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.12-03.

In *Pitt v Holt [2013] UKSC 26, [2013] 2 W.L.R. 1200*, a case of a mistake affecting a voluntary settlement, Lord Walker said (at [108]–[109]) that a mistake is different from ignorance, inadvertence and misprediction as to the future. A mistake encompasses two states of mind, namely an incorrect conscious belief or an incorrect tacit assumption as to a present matter of fact or law, but does not encompass mere causative ignorance but for which the claimant would not have acted as he did. The nature of the mistake that must be shown for a settlor to obtain rectification of a voluntary settlement was discussed extensively: see below, para.32-058.

<sup>21</sup> Or voidable in equity, under a line of cases no longer accepted as good law: see below, para.8-009.

<sup>22</sup> See below, para.5-028.

<sup>23</sup> See below, para.5-047.

<sup>24</sup> See above, para.5-002.

<sup>25</sup> Therefore there is no misrepresentation: compare below, para.8-013.

- 26 Compare Anson's famous "Dresden china" example: Anson's Law of Contract, 28th edn, p.324 (second scenario). The example is omitted from the 31st edition by Beatson, Burrows and Cartwright (eds) (2020) but it is explained that a unilateral mistake of fact or law does not render the contract void or give rise to an equitable jurisdiction to set aside the contract: p.296. *Friedmann* (2003) 119 *L.Q.R.* 68, 79–81 argues that in such a case relief should be given, by analogy of cases of innocent misrepresentation.
- 27 Again it is assumed that neither party has stated what he believes to be the facts. If he had, the other might have a remedy for misrepresentation. See below, para.8-013.
- 28 See below, para.8-015. Note that the grounds on which a voluntary settlement may be set aside because of mistake on the part of the settlor are much wider: see *Pitt v Holt* [2013] UKSC 26; *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) (rescission of self-contained and severable part of settlement).
- 29 *Bell v Lever Bros Ltd* [1932] A.C. 161, 217.
- 30 See below, paras 8-055 et seq.
- 31 Below, para.5-019.
- 32 *Hardman v Booth* (1863) 1 H. & C. 803; *Cundy v Lindsay* (1878) 3 App. Cas. 459; *Ingram v Little* [1961] 1 Q.B. 31. See below, paras 5-036 et seq.
- 33 See below, paras 5-029 et seq.
- 34 See below, paras 5-029 et seq.
- 35 See below, paras 5-070 et seq.
- 36 [2002] EWCA Civ 1407, [2003] Q.B. 679.
- 37 See the 28th edition of this work, para.5-001.
- 38 e.g. because the mistake was not sufficiently serious: see above, para.5-008.
- 39 See below, paras 8-055 et seq.
- 40 Below, paras 5-029—5-035. These paragraphs discuss the relationship between rectification and unilateral mistake as to the terms at common law. There was very little authority to suggest that unilateral mistake as to the facts was a ground for rescission in equity, and what there was has recently been rejected: see below, para.5-025.
- 41 See below, paras 5-057 et seq. Equity may also prevent a mistaken party from obtaining rectification to the "true" terms of a contract if a third party has relied on a document that stated the terms differently: see below, para.5-105.
- 42 See below, paras 5-026 and 8-061.
- 43 See, e.g. *Wood v Scarth* (1855) 2 K. & J. 33 (equity); (1858) 1 F. & F. 293 (law).
- 44 cf. cases in which specific performance may be refused because of the hardship that would result because of a subsequent change of circumstances: see below, paras 5-026 and 8-061 and para.30-049.
- 45 cf. Chitty, 28th edn, paras 5–060 et seq.
- 46 See below, paras 8-017 et seq.
- 47 e.g. *Slade* (1954) 70 *L.Q.R.* 385.
- 48 *Smith* (1994) 110 *L.Q.R.* 400. See below, para.8-014.
- 49 e.g. *Slade* (1954) 70 *L.Q.R.* 385; Atiyah, Essays in Contract (1986), Ch.9.

- 50 This is clearly so in cases of common mistake, e.g. *Bell v Lever Bros [1932] A.C. 161*; *Associated Japanese Bank International Ltd v Crédit du Nord SA [1989] 1 W.L.R. 255*; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace) [2002] EWCA Civ 1407, [2003] Q.B. 679*. In the cases to be covered in this chapter, usage is less uniform.
- 51 Or when it resulted from a misrepresentation but the right to rescind for misrepresentation has been lost. See below, para.[8-013](#).

## (a) - Underlying Principles

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 2. - Mistakes as to Terms or Identity<sup>52</sup>

(a) - Underlying Principles

### Underlying basis of law

<sup>113</sup> It is arguable that the cases in which there is a mistake as to the terms of the contract, or as to the identity of one of the parties, that will have some legal effect are no more than an application of general rules of contract formation and interpretation.

<sup>53</sup>

 They fall into three groups, each seeming to depend on a particular application of those rules.

### Lack of agreement or agreement ambiguous

<sup>114</sup> No contract can be formed if there is no correspondence between the offer and the acceptance,

<sup>54</sup>

 or if the agreement is not sufficiently certain.

<sup>55</sup>

 The starting point must be whether the parties have reached an agreement that there is a contract between them on the same terms, so that subjectively they are agreed on the same thing.

If so, there will be a contract on the agreed terms, certainly if they had made their intentions clear to each other

56

 and quite possibly if they had not but in fact their intentions coincided.

57

 If, however, one party claims that he did not intend to contract at all, or did not intend to contract on the terms which the other party claims were agreed, then the question is whether there is a contract (or, as it is often put, whether or not the “contract is void”). The intention of the parties is, as a general rule, to be construed objectively: the language used by one party, whatever his real intention may be, is to be construed in the sense in which it was reasonably understood by the other.

58

 Thus:

“... if one party (O) so acts that his conduct, objectively considered, constitutes an offer, and the other party (A), believing that the conduct of O represents his actual intention, accepts O’s offer, then a contract will come into existence, and on those facts it will make no difference if O did not in fact intend to make an offer, or if he misunderstood A’s acceptance, so that O’s state of mind is, in such circumstances, irrelevant.”

59



Nevertheless cases may occur in which the terms of the offer and acceptance do not match or suffer from such latent ambiguity that it is impossible reasonably to impute any agreement between the parties. For example, if it was reasonable for A to interpret the words of O’s offer as meaning *x* when O in fact meant *y*, but it was equally reasonable for O to interpret A’s reply as an acceptance of the offer as O intended it (i.e. as meaning *y*), there is no agreement even on an objective basis.

60

 Thus “mutual misunderstanding” may prevent the formation of a contract,

61

 and arguably this is no more than an application of the requirements of offer and acceptance and certainty.

62



## Known mistake may prevent party holding other to words used

The “objective principle” just referred to means that normally a party is bound by what they said or wrote: they cannot escape by simply saying that they did not mean what the other party reasonably understood, in the circumstances, by the words used. It may happen, however, that one party accepts a promise knowing that the terms stated by the other differ from what the other party intends. In such circumstances, the mistake may prevent the party’s acceptance being effective at face value: either the contract will be on the terms the other party actually intended or, possibly, the “mistake” will render the contract void.<sup>63</sup> This explains the cases on “unilateral mistake as to the terms of the contract”.<sup>64</sup>

## Offer limited to particular person cannot be accepted by another

- ¶16 If an offer is by its express or implied terms open only to one person, or to a defined group of persons, no one else can accept the offer; and if they purport to do so, no contract will result. This underlies the cases of “mistaken identity”.<sup>65</sup>

## Older “subjective” notions

- ¶17 The modern “objective principle” referred to in the previous paragraphs was not firmly established in the nineteenth century, and some cases seem to depend on an older theory, probably derived from continental thinking, that “subjective agreement” or *consensus ad idem* was necessary for a contract.<sup>66</sup> Some of the earlier authorities may thus require reinterpretation in the light of the modern principle.<sup>67</sup>

## Test not wholly objective<sup>68</sup>

- ¶18 It has sometimes been suggested that in deciding whether the parties have reached an agreement, each party’s words are to be interpreted in a wholly objective fashion.<sup>69</sup> However, it is submitted that this is not consistent with the leading authorities. First, in *Smith v Hughes*<sup>70</sup> Blackburn J said:

“If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, *and that other party upon that belief enters into the contract with him*, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

The italicised words show that if party O's words reasonably appear to mean *x* when in fact O intended *y*, the other party (A) can only hold O to meaning *x* if A in fact believed this to be what O meant. This is why a party cannot snap up an offer which he knows contains a mistake.<sup>71</sup> Secondly, in *The Hannah Blumenthal*,<sup>72</sup> though there were differences between Lords Brandon, Diplock and Brightman in the way they explained the objective test,<sup>73</sup> all three spoke of the way in which the individual parties would reasonably understand the others' conduct.<sup>74</sup> In other words, the test is not how an entirely detached observer might interpret what each party said or did, but how it would reasonably appear to the other party in the circumstances. This is why a mistake in the terms of the offer may be relevant even if the other party did not know of it but ought to have known of it.<sup>75</sup>

## Footnotes

- <sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022); Macmillan, Mistakes in Contract Law (2010).
- <sup>52</sup> On this phrase see above, para.[5-001](#). On the kinds of mistake dealt with in this section, see *Cheshire* (1944) 60 *L.Q.R.* 175, 178, 180; *Tylor* (1948) 11 *M.L.R.* 257, 259; *Slade* (1954) 70 *L.Q.R.* 385, 386; *Stoljar* (1965) 28 *M.L.R.* 265, 266; M. Chen-Wishart, "Contractual Mistake, Intention in Formation and Vitiation: the Oxymoron of *Smith v Hughes*" in J. Neyers, R. Bronaugh and S. Pitel (eds), Exploring Contract Law (2009) 341; G. McMeel, "*Interpretation and Mistake in Contract Law: 'The fox knows many things'*" [2006] *Lloyd's Maritime and Law Quarterly* 49; R. Stevens, "Objectivity, Mistake and the Parol Evidence Rule" in Andrew Burrows and Edwin Peel (eds), Contract Terms (2007) 101.
- <sup>53</sup> See above, para.[5-012](#). These rules, and therefore the rules on the effect of a mistake, apply to a mistake in a Part 36 offer: *O'Grady v B15 Group Ltd (formerly Brighthouse Group Ltd)* [2022] EWHC 67 (QB).
- <sup>54</sup> See above, paras 4-037—4-039.
- <sup>55</sup> See above, para.[4-185](#).
- <sup>56</sup> i.e. there was an "outward accord" or were expressions that "crossed the line": see below, paras [5-057](#) and [5-064—5-065](#).
- <sup>57</sup> *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.13-10, citing *Glanville Williams* (1954) 17 *M.L.R.* 154–155; *Stoljar*, Mistake and Misrepresentation:

A Study in Contractual Principles (1968), p.11; *Vorster* (1987) 104 *L.Q.R.* 274, 286; Lord Macnaghten in *Falcke v Williams* [1900] *A.C.* 176 at 178–179, PC; and Blackburn J in *Smith v Hughes* (1871) *L.R.* 6 *Q.B.* 597, 607, who clearly assumes that the objective test need be used only if there was no subjective agreement. Cartwright rightly points out that some decisions, such as *Paal Wilson & Co A/S v Partenreederi Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 *A.C.* 854, discuss the objective test without mentioning the subjective test. Each party must, of course, have signalled willingness to contract to the other, or there will be no agreement on which a contract can be based (see above, para.4-001; and compare the need for some “outward accord” in rectification cases, below, para.5-064). For an example in German law, see RG 8 Jun 1920 II (Ziv), RGZ 99, 147, in which both parties thought that the Norwegian word Haakjöringsköd meant whale meat when in fact it means shark meat. It was held that the contract was for whale meat. (The case is translated in Beale, Fauvarque-Cosson, Rutgers, Tallon and Vogenauer, *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, 3rd edn (2019), 502.) The importance of the parties’ sharing subjective intentions will be when they both intend the contract to mean something other than its apparent meaning, when the communications are unclear, or where there is evidently an agreement but it is not clear what its terms are. For the possibility that a written agreement can be rectified to match what the parties were subjectively agreed on, see below, para.5-065.

•58 *Cornish v Abington* (1859) 4 *H. & N.* 549, 556; *Fowkes v Manchester and London Assurance Association* (1863) 3 *B. & S.* 917, 929; *Smith v Hughes* (1871) *L.R.* 6 *Q.B.* 597, 607; *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Products Marketing Co Ltd* [1972] *A.C.* 741; *McInerny v Lloyds Bank* [1974] 1 *Lloyd's Rep.* 246. Compare the effect of a mistake in a contractual notice. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] *A.C.* 749 (below, paras 15-061—15-062) the House of Lords held that a contractual notice to determine a lease was effective although it did not comply exactly with the break clause in the contract, provided that the notice given would convey the lessee’s intention to exercise its rights under the clause unambiguously to a reasonable recipient.

•59 Goff LJ in *Allied Marine Transport Ltd v Vale do Rio Navegacao SA, The Leonidas D* [1985] 1 *W.L.R.* 925, summarising the approach of Lord Brightman in *Paal Wilson & Co A/S v Partenreederi Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 *A.C.* 854, 924. The Court of Appeal in *The Leonidas D* preferred Lord Brightman’s formulation of the objective principle to those of Lords Brandon and Diplock ([1985] 1 *W.L.R.* 925, 936). See above, paras 4-004—4-006.

•60 Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022), para.13-18.

•61 See below, para.5-019.

•62 It may be that a similar result will follow if a “mistake” over the terms renders the contract legally impossible in the sense of being unworkable, as was suggested in *Lehman Brothers*

*International (Europe) (In Administration) v Exotix Partners LLP [2019] EWHC 2380 (Ch), [2020] 1 All E.R. (Comm) 635* (though the case was discussed as one of a common mistake of the kind that normally relates to the facts not the terms: see below, para.8-038). If that were the case the contract might again be void, but on the facts the court implied a term to make the contract workable.

63 See below, paras 5-029—5-033.

64 See below, paras 5-022 et seq.

65 See below, paras 5-036 et seq.

66 See Beatson, Burrows and Cartwright, Anson's Law of Contract, 31st edn (2020), pp.265–266.

67 For examples, see below, paras 5-019, 5-042.

68 The points in the paragraph are particularly well made in Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), paras 13-07—13-19. Cartwright's summary of the law was adopted in *DNA Production (Europe) Ltd v Manoukian [2008] EWHC 943 (Ch)* at [47], [50].

69 e.g. by Denning LJ in *Frederick E. Rose (London) Ltd v William H. Pim Jnr & Co Ltd [1953] 2 Q.B. 450, 460* (“... the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans. Once they had done that, nothing in their minds could make the contract a nullity from the beginning ...”).

70 (*1871*) L.R. 6 Q.B. 597.

71 See below, para.5-022.

72 *Paal Wilson & Co A/S v Partenreederi Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 A.C. 854*.

73 See above, paras 4-004—4-006.

74 See [*1983*] 1 A.C. 854 at 914, 915 and 924 respectively.

75 See below, para.5-023.

## **(b) - Mutual Misunderstanding**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 2. - Mistakes as to Terms or Identity<sup>52</sup>

**(b) - Mutual Misunderstanding**

### **Parties at cross-purposes**

- 119 In most cases the application of the objective test will preclude a party who has entered into a contract under a mistake from setting up his mistake as a defence to an action against him for breach of contract. If a reasonable person in the defendant's position would have understood the contract in a certain sense but the defendant "mistakenly" understood it in another, then, despite his mistake, the court will hold that the defendant is bound by the meaning that the reasonable person would have understood.<sup>76</sup> But where parties are genuinely at cross-purposes as to the subject matter of the contract, the result may be that there is no offer and acceptance of the same terms because neither party can show that the other party should reasonably have understood his version.<sup>77</sup> Alternatively, the terms of the offer and acceptance may be so ambiguous that it is not possible to point to one or other of the interpretations as the more probable, and the court must necessarily hold that no contract exists.<sup>78</sup> The best-known example is of some antiquity. In *Raffles v Wichelhaus*<sup>79</sup> the defendants contracted to buy a cargo of cotton to arrive "ex Peerless from Bombay". There were two ships of that name and both sailed from Bombay, but one left in October and the other in December. The description of the goods pointed equally to either cargo. To an action for refusal to accept goods from the December shipment, the defendant pleaded that the agreement referred to the other one. The plaintiff demurred, but the court gave judgment for the defendants, apparently taking the view that it was open to the latter to adduce parol evidence as to which ship was meant. The judgment does not indicate what the position would be if the parol evidence failed to point to one cargo rather than the other, but the court did not express any disagreement with counsel's proposition that, if the defendant meant one *Peerless* and the

plaintiff the other, there would be no contract. At that time it is likely that it was thought that there would be no contract without subjective agreement, *consensus ad idem*. In a modern case of a similar character it would have to be shown that each party's interpretation was as reasonable as the other's,<sup>80</sup> and it is unlikely that the facts proved would be so sparse as not to give some ground for adopting one interpretation of the contract rather than the other.<sup>81</sup>

## Reasonable meaning of A's offer may depend on B's conduct

- 120 If one party has misled the other, even unintentionally, he may be precluded from relying on the normal interpretation of the other's words or conduct, with the result that even on an objective criterion no agreement results. In the case of *Scriven v Hindley*,<sup>82</sup> an auctioneer acting for the plaintiff put up for sale lots of hemp and tow from a single ship. It was very unusual for both hemp and tow to be shipped together. The auction catalogue did not indicate the difference in the contents of the lots. A lot of tow was put up, and the defendant bid for it thinking it was hemp. The bid was accepted. The jury found that the auctioneer intended to sell tow, while the defendant intended to bid for hemp, and that the former had merely thought that an overvalue had been placed by the defendant on the tow. It was held that, as the parties were never *ad idem* as to the subject matter of the contract, there was no binding contract of sale. In the ordinary way an auctioneer is entitled to assume that a bidder knows what he is bidding for, and acceptance of a bid will create a binding contract; the decision in this case seems to have turned on the misleading nature of the catalogue.<sup>83</sup>

## Parties aware of disagreement over meaning of clause

- 121 The case of mutual misunderstanding should be distinguished from the case in which the parties are aware that they disagree over the meaning of a term of the contract. It has been held that there may be a valid contract despite the fact that the parties know that they are not agreed as to the meaning of one of its terms. Provided there is evidence that the parties intended to make a binding agreement, the contract will be valid and the parties are treated as having left it to the court to determine its correct meaning.<sup>84</sup>

## Footnotes

1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.*

- 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022); Macmillan, *Mistakes in Contract Law* (2010).
- 52 On this phrase see above, para.5-001. On the kinds of mistake dealt with in this section, see *Cheshire* (1944) 60 *L.Q.R.* 175, 178, 180; *Tylor* (1948) 11 *M.L.R.* 257, 259; *Slade* (1954) 70 *L.Q.R.* 385, 386; *Stoljar* (1965) 28 *M.L.R.* 265, 266; M. Chen-Wishart, “Contractual Mistake, Intention in Formation and Vitiating: the Oxymoron of *Smith v Hughes*” in J. Neyers, R. Bronaugh and S. Pitel (eds), *Exploring Contract Law* (2009) 341; G. McMeel, “*Interpretation and Mistake in Contract Law: ‘The fox knows many things’*” [2006] *Lloyd’s Maritime and Law Quarterly* 49; R. Stevens, “Objectivity, Mistake and the Parol Evidence Rule” in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2007) 101.
- 76 *Scott v Littledale* (1858) 8 *El. & Bl.* 815; *Wood v Scarth* (1855) 1 *F. & F.* 293; *Smith v Hughes* (1871) *L.R.* 6 *Q.B.* 597.
- 77 e.g. *South East Windscreens Ltd v Jamshidi* [2005] *EWHC* 3322 (QB), [2005] *All E.R.* (D) 317 (Dec) (parties put forward different versions of the agreement as to price); “... it is a question of trying to decide objectively what was agreed ... neither party has discharged the burden of proving, on the balance of probabilities, that their version of the agreement is correct” (at [84]).
- 78 *Thornton v Kempster* (1814) 5 *Taunt.* 786; *Henkel v Pape* (1870) *L.R.* 6 *Ex.* 7; *Smidt v Tiden* (1874) *L.R.* 9 *Q.B.* 446; *Hickman v Berens* [1895] 2 *Ch.* 638; *Falck v Williams* [1900] *A.C.* 176; *Van Praagh v Everidge* [1903] 1 *Ch.* 434; cf. *Marwood v Charter Credit Corp* (1971) 20 *D.L.R.* (3d) 563. However, it seems possible that the mistake must relate to a point which is of some importance. If the misunderstanding is as to some unimportant point the court might simply disregard the relevant term and uphold the rest of the contract. cf. *Nicolene Ltd v Simmonds* [1953] 1 *Q.B.* 543.
- 79 (1864) 2 *H. & C.* 906. See further as to this case, Grant Gilmore, *The Death of Contract* (1974), pp.35–41; *Simpson* (1975) 91 *L.Q.R.* 247, 268.
- 80 Thus *Hickman v Berens* [1895] 2 *Ch.* 638 would not be followed today: a compromise agreement was set aside for want of consensus even though the document apparently expressed exactly what one of the parties meant.
- 81 This paragraph in the 29th edition was cited in *NBTY Europe Ltd (formerly Holland & Barrett Europe Ltd) v Nutricia International BV* [2005] *EWHC* 734, [2005] 2 *Lloyd’s Rep.* 350, but it was held on the facts that there was no ambiguity in the agreement, nor indeed were the parties at cross-purposes.
- 82 [1913] 3 *K.B.* 564.
- 83 Although the jury found the parties were not ad idem, this does not mean that the court thought subjective agreement was necessary. Lawrence J discussed whether the defendants were “estopped”, which seems to be equivalent to asking whether they were bound by the normal meaning of their conduct in bidding, and held that, because of the auctioneer’s behaviour, they were not. It is conceivable that, had the question arisen, the court might have held, not that there was no contract, but that the lot was sold as hemp. Compare below, paras 5-024 and 5-029.
- 84 *LCC v Henry Boot & Sons Ltd* [1959] 1 *W.L.R.* 1069.

---

End of Document

© 2022 SWEET & MAXWELL

## **(i) - When Mistake will Affect Contract**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>**

**Section 2. - Mistakes as to Terms or Identity<sup>52</sup>**

**(c) - Unilateral Mistake as to Terms**

**(i) - When Mistake will Affect Contract**

**Mistake known to the other party**

<sup>122</sup>

A mistake as to the terms of the contract,

<sup>85</sup>

**U** if known to the other party, may affect the contract. In this case, the normal rule of objective interpretation is displaced in favour of admitting evidence of subjective intention.

<sup>86</sup>

**U** In *Hartog v Colin and Shields*

<sup>87</sup>

**U** the defendants offered for sale to the plaintiffs some Argentine hare skins, but by mistake offered them at so much per pound instead of so much per piece. The previous negotiations between the parties had proceeded on the basis that the price was to be assessed at so much per piece, as was usual in the trade. But the plaintiffs purported to accept the offer and sued for damages for non-delivery. The court held that the plaintiffs must have known that the offer did not express the true intention of the defendants and that the apparent contract

<sup>88</sup>

**U** was therefore void.

89

 On the same principle, it has been held in Canada

90

 that an offer contained in a tender cannot be accepted when it is apparent that the tender had mistakenly omitted a price escalation clause.

91



## Mistakes which ought to have been apparent

 123 It is not clear whether for the mistake to be operative it must actually be known to the other party, or whether it is enough that it ought to have been apparent to any reasonable person in the position of the other party. In Canada there are suggestions that the latter suffices,

92

 93 but the Singapore Court of Appeal has held that the common law doctrine of mistake applies only when the non-mistaken party had actual knowledge of the other's mistake.

93

 94 In England there are differing suggestions. Two cases suggest that if the other party ought to have known of the mistake, he will not be able to hold the mistaken party to the literal meaning of his offer.

94

 95 In *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd*

95

 96 the Court of Appeal appeared to consider that the plaintiff might be able to negate any binding agreement by showing that the defendant ought to have known that the plaintiff's offer contained an error; and in *O.T. Africa Line Ltd v Vickers Plc*

96

 97 Mance J said that the objective principle would be displaced if a party knew or ought to have known of the mistake. The latter situation would include cases in which the party refrained from making enquiries or failed to make enquiries when these were reasonably called for,

97

 98 but first there must be a real reason to suspect a mistake. In contrast, in *Longley v PPB Entertainment Ltd*

98

**U** Ellenbogen J adopted the approach of the Singapore Court of Appeal: constructive knowledge on the part of a non-mistaken party does not suffice to establish the defence of unilateral mistake. In rectification cases it has been said that a unilateral mistake made by one party is a ground for rectification only if the other party actually knew of it.

99

**U** This too suggests that only actual knowledge of a mistake in an offer will prevent the other party from accepting it. However, it is possible that the courts apply a different standard when the parties have signed a written document recording their agreement; and also it has been argued that rectification for unilateral mistake should be granted when the mistake was not known but ought to have been known to the defendant. These points will be discussed when we consider rectification.

100

**U**

## Mistakes caused by the non-mistaken party

- 124 In *Deutsche Bank (Suisse) SA v Khan*<sup>101</sup> the defendants had argued that even if the mistake as to terms was neither known nor ought to have been known to the other party, it may still affect the contract if it has been induced by the other party. Hamblen J found it unnecessary to decide the point but doubted that there is any such principle.<sup>102</sup>

## Mistake as to the terms of the contract

- 125 It is not sufficient that one party knows the other has entered the contract under a mistake of some kind. The mistake must relate to the terms of the contract.<sup>103</sup> If it relates, for example, to what is the subject matter that is being bought and sold (i.e. as to its contractual description), the mistake is to the terms and may prevent there being a contract; but if the mistake is merely to the quality or the substance of the thing contracted for, it will be a mistake as to the facts (or “an error in motive”) and it is well established that an error in motive will not avoid a contract.<sup>104</sup> In *Smith v Hughes*<sup>105</sup> the defendant purchased from the plaintiff a quantity of oats in the belief that they were old oats, whereas in fact they were new oats and quite unsuitable for the purpose for which he wanted them. On discovering his mistake, he refused to accept them and was sued by the plaintiff for the price. The judge asked the jury whether the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats. If so, they were to return a verdict for the defendant. On a motion for a new trial, the Court of Queen’s Bench considered that this direction would not sufficiently distinguish between a mistake on the part of the defendant that the oats were old oats, and a mistake that they were being offered to him as old oats. In the

former case, the contract would be valid, as the error would be one of motive; in the latter, the mistake would be as to the terms of the contract, and, if known to the plaintiff, would provide a defence to the action. A new trial was ordered. It is not clear whether the defendant would, on the latter hypothesis, have been free from liability on the ground that the contract was void, or on the ground that the seller was in breach by delivering new oats.<sup>106</sup> As the buyer had been given a sample of the oats it is difficult to see how, on similar facts occurring today, any sort of a defence could be made out. In a more recent case, the parties had reached a compromise over the amount of demurrage due. One party had made an offer, basing its calculations on a mistaken assumption as to the date the ship had completed its unloading. The mistaken party was not entitled to relief even though the other party was aware of the mistake when it accepted the offer and decided to say nothing.<sup>107</sup> It was not a term of the contract that discharge was completed on the date the claimant supposed.<sup>108</sup> There is no equitable jurisdiction to set the contract aside where one party has made a unilateral mistake as to a fact or state of affairs which is the basis upon which the terms of the contract are agreed, but that assumption does not become a term of the contract.<sup>109</sup>

## **Refusal of specific performance for unilateral mistakes not known to the other party or not as to terms**

- 126 Even though a mistake by one party has no effect at common law, for example because the other party neither knew nor had reason to know of it,<sup>110</sup> or because it is not a mistake as to the terms of the contract,<sup>111</sup> it may be a ground on which the court will refuse to order specific performance when it would otherwise have done so. In *Burrow v Scammell*<sup>112</sup> Bacon VC said:

“It cannot be disputed that courts of equity have at all times relieved against honest mistakes in contracts, where the literal effect and the specific performance of them would be to impose a burden not contemplated, and which it would be against all reason and justice to fix, upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake; and also where not to correct the mistake would be to give an unconscionable advantage to the other party.”

It has been held that specific performance may be refused if it would cause the defendant “a hardship amounting to injustice”<sup>113</sup> although he may still be liable to an action for damages at law.<sup>114</sup> It has also been held that mistake may also be a defence if the plaintiff has in some way contributed, even unwittingly, to the mistake.<sup>115</sup> But a mistake which is entirely the product of the defendant’s own carelessness will afford no ground for relief<sup>116</sup> unless (perhaps) the case is one of considerable harshness or hardship.<sup>117</sup> Most of the cases are ones in which one party made a mistake about the terms and the other party did not know of the mistake,<sup>118</sup> but there is no reason in principle why the mistake might not have been one as to the surrounding facts rather than the terms

of the contract and at least one case involved that.<sup>119</sup> However, most of the cases on refusal of specific performance are old. It is not clear whether the modern tendency to cut down defences of unilateral mistake as grounds for rectifying a contract, or refusing rescission as an alternative,<sup>120</sup> will extend also to cases where the defendant seeks to be excused from specific performance.

## No equitable power to set aside contract

- <sup>127</sup> It appears that if one party enters a contract under a mistake as to the terms, and what was really intended is known to the other who nonetheless purports to agree, the contract will be on the terms actually intended by the first party,<sup>121</sup> and if necessary the document may be rectified to bring it into line with the contract.<sup>122</sup> In other cases (where the other party knows there has been a mistake but not what it is, or where he should know there is a mistake) the mistake seems to render the contract void, as some of the authorities suggest.<sup>123</sup> In neither situation is there a separate equitable jurisdiction to set aside the contract for unilateral mistake.<sup>124</sup>

## Positive mistake necessary

- <sup>128</sup> It is submitted that there will not be an effective mistake as to the terms unless the “mistaken” party has a positive belief that the terms are X when the contract in fact says Y, or at least that the contract does not include term Y, and the other party knows or ought to know of the mistake.<sup>125</sup> It will not suffice that the “mistaken” party simply did not know that the contract contained a particular term, for example because he had not read it before signing it.<sup>126</sup>

## Footnotes

<sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright*, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022); Macmillan, *Mistakes in Contract Law* (2010).

<sup>52</sup> On this phrase see above, para.5-001. On the kinds of mistake dealt with in this section, see *Cheshire* (1944) 60 *L.Q.R.* 175, 178, 180; *Tylor* (1948) 11 *M.L.R.* 257, 259; *Slade* (1954) 70 *L.Q.R.* 385, 386; *Stoljar* (1965) 28 *M.L.R.* 265, 266; M. Chen-Wishart, “Contractual Mistake, Intention in Formation and Vitiation: the Oxymoron of *Smith v Hughes*” in J. Neyers, R. Bronaugh and S. Pitel (eds), *Exploring Contract Law* (2009) 341; G. McMeel,

*“Interpretation and Mistake in Contract Law: ‘The fox knows many things’”* [2006] *Lloyd’s Maritime and Law Quarterly* 49; R. Stevens, “Objectivity, Mistake and the Parol Evidence Rule” in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2007) 101.

•85 On the application of this to cases of mistaken identity, see above, para.5-002 and below, paras 5-036 et seq. This applies also to a mistake in a Pt 36 offer: *O’Grady v B15 Group Ltd (formerly Brighthouse Group Ltd)* [2022] EWHC 67 (QB).

•86 The question is strictly speaking not one of whether either party was at fault, but of whether one knew (or possibly ought to have known; see next paragraph) of the other’s intention: see Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022), paras 13-24—13-26. Contrast *LCC v Henry Boot & Sons Ltd* [1959] 1 W.L.R. 1069, criticised by *Goodhart* (1960) 76 L.Q.R. 32.

•87 [1939] 3 All E.R. 566, followed in *McMaster University v Wilchar Construction Ltd* (1971) 22 D.L.R. (3d) 9 and in *Ulster Bank Ltd v Lambe* [2012] NIQB 31 (offer to settle claim for €155,000 when P meant £155,000 and D knew this; this paragraph of Chitty was applied (at [20])). See also *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd’s Rep. 685 (below, para.5-025) at [87].

•88 The question whether there was no contract at all, or one on the terms in fact intended by the defendants, is discussed below at para.5-029. It will be submitted that the effects of the mistake may differ according to whether the party knew not only that the offer contained a mistake but what the mistake was, or merely knew or should have known that it contained a mistake.

•89 See also *Watkin v Watson-Smith*, *The Times*, 3 July 1986. In *Taylor v Johnson* (1983) 151 C.L.R. 422, 45 A.L.R. 265 the High Court held that where one party knew that the other was mistaken as to a term in a formal written contract, the contract was voidable rather than void; sed quaere. Part of the majority judgment of the High Court was adopted by the Court of Appeal in *Commission for New Towns v Cooper (Great Britain) Ltd* [1995] Ch. 259, a case of rectification, without discussion of the majority’s view on this point. See further, below, para.5-027. In *Deputy Commissioner of Taxation (N.S.W.) v Chamberlain* (1990) 93 A.L.R. 729 (Federal Court General Division) a taxpayer was not permitted to take advantage of a typing error he had noticed in a writ issued against him.

•90 *McMaster University v Wilchar Construction Ltd* (1971) 22 D.L.R. (3d) 9 (Ont.). Canadian cases have also given relief for mistakes in the calculations underlying a bid, which would almost certainly not be permitted in English law: see below, para.5-025.

•91 See also *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2, [2005] 1 S.L.R. 502 (buyers tried to take advantage of offer on Internet to sell goods at mistakenly low price). The case is noted by *Yeo* in (2005) 121 L.Q.R. 393. In *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I)

02, in which trades in crypto-currencies were being made through algorithms running on an electronic platform, and after an input failure the program made trades at 250 times the current market rate, the Singapore Court of Appeal said that the relevant knowledge was that of the programmer (at [15]); and it was necessary to ask “when programming the algorithm, was the programmer doing so with actual or constructive knowledge of the fact that the relevant offer would only ever be accepted by a party operating under a mistake and was the programmer acting to take advantage of such a mistake?” (at [103]). The case is noted by *Low and Mik* (2020) 136 L.Q.R. 563 and by *Loke* (2020) 83 M.L.R. 1343, who points out that the SGCA has held that at common law only actual knowledge suffices and the reference to constructive knowledge in the test quoted refers to a wider equitable rule accepted in Singapore, see below, para.[5-023](#).

•92 See *McMaster University v Wilchar Construction Ltd* (1971) 22 D.L.R. (3d) 9 (Ont.), 22, per Thompson J (“one is taken to have known what would have been obvious to a reasonable person in the light of the surrounding circumstances”). Some Canadian courts consider that there is a power to give equitable relief if it would be unconscientious to permit the defendant to obtain or retain a legal advantage resulting from a mistake, and that it would be unconscientious for the defendant to do so when he knew or ought to have known of the claimant’s mistake: see *Craig Estate v Higgins* [1994] 2 W.W.R. 595 (B.C.S.C.) (contrast para.[5-027](#) below). When a defendant ought to have known that a contract document did not reflect the claimant’s intention, the Canadian courts have given the defendant an option between rescission and rectification, see below, para.[5-077](#); see also Waddams, Law of Contracts, 6th edn (2010), para.343.

•93 *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2, [2005] 1 S.L.R. 502 at [53]. It appears that actual knowledge would include cases of “Nelsonian knowledge”, namely, wilful blindness or shutting one’s eyes to the obvious” (at [42]). The court considered that there is also an equitable jurisdiction to set aside a contract for unilateral mistake in cases in which there is “sharp practice” or “unconscionable conduct” (at [76]–[77]); see also *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02 at [92], [105]–[110]; but this does not seem to represent English law: see below, para.[5-027](#).

•94 Also in *Merrill Lynch International v Amorim Partners Ltd* [2014] EWHC 74 (QB) at [54] Hamblen J said that a mistake will only give rise to relief if it was known to the other party, but the point does not appear to have been argued and the mistake was in any event not as to the terms of the contract: see below, para.[5-025](#).

•95 *[1983] Com. L.R. 158*. In this case it was said that if the other party did not know and had no reason to know of the mistake, he is entitled to hold the mistaken party to the terms of the contract in their objective sense; it is immaterial that he has not changed his position or relied upon the contract. This appears to be consistent with the objective test of liability, see Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.13-22.

•96

- 97 [1996] *1 Lloyd's Rep.* 700, 703.  
[1996] *1 Lloyd's Rep.* 700, 703 (i.e. where the party would not be treated as having actual knowledge: see below, para.5-072).
- 98 [2022] *EWHC* 977 (*QB*), see at [94.1]–[94.10] and [104]. The remarks were obiter: there was not even an apparent contract on the terms the claimant alleged and, if there was, he had actual knowledge that it was not what the other party intended and therefore he could not enforce it, see at [104.1]–[104.3].
- 99 See below, para.5-072.
- 100 See below, paras 5-070 et seq. The question whether there was no contract at all, or one on the terms in fact intended by the defendants, is discussed below, para.5-029. It will be submitted that the effects of the mistake may differ according to whether the party knew not only that the offer contained a mistake but what the mistake was, or merely knew or should have known that it contained a mistake.
- 101 [2013] *EWHC* 482 (*Comm*).
- 102 [2013] *EWHC* 482 (*Comm*) at [265]–[268]. cf. above, para.5-020.
- 103 Or, where the mistake is over one party's identity, must prevent effective offer and acceptance: above, para.5-002 and below, paras 5-036 et seq.
- 104 *Balfour v Sea Fire and Life Assurance Co* (1857) 3 C.B.(N.S.) 300; *Scrivener v Pask* (1866) *L.R.* 1 *C.P.* 715; *Pope v Buenos Ayres New Gas Co* (1892) 8 *T.L.R.* 758; cf. *Gill v M'Dowell* [1903] 2 *Ir.Rep.* 463. In *G & S Fashions v B&Q Plc* [1995] 1 *W.L.R.* 1088 it was held that, if a landlord purports to forfeit a lease in the mistaken belief that the tenant is in breach of covenant, the fact that the tenant knows of the landlord's mistake does not prevent it accepting the forfeiture. See also *Bank of Credit and Commerce International SA (In Liquidation) v Ali* [1999] 2 *All E.R.* 1005, 1019. See further above, para.5-002. A contract will not be invalidated by a unilateral mistake over a separate document that was itself of no legal effect: *Donegal International Ltd v Zambia* [2007] *EWHC* 197, [2007] *1 Lloyd's Rep.* 397 at [471], referring to this paragraph.
- 105 (1871) *L.R.* 6 *Q.B.* 597.
- 106 cf. *Roberts & Co Ltd v Leicestershire CC* [1961] *Ch.* 555 (rectification in case of unilateral mistake); see below, paras 5-070—5-071.
- 107 *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] *EWHC* 2257 (*Comm*), [2008] 2 *Lloyd's Rep.* 685; followed in *UTB LLC v Sheffield United Ltd* [2019] *EWHC* 2322 (*Ch*) at [280].
- 108 [2008] *EWHC* 2257 (*Comm*) at [91]. See also *Merrill Lynch International v Amorim Partners Ltd* [2014] *EWHC* 74 (*QB*) at [55].
- 109 [2008] *EWHC* 2257 (*Comm*) at [105], refusing to follow in this respect suggestions made by the judge at first instance (and not discussed by the Court of Appeal, [2003] *EWCA Civ* 1104) in *Huyton SA v Distribuidora Internacional de Productos Agricolas SA* [2002] *EWHC* 2088 (*Comm*) at [455], both reported in [2003] 2 *Lloyd's Rep.* 780. See also *UTB LLC v*

*Sheffield United Ltd [2019] EWHC 2322 (Ch)* at [280]–[285], where it is pointed out that in the *Statoil* case the judge did not address the different question whether a mistake that was not about the terms of the contract might lead the court to refuse specific performance (on which see below, para.5-026). In Canada relief has been given when the claimant has made a “calculation error” which has led to its bid being underpriced, even though the mistake was not in the terms of the offer itself: see *McCamus* (2008) 87 *Can. B.R.* 1, 6 (compare *The Harriette N*, where relief was refused because the mistake was not as to a term of the offer, see text above). In *Quoine Pte Ltd v B2C2 Ltd [2020] SGCA(I) 02*, in which trades in crypto-currencies were being made through algorithms running on an electronic platform, and after an input failure the program made trades at what appeared to be the best available price, which was 250 times the current market rate for such exchanges, the majority of the Singapore Court of Appeal held that the mistake was not over the terms of the contract. The algorithm was intended to sell at the best available price; the mistake, caused by the failure of the data input, was over what that price was (at [114]). Mance LJ dissented on the ground that the equitable doctrine adopted in Singapore (see above, para.5-023) extended to a wider range of mistakes, provided the mistake was fundamental.

110 See above, para.5-008.

111 See previous paragraph.

112 (1881) 19 *Ch. D.* 175, 182. See also *Preston v Luck* (1884) 27 *Ch. D.* 497, 506; *Stewart v Kennedy* (1890) 15 *App. Cas.* 75, 105; *UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch)* at [280], [284].

113 *Tamplin v James* (1880) 15 *Ch. D.* 215, 221.

114 *Webster v Cecil* (1861) 30 *Beav.* 62, 64.

115 *Baskomb v Beckwith* (1869) *L.R.* 8 *Eq.* 100; *Denny v Hancock* (1870) *L.R.* 6 *Ch. App.* 1; *Wilding v Sanderson* [1897] 2 *Ch.* 534.

116 *Tamplin v James* (1880) 15 *Ch. D.* 215.

117 *Manser v Back* (1848) 6 *Hare* 443; *Malins v Freeman* (1837) 2 *Keen* 25; *Van Praagh v Everidge* [1903] 1 *Ch.* 434.

118 If the other party did know of the mistake, it would have the effects described below: see para.5-029.

119 *Jones v Rimmer* (1880) 14 *Ch. D.* 588 (though the omission of any mention of the ground rent in otherwise very detailed particulars makes the case very close to one of misrepresentation by a misleading half-truth: see below, para.9-024). See also *Heath v Heath [2009] EWHC 1908 (Ch)*, [2009] 2 *P. & C.R. DG21* at [26] (“specific performance is a discretionary remedy and mistake may ... still be a relevant factor in refusing equitable relief, at all events where the mistake has been induced by the words or conduct of the person seeking specific performance. In such a case ... the mistake may also amount to, or be practically indistinguishable from, a misrepresentation”). In *UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch)* at [280], [284] the court accepted that specific performance might be refused if the claimant was seeking to take advantage of a mistake by the defendant that was not one as to the terms of the contract, but on the facts the defendant was not disadvantaged (see at [496]).

120 See below, paras 5-075—5-077.

- 121 See below, para.5-029.
- 122 See below, paras 5-070—5-071.
- 123 See below, paras 5-029—5-035.
- 124 An equitable remedy was applied by the court in *VP Plc v Thomas Megarry [2012] NIQB 22*. Compare the cases in Canada and Singapore (above, para.5-023). In *Taylor v Johnson (1983) 151 C.L.R. 422, 45 A.L.R. 265* the Australian High Court held that where one party knew that the other was probably mistaken as to the terms of a formal written contract, and tried to prevent her discovering the mistake, the contract was voidable rather than void. Part of the majority judgment of the High Court was adopted by the Court of Appeal in *Commission for New Towns v Cooper (Great Britain) Ltd [1995] 2 Ch. 259*, a case of rectification, without discussion of the majority's view on this point. In *Deputy Commissioner of Taxation (NSW) v Chamberlain (1990) 93 A.L.R. 729 (Federal Court General Division)* a taxpayer was not permitted to take advantage of a typing error he had noticed in a writ issued against him. The dictum of Rimer J in *Clarion Ltd v National Provident Institution [2000] 2 All E.R. 265, 276*, that there are “plenty of examples of equity permitting either rescission or rectification where one party has, to the knowledge of the other, made the contract under a mistake as to its subject matter or terms” must, with respect, be doubted as regards rescission. But cf. below, paras 5-075—5-078.
- 125 See above, para.5-007. This paragraph was cited with apparent approval in *Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)* at [269].
- 126 Contrast *Spencer [1973] C.L.J 104, 114–116*, cited in *Tilden Rent-a-Car Co v Clendenning (1978) 83 D.L.R. (3d) 400, CA Ont.* (signature does not show assent to provision which company “had no reason to believe were being assented to by the other contracting party”).

## (ii) - Effect on Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 2. - Mistakes as to Terms or Identity<sup>52</sup>

(c) - Unilateral Mistake as to Terms

(ii) - Effect on Contract

**Effect of mistake as to terms: mistaken party's intention known to other**

<sup>129</sup>

In both *Hartog v Colin and Shields*<sup>127</sup> and *Smith v Hughes*<sup>128</sup> it was suggested that the effect of a mistake by one party as to the terms of the contract would, if it were known to the other party, make the contract void. However, in both cases the only question was whether the party who had made the mistake could be held to the objective meaning of his words. The *apparent* contract was void, but it was not decided that neither party had any contractual rights against the other. When the actual intentions of the mistaken party are known to the other, it is possible that the mistaken party can enforce the contract in those terms. Thus it may be that in *Hartog v Colin and Shields* the seller could have enforced the contract at so much per piece (the figure the seller actually intended) against the buyer.

<sup>129</sup>

**U** The buyer, having accepted an offer which he knew was meant to read so much per piece, could be said to be bound by it. This was the result reached in a case in Northern Ireland in which the plaintiff had made an offer to settle a claim for €155,000 when they meant £155,000 and the defendant knew this<sup>130</sup>: Weatherup J treated the offer as one for £155,000 "mistakenly expressed in euros" and enforced the settlement accordingly.<sup>131</sup> Further, although a contract entered under an operative mistake is often said to be void, it appears that this cannot be raised by the mistaken

party against a third party who in good faith and without notice of the mistake has relied on the signed document. The signer is estopped and can only succeed against the third party if he can show non est factum.<sup>132</sup>

## Rectification cases

- 130 The interpretation proposed in the previous paragraph is consistent with the cases granting rectification in cases of unilateral mistake.<sup>133</sup> There it is said that if the party against whom rectification is sought knew that the documents did not represent the true intention of the party seeking relief, the documents will be rectified to show what the party seeking relief actually intended. This presupposes the existence of a valid contract despite the mistake, on the terms actually intended by the mistaken party and known by the other to be so intended.<sup>134</sup>

## Estoppel

- 131 To hold the party to the terms actually intended by the mistaken party is also consistent with cases on estoppel. There it has been said that if one party knows the other has made a mistake and fails to point it out when the reasonable person would expect him to do so were he acting honestly and reasonably, an estoppel by silence or acquiescence may arise and result in liability where there would otherwise be none.<sup>135</sup>

## Mistake should have been known to the other party; or true intention not known

- 132 It was submitted earlier that, at present, English law gives relief for a unilateral mistake if the mistake was known to the other party; but that there are suggestions in some of the cases that relief should also be given if the other party ought to have known of it.<sup>136</sup> If it were decided to give relief in these circumstances, what should the effect on the contract be? A similar question arises when the other party knows that the first party has made a mistake over the terms but (unlike in *Hartog v Colin and Shields*,<sup>137</sup> for example) does not know what the first party actually intended.
- 133 In these situations it might be argued that if the first party were to purport to accept the apparent offer, he would be estopped from denying that he had accepted whatever the offeror can prove he actually meant. But this would at the very least leave the first party in some uncertainty, and might

involve holding him to a contract to which he would never have agreed. In a recent rectification case it was said that:

“The effect of a successful rectification claim based on unilateral mistake is always that it imposes a contract upon the defendant which he did not intend to make. It is the unconscionable conduct involved in staying silent when aware of the claimant’s mistake that makes it just to impose a different contract upon him from that by which he intended to be bound.”<sup>138</sup>

When the first party’s mistake was not actually known to the second party, or what the first party actually meant when that was unknown to the second party, it seems less appropriate to hold the second party to the terms intended by the first. It is more appropriate to hold that there is no contract.<sup>139</sup>

## Oral and written contracts

- 134 It may be noted that there is at least one difference between the treatment of oral and written contracts which have been entered into as the result of a mistake as to the terms by one party which was known to the other. If the submissions above are correct, with an oral contract or one made by exchange of written communications, where the mistaken party’s real intentions are known to the other, and yet the other appears to agree to contract, there will be a contract on the terms intended by the mistaken party<sup>140</sup>; and for the most part the result when the contract has been reduced to writing is parallel. As was just mentioned,<sup>141</sup> a party who has signed a written agreement under a mistake may, if the mistake was known to the other party, claim to have the document rectified. The difference is that the right to rectification may be lost, and then, in the case of an agreement in writing, it is the ostensible agreement which will stand.<sup>142</sup>
- 135 It is possible that there is a second difference between the treatment of oral and written contracts, in the case where the mistaken party’s intentions are not known to the other party, but either the other knows that there was a mistake but not what it is, or he should have known that there was a mistake. In these cases it is suggested that if the contract was oral, or formed simply by an exchange of correspondence, it is void.<sup>143</sup> What is not wholly clear is whether the same applies when the parties have reduced their agreement to writing. If oral and written contracts were to be treated identically, the contract should be void. As we will see below, in very limited circumstances a party who has signed a deed or other document under a misapprehension can claim that it is not binding on him under the doctrine of non est factum. The circumstances are very limited because a plea of non est factum can operate to prejudice third parties who have relied on the contract. It may be thought that this is the only ground on which the mistaken party can escape from a written

contract, which would mean a second difference between oral and written contracts. But it has been pointed out that when the dispute is between the original parties, there is no need to rely on this defence: the contract may be void for mistake<sup>144</sup>; moreover, it is possible that in the case of a written contract which the defendant ought to know does not reflect the claimant's intention, the claimant may obtain rectification or possibly cancellation.<sup>145</sup>

## Footnotes

- <sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022); Macmillan, Mistakes in Contract Law (2010).
- <sup>52</sup> On this phrase see above, para.5-001. On the kinds of mistake dealt with in this section, see *Cheshire* (1944) 60 *L.Q.R.* 175, 178, 180; *Tylor* (1948) 11 *M.L.R.* 257, 259; *Slade* (1954) 70 *L.Q.R.* 385, 386; *Stoljar* (1965) 28 *M.L.R.* 265, 266; M. Chen-Wishart, "Contractual Mistake, Intention in Formation and Vitiating: the Oxymoron of *Smith v Hughes*" in J. Neyers, R. Bronaugh and S. Pitel (eds), Exploring Contract Law (2009) 341; G. McMeel, "*Interpretation and Mistake in Contract Law: 'The fox knows many things'*" [2006] *Lloyd's Maritime and Law Quarterly* 49; R. Stevens, "Objectivity, Mistake and the Parol Evidence Rule" in Andrew Burrows and Edwin Peel (eds), Contract Terms (2007) 101.
- <sup>127</sup> [1939] 3 *All E.R.* 566; above, para.5-022. In *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] *EWHC* 2257 (Comm), [2008] 2 *Lloyd's Rep.* 685 Aikens J preferred to say that there is no contract at all (at [87]).
- <sup>128</sup> (1871) *L.R.* 6 *Q.B.* 597, 606, 607, 609; above, para.5-025.
- <sup>129</sup> See also Beatson, Burrows and Cartwright (eds), Anson's Law of Contract, 31st edn (2020), p.274; contrast Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.8-057 (possibly seller could have held buyer to contract on the *stated* terms had he wished to do so). Contra, *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.13-28 ("there can be no contract for the simple reason that though the defendant may have intended the contract to be on a different set of terms, there is no external evidence by which he can say that the claimant in fact agreed to it"). See also *McLauchlan* (2008) 124 *L.Q.R.* 608, 613. However, if the claimant purported to accept the defendant's offer, there does seem to be such evidence, whether the contract was oral or written, unless it was not reasonable for the claimant to think that the defendant was accepting the claimant's offer as he intended it. For example, on facts like those in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2, [2005] 1 *S.L.R.* 502, in which buyers tried to take advantage of an offer on the internet to sell goods at a mistakenly low price and ordered large quantities of them, even if the buyers knew what the correct price should be, it would not reasonable

for the seller to assume that a buyer was agreeing to buy large quantities of the goods at the correct price.

- 130 *Ulster Bank Ltd v Lambe [2012] NIQB 31*.
- 131 *[2012] NIQB 31* at [28]. The judge would have ordered rectification but thought it unnecessary to do so.
- 132 See the judgment of Sir Edward Eveleigh in *Lloyds Bank Plc v Waterhouse (1991) 10 Tr. L.R. 161*. Contrast the “mistaken identity” cases, below, para.5-036, where the mistaken party is not estopped simply by entrusting possession of his property to the rogue who sells it to the third party. On non est factum see below, para.5-049.
- 133 See below, paras 5-070—5-071.
- 134 In *Ulster Bank Ltd v Lambe [2012] NIQB 31* (above, para.5-029) the judge would have ordered rectification but thought it unnecessary to do so, as the issue could be dealt with as a matter of interpretation, cf. below, para.5-060.
- 135 *Pacol Ltd v Trade Lines Ltd, The Henryk Sif [1982] 1 Lloyd's Rep. 456, 465; The Stolt Loyalty [1993] 2 Lloyd's Rep. 281, 290; Republic of India v Indian Steamship Co, The Indian Grace (No.2) [1994] 2 Lloyd's Rep. 331, 344*. cf. above, para.4-090.
- 136 See above, para.5-023.
- 137 *[1939] 3 All E.R. 566*; above, para.5-022.
- 138 *Chartbrook Ltd v Persimmon Homes Ltd [2007] EWHC 409 (Ch), [2007] 2 P. & C.R. 9* at [137] (not referred to when the decision was reversed by the House of Lords, *[2009] UKHL 38*). See also *Daventry DC v Daventry and District Housing Ltd [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333* at [177]. But see below, para.5-078.
- 139 In Canada, in the analogous situation in which the mistaken party seeks rectification, the other party is given the option of submitting to rectification or to rescission, see below, para.5-077. It does not seem easy to reach a parallel conclusion in the case of an oral agreement if it is the law that the effect of a mistake is to make the contract void rather than voidable.
- 140 See above, para.5-029.
- 141 See above, para.5-030.
- 142 See below, para.5-102. In *Taylor v Johnson (1983) 151 C.L.R. 422, 45 A.L.R. 265* the Australian High Court held that where one party knew that the other was probably mistaken as to the terms of a formal written contract, and tried to prevent her discovering the mistake, the contract was voidable rather than void. This is an attractive solution but may go beyond English authority in allowing rescission for unilateral mistake: see above, para.5-027 and below, paras 5-076—5-077.
- 143 See above, para.5-034.
- 144 See the judgment of Sir Edward Eveleigh in *Lloyds Bank Plc v Waterhouse (1991) 10 Tr. L.R. 161*, discussed further below, para.5-050. It is suggested that that, if necessary, the court should cancel the document; but it is not clear that this remedy is available unless there was actual or constructive fraud: see Halsbury's Laws of England Vol.47 (2014) Equitable Jurisdiction, para.84.
- 145 See below, paras 5-077—5-078.

---

End of Document

© 2022 SWEET & MAXWELL

## (d) - Mistaken Identity

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 2. - Mistakes as to Terms or Identity<sup>52</sup>

(d) - Mistaken Identity

### Mistaken identity

- 136 A number of cases have raised the question whether a mistake by one party as to the identity of the person with whom he appears to be contracting will render the contract void. The question arises in a recurrent situation typified by the facts of *Cundy v Lindsay*.<sup>146</sup> A fraudulent person named Blenkarn wrote to the plaintiffs offering to buy certain goods, and so contrived his signature to resemble that of Blenviron & Co, a prosperous firm carrying on business in the same street and with whom the plaintiffs had previously dealt. The plaintiffs despatched the goods in the belief that they were dealing with Blenviron & Co and the goods eventually came into the hands of an innocent purchaser, the defendant. If the contract between the plaintiffs and Blenkarn was void for mistake, no property in the goods had passed under the contract, and the plaintiffs were entitled to recover them. But otherwise the contract was merely voidable for fraud, and the defendant would have acquired a good title.<sup>147</sup>

### Mistake as to the person<sup>148</sup>

- 137 The identity of the person with whom one is contracting or proposing to contract is often immaterial. It is usually of no importance to a shopkeeper to whom he sells goods across the counter for cash<sup>149</sup>; and an auctioneer who accepts a bid at a public auction is not normally concerned with the identity of the person who makes the bid.<sup>150</sup> Sometimes, however, and for special reasons, the

identity of the person is material. In such circumstances, if one party mistakenly believes that he is dealing with person A when he is in fact dealing with B, and he communicates to B an offer that is intended only for A, the mistake as to identity may prevent a contract coming into existence. The same may apply if the mistaken party purports to accept an offer that he believes to have been made by A but that was in fact made by B.<sup>151</sup>

## Offer to B cannot be accepted by C

- 138 Assuming the identity of the other party to be material to party A, we may start with the general proposition that, if A offers to make a contract with B, C cannot give himself any rights under the offer:

“A person cannot constitute himself a contracting party with one whom he knows or ought to know has no intention of contracting with him. An offer can be accepted only by the person to whom it is addressed.”<sup>152</sup>

Equally, if a party makes an offer to another and the other addresses his acceptance to a third person with whom the other intends to deal, there will be no contract.<sup>153</sup> In *Boulton v Jones*<sup>154</sup> the defendant had been used to deal with one Brocklehurst, against whom he had a set-off. He sent Brocklehurst a written order for some goods. On the very day that the order was sent, Brocklehurst had transferred his business to his foreman, the plaintiff. The plaintiff thereupon dispatched the goods without informing the defendant of the change of ownership. The defendant refused to pay for the goods, and the court held that he was not liable to do so as the plaintiff could not accept an offer which was not addressed to him. Nevertheless the test is not entirely a subjective one. The question is not simply “with whom did the offeror intend to contract?” but “how would the offer have been understood by a reasonable man in the position of the offeree”? If A makes an offer to B in mistake for C, and B accepts the offer reasonably believing it to have been intended for him, A will be bound despite the mistake.<sup>155</sup> In *Boulton v Jones* the circumstances were such that a reasonable man would not have believed the offer to have been addressed to him. The business had only just changed hands, and the plaintiff either knew of<sup>156</sup> or could easily have discovered the existence of the set-off. But where such knowledge or means of knowledge is lacking, the offeror will be bound. Moreover, the growth of companies and the increasing depersonalisation of commerce may mean that nineteenth-century cases on questions of this kind are not very reliable as authorities. In 1857 a buyer of goods from a shop may well have regarded the identity of the seller as a matter of importance; in the day of the supermarket this is unlikely to be the case.

## Offer may be accepted only by person to whom it was made

<sup>139</sup> Thus the question is, to whom was the offer

<sup>157</sup>

**U** made: to the actual recipient to whom it was addressed or sent, or to the person with whom the offeror thought he was dealing? As with the question of who are the parties to the contract,

<sup>158</sup>

**U** the test is objective. There will be no contract if it is shown that:

“... there was no objective agreement, e.g. that the offer was, objectively speaking, made to one person and (perhaps as the result of fraud) objectively speaking, accepted by another.”

<sup>159</sup>

**U**

In other words, the issue is parallel to the one raised when one party has made a mistake in the terms of his offer: whether or not the purported offer and acceptance result in a contract depends upon the terms of the offer or the acceptance.

“Just as the parties must be shown to have agreed on the terms of the contract, so they must also be shown to have agreed the one with the other. If A makes an offer to B, but C purports to accept it, there will be no contract. Equally, if A makes an offer to B and B addresses his acceptance to C there will be no contract. Where there is an issue as to whether two persons have reached an agreement, the one with the other, the courts have tended to adopt the same approach to resolving that issue as they adopt when considering whether there has been agreement as to the terms of the contract. The court asks the question whether each *intended*, or must be deemed to have *intended*, to contract with the other.”

<sup>160</sup>

**U**

In the typical case

<sup>161</sup>

**U** in which a rogue (R) has fraudulently induced the innocent party (S) to believe that R is in fact a third person (X), R is of course aware of S's mistake and it makes no sense to ask whether S intended to deal with R or X: to him they were the same person.

162

**U** Nonetheless the questions are, first, to whom did S intend to make the offer—only to X or to whomever he was in fact dealing with

163

**U**; and secondly, whether the offer must in the circumstances be interpreted as made to, or intended for, only X or as made to the person with whom S was actually dealing, whom he merely thought to be X. In practice the answer to the second question will depend on whether the parties were dealing face-to-face or by correspondence.

## Face-to-face dealings

140 When the parties are dealing with each other face-to-face<sup>164</sup> there is a strong presumption that the mistaken party “intends” to deal with the person physically present or, to put it in other words, there is a presumption that the offer is made to the person present.<sup>165</sup> Thus, in *Phillips v Brooks*<sup>166</sup> one North entered the plaintiff’s shop and selected several pieces of jewellery. He then wrote out a cheque for the price, saying “I am Sir George Bullough”—a person known by reputation to the plaintiff. He took away some of the jewellery and pledged it with the defendant who received it in good faith. In an action by the plaintiff to recover the jewellery pledged, it was held that the plaintiff intended to contract with the person in the shop. There was therefore no operative mistake and the property in the jewellery passed.

## The cases have not been wholly consistent in their outcomes<sup>167</sup>

141 In *Ingram v Little*<sup>168</sup> the plaintiffs advertised their car for sale. A rogue who called himself Hutchinson offered to buy the car and to pay for it with a cheque. This offer was rejected. “Hutchinson” then gave his initials and address, describing himself as a respectable business man living in Caterham. The plaintiffs had never heard of this man but one of the plaintiffs ascertained from the telephone directory that such a person lived at that address. Relying on this information, they accepted the cheque, which was dishonoured on presentation. The rogue sold the car, which subsequently came into the hands of the defendant, a bona fide purchaser for value. In an action by the plaintiffs to recover the car, or its value, from the defendant, the Court of Appeal by a majority held that the contract between the plaintiffs and the rogue was void for mistake as to identity, and that they were entitled to judgment since the car was still their property. The circumstances

(particularly the investigation of the telephone directory) indicated that it was with Hutchinson that the plaintiffs intended to deal and not with the rogue who was physically present before them. Devlin LJ dissented: there was a presumption that the person intended to contract with the person to whom she was addressing her words and that the presumption had not been rebutted. It did not suffice to show that S would not have contracted with R unless she thought he was X. The decision in *Ingram v Little* was criticised and not followed in *Lewis v Averay*<sup>169</sup> where the facts were very similar but judgment was given for the bona fide purchaser. Phillimore LJ emphasised that each of these cases must be decided on its own facts but that there is a strong presumption against holding a contract to be totally void where it is entered into inter praesentes. Megaw LJ held that it had not been shown that the seller considered the identity of the buyer to be of vital importance. Denning LJ expressed the view that a mistake of identity would never make a contract void. In the recent House of Lords case of *Shogun Finance Ltd v Hudson*<sup>170</sup> (a case of a contract in writing) it seems to have been accepted by all their lordships who discussed the point that, in face-to-face dealings, there is a strong presumption that the offer is made to the person physically present.<sup>171</sup> Indeed, two of their lordships doubted whether the presumption could be rebutted.<sup>172</sup> The tenor of their lordships' speeches was that the dissenting approach of Devlin LJ in *Ingram v Little*<sup>173</sup> was to be preferred; Lord Walker said that the case was wrongly decided.<sup>174</sup>

## Contracts in writing

- ¶42 Where the contract is in writing, in contrast, only the persons named in the writing can be parties to the contract, and it seems that the same applies when the negotiations for the contract were conducted in writing even if there was no formal written agreement. In *Cundy v Lindsay*<sup>175</sup> (the facts of which were given in para.5-036, above) it was held that the mistake was one as to the identity of the contracting party and the contract was void. Lord Cairns remarked:

“... how is it possible to imagine that in the that state of things any contract could have arisen between the Respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested on him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever.”<sup>176</sup>

This decision does not seem at the time to have rested on the distinction between face-to-face negotiations and a written contract; rather it seems to reflect the subjective approach to intention that was widely adopted in the nineteenth century.<sup>177</sup> However, the decision has been upheld on the basis that the negotiations were by correspondence and therefore the respondent's offer was made only to the person identified in the writing, i.e. the respectable firm of Blenkirons to whom

the respondents dispatched the goods. This is the effect of the House of Lords decision in *Shogun Finance Ltd v Hudson*.<sup>178</sup>

- <sup>143</sup> In *Shogun Finance Ltd v Hudson*<sup>179</sup> a rogue wanted to acquire a vehicle displayed by a car dealer and showed the dealer a driving licence in the name of a Mr Patel. The dealer contacted the claimants and, after the claimants had checked Mr Patel's credit details, a financing agreement with the claimants was arranged in the name of Mr Patel. After the rogue had paid a deposit partly in cash and partly by cheque (which was later dishonoured), the dealer allowed the rogue to take the vehicle. The defendant bought the vehicle in good faith. The defendant claimed that he was protected by *Hire-Purchase Act 1964 s.27*. This provides that when a motor vehicle has been bailed under a hire-purchase agreement or agreed to be sold under a conditional sale agreement, and before the property has vested in the debtor he disposes of it to a private purchaser who buys it in good faith, the purchaser will obtain good title. The Court of Appeal,<sup>180</sup> by a majority, held that the defendant had not acquired the vehicle from a "debtor" under a hire-purchase agreement as there was no valid agreement. Mr Patel was not bound by any agreement and there was no valid agreement with the rogue. By a majority this decision was affirmed in the House of Lords. A minority of their lordships argued powerfully that there was a contract between the finance company and the rogue; the effect of the fraudulently-induced belief by the company that it was dealing with Mr Patel merely rendered the contract voidable.<sup>181</sup> Lord Millett accepted that A cannot accept an offer that is made to B but argued that, whether the parties are dealing with each other face-to-face or in writing, there should be a presumption that the mistaken party intends to deal with the person with whom he is physically dealing—the person present or the writer of the letter. A contract should come into existence whenever there is sufficient correlation between the offer and the acceptance to make it possible to say that the imposter's offer has been accepted by the person to whom it was addressed.<sup>182</sup> Lord Millett said that *Cundy v Lindsay* was wrongly decided.<sup>183</sup> Lord Nicholls agreed that *Cundy v Lindsay* should not be followed.<sup>184</sup> A person should be presumed to intend to contract with the person with whom he is actually dealing, whatever the mode of communication.<sup>185</sup> But the majority held that when the dealings are carried out by correspondence in writing, and certainly when the contract is reduced to a writing,<sup>186</sup> the identification of the parties to the agreement is a question of the construction of the putative contract. If an individual is unequivocally identified by the description in the writing, that precludes any finding that the party to the agreement is anyone other than the person so described.<sup>187</sup> On the facts, the finance company was willing to do business only with the person who appeared to have identified himself in the written document, i.e. Mr Patel<sup>188</sup>; and where the party is specifically identified in the document, oral or other extrinsic evidence is not admissible to show that the party is someone else.<sup>189</sup> There was therefore no contract between the rogue and the finance company.

## Non-existent person

- ¶44 It seems that if the rogue purports to be not another individual who exists but a non-existent person, then even when the contract is in writing it will normally be between the mistaken party and the rogue. In *King's Norton Metal Co v Edridge, Merrett & Co Ltd*<sup>190</sup> the plaintiffs had despatched goods to one Wallis, who had written to them posing as a member of a mythical firm named "Hallam & Co". Wallis subsequently sold the goods so obtained to the defendants, who took in good faith and for value. The Court of Appeal held that the plaintiffs had intended to contract with the writer of the letter, although they had invested him with the attributes of solvency and respectability. A.L. Smith LJ said<sup>191</sup> that if there had been a separate entity called Hallam & Co the case might have been within *Cundy v Lindsay*.<sup>192</sup> In the *Shogun* case, Lord Phillips said that in the *King's Norton* case:

"... the plaintiffs intended to deal with whoever was using the name Hallam & Co. Extrinsic evidence was needed to identify who that was but, once identified as the user of that name, the party with whom the plaintiffs had contracted was established. They could not demonstrate that their acceptance of the offer was intended for anyone other than Wallis."<sup>193</sup>

The *King's Norton* decision does not completely preclude a finding that the mistaken party intended to contract only with a person who does not in fact exist<sup>194</sup> but, as Lord Hobhouse pointed out in the *Shogun* case, in a credit agreement it would be useless to use a pseudonym as there would be no actual person against whom a credit check could be run.<sup>195</sup>

## Identity and attributes

- ¶45 It often used to be said that only a mistake as to the identity of the other party could ever prevent the formation of a contract; a mistake as to attributes could never do so.<sup>196</sup> While it is clear that a mistake as to an attribute of the other party such as whether he is credit-worthy will not prevent the formation of a contract,<sup>197</sup> the distinction has been criticised.<sup>198</sup> It is possible that in exceptional circumstances a mistake as to attribute may prevent a contract coming into existence, if a person is for the purpose identified by some attribute. An offer made only to members of the University of Warwick could not be accepted by someone who was not a member of the University.<sup>199</sup>

## Mistake and third parties

- ¶46 It is not clear whether a person can intervene and allege that a contract is void for mistake as to the person when the contracting parties themselves are unwilling to assert its invalidity. In *Fawcett v Saint Merat (Star Car Sales Ltd, Claimant)*<sup>200</sup> Hardie Boys J in the Supreme Court of New Zealand held that a third party (an execution creditor of the original owner of the goods) could not raise “in the name of one of the contracting parties” the question of mistake as to the person; but his view did not form part of the reasoning of the decision on appeal.<sup>201</sup> At first sight it might seem that a third party should be allowed to rely on the invalidity of the transaction for the contract is not voidable at the parties’ option but void ab initio. But in practice some strange consequences would follow from permitting such intervention. If the buyer in *Boulton v Jones*<sup>202</sup> had waived his objections to the identity of the seller and paid for the goods could it really be contended by a third party that the property did not thereby pass to the buyer?

## A believes B is not B

- ¶47 Suppose that A makes an offer to B merely in the belief that B is not B? The offer has been made to B even though A would never have made it had he known B’s true identity. B can therefore accept the offer whether or not he knows of the mistake. The contract may be voidable for fraud, but it is not a nullity from the beginning.<sup>203</sup> It is only if a term can be implied into the offer that B is not B, and it is proved that this was known to the other party, that the contract will be void ab initio.<sup>204</sup> In such a case the other party knows that the terms of the offer preclude him from accepting it, and, as we have seen,<sup>205</sup> this may invalidate the agreement.

## Proposal for reform

- ¶48 In its Twelfth Report,<sup>206</sup> the Law Reform Committee recommended that, in the case of mistake as to the person, the distinction between void and voidable contracts should be abrogated so far as the acquisition of title by innocent parties is concerned. However, the Report was never implemented.

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022); Macmillan, Mistakes in Contract Law (2010).
- 52 On this phrase see above, para.5-001. On the kinds of mistake dealt with in this section, see *Cheshire* (1944) 60 *L.Q.R.* 175, 178, 180; *Tylor* (1948) 11 *M.L.R.* 257, 259; *Slade* (1954) 70 *L.Q.R.* 385, 386; *Stoljar* (1965) 28 *M.L.R.* 265, 266; M. Chen-Wishart, "Contractual Mistake, Intention in Formation and Vitiating the Oxymoron of *Smith v Hughes*" in J. Neyers, R. Bronaugh and S. Pitel (eds), Exploring Contract Law (2009) 341; G. McMeel, "*Interpretation and Mistake in Contract Law: 'The fox knows many things'*" [2006] *Lloyd's Maritime and Law Quarterly* 49; R. Stevens, "Objectivity, Mistake and the Parol Evidence Rule" in Andrew Burrows and Edwin Peel (eds), Contract Terms (2007) 101.
- 146 (1878) 3 *App. Cas.* 459; see further below, para.5-042.
- 147 The owner who has parted with possession of the goods to the rogue is not estopped from reclaiming them from the innocent third party to whom the rogue sells them; contrast the case where a party has mistakenly signed a document which is relied on by an innocent third party, below, para.5-049.
- 148 See *Goodhart* (1941) 57 *L.Q.R.* 228; *Cheshire* (1944) 60 *L.Q.R.* 175, 183; *Williams* (1945) 23 *Can. Bar Rev.* 271; *Tylor* (1948) 11 *M.L.R.* 257, 259; *Slade* (1954) 70 *L.Q.R.* 385, 390; *Wilson* (1954) 17 *M.L.R.* 515; *Unger* (1955) 18 *M.L.R.* 259; *Hall* [1961] *Camb. L.J.* 86; *Stoljar* (1965) 28 *M.L.R.* 265, 280; C. Hare, "Identity Mistakes: A Missed Opportunity?" (2004) 67 *Modern Law Review* 993; C. Macmillan, "Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law" [2005] *Cambridge Law Journal* 711; D. McLauchlan, "Mistake of Identity and Contract Formation" (2005) 21 *Journal of Contract Law* 1.
- 149 *Ingram v Little* [1961] 1 *Q.B.* 31, 57.
- 150 *Dennant v Skinner* [1948] 2 *K.B.* 164. See also *Smith v Wheatcroft* (1878) 9 *Ch. D.* 223. The seller will normally have lost the right to rescind for fraud: see below, para.9-147 (but nb. para.9-127).
- 151 See below, para.5-039. The same may occasionally apply when the mistake is one as attributes rather than identity: see below, para.5-045.
- 152 Beatson, Burrows and Cartwright (eds), Anson's Law of Contract, 31st edn (2020), p.286; see *Shogun Finance Ltd v Hudson* [2003] *UKHL* 62, [2004] 1 *A.C.* 919 at [63], [125] and [184].
- 153 *Shogun Finance Ltd v Hudson* [2003] *UKHL* 62, [2004] 1 *A.C.* 919, per Lord Phillips at [125].
- 154 (1857) 2 *H. & N.* 564, 6 *L.R.* 107.
- 155 *Goodhart* (1941) 57 *L.Q.R.* 228, 241–244; *Cheshire* (1944) 60 *L.Q.R.* 175, 186–187. See also *Upton-on-Severn RDC v Powell* [1942] 1 *All E.R.* 220; *Shogun Finance Ltd v Hudson* [2003] *UKHL* 62, [2004] 1 *A.C.* 919 at [65], [123] and [183].
- 156 See the report in (1857) 6 *W.R.* 107.
- 157

For convenience it is assumed that it is the offeror who is the mistaken party. The same principle will apply when the mistaken party purportedly accepts an offer that he believes came from A but was in fact made by C. See para.5-037, above.

- 158 *Lumley v Foster & Co Group Ltd [2022] EWHC 54 (TCC)* at [6]: see above para.4-002.
- 159 Robert Goff LJ in *Whittaker v Campbell [1984] Q.B. 318, 327*.
- 160 Lord Phillips in *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [125].
- 161 See above, para.5-036.
- 162 See the judgment of Devlin LJ in *Ingram v Little [1961] Q.B. 31, 65* and the speeches of Lords Millett, Phillips and Walker in *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [64], [138], and [125], respectively.
- 163 See above, para.5-014. cf. *Midland Bank Plc v Brown Shipley & Co Ltd [1991] 1 Lloyd's Rep. 576* at 585 (mistake not of crucial importance).
- 164 Or probably where they negotiate over the telephone or by other means involving interpersonal contact other than in writing: *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [153].
- 165 See the speech of Lord Walker in *Shogun Finance Ltd v Hudson [2003] UKHL 62* at [184]–[185].
- 166 [1919] 2 K.B. 243, criticised by *Goodhart (1941) 57 L.Q.R. 228* at 241, and by Gresson P in *Fawcett v Star Car Sales [1960] N.Z.L.R. 406*. See also *Dennant v Skinner [1948] 2 K.B. 164; Barclays Bank Ltd v Okenarhe [1966] 2 Lloyd's Rep. 87*.
- 167 *Phillips v Brooks [1919] 2 K.B. 243* was distinguished by Viscount Haldane in *Lake v Simmons [1927] A.C. 487, 502*, who pointed out that the misrepresentation of his identity by North had not occurred until after the sale had been concluded and the property had passed. But in *Lake v Simmons* the question was whether the loss was covered by an insurance policy and Viscount Haldane's approach was not adopted by the other Lords: see Devlin LJ in *Ingram v Little [1961] 1 Q.B. 31, 69–73* and Lord Phillips in *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [141].
- 168 [1961] 1 Q.B. 31 (Devlin LJ dissenting).
- 169 [1972] 1 Q.B. 198.
- 170 [2003] UKHL 62, [2004] 1 A.C. 919. See below, para.5-043.
- 171 [2003] UKHL 62. See the speeches of Lord Nicholls at [22] and [37], of Lord Millett at [69], of Lord Phillips at [170] and of Lord Walker at [187]. Lord Hobhouse did not address the question.
- 172 Lord Nicholls, [2003] UKHL 62 at [37] and Lord Millett, who at [67] suggested that perhaps the presumption should be conclusive. Both were dissenting. Of the majority, Lord Walker said at [187] that exceptions to the presumption would be very rare but might occur in, e.g.

cases of impersonation of someone actually known to a mistaken party whose senses are impaired.

- 173 [1961] 1 Q.B. 31.
- 174 [2003] UKHL 62, [2004] 1 A.C. 919 at [185].
- 175 (1878) 3 App. Cas. 459.
- 176 (1878) 3 App. Cas. 459 at 465. See also the speeches of Lord Hatherly at 469 and Lord Penzance at 471.
- 177 For a useful discussion see *Simpson* (1975) 91 L.Q.R. 247, 266 et seq. and Macmillan in Lewis and Lobban (eds), Law and History Current Legal Issues (2004) Vol.6, pp.285–315.
- 178 [2003] UKHL 62, [2004] 1 A.C. 919.
- 179 [2003] UKHL 62, [2004] 1 A.C. 919. See C. Hare, “Identity Mistakes: A Missed Opportunity?” (2004) 67 Modern Law Review 993; C. Macmillan, “Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law” [2005] Cambridge Law Journal 711; D. McLauchlan, “Mistake of Identity and Contract Formation” (2005) 21 Journal of Contract Law 1.
- 180 [2001] EWCA Civ 100, [2002] Q.B. 834.
- 181 The minority took a different approach to the policy of protecting good faith purchasers, see [2003] UKHL 62 at [13] and [35] (Lord Nicholls) and [60] and [82] (Lord Millett); compare [2003] UKHL 62 at [49] and [55] (Lord Hobhouse) and [181]–[182] (Lord Walker).
- 182 [2003] UKHL 62 at [81].
- 183 [2003] UKHL 62 at [93]. The minority were in part driven by the desire to protect innocent third parties who might purchase the property: see Lord Nichols at [35] and Lord Millett at [60] and [84].
- 184 [2003] UKHL 62 at [34].
- 185 [2003] UKHL 62 at [36].
- 186 Lord Hobhouse appears to state this as the rule when the contract is reduced to writing (at [46]) and then gives as a separate ground that the finance company only accepted the written offer apparently made on the form by Mr Patel. Lord Walker agreed with Lord Hobhouse and in his further remarks he appears to say that where there is an alleged contract reached by correspondence, again the identity of the parties will normally be determined by the writing; but he seemed to envisage that in such a case there might be room for argument, for example if in *Cundy v Lindsay* the respondents had never heard of Blenkiron & Co (at [188]). Lord Phillips does not seem to distinguish the two situations (see at [170] and [178]).
- 187 See the speeches of Lord Hobhouse, especially at [47]–[50]; Lord Phillips, especially at [154], [161] and [170]; and Lord Walker especially at [180] and [188]. The decision in *Hector v Lyons* (1989) 58 P. & C.R. 156, in which it was held that the mistaken identity cases have no application when the contract is wholly in writing (*(1989) 58 P. & C.R. 159*), was said to be correct in principle though the reason for the decision on the facts was not wholly clear: see [2003] UKHL 62 at [49], [166] and [192].
- 188 See the speech of Lord Hobhouse at [48].
- 189 [2003] UKHL 62 at [49]. It could of course be shown that the party named was acting as agent.
- 190 (1897) 14 T.L.R. 98.

- 191 (1897) 14 T.L.R. 98, 99.
- 192 (1878) 3 App. Cas. 459; above, paras 5-036 and 5-039.
- 193 [2003] UKHL 62 at [135]. See also the speech of Lord Walker at [189].
- 194 *Lake v Simmons* [1927] A.C. 487; cf. *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 Q.B. 45.
- 195 [2003] UKHL 62, [2004] 1 A.C. 919 at [48].
- 196 e.g. in *Lewis v Averay* [1972] 1 Q.B. 198, 215 Megaw LJ decided the case on the ground that the mistake was merely as to attributes. See also *Whittaker v Campbell* [1984] Q.B. 318, 324. A mistake as to whether a person is contracting as agent for another or as principal may be relevant, as in *Hardman v Booth* (1863) 1 H. & C. 803; but not a mistake as to the identity of a mere messenger: *Midland Bank Plc v Brown Shipley & Co Ltd* [1991] 1 Lloyd's Rep. 576.
- 197 *Midland Bank Plc v Brown Shipley & Co Ltd* [1991] 1 Lloyd's Rep. 576, 585.
- 198 See *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919 at [5] (Lord Nicholls).
- 199 See Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.8-038.
- 200 [1959] N.Z.L.R. 952.
- 201 sub nom. *Fawcett v Star Car Sales* [1960] N.Z.L.R. 406. The majority of the court make no reference to this point, and Gresson P (dissenting) expressly rejects it.
- 202 (1857) 2 H. & N. 564, above, para.5-038.
- 203 *Ingram v Little* [1961] 1 Q.B. 31, 54; *Goodhart* (1941) 57 L.Q.R. 228; *Unger* (1955) 18 M.L.R. 259. See also *Dyster v Randall & Sons* [1926] Ch. 932. Contrast *Gordon v Street* [1899] 2 Q.B. 641; *Sowler v Potter* [1940] 1 K.B. 271, which may perhaps now be taken to have been overruled, see *Solle v Butcher* [1950] 1 K.B. 671, 691; *Gallie v Lee* [1969] 2 Ch. 17, 33, 41, 45, affirmed sub nom. *Saunders v Anglia Building Society* [1971] A.C. 1004; *Lewis v Averay* [1972] 1 Q.B. 198, 206; and *Wilson* (1954) 17 M.L.R. 515.
- 204 *Said v Butt* [1920] 3 K.B. 497 (a case of agency); see below, para.21-074.
- 205 See above, para.5-039.
- 206 Cmnd.2958 (1966), para.15.

## Section 3. - Non est Factum

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 3. - Non est Factum

### Definition

- 149 This category of mistake is derived from a small group of cases most of them of modern times, although the doctrine existed at least as early as 1584.<sup>207</sup> The general rule is that a person is estopped by his or her deed, and although there is no such estoppel in the case of ordinary signed documents, a party of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not. If, however, a party has been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him. The deed or writing is completely void in whosesoever hands it may come. In most of the cases in which non est factum has been successfully pleaded, the mistake has been induced by fraud. But the presence of fraud is probably not a necessary factor.<sup>208</sup> As Byles J said in *Foster v Mackinnon*<sup>209</sup>:

“... it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.”

However, a party is not permitted to escape the effect of a document that he has signed merely because he did not intend to sign a contract or a contract of the type he has in fact signed. As is explained below, the courts have placed strict limits on the doctrine of non est factum. The “key elements” for a successful plea of non est factum have been summarised thus:

- (a)the belief of the signer that the person is signing a document of one character or effect whereas its character and effect were quite different;

- (b)the need for some sort of disability which gives rise to that state of mind;
- (c)the plea cannot be invoked by someone who does not take the trouble to find out at least the general effect of the document.<sup>210</sup>

## Importance of doctrine

- 150 The defence of non est factum is most obviously important in two situations. The first is where a party has signed the supposed contract as the result of the fraud of a third party and the other party to the contract has no actual knowledge or reason to know of, the fraud.<sup>211</sup> For example, in *United Dominions Trust Ltd v Western*<sup>212</sup> the defendant signed a blank hire-purchase proposal form and the dealer filled in incorrect figures before dispatching it to the finance company. The second is where the fraud has been committed by the other party to the alleged contract or deed and a third party has then relied on the document. In *Saunders v Anglia Building Society*<sup>213</sup> an elderly lady signed what she believed to be a deed of gift to her house to her nephew but which was in fact an assignment on sale to a third party who mortgaged the house to the defendants and kept the proceeds. If the case is one of fraud or misrepresentation by the other party to the contract, with no third party involved, the majority in the Court of Appeal in *Lloyds Bank Plc v Waterhouse*<sup>214</sup> said that the case should be dealt with as one of misrepresentation.<sup>215</sup> Alternatively, where the other party knew that the document did not represent the intention of the party signing it, the latter may have a remedy for unilateral mistake.<sup>216</sup>

## Nature of mistake necessary to invalidate transaction

- 151 The plea of non est factum was formerly held to be available only if the mistake was as to the very nature of the transaction. In *Foster v Mackinnon*<sup>217</sup> the defendant was induced to indorse a bill of exchange on the false representation that it was a guarantee similar to one he had signed on a previous occasion. He was held not liable when sued by an innocent indorsee of the bill. In *Lewis v Clay*<sup>218</sup> the result was the same. The defendant was induced by a friend of long standing to sign a document, which was covered by a paper with four openings in it, under the representation that he was witnessing it.<sup>219</sup> The defendant had in fact signed two promissory notes and two letters authorising the plaintiff to pay the proceeds of the notes to the friend. The defendant was held not liable because his mind never went with the transaction. On the other hand, a mistake as to the contents of a deed or document was held not sufficient. An extreme case was that of *Howatson v Webb*,<sup>220</sup> where the defendant was fraudulently induced by one Hooper to execute a mortgage relating to certain property. The defendant executed the mortgage without reading the deed; he knew that it disposed in some way of the land in question, but was induced to believe that it was a

conveyance rather than a mortgage. The plaintiff became transferee of the mortgage in good faith and sued the defendant on a covenant therein to repay £1,000. The defendant's plea of non est factum did not succeed as the deed in question was not of a wholly different class and character from that which the defendant believed it to be. It purported to be a transfer of property, and the defendant was merely mistaken as to its contents.

## Distinction between nature and contents of document rejected

- 152 The law on this subject was completely reviewed and restated by the House of Lords in *Saunders v Anglia Building Society*<sup>221</sup> and the distinction between the character and nature of a document and the contents of the document was rejected as unsatisfactory. It was stressed that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms. But it was nevertheless held that in exceptional circumstances the plea was available so long as the person signing the document had made a fundamental mistake as to the character or effect of the document. Their Lordships appear to have concentrated on the disparity between the effect of the document actually signed, and the document as it was believed to be (rather than on the nature of the mistake) stressing that the disparity must be "radical", "essential", "fundamental", or "very substantial".<sup>222</sup> The plea may also be used when the mistake was as to the capacity in which the signor was acting, for example when he believed that he was merely witnessing the document.<sup>223</sup> In contrast, it may not be available when the party knew the nature of the document he was signing but thought that it would be used for a completely different purpose.<sup>224</sup>

## Documents signed in blank

- 153 The plea of non est factum is likewise potentially applicable where one person signs a document in blank and hands it to another, leaving him to fill in the details and complete the transaction.<sup>225</sup> However, where erroneous details are inserted which are not in accord with the instructions of the person executing the document, he may yet be liable if the transaction which the document purports to effect is not essentially different in substance or in kind from the transaction intended.<sup>226</sup> Moreover, the onus is on the person signing the document to show that he has acted carefully,<sup>227</sup> and if he fails to discharge that onus he will be bound.<sup>228</sup>

## Negligence

- 154

A person who signs a document may not be permitted to raise the defence of non est factum where he has been guilty of negligence in appending his signature. It was formerly held in a number of cases, of which the leading one was *Carlisle and Cumberland Banking Co v Bragg*<sup>229</sup> that negligence was only material where the document actually signed was a negotiable instrument, for there was not otherwise any duty of care owed by the person executing the document to an innocent third party who acted in reliance on it. But these cases were much criticised, both by the courts<sup>230</sup> and by writers,<sup>231</sup> and they were eventually reconsidered by the House of Lords in *Saunders v Anglia Building Society*, above. *Bragg's* case was overruled, and it was held that no matter what class of document was in question, negligence or carelessness on the part of the person signing the document would exclude the defence of non est factum. This does not depend on the principle of estoppel but on the principle that no man can take advantage of his own wrong.<sup>232</sup>

## Disability or trickery

¶55 In *Saunders v Anglia Building Society*<sup>233</sup> Lord Reid said:

“Originally this extension [of the plea] appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.”

To these cases, Lord Wilberforce added cases, of:

“... persons who may be tricked into putting their signature on a piece of paper which has legal consequences totally different from anything they intended.”<sup>234</sup>

Non est factum was held to be available in a case in which a person was led to sign a guarantee thinking he was merely witnessing the document, of which he was shown only the last page.<sup>235</sup> But in each case the person claiming non est factum must have “taken all reasonable precautions available ... before signing to ascertain the nature and purpose of the deed being signed”.<sup>236</sup>

## Onus of proof

¶56

There is “a heavy burden of proof on the person who seeks to invoke this remedy”.<sup>237</sup> It will be a rare case in which a person who does not suffer from a disability will be able to plead non est factum when he has signed a document without checking to see what it is, or in what capacity he is signing it.

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022); Macmillan, Mistakes in Contract Law (2010).
- 207 *Thoroughgood's Case* (1584) 2 *Co. Rep.* 9a. The doctrine was probably much older than that case: see Holdsworth, History of English Law, Vol.8, p.50.
- 208 Contrast *Destine Estates Ltd v Muir* [2014] *EWHC 4191 (Ch)* at [83] (“Absent, however, misrepresentation, there can be no sound foundation for the defence of non est factum”).
- 209 (1869) *L.R.* 4 *C.P.* 704, 711. See also *Bank of Ireland v M'Manamy* [1916] 2 *I.R.* 161. cf. *Hasham v Zenab* [1960] *A.C.* 316; *Mercantile Credit Co Ltd v Hamblin* [1965] 2 *Q.B.* 242, 268, 280 (misrepresentation).
- 210 *Yedina v Yedin* [2017] *EWHC 3319 (Ch)* at [262] (Mann J). In *Kerr v Jamison* [2019] *NICH 4*, in which this paragraph was cited with the omission of (c), an elderly person who could not read the document she signed was held to be entitled to rely on the doctrine. The document had not been explained to her and she believed that it would entitle her to £40,000 for the land when in fact it was a gratuitous transfer.
- 211 On notice of fraud or misrepresentation by a third party, see below, paras 9-030—9-036.
- 212 [1976] *Q.B.* 513.
- 213 [1971] *A.C.* 1004.
- 214 (1991) 10 *Tr. L.R.* 161.
- 215 See also *Destine Estates Ltd v Muir* [2014] *EWHC 4191 (Ch)* at [83].
- 216 See the judgment of Sir Edward Eveleigh in *Lloyds Bank Plc v Waterhouse* (1991) 10 *Tr. L.R.* 161. Although a contract entered under an operative mistake is often said to be void, above, para.5-029, it appears that this cannot be raised by the mistaken party against a third party who in good faith and without notice of the mistake has relied on the signed document. The signer is estopped and can only succeed against the third party if he can show non est factum: Contrast the “mistaken identity” cases, above, para.5-036, where the mistaken party is not estopped simply by entrusting possession of his property to the rogue who sells it to the third party.
- 217 (1869) *L.R.* 4 *C.P.* 704; cf. *National Provincial Bank of England v Jackson* (1886) 33 *Ch. D.* 1; *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 *K.B.* 489; *Muskham Finance Ltd v Howard* [1963] 1 *Q.B.* 904. See also *Bagot v Chapman* [1907] 2 *Ch.* 222.
- 218 (1898) 67 *L.J. Q.B.* 224.

- 219 For a recent example with similar facts see *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley* [2011] EWHC 1380 (QB).
- 220 [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1; cf. *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242.
- 221 [1971] A.C. 1004; see *Stone* (1972) 88 L.Q.R. 190.
- 222 [1971] A.C. 1004, at 1017, 1022, 1026. In *Lloyds Bank Plc v Waterhouse* (1991) 10 Tr. L.R. 161 it was held that an “all monies” guarantee was fundamentally different to one of liability under a particular transaction for the purchase of land. cf. *Hambros Bank Ltd v British Historic Buildings Trust and Din* [1995] N.P.C. 179.
- 223 As in *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley* [2011] EWHC 1380 (QB).
- 224 *CF Asset Finance Ltd v Okonji* [2014] EWCA Civ 870 at [27]–[32] per Patten LJ (obiter). The defendant had signed in blank what she knew was a hire-purchase proposal; she thought it would be used by the salesman only to see whether she could obtain sufficient credit, but the salesman completed it and sent it to the finance company, which purported to accept it. Lord Dyson MR preferred to express no opinion, pointing out that: “there is some support in [*Saunders v Anglia BS*] for the view that such a mistake may enable her to invoke the remedy (subject to the question of negligence) ... Lord Pearson (1031B–H) agreed with the reasoning of Russell LJ and ‘in particular with the principle that importance should be attached to the “object of the exercise” when dissimilar legal documents may have similar practical effects’”.
- 225 *United Dominions Trust v Western* [1976] Q.B. 513. cf. *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242 at [279]–[280].
- 226 *United Dominions Trust Ltd v Western* [1976] Q.B. 513 disapproving *Campbell Discount Ltd v Gall* [1961] 1 Q.B. 431; see also *Bills of Exchange Act 1882* s.20. cf. *Unity Finance Ltd v Hammond* (1965) 109 S.J. 70.
- 227 See below, para.5-054 (same principles applicable).
- 228 See also *British Ry Traffic and Electric Co Ltd v Roper* (1939) 162 L.T. 217; *Eastern Distributors Ltd v Goldring* [1957] 2 Q.B. 600.
- 229 [1911] 1 K.B. 489; *Campbell Discount Co Ltd v Gall* [1961] 1 Q.B. 431, *Wilson and Meeson v Pickering* [1946] K.B. 422, 425.
- 230 *Muskham Finance Ltd v Howard* [1963] 1 Q.B. 904, 913; *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242 at [278].
- 231 *Anson* (1912) 28 L.Q.R. 190; *Guest* (1963) 79 L.Q.R. 346.
- 232 [1971] A.C. 1004, at 1019, 1038. In the Australian case of *Petelin v Cullen* (1975) 132 C.L.R. 355 the High Court held that where no innocent third party is involved the question of negligence is not relevant. But in England it has been held that such a case should be dealt with as one of misrepresentation or unilateral mistake, not as non est factum, above, para.5-050. Negligence was one ground for failure of the plea in *Hambros Bank Ltd v British Historic Buildings Trust and Din* [1995] N.P.C. 179.
- 233 [1971] A.C. 1004, 1015–1016. See also the speech of Lord Pearce at 1034.
- 234 [1971] A.C. 1004, 1025. This is what occurred in *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley* [2011] EWHC 1380 (QB).

- 235 *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley [2011] EWHC 1380 (QB)*.
- 236 *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley [2011] EWHC 1380 (QB)* at [53].
- 237 Lord Reid in *Saunders v Anglia Building Society [1971] A.C. 1004, 1016*; see also at 1019 and 1027.

---

End of Document

© 2022 SWEET & MAXWELL

## Section 4. - Rectification of Written Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 4. - Rectification of Written Agreements<sup>238</sup>

**D** Replace footnote 236 with: Hodge, Rectification, 2nd edn (2016); A Burrows, “Construction and Rectification” in A. Burrows and E. Peel (eds), Contract Terms (2007), 77; Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), paras 13-38—13-55; *McLauchlan* (2008) 124 *L.Q.R.* 608, (2010) 126 *L.Q.R.* 8 and (2014) 130 *L.Q.R.* 83. N. Patten, “Does the law need to be rectified? Chartbrook revisited”, Chancery Bar Association Annual Lecture 2013, available at <http://www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited> [Accessed 1 September 2021]; R. Toulson, “Does Rectification Require Rectifying?”, TECBar Lecture 2013, available at <https://www.supremecourt.uk/docs/speech-131031.pdf> [Accessed 1 September 2021]; T. Etherton, “Contract and the Fog of Rectification” (2015) 68 Current Legal Problems 367.

### Footnotes

<sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022); Macmillan, *Mistakes in Contract Law* (2010).

<sup>238</sup> Hodge, Rectification, 2nd edn (2016); A Burrows, “Construction and Rectification” in A. Burrows and E. Peel (eds), Contract Terms (2007), 77; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019), paras 13-38—13-54; *McLauchlan* (2008) 124 *L.Q.R.* 608, (2010) 126 *L.Q.R.* 8 and (2014) 130 *L.Q.R.* 83. N. Patten, “Does the law need to be rectified? Chartbrook revisited”, Chancery Bar Association Annual Lecture 2013, available at <http://www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited> [Accessed 1 September 2021]; R. Toulson, “Does Rectification Require Rectifying?”, TECBar Lecture 2013, available at <https://www.supremecourt.uk/docs/speech-131031.pdf> [Accessed 1 September 2021]; T. Etherton, “Contract and the Fog of Rectification” (2015) 68 Current Legal Problems 367.

[law-need-to-be-rectified-chartbrook-revisited](#) [Accessed 1 September 2021]; R. Toulson, “Does Rectification Require Rectifying?”, TECBar Lecture 2013, available at <https://www.supremecourt.uk/docs/speech-131031.pdf> [Accessed 1 September 2021]; T. Etherton, “Contract and the Fog of Rectification” (2015) 68 Current Legal Problems 367.

## (a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 4. - Rectification of Written Agreements<sup>238</sup>

(a) - Introduction

### Rectification of document to match agreement

<sup>157</sup> Rectification only applies to contracts which have been reduced to writing.

<sup>239</sup>

 It is a process by which the document is made to conform to what was actually agreed between the parties, or what the law, applying the objective principle, treats as being their agreement.

“... the remedy of rectification is one permitted by the Court, not for the purpose of altering the terms of an agreement entered into between two or more parties, but for that of correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect their true agreement.”<sup>240</sup>

It has become customary to divide rectification cases into two types. Most of the cases involve what has been agreed by the parties having been wrongly recorded in the document without either party being aware of the mistake. These cases involve what may be termed rectification to correct a common mistake; the document is rectified to bring it into line with the prior agreement. Rectification may also be available when, whether or not the parties had reached a prior agreement, one party signed a written document which did not record his intentions correctly, and the other party knew of the first party’s intentions.<sup>241</sup> In this case the court may rectify the document so that it reflects the first party’s intentions. This may be termed a case of rectification to correct

a unilateral mistake. But in the case of *Chartbrook Ltd v Persimmon Homes Ltd*<sup>242</sup> the House of Lords seemed to create an extended version of rectification based on a common mistake, or perhaps a third category of rectification case. It said that rectification can also<sup>243</sup> be ordered if the parties were not in actual agreement on the content or effect of their prior agreement but, under the objective approach, the prior agreement has a content or effect that differs from the content or effect of the document: again the document can be rectified to bring it into line with the prior agreement as objectively ascertained. This extended version of common mistake has proven to be controversial. It stretches the natural meaning of the phrase “common mistake”<sup>244</sup> and it seems to cut across the distinction between “common mistake” and “unilateral mistake” rectification in such a way as to make that distinction of doubtful utility. The Court of Appeal, however, has recently said that rectification of the document is available to bring the final document into line with the objective meaning of the prior agreement only when the prior agreement amounted to a concluded contract that was replaced by the final document; if the prior agreement did not amount to a concluded contract, rectification should be granted only if the written document did not conform to the common subjective intentions of the parties and these intentions had been outwardly expressed in communications that “crossed the line”.<sup>245</sup> In this section we will consider first “traditional” common mistake rectification, then unilateral mistake rectification and then the extended version before considering some general principles which apply in all situations.<sup>246</sup>

## Footnotes

- <sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022); Macmillan, *Mistakes in Contract Law* (2010).
- <sup>238</sup> *Hodge, Rectification*, 2nd edn (2016); A Burrows, “Construction and Rectification” in A. Burrows and E. Peel (eds), *Contract Terms* (2007), 77; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019), paras 13-38—13-54; *McLauchlan* (2008) 124 *L.Q.R.* 608, (2010) 126 *L.Q.R.* 8 and (2014) 130 *L.Q.R.* 83. N. Patten, “Does the law need to be rectified? Chartbrook revisited”, Chancery Bar Association Annual Lecture 2013, available at <http://www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited> [Accessed 1 September 2021]; R. Toulson, “Does Rectification Require Rectifying?”, TECBar Lecture 2013, available at <https://www.supremecourt.uk/docs/speech-131031.pdf> [Accessed 1 September 2021]; T. Etherton, “Contract and the Fog of Rectification” (2015) 68 *Current Legal Problems* 367.
- <sup>239</sup> In *Tyne and Wear Passenger Transport Executive (t/a Nexus) v National Union of Rail, Maritime and Transport Workers [2021] EWHC 1388 (Ch)* (appeal outstanding) it was held that a collective agreement can be rectified even though it is not legally binding; and though

employees into whose contracts of employment the collective agreement is incorporated are bound by its terms, the employees are not the appropriate defendants (see at [58]–[61]).

- 240 *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba) [1984] 1 Lloyd's Rep. 353, 359*. For further discussion of what “the parties’ agreement” is, see below, paras 5-064 et seq.
- 241 And possibly also if the other party should have known of the first party’s intentions: see below, para.5-078.
- 242 *[2009] UKHL 38, [2009] 1 A.C. 1101*. See further below, para.5-079.
- 243 It is not thought that Lord Hoffmann intended to exclude rectification in cases in which the parties shared the same intention and had expressed this to each other in communications that had crossed the line: see below, para.5-086.
- 244 See below, para.5-084.
- 245 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd [2019] EWCA Civ 1361, [2020] Ch. 365* esp. at [176]; see below, paras 5-086 et seq.
- 246 See below, paras 5-095 et seq.

## **(b) - Common Mistake Rectification**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>**

**Section 4. - Rectification of Written Agreements<sup>238</sup>**

**(b) - Common Mistake Rectification**

### **Common mistake**

**D** 158 It has long been an established rule of equity that where a contract has by reason of a mistake common<sup>247</sup> to the contracting parties been drawn up so as to militate against the terms intended by both as revealed in their previous oral or written agreement,<sup>248</sup> the court will rectify the document so as to carry out such intentions.<sup>249</sup> So if the subsequent agreement was intended to reflect the terms of the earlier agreement but fails to do so, a party will be entitled to rectification unless it was shown that the parties intended to vary the terms of the earlier agreement.<sup>250</sup> Rectification will not be ordered, in contrast, if the terms of the subsequent written agreement were intended to supersede the terms of the earlier agreement,<sup>251</sup> if a written agreement fails to mention a matter because the parties simply overlooked it, having no intention on the point at all,  
<sup>252</sup>

**U** or if they decided deliberately to omit the issue.<sup>253</sup> In such cases the written agreement must be construed as it stands. It is an essential element of the doctrine that there has been a mistake.<sup>254</sup>

### **Mistake in recording of terms or as to meaning or legal effect**

159

Rectification may be ordered where the document did not record correctly what the parties had agreed, or where the legal effect of the words used was not what the parties had agreed on<sup>255</sup>: for example, if the document states that £x is to be paid “free of tax” when what was meant was that the payment would be of such sum that after deduction of tax would amount to £x.<sup>256</sup> As was said in *Re Butlin’s Settlement Trusts*:

“... rectification is available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of construction.”<sup>257</sup>

The same applies when the mistake is over the legal effect of the words used.<sup>258</sup> In contrast, rectification is not possible if the parties were merely mistaken over the consequences of their agreement,<sup>259</sup> for example for tax purposes,<sup>260</sup> any more than it is when the mistake is not over the terms the parties had agreed but the factual circumstances.<sup>261</sup>

## Issue may be solved by construction<sup>262</sup>

**D**<sup>160</sup> Reference is made elsewhere to a series of cases in which the courts of common law have corrected clerical errors<sup>263</sup>; and also to cases in which parol evidence has been admitted to explain latent ambiguities.<sup>264</sup> Where a mistake is obvious, for example because the literal meaning of the words would be absurd,<sup>265</sup>

**U** and it is clear what is meant, rectification is not necessary; the matter will be dealt with as one of construction. As Brightman LJ said in *East v Pantiles Plant Hire Ltd*<sup>266</sup>:

“It is clear on the authorities that a mistake in a written instrument can, in limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied, then either the Claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention.”

In *Chartbrook Ltd v Persimmon Homes Ltd*<sup>267</sup> Lord Hoffmann accepted Brightman LJ's two conditions for the "correction of mistakes by construction" with two qualifications that had been explained in an earlier case by Carnwath LJ<sup>268</sup>: first, that this is not a separate branch of the law but "simply aspects of the single task of interpreting the agreement in its context"; and, secondly, that:

"... in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration."

Lord Hoffmann's analysis was accepted by the other members of the Judicial Committee. In *State Street Bank & Trust Co v Sompo Japan Insurance Inc*<sup>269</sup> the Chancellor said:

"... although the mistake must be clear it may emerge from a consideration of all the relevant documents, not only on the face of one of them; nor is there a limit to the correction which may be made provided that it is clear to the reasonable person having regard to all the relevant documents what the parties meant."

It is only where on an objective analysis it appears that each party must have had or must be taken to have had the same intention that the document will be interpreted in this way. In *Bashir v Ali*<sup>270</sup> a property was auctioned and, after the sale, the vendors claimed that they had not intended to include certain accommodation. Etherton LJ said:

"The present case is not one, like *Chartbrook*, in which what is being interpreted is an agreement between two negotiating parties. This case concerns a contract resulting from a bid at an auction. In that situation the terms are not negotiated. It is entirely up to the vendor to decide what to offer and on what terms. The bidder decides how much to bid in the light of what is offered and the terms dictated by the vendor. If, as in the present case, there has been a misdescription of the property and a low reserve leading the bidder to conclude that the vendor has or may have made a mistake in failing to take account of part of the accommodation, that does not mean that the contract must be construed so as to rectify the vendor's mistake. That is to confuse construction with the need for an action for rectification for (say) unilateral mistake. The vendor's mistake will only be corrected by construction if, objectively, it is clear what property and terms the vendor intended to offer and that the bidder understood them and intended to bid on that basis."<sup>271</sup>

However, it is not only in cases of common mistake that the question may be solved by construction. In *Ulster Bank Ltd v Lambe* the plaintiff had made an offer to settle a claim for

€155,000 when they meant £155,000 and the defendant knew this.<sup>272</sup> Weatherup J treated the offer as one for £155,000 mistakenly expressed in euros and enforced the settlement accordingly.<sup>273</sup>

## Parol evidence

- ¶61 Where it is sought to construe a document, evidence of prior negotiations is not admissible.<sup>274</sup> But where it is sought to rectify a document, this rule does not apply.<sup>275</sup> In *Murray v Parker*<sup>276</sup> Lord Romilly MR said:

“In matters of mistake the court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised, in all cases, where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written ... If there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly: if ambiguous, parol evidence may be used to explain it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument.”

Even evidence of what a party believed had been agreed is admissible. In *Chartbrook Ltd v Persimmon Homes Ltd*<sup>277</sup> Lord Hoffmann said:

“Unless itself a binding contract, the prior consensus is, by definition, not contained in a document which the parties have agreed is to be the sole memorial of their agreement. It may be oral or in writing and, even if the latter, subject to later variation. In such a case, if I may quote what I said in *Carmichael v National Power Plc*<sup>278</sup>:

‘The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done.’

In a case in which the prior consensus was based wholly or in part on oral exchanges or conduct, such evidence may be significant. A party may have had a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief. Evidence of subsequent conduct may also have some evidential value. On the other hand, where the prior consensus is expressed entirely in writing, (as in *George Cohen Sons & Co Ltd v Docks and Inland Waterways*

*Executive 84 Ll. L. Rep. 97*) such evidence is likely to carry very little weight. But I do not think that it is inadmissible."

Even where the contract is one which is required to be in writing under s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989<sup>279</sup> or under s.4 of the Statute of Frauds 1677<sup>280</sup> parol evidence is admissible, for the jurisdiction of the court to rectify is outside the prohibition of the statute.<sup>281</sup> However, it must be borne in mind that statements made in the course of negotiations are often no more than statements of a negotiating stance at that point in time.<sup>282</sup>

## Conditions for rectification on the ground of common mistake

- <sup>162</sup> In *Chartbrook Ltd v Persimmon Homes Ltd* Lord Hoffmann said<sup>283</sup> that the requirements for rectification had been "succinctly summarised" by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd*<sup>284</sup>:

"The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."

The conditions for rectification on the ground of common mistake will be discussed more fully in the paragraphs that follow.

## Concluded prior contract not required

- <sup>163</sup> It was formerly thought that a plaintiff must show that there was an antecedent concluded contract, which was inaccurately represented by the instrument purporting to be made in pursuance of it:

"Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts."<sup>285</sup>

Where, therefore, a builder entered into a contract with an urban authority, the contract being sealed in accordance with s.174 of the Public Health Act 1875, it was held that it could not subsequently be rectified, for until the seal was affixed to the formal contract (i.e. the instrument sought to be rectified) there was no contract at all between the parties, and also because the effect

of rectification, if allowed, would have been to bind the corporation to a contract which required a seal for its validity but which they had never sealed.<sup>286</sup> But although there was a strong body of judicial opinion in favour of this view,<sup>287</sup> Clauson J in *Shipley UDC v Bradford Corp*<sup>288</sup> refused to accept that:

“... the jurisdiction of the court cannot be exercised even in cases of clear mutual mistakes in the attempt to embody in the instrument the concurrent intentions of the parties existing at the moment of the execution of the instrument unless a previously existing contract can be proved.”

This view was confirmed by a unanimous Court of Appeal in *Joscelyne v Nissen*.<sup>289</sup> The parties had negotiated an agreement but no concluded contract was made until execution of a formal legal document. It was held that the court had power to rectify the agreement so long as there was a continuing common intention in regard to a particular provision down to the execution of the written contract. However the Court of Appeal has now said that where the prior agreement did not amount to a concluded contract, the test for common mistake rectification is whether the written document matches the common subjective intentions of the parties, as outwardly expressed; whereas if the prior agreement amounted to a concluded contract, its meaning must be assessed on the normal objective basis and the final document may be rectified if it does not match the objective meaning of the prior contract.<sup>290</sup>

## Outward expression of accord

- <sup>291</sup> Although it is unnecessary to show that there was a binding agreement prior to the execution of the written document, in *Joscelyne v Nissen* it was said that there must have been an “outward expression of accord”.<sup>291</sup> The Court of Appeal cited with approval its previous decision, *Lovell and Christmas Ltd v Wall*<sup>292</sup> and, in particular, the following passage from the judgment of Buckley LJ:

“In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents. For rectification it is not enough to set about to find out what one or even both of the parties to the contract intended. What you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.”

It is not necessary that the parties had formulated their intention into words at the time provided they had a common intention as to the substance, but there must have been some outward

agreement.<sup>293</sup> The requirement of an “outward expression of accord” had been said not to be an absolute one, but one of evidence that the parties shared a common intention even if they had not put it into words. The requirement of outward accord was first relaxed in a series of cases involving pension schemes<sup>294</sup> but in *Munt v Beasley*, which involved rectification of a lease, Mummery LJ, with whom the other members of the court agreed, said:

“I would also accept ... that the recorder was wrong to treat ‘an outward expression of accord’ as a strict legal requirement for rectification in a case such as this, where the party resisting rectification has in fact admitted ... that his true state of belief when he entered into the transaction was the same as that of the other party and there was therefore a continuing common intention which, by mistake, was not given effect in the relevant legal document. I agree with the trend in recent cases to treat the expression ‘outward expression of accord’ more as an evidential factor rather than a strict legal requirement in all cases of rectification.”<sup>295</sup>

However, in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*<sup>296</sup> the Court of Appeal said that the authorities relied on in *Munt v Beasley* did not justify this conclusion, as they involved the rectification of pension schemes, which do not depend on mutual agreement<sup>297</sup>; for rectification of a contract on the ground of common mistake, an outward expression of accord is an absolute requirement.

<sup>298</sup>

 The Court of Appeal said that the agreement might be “tacit”, and accepted that

“the accord may include understandings that the parties thought so obvious as to go without saying, or that were reached without being spelled out in so many words,”<sup>299</sup>

“[p]rovided that it is understood that on a claim for rectification the court is concerned with what the parties actually communicated to each other, and not with identifying their presumed intention by means of an officious bystander test.”<sup>300</sup>

## Unexpressed but shared intentions

 <sup>301</sup> Despite the insistence by the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*

**U** that an outward expression of accord is an absolute requirement (which on the facts of the case was satisfied), it remains unclear that it would never be proper to grant rectification based on intentions that were never expressed to the other party in any form, if the unexpressed intentions of each party in fact coincide.

302

**U** One argument is that unexpressed and unknown subjective intentions are irrelevant.

303

**U** Rectification is to make the document conform to the agreement and in English law some outward manifestation is required for there to be an agreement. However, it was argued earlier

304

**U** that if the parties appear to have contracted, even if neither party has expressed their true intention as to the content or meaning of the agreement and neither party's intention coincides with the apparent agreement, if in fact their intentions coincide there may be a contract on the terms subjectively intended by both. If the apparent agreement is in writing, it might then be possible to rectify the written agreement to accord with the parties' subjective agreement.

305

**U** If this were not the case, the parties would end up being bound by a written agreement that represented neither party's intentions. But it is conceded that modern authority requires, as Leggatt LJ put it in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*:

“... an ‘outward expression of accord’—meaning that, as a result of communication between them, the parties understood each other to share that intention.”

306



## Continuing intention

- 166 Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document.<sup>307</sup> If A prepares a draft of the written agreement, and the draft differs from the prior agreement, but B approves and signs the written agreement without noticing the change, can A resist rectification on the grounds that B knew or should have known that A had changed its mind? It cannot be that a difference between the prior agreement and the draft always prevents there being a continuing common intention or no rectification plea would ever succeed.<sup>308</sup> If A's intention is unchanged, and the difference between the prior agreement and the version that

is signed is merely a slip, then there is a continuing intention and rectification can properly be granted.<sup>309</sup> But what if though the parties originally shared the same intention, A subsequently changed its mind and prepared the draft on the basis of its new intention without informing B of the change? In most cases, A will know that the draft does not reflect B's intentions and B will be entitled to rectification on the basis of unilateral mistake, as will be explained in the next section. However, there may be cases in which A does not know that B still has its original intention, for example because A believes that B will have spotted and accepted the change. This can happen whether or not the prior agreement amounted to a "concluded contract".

- <sup>167</sup> In *Daventry DC v Daventry and District Housing Ltd*,<sup>310</sup> where the prior agreement did not amount to a concluded contract,<sup>311</sup> there was a difference of opinion over the correct test to apply, and also on its application to the facts.<sup>312</sup> The case involved a prior, non-binding agreement which the parties had understood in different ways but which, as properly interpreted, placed an obligation on Daventry and District Housing (DDH) to pay a pension deficit. DDH made a deliberate change in the draft contract, so that it no longer represented what had been the prior agreement (as properly interpreted<sup>313</sup>): it contained a term requiring Daventry and District Council (DDC) to pay the deficit, so making explicit DDH's understanding of the prior agreement. However, DDC did not appreciate the effect of the draft and continued to think that the agreement was in the terms of the prior agreement as DDC had (reasonably) understood it. (The same issue would arise when the draft prepared by A was different to the prior agreement because A had changed its mind.) Though the members of the Court of Appeal agreed that the question whether there was a continuing intention must be answered on an objective test,<sup>314</sup> they took different approaches to what the test should be. Toulson LJ asked "whether on a fair view there was a renegotiation of the prior agreement or a mistake"<sup>315</sup> and concluded that there was no attempt to renegotiate, as there was nothing to show that DDC had changed its mind.<sup>316</sup> For Etherton LJ the test was "whether objectively, prior to the execution of the contract, DDH communicated to DCC that it intended to contract on a different basis" than the payment provided for in the prior agreement.<sup>317</sup> The Master of the Rolls pointed out that Toulson LJ's approach would require an assessment of DDC's reaction to the draft, which he considered unnecessary: as the prior accord was not legally binding, "there was no need for DDC to agree to DDH's resiling from the prior accord before that resiling could be effective". He therefore preferred Etherton LJ's approach.<sup>318</sup> However, Etherton LJ and the Master of the Rolls reached different conclusions on the facts. The Master of the Rolls held that "the hypothetical observer would not have concluded that DDH was signalling a departure from the prior accord: the observer would have believed that DDH was making a mistake"<sup>319</sup> and therefore there was a continuing intention. Etherton LJ, dissenting, held that the trial judge<sup>320</sup> had been right to find that DDH had objectively, prior to the execution of the contract, communicated to DDC that it intended to contract on a different basis, and therefore the appeal should be dismissed.<sup>321</sup> In a postscript to his judgment Etherton LJ explained why he considers the Master of the Rolls' finding that the reasonable observer would have concluded that DDH was "making a mistake" to have been an incorrect application of the objective test, given that the wording inserted in the draft

clearly placed the obligation to pay the deficit on DDC.<sup>322</sup> In the light of these disagreements, it is difficult to extract a clear ratio on how “continuing intention” is to be assessed from the *Daventry* case.<sup>323</sup>

- ¶68 It is submitted that when A submits to B a draft which differs from the parties’ earlier agreement, and it appears that A no longer shares the previously common intention, the correct approach in principle is to ask whether B realised or should reasonably have realised that the draft agreement was intended to differ from the prior agreement rather than to implement the prior accord.<sup>324</sup> That B did not realise this is evidence of what it was reasonable for B to understand but no more. Though in the context of rectification the question is slightly different, this approach is consistent with the normal approach to the interpretation of contractual intention. In the case of a statement of intention such as an offer, the question is how should B as a reasonable person in the circumstances, have understood A’s offer<sup>325</sup>; in the context of ascertaining whether or not there was a continuing common intention for the purposes of rectification, it is how B should reasonably have understood the draft, as merely to set down what was previously agreed, or as a new proposal (or perhaps a deliberate assertion that A did not accept the “objective” meaning of the prior agreement).<sup>326</sup> However, the practical application of the test suggested may vary according to whether or not the prior agreement was “a concluded contract”. If the parties had reached a concluded contract, but later signed a document that does not match the prior agreement as objectively interpreted, either party is entitled to have the document rectified unless it is clear that this was not the result of a mistake but of the parties agreeing to vary their earlier agreement. It is submitted that unless one party clearly indicates a wish to vary the prior agreement and the other acts in such a way as to indicate its assent to the change, the court will assume that there has been a mistake. In contrast, where no concluded contract had yet been reached; as we will see below,<sup>327</sup> the courts seem to give much greater weight to the final document—in effect, they expect B to check the concluding draft.<sup>328</sup>

## More than one way of achieving intention

- ¶69 Rectification may be granted if the writing does not carry out the parties’ objective intention even if there is more than one way by which the parties’ intention can be achieved and the parties had not agreed on the precise mechanism.<sup>329</sup>

## Footnotes

<sup>1</sup> See generally *Cheshire* (1944) 60 L.Q.R. 175; *Tylor* (1948) 11 M.L.R. 257; *Slade* (1954) 70 L.Q.R. 385; *Stoljar* (1965) 28 M.L.R. 265; *Stoljar*, Mistake and Misrepresentation: A Study

in Contractual Principles (1968); *Smith* (1994) 110 L.Q.R. 400; *Friedmann* (2003) 19 L.Q.R. 68; Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022); Macmillan, Mistakes in Contract Law (2010).

- 238 Hodge, Rectification, 2nd edn (2016); A Burrows, “Construction and Rectification” in A. Burrows and E. Peel (eds), Contract Terms (2007), 77; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019), paras 13-38—13-54; *McLauchlan* (2008) 124 L.Q.R. 608, (2010) 126 L.Q.R. 8 and (2014) 130 L.Q.R. 83. N. Patten, “Does the law need to be rectified? Chartbrook revisited”, Chancery Bar Association Annual Lecture 2013, available at <http://www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited> [Accessed 1 September 2021]; R. Toulson, “Does Rectification Require Rectifying?”, TECBar Lecture 2013, available at <https://www.supremecourt.uk/docs/speech-131031.pdf> [Accessed 1 September 2021]; T. Etherton, “Contract and the Fog of Rectification” (2015) 68 Current Legal Problems 367.
- 247 *Murray v Parker* (1854) 19 Beav. 305.
- 248 On the meaning of this see below, paras 5-079 and 5-087 et seq.
- 249 *Burroughs v Abbott* [1922] 1 Ch. 86; *Constantinidi v Ralli* [1935] Ch. 427; *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch. 67. As regards past transactions, the court may give effect to a “defence” of rectification without actually ordering rectification: *The Nile Rhapsody* [1992] 2 Lloyd’s Rep. 399, 408. A claimant may also invoke rectification on the same basis: [1992] 2 Lloyd’s Rep. 399, 409.
- 250 *PT Berlian Laju Tanker TBK v Nuse Shipping Ltd (The Aktor)* [2008] EWHC 1330 (Comm), [2008] 2 Lloyd’s Rep. 246 at [58].
- 251 [2008] EWHC 1330 (Comm) at [60].
- 252 *Harlow Development Corp v Kingsgate (Clothing Productions)* (1973) 226 E.G. 1960; *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd (The Ypatia Halcoussi)* [1985] 2 Lloyd’s Rep. 364; *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm) at [422]; *Ralph v Ralph* [2021] EWCA Civ 1106, [2021] 4 W.L.R. 128 at [34]–[41].
- 253 *OMV Supply and Trading AG v Kazmunaygaz Trading AG* [2014] EWHC 1372 (Comm) (neither party thought document contained the term that one claimed should be inserted). It is submitted that the apparent suggestion in that case (at [74]) that a contractual document cannot be rectified to include a term that has been omitted is not correct, provided the parties had a common intention that the term should form part of the agreement.
- 254 *Daventry DC v Daventry and District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333 at [82], per Etherton LJ.
- 255 *Whiteside v Whiteside* [1950] Ch. 65 at 74; *Ahmad v Secret Garden (Cheshire) Ltd* [2013] EWCA Civ 1005 at [27].
- 256 See *Burroughs v Abbott* [1922] 1 Ch. 86; *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch. 67.
- 257 [1976] Ch. 251, 260 (a case involving a voluntary settlement); applied to rectification of a contract in *Phillips Petroleum Co UK Ltd v Snamprogetti Ltd* (2001) 79 Con. L.R. 80 at [39] (affirmed on other grounds [2001] EWCA Civ 889); and to rectification of a pension scheme

in *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch), [2020] Pens. L.R. 23 at [196]. However, in the case of a voluntary settlement it seems that the test is not whether the mistake was as to the legal effect of the instrument or its consequences, as was said by Millett J in *Gibbon v Mitchell* [1990] 1 W.L.R. 1304, 1309, but a broader one of whether the mistake was of sufficient gravity: see *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 at [122], where Lord Walker added that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction. This was, applied in *Payne v Tyler* [2019] EWHC 2347 (Ch) at [23]; but compare *Rogge v Rogge* [2019] EWHC 1949 (Ch) at [119]–[120] (some mistakes as to matters too far removed from transaction).

- 258 *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch), [2020] Pens. L.R. 23 at [197].
- 259 *Gibbon v Mitchell* [1990] 1 W.L.R. 1304 at 1309.
- 260 *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch), [2010] S.T.C. 2544 at [17]; *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) at [43] (voluntary settlement); *Allnut v Wilding* [2007] EWCA Civ 412 at [19]–[20] (voluntary settlement); *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch) at [199] (pension scheme). See also Hodge, Rectification, 2nd edn (2016), paras 4-63 et seq. In *AMP (UK) Plc v Barker* [2001] Pens. L.R. 77 Lawrence Collins J suggested that the distinction “is simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them”, but in that case it was conceded that the mistake was as to the effect of the words, not their consequences (at [70]). The distinction may not be easy to draw: *FSHC Group Holdings Ltd v Barclays Bank Plc* [2018] EWHC 1558 (Ch) at [18], but it was re-affirmed by the Court of Appeal in that case, [2019] EWCA Civ 1361, [2020] Ch. 365 at [179]–[182].
- 261 *Frederick E Rose (London) Ltd v William H Pim Jnr and Co Ltd* [1953] 2 Q.B. 450: see below, para.5-097.
- 262 On the appropriateness of employing construction rather than rectification, see *Davies* (2016) 75 C.L.J. 62 and also (2017) 76 C.L.J. 483, discussing Australian authority.
- 263 See below, para.15-106.
- 264 See below, para.15-057.
- 265 See para.15-094. Compare *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), 165 Con. L.R. 58 (“no ambiguity, no syntactical difficulty in construing the language used and the reference to the 1992 form of ISDA Agreement cannot be said to be such a commercial nonsense as to make it absurd for the parties to refer to it”: at [62]). The requirement that there must have been a mistake and that it must be obvious what the provision was intended to say make the process of correction is different to that of choosing between rival interpretations, and it is not affected by anything said by the Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 (see below, para.15-062): *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961, [2022] 2 P.&C.R. 10 at [25]–[30]. The court will not re-write a bargain that it is “commercially unattractive and even unreasonable” but if it is “nonsensical or absurd” the court may conclude that a mistake has been made:

- [2021] EWCA Civ 961 at [31]–[33], referring to the judgment of *Briggs LJ* in *Sugarman v CJS Investments LLP* [2014] EWCA Civ 1239 at [44]. See also Lord Hodge in *Patersons of Greenoakhill Ltd v Biffa Waste Services Ltd* 2013 S.L.T. 729 at [16].
- 266 [1982] 2 E.G.L.R. 111, 112, quoted in *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599, at [109]. See below, para.15-106.
- 267 [2009] UKHL 38, [2009] 1 A.C. 101 at [22]–[24]. For a critique, see *Buxton* (2010) 69 C.L.J. 253.
- 268 *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus. L.R. 1336 at [44]–[50].
- 269 [2010] EWHC 1461 (Ch) at [20].
- 270 [2011] EWCA Civ 707, [2011] 2 P. & C.R.12.
- 271 [2011] EWCA Civ 707 at [42]. In *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 Arden LJ said (at [20]) that (i) it must be clear from the document interpreted with the admissible background that the parties have made a mistake and what that mistake is; (ii) it must be clear, from the rest of the agreement interpreted with the admissible background, what the parties intended to agree; and (iii) the mistake must be one of language or syntax. It has been pointed out that when the question is one of construction of the contract, the court has no discretion; so that, unlike when rectification is sought, the court cannot refuse to give the contract its correct meaning on the ground that this would affect the rights of a third party: *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132 at [42] (per Lewison LJ, referring to his judgment in *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch. 305 at [122]).
- 272 *Ulster Bank Ltd v Lambe* [2012] NIQB 31.
- 273 [2012] NIQB 31 at [28]. The judge would have ordered rectification but thought it unnecessary to do so.
- 274 See below, para.15-059.
- 275 *Lovell and Christmas Ltd v Wall* (1911) 104 L.T. 85; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at [47]. In *J.J. Huber (Investments) Ltd v Private DIY Co Ltd* [1995] N.P.C. 102, Ch D it was held that the presence on an “entire agreement” clause in the contract does not prevent rectification. An entire agreement clause may tend to show that the parties have intended to be bound by the document in the material respects regardless of prior or other intentions (citing Spry on Equitable Remedies 5th edn (1997) at p.612): *Snampyrogetti Ltd v Phillips Petroleum Co UK Ltd* [2001] EWCA Civ 889, 79 Con. L.R. 80 at [32]. However, the clause may not be helpful if it was incorporated without any thought being given to its meaning: *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch) at [75]. See also *Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 498 (Ch) at [104]–[106]; *DS-Rendite-Fonds Nr.106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA* [2013] EWHC 3492 (Comm) at [48]; *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), 165 Con. L.R. 58 at [121]–[123]; *Milton Keynes BC v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC), [2017] B.L.R. 216 at [77].
- 276 (1854) 19 Beav. 305, 308.
- 277 [2009] UKHL 38 at [64]–[67].

- 278 [1999] 1 W.L.R. 2042, 2050–2051. For an example of the parties' subjective intentions being evidence of the objective agreement, see *Equity Syndicate Management Ltd v Glaxosmithkline Plc* [2015] EWHC 2163 (Comm) at [35].
- 279 See below, paras 7-016 et seq.
- 280 See Vol.II, Ch.47 (contracts of suretyship).
- 281 *Cowen v Truefitt Ltd* [1899] 2 Ch. 309; *Johnson v Bragge* [1901] 1 Ch. 28; *Thompson v Hickman* [1907] 1 Ch. 550; *Craddock Bros v Hunt* [1923] 2 Ch. 136; *USA v Motor Trucks Ltd* [1924] A.C. 196. cf. para.7-038.
- 282 *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 at [34].
- 283 [2009] UKHL 38, [2009] 1 A.C. 1101 at [48]. Lord Hoffmann's statements on rectification were obiter, as the case was decided on a question of construction (see para.5-060), but appear to have been supported by the other members of the Judicial Committee (see [2009] UKHL 38 at [1], [71], [97] and [101]). See, however, below, para.5-084.
- 284 [2002] 2 E.G.L.R. 71 at 74, para.33. Compare the statement by Leggatt LJ in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [176], below, para.5-086.
- 285 *Mackenzie v Coulson* (1869) L.R. 8 Eq. 368, 375.
- 286 *W. Higgins Ltd v Northampton Corp* [1927] 1 Ch. 128.
- 287 *Mackenzie v Coulson* (1869) L.R. 8 Eq. 368; *Faraday v Tamworth Union* (1916) 86 L.J. Ch. 436, 438; *W. Higgins Ltd v Northampton Corp* [1927] 1 Ch. 128, 136; *USA v Motor Trucks Ltd* [1924] A.C. 196, 200; *Lovell Christmas Ltd v Wall* (1911) 104 L.T. 85.
- 288 [1936] Ch. 375. See also *Frederick E. Rose (London) Ltd v William H. Pim Jnr. & Co Ltd* [1953] 2 Q.B. 450, 461; *Crane v Hegemann-Harris Co Inc* [1939] 1 All E.R. 662, affirmed [1939] 4 All E.R. 68, [1971] 1 W.L.R. 1390n; *Monaghan CC v Vaughan* [1948] Ir.R. 306; *Carlton Contractors v Bexley Corp* (1962) 106 S.J. 391; *Kent v Hartley* (1966) 200 E.G. 1027.
- 289 [1970] 2 Q.B. 86.
- 290 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361; see further below, paras 5-085 et seq.
- 291 [1970] 2 Q.B. 86, 98. Use of this phrase is criticised by *Bromley* in (1971) 87 L.Q.R. 532; but compare *Smith* (2007) 123 L.Q.R. 116.
- 292 (1911) 104 L.T. 85.
- 293 *Grand Metropolitan Plc v William Hill Group Ltd* [1997] 1 B.C.L.C. 390. In *Mangistaumunaigaz Oil Production Association v United World Trading Inc* [1995] 1 Lloyd's Rep. 617 no prior agreement was shown and rectification was refused. In *Mace v Rutland House Textiles Ltd (In Administrative Receivership)*, The Times, 11 January 2000 rectification was permitted when the text of the agreement had been prepared by a person instructed by both parties and did not represent their common intention although that had not been expressed in a settled form of words. In *Prowting 1968 Trustee One Ltd v Amos-Yeo* [2015] EWHC 2480 (Ch), [2015] B.T.C. 33 rectification was ordered when an agreement did not reflect the parties' intention to transfer enough shares to entitle the claimants to tax relief, although the parties had left the number to be determined by a trustee, who had miscalculated the number (see at [37]–[38]).

- 294 In particular *AMP v Barker* [2001] P.L.R. 77 and *Gallaher v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] All E.R. (D) 177 (Jan).
- 295 [2006] EWCA Civ 370, [2006] All E.R. (D) 29 (Apr), at [36].
- 296 [2019] EWCA Civ 1361, [2020] Ch. 365.
- 297 See [2019] EWCA Civ 1361 at [78]–[79]. Examples of the approach in pension scheme cases can be found in *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch), [2020] Pens. L.R. 23 at [205]–[207].
- 298 [2019] EWCA Civ 1361 at [77]. The *FSHC* case was applied in *Gwynt y Mor OFTO Plc v Gwynt y Mor Offshore Wind Farm Ltd* [2020] EWHC 850 (Comm); *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm) at [372]–[373] (lack of an outward expression of accord was one reason for failure of the claim for rectification (see at [392])); and *Ralph v Ralph* [2021] EWCA Civ 1106, [2021] 4 W.L.R. 128 at [14]–[20].
- 299 Referring to the formulation of this point in para.3-064 of the 33rd edition of this work: [2019] EWCA Civ 1361 at [84]; *Ralph v Ralph* [2021] EWCA Civ 1106 at [18], also applying para.3-064. The authorities cited in Chitty were Carnwath LJ in *JIS (1974) Ltd v MCP Investment Nominees Ltd* [2003] EWCA Civ 721 at [33]–[34]; see also *Cambridge Antibody Technology v Abbott Biotechnology Ltd* [2004] EWHC 2974 (Pat), [2005] F.S.R. 27 at [105]–[112]. “Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in substance and in detail the common intention can be ascertained”: *Co-operative Insurance Society Ltd v Centremoor Ltd* [1983] 2 E.G.L.R. 52 at 54, cited in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560 at [34]. The sentence quoted in the text was accepted as correct in *DS-Rendite-Fonds Nr.106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA* [2013] EWHC 3492 (Comm) (at [47]). The party claiming rectification must be able “to articulate with precision the form the agreement should take when rectified”: *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2020] EWHC 337 (Ch) at [34].
- 300 [2019] EWCA Civ 1361 at [87].
- 301 [2019] EWCA Civ 1361, [2020] Ch. 365.
- 302 In *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm) neither party was able to establish a subjective intention that differed from the wording of the settlement: see at [418] and [441].
- 303 cf. *Smith* (2007) 123 L.Q.R. 116; *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm) at [88]–[89]. Similarly, it has been said that in establishing what the prior understanding was, “the court is not concerned with what the parties *thought* they had agreed or what they *thought* their agreement meant—a subjective inquiry. What it is concerned with is what the parties said and did, and what that would convey to a reasonable person in their position—an objective question”: *PT Berlian Laju Tanker TBK v Nuse Shipping Ltd (The Aktor)* [2008] EWHC 1330 (Comm), [2008] 2 Lloyd’s Rep. 246 at [38]. Christopher Clarke J added that it was immaterial that both parties, although agreeing “X”, thought that “X” meant

something that, objectively, it does not mean. He added (at [41]) that “a continuing common intention is not sufficient unless it has found expression in outward agreement”. See also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [57]; and the lectures by Lord Justice Patten and Sir Terence Etherton, above, para.5-057. However, it is submitted that if each party understands “X” to mean “Y” and believes that the other has the same understanding (though the other has not expressed it), the actual agreement is on “Y” (see above, para.5-014). If this is correct, possibly the written document can be rectified accordingly. But cases in which it can be shown that the parties in fact intended the same thing but never expressed this outwardly to each other will be very rare.

•304 See above, para.5-014.

•305 Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.13-40. Compare Hodge, Rectification, 2nd edn (2016), paras 3-51–3-52. Bromley (1971) 87 L.Q.R. 532 argued that an outward expression of accord is not necessary.

•306 [2019] EWCA Civ 1361 at [176]. See also *ABN AMRO Bank NV v Royal and Sun Alliance Insurance Plc* [2021] EWCA Civ 1789, [2022] 1 W.L.R. 1773 at [87] (estoppel by convention based on acquiescence also requires subjective agreement, so that the party making the representation must know the other has a different understanding; this brings estoppel by convention into line with rectification).

307 *Fowler v Fowler* (1859) 4 De G. & J. 250; *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 E.G.L.R. 71 at 74, para.33, cited with approval in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at [48]; see above, para.5-062. It has been said that the word “continuing” in Peter Gibson LJ’s first requirement in the *Swainland Builders* case seems to be superfluous; it is more accurate to say that there needs to be a common intention (requirement 1) which was continuing at the time that the contract was executed (requirement 3): *Milton Keynes BC v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC), [2017] B.L.R. 216 at [48] (Coulson J). If the parties have altered their agreement extensively before the document was executed, rectification will not be appropriate because their initial intention on the point at issue may well have changed also (as in *Pindos Shipping Corp v Raven (“The Mata Hari”)* [1983] 2 Lloyd’s Rep. 449), but the fact that there have been minor changes to other aspects of the agreement does not prevent rectification: [2017] EWHC 239 (TCC), [2017] B.L.R. 216 at [62]–[63], citing *Dunlop Haywards Ltd v Erinaceous Insurance Services Ltd* [2009] EWCA Civ 354 at [82].

308 *Daventry DC v Daventry and District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333 at [59], per Toulson LJ, and at [211], per Lord Neuberger MR Compare below, para.5-101.

309 The absence of any discussion of a change may be evidence that the parties did not intend one, but it all depends on the circumstances: *FSHC Group Holdings Ltd v Barclays Bank Plc* [2018] EWHC 1558 (Ch) at [47].

- 310 [2011] EWCA Civ 1153, [2012] 1 W.L.R. 133. See *McLauchlan* (2014) 131 L.Q.R. 83; and the very full account of the *Daventry* case and the commentary on it in Hodge, Rectification, 2nd edn (2016), paras 3-61 et seq.
- 311 Where the prior agreement was not binding, the Court of Appeal has said that the document can only be rectified if it does not reflect the subjective intentions of the parties (as outwardly expressed): *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] Ch. 365. See below, paras 5-085 et seq.
- 312 See the summary of the differences in the postscript to Etherton LJ's judgment at [104]–[105].
- 313 In other words, the case was one within the “extended” notion of common mistake: see below, para.5-079.
- 314 See *AML Global Ltd v ExxonMobil Petroleum and Chemical BVBA* [2018] EWHC 3321 (TCC) at [39]. However the Court of Appeal has now declined to apply the objective approach in cases in which the prior agreement was not binding: *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361. See below, paras 5-085 et seq.
- 315 [2011] EWCA Civ 1153 at [160].
- 316 [2011] EWCA Civ 1153 at [170].
- 317 [2011] EWCA Civ 1153 at [91].
- 318 [2011] EWCA Civ 1153 at [207]. In *AML Global Ltd v ExxonMobil Petroleum and Chemical BVBA* [2018] EWHC 3321 (TCC) at [41] Waksman J doubted whether Toulson LJ's approach led to a different result; if it did, the judge preferred Etherton LJ's approach.
- 319 [2011] EWCA Civ 1153 at [213].
- 320 [2010] EWHC 1935 (Ch).
- 321 [2011] EWCA Civ 1153 at [91]–[92].
- 322 [2011] EWCA Civ 1153 at [106]–[115], esp. at [110]–[112]. In *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 the appellants argued that the reasonable observer would conclude from the documents sent for signature, which not only had the effect that the respondents provided the security that had mistakenly been omitted from previous arrangements between the parties but also imposed “Additional Obligations” on the respondents, that the intentions of the parties assessed objectively, was that the respondents were undertaking the Additional Obligations. Although it was not necessary to decide what was the objectively-ascertained common intention (as the parties' shared and outwardly manifested subjective intentions were that the respondents should only provide the security; see at [177] and [183]), given the factual matrix of the new agreement and the earlier communications between the parties, the Court of Appeal upheld the finding of the trial judge that the objective observer would have understood that the accession deeds were not intended to do more than fill the gap in the security (at [183]–[193]).
- 323 *Daventry DC v Daventry and District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333.
- 324 However, in *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC) the court applied the test of whether a hypothetical observer would have concluded that the draft agreement contained a mistake or that the intention of the parties had changed, and held that the hypothetical observer would have concluded the latter (at [123]–[129]).

- 325 cf. above, para.[5-022](#).
- 326 cf. below, para.[5-073](#).
- 327 See para.[5-085](#).
- 328 cf. *Davies* (2016) 75 *C.L.J.* 62, 75.
- 329 *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 *E.G.L.R.* 71 at para.38; *Lloyds TSB Bank Ltd v Crowborough Properties Ltd* [2013] *EWCA Civ 107* at [57]–[70].

---

End of Document

© 2022 SWEET & MAXWELL

## (c) - Unilateral Mistake Rectification

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 4. - Rectification of Written Agreements<sup>238</sup>

(c) - Unilateral Mistake Rectification<sup>330</sup>

### Unilateral mistake

- 170 In this section we deal with cases in which one party makes a mistake over the terms of the contract and the other party does not intend to contract on the terms intended by the first party. If Lord Hoffmann's approach to rectification for common mistake in *Chartbrook Ltd v Persimmon Homes Ltd*<sup>331</sup> were followed, rectification for unilateral mistake would be less important than hitherto<sup>332</sup>; but that approach has been rejected by the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*.<sup>333</sup> In any event, rectification on the basis of a unilateral mistake will remain important in cases in which there was no agreement (concluded contract or not) prior to the document being signed but the defendant knows that the document does not express the claimant's intention correctly. In this type of case rectification cannot be given on the ground of common mistake.<sup>334</sup>

### Requirements for unilateral mistake rectification

- 171 Where the mistake is unilateral, that is of one party only, it was formerly thought that rectification would not be granted unless a case of fraud or misrepresentation,<sup>335</sup> or unfair dealing,<sup>336</sup> or perhaps sharp practice, could be shown. In *Roberts & Co Ltd v Leicestershire CC*<sup>337</sup> it was said that the doctrine might be based on either fraud or estoppel, when:

“... it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendants in such circumstances.”<sup>338</sup>

In *Thomas Bates Son v Wyndhams Ltd* the Court of Appeal rejected these limits on the availability of the remedy of rectification.<sup>339</sup> Where one party is mistaken as to the incorporation of the agreement in the document, and the other knows of the mistake, and does not draw it to the attention of the first party, it suffices that it would be inequitable to allow the second party to insist on the binding force of the document, either because this would benefit him or because it would be detrimental to the mistaken party. Buckley LJ said:

“For this doctrine—that is to say the doctrine of *A. Roberts & Co. Ltd. v. Leicestershire County Council*—to apply I think it must be shown: first, that one party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element<sup>340</sup> involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A’s intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.”<sup>341</sup>

There are at least two issues which require discussion: the degree of knowledge required and the “fourth element”, which Buckley LJ put as whether, in addition to knowing of the mistake, the defendant must be guilty of some inequity.<sup>342</sup>

## Knowledge of the mistake

- <sup>172</sup> Even though sharp practice may not be required, unilateral mistake is not by itself a ground for rectifying a contract unless the other party knew of the mistake.<sup>343</sup> On current authority<sup>344</sup> it appears that the knowledge must be actual knowledge.<sup>345</sup> It is not enough that the party against whom rectification is sought may have suspected that a mistake had been made<sup>346</sup>; but if a party wilfully shuts its eyes to the obvious, or wilfully and recklessly fails to make such inquiries as an honest and reasonable man would make, that will count as actual knowledge.<sup>347</sup> The nature of the knowledge that A must be shown to have of B’s mistake if rectification is to be granted was discussed in detail by the Court of Appeal in *George Wimpey UK Ltd v VI Construction Ltd*.<sup>348</sup> Using the analysis of the various forms of knowledge made by Peter Gibson J in *Baden v Société*

*Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA*,<sup>349</sup> it must be: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; or (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. In *Agip (Africa) Ltd v Jackson*<sup>350</sup> Millett J said that the true distinction is between honesty and dishonesty. In cases within (ii)–(iii) A would not be acting honestly. The implication is that the same would not be true if A merely had (again using the categories of Peter Gibson J); (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man, or (v) knowledge of circumstances which would put an honest and reasonable man on inquiry:

“The remedy of rectification for unilateral mistake is a drastic remedy, for it has the result of imposing on the defendant to the claim a contract which he did not, and did not intend to, make. Accordingly the conditions for the grant of such relief must be strictly satisfied.”<sup>351</sup>

In cases that fall within Peter Gibson J’s categories (ii) and (iii), dishonesty is a requirement of establishing that the defendant had sufficient knowledge<sup>352</sup>; but in cases in category (i), i.e. in which the defendant actually knew of the claimant’s mistake, it is not necessary to show dishonesty on the part of the defendant.<sup>353</sup>

## Conduct contributing to the mistake

- 173 It seems that rectification will also be granted even if the defendant did not have positive knowledge of the claimant’s mistake if the defendant deliberately sought to prevent the claimant from discovering that what was written in the document may not accord with his intentions. Although it has been suggested that it is not sufficient that the defendant contributed to the mistake unless he did so knowingly,<sup>354</sup> if a party puts forward a draft document in such a way that he makes a representation that it is in accordance with an earlier accord of the parties, and the other party foreseeably relies on this, an estoppel may arise.<sup>355</sup> Further, in *Commission for New Towns v Cooper* Stuart Smith LJ said:

“... were it necessary to do so in this case, I would hold that where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B’s attention from discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A’s conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient ...”<sup>356</sup>

This type of conduct would clearly not be honest. In the Australian case of *Taylor v Johnson*<sup>357</sup> the High Court had held that this sort of unconscionable conduct on A's part would suffice for the contract to be rescinded on the ground of mistake.<sup>358</sup> The same principle does not necessarily apply to cases of rectification, since the court is not simply undoing the bargain but also imposing a different bargain on A. However, it is not unjust to insist that the contract be performed according to B's understanding where that was the very meaning that A intended B to put on it, even if it is not shown that A had actual knowledge of B's mistake, and rectification may be granted.<sup>359</sup> If on the other hand it is reasonable to expect the other party to check the draft, and A does not know that B mistakenly thinks that it reflects what B hoped would be agreed, there will be no relief.<sup>360</sup> In cases of pure unilateral mistake that the other party did not know or have any reason to know of,<sup>361</sup> the remedy (if any, and there will often be none), may be refusal of an order of specific performance<sup>362</sup> but not, it appears, rescission.<sup>363</sup>

## Inequity

<sup>374</sup> In *Riverlate Properties Ltd v Paul*<sup>364</sup> it was suggested that in a case of unilateral mistake the defendant must not only have known of the mistake but be guilty of sharp practice. In *Thomas Bates Son v Wyndhams Ltd* Buckley LJ rejected this,<sup>365</sup> saying:

“Undoubtedly I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies some measure of “sharp practice”, so be it; but for my part I think that the doctrine is one which depends more upon the equity of the position. The graver the character of the conduct involved, no doubt the heavier the burden of proof may be; but, in my view, the conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake.”

He went on to say that for this requirement<sup>366</sup> to be satisfied, the mistake must be one “calculated to benefit B”. In contrast, Eveleigh LJ said that this was not necessary: it was enough that there would be a detriment to the claimant.<sup>367</sup> It is submitted that either should suffice. In practice, if the claimant's mistake was known to the defendant, or the defendant deliberately induced the mistake in the way described earlier,<sup>368</sup> and the terms of the written document are less favourable to the claimant than those the defendant knew that the claimant actually intended, it will be inequitable for the defendant to insist on the terms stated in the document and the grounds for rectification will be satisfied.<sup>369</sup> Even though it is still sometimes said that sharp practice is required, what amounts to

sharp practice may depend on the comparative competence and resources of the parties.<sup>370</sup> A party with little experience or few bargaining resources who has noticed a possible mistake made by a much stronger party may be entitled to assume that the stronger party “knew what it was doing”.<sup>371</sup> This may be explained in terms of whether the weaker party was acting unconscionably<sup>372</sup>; but it can equally be seen as a question of whether the weaker party had the requisite degree of knowledge —a party who did not actually know a mistake had been made but who shut his eyes to the obvious or failed to make enquiries is treated as “knowing of it” only if he acted dishonestly.<sup>373</sup>

## Cancellation with option of rectification

- 175 In a small group of cases a middle course between refusing and granting rectification was adopted. These cases are *Garrard v Frankel*,<sup>374</sup> *Harris v Pepperell*,<sup>375</sup> *Bloomer v Spittle*<sup>376</sup> and *Page v Marshall*.<sup>377</sup> The course adopted was to order cancellation with an option to the defendant to accept rectification instead. They are all cases of unilateral mistake. In *Garrard v Frankel*<sup>378</sup> the defendant agreed to take from the plaintiff a lease of a house at the rent of £230, and in the lease drawn up in pursuance of the agreement the rent was stated to be £130. Lord Romilly MR considered that the error was the plaintiff's but that the defendant must have perceived it, and held that though the plaintiff was not entitled to have the lease rectified, the lessee ought to be put to his election whether to have the lease rectified or to reject it. In *Harris v Pepperell*<sup>379</sup> the vendor had executed a conveyance including a piece of land he had not intended to sell but which the defendant alleged he had intended to buy. Lord Romilly, following his previous decision in *Garrard v Frankel*, gave the defendant the option “of having the whole contract annulled or else of taking it in the form which the plaintiff intended”. In *Bloomer v Spittle*<sup>380</sup> a conveyance of land reserved to the vendor the right to minerals. The purchaser alleged that the reservation had been inserted by mistake, but the vendor denied that this was so. The vendor died before he could be cross-examined on this point. In an action by the purchaser for rectification of the conveyance, it was held that this relief could not be granted after a long lapse of time and in the face of the vendor's denial. Nevertheless the personal representatives of the vendor were to choose whether to have the conveyance set aside or rectified. In *Page v Marshall*<sup>381</sup> the plaintiff by mistake had offered and demised to the defendant four floors of three houses, whereas he had intended to reserve for his own use the first floor of one of the houses. Again the defendant had to elect whether to submit to rectification or have the lease cancelled.
- 176 This group of cases was critically re-examined by the Court of Appeal in *Riverlate Properties Ltd v Paul*.<sup>382</sup> The court expressed serious doubts about the authority of these cases and was especially critical of *Garrard v Frankel*.<sup>383</sup> Although they did not expressly overrule this case they left little doubt that in their view it was wrongly decided. They emphasised that if the defendant neither knows of, nor contributes to nor shares the mistake, but bona fide assumes that

the written document correctly represents the common intention, there is no ground for rescission or rectification. If, on the other hand, the defendant does know of the claimant's mistake, and what his intention was, the claimant is today entitled to rectification, and there is no reason why the defendant should be offered the option of rescission. It seems that the cases referred to in para.<sup>5-075</sup> must be explained on the ground that they were decided before it became clear that rectification could be ordered even for a unilateral mistake if it was known to (or, perhaps, if contributed to) by the defendant.

## Rescission when known that claimant had made some mistake

- <sup>177</sup> There may be cases in which the claimant has made a mistake, and the defendant is aware of that but does not know what the claimant intended. It is submitted that in such a case the contract should not be rectified to accord with what the claimant shows his true intention to have been; that might force the defendant into a contract to which he had never agreed.<sup>384</sup> However, in such a case it seems appropriate to allow rescission.<sup>385</sup> This seems to have been recognised by Stuart Smith LJ in *Commission for New Towns v Cooper*.<sup>386</sup> The passage quoted in para.<sup>5-073</sup>, above in fact ends: "... that is sufficient *for rescission*" (emphasis supplied). If necessary the document should be cancelled.<sup>387</sup>

## Mistake that ought to have been known to the defendant

- <sup>178</sup> The requirements that the claimant's mistake must have been known to the defendant and that the defendant must have been guilty of sharp practice or that there would be inequity were rectification not to be granted, have been justified on the grounds that rectification for unilateral mistake is a drastic remedy because it results of imposing on the defendant to the claim a contract which he did not, and did not intend to, make.<sup>388</sup> It has been argued,<sup>389</sup> however, that rectification is not drastic: its purpose is simply to bring the written agreement into line with the agreement between the parties as determined by the ordinary principles of contract formation. Therefore rectification on the ground of a unilateral mistake should not be confined to the case in which the claimant's intention was known to the defendant, but should be extended to cases in which the defendant should have been aware of the claimant's intention and led the claimant reasonably to believe that the terms it intended were accepted. This would be consistent with the principle laid down by Blackburn J in *Smith v Hughes*<sup>390</sup>:

"If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

Blackburn J's dictum is normally used to justify holding a party (A) to what he appeared to say, unless the other party (B) does not believe that this is what in fact A intended. However, the implication is that if in the circumstances it was not reasonable for B to believe that A intended what he said—in other words, if B should have realised that A had made a mistake—then B cannot rely on the apparent meaning of what A said. The argument is then made that if B, by his actions, appears to accept A's meaning, A is entitled to rely on this, provided his reliance is reasonable, with the result that the contract at common law will be in the terms in fact intended by A; and if the written agreement does not reflect what B should reasonably have understood to be A's intention, it should be rectified. In *Daventry DC v Daventry and District Housing Ltd*,<sup>391</sup> Toulson LJ expressed sympathy for this view.<sup>392</sup> It would seem odd not to grant rectification if, were the contract an oral one, the contract would be on the terms intended by A. However, the effect on an oral contract of a mistake by A which of which B did not know but should have known is not clearly established. The mistake may be of no effect at all; or it may prevent an oral contract being formed; or it may result in the contract being on A's intended terms.<sup>393</sup> Earlier it was submitted that it should be treated as not giving rise to a contract. That would suggest that in case of the kind under discussion, the document should be treated as void.<sup>394</sup> But the rule stated in the current case law, that actual knowledge is required before a contract document can be rectified on the ground of a unilateral mistake and that anything less than actual knowledge or deliberately causing the mistake is irrelevant, can be justified on the grounds of convenience and certainty; it is undesirable to allow A to go behind a document it has signed save in exceptional circumstances amounting to dishonesty, or something close to it, on B's part. The rule certainly seems to represent the authorities on unilateral mistake rectification as they stand currently.

## Footnotes

- <sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022); Macmillan, *Mistakes in Contract Law* (2010).
- <sup>238</sup> *Hodge, Rectification*, 2nd edn (2016); A. Burrows, "Construction and Rectification" in A. Burrows and E. Peel (eds), *Contract Terms* (2007), 77; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019), paras 13-38—13-54; *McLauchlan* (2008) 124 *L.Q.R.* 608, (2010) 126 *L.Q.R.* 8 and (2014) 130 *L.Q.R.* 83. N. Patten, "Does the law need to be rectified? Chartbrook revisited", Chancery Bar Association Annual Lecture 2013, available at <http://www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited> [Accessed 1 September 2021]; R. Toulson, "Does Rectification Require Rectifying?", TECBar Lecture 2013, available at <https://>

- [www.supremecourt.uk/docs/speech-131031.pdf](http://www.supremecourt.uk/docs/speech-131031.pdf) [Accessed 1 September 2021]; T. Etherton, “Contract and the Fog of Rectification” (2015) 68 Current Legal Problems 367.
- 330 Burrows in Burrows and Peel (eds), Contract Terms (2010), p.77; *McLauchlan* (2008) 124 *L.Q.R.* 608.
- 331 *[2009] UKHL 38, [2009] 1 A.C. 1101*; see below, para.5-079.
- 332 See the discussion of *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] Ch. 365, below, paras 5-085 et seq.
- 333 *[2019] EWCA Civ 1361, [2020] Ch. 365*.
- 334 cf. paras 5-058 et seq.; but compare *Ulster Bank Ltd v Lambe* [2012] NIQB 31, cited in para.5-060, where it was held that D must have known of the mistake of euros for pounds in P’s offer when accepting it and that the contract meant what P intended.
- 335 *Wood v Scarth* (1855) 2 K. & J. 33, 41; *May v Platt* [1900] 1 Ch. 616.
- 336 *McCausland v Young* [1949] N.I. 49.
- 337 *Roberts & Co Ltd v Leicestershire CC* [1961] Ch. 555.
- 338 Pennycuick J at 570.
- 339 *Thomas Bates & Son v Wyndhams Ltd* [1981] 1 W.L.R. 505.
- 340 Differing views were expressed by the members of the Court of Appeal in *Thomas Bates & Son v Wyndhams Ltd* [1981] 1 W.L.R. 505 on this fourth element. See below, para.5-074.
- 341 [1981] 1 W.L.R. 505, 516. In unilateral mistake cases, it may be said that rectification can be granted without there having been an antecedent agreement between the parties: *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [2006] 2 P. & C.R. 2; but as Jacobs LJ noted at [24], a party who accepts a clause knowing full well what the other party (mistakenly) thinks it means or says is in effect agreeing to the other party’s version.
- 342 See below, para.5-074.
- 343 *Riverlate Properties Ltd v Paul* [1975] Ch. 133, below, para.5-076; *Kemp v Neptune Concrete* (1989) 57 P. & C.R. 369; *Yedina v Yedin* [2017] EWHC 3319 (Ch) at [293]. In the latter case Purchas LJ (at 377) said that it must have been unconscionable for the non-mistaken party to execute the deed or to stand by while the other does so; but it seems that the requirement of unconscionability will be satisfied if the non-mistaken party seeks to take advantage of the other’s mistake: *Templiss Properties Ltd v Hyams* [1999] E.G.C.S. 60.
- 344 But see para.5-078, below.
- 345 *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba)* [1984] 1 Lloyd’s Rep. 353; *Commission for New Towns v Cooper (Great Britain)* [1995] Ch. 259. cf. above, paras 5-022—5-023.
- 346 *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd (The Ypatia Halcoussi)* [1985] 2 Lloyd’s Rep. 364, 371.
- 347 cf. *Commission for New Towns v Cooper (Great Britain)* Ltd [1995] Ch. 259.
- 348 [2005] EWCA Civ 7, [2005] B.L.R. 135.
- 349 [1993] 1 W.L.R. 509, 575–582.
- 350 [1990] Ch. 265 at 293.
- 351 See the judgment of Sedley LJ in the *George Wimpey* case [2005] EWCA Civ 77 at [65]. But see also below, para.5-078.

- 352 This statement was approved by Jacobs J in *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm) at [455].
- 353 *Palo Alto Ltd v Alnor Estates Ltd* [2018] UKUT 231 (TCC) at [51]–[55] (though His Honour John Behrens described this conclusion as “unattractive”: at [51]) and pointed to dicta by Etherton and Toulson LJJ in the *Daventry case* at [116] and [118] that dishonesty is required); see *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm) at [456]–[458] (seemingly accepting that in cases of actual knowledge, dishonesty need not be shown, though Jacobs J remarked that “a case where one party knows that the other is labouring under a mistake as to the contract terms, but does nothing to alert him, will usually be a case of dishonesty anyway”).
- 354 *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba)* [1983] 2 Lloyd’s Rep. 333, 344. The point was not discussed directly on appeal but appears to be consistent with the Court of Appeal’s insistence on actual knowledge: [1984] 1 Lloyd’s Rep. 353.
- 355 [1984] 1 Lloyd’s Rep. 353, 365.
- 356 [1995] Ch. 259 at 280.
- 357 (1983) 151 C.L.R. 422, 45 A.L.R. 265; see above, para.5-027.
- 358 See above, para.5-027.
- 359 *Commission for New Towns v Cooper (Great Britain) Ltd* [1995] Ch. 259.
- 360 *Taylor Barnard v Tozer* (1984) 269 E.G. 225.
- 361 cf. below, paras 5-077—5-078.
- 362 See above, para.5-026.
- 363 See above, para.5-027. Nor will a document be interpreted in a way one party contends merely because the other party knew or suspected, at the time, that that was what the first party was hoping to achieve: *Zoan v Rouamba* [2000] 2 All E.R. 620, 633.
- 364 [1955] Ch. 133, 140.
- 365 [1981] 1 W.L.R. 505 at 515; see similarly Brightman LJ at 522.
- 366 The “fourth element”: see paras 5-070—5-071, above.
- 367 [1981] 1 W.L.R. 505 at 521.
- 368 Above, para.5-073.
- 369 In *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579 at [23]–[24] Jacobs LJ said that it would be sufficiently inequitable for one party to take deliberate advantage of a drafting error by the other.
- 370 *Rowallan Group Ltd v Edgehill Portfolio No.1 Ltd* [2007] EWHC 32 (Ch), [2007] All E.R. (D) 106 (Jan), at [14].
- 371 See *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] B.L.R. 135 at [65]–[67] (Sedley LJ).
- 372 *NHS Commissioning Board v Silovsky* [2015] EWHC 3141 (Comm) at [42]–[43]; affirmed without reference to this point [2017] EWCA Civ 1389.
- 373 As by the majority in *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] B.L.R. 135, see at [47] and [79]; see above, para.5-072.
- 374 (1862) 30 Beav. 445.

- 375 *(1867) L.R. 5 Eq. 1.*
- 376 *(1872) L.R. 13 Eq. 427.*
- 377 *(1884) 28 Ch. D. 255.*
- 378 *(1862) 30 Beav. 445.*
- 379 *(1867) L.R. 5 Eq. 1.*
- 380 *(1872) L.R. 13 Eq. 427.* This decision was said by Neville J in *Beale v Kyte [1907] 1 Ch. 564, 565* to be “unintelligible as reported”.
- 381 *(1884) 28 Ch. D. 255.*
- 382 *[1975] Ch. 133.*
- 383 *(1862) 30 Beav. 445.*
- 384 This passage in the 30th edition was referred to with apparent approval by Andrew Smith J in *BP Oil International Ltd v Target Shipping Ltd [2012] EWHC 1590 (Comm)* at [199] (“I know of no precedent for rectifying a contract on the grounds of unilateral mistake so as to make for more favourable provision for the mistaken party than the other party realised he had in mind, and I should be reluctant so to expand the remedy”). The decision was reversed in part, *[2013] EWCA Civ 196, [2013] 1 Lloyd's Rep. 561*, without reference to this point.
- 385 In *Stepps Investments Ltd v Security Capital Corp Ltd* (1976) 73 D.L.R. (3d) 351 the Ontario High Court held that an order for rectification or rescission at the defendant’s option could be granted where the defendant did not actually know of the mistake but should have known of it. See also *Murphy’s Ltd v Fabricville Co Inc* (1980) 117 D.L.R. (3d) 668 (*Supreme Ct of Nova Scotia*); Waddams, *The Law of Contracts*, 6th edn (2010), §344; Hodge, *Rectification*, 2nd edn (2016), paras 1-44—1-45.
- 386 *[1995] Ch. 259, 280.*
- 387 On cancellation of documents see Halsbury’s Laws of England, Vol.47 (2014) *Equitable Jurisdiction*, para.84.
- 388 See above, para.5-072. This point is frequently made without apparent recognition that in the classic case of unilateral mistake known to the defendant, to refuse rectification would be equally harsh on the claimant, who would then be bound by a contract that they did not, and the defendant knew that they did not, intend to make.
- 389 *McLauchlan* (2008) 124 L.Q.R. 608. McLauchlan argues (at 619) that the defendant should have led the claimant reasonably to believe that the terms it intended were accepted. He seems to envisage that B does more than merely agree to A’s proposal, but what that more should be is not wholly clear. cf. above, para.5-029.
- 390 *(1871) L.R. 6 Q.B. 597, 607.* See above, para.5-018.
- 391 *[2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333.* In contrast *Davies* (2012) 75 M.L.R. 412 argues that rectification should be confined to cases in which B had actual knowledge of A’s mistake.
- 392 *[2011] EWCA Civ 1153* at [174]. In *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd [2013] EWHC 2688 (TCC), [2014] B.L.R. 179* at [139]–[141] Ramsey J preferred the approach of Etherton LJ in the *Daventry* case (*[2011] EWCA Civ 1153* at [95]–[97]), which was to insist that B must have been actually aware of A’s mistake, which will include cases that fall within the first three categories set out by Peter Gibson J in *Baden v Société Générale*

*pour Favouriser le Développement du Commerce et de l'Industrie en France SA [1993] 1 W.L.R 509*, see above, para.5-072.

393 See above, paras 5-029 et seq.

394 Compare above, para.5-033.

## (d) - The Extended Notion of Common Mistake

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 4. - Rectification of Written Agreements<sup>238</sup>

(d) - The Extended Notion of Common Mistake

### Subjective agreement not required

<sup>179</sup> In *Chartbrook Ltd v Persimmon Homes Ltd*<sup>395</sup> Lord Hoffmann said that if there was an outward expression of common intention such that on an objective view the parties appeared to be in agreement, but the document signed did not reflect the objective meaning of that agreement, rectification is available on the basis of common mistake, whether or not the prior agreement was itself binding. It is not wholly clear whether Lord Hoffmann meant that that it not sufficient for rectification that the parties were subjectively agreed on the same terms, or merely that it was not necessary—in other words, that rectification could also be given on the basis of shared (and outwardly expressed) subjective intentions.<sup>396</sup> In *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* it was argued that rectification could only be granted on the basis of a difference between the objective meaning of the prior agreement and the document signed.<sup>397</sup> The Court of Appeal expressed the unanimous view that, though where the prior agreement amounted to a binding contract, the question is whether the document reflects the objective meaning of the prior agreement, where the prior agreement is not binding rectification is available only if the final document differs from the shared (and outwardly expressed) subjective intentions of the parties.<sup>398</sup>

### The Chartbrook case

<sup>180</sup>

It has been said in the House of Lords that it is not necessary for rectification on the basis of common mistake that the parties were subjectively agreed on the same terms; it suffices for there to be an outward expression of common intention that on an objective view the parties appeared to be in agreement. In *Chartbrook Ltd v Persimmon Homes Ltd*<sup>399</sup> Lord Hoffmann said that for rectification for common mistake, the document must differ from what the parties had agreed, objectively determined. He said<sup>400</sup>:

“Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the ‘common continuing intention’ were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be. Perhaps the clearest statement is by Denning LJ in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd*<sup>401</sup>:

‘Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.’”

What one or other party believed they had agreed was not the issue.<sup>402</sup> Lord Hoffmann said that evidence of what a party believed should not be excluded, “but that is not inconsistent with an objective approach to what the terms of the prior consensus were”.<sup>403</sup>

- 181 In the *Chartbrook* case, Chartbrook had always intended that Persimmon should pay “super overage”,<sup>404</sup> and thought that this was the prior agreement, but the reasonable person reading the prior documents would conclude that it was not to be payable. The final document might be understood to provide that it should be payable. The House of Lords held that as a matter of interpretation of the final document, super-coverage was not payable<sup>405</sup>; but they also considered Persimmon’s alternative claim for rectification, on the assumption that while according to the prior agreement, super coverage was not payable, the final document did require it to be paid. Both parties thought that the final written agreement reflected their previous agreement; and as on this

assumption it did not reflect the prior agreement, Lord Hoffmann reasoned, Persimmon would be entitled to rectification.<sup>406</sup>

## The Daventry case

- 182 Similarly, in *Daventry DC v Daventry and District Housing Ltd*<sup>407</sup> the objective meaning of the prior agreement was that the burden of paying a pension fund deficit was to be borne by the defendants, but the defendants were misled by one of their employees into thinking it was to be borne by the Council. The written contract, as the result of an insertion made at a late stage, placed the burden on the Council but the Council misunderstood the relevant clause and so were unaware of the change. It was held that on the *Chartbrook* principle (the correctness of which was not challenged in the *Daventry* case), as both parties (though for different reasons) were mistaken in thinking that the final written agreement effected the prior agreement, rectification should be granted.

## An extended notion of “common mistake”

- 183 Lord Hoffmann’s reasoning in the *Chartbrook* case seems to stretch the notion of “common mistake”, as though each party had made a mistake, it was not the same mistake: Chartbrook’s mistake was as to the meaning of the prior agreement, Persimmons’ as to whether the written document reflected the prior agreement. It may be more accurate to say that what is being done in both traditional cases of common mistake rectification and in cases like *Chartbrook* is that the written document is being brought into line with the prior agreement as properly interpreted.

## Criticism of the Chartbrook decision

- 184 This extended notion of rectification for common mistake adopted by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*<sup>408</sup> has been criticised by both academic commentators and judges. Thus it has been said:

“It is difficult to accept that Chartbrook was mistaken, at least in any usual sense of the word. The company intended the contract to provide the benefits that [on the assumption that the written agreement did provide for super coverage] it did provide for.”<sup>409</sup>

In the *Daventry*<sup>410</sup> case Toulson LJ doubted the correctness of the *Chartbrook* principle but was prepared to apply it since its correctness had not been argued before the court and because it would cause no injustice, as it was arguable that because the defendant's employee knew of the Council's intention, the Council would be entitled to rectification on the basis of a unilateral mistake.<sup>411</sup> The Master of the Rolls also considered that the *Chartbrook* principle "may have to be reconsidered or at least refined"<sup>412</sup> but agreed with Toulson's LJ's approach.<sup>413</sup> Etherton LJ did not share the doubt about the *Chartbrook* principle<sup>414</sup> but dissented for other reasons, discussed above.<sup>415</sup> In *Tartsinis v Navona Management Co*<sup>416</sup> Leggatt J said that in *Britoil Plc v Hunt Overseas Oil Inc*<sup>417</sup> the Court of Appeal had held that rectification for common mistake is available only where it is proved that both parties were in fact mistaken about the effect of the final document, and that was not the case in *Chartbrook*.<sup>418</sup> He also said that he found it

"... difficult to see the equity of imposing the view that a hypothetical reasonable observer would have formed of what had been agreed on a party who did not have that understanding of what had been agreed and whose understanding is reflected in the proper interpretation of the final document",<sup>419</sup>

unless the party against whom rectification is sought knew that the party seeking it was mistaken, so that the requirements of rectification for unilateral mistake were satisfied.<sup>420</sup>

## Prior agreement not a concluded contract

- )85 Some commentators accept that where the prior agreement amounted to a concluded contract and the final document does not match the objective meaning of the prior agreement, then rectification on the basis of a common mistake should be possible without showing that the parties subjectively meant (and had outwardly expressed) the same thing,<sup>421</sup> but argue that this should not be possible where there was no concluded contract.<sup>422</sup> In the latter case it should be available only on the basis of either a subjective common intention or unilateral mistake. It is argued that to allow it on the basis of the objective meaning of incomplete negotiations would favour, in the words of Hobhouse LJ in *Britoil Plc v Hunt Overseas Oil Inc*,<sup>423</sup> "less formal, less considered and less carefully drafted earlier documents" over the carefully considered final version. This was the approach adopted unanimously by the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*.<sup>424</sup>

## The FSHC Group case

)86

In *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*,<sup>425</sup> as part of a corporate acquisition in 2012, the parent company (the respondent) had undertaken to provide the appellant's predecessors (Barclays Bank) with security in the form of an assignment of the benefit of a shareholder loan, but it seems that this had been overlooked. The parties then agreed that the respondents should provide the missing security; and the mechanism chosen was that the respondents should accede to two pre-existing security agreements. Neither party realised that these agreements contained clauses imposing additional obligations on the respondent. The trial judge concluded that it was both "objectively" and "subjectively" the common intention of the parties to execute a document which satisfied the parent company's obligation to grant security over the shareholder loan and which did no more than this; and granted rectification.<sup>426</sup> Barclays Bank's replacement as security agent, GLAS Trust Corp Ltd, appealed, arguing first that rectification could only be granted on the basis of a difference between the objective meaning of the prior agreement and the document signed, the test being "purely objective"; and, secondly, that the reasonable observer would conclude from the documents sent for signature, which not only had the effect that the respondents provided the security that had mistakenly been omitted but also imposed the additional obligations on the respondents, that the intentions of the parties, assessed objectively, was that the respondents were undertaking the additional obligations.<sup>427</sup> Leggatt LJ, delivering the judgment of the Court of Appeal as a whole, held that the Court of Appeal was not bound to follow the *Daventry* case, as the case had been decided on the basis that Lord Hoffmann's obiter dicta were correct without that proposition being challenged and two members of the court had expressed doubt as to its correctness.<sup>428</sup> Leggatt LJ refused to follow Lord Hoffmann's approach. Where the prior agreement amounted to a binding contract, the question is whether the document reflects the objective meaning of the prior agreement.<sup>429</sup> But, Leggatt LJ said, where the prior agreement is not binding, rectification is available only if the final document differs from the shared (and outwardly expressed) subjective intentions of the parties. Both parties must make the same mistake, that the document differs from their shared intention.<sup>430</sup> This was established by the judgment of the majority in *Britoil Plc v Hunt Overseas Oil Inc.*<sup>431</sup> Only then would it be inconsistent with good faith for a party to take advantage of the mistake.<sup>432</sup> Thus if the prior agreement is not itself binding and the subjective intentions of the parties (which must be outwardly expressed) do not coincide and differ from what is in the document, rectification cannot be given. Leggatt LJ summarised the position thus:

"[B]efore a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an 'outward expression of accord' – meaning that, as a result of communication between them, the parties understood each other to share that intention."<sup>433</sup>

However, as the trial judge's findings in the *FSHC* case showed that the parties had a shared intention, derived from communications with each other, that the respondents should grant security over the shareholder loan and no more, the appeal failed.

## Evaluation of the “extended approach”

- 187 It is submitted that, despite the strictures of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*,<sup>434</sup> Lord Hoffmann's approach can be justified, but that much depends on the circumstances, in particular the degree of agreement that the parties believed they had reached at the “prior accord” stage and the purpose of the parties in drawing up a final document. Further, the “objective approach to what the terms of the prior consensus were” must be treated with care. Determining the agreement between the parties is more complex than applying a simple objective test, as will be explained in the paragraphs that follow.

## Subjective accord may not be necessary

- 188 It is submitted that much depends on the extent to which the parties regarded themselves as having “concluded” an agreement. Although in *Britoil Plc v Hunt Overseas Oil Inc*<sup>435</sup> Hobhouse LJ does seem to have considered that the parties must have expressed the same intention, another reason that the Court of Appeal refused rectification in the *Britoil* case was that, in the view of the majority, the “heads of agreement” did not constitute the final version: it was in some respects unclear and a witness conceded that part of the point of drawing up a final version was to eliminate any ambiguities. It is not surprising therefore that Hobhouse LJ said that to base rectification on going “back to successively less formal, less considered and less carefully drafted earlier documents ... cannot be right”.<sup>436</sup> But if the parties had thought that their prior agreement was complete, even if not binding on them, and had merely instructed lawyers to incorporate it into a final document that they both signed without careful study, it is not inappropriate to rectify any discrepancy between the objective meaning of the prior agreement and the final document even without proof that the parties shared, or still shared, the same subjective intention. In the *Britoil* case Hoffmann LJ dissented precisely because:

“... there was no further negotiation or discussion between the parties and that the common intention was that the definitive agreement should reflect the meaning of the heads of agreement, whatever that might be.”<sup>437</sup>

This suggests that, even where there is no concluded prior contract, it may sometimes be appropriate to grant rectification on the basis of a discrepancy between the “prior accord”, objectively determined,<sup>438</sup> and the final document, unless there is evidence either that the parties intended to negotiate further or that one has given a reasonable indication that it has put something different into the draft—which raises the question of whether there was a continuing common intention, discussed earlier. It was there suggested that the question is whether the party claiming rectification to bring the terms into line with the previous agreement knew or should have known that the other party was seeking to renegotiate, or at least to assert that its own view as to their prior agreement differed from its objective meaning.<sup>439</sup>

- 190 It may be added that when in “common mistake” cases in the past the courts have determined the terms of the prior agreement, it is not clear that they have always looked for actual subjective agreement. It is only subjective intentions that have been outwardly expressed or “crossed the line” that matter. So typically in rectification cases the court looks at the outward expression to determine what the agreement was. Though evidence of what a party intended or thought the words meant is admissible and may be relevant, at least when the prior agreement is in writing the court determines its meaning in the usual way. Thus in *Britoil Plc v Hunt Overseas Oil Inc*<sup>440</sup> the court considered the meaning of the prior “heads of agreement” document without asking what each party actually meant.<sup>441</sup> Hobhouse LJ referred<sup>442</sup> to an earlier summary of the law by Mustill J, where the latter said:

“3. The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must be objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter.”<sup>443</sup>

In *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*<sup>444</sup> Leggatt LJ explained Mustill J’s statement as being merely a reference to the requirement of an outward expression of accord, but with respect it is not wholly clear that Mustill J thought that shared subjective intentions must also be proved. If during their negotiations A has manifested a particular intention to B, who shares that intention, and A has never subsequently gone back on what he indicated, should A really be able to resist rectification on the ground that his subjective intention was not in fact what he outwardly expressed?<sup>445</sup>

- 191 It is submitted, therefore, that for this purpose no absolute distinction should be drawn between concluded prior contracts and partially negotiated agreements. First, while it may be the case that while negotiations on any aspect continue, the parties will regard the whole transaction as still open, this will not always be so. The parties may regard some issues as completely settled (not realising that their intentions on the point differ) and therefore not examine the relevant parts of the final document with care, so that they fail spot the difference between it and the final

document. Although neither party is acting dishonestly, there seems no reason why this situation must necessarily be treated differently from that of the concluded prior agreement. It is a matter of degree, of the extent to which the parties regarded the matter as “settled” and of whether the party against whom rectification is claimed had indicated that it was proposing a change or at least a clarification.<sup>446</sup> Secondly, even when no concluded contract has been reached, it seems appropriate to allow each party to rely on what the other has “outwardly manifested”, rather than insist on proof of each party’s subjective intention.

## “Objective” meaning known not to be party’s intention

- <sup>192</sup> It is submitted, however, that even when the parties had concluded a prior agreement, and (if the arguments in the preceding paragraphs are accepted) in cases in which there was no concluded agreement but the parties regarded their negotiations on the relevant issue as complete, and the final document does not reflect accurately the seemingly “objective” meaning of the prior agreement, it would not always be right to rectify the document to match that objective meaning. Lord Hoffmann’s dictum in *Chartbrook Ltd v Persimmon Homes Ltd*<sup>447</sup> quoted earlier,<sup>448</sup> like the statement he quotes from Denning LJ, appears to look only at the evidence of prior agreement in a purely objective way,

<sup>449</sup>

**U** from the view point of “the reasonable fly on the wall”.<sup>450</sup> The test normally used in English contract law to determine the content or meaning of a contract is not wholly objective in this sense.<sup>451</sup> First, as submitted earlier, if the parties were in fact in subjective agreement as the meaning of their words, it is at least arguable that their subjective intentions should govern.<sup>452</sup> Secondly, if there is no subjective agreement, the question is how A understood B’s words and whether A’s interpretation was reasonable, and vice versa.<sup>453</sup> Normally it will be reasonable to understand the words of the prior agreement on their “purely objective” sense.<sup>454</sup> However, if A knew B’s intention to be different from the “purely objective” meaning of the words of the prior agreement, A cannot hold B to that meaning.<sup>455</sup> If the subsequent written agreement provides what B had intended, A should not be entitled to rectification, even if the result is that A is bound by a contract that he did not intend to make. If the written agreement were in the same terms as the prior agreement, but to A’s knowledge B still intended it mean something different, B would be entitled to have it rectified on the basis of a unilateral mistake.<sup>456</sup> It is submitted that even if it cannot be shown that A had actual knowledge that B was still mistaken at the stage of the final draft, B should still be entitled to have the final draft rectified to match the intention that A knew that B had at the earlier stage, unless again B should reasonably have understood the draft as not merely setting down what was previously agreed, but as a new proposal (or perhaps a deliberate assertion that A did not accept the “objective” meaning of the prior agreement).<sup>457</sup> The aim of rectification should

be “to ensure the written agreement reflects the true bargain between the parties as determined by ordinary principles of contract formation”.<sup>458</sup>

## A ought to have known of B’s intention

- 193 It is arguable that in cases in which B’s intention differed from the “purely objective”, relief should be given even if A did not have actual knowledge of B’s intention but A should have known that it was different to the objective meaning of the words used in the prior agreement. A’s belief that B intended what he appeared to say is not a reasonable belief. In the case of an oral contract, although the authorities are not conclusive, the result at common law may be either that there is one on the terms which B intended and A should reasonably have understood to be intended, or that there is no contract.<sup>459</sup> It was submitted that the latter is the better solution, as to treat the contract as being on the terms that B intended would be to impose on A terms to which A never intended to agree.<sup>460</sup> If that is correct, it would be wrong to rectify the written agreement to bring it into line with the “purely objective” meaning of the prior agreement. Rather, the prior agreement should be treated as void and the final document cancelled.<sup>461</sup>

## A “unilateral mistake” approach

- 194 The examples discussed in the two previous paragraphs raise the issue of whether in cases in which the parties were not in subjective agreement over the “prior accord”, it is more appropriate to consider rectification for unilateral mistake than to use rectification for common mistake.<sup>462</sup> Unilateral mistake focuses on the intentions and understandings of the parties at the stage of signature of the document, rather than on the meaning of the prior agreement and whether there was a continuing common intention. On the authorities as they stand at present, rectification can be given on the ground of unilateral mistake only if the defendant knew that the document signed did not represent the claimant’s intention, or deliberately caused the mistake.<sup>463</sup> It is submitted that this might leave some deserving claimants without a remedy. Suppose in the prior negotiations, A intends *x* and B intends *y*. The “objective meaning” of the agreement is *x*. That must be because this is what the words used would mean to the reasonable person in the circumstances (and that A did not know of B’s actual intention). The parties then draft a document into which B, without any intent to deceive, has inserted a clause providing for *y*. A may reasonably assume that the document merely represents what was previously agreed and sign without noticing the slip.<sup>464</sup> It is submitted that A should be able to obtain rectification, provided that A reasonably understood the draft as merely setting down what was previously agreed, rather than as a new proposal (or perhaps a deliberate assertion that B did not accept the “objective” meaning of the prior agreement). But in this case rectification could not be given either on the basis of a subjective common intention,

nor on the basis of unilateral mistake, as the law is currently understood,<sup>465</sup> as B did not know of A's mistake. If the doctrine of relief for unilateral mistake were to be extended in the fashion suggested in the preceding paragraph, it might deal adequately with cases like the one envisaged in this paragraph. It could be argued that B should have known, from the "purely objective" meaning of the prior agreement and the fact that he has not flagged up a change, that the final document did not represent A's intentions. A could then at least seek to have the document cancelled. However, such an extension of relief has yet to be made and is likely to be controversial. Unless and until it is made, it is submitted that rectification to bring the agreement into line with the objective meaning of the prior agreement (concluded or not) is a useful supplement to rectification when the final document is different to the subjective understanding of one of the parties and rectification for unilateral mistake is not available.

## Footnotes

- <sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022); Macmillan, *Mistakes in Contract Law* (2010).
- <sup>238</sup> *Hodge, Rectification*, 2nd edn (2016); A Burrows, "Construction and Rectification" in A. Burrows and E. Peel (eds), *Contract Terms* (2007), 77; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019), paras 13-38—13-54; *McLauchlan* (2008) 124 *L.Q.R.* 608, (2010) 126 *L.Q.R.* 8 and (2014) 130 *L.Q.R.* 83. N. Patten, "Does the law need to be rectified? Chartbrook revisited", Chancery Bar Association Annual Lecture 2013, available at <http://www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited> [Accessed 1 September 2021]; R. Toulson, "Does Rectification Require Rectifying?", TECBar Lecture 2013, available at <https://www.supremecourt.uk/docs/speech-131031.pdf> [Accessed 1 September 2021]; T. Etherton, "Contract and the Fog of Rectification" (2015) 68 *Current Legal Problems* 367.
- <sup>395</sup> *[2009] UKHL 38, [2009] 1 A.C. 1101*. The point on rectification did not have to be decided but it had been fully argued. The other members of the Judicial Committee agreed with Lord Hoffmann, see above, para.<sup>5-062</sup>.
- <sup>396</sup> In practice, if the parties shared a common intention and each had each expressed their intention outwardly, that will normally be the objective meaning of the prior agreement.
- <sup>397</sup> *[2019] EWCA Civ 1361, [2020] Ch. 365* at [47]–[48].
- <sup>398</sup> As there was no challenge to the trial judge's findings that the parties subjectively intended that the agreement would only provide for the respondent to give security and did not intend to impose on the respondent the additional obligations in fact contained in the document signed, and that they had expressed their intentions outwardly, it seems that the CA's view that, where the prior agreement is not binding, rectification cannot be given on the "objective" basis is technically obiter.

- 399 [2009] UKHL 38, [2009] 1 A.C. 1101.
- 400 [2009] UKHL 38 at [60].
- 401 [1953] 2 Q.B. 450, 461.
- 402 [2009] UKHL 38 at [59].
- 403 [2009] UKHL 38 at [64]–[65].
- 404 As the amount was called in the Court of Appeal: [2008] EWCA Civ 183 at [13].
- 405 See above, para.5-060.
- 406 [2009] UKHL 38 at [66].
- 407 [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333.
- 408 [2009] UKHL 38, [2009] 1 A.C. 1101. The point on rectification did not have to be decided but it had been fully argued. The other members of the Judicial Committee agreed with Lord Hoffmann see above, para.5-062.
- 409 *McLauchlan* (2010) 126 L.Q.R. 8, 13.
- 410 *Daventry DC v Daventry and District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333. See *McLauchlan* (2014) 131 L.Q.R. 83. See also Lord Toulson’s lecture, above, para.5-057 and the very full account of the *Daventry* case and the commentary on it in Hodge, Rectification, 2nd edn (2016), paras 3-61 et seq.
- 411 [2011] EWCA Civ 1153 at [178]–[185]. Etherton LJ (at [97]–[98]) held that rectification could not be granted on the basis of unilateral mistake as the trial judge held the Council had not proved that the Housing Association knew of the Council’s mistake, and had found that the Housing Association’s representative was not guilty of dishonesty. The Master of the Rolls found it unnecessary to decide whether rectification should be granted on the ground of unilateral mistake (at [226]).
- 412 [2011] EWCA Civ 1153 at [19]. In *NHS Commissioning Board v Silovsky* [2015] EWHC 3141 (Comm), Leggatt J respectfully agreed with Lord Neuberger MR but held that he was bound to apply Lord Hoffmann’s “strong” objective approach: at [31]. The case was affirmed without reference to this point, [2017] EWCA Civ 1389. See also *Magellan Spirit ApS v Vitol SA (The Magellan Spirit)* [2016] EWHC 454 (Comm), [2016] 2 Lloyd’s Rep. 1 at [42].
- 413 [2011] EWCA Civ 1153 at [196]–[202]. The case is noted by *Dawson* (2015) 131 L.Q.R. 344.
- 414 [2011] EWCA Civ 1153 at [104].
- 415 See below, para.5-067.
- 416 [2015] EWHC 57 (Comm).
- 417 [1994] C.L.C. 561.
- 418 [2015] EWHC 57 (Comm) at [91].
- 419 [2015] EWHC 57 (Comm) at [92].
- 420 [2015] EWHC 57 (Comm) at [93]. See also *AML Global Ltd v ExxonMobil Petroleum and Chemical BVBA* [2018] EWHC 3321 (TCC) at [43].
- 421 Hodge, Rectification, 2nd edn (2016), paras 3-53 et seq. and 3-107, points out that even this should not be permitted where the objective meaning of the prior agreement was not consistent with what the claimant subjectively intended at the time.
- 422 Ruddell [2014] L.M.C.L.Q. 48; Hodge, Rectification, 2nd edn (2016), paras 3-92 et seq. and 3-107 (with which Waksman J agreed, obiter, in *AML Global Ltd v ExxonMobil Petroleum*

and Chemical BVBA [2018] EWHC 3321 (TCC) at [44]); and see the lecture by Lord Justice Patten, above, para.5-057.

423 [1994] C.L.C. 561.

424 [2019] EWCA Civ 1361, [2020] Ch. 365.

425 [2019] EWCA Civ 1361, [2020] Ch. 365; Beale and Beale [2020] L.M.C.L.Q. 1; Davies (2020) 79 C.L.J. 8; Peel (2020) 136 L.Q.R. 205; McLauchlan (2020) 36 J.C.L. 131.

426 FSHC Group Holdings Ltd v Barclays Bank Plc [2018] EWHC 1558 (Ch).

427 [2019] EWCA Civ 1361 at [5] and [184].

428 [2019] EWCA Civ 1361 at [134]. (Nor was the *Chartbrook* principle questioned in *Persimmon Homes Ltd v Hillier* [2019] EWCA Civ 800, which was not cited in the *FSHC* case.)

429 As Leggatt LJ pointed out, this has sometimes been seen as analogous to granting specific performance of the prior agreement: [2019] EWCA Civ 1361 at [93] and [141], referring to *Lovell and Christmas Ltd v Wall* (1911) 104 L.T. 85, 88.

430 [2019] EWCA Civ 1361 at [122].

431 [2019] EWCA Civ 1361 at [162], referring to [1994] C.L.C. 5561, esp. at 573. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 Lord Hoffmann had explained the *Britoil* decision as resting on the fact that the prior agreement was too uncertain for the court to be able to predicate what that agreement was: at [63].

432 At [142] and [147]. It seems that Leggatt LJ is referring to a lack of good faith in the sense of dishonesty; compare the somewhat stronger versions (e.g. “commercially unacceptable”) that have been advocated in other contexts, see above, paras 2-081 et seq.

433 FSHC Group Holdings Ltd v GLAS Trust Corp Ltd [2019] EWCA Civ 1361 at [176]. The Court of Appeal’s approach has been followed in Scotland, where rectification is based on the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s.8, in interpreting that section’s reference to a document that “fails to express accurately the common intention of the parties to the agreement at the date when it was made”: *Briggs of Burton Plc v Doosan Babcock Ltd* [2020] CSOH 100.

434 [2019] EWCA Civ 1361, [2020] Ch. 365 at [155]–[163].

435 [1994] C.L.C. 561.

436 [1994] C.L.C. 561, 573

437 [1994] C.L.C. 561, 577.

438 In the passage from the judgment of Mustill J quoted earlier in the paragraph, the judge does not say how the meaning of a “concluded” prior agreement is to be judged, but it would certainly be in the objective manner by which contracts are normally interpreted.

439 See above, para.5-068.

440 [1994] C.L.C. 561.

441 See also Ruddell [2014] L.M.C.L.Q. 48, 58.

442 [1994] C.L.C. 561, 569.

443 *Etablissements Levy v Adderley Navigation Co Panama SA (The Olympic Pride)* [1980] 2 Lloyd’s Rep. 67, 72–73.

444 [2019] EWCA Civ 1361, [2020] Ch. 365 at [159].

- 445 If A was aware that B had a different understanding of what was agreed, then rectification may be available on the basis of a unilateral mistake.
- 446 See above, para.5-067.
- 447 [2009] UKHL 38, [2009] 1 A.C. 1101 at [60].
- 448 Above, para.5-080.
- 449 Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.13-40.
- 450 *Spencer* [1973] C.L.J. 104, 108.
- 451 See above, paras 4-004—4-006.
- 452 See above, paras 5-014 and 5-065.
- 453 See above, para.5-014.
- 454 In *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 Arden LJ pointed out that Lord Hoffmann's test is not fully objective as the meaning of any words is taken to be that which the meaning would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which the parties were at the time of their agreement (at [46]).
- 455 No more than A can accept an apparent offer from B which A knows does not represent B's true intention: see *Hartog v Colin and Shields* [1939] 3 All E.R. 566, above, para.5-022. See also paras 4-004—4-006; *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm) at [228], though doubted in the CA: [2009] EWCA Civ 1334 at [17]; *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm) at [54]—[57]; *Blue v Ashley* [2017] EWHC 1928 (Comm) at [64].
- 456 *Daventry DC v Daventry and District Housing Ltd* [2011] EWCA Civ 1153 at [177], per Toulson LJ at [178]. For rectification on the basis of unilateral mistake see above, paras 5-070 et seq.
- 457 See above, para.5-068.
- 458 *McLauchlan* (2008) 124 L.Q.R. 608, 640.
- 459 See above, paras 5-032—5-033.
- 460 Above, para.5-033.
- 461 cf. above, para.5-035.
- 462 *McLauchlan* (2010) 126 L.Q.R. 8, 13 argues that if Chartbrook knew of Persimmon's mistake, there would be a claim based on unilateral mistake, on which see above, paras 5-070—5-071. As they did not know, the writer concludes that the only proper basis for rectification would be if Chartbrook ought to have known that Persimmon did not intend super coverage to be payable, when there might also be a claim based on unilateral mistake or the contract might be void, see above, para.5-078.
- 463 See above, paras 5-072—5-073.
- 464 See above, paras 5-066—5-067.
- 465 See above, para.5-078.

## (e) - General Principles

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Mistakes as to the Terms or as to Identity<sup>1</sup>

Section 4. - Rectification of Written Agreements<sup>238</sup>

(e) - General Principles

### Proof of mistake

- <sup>195</sup> The burden of proof is on the party seeking rectification.<sup>466</sup> He must produce “convincing proof”<sup>467</sup> not only that the document to be rectified was not in accordance with the parties’ true intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions.<sup>468</sup> It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract.<sup>469</sup> Although it has sometimes been suggested that the standard of proof is that required in criminal proceedings,<sup>470</sup> that was rejected by the Court of Appeal in *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and The Nai Superba)*.<sup>471</sup> It is also now established that there is only one standard of proof in civil cases, namely the balance of probabilities.<sup>472</sup>

“The explanation for the statements that ‘convincing proof’ is needed where rectification is claimed lies in the very nature of the allegation that the written instrument does not record the parties’ common intention ... The fact that the parties to a contract have approved particular language as the appropriate expression of their bargain is thus often itself cogent evidence that the document correctly records their common intention, so that convincing proof will be needed to displace that inference.”<sup>473</sup>

The denial of one of the parties that the deed as it stands is contrary to his intention ought to have considerable weight.<sup>474</sup> Indeed, it has been said that it is not sufficient that the written contract

does not represent the true intention of the parties; it must be shown that the written contract was actually contrary to the intention of the parties.<sup>475</sup> Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document.<sup>476</sup>

## Negotiations by agents<sup>477</sup>

**D** When the contract is concluded by an agent on behalf of another legal person, it is the intention of the agent that is relevant. Where the negotiator does not have authority to conclude the contract, the negotiator's intentions have sometimes been treated as irrelevant.<sup>478</sup> However, more recently it has been held that the negotiator's intentions may be the relevant ones if the negotiator shares in a relevant way those intentions with the person who is the decision maker.<sup>479</sup> So where a person who would normally be expected to be the decision maker (such as the board of a company) leaves it to a negotiator to negotiate a deal and produce a contract by instructing solicitors, on the understanding that the decision maker would do a deal on those terms, then the negotiator's intention is the relevant one, either because that person is the decision maker, or, if that description is not apt, because the technical decision maker has simply adopted the intentions of the negotiator.<sup>480</sup> Where the decision is made by a collective body such as a board of trustees, it has been suggested that:

“... the correct approach is first to identify the trustees who participated in the actual decision pursuant to which they committed themselves collectively to the words in that part of the document which (objectively construed) is said not to reflect the actual subjective intent. In a case such as the present, that is all of the Trustees, because they were all parties to the relevant document. However, in carrying out that exercise, it may be the case that the actual intention of some of them was simply to be guided by others on a particular issue without having any independent intent of their own. That is only likely to arise, however, where notwithstanding their status as trustee they are not in fact a decision maker in relation to the relevant issue, for example because the words or their legal effect were of insufficient significance for them to need to form a view which was independent of the view of those who addressed and were known to have addressed the issue in question.”

481



## Mistake as to terms

- 197 There must be a disparity between the terms of the prior agreement and those of the document which it is sought to rectify. In *Frederick E. Rose (London) Ltd v William H. Pim Junior & Co Ltd*,<sup>482</sup> the parties entered into an oral agreement for the purchase of horsebeans, in the belief that they were the same as “feveroles”, and a subsequent written agreement embodied the same terms. Denning LJ said:

“Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. ... in order to ascertain the terms of their contract, you do not look into the inner minds of the parties —into their intentions any more than you do in the formation of any other contract. You look at their outward acts ...”

Insofar as this dictum seems to say that the subjective intentions of the parties are irrelevant, even if expressed outwardly as in that case, it has given rise to some difficulties of interpretation.<sup>483</sup> However, it is submitted that the case is readily explicable on a simpler basis, which was in fact the basis on which the other members of Court of Appeal decided it. Rectification was refused because both the oral and written contracts were for horse-beans; the mistake was not about the terms of the contract but one of fact,<sup>484</sup> namely that the parties both thought that feveroles and horsebeans were the same, so that horsebeans would fulfil the buyers’ requirements. In contrast, where two persons expressly agree with one another what is the meaning of a particular phrase used in a written contract, the contract can be rectified to make it clear that the phrase bears the meaning agreed.<sup>485</sup>

## Live issue required

- 198 Rectification will only be ordered so long as there is an issue between the parties as to their legal rights inter se. If there is no such issue or if no substantive relief is sought and no practical purpose will be achieved rectification may be refused.

<sup>486</sup>



## Specific performance

- 199 Before the **Judicature Act 1873**, it was generally held that the court would not grant rectification of the contract to comply with its proper terms and then grant specific performance of the contract so rectified, at least in the same action.<sup>487</sup> But the **Judicature Act 1925 s.43** required the court to grant to the parties in one action all the relief to which they are entitled,<sup>488</sup> and this has been held to confer upon the court the power to order rectification and specific performance in the same action, even though the mistake has been proved by parol evidence.<sup>489</sup>

## A discretionary remedy

- 200 As with other equitable remedies, the court has a residual discretion to refuse to grant rectification.

D 490

- On at least one occasion rectification has been awarded on terms.<sup>491</sup>

## Effect of negligence

- 201 The fact that one party's negligence has caused the mistake appears to be irrelevant where rectification is sought on the ground of a mistake common to both parties<sup>492</sup>:

"If it were, many a claim to rectification for mutual mistake would fail since, ex hypothesi, the instrument as executed has failed accurately to express the parties' common intention and this will very often have been as a result of carelessness for which, in part at least, the claimant for relief must share responsibility."<sup>493</sup>

Equally, in cases of unilateral mistake, provided that the claimant's mistake was known to the defendant or the defendant had deliberately sought to distract the claimant from discovering that the document did not reflect what he intended,<sup>494</sup> it seems to be irrelevant that the claimant might have discovered the mistake had he used more care.

## Delay or acquiescence

- <sup>102</sup> A claimant who has discovered the mistake but delayed in seeking rectification may be denied it on the ground of laches. Mere lapse of time is no bar if the mistake is clearly proved,<sup>495</sup> but as Blackburne J put it<sup>496</sup>:

“... it is well established that the doctrine does not come into play before the person against whom it is raised as a defence has discovered the material facts, in this case the mistake. It must be shown that the subsequent delay in pursuing the claim renders it ‘practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were otherwise to be asserted’. <sup>497</sup> As Lord Selborne went on to observe<sup>498</sup>:

“Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.””

A claim for rectification may also be barred by acquiescence,

“the non-exercise of a right in circumstances where the obligor may reasonably assume that it will never be exercised.”

<sup>499</sup>



## Parties must be restored to former position

- <sup>103</sup> Rectification will be refused if the parties cannot be restored to the same position which they occupied prior to the contract sought to be rectified; but this rule will not be applied so strictly as to require an exact restoration where such is difficult or impossible.<sup>500</sup>

## Payment of money under judgment

- 104 After money had been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that this construction was contrary to the intention of all parties was refused by the Court of Appeal. There was no question of res judicata, but the agreement had been worked out and a fund distributed on that footing.<sup>501</sup>

## Third parties

- 105 Rectification may be granted against third parties<sup>502</sup> but a conveyance will not be rectified as against a purchaser for value of a legal or equitable interest claiming under the deed in good faith and without notice of the mistake.<sup>503</sup> It may, however, be granted after the death of one of the parties.<sup>504</sup>

## Procedure

- 106 Actions for rectification, setting aside or cancellation of deeds or other written instruments are by s.61 of and Sch.1 to the Senior Courts Act 1981 assigned to the Chancery Division of the High Court, but a counterclaim for rectification or cancellation is not infrequently entertained by the Queen's Bench Division.<sup>505</sup>
- 107 By ss.23 and 147(1) of the County Courts Act 1984, the county court may exercise all the powers of the High Court in proceedings for the rectification, delivery up or cancellation of any agreement for the sale, purchase or lease of any property where, in the case of a sale or purchase, the purchase money, or, in the case of a lease, the value of the property, does not exceed £350,000<sup>506</sup> and also in proceedings for relief against fraud or mistake, where the damage sustained or the estate or fund in respect of which relief is sought does not exceed in amount or value £350,000.<sup>507</sup> The same limit applies to actions for the specific performance of such contracts.<sup>508</sup>

## Other instances of rectification

108

The court has rectified a bill of exchange,<sup>509</sup> a marine insurance policy,<sup>510</sup> a transfer of shares wrongly numbered,<sup>511</sup> a bill of quantities,<sup>512</sup> and bought and sold notes by inserting therein a clause customary in a particular trade,<sup>513</sup> a disclosure letter that had the effect of qualifying contractual warranties given by a seller<sup>514</sup> and very frequently conveyances of land.<sup>515</sup> A charge registered at the Land Registry pursuant to the [Land Registration Act 2002](#) may be rectified.<sup>516</sup>

## Marriage settlements

- <sup>109</sup> The court has used its jurisdiction in order to rectify marriage settlements.<sup>517</sup> If both the marriage articles and the settlement are executed before the marriage takes place, rectification will not be ordered so as to bring the settlement into line with the articles unless the settlement is expressly or impliedly executed in pursuance of the articles. But if the settlement is made after the marriage, it will be rectified so as to make it correspond with the articles.<sup>518</sup> It also seems that the court will readily admit evidence on behalf of the settlor alone that the settlement does not conform with his intention.<sup>519</sup>

## Articles of association

- <sup>110</sup> The court has no jurisdiction to rectify the articles of association of a company on the ground that they do not accord with the proved intention of the signatories at the moment of signature. Any power of alteration in this respect is purely statutory and there is no hint in the Companies Act of any power in the court to rectify.<sup>520</sup>

## Voluntary settlements

- <sup>111</sup> A voluntary deed cannot be rectified except with the consent of the donor,<sup>521</sup> and the court will hesitate to rectify such a deed at the suit of the settlor merely on their own evidence as to their intention unsupported by other evidence such as written instructions.<sup>522</sup> Nevertheless, the unilateral mistake of the settlor will suffice, in certain circumstances, to justify rectification<sup>523</sup>

 or rescission<sup>524</sup> of a settlement. If it is clearly shown that the settlement as executed does not express the true intentions of the settlor, and if the settlement was not executed by trustees or other

parties as the result of a contract or bargain, rectification can be ordered. If the trustees object, however, the court may, in its discretion, refuse an order for rectification.<sup>525</sup>

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 19 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022); Macmillan, Mistakes in Contract Law (2010).
- 238 Hodge, Rectification, 2nd edn (2016); A Burrows, “Construction and Rectification” in A. Burrows and E. Peel (eds), Contract Terms (2007), 77; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019), paras 13-38—13-54; *McLauchlan* (2008) 124 *L.Q.R.* 608, (2010) 126 *L.Q.R.* 8 and (2014) 130 *L.Q.R.* 83. N. Patten, “Does the law need to be rectified? Chartbrook revisited”, Chancery Bar Association Annual Lecture 2013, available at <http://www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited> [Accessed 1 September 2021]; R. Toulson, “Does Rectification Require Rectifying?”, TECBar Lecture 2013, available at <https://www.supremecourt.uk/docs/speech-131031.pdf> [Accessed 1 September 2021]; T. Etherton, “Contract and the Fog of Rectification” (2015) 68 Current Legal Problems 367.
- 466 *Tucker v Bennett* (1887) 38 *Ch. D.* 1, 9.
- 467 This was the expression preferred by the Court of Appeal in *Joscelyne v Nissen* [1970] 2 *Q.B.* 86. See also *Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd* [1973] 2 *Lloyd's Rep.* 101; *Thomas Bates & Son v Wyndhams Ltd* [1981] 1 *W.L.R.* 505.
- 468 *Fowler v Fowler* (1859) 4 *De G. & J.* 250, 265; *Constantinidi v Ralli* [1935] *Ch.* 427. But provided that the true agreement is clear, it is sufficient if it is merely doubtful whether the document accurately records this agreement: *Re Walton's Settlement* [1922] 2 *Ch.* 509.
- 469 *Earl of Bradford v Earl of Romney* (1862) 30 *Beav.* 431; *Harris v Pepperell* (1867) *L.R.* 5 *Eq.* 1, 4; *Stait v Fenner* [1912] 2 *Ch.* 504. Where lengthy negotiations have taken place between experienced negotiators, there must be a strong presumption that the parties intended to be bound by precisely the words they used, not some earlier understanding which might be derived from earlier, less carefully drafted documents: *Snamprogetti Ltd v Phillips Petroleum Co UK Ltd* [2001] *EWCA Civ* 889 at [33]. And see above, para.5-085.
- 470 *Atlantic Maritime Transport Corp v Coscol Petroleum Corp, The Pina* [1991] 1 *Lloyd's Rep.* 246, 250 (“proof to the criminal standard”).
- 471 [1984] 1 *Lloyd's Rep* 353, 359.
- 472 *In Re B (Care Proceedings)* [2009] 1 *A.C.* 11.
- 473 *Tartsinis v Navona Management Co* [2015] *EWHC* 57 (*Comm*) at [85]. See also *Price v Saundry* [2019] *EWHC* 496 (*Ch*) at [15]. The evidential weight to be given to the document will vary according to the circumstances, for example whether it was prepared after long

negotiations with the help of legal advisers, how clearly the document is drafted and whether the drafters were working in their first language: [2015] EWHC 57 (Comm) at [86]).

- 474 *Fowler v Fowler* (1859) 4 De G. & J. 250, 265; *Wollaston v Tribe* (1869) L.R. 9 Eq. 44; *Cook v Fearn* (1878) 48 L.J. Ch. 63; *Hanley v Pearson* (1879) 13 Ch. D. 545. cf. *Tucker v Bennett* (1887) 38 Ch. D. 1; *Bonhote v Henderson* [1895] 1 Ch. 742, affirmed [1895] 2 Ch. 202; *Re Walton's Settlement* [1922] 2 Ch. 509.
- 475 *Lloyd v Stanbury* [1971] 1 W.L.R. 535; *Pappadakis v Pappadakis*, *The Times*, 19 January 2000. It is not enough that there has been confusion between the parties as to what was being agreed: *Cambro Contractors Ltd v John Kennelly Sales Ltd*, *The Times*, 14 April 1994.
- 476 *Fowler v Fowler* (1859) 4 De G. & J. 250. See above, paras 5-066—5-067.
- 477 See Davies, “*Agency and Rectification*” (2020) 136 L.Q.R. 77.
- 478 *Mayor and Burgesses of the London Borough of Barnet v Barnet Town Football Club Holdings Ltd* [2004] EWCA Civ 1191 at [56]–[57]; *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] B.L.R. 135 at [47].
- 479 *Hawksford Trustees Jersey Ltd (Trustee of the Bald Eagle Trust) v Stella Global UK Ltd* [2012] EWCA Civ 55 at [41].
- 480 *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch) at [198], per Mann J.
- 481 *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch), [2020] Pens. L.R. 23 at [212] (Trower J.).
- 482 [1953] 2 Q.B. 450, 461. Compare above, para.5-025.
- 483 See the discussion of the case at [2019] EWCA Civ 1361 at [63]–[66] and [69]–[71].
- 484 cf. above, para.5-002.
- 485 See above, para.5-059.
- 486 *Whiteside v Whiteside* [1950] Ch. 65; cf. *Re Colebrook's Conveyances* [1972] 1 W.L.R. 1397; *Etablissements Georges et Paul Levy v Adderley Navigation Co SA* [1980] 2 Lloyd's Rep. 67. Provided that there is an issue capable of being contested by the parties it is no bar to rectification that both sides wish the document to be rectified so as to reduce one party's tax liability: *Lake v Lake* [1989] S.T.C. 865; *Racal Group Services Ltd v Ashmore* [1995] S.T.C. 1151. In the *Racal* case it was said that rectification will not be ordered if the parties' rights will not be affected and the only effect would be to secure a fiscal benefit: [1995] S.T.C. 1151, 1157. See also *Giles v R.N.I.B* [2014] EWHC 1373 (Ch); *RBC Trustees (CI) Ltd v Stubbs* [2017] EWHC 180 (Ch) and *Ware v Ware* [2021] EWHC 694 (Ch). Where the parties have resolved the issue (as to who was a party to the contract) between themselves by means of a deed of rectification, and rectification of the document would merely bring a tax advantage to one of the parties, rectification will be refused unless there was a specific shared intention to bring about that tax consequence: *MV Promotions Ltd v Telegraph Media Group Ltd* [2020] EWHC 1357 (Ch).
- 487 *Woollam v Hearn* (1802) 7 Ves. 211; *Martin v Pycroft* (1852) 3 De G.M. & G. 785; cf. *Thomas v Davis* (1757) 1 Dick. 301.
- 488 See now Senior Courts Act 1981 s.49.

- 489 *Olley v Fisher* (1886) 34 Ch. D. 367; *Craddock Bros v Hunt* [1923] 2 Ch. 136; *USA v Motor Trucks Ltd* [1924] A.C. 196, not following *May v Platt* [1900] 1 Ch. 616.
- 490 *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch), [2006] All E.R. (D) 247 (Jan) at [193] et seq. (party not disentitled by sending a clean copy of a draft rather than one showing the amendments which were proposed, and stating that none of the amendments were of any substance, even when it was known that some were. The other party in fact spotted the changes); reversed without reference to this point [2007] EWCA Civ 363, [2007] All E.R. (D) 245 (Apr). See also *Equity Syndicate Management Ltd v Glaxosmithkline Plc* [2015] EWHC 2163 (Comm), [2016] Lloyd's Rep. I.R. 155 at [46]–[47] (on the facts it would have been inequitable to withhold the remedy); *Markel Bermuda Ltd v Caesars Entertainment Inc* [2021] EWHC 1931 (Comm) at [108]–[114] (on facts claimant did not have “unclean hands”); *LLC Agronefsteproduct v Ameropa AG* [2021] EWHC 3474 (Comm), [2022] 1 Lloyd's Rep 388 at [26] (inequitable to rectify a Notice of arbitration and decide that the tribunal had no jurisdiction when, subsequent to the Notice, the parties had signed a “Washout Agreement” by which the Sellers agreed that the Buyers were to be entitled to continue with the arbitration should the settlement sum not be paid).
- 491 *Central & Metropolitan Estates Ltd v Compusave* (1982) 266 E.G. 900 (20-year fixed term lease rectified to include clause allowing rent to be reviewed each five years, on the basis of landlord’s unilateral mistake known to tenant; tenant given option to surrender lease after five years). See Hodge, Rectification, 2nd edn (2016), paras 1-46 and 1-58—1-59.
- 492 *Kent v Hartley* (1966) 200 E.G. 1027; *Weeds v Blaney*, *The Times*, 18 March 1976.
- 493 Blackburne J in *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch), [2006] All E.R. (D) 247 (Jan) at [195]; reversed without reference to this point [2007] EWCA Civ 363, [2007] All E.R. (D) 245 (Apr).
- 494 See above, para.5-073.
- 495 *Millar v Craig* (1843) 6 Beav. 433; *Re Garnett* (1885) 31 Ch. D. 1; cf. *Beale v Kyte* [1907] 1 Ch. 564 (laches).
- 496 *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch), [2006] All E.R. (D) 247 (Jan) at [197], reversed without reference to this point [2007] EWCA Civ 363, [2007] All E.R. (D) 245 (Apr). In *Ahmad v Secret Garden (Cheshire) Ltd* [2013] EWCA Civ 1005 at [56] Arden LJ referred to “the inordinate delay that would be necessary to deprive a person of his right to apply for rectification”.
- 497 *Lindsay Petroleum Co v Hurd* (1873) 5 App. Cas. 221, 239 (per Lord Selborne).
- 498 (1873) 5 App. Cas. 221, 240.
- 499 Briggs J in *Transview Properties Ltd v City Site Properties Ltd* [2008] EWHC 1221 (Ch) at [149] (affd without reference to the point [2009] EWCA Civ 1255: cited in *Tyne and Wear Passenger Transport Executive (t/a Nexus) v National Union of Rail, Maritime and Transport Workers* [2021] EWHC 1388 (Ch) at [67] (appeal outstanding)).
- 500 *Earl of Beauchamp v Winn* (1873) L.R. 6 H.L. 223. cf. below, paras 9-132 et seq.
- 501 *Caird v Moss* (1886) 33 Ch. D. 22.
- 502 *Leuty v Hillas* (1858) 2 De & G. J. 110; *Craddock Bros v Hunt* [1923] 2 Ch. 136.

- 503 *Bell v Cundall* (1750) *Amb.* 101; *Smith v Jones* [1954] 1 *W.L.R.* 1089; *Lyme Valley Squash Club Ltd v Newcastle-under-Lyme BC* [1985] 2 *All E.R.* 405, 413. It is no bar to rectification that it would deprive a third party of an unintended windfall: *Equity Syndicate Management Ltd v Glaxosmithkline Plc* [2015] *EWHC* 2163 (*Comm*) at [47].
- 504 *Johnson v Bragge* [1901] 1 *Ch.* 28.
- 505 *Mostyn v West Mostyn Coal & Iron Co Ltd* (1876) 1 *C.P.D.* 145; *Storey v Waddle* (1879) 4 *Q.B.D.* 289; but see *Leslie v Clifford* (1884) 50 *L.T.* 690 (partnership accounts transferred to Chancery Division).
- 506 See *County Court Jurisdiction Order 2014* (SI 2014/503), revoking and replacing *County Courts Jurisdiction Order 1981* (SI 1981/1123).
- 507 *R. v Judge Whitethorne* [1904] 1 *K.B.* 827 and *Angel v Jay* [1911] 1 *K.B.* 666.
- 508 See below, Ch.30; but see also *Bourne v Macdonald* [1950] 2 *K.B.* 422 and ss.21 and 38 of the Act.
- 509 *Druiff v Lord Parker* (1868) 5 *Eq.* 131.
- 510 *Spalding v Crocker* (1897) 2 *Com. Cas.* 189.
- 511 *Re International Contract Co* (1872) 7 *Ch. App.* 485.
- 512 *Neill v Midland Ry* (1869) 17 *W.R.* 871.
- 513 *Caraman Rowley & May v Aperghis* (1923) 40 *T.L.R.* 124.
- 514 *Persimmon Homes Ltd v Hillier* [2019] *EWCA Civ* 800, [2020] 1 *All E.R.* (*Comm*) 475.
- 515 *Beale v Kyte* [1907] 1 *Ch.* 564; *Craddock Bros v Hunt* [1923] 2 *Ch.* 136. In *Lee v Lee* [2018] *EWHC* 149 (*Ch*) a notice of severance was rectified.
- 516 See *Cherry Tree Investments Ltd v Landmain Ltd* [2012] *EWCA Civ* 736, [2013] *Ch.* 305.
- 517 *Johnson v Bragge* [1901] 1 *Ch.* 28.
- 518 *Cogan v Duffield* (1876) 2 *Ch. D.* 44.
- 519 *Hanley v Pearson* (1879) 13 *Ch. D.* 545; cf. *Tucker v Bennett* (1887) 38 *Ch. D.* 1.
- 520 *Evans v Chapman* (1902) 86 *L.T.* 381; *Scott v Frank F. Scott (London) Ltd* [1940] *Ch.* 217, affirmed [1940] *Ch.* 794.
- 521 *Phillipson v Kerry* (1863) 32 *Beav.* 628.
- 522 *Bonhote v Henderson* [1895] 1 *Ch.* 742, affirmed [1895] 2 *Ch.* 202; *Van der Linde v Van der Linde* [1947] *Ch.* 306, 311.
- 523 *Re Butlin's Settlement Trusts* [1976] *Ch.* 251; *Ralph v Ralph* [2021] *EWCA Civ* 1106, [2021] 4 *W.L.R.* 128 at [23]–[25] (where the question of how far the principles of rectification applicable to commercial contracts apply to settlements was left open, see at [26]–[32]. It is the subjective intention of the settlor, rather than the intention of an agent of the settlor, which is relevant: see *Day v Day* [2013] *EWCA Civ* 280, [2013] 2 *P. & C.R. DG1*. The burden of proof of the kind of transaction involved is on the party seeking rectification, and whether the transaction is voluntary or one for value is to be judged by the unrectified document, not by what it would be if rectified: *Price v Saundry* [2019] *EWHC* 496 (*Ch*) at [19].
- 524 *Pitt v Holt* [2013] *UKSC* 26 (see below, para.32-058); *Kennedy v Kennedy* [2014] *EWHC* 4129 (*Ch*) (rescission of self-contained and severable part of settlement). In *NRAM Plc v*

*Evans [2015] EWHC 1543 (Ch)* the same principle was applied to a chargee's mistaken cancellation of a charge.

525 *Re Butlin's Settlement Trusts [1976] Ch. 251.*

# Chapter 6 - Consideration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

*Paul S. Davies*

D Replace footnote 1 with: Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 3rd edn (2021); Shatwell (1955) *1 Sydney Law Review* 289.

## Footnotes

- <sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); Shatwell (1955) *1 Sydney Law Review* 289.

## Section 1. - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 1. - Introduction

### General

- 101 In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed or supported by some “consideration”. A party must provide something in exchange for a promise in order to be able to enforce that promise. That “something” is called “consideration”, and may itself be a promise. The purpose of the doctrine of consideration is to put some legal limits on the enforceability of agreements even where they are intended to be legally binding and are not vitiated by some factor such as mistake, misrepresentation, duress or illegality. The existence of such limits is not a peculiarity of English law: for example, in some civil law countries certain promises which in England are not binding for “want of consideration” cannot be enforced unless they are made in some special form, e.g. by a notarised writing.<sup>2</sup> The view was, indeed, at one time put forward in England that consideration was only evidence of the intention of the parties to be bound, and that (at any rate in the case of certain commercial contracts), such evidence could equally well be furnished by writing.<sup>3</sup> But the view that agreements (other than those contained in deeds) were binding without consideration merely because they were in writing was rejected over 200 years ago,<sup>4</sup> though it has been revived as a proposal for law reform.<sup>5</sup> The present position therefore is that English law limits the enforceability of agreements (other than those contained in deeds) by reference to a complex and multifarious body of rules known as “the doctrine of consideration”.

### Informal gratuitous promises

102

The doctrine of consideration is based on the idea of reciprocity: “something of value in the eye of the law”<sup>6</sup> must be given for a promise in order to make it enforceable as a contract.<sup>7</sup> It follows that an informal gratuitous promise does not amount to a contract.<sup>8</sup> A person or body to whom a promise of a gift is made from purely charitable or sentimental motives gives nothing for the promise; and the claims of such a promisee are regarded as less compelling than those of a person who has provided (or promised) some return for the promise.<sup>9</sup> The invalidity of informal gratuitous promises of this kind can also be supported on the ground that their enforcement could prejudice third parties such as creditors of the promisor.<sup>10</sup> Such promises, too, may be rashly made;<sup>11</sup> and the requirements of executing a deed or giving value provide at least some protection against this danger.

## Footnotes

- <sup>1</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- <sup>2</sup> See generally, *von Mehren* (1959) 72 *Harv.L.Rev.* 1009.
- <sup>3</sup> *Pillans v Van Mierop* (1765) 3 *Burr. 1663*.
- <sup>4</sup> *Rann v Hughes* (1778) 7 *T.R.* 350n; 4 *Bro.P.C.* 27.
- <sup>5</sup> Law Revision Committee, 6th Interim Report, Cmnd.5449 (1937), para.29; for comments on this and other proposals in the Report, see Lord Wright, *Legal Essays and Addresses*, p.287; *Hamson* (1938) 54 *L.Q.R.* 233; *Hays* (1941) 41 *Col.L.Rev.* 849; *Chloros* (1968) 17 *I.C.L.Q.* 137; *Beatson* [1992] *C.L.P.* 1. In many of the United States, writing is (at least for some purposes) regarded as a substitute for consideration: *Farnsworth on Contracts*, 4th edn, para.2.18. For a judicial evaluation of the doctrine of consideration, and a discussion of possible alternatives, see *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] SGCA 3 (*Singapore Court of Appeal*) at [92]–[118]. In that case, the requirement of consideration was satisfied (see at [80]–[86]).
- <sup>6</sup> *Thomas v Thomas* (1842) 2 *Q.B.* 851, 859; *Haines v Hill* [2007] *EWCA Civ* 1284, [2008] *Ch.* 412 at [79], citing para.3-002 of this book in its 29th edition (para.6-002 in the present edition) with apparent approval.
- <sup>7</sup> See, for example, *Ashia Centur Ltd v Barber Gillette LLP* [2011] *EWHC* 148 (QB), [2011] *Costs L.R.* 576 at [20] (solicitors held not bound by promise not to charge client for work done after a specified date).
- <sup>8</sup> *Re Hudson* (1885) 54 *L.J. Ch.* 811; *Re Cory* (1912) 29 *T.L.R.* 18; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 *Q.B.* 1, 19.
- <sup>9</sup> cf. *Eisenberg*, 85 *Cal.L.Rev.* 821 (1997).
- <sup>10</sup> *Eastwood v Kenyon* (1840) 11 *Ad. & E.* 438, 451. For legislation giving effect to the similar policy of protecting creditors of a gratuitous transferee of property, see *Insolvency Act 1986* s.242, applied in *Joint Administrators of Oceancrown Ltd v Stonegate Ltd* [2016] *UKSC* 30,

*2016 SC (UKSC) 91* at [17] (“received nothing whatsoever”), approving the judgment in the Court below, quoted in *[2016] UKSC 30* at [13] (“no party paid anything” for the transfer).

- 11    *Beaton v McDivitt (1988) 13 N.S.W.L.R. 162* at 170. It is often easier to promise to make a gift than actually to make one.

## Section 2. - Definitions

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 2. - Definitions

### Benefit and detriment

- 103 The traditional definition of consideration concentrates on the requirement that “something of value” must be given and accordingly states that consideration is either some detriment to the promisee (in that they may give value) or some benefit to the promisor (in that they may receive value).<sup>12</sup> Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller’s promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer’s promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. It should be emphasised that these statements relate to the consideration *for each promise* looked at separately. For example, the seller suffers a “detriment” when they deliver the goods and this enables them to enforce the buyer’s promise to pay the price. It is quite irrelevant that the seller has made a good bargain and so gets a benefit from the performance of the contract. What the law is concerned with is the consideration *for a promise*—not the consideration *for a contract*.

### Either benefit or detriment sufficient

- 104 Under the traditional definition, it is sufficient if there is either a detriment to the promisee or a benefit to the promisor. Thus detriment to the promisee suffices even though the promisor does not benefit<sup>13</sup>: for example, if A guarantees B’s bank overdraft and the promisee bank suffers detriment by advancing money to B, then A is bound by their promise, even though they get no benefit from the advance to B.<sup>14</sup> One view, indeed, was that “Detriment to the promisee is of the essence of the

doctrine, and benefit to the promisor is, when it exists, merely an accident".<sup>15</sup> But in a number of cases promises have been enforced in spite of the fact that there was no apparent detriment to the promisee<sup>16</sup>; and these cases support the view that benefit to the promisor is (even without detriment to the promisee) sufficient to satisfy the requirement of consideration.<sup>17</sup>

## Benefit and detriment may be factual or legal

- 105 The traditional definition of consideration lacks precision because the key notions of "benefit" and "detriment" are used in at least two senses. They may mean, first any act,<sup>18</sup> which is of some value, or secondly, only such acts, the performance of which is not already legally due from the promisee. In the first sense, there is consideration if a benefit or detriment is *in fact* obtained or suffered. When the words are used in the second sense this factual benefit or detriment is disregarded, and a notion of what may be called legal benefit or detriment is substituted. Under this notion, the promisee may provide consideration by doing anything that they were not legally bound to do, whether or not it actually occasions a detriment to them or confers a benefit on the promisor; while conversely they may provide no consideration by doing only what they were legally bound to do, however much this may in fact occasion a detriment to them or confer a benefit on the promisor. The English courts have not consistently adopted either of these senses of the words "benefit" and "detriment". In some of the cases to be discussed in this chapter, factual benefit is stressed<sup>19</sup> even though legal detriment may also have been present; while in others the absence of legal detriment or benefit has in the past been regarded as decisive.<sup>20</sup> The Court of Appeal has on two occasions<sup>21</sup> treated factual benefit to the promisor as sufficient, even in the absence of a legal benefit to them or of a legal detriment to the promisee; but dicta in the Supreme Court,<sup>22</sup> which reversed the second decision on other grounds,<sup>23</sup> throw doubt on the reasoning in the cases.

## Something requested in exchange

- 106 Sir Frederick Pollock has described consideration simply as "the price for which the promise is bought".<sup>24</sup> The courts tend to consider anything that the promisor requested from the promisee in exchange for the promise as a sufficient benefit to the promisor or detriment to the promisee. In *Shadwell v Shadwell*,<sup>25</sup> an uncle wrote to his nephew: "I am glad to hear of your intended marriage with Ellen Nicholl; and as I promised to assist you at starting, I am happy to tell you that I will pay you £150 yearly during my life ...". A majority of the Court of Common Pleas held that the nephew had provided consideration for the uncle's promise by marrying Ellen Nicholl. This is difficult to explain on the basis of benefit or detriment. It was said that there was a detriment to the nephew in that he "may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting

in embarrassments";<sup>26</sup> and that there was a benefit to the uncle in that the marriage was "an object of interest to a near relative".<sup>27</sup> But this reasoning simply ignores the nephew's previous contractual obligation to marry Ellen Nicholl,<sup>28</sup> under which he was legally bound to suffer the alleged detriment. It could perhaps be argued that he forbore from trying to persuade his fiancée to postpone the wedding or to put an end to the engagement<sup>29</sup>; but it is doubtful whether his forbearance to attempt to persuade her to do this can be regarded as consideration in the absence of any suggestion that he contemplated the possibility.<sup>30</sup> The argument that the uncle benefited fares little better, for the benefit described by the court was a purely sentimental one. The decision is difficult to justify,<sup>31</sup> but the best explanation for decision is to be found in the majority's conclusion that the letter was an inducement to the nephew to marry and therefore a request to marry. By complying with this request, the court was able to find sufficient detriment to the nephew for there to be consideration. That may have been a strained interpretation of the letter, but the emphasis all the judges placed upon whether the uncle requested the nephew to marry illustrates the important of exchange to consideration, and the view that the contract represents a bargain made between the parties.

## Other definitions

- 107 Other, wider definitions of consideration are too vague and uncertain. For example, it has been suggested that consideration "*means* a reason for the enforcement of promises"<sup>32</sup>—that reason being simply "the justice of the case".<sup>33</sup> But "the justice of the case" is in almost all the decided cases highly debatable, so that the suggested definition provides no basis at all for formulating a coherent legal doctrine.<sup>34</sup> A modification of the suggested definition, describing consideration as "a reason for the recognition of an obligation"<sup>35</sup> is open to the same objection. The reason why a promise is enforced is, normally, because the promisee did something the promisor requested and there is a detriment to the promisee or benefit to the promisor.

## Performances and promises as consideration

- 108 The consideration for a promise may consist either of a performance rendered by the promisee or of a promise to render a performance. The first possibility is illustrated by cases of unilateral contracts<sup>36</sup> where performance by the promisee of the stipulated act or forbearance (e.g. walking from London to York) constitutes the consideration for the promise (usually) to pay a sum of money to the promisee.<sup>37</sup> The second possibility is illustrated by cases in which each party makes a promise to the other, but neither party has yet rendered any performance. The rule that, in such a case, the parties' mutual promises can amount to consideration for each other has long been

settled.<sup>38</sup> If a seller promises to deliver goods in six months' time, and the buyer to pay for them on delivery, there is an immediately binding contract from which neither party has any right to withdraw, although, of course, performance cannot be claimed until the appointed time. An implied, no less than an express, promise is capable of constituting consideration.<sup>39</sup>

- 109 A promise can, however, only be regarded as consideration for a counter-promise if the performance of the promise would have been so regarded.<sup>40</sup> Part payment of a debt by the debtor on or after the due day does not amount (without more) to consideration for a promise by the creditor to forgo the balance,<sup>41</sup> and the position would be exactly the same if the debtor, instead of actually making such a payment, simply promised to do so. Similarly, a promise to make a gift of £100 could not be made binding by a counter-promise to accept it since performance of the counter-promise could not be viewed in the eyes of the law as a benefit to the original promisor or a detriment to the original promisee. Such benefit or detriment can (in such a case) arise only if the subject-matter of the promised gift is onerous property and the donee makes a counter-promise to discharge the obligations attached to it: e.g. to perform the covenants in a lease,<sup>42</sup> or to pay outstanding mortgage instalments<sup>43</sup> or to pay calls on shares.<sup>44</sup> Of course, if the property is worth more than the obligations attached to it there will be an element of gift in such a transaction; and special safeguards are provided by law to ensure that certain categories of third parties (such as creditors of the promisor) are not prejudiced by this aspect of the transaction.<sup>45</sup>

## Invented consideration

- 110 Normally, a party enters into a contract with a view to obtaining the consideration promised by the other: for example, the buyer wants the goods and the seller the price. In the United States it has been said that this is essential, and that "Nothing is consideration that is not regarded as such by both parties".<sup>46</sup> But English courts do not insist on this requirement and may regard an act or forbearance as consideration even though the promisee "did not consciously realise that [he was] subjecting himself to a detriment and [was] giving consideration for the [promisor's] undertaking"<sup>47</sup> or even though it was not the object of the promisor to secure it.<sup>48</sup> They may also treat the possibility of some prejudice to the promisee as a detriment without regard to the question whether it has in fact been suffered.<sup>49</sup> These practices may be called "inventing" consideration, and the temptation to adopt one or the other of them is particularly strong when the act or forbearance which was actually bargained for cannot be regarded as consideration for some reason which is thought to be technical and without merit. In such cases the practice of inventing consideration may help to make the operation of the doctrine of consideration more acceptable<sup>50</sup>; but the practice may also be criticised<sup>51</sup> on the ground that it gives the courts a wide discretion to hold promises binding or not as they please. Thus the argument that the promisee *might* have suffered prejudice by acting in reliance on a promise is in some cases made a basis of

decision,<sup>52</sup> while in others precisely the same argument is rejected.<sup>53</sup> The practice of “inventing” consideration is, therefore, a source of considerable uncertainty in this branch of the law.

## Motive and consideration

- ¶11 In *Thomas v Thomas*<sup>54</sup> a testator shortly before his death expressed a desire that his widow should during her life have the house in which he lived, or £100. After his death, his executors “in consideration of such desire” promised to convey the house to the widow during her life or for so long as she should continue a widow, “provided nevertheless and it is hereby further agreed” that she should pay £1 per annum towards the ground rent, and keep the house in repair. In an action by the widow for breach of this promise, the consideration for it was stated to be the widow’s promise to pay and repair. An objection that the declaration omitted to state part of the consideration, viz the testator’s desire, was rejected. Patteson J said: “Motive is not the same thing with consideration. Consideration means something which is of value in the eye of the law moving from the plaintiff”.<sup>55</sup> This remark should not be misunderstood: a common motive for making a promise is the desire to obtain the consideration; and an act or forbearance on the part of the promisee may (unless the court is prepared to “invent”<sup>56</sup> a consideration) fail to constitute consideration precisely because it was not the promisor’s motive to secure it. What Patteson J meant was that a motive for promising did not amount to consideration unless two further requirements were satisfied, viz: (i) that the thing secured in exchange for the promise was “of some value in the eye of the law”; and (ii) that it moved from the plaintiff.<sup>57</sup> Consideration and motive are not opposites; the former concept is a subdivision of the latter. The consideration for a promise is (unless the consideration is nominal<sup>58</sup> or invented) always a motive for promising; but a motive for making a promise is not necessarily consideration for it in law. Thus the testator’s “desire” in *Thomas v Thomas* was a motive for the executors’ promise but not part of the consideration for it. The widow’s promise to pay and repair was another motive for the executors’ promise and did constitute the consideration for that promise.

## Consideration and condition

- ¶12 *Thomas v Thomas*<sup>59</sup> also illustrates the difference between consideration and condition: the plaintiff’s remaining a widow was not part of the consideration but a condition of her entitlement to enforce the executor’s promise. On the other hand, in *Re Soames*<sup>60</sup> A promised £3,000 to B if B would set up a school in the running of which A was to have an active part. It was held that, by establishing the school, B had provided consideration for A’s promise. It seems that the distinction between consideration and condition depends, in such cases, on whether “a reasonable man would or would not understand that the performance of the condition was requested as the price or

exchange for the promise".<sup>61</sup> In *Thomas v Thomas* the executors had not requested the plaintiff to remain a widow; while in *Re Soames* a request by A that B should establish the school could be inferred from A's expressed intention to participate in its management. The distinction is further illustrated by *Carlill v Carbolic Smoke Ball Co*<sup>62</sup> where the claimant provided consideration for the defendants' promise by using the smoke-ball; but her catching influenza was a condition of her entitlement to enforce that promise.<sup>63</sup>

## Certain limited effects of promises without consideration

- ¶13 A promise that is not supported by consideration may, in spite of having no contractual force, nevertheless give rise to certain other legal effects. This is especially important where the promise is to give up an existing right, or to transfer an interest in identifiable property.<sup>64</sup> English law places certain restrictions on the revocability of a promise where the promisee has acted on it in a way that was intended and could have been anticipated (without having been requested) by the promisor; and it may give a remedy against a promisor who would be unjustly enriched (or otherwise act unconscionably) if they were allowed freely to revoke and did revoke their promise after such action in reliance on it by the promisee. These limited legal effects of promises without consideration are discussed later in this chapter.<sup>65</sup> Here it is necessary only to emphasise that these legal effects do not give such promises the full consequences of a binding contract. Thus the restriction on revocability may be only temporary<sup>66</sup>; breach of the promise may not entitle the injured party to the full loss of bargain damages normally awarded for breach of contract,<sup>67</sup> or may not entitle the injured party to them as of right.<sup>68</sup> Only a promise supported by consideration or made in a deed has these full contractual effects.

## Advantages of promises supported by consideration

- ¶14 "Contract" does not exhaust the category of promises having *some* legal effect; it refers, more narrowly, to those promises or agreements leading to the full degree of enforceability accorded by the law to contractual promises.<sup>69</sup> Moreover, while promises without consideration may have some legal effects, the promisee can still gain a number of important practical advantages by showing that they provided consideration. If the promise was supported by consideration, the promisee will not need to show that they had acted in reliance on the promise or that the promisor would be unjustly enriched or would otherwise be acting unconscionably if they went back on the promise; the promise will not be revocable but enforceable according to its terms; and the promisee will be entitled to full loss of bargain damages as of right. The limited legal effects of promises

without consideration may have mitigated some of the rigours of the strict doctrine; but they have not eliminated consideration as an essential requirement of a binding contract.<sup>70</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 12 *Currie v Misa* (1875) L.R. 10 Ex. 153, 162. See also *Barber v Fox* (1669) 2 *Saund.* 134, n. (e); *Cooke v Oxley* (1790) 3 *Term Rep.* 653, 654; *Jones v Ashburnham* (1804) 4 *East* 455; *Bainbridge v Firmstone* (1838) 8 *A. & E.* 743, 744; *Thomas v Thomas* (1842) 2 *Q.B.* 851, 859; *Bolton v Madden* (1873) L.R. 9 *Q.B.* 55, 56; *Gore v Van der Lann* [1967] 2 *Q.B.* 31, 42; *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] *Lloyd's Rep.* 67, 75; *Midland Bank & Trust Co Ltd v Green* [1981] A.C. 513, 531; *R. v Braithwaite* [1983] 1 *W.L.R.* 383, 391; *Johnsey Estates Ltd v Lewis Manley (Engineering) Ltd* [1987] 2 *E.G.L.R.* 69, 70; *Guiness Mahon & Co Ltd v Kensington & Chelsea Royal BC* [1999] Q.B. 215 at 236; *Modahl v British Athletics Federation Ltd* [2001] EWCA Civ 1447, [2002] 1 *W.L.R.* 1192 at [50]; cf. at [103].
- 13 *O'Sullivan v Management Agency & Music Ltd* [1985] Q.B. 428, 459; *Re Dale* [1994] Ch. 31, 38. cf. *Gill & Duffus SA v Rionda Futures* [1994] 2 *Lloyd's Rep.* 67 at 82. These authorities for the principle stated at this point in the text above appear to have been overlooked in a passage of the judgment in *Ritz Hotel Casino Ltd v Al Geabury* [2015] EWHC 2294 (QB), [2015] L.L.R. 860 at [137]; this passage is discussed in Vol.II, para.43-026 below.
- 14 cf. below, paras 6-041—6-042.
- 15 Holdsworth, History of English Law, Vol.8, p.11.
- 16 e.g. below, paras 6-041—6-042, 6-069—6-072, 6-141.
- 17 cf. *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] 2 *Q.B.* 1270 at [63], referring only to “benefit” (and not to detriment).
- 18 Or forbearance, or promise to do or to forbear. For the sake of brevity, references in the text are confined to the doing of an act.
- 19 e.g. in *Bolton v Madden* (1873) L.R. 9 *Q.B.* 55; cf. *R. v Att-Gen for England and Wales* [2003] UKPC 22, [2003] E.M.L.R. 24 at [32] (“practical benefit” to promisor).
- 20 e.g. in some of the existing duty cases discussed in paras 6-069—6-072, 6-079, 6-080, below.
- 21 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 *Q.B.* 1; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604. [2018] UKSC 24, [2018] 2 *W.L.R.* 1603.
- 23 See below, para.25-047.
- 24 Principles of Contract, 13th edn (1950), p.133. This statement has been approved in the House of Lords: *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847, 855.
- 25 (1860) 9 C.B. N.S. 159.
- 26 (1860) 9 C.B. N.S. 159 at 174.

27 (1860) 9 C.B. N.S. 159.

28 If the facts recurred now, the nephew's promise to marry Ellen Nicholl would no longer give rise to a contractual obligation: [Law Reform \(Miscellaneous Provisions\) Act 1970 s.1](#). This section applies also to an agreement to marry made between two persons of the same sex: [Marriage \(Same Sex Couples\) Act 2013 s.11](#) and [Sch.3 para.1](#). An agreement to enter into a civil partnership likewise has no contractual force: [Civil Partnership Act 2004 s.73](#).

29 cf. *De Cicco v Schweitzer* 221 N.Y. 413, 117 N.E. 807 (1917).

30 Below, para.[6-027](#).

31 It is doubtful whether, on the true construction of the uncle's letter, the nephew's marriage to Ellen Nicholl was intended to be the consideration for the uncle's promise, or only a condition. Byles J, who dissented, treated it as a condition and also thought that the uncle's promise was not made with any contractual intent. This view was subsequently approved in *Jones v Padavatton* [1969] 1 W.L.R. 328 at 333, so the correctness of the actual decision in *Shadwell v Shadwell* is very much in doubt.

32 Atiyah, Consideration in Contracts: A Fundamental Restatement, 1971, p.60. For an earlier, similar statement, see *Llewellyn* (1931) 40 Yale L.J. at p.741—"any sufficient justification for court enforcement"; but no attempt is there made to suggest that this actually is the law. For further criticism of Atiyah's views, see *Treitel* (1976) 50 A.L.J. 439. cf. *Colonia Versicherung AG v Amoco Oil Co* [1995] 1 Lloyd's Rep. 570, 577 (affirmed without reference to this point [1997] 1 Lloyd's Rep. 261) where the words "(a) the reason for and (b) ample consideration for" a payment clearly treat these concepts as distinct.

33 Atiyah, Consideration in Contracts: A Fundamental Restatement (1971) pp.52, 58.

34 cf. the description of a similar concept as "potentially very confusing": *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal BC* [1999] Q.B. 215 at 216.

35 Atiyah, Essays on Contract, pp.179, 183.

36 Above, para.[4-102](#). See also *Carlill v Carbolic Smoke Ball Co* [1892] 2 Q.B. 484; *Budgett v Stratford Co-operative and Industrial Society Ltd* (1916) 32 T.L.R. 378; *Melhuish v Redbridge Citizens Advice Bureau* [2005] I.R.L.R. 415 at [18].

37 The promisee may accept and provide consideration at an earlier stage: see above, paras [4-103—4-104](#) and below, para.[6-200](#).

38 See, e.g. *Pecke v Redman* (1555) 1 Dyer 113a; *Joscelin v Shelton* (1557) 3 Leon. 4; *Manwood v Burston* (1586) 2 Leon. 203; *Harrison v Cage* (1698) 12 Mod. 214; Simpson, A History of the Common Law of Contract, pp.459–470; Baker (1980) 43 M.L.R. 467, 468 (reviewing Atiyah, The Rise and Fall of Freedom of Contract).

39 *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 Lloyd's Rep. 614, 619; *The Aramis* [1989] 1 Lloyd's Rep. 213 at 225 (where the claim failed for want of contractual intention).

40 *Re Dale* [1994] Ch. 31, 38.

41 Below, para.[6-127](#).

42 *Price v Jenkins* (1877) 5 Ch. D. 619. In so far as *Thomas v Thomas* (1842) 2 Q.B. 851 (below, para.[6-011](#)) is contra, it seems to be inconsistent with *Price v Jenkins* (where the "case which is not reported" mentioned at p.620 closely resembles *Thomas v Thomas*); cf. *Johnsey Estates*

- v Lewis & Manley [1987] 2 E.G.L.R. 69; Westminster City Council v Duke of Westminster [1991] 4 All E.R. 136* (reversed in part on other grounds *(1992) 24 H.L.R. 572*).
- 43 *Merritt v Merritt [1970] 1 W.L.R. 1211.*
- 44 *Cheale v Kenward (1858) 3 D. & J. 27.*
- 45 Insolvency Act 1986 ss.238, 339; and see below footnotes to para.6-022; *Re Kumar [1993] 1 W.L.R. 224.*
- 46 *Philpot v Gruninger (1872) 14 Wall. 570, 577*; Restatement, Contracts, §75(1): “bargained for and given in exchange for the promise”; Restatement 2d, Contracts, §75(1) and (2); Williston, Contracts, rev. edn, Vol.1, p.320; Corbin, Contracts, §172, is more sceptical. The Restatement 2d, §72 also supports the converse proposition that “any performance which is bargained for is consideration”, even though there may be no element of benefit or detriment; but this is subject to important exceptions, especially where the performance bargained for is the settlement of an invalid claim and the performance of an existing duty: see §§73 and 74; as to these topics, see below, paras 6-050—6-080.
- 47 *Pitts v Jones [2007] EWCA Civ 1301, [2008] Q.B. 76* at [18].
- 48 See, for example, below, paras 6-013—6-014, 6-018—6-019, 6-079, 6-205 and *Shadwell v Shadwell (1860) 9 C.B. N.S. 159*, 174 (below); and cf. *Pollwaty Ltd v Abdullah [1974] 1 W.L.R. 493*, discussed by Zuckerman (1975) 38 M.L.R. 384 and Thornely [1975] C.L.J. 26; cf. *Vantage Navigation Corp v Sahail and Saud Building Materials Co LLC (The Alev) [1989] 1 Lloyd's Rep. 138, 147; Moran v University College Salford (No.2), The Times, 23 November 1993.*
- 49 e.g. *Shadwell v Shadwell (1860) 9 C.B. N.S. 159*, 174 (below).
- 50 cf. the dictum in *Williams v Roffey Bros & Nicholls Contractors Ltd [1991] 1 Q.B. 1* (below, paras 6-069—6-072) at 18 that the courts should “be more ready” to find that there was consideration where such a finding “reflects the true understanding of the parties”; and the reliance on this dictum in *Birmingham City Council v Forde [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732* (below, paras 6-021 and 6-074—6-077) at [88].
- 51 For criticism, see Holmes, The Common Law, p.292. In the United States there is less need for “inventing” consideration because of the existence of a broad doctrine of promissory estoppel: see Restatement, Contracts, §90, and Restatement 2d, Contracts, §90 and below para.6-115.
- 52 *Shadwell v Shadwell (1860) 9 C.B. N.S. 159, 174*: the consideration was said by Erle CJ to consist of the possibility that the promisor “*may have made a most material change in his position ...*” (italics supplied).
- 53 In *Offord v Davies (1862) 12 C.B. N.S. 748*: the argument of counsel (at 750) that “the plaintiff *might* have altered his position in consequence of the guarantee” (italics supplied) was rejected, Erle CJ being again a member of the court. cf. also *Collier v P & M.J. Wright (Holdings) [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643* at [27(ii)]; and see *Re Charge Card Services [1987] Ch. 150, 164*, affirmed *[1989] Ch. 497* (production of charge card and signature of voucher not consideration for a supply of goods, evidently because such “consideration” would be blatantly “invented”: paras 6-018—6-019 for refusal to “invent” consideration).
- 54 *(1842) 2 Q.B. 851.*

- 55 At 859; cf. *Hadley v Kemp* [1999] *E.M.L.R.* 589 at 625.
- 56 Above, para.6-010.
- 57 Discussion of these requirements forms the bulk of this chapter.
- 58 In *Thomas v Thomas* the consideration may not have been adequate, but it was not nominal; cf. *Westminster City Council v Duke of Westminster* [1991] 4 All E.R. 136 (*reversed in part on other grounds* (1992) 24 H.L.R. 572); below, para.6-023.
- 59 (1842) 2 Q.B. 851.
- 60 (1897) 13 T.L.R. 439; cf. below, para.6-200.
- 61 Williston, Contracts, 3rd edn, §112. On this question judicial views can naturally differ: see, e.g. the judgments of Byles J and the majority in *Shadwell v Shadwell* (1860) 9 C.B. N.S. 159 (above). See too *Dickinson v Abel* [1969] 1 W.L.R. 295; *Ellis v Chief Adjudication Officer* [1998] 1 F.L.R. 184.
- 62 [1893] 1 Q.B. 256; stated above, para.4-019.
- 63 For the purpose of assessing VAT, a wider test (laid down by European Community Law), requiring only a “direct link” between performance and counter-performance, suffices: see *Rosgill Group Ltd v Customs & Excise Commissioners* [1997] 3 All E.R. 1012, though in that case the English test for what constitutes consideration was also said to have been satisfied (at 1020).
- 64 See below, para.6-172.
- 65 Below, paras 6-089—6-115, 6-144—6-193.
- 66 Below, paras 6-104, 6-145, 6-179.
- 67 Below, paras 6-183—6-187.
- 68 Below, para.6-183.
- 69 See below, Chs 29 and 30.
- 70 See further, below, paras 6-114, 6-193.

## Section 3. - Adequacy of Consideration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 3. - Adequacy of Consideration

### Courts generally will not judge adequacy

- 115 Under the doctrine of consideration, a promise has no contractual force unless *some* value has been given for it. But as a general rule<sup>71</sup> the courts do not concern themselves with the question whether “adequate” value has been given,<sup>72</sup> or whether the agreement is harsh or one-sided.<sup>73</sup> The fact that a person pays “too much” or “too little” for a thing may be evidence of fraud<sup>74</sup> or mistake, or it may induce the court to imply a term as to the quality of the subject-matter. But it does not of itself affect the validity of the contract, so that (for example) a promise by an employer to make a payment to an employee under a compromise agreement would not be invalid merely because the amount of the payment was irrationally generous.<sup>75</sup> Courts are not insensitive to the problems raised by unequal or unfair bargains, but some additional factor is required before a court will refuse to enforce a contract, such as the existence of a relationship in which one party is able to take an unfair advantage of the other. In the absence of some such factor, the general rule applies that the courts will enforce a promise so long as *some* value for it has been given: “no bargain will be upset which is the result of the ordinary interplay of forces”.<sup>76</sup>

### Consumer contracts

- 116 The principle that the courts are not generally concerned with the adequacy of consideration is also recognised by the [Consumer Rights Act 2015](#). Some “unfair terms” are not binding on the consumer in a consumer contract,<sup>77</sup> but s.64(1)(b) provides that a term “may not be assessed for fairness under ... to the extent that ... the assessment is of the appropriateness of the price payable

under the contract by comparison with the goods, digital content or services supplied under it".<sup>78</sup> A term would not be "unfair" within the Act merely because it required the consumer to pay "too much" for what had been supplied to them under the contract.<sup>79</sup> After all, consumers are normally aware of the price to be paid, so do not need protecting from the dangers of "consumer surprise".<sup>80</sup>

## Illustrations

- <sup>117</sup> It follows from the general common law rule stated in paras 6-015—6-016 above that acts or omissions of very small value can be consideration. Thus it has been said that there was consideration for a promise to give a man £50 "if you will come to my house"<sup>81</sup>; that the act of executing a deed could be consideration for a promise to pay money although the deed was void<sup>82</sup>; that the execution of a will can be consideration (for a promise to make, and not to revoke, a similar will<sup>83</sup>) even though the will is in its nature revocable<sup>84</sup>; that to give up a piece of paper without reference to its contents was consideration,<sup>85</sup> and even that to show a person a document was consideration.<sup>86</sup> The mere act of conducting negotiations can similarly satisfy the requirement of consideration, even though the act does not commit the promisee to bringing the negotiations to a successful conclusion.<sup>87</sup> Further illustrations of the principle are provided by a case in which a promise to cut back undergrowth was regarded as consideration for the grant of a contractual licence to occupy land<sup>88</sup> and by one in which an employee's agreement to submit to a temporary change of workplace and to take part in an assessment of his professional competence was held (though it had no easily quantifiable value) to amount to consideration for his employer's promise not to take disciplinary proceedings against him.<sup>89</sup>

## Objects of trifling value

- <sup>118</sup> In *Chappell & Co Ltd v Nestlé Co Ltd*,<sup>90</sup> chocolate manufacturers sold gramophone records for 1s. 6d. plus three wrappers of their 6d. bars of chocolate. It was held that the delivery of the wrappers formed part of the consideration, though the wrappers were of little value to the buyer and were in fact thrown away by the seller. If the delivery of the wrappers formed part of the consideration it could, presumably, have formed the whole of the consideration, so that a promise to deliver records for wrappers alone would have been binding.
- <sup>119</sup> This case should be contrasted with *Lipkin Gorman v Karpnale Ltd*,<sup>91</sup> where gaming chips supplied by a gaming club to one of its members (and then lost by the member in the course of the gaming) were held not to constitute consideration for the money which the member had paid for

them. One reason for this view appears to have been that “the chips themselves were worthless”<sup>92</sup>; but this is equally true of the wrappers in the *Chappell* case. Another seems to have been that the chips “remained the property of the club”<sup>93</sup>; but this again would not of itself be decisive, since it is settled that a transfer of the possession of a thing (no less than that of the ownership of it) can constitute consideration.<sup>94</sup> A third reason for the view that the chips were not consideration for the money may be that the parties did not so regard the transaction: they regarded the chips as merely “a convenient mechanism for facilitating gambling”,<sup>95</sup> and the case may be one in which the court refused to “invent” consideration<sup>96</sup> (by regarding something as consideration which was not so regarded by the parties) even though this course was technically open to it. This refusal appears to have been based on the context in which the question arose. The issue was not whether the club could sue the member on any promise made by him: it arose because the money paid by the member to the club had been stolen; and the club, which had received the money in good faith, argued that it had given valuable consideration for it, so as to defeat the true owner’s claim for the return of the money. This explanation of the case derives some support from Lord Goff’s discussion of a hypothetical case of tokens supplied by a department store in exchange for cash: he said that “by receiving the money in these circumstances the store does not *for present purposes* give valuable consideration for it”.<sup>97</sup> Yet he also accepted that (in the store example) “an independent contract is made for the chips when the customer originally obtains them at the cash desk”.<sup>98</sup> The question whether a party has provided consideration may thus receive one answer when it arises for the purpose of determining the enforceability of a promise, and a different and narrower one when it arises for the purpose of determining whether a transaction has adversely affected the rights of an innocent third party.<sup>99</sup> It was the desire to protect the victim of the theft which led the House of Lords in the *Lipkin Gorman* case to reject the, no doubt somewhat technical, argument that the chips constituted consideration for the receipt of the money.

<sup>120</sup> The *Lipkin Gorman*<sup>100</sup> case gives rise to further difficulty because the chips were supplied on the terms that they could be used, not only for gaming, but also to buy refreshments at the club. There was no evidence of their having been used for this purpose,<sup>101</sup> but Lord Templeman said that “neither the power to buy refreshments nor the exercise of that power could constitute consideration for the receipt [by the club] of £154,693”.<sup>102</sup> One possible interpretation of this passage is that the supply of refreshments could not constitute consideration for £154,693 (the sum lost by the member of the club) since the disparity in value was too great; but this would be inconsistent with the principle that consideration need not be adequate. It is submitted that the preferable explanation of Lord Templeman’s statement is that the chips were simply “treated as currency”<sup>103</sup> in the club and could be used for a variety of transactions. The reason why the supply of refreshments was no consideration for the face value of the chips lost at play was simply that these transactions were entirely separate ones.

## Nominal consideration

- 121 The rule that consideration need not be adequate makes it possible to make a gratuitous promise binding by giving a nominal consideration, e.g. £1 for the promise of valuable property, or a peppercorn for a substantial sum of money. Such cases are merely extreme examples of the rule that the courts will not judge the adequacy of consideration.<sup>104</sup> If, however, it appears on the face of an agreement that the consideration must as a matter of arithmetic be worth less than the performance of the counter-promise, there would seem to be no contract: for example, if A promised to pay B £100 in return for £1 to be simultaneously paid by B to A. It has been said that, in such a case, the apparent contract would amount “in reality to a gift of £99”.<sup>105</sup> It is assumed in the example that both sums are simply to be paid in legal tender. An agreement to exchange a specific coin or coins of a particular description for a sum of money greater than their face value (e.g. 20 pound coins bearing the date 1983 for £100) would be a good contract. The same would be true of an agreement to pay a sum in one currency in exchange for one payable in another, and of an agreement to pay a larger sum tomorrow in exchange for a smaller sum paid today.
- 122 The deliberate use of a nominal consideration can be regarded as a form used with the intention of making a gratuitous promise binding. This is not objectionable; after all, the law refuses to enforce only *informal* gratuitous promises.<sup>106</sup> In some cases it may be undesirable to give promises supported by nominal consideration the same legal effect as promises supported by substantial consideration; but these cases are best dealt with by special rules.<sup>107</sup> Such rules are particularly necessary where the promise can cause prejudice to third parties. For example, the danger that company promoters might use the device of nominal consideration to the prejudice of shareholders is avoided by imposing fiduciary duties on the promoters.<sup>108</sup>

## Nominal distinguished from inadequate consideration

- 123 It is not normally necessary to distinguish between consideration that is “nominal” and consideration that is merely “inadequate”, since both equally suffice to make a promise binding. The need to draw the distinction may, however, arise where rules of law treat promises or conveyances supported only by nominal consideration differently from those supported by consideration which is substantial or “valuable” even though it may be inadequate.<sup>109</sup> One view is that a nominal consideration is one that is of only token value,<sup>110</sup> while an inadequate consideration is one that has substantial value even though it is manifestly less than that of the performance promised or rendered in return. A second view is that “‘Nominal consideration’ and ‘nominal sum’ appear …, as terms of art, to refer to a sum or consideration which can be mentioned

as consideration but is not necessarily paid".<sup>111</sup> This view was expressed by Lord Wilberforce (in a speech with which all the other members of the House of Lords concurred) in *Midland Bank & Trust Co Ltd v Green*.<sup>112</sup> In that case a husband sold a farm, said to be worth £40,000, to his wife for £500. It was held that the wife was, for the purposes of s.13(2) of the Land Charges Act 1925, a "purchaser for money or money's worth" so that the sale to her prevailed over an unregistered option to purchase the land, which had been granted to one of the couple's children.<sup>113</sup> It was not necessary to decide whether the consideration for the sale was nominal but Lord Wilberforce said that he would have had "great difficulty" in so holding; and that "To equate 'nominal' with 'inadequate' or even 'grossly inadequate' consideration would embark the law on inquiries which I cannot think were ever intended by Parliament".<sup>114</sup> On the facts of the case the £500 was paid and was more than a mere token, so that the consideration was not nominal on either of the two views stated above. But if the stated consideration had been only £1, or a peppercorn, it is submitted that it would have been nominal even if it had been paid, or delivered, in accordance with the intention of the parties. So to hold would not lead to inquiries as to the adequacy of consideration; for the distinction between a consideration that is a mere token and one that is inadequate (or even grossly inadequate) is, it is submitted, clear as a matter of common sense. Thus where the question was whether a lease amounted to a "disposition ... for a nominal consideration"<sup>115</sup> it was said that "Any substantial value—that is, a value of more than, say, £5 ... will prevent [the] disposition from being for a nominal consideration".<sup>116</sup> Such an approach gives rise to no more difficulty than the concept of a consideration which is "mentioned as a consideration but ... not necessarily paid". This test would presumably make the question whether consideration was nominal turn on the intention of the parties; and in the present context this would be an even more than usually elusive criterion since no guidance could be obtained from the terms of the contract, those terms being in cases of this kind often deliberately drafted so as to conceal the true nature of the transaction.

## Attitude of equity

- 124 Even in equity the validity of a contract could not generally be challenged on the ground that the consideration provided for one party's promise was inadequate.<sup>117</sup> But the equitable remedy of specific performance may be refused on this ground<sup>118</sup> (at least if coupled with certain other factors); and in exceptional cases gross undervalue may even be a ground for more radical forms of equitable relief, such as setting a contract aside or reopening it.<sup>119</sup> Equity also refuses to aid a "volunteer"—so that its remedy of specific performance is not available to a person who has given no substantial consideration but who can nevertheless bring an action on the promise because it is in a deed or supported by nominal consideration.<sup>120</sup> But while the equitable principle restricts the enforceability of gratuitous *promises*, it does not affect the validity of a *completed gift*.<sup>121</sup>

## Footnotes

- 1 Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.
- 71 For exceptional cases, see below, paras 6-021, 10-161, 10-180, 30-051. See also *Bankway Properties Ltd v Penfold Dunsford* [2001] EWCA Civ 538; [2001] 1 W.L.R. 1369, where a provision for rent increase in a shorthold tenancy far beyond the amount which (as the landlord knew) the tenant could possibly pay was held to be unenforceable as being inconsistent with the intention of the parties to create an assured tenancy.
- 72 *Haigh v Brooks* (1839) 10 A. & E. 309, 320; *Moss v Hall* (1850) 5 Ex. 46, 49–50; *Westlake v Adams* (1858) 5 C.B. N.S. 248, 265; *Gravely v Barnard* (1874) L.R. 18 Eq. 518; *Wild v Tucker* [1914] 3 K.B. 36, 39; *Midland Bank & Trust Co Ltd v Green* [1981] A.C. 513, 532; cf. *Ball v National and Grindley's Bank* [1973] Ch. 127, 139; *Langdale v Danby* [1982] 1 W.L.R. 1123; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16, 27; *Brady v Brady* [1989] A.C. 755, 775; *Normid Housing Association Ltd v R. John Ralphs* [1989] 1 Lloyd's Rep. 265, 272; *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch. 412 at [79], referring to para.3-014 of this book in its 29th edition (paras 6-015—6-016 in the present edition) with apparent approval; *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 at [84], [90] (as to which see also below, paras 6-021 and 6-074—6-077). cf. *Barton* (1987) 103 L.Q.R. 118.
- 73 *Gaumont-British Pictures Corp v Alexander* [1936] 2 All E.R. 1686. On such facts, provisions of the *Consumer Rights Act 2015* cited below would not apply.
- 74 *Tennent v Tennents* (1870) L.R. 2 Sc. & Div. 6, 9. See also *Rice v Gordon* (1847) 11 Beav. 265; *Cockell v Taylor* (1852) 15 Beav. 103.
- 75 *National Car Parks Ltd v Revenue and Customs Commissioners* [2019] EWCA Civ 854, [2019] 3 All E.R. 590 concerned the analogous situation where motorists pay more than the specified tariff for parking when inserting coins into “pay and display” machines which do not give change. The court found that the consideration for the parking was the amount of money paid into the machine, including the overpayment. Consideration should be assessed objectively (at [18]).
- 76 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 336, per Lord Denning MR.
- 77 The *2015 Act* is fully discussed in Vol.II, Ch.40; see especially Vol.II, para.40-380.
- 78 This provision applies to contracts made after 1 October 2015, and replaces reg.6(2)(b) of the *Unfair Terms in Consumer Contracts Regulations 1999* (SI 1999/2083), which similarly referred to “the adequacy of the price”.
- 79 See *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481 at [12], per Lord Bingham (with whom all the other members of the House of Lords agreed); cf. [64], per Lord Rodger. *Office of Fair Trading v Abbey National Plc* [2009] UKSC 6, [2010] 1 A.C. 696, discussed further in Ch.40.

- 80 See e.g. *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481 at [54]–[55], per Lord Millett; *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (C-415/11)*, 14 March 2013; [2013] 3 C.M.L.R. 89; Vol.II, Ch.40.
- 81 *Gilbert v Rudeard* (1608) 3 Dy. 272b (n); cf. *Denton v G.N. Ry.* (1856) 5 El. & Bl. 860.
- 82 *Westlake v Adams* (1858) 5 C.B. N.S. 248; perhaps there was also an element of compromise in this case.
- 83 If such promises are contractually binding, they can be enforced under the doctrine of mutual wills even where the promise sought to be so enforced is established by evidence extraneous to the will: *Charles v Fraser* [2010] EWHC 2154 (Ch), [2010] W.T.L.R. 1489.
- 84 *Re Dale* [1994] Ch. 31. cf. *Re Goodchild* [1997] 1 W.L.R. 1216 where a mere “common understanding” (as opposed to definite mutual promises) did not suffice to make B’s promise irrevocable, but some effect to it was given by an order in favour of the intended beneficiary under the *Inheritance (Provision for Dependents) Act 1975*; *Taylor v Dickens* [1998] 1 F.L.R. 806, the reasoning of which was doubted on other grounds in *Gillet v Holt* [2001] Ch. 210.
- 85 *Haigh v Brooks* (1839) 10 A. & E. 309, 334; cf. *Foster v Dawber* (1861) 6 Ex. 839; *Aspinall's Club Ltd v Al Zayat* [2007] EWCA Civ 1001 at [30].
- 86 *Sturlyn v Albany* (1586) Cro. Eliz. 67; *March v Culpepper* (1628) Cro. Car. 70; contrast *Re Charge Card Services* [1987] Ch. 150, 164, affirmed [1989] Ch. 487 (production of charge card and signature of voucher not consideration for a supply of goods, evidently because such “consideration” would be blatantly “invented”: cf. above, para.6-010).
- 87 *Sepoong Engineering Construction Co Ltd v Formula One Management Ltd* [2000] 1 Lloyd's Rep. 602, 611.
- 88 *Well Barn Farming Ltd v Backhouse* [2005] EWHC 1520, [2005] 3 E.G.L.R. 109 at [45].
- 89 *Palmer v East & North Herefordshire NHS Trust* [2006] EWHC 1997, [2006] Lloyd's Rep. Med 472.
- 90 [1960] A.C. 87.
- 91 [1991] 2 A.C. 548. On facts such as those of this case, consideration for the money paid by the member to the club would now be provided by reason of the fact that the club’s promise to the member would be legally enforceable by virtue of s.335(1) of the *Gambling Act 2005*: Vol.II, para.43-011. But the question whether tokens of very small intrinsic value can constitute consideration can still arise in other contexts, not connected with gambling: see below, para.6-020.
- 92 [1991] 2 A.C. 548 at 561.
- 93 [1991] 2 A.C. 548 and see 575.
- 94 *Bainbridge v Firmstone* (1838) 8 A. & E. 743; below, paras 6-210—6-213.
- 95 *Lipkin Gorman case* [1991] 2 A.C. 548, 575. The reasoning of the *Lipkin Gorman* case on this point continues to apply after the coming into force of the *Gambling Act 2005*: see *Ritz Hotel Casino Ltd v Al Daher* [2014] EWHC 2847 (QB) at [31]–[32], below, Vol.II, para.43-042.
- 96 Above, para.6-010.
- 97 *Lipkin Gorman case* [1991] 2 A.C. 548, 577; italics supplied; cf. below, para.6-035.
- 98 *Lipkin Gorman case* [1991] 2 A.C. 548 case above, 576.
- 99 Above, para.6-002.
- 100 [1991] 2 A.C. 548.

- 101 *Lipkin Gorman case* [1991] 2 A.C. 548, 569.
- 102 *Lipkin Gorman case* [1991] 2 A.C. 548, 567. For the effect of s.335(1) of the Gambling Act 2005 on the reasoning of the *Lipkin Gorman* case, see above, paras 6-019—6-020.
- 103 *Lipkin Gorman case* [1991] 2 A.C. 548, 561.
- 104 Atiyah, Essays on Contracts, p.194 argues that there is no logical connection between the two rules, relying on the fact that in many of the United States the courts recognise the principle that consideration need not be adequate, while rejecting the device of nominal consideration. The answer to this argument lies in Holmes' aphorism (The Common Law, p.1) that "life of the law has not been logic: it has been experience:" American courts which reject the device of nominal consideration do so on policy grounds which have nothing to do with logic.
- 105 *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 3732 at [90].
- 106 Above, para.6-002.
- 107 Thus a nominal consideration was disregarded in *Milroy v Lord* (1862) 4 De G.F. & J. 264, discussed below, para.22-035; specific performance will not be ordered of a promise supported by only nominal consideration (below, paras 30-052—30-053) and for the purposes of the Law of Property Act 1925, "valuable consideration does not include a nominal consideration in money": s.205(1)(xxi).
- 108 Below, para.12-054. For other ways of protecting third parties from being prejudiced by promises made for inadequate consideration, see Trustee Act 1925 s.13; Law of Property Act 1925 ss.172, 173; Local Government Act 1972 s.123, considered in *R. v Pembrokeshire CC Ex p. Coker* [1999] 4 All E.R. 1007, *Structadene Ltd v Hackney LBC* [2001] 2 All E.R. 225, discussing s.123(2) of the 1972 Act, restricting disposals by local authorities "for a consideration less than the best that can reasonably be obtained" and *R. (On the application of Salford Estates) v Salford City Council* [2011] EWHC 2135 (Admin), [2011] B.L.G.R. 982, discussing the scope of the local authority's duty under that provision; Inheritance (Provision for Family and Dependants) Act 1975 ss.10(2)(b), 10(5)(b), 11(2)(c); Insolvency Act 1986 ss.238, 239, 423 (applied in *Barclays Bank Plc v Eustice* [1995] 1 W.L.R. 1238; *Agricultural Mortgage Corp Plc v Woodward* [1995] B.C.L.C. 1); *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2, [2001] 1 W.L.R. 143; *Battaillon v Shone* [2016] EWHC 1174 (QB), [2016] B.P.I.R. 829 (transfers from husband to wife at an undervalue set aside as having been made for "no consideration" within s.423(1)(a) of the Insolvency Act 1986). cf. Companies Act 2006 ss.190, 593. See also Charities Act 2011 ss.197(2)(a) and 218(3), requiring "full consideration in money or money's worth" (a similar requirement, previously contained in s.65(1)(a) of the Charities Act 1993, now repealed by s.354 and Sch.10 of Charities Act 2011, was held not to have been satisfied in *Bayoumi v Women's Total Abstinence Educational Union Ltd* [2003] EWCA Civ 1548, [2004] Ch. 40 at [46]–[47]).
- 109 Above, para.6-021.
- 110 This seems to be the sense in which 10 shillings was described as "nominal" consideration (for the assignment of a debt) in *Turner v Forwood* [1951] 1 All E.R. 746.
- 111 *Midland Bank & Trustee Co Ltd v Green* [1981] A.C. 513, 532.
- 112 [1981] A.C. 513.
- 113 For later successful proceedings by that child against the parents for conspiracy, see [1982] Ch. 529.

- 114 *[1981] A.C. 513, 532*. In other legislative contexts such an inquiry may be intended: e.g. by use of the phrase “full and valuable consideration” in the *Inheritance (Provisions for Family and Dependants) Act 1975* s.1(3); cf. *Charities Act 2011* ss.197(2)(a) and 218(3), above.
- 115 Within *Law of Property Act 1925* s.84(7).
- 116 *Westminster City Council v Duke of Westminster [1991] 4 All E.R. 136, 146 (reversed in part on another ground (1992) 24 H.L.R. 572)*.
- 117 See, e.g. *Cheale v Kenward (1858) 3 De G. & J. 27; Townsend v Toker (1866) L.R. 1 Ch. App. 446*.
- 118 Below, para.30-051.
- 119 Below; para.10-161; *Pennell v Miller (1857) 23 Beav. 172; Butler v Miller (1867) L.R. 1 Eq. 195, 210; Tennent v Tennents (1870) L.R. 2 Sc. & Div. 6, 9*.
- 120 *Jefferys v Jefferys (1841) Cr. & Ph. 138*; below, paras 30-052—30-053.
- 121 *T. Choithram International S.A. v Pagarani [2001] 1 W.L.R. 1; Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 2075*.

## Section 4. - The Concept of “Valuable” Consideration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 4. - The Concept of “Valuable” Consideration

### “Value in the eye of the law”

- <sup>125</sup> Although consideration need not be adequate, it must be “of some value in the eye of the law”. <sup>122</sup> This is one reason why there is no consideration for a promise made “in consideration of natural love and affection”, <sup>123</sup> and why in *Thomas v Thomas* <sup>124</sup> the testator’s desire that his widow should live in his house was not part of the consideration for the executors’ promise to allow her to do so. The same reasoning may explain the decision in *White v Bluett* <sup>125</sup> that a son had not provided consideration for his father’s promise not to sue him on a promissory note by promising in return not to bore his father with complaints. But in *Ward v Byham* <sup>126</sup> a promise by the mother of an illegitimate child to make them happy appears to have been regarded as part of the consideration for the father’s promise to pay her an allowance. It is by no means clear why the mother’s promise in *Ward v Byham* was, while the son’s promise in *White v Bluett* was not, thought to have “value in the eye of the law”. <sup>127</sup>

### Impossible and illusory consideration

- <sup>126</sup> A contract may be void for mistake if at the time of the agreement its performance is, unknown to either party, physically impossible. <sup>128</sup> In such a case there may nevertheless be consideration, e.g. in the mutual promises of the parties. But if the performance of one party’s promise is known by both to be impossible to perform, it is arguable that the consideration is only illusory and therefore to be disregarded. For example, a promise by A to pay B £100 for all the wine in B’s cellar would probably be regarded as gratuitous if at the time when it was made both A and B knew <sup>129</sup> that

there was no wine in the cellar. The position would be different if B's promise was to deliver the *future* contents of the cellar. In that case, A would be buying the chance of the cellar's containing wine<sup>130</sup>; and the value of that chance would be illusory only if the question whether any wine was put into the cellar had been left entirely to B's discretion.<sup>131</sup>

## Promissee would have performed anyway

- 127 Consideration may also be said to be illusory where it is clear that the promissee would have accomplished the act or forbearance anyway, even if the promise had not been made: “it is no consideration to refrain from a course of conduct which it was never intended to pursue”.<sup>132</sup> The burden of proof on this issue is on the promisor.<sup>133</sup> To discharge it, the promisor must show that the promissee would (even if the promise had not been made) definitely have accomplished the act or forbearance in question; the burden would not be discharged by the promisor's showing no more than that the promissee had simply not given any thought to the question whether or not to accomplish it.<sup>134</sup> Moreover, where the promise provided *an* inducement for the act or forbearance, the requirement of consideration is satisfied even though there were also other inducements operating on the promissee's mind.<sup>135</sup>

## Discretionary promise

- 128 Consideration would again be illusory where it was alleged to consist of a promise the terms of which left performance entirely to the discretion of the promisor.<sup>136</sup> A person does not provide consideration by promising to do something “if I feel like it”, or “unless I change my mind”. Promises are not often made in this form; but the same principle may apply in analogous cases. Thus a promise may be illusory if it is accompanied by a clause effectively<sup>137</sup> excluding all liability of the promisor for breach.<sup>138</sup> And a promise to pay for “so much coal as I may decide to order” would be an illusory consideration for the seller's counter-promise to deliver, which would therefore not be enforced.<sup>139</sup> On the other hand, if the promise were one to buy “so much of the coal that I require as I may order from you”, the court could give reality to the promise by implying a term into it to the effect that at least a reasonable part of any requirements which the promisor actually turned out to have must be ordered from the promissee. Equally the buyer would provide consideration by promising to buy “*all* the coal I require”; for in such a case, even if the buyer does not promise to have any requirements, they does at least give a definite undertaking not to deal with anybody else.<sup>140</sup> This promise may, it is true, be illegal as being in restraint of trade;

but if this makes the whole contract invalid, such invalidity rests on grounds of public policy and not on lack of consideration.<sup>141</sup>

## Footnotes

- 1 Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.
- 122 *Thomas v Thomas* (1842) 2 Q.B. 851, 859.
- 123 *Bret v J.S. (1600) Cro. Eliz.* 755; *Tweddle v Atkinson* (1861) 1 B. & S. 393, disapproving of *Dutton v Poole* (1677) 2 Lev. 210; cf. *Horrocks v Forray* [1976] 1 W.L.R. 230; *Mansukhani v Sharkey* [1992] 2 E.G.L.R. 125; *Kerr v Jamison* [2019] NICH 4.
- 124 (1842) 2 Q.B. 851; above, para.6-011.
- 125 (1853) 23 L.J. Ex. 36.
- 126 [1956] 1 W.L.R. 496; below, para.6-063.
- 127 *White v Bluett*, above, can perhaps be explained on the ground that the father, in spite of his promise, retained the note.
- 128 Below, Ch.8.
- 129 There could be a good contract if the parties were in doubt on this point: see *Smith v Harrison* (1857) 26 L.J. Ch. 412. In *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 (above, para.6-021, below, paras 6-074—6-076) Christopher Clarke J also considered the question whether the consideration consisting of the solicitors’ promise to provide additional services in the form of legal representation on appeal was illusory in view of the fact that “the prospect of a council appeal was very remote” (at [84]). The judgment does not in terms answer the question, but it may be that a negative answer can be inferred from the fact that the agreement referred to in paras 6-021 above and 6-074—6-076 below as CFA 2 was held to be a binding contract.
- 130 cf. *Brady v Brady* [1989] A.C. 755, 774 (“at the date of the promise”).
- 131 Below, para.6-028.
- 132 *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd’s Rep. 98, 106; cf. *Colchester BC v Smith* [1991] Ch. 448, 489, affirmed without reference to this point [1992] Ch. 421; *Beaton v McDivitt* (1988) 13 N.S.W.L.R. 162. In *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 (paras 6-021 above and 6-074—6-076 below) the principle stated in the text above was held not to apply as it was not established that the solicitors would not have continued to act for the client under CFA 1 even if CFA 2 had not been signed: see at [96], and that in any event the client benefited from the certainty, created by CFA 2, that they would so continue: see at [87].
- 133 *Well Barn Farming Ltd v Backhouse* [2005] EWHC 1520, [2005] E.G.L.R. 109, where the promisor failed to discharge this burden (at [47], [48]); cf. below, para.6-170.
- 134 *Pitts v Jones* [2007] EWCA Civ 1301, [2008] Q.B. 706 at [15]–[18].
- 135 *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 490.

- 136 For another problem arising out of such promises, see above, paras 4-226—4-227; *Stabilad Ltd v Stephens & Carter (No.2) [1999] 2 All E.R. (Comm), 651, 659* (citing a previous edition of this book); *Simpkin v Berkeley Group Holdings Plc [2016] EWHC 1619 (QB)*, where it was not disputed that a contract had come into existence and held that an employer’s discretion to decide that an employee had been a “good leaver” (and so was to receive benefits under a bonus scheme operated by the employer) must be exercised in good faith and without being “arbitrary, capricious or irrational …” at [327]. For the implication of a term to this effect into a discretionary promise, see also *Watson v Watchfinder Co UK Ltd [2017] EWHC 1275 (Comm), [2017] Bus. L.R. 1309* and above paras 2-066 and 2-070. Such restrictions on the exercise of the discretion would also have satisfied the requirement of consideration if an issue of consideration had arisen.
- 137 If the clause were ineffective (e.g. under the *Consumer Rights Act 2015 s.63* and *Sch.2 paras 3 and 7* (see Vol.II, para.40-316)), this fact would give reality to an otherwise illusory promise.
- 138 *Firestone Tyre & Rubber Co Ltd v Vokins [1951] 1 Lloyd’s Rep. 32, 39*; cf. the discussion of *The Cap Palos [1921] p.458*, in the *Suisse Atlantique case [1967] 1 A.C. 361, 432*.
- 139 See *Wickham & Burton Coal Co v Farmer’s Lumber Co 189 Iowa 1183, 179 N.W. 417* (1923); cf. the discussion in *Cotswold Development Construction Ltd v Williams [2006] I.R.L.R. 181* of the status of a casual worker. For an exception, see *Citadel Insurance Co v Atlantic Union Insurance Co [1982] 2 Lloyd’s Rep. 543*, below para.6-204.
- 140 The validity of “requirement” contracts is assumed in such cases as *Metropolitan Electric Supply Co v Ginder [1901] 2 Ch. 799* and *Dominion Coal Co Ltd v Dominion Steel & Iron Co Ltd [1901] A.C. 293*. Similarly, a contract by a manufacturer to sell their entire output to a particular buyer is binding even though they do not bind themselves to have any output: see, e.g. *Donnell v Bennett (1883) 22 Ch. D. 835* and cf. *Thames Tideway Properties Ltd v Serfaty [1999] 2 Lloyd’s Rep. 110, 127; Howard (1967) 2 U. of Tas.L.R. 446; Adams (1978) 94 L.Q.R. 173*.
- 141 Below, para.6-194.

## Section 5. - Past Consideration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 5. - Past Consideration

### Past consideration is no consideration

- 129 The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to "past consideration"; and such past acts or forbearances do not in law amount to consideration for the promise.<sup>142</sup> If, for example, a thing is guaranteed by a seller *after* it has been sold the guarantee is not contractually binding on the seller as the consideration for their promise is past.<sup>143</sup> Similarly a promise to make a payment in respect of past services is not contractually binding unless the conditions specified in para.6-033 below are satisfied or some other consideration<sup>144</sup> is provided. For example, a promise to pay money may be made to an employee after their retirement or to an agent after the termination of the agency. If the sole consideration for the promise is the service previously rendered by the former employee or agent, it will be past consideration, so that the promise will not be contractually binding.<sup>145</sup> It will be so binding only if some consideration other than the past service has been provided by the promisee. Such other consideration may consist in their giving up rights which are outstanding (or are in good faith believed to be outstanding) under the original contract,<sup>146</sup> or in their promising to perform or actually performing some other act or forbearance not due from them under the original contract: for example, in their validly promising not to compete with the promisor.<sup>147</sup>

### When consideration is past

130

In determining whether consideration is past, the courts are not, it is submitted, bound to apply a strictly chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive.<sup>148</sup> Where, for example, a contract of affreightment (COA) had been made between A and B on 13 August 2008, and a guarantee was given by C to A of B's performance on 28 August in pursuance of B's obligation under the COA to procure such a guarantee (though not from C but from D), it was held that the consideration for the guarantee was not past as the guarantee formed "part and parcel of the single transaction".<sup>149</sup>

## Guarantees given to consumers

- 131 Legislation passed for the protection of consumers contains a number of provisions which attach specified legal consequences to "guarantees" given to "consumers" in connection with contracts for the supply of goods, and certain other contracts, between a "consumer" and a "trader". In such cases, the requirement of consideration can, at common law, be satisfied on the reasoning of para.6-030 above not only where the guarantee was given by the supplier of the goods or other subject-matter, but also by a third person who was not a party to the contract under which the supply was made. Legislation has, however, gone further than this and has dispensed with the requirement of consideration for the enforceability of at least some such guarantees.<sup>150</sup>

## Wording of promise not decisive

- 132 The question whether consideration is past is one of fact: the wording of the promise is not decisive. Thus in *Re McArdle*<sup>151</sup> a promise made "in consideration of your carrying out" certain work was held to be gratuitous on the ground that the work had already been done. Conversely, a promise made "in consideration of your having today advanced ... £750" has been held to be binding on proof that the advance was made at the same time as the promise.<sup>152</sup>

## Past act done at promisor's request

- 133 An act done before the promise was made can be consideration for the promise if three conditions are satisfied.<sup>153</sup> First, the act must have been done at the request of the promisor<sup>154</sup>; secondly, it must have been understood that payment would be made; and thirdly, the payment, if it had been promised in advance, must have been legally recoverable.<sup>155</sup> In such a case the promisee is, quite apart from the subsequent promise, entitled to a quantum meruit for their services. The

promise can be regarded either as fixing the amount of that quantum meruit<sup>156</sup> or as being given in consideration of the promisee's releasing their quantum meruit claim. On the other hand, a past service for which payment was not expected, or one for which payment, though expected, is not legally recoverable, is no consideration for a subsequent promise to pay for it.<sup>157</sup>

## Past promise given at promisor's request

- 134 The principle stated in para.6-033 above can apply not only where the consideration for A's promise consists of a past *act* done by B at A's request, but also where it consists of an earlier *promise* made by B at A's request. Thus in *Pao On v Lau Yiu Long*<sup>158</sup> the claimants had entered into a contract with the X Co for the sale to that company of their shares in another company. Under that contract, the claimants were to be paid by an allotment of shares in the X Co, and they also promised not to sell 60 per cent of these shares for one year. This promise had been made at the request of the defendants, who held most of the shares in the X Co and who were anxious that the value of their holding should not be depressed by a sudden sale of all the shares allotted to the claimants. In addition, the defendants agreed to buy back 60 per cent of the shares for a fixed price. This was intended to protect the claimants against a fall in the share price, but the claimants later realised that if the share price rose this arrangement would not work in their favour. The claimants therefore successfully sought from the defendants a guarantee in which the defendants promised to indemnify the claimants against any loss which they might suffer as a result of a fall in the value during the year of the shares in the X Co.<sup>159</sup> The Privy Council rejected the argument that the consideration for the guarantee was past.<sup>160</sup> The claimants' promise not to sell the shares in the X Co was good consideration for the guarantee; for although that promise had been made before the guarantee was given, it had been made at the defendants' request and on the understanding that the claimants were, in return for making it, to receive some form of protection against the risk (to which their promise exposed them) of a fall in the value of the X Co's shares.

## Antecedent debt

- 135 In a number of cases it has been held that the mere existence of an antecedent debt does not constitute "value" for a transfer since it amounts only to past consideration. Accordingly, in *Roger v Comptoir d'Escompte de Paris*<sup>161</sup> it was held that a transfer of a bill of lading by a buyer in consideration of a debt already due from him to the transferee did not deprive the seller of his right of stoppage in transit<sup>162</sup>; in *Re Barker's Estate*<sup>163</sup> a mortgage executed as security for an antecedent debt and not communicated to the creditor was held to be voluntary and hence a fraudulent conveyance in bankruptcy; and in *Wigan v English & Scottish Law Life Assurance Society*<sup>164</sup> an assignment of an insurance policy which was made as security for an antecedent

debt and had not been communicated to the creditor was held not to have been made (to him as assignee) “for valuable consideration” within a clause of the policy protecting the rights of such an assignee on the death of the assured by his own hand. These cases are not directly concerned with the question of whether such an antecedent debt can constitute consideration for a later *promise* by the debtor: indeed, in *Wigan's* case such enforceability at common law could hardly have been disputed since the assignment was made in a deed. The cases may, however, be relevant by analogy to the enforceability of a promise made by the debtor to the creditor (e.g. of one to pay higher interest or to pay early); and, in principle, it seems that where the only possible consideration for such a promise is an antecedent debt owed by the promisor to the promisee, then such consideration is past, so that the promise is not contractually binding.<sup>165</sup> In practice, however, the creditor (i.e. the promisee) will often be held to have provided consideration for such a promise if, on the strength of it, they forbears to sue for the debt.<sup>166</sup>

## “Moral” obligation

- 136 In the eighteenth and early nineteenth centuries, an attempt was made (originally by Lord Mansfield) to define consideration so as to include certain pre-existing “moral” obligations. In accordance with this theory it was held that an executor was personally liable on a promise to pay a legacy if they had sufficient assets of the deceased in their hands to pay the deceased’s debts and legacies<sup>167</sup>; that a promise by a discharged bankrupt to pay a debt contracted before the discharge was binding<sup>168</sup>; and that a promise to pay a statute-barred debt<sup>169</sup> or one contracted during minority<sup>170</sup> was binding. In some of these cases, the consideration for the promise was said to be the “moral” obligation of the promisor to pay the debt. In this context, the term “moral obligation” was used in a narrow sense. It was restricted to cases in which the promisor’s previous obligation was not legally enforceable (or not enforceable in the particular court in which the action on the promise was brought<sup>171</sup>) because it suffered from some specific legal defect. It did not follow that any “moral obligation”, such as one which might be said to have arisen from the receipt of a past benefit, constituted consideration. Thus in *Eastwood v Kenyon*<sup>172</sup> the guardian of a young girl had raised a loan to pay for her maintenance and education, and to improve her estate. After she had come of age and married, her husband promised the guardian to pay the amount of the loan. In dismissing the guardian’s action on this promise, the court rejected the argument that the defendant’s promise was binding merely because they were under a moral obligation to perform it. Lord Denman CJ said that this argument would “annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it”.<sup>173</sup> The case also shows that the mere existence of an antecedent moral obligation (in the ordinary sense of the phrase) to reimburse the guardian did not amount to consideration for the husband’s promise. From this point of view, the case provides a classic illustration of the requirement that the consideration for a promise must not be past.

## Defective obligations as consideration: present position

- <sup>137</sup> Many of the cases in which promises were held binding under the old “moral obligation” theory <sup>174</sup> would now go the other way. For example, an executor who has assets of the deceased in their hands is no longer personally liable on a promise to pay legacies <sup>175</sup>; a promise by a discharged bankrupt to pay in full debts incurred before their discharge is binding only if supported by fresh consideration <sup>176</sup>; and the same is true of a promise to pay a debt after it has become statute-barred. <sup>177</sup> There is Australian authority in favour of the same rule where a company renewed a note that was originally ultra vires after it had been validated by subsequent legislation. <sup>178</sup> On the other hand, a promise by an adult to pay a debt (or to perform some other obligation) contracted during minority is enforceable <sup>179</sup>; and in *Eastwood v Kenyon* <sup>180</sup> Lord Denman did not purport to overrule the “moral obligation” theory in its original narrow sense, that a promise to discharge an earlier obligation which suffered from some specific legal defect might be binding. In this sense the theory was again recognised by Lord Denman himself in *Flight v Reed*. <sup>181</sup> That case supports the view that a promise to repay a loan made after the repeal of the legislation against usury was not invalid for want of consideration merely because the original loan was usurious. Of course an action on such a promise might, under the modern view of past consideration, fail because the loan was an antecedent debt; but this objection would be overcome if the promisee’s forbearance to enforce the loan could be regarded as consideration for the promise in accordance with the requirements stated in paras 6-056 and 6-058, below.

## Bills of exchange

- <sup>138</sup> Under s.27(1)(b) of the Bills of Exchange Act 1882, an “antecedent debt or liability” constitutes valuable consideration for a bill of exchange. <sup>182</sup> In many cases, such a consideration would not be past: it could be said to consist in the forbearance of the creditor to sue for the debt <sup>183</sup> or in their treating the bill as conditional payment. <sup>184</sup> But s.27(1)(b) could apply even though, for some reason, this analysis were not possible; and in such cases it would constitute an exception to the rule that past consideration is no consideration.

## Acknowledgments of statute-barred debts

- <sup>139</sup> A further qualification of the past consideration rule is contained in s.29(5) of the Limitation Act 1980. This provides (inter alia) that, where a debtor in a writing signed by them <sup>185</sup> “acknowledges”

a debt,<sup>186</sup> it shall be deemed to have accrued on and not before the date of the acknowledgment. An “acknowledgment” need not take the form of a promise<sup>187</sup>; but if it does take this form the promise can extend the period of limitation even though the only consideration for it was the antecedent debt, and thus past. Further acknowledgments made within such an extended period or periods have the same effect.<sup>188</sup> But once the debt has become statute-barred the right to sue for it cannot be revived by any subsequent acknowledgment<sup>189</sup>: to this extent, the old “moral obligation” theory, as applied to statute-barred debts,<sup>190</sup> has been reversed.

## Footnotes

- 1 Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.
- 142 *Dent v Bennett* (1839) 4 *My. & C.* 269; *Eastwood v Kenyon* (1840) 11 *Ad. & El.* 438.
- 143 *Thorner v Field* (1611) 1 *Bulst.* 120; *Roscorla v Thomas* (1842) 3 *Q.B.* 234. In the latter case an oral warranty was given at the time of sale (see (1842) 11 *L.J. Q.B.* 214 and 6 *Jur.* 929) but this was presumably considered at the time to be “void” for want of written evidence.
- 144 Such “other consideration” may be provided by “the exchange of one obligation from one party for another from a different party”: *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2009] *EWHC* 1142 (Comm), [2010] *1 Lloyd's Rep.* 59 at [46], where a contract between A and B required B to provide a guarantee from D and A had instead accepted one from C.
- 145 See the facts of *Simpson v John Reynolds* [1975] *1 W.L.R.* 617, where such a payment was held to be voluntary for tax purposes and cf. *Murray v Goodhews* [1978] *1 W.L.R.* 499.
- 146 e.g. *Bell v Lever Bros Ltd* [1932] *A.C.* 161 (where the value of the rights given up in return for the payment was uncertain in amount since it included not only future salary but also possible future commission).
- 147 cf. *Wyatt v Kreglinger and Fernau* [1933] *1 K.B.* 793—where the ex-employee’s claim would have succeeded if the restraint undertaken by him had not been invalid (below, para.18-153).
- 148 *Thornton v Jenkyns* (1840) 1 *M. & G.* 166; *Tanner v Moore* (1846) 9 *Q.B.* 1; *Lictor Anstalt v MIR Steel UK Ltd* [2015] *EWHC* 3316 (Ch) at [223] (“whole matter can be construed as a single transaction”); cf. the discussion of *Halifax B.S. v Edell* [1992] *Ch.* 436, below, para.20-015.
- 149 *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2009] *EWHC* 1142 (Comm), [2010] *1 Lloyd's Rep.* 59 at [45], where para.3-027 of the 30th edition of this book (para.6-030 of the present edition) is cited at [46] with apparent approval.
- 150 See notably *Consumer Rights Act 2015* s.30, discussed further in Vol.II, para.40-531.
- 151 [1951] *Ch.* 669.
- 152 *Goldshede v Swan* (1847) 1 *Ex.* 154. In such cases, the burden of proving that the consideration is not past lies on the person seeking to enforce the promise: *Savage v Uwechia* [1961] *1 W.L.R.* 455.

- 153 This approach was apparently endorsed in *Lictor Anstalt v MIR Steel UK Ltd* [2014] EWHC 3316 (Ch) at [221].
- 154 See *Southwark LBC v Logan* (1996) 8 Admin. L.R. 292 (where this requirement was not satisfied).
- 155 *Re Casey's Patents* [1892] 1 Ch. 104, 115–116; cf. *Lampleigh v Brathwait* (1615) Hob. 105. For further discussion in the context of guarantees, see Vol.II, para.47-022, recently considered in *Longulf Trading (UK) Ltd v Niyazi Onen Gida Sanayi AS* [2019] EWHC 1573 (Comm) at [11].
- 156 *Kennedy v Brown* (1863) 13 C.B. N.S. 677, 740; *Rondel v Worsley* [1969] 1 A.C. 191, 236, 278, 287.
- 157 *Rondel v Worsley* [1969] 1 A.C. 191 (the reasoning of which was disapproved in *Arthur J.S. Hall Ltd v Simons* [2002] 1 A.C. 615 but not on this point).
- 158 [1980] A.C. 614.
- 159 This guarantee replaced an earlier agreement (made at the time of the principal sale but subsidiary to it) which was less favourable to the claimants.
- 160 For the further argument that the consideration was no more than the promise to perform an existing contractual duty, see below, para.6-080.
- 161 (1869) L.R. 2 P.C. 393.
- 162 Below, Vol.II, para.46-327.
- 163 (1875) 44 L.J. Ch. 487.
- 164 [1909] 1 Ch. 291.
- 165 e.g. *Hopkinson v Logan* (1839) 5 M. & W. 241 (promise fixing date of payment).
- 166 Below, paras 6-056, 6-058.
- 167 *Atkins v Hill* (1775) 1 Cowp. 284; *Hawkes v Saunders* (1782) 1 Cowp. 289; an alternative ground for the decision given by Buller J was that the defendant's equitable (as opposed to "moral") obligation to pay the legacy was consideration for the promise.
- 168 *Trueman v Fenton* (1777) 2 Cowp. 544.
- 169 *Hyeling v Hastings* (1699) 1 Ld.Raym. 389.
- 170 Below, para.11-051, cf. *Lee v Muggeridge* (1813) 5 Taunt. 36 (promise by a woman after her husband's death to pay debt incurred during marriage); for attempts to restrict or define the doctrine, see *Littlefield v Shee* (1831) 2 B. & Ad. 811; *Meyer v Haworth* (1838) 8 Ad. & El. 467.
- 171 As in *Hawkes v Saunders* (1782) 1 Cowp. 289.
- 172 (1840) 11 Ad. & El. 438.
- 173 (1840) 11 Ad. & El. 438 at 450.
- 174 Above, para.6-036.
- 175 Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 19th edn (2007), para.55-80.
- 176 *Jakeman v Cook* (1878) 4 Ex.D. 26; *Re Bonacina* [1912] 2 Ch. 394; *Wild v Tucker* [1914] 3 K.B. 36.
- 177 Limitation Act 1980 s.29(7) (below para.6-039); cf. as to time bars imposed by contract, *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd's Rep. 245, 249.

- 178 *Sharp v Ellis* (1971) 20 F.L.R. 199.
- 179 Minors' Contracts Act 1987 ss.1 and 4, repealing Infants Relief Act 1874 s.2 and Betting and Loans (Infants) Act 1892 s.5.
- 180 (1840) 11 Ad. & El. 438; above, para.6-036.
- 181 (1863) 1 H. & C. 703; mentioned with approval by Scrutton LJ in *J. Evans & Co v Heathcote [1918]* 1 K.B. 418, 437.
- 182 Below, Vol.II, para.36-062.
- 183 See *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm), where forbearance to sue, "both promised and actual" (at [62]) was held to be consideration for two promissory notes. No reliance was placed on Bills of Exchange Act 1882 s.27(1)(b) though this provision applies, by virtue of s.89(1) of the 1882 Act, to promissory notes "with the necessary modifications".
- 184 See *Currie v Misa* (1875) L.R. 10 Ex. 153 and cf. below, paras 6-056—6-059.
- 185 Limitation Act 1980 s.30(1). An inscription of a person's name, typed on a telex document, is a sufficient signature for the present purpose: *Good Challenger Navegante SA v Metalexportimport SA (The Good Challenger)* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep. 67 at [20]–[28].
- 186 s.29(5) is expressed to apply also to "any ... other liquidated claims" (s.29(5)(a)). In *Barnett v Creggy* [2016] EWCA Civ 1004, [2017] P.N.L.R. 4 a majority of the Court of Appeal held that the words here quoted could include a claim against a trustee for money paid away in breach of his fiduciary duty, but (unanimously) that these words did not apply to the claim for "equitable compensation" since this was "equivalent to a claim for damages" (at [37]) and so not a "liquidated claim" within s.29(5)(a) (at [40], [54], [55]).
- 187 *Lia Oil SA v ERG Petroli* [2007] EWHC 505 (Comm), [2007] 2 Lloyd's Rep. 509; an admission of liability suffices: *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 W.L.R. 565, [1977] 2 All E.R. 481; see further *Bradford & Bingley Plc v Rashid* [2006] UKHL 37, [2006] 1 W.L.R. 2066, where a debtor's statement that he was not in a position to pay "the outstanding amount due to you" was held to amount to an "acknowledgement within section 29(5)" even though it contained no admission of the amount (or undisputed amount) of the debt; cf. *Re Overmark Smith Warden Ltd* [1982] 1 W.L.R. 1195 ("statement of affairs" by insolvent company). An express denial of liability is not an acknowledgement within s.29(5): *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174; and the same is true of a letter from the debtor merely questioning the amount claimed: *Phillips & Co v Bath Housing Co-operation Ltd* [2012] EWCA Civ 1591, [2013] 1 W.L.R. 1479 at [53], [58]. For the analogous question of what amounts to an acknowledgement by an occupier of land of the owner's title for the purposes of Limitation Act 1980 s.29(5)(a), see *Oفالue v Bossert* [2009] UKHL 16, [2009] 1 A.C. 290.
- 188 Limitation Act 1980 s.29(7).
- 189 Limitation Act 1980 s.29(7).
- 190 Above, para.6-036.

## Section 6. - Consideration Must Move from the Promisee

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 6. - Consideration Must Move from the Promisee

### Promisee must provide consideration

- <sup>140</sup> The rule that “consideration must move from the promisee”<sup>191</sup> means that a person can enforce a promise only if they themselves provided consideration for it. Thus if A promises B to pay a sum of money to B if C will paint A’s house and C does so, B cannot enforce the promise (unless, of course, they procured, or expressly or impliedly undertook to procure, C to do the work). It is, however, not necessary for the promisee to provide the whole consideration for the promise: thus they can enforce a promise part of the consideration for which was provided by their agent or partner or by some other co-promisee.<sup>192</sup>

### Consideration need not move to the promisor

- <sup>141</sup> While consideration must move from the promisee, it need not move to the promisor.<sup>193</sup> It follows that the requirement of consideration may be satisfied where the promisee does something at the promisor’s request, but confers no corresponding benefit on the promisor. Thus the promisee may provide consideration by giving up a job<sup>194</sup> or the tenancy of a flat,<sup>195</sup> even though no direct benefit results to the promisor from these acts. In *Bolton v Madden*<sup>196</sup> the claimant and defendant were subscribers to a charity and entitled to vote on the disposition of its funds. The claimant promised to vote at one meeting for a person whom the defendant wished to benefit, and the defendant promised in return to vote at the next meeting for a person whom the claimant wished to benefit. The court held that consideration moved from the claimant when he had at the defendant’s request conferred a benefit on a third party.

- ¶42 It also follows that the promisee may provide consideration by conferring a benefit on a third party at the promisor's request: e.g. by entering into a contract with the third party.<sup>197</sup> This possibility is illustrated by the case in which goods are bought and paid for by the use of a credit or debit or cheque guarantee card. The issuer of the card makes a promise to the supplier of the goods that the cheque will be honoured or that the supplier will be paid; and the supplier provides consideration for this promise by supplying the goods to the customer.<sup>198</sup> There may also be consideration in the form of the discount allowed by the supplier of the goods or services to the issuer of the card<sup>199</sup>: this is both a detriment to the supplier and a benefit to the issuer of the card.

## More than one promisee <sup>200</sup>

- ¶43 Where a promise is made to more than one person, it is clear that it can be enforced by any of the promisees, even by one who provided only *part* of the consideration.<sup>201</sup> But the further question may arise whether the promise can be enforced by one of the promisees even though they provided no part of the consideration, the *whole* being provided by the other or others. There is no clear answer in the present law to this question; but it is submitted that the position depends on the distinctions drawn in paras 6-044—6-046 below.

### Joint promisees

- ¶44 Where a promise is made to A and B *jointly*, it can be enforced by both of them, even though the whole consideration was provided by A.<sup>202</sup> If this were not so, the promise could not be enforced at all; for, if A tried to sue alone, they would be defeated by the rule that all the joint creditors must be parties to the action.<sup>203</sup> It follows from the doctrine of survivorship (which applies between joint promisees)<sup>204</sup> that B would be entitled to the entire benefit of the promise after A's death.

### Several promisees

- ¶45 None of the reasoning in para.6-044 above applies where a promise is made to A and B *severally*.<sup>205</sup> Hence it seems that each promisee must provide consideration for what is in theory a separate promise to them.

## Joint and several promisees

- ¶46 It is, however, uncertain which of the rules stated in paras 6-044 and 6-045 above applies to the intermediate case of a promise made to two persons *jointly and severally*. Such a promise may be made under s.81 of the Law of Property Act 1925<sup>206</sup>; but that section appears to contemplate only promises under seal,<sup>207</sup> so that no question of consideration can arise. The common law originally did not recognise the possibility that a promise *to* a number of persons<sup>208</sup> could be joint and several<sup>209</sup>; but the possibility came to be recognised late in the nineteenth century.<sup>210</sup> It may be illustrated by *McEvoy v Belfast Banking Co.*<sup>211</sup> where a father, A, deposited £10,000 in a bank and the deposit receipt stated that this amount had been received from him and his son, B, and that it was payable “to either or the survivor”. With reference to these facts, Lord Atkin said obiter that the contract was not by the bank with A for the benefit of B but “with A and B,<sup>212</sup> and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself and the consideration supports such a contract”.<sup>213</sup> Of course after A’s death (which in *McEvoy’s* case had occurred) B would be entitled to sue on any joint promise under the doctrine of survivorship.<sup>214</sup> But it is harder to see how he could sue on any several promise, for this is ex hypothesi an independent promise and on the facts stated no consideration for it moved from B.<sup>215</sup> Indeed, the more probable view of such facts is that the bank makes no promise at all to B but only has authority to pay him. Hence the bank is discharged by paying B but it is not liable to him.<sup>216</sup> The bank would not, however, be discharged by such payment if it were *not* authorised by its contract with A to pay B. This possibility is illustrated by *Thavorn v Bank of Credit & Commerce SA*<sup>217</sup> where A opened a bank account in the name of her nephew B (who was under age), stipulating that only A should operate the account. It was held that B was a mere nominee and that the bank was not discharged by (or was liable in damages to A for) paying B at the sole request of B and without any instructions from A. There were two reasons why B could not have sued the bank: no promise by the bank had been made to him, and no consideration had moved from him.

## Contracts (Rights of Third Parties) Act 1999

- ¶47 Under this Act, a term in a contract between A (the promisor) and B (the promisee) is, in specified conditions, enforceable by a third party, C, against A. The Act is more fully discussed in Ch.20<sup>218</sup>; the only points to be made here are that C is not prevented from enforcing the term by the fact that no consideration for A’s promise moved from them,<sup>219</sup> and that C’s right to enforce that promise can be described as a quasi-exception to the rule that consideration must move from the

promisee.<sup>220</sup> It is not a true exception to the rule since in the case put the promisee is B, who must provide consideration for A's promise.

## Footnotes

- 1 Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.
- 191 *Barber v Fox* (1669) *2 Saund.* 134, n.(e); *Thomas v Thomas* (1842) *2 Q.B.* 851, 859; *Tweddle v Atkinson* (1861) *1 B. & S.* 393, 399; *Pollway v Abdullah* [1974] *1 W.L.R.* 493, 497; cf. *Dickinson v Abel* [1969] *1 W.L.R.* 295, and (for VAT purposes) *Customs and Excise Commissioners v Telemed* [1992] *S.T.C.* 89. In *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] *UKSC 15*, [2013] *2 All E.R.* 719 the judgments of the Supreme Court contain many references to "third party consideration" (see at [12] and *passim*). This phrase simply reflects the words of art.11 of the relevant EC Council Directive (95/7 of 10 April 1995) which defines the taxable amount for VAT purposes as "the *consideration* which has been obtained by the supplier from the purchaser or a *third party* for such supplies" (italics supplied). The phrase carries no implication to the effect that the "third party consideration" gives any promise to the force of a binding contract. For criticism of a possibly contrary dictum, see below, para.6-046. See too *Dixons Carphone Plc v Revenue and Customs Commissioners* [2018] *UKFTT* 557 (TC).
- 192 *Jones v Robinson* (1847) *1 Ex.* 454; *Fleming v Bank of New Zealand* [1900] *A.C.* 577. For the position where the *whole* consideration is provided by a co-promisee, see below, paras 6-043—6-046.
- 193 *Re Wyvern Developments Ltd* [1974] *1 W.L.R.* 1097; cf. *International Petroleum Refining & Supply Ltd v Caleb Brett & Sons Ltd* [1980] *1 Lloyd's Rep.* 569, 594 (below, para.20-011); *Barclays Bank Plc v Weeks, Legg & Dean* [1998] *3 All E.R.* 213, 220–221. These authorities for the principle stated at this point in the text above, and that principle itself, appear to have been overlooked in a passage from the judgment in *Ritz Hotel Casinos Ltd v Al Geabury* [2015] *EWHC 2294 (QB)*, [2015] *L.L.R.* 860 at [137]. This passage is discussed in Vol.II, para.43–026 below.
- 194 *Jones v Padavatton* [1969] *1 W.L.R.* 628.
- 195 *Tanner v Tanner* [1975] *1 W.L.R.* 1346; contrast *Horrocks v Forray* [1976] *1 W.L.R.* 230 where there was no such (nor any other) consideration and no contract, partly for this reason and partly for lack of contractual intention: above, para.4-238; and see *Coombes v Smith* [1986] *1 W.L.R.* 808.
- 196 (1873) *L.R.* 9 *Q.B.* 55.
- 197 See *International Petroleum Refining Supply Ltd v Caleb Brett & Son Ltd* [1980] *1 Lloyd's Rep.* 569, 594, where the promisor benefited indirectly since promisor and third party were associated companies. cf. *Pearl Carriers Inc v Japan Lines Ltd (The Chemical Venture)* [1993] *1 Lloyd's Rep.* 508, 522 (payments made by charterers of ship to the crew regarded as consideration for promise by shipowners to charterers).

- 198 *R. v Lambie* [1982] A.C. 449; *Re Charge Card Services* [1987] Ch. 150, affirmed [1989] Ch. 497.
- 199 *Customs & Excise Commissioners v Diners Club Ltd* [1989] 1 W.L.R. 1196, 1207.
- 200 *Cullity* (1969) 85 L.Q.R. 530; *Winterton* (1970) 47 Can.Bar Rev. 483.
- 201 Above, para.6-040.
- 202 This proposition seems to have been accepted in *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] A.L.R. 385; though the majority of the court held that no joint promise had in fact been made: below, para.20-076.
- 203 *Jell v Douglas* (1821) 4 B. & Ald. 374; *Sorsbie v Park* (1843) 12 M. & W. 146; *Thompson v Hakewill* (1865) 9 C.B. N.S. 713.
- 204 *Anderson v Martindale* (1801) 1 East 497.
- 205 In such cases it is not necessary to join all the creditors to the action: *James v Emery* (1818) 5 Price 529; *Keighley v Watson* (1849) 3 Ex. 716; *Palmer v Mallett* (1887) 36 Ch. D. 411; nor did the doctrine of survivorship apply: *Withers v Bircham* (1824) 3 B. & C. 254.
- 206 Re-enacting, with some changes, the Conveyancing Act 1881 s.60. Section 81 of the 1925 Act does not affect the law relating to joint debtors: *Johnson v Davies* [1999] Ch. 117, 127; but our present concern is with the case in which there is more than one creditor.
- 207 See now Law of Property (Miscellaneous Provisions) Act 1989 s.1(7).
- 208 For promises made by a number of persons, see Ch.19, below.
- 209 *Slingsby's Case* (1588) 5 Co. Rep. 186; *Anderson v Martindale* (1801) 1 East 487; *Bradburne v Batfield* (1845) 14 M. & W. 559, 573; *Keighley v Watson* (1849) 3 Ex. 716, 723 (criticising the rule).
- 210 *Thompson v Hakewill* (1865) 19 C.B. N.S. 713, 726; *Palmer v Mallett* (1887) 36 Ch. D. 410, 421.
- 211 [1935] A.C. 24.
- 212 Hence B would not be a “third party” within s.1(1) of the Contracts (Rights of Third Parties) Act 1999 (below, paras 20-091 et seq.).
- 213 [1935] A.C. 24, 43.
- 214 cf. *Aroso v Coutts & Co* [2002] 1 All E.R. (Comm) 241, where the contract expressly so provided.
- 215 S.J.B. (1935) 51 L.Q.R. 419.
- 216 See *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] A.L.R. 385; below, para.20-076.
- 217 [1985] 1 Lloyd's Rep. 259. The Contracts (Rights of Third Parties) Act 1999 would not apply to such a case as it was not the intention of the contracting parties that B should be entitled to enforce the contract: see s.1(2) of the Act, below, paras 20-094—20-096.
- 218 Below, paras 20-091 et seq.
- 219 Law Com. No.242 (on which the Act is based), para.6.8.
- 220 Below, para.20-108.

## Section 7. - Compromise and Forbearance to Sue

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 7. - Compromise and Forbearance to Sue

### Introductory

- 148 Three situations here call for discussion: in the first a person promises not to enforce a *valid* claim (or performs such a promise); in the second the claim which is the subject-matter of such a promise is *invalid* or *doubtful*; and in the third the person in question simply *forbears in fact* from enforcing a claim, without making any *promise* to forbear. The question in all these cases is whether the promise to forbear (or its performance), or the actual forbearance (without any promise), can constitute consideration for a (counter-) promise made by the other party.<sup>221</sup>

### Footnotes

<sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 Sydney Law Review 289.

<sup>221</sup> Our concern in the ensuing discussion is with compromises made otherwise than in legal proceedings. Where legal proceedings have been brought, acceptance of an offer to settle the proceedings under CPR Pt 36 “may well create a contract and probably does so in the vast majority of cases”: *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 W.L.R. 2953 at [60]. But the obligation that arises from a Pt 36 settlement agreement “is not primarily contractual. It is *sui generis*. It is part of the court’s inherent jurisdiction ...” (*Orton v Collins* at [62]). It may therefore be binding even though it lacks contractual force, e.g. for failure to comply with formal requirements (as in *Orton v Collins*, above) or, presumably, for want of consideration.

## **(a) - Valid Claims**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 7. - Compromise and Forbearance to Sue**

**(a) - Valid Claims**

### **Promise not to sue on a valid claim**

- 149 A creditor's promise not to enforce a valid claim is normally good consideration for a promise given in return.<sup>222</sup> For example, a creditor to whom a sum of money has become due may promise to give the debtor extra time to pay, in return for the debtor's promise to give additional security or to pay higher interest. In such a case, there is good consideration for the debtor's promise: the creditor suffers a detriment in that they are, at least for a time, kept out of their money, while the debtor benefits by getting extra time to pay.<sup>223</sup> In the case put (of a creditor giving their debtor extra time to pay) there is such detriment and benefit even though the creditor has promised to forbear only for a limited time<sup>224</sup>; if no time is specified in the promise, the court will infer that the creditor undertook to forbear for a reasonable time.<sup>225</sup> A fortiori, the creditor will provide consideration where they promise absolutely not to sue on the claim<sup>226</sup>: this is the position where a valid claim is settled by agreement between the parties.<sup>227</sup> The principles just stated apply not only to a promise not to enforce a claim but also to one to abandon a good defence<sup>228</sup>; and to one to abandon a particular remedy: e.g. to one to abandon arbitration proceedings.<sup>229</sup> Analogous reasoning has been used to support the view that, where a husband is ordered to transfer property to his former wife by way of ancillary relief in divorce proceedings, then the wife provides consideration for the transfer in the sense that the transfer wholly or in part satisfies her claim for ancillary relief.<sup>230</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 222 See *Pullin v Stokes* (1794) 2 *H.B.* 312; *Smith v Algar* (1830) 1 *B. & Ad.* 603; *Morton v Burn* (1837) 7 *Ad. & El.* 19; *Coles v Pack* (1869) *L.R.* 5 *C.P.* 65; *Crears v Hunter* (1887) 19 *Q.B.D.* 341; *Greene v Church Commissioners for England* [1974] *Ch.* 467. See also *Oliver v Davis* [1949] 2 *K.B.* 727, especially at 743; *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd*, *The Times*, 8 March 1983 (as to which see above, para.4-003); *G.N. Angelakis Co SA v Cie Algérienne de Navigation (The Attika Hope)* [1988] 1 *Lloyd's Rep.* 439; *Haines v Hill* [2007] *EWCA Civ* 1284, [2008] *Ch.* 412 at [79].
- 223 *Crowther v Farrer* (1850) 15 *Q.B.* 677. It seems to be immaterial whether the proceedings have been commenced or not: see *Wade v Simeon* (1846) 2 *C.B.* 548, 565, 567.
- 224 *Willatts v Kennedy* (1831) 7 *Bing.* 5; *Morton v Burn* (1837) *Ad. & El.* 19; *Board v Hoey* (1949) 65 *T.L.R.* 43.
- 225 *Payne v Wilson* (1827) 7 *B. & C.* 423; *Oldershaw v King* (1857) 2 *Hurl. & N.* 517; *Fullerton v Provincial Bank of Ireland* [1903] *A.C.* 309, 313.
- 226 *Mapes v Sidney* (1624) *Cro. Jac.* 683.
- 227 The normal rules of construction apply to releases: *Bank of Credit and Commerce International SA v Ali* [2001] *UKHL* 8, [2002] 1 *A.C.* 251 at [8], [26], discussed further below, paras 25-019—25-021.
- 228 See *Banque de l'Indochine v J.H. Rayner (Mincing Lane) Ltd* [1983] *Q.B.* 711; *Haines v Hill* [2007] *EWCA Civ* 1284, [2008] *Ch.* 412 at [30].
- 229 *Allied Marine Transport Ltd v Vale do Rio Doce Navegação SA (The Leonidas D.)* [1985] 1 *W.L.R.* 925, 933.
- 230 *Haines v Hill* [2007] *EWCA Civ* 1284, [2008] *Ch.* 412 at [39]; the issue in this case was not whether there was any consideration for a *promise* but whether there was consideration for a *transfer* (cf. above, paras 6-018—6-019, 6-035). The wife was held to have provided such consideration even though her original claim depended for its quantification on the discretion of the court: *Haines v Hill*, above, at [39], approving the judgment of District Judge Cooke, described at [53] as “a model of lucid erudition”.

## **(b) - Invalid or Doubtful Claims**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 7. - Compromise and Forbearance to Sue

**(b) - Invalid or Doubtful Claims**

### **Claims known to be invalid**

- 150 A compromise of a claim which is legally invalid and which is either known by the party asserting it to be invalid or not believed by that party to be valid is not contractually binding. This rule can be explained either on the ground that merely making or performing a promise to give up a worthless claim cannot constitute consideration for the counter-promise,<sup>231</sup> or (preferably) on grounds of public policy. As Tindal CJ said in *Wade v Simeon*<sup>232</sup>: “It is almost contra bonos mores and certainly contrary to all the principles of natural justice that a man should institute proceedings against another when he is conscious that he has no good cause of action”.

### **Claims which are doubtful in law**

- 151 The compromise of a claim which is doubtful in law is binding as a contract. Making or performing a promise to give up a doubtful claim can constitute consideration for a counter-promise since it involves the possibility of detriment to the person to whom the latter promise is made and that of benefit to the person making it. In *Haigh v Brooks*, for example,<sup>233</sup> it was held that the promisee had provided consideration by giving up a guarantee containing “an ambiguity that might be explained ... so as to make it a valid contract”.<sup>234</sup> And in *Simantob v Shavleyan* the Court of Appeal held that giving up an argument that a clause to pay \$1,000 per day in interest was a

penalty clause did constitute good consideration, even though that argument had previously been rejected in an application for summary judgment.<sup>235</sup>

## Claims in law invalid but made in good faith

- 152 Even if the claim given up is *clearly invalid* in law, that act of forbearance may still constitute good consideration if (i) it was provided in exchange for the counter-promise; (ii) it was a “reasonable claim”<sup>236</sup> (i.e. one made on reasonable grounds); (iii) the party forbearing believed, in good faith, that it had a fair chance of success;<sup>237</sup> and (iv) they seriously intended to pursue the claim.<sup>238</sup> The counter-party benefits since “instead of being annoyed with the action, he escapes from the vexations incident to it”.<sup>239</sup> This may, indeed, also be true where the claim is *known* to be invalid; but the rule that a compromise of such a claim is not binding is, as has been suggested in para.6-050 above, more appropriately based on grounds of public policy than on want of consideration.

## Claims on disputed facts

- 153 The cases considered in paras 6-051 and 6-052 above concern claims the validity of which is doubtful in law. It seems that the same principles can apply where the validity of a claim is in doubt because of a dispute about the facts. A settlement based on a *mistake* shared by both parties may be void for mistake.<sup>240</sup> But this would not be the case where both parties knowingly took the risk that the facts might turn out to be different from the facts as they were alleged or supposed to be. A negotiation of a settlement on disputed facts always takes such an element of risk into account.

## Void forbearances

- 154 The forbearance itself (as opposed to the claim forborne) may be void on grounds of public policy, or by statute: for example, where a wife promises her husband not to apply for maintenance in matrimonial proceedings.<sup>241</sup> In such cases the promise to forbear cannot of course be enforced; but, unless the promise is illegal, it may nevertheless constitute consideration for a counter-promise to make a payment in return for it. A fortiori the performance of the promise to forbear may (if the promise was not illegal) be good consideration for a counter-promise<sup>242</sup> even though the promise could not have been enforced.

## Executed compromises

- 155 The discussion in paras 6-050—6-054 above is concerned with the enforceability of an agreement to compromise a claim. Different problems can arise after such an agreement has been *performed*, generally by payment of the amount which one party agreed to pay under the compromise. Even if there was, under the rules discussed above, no consideration for that party's promise, they will not be entitled to the return of the payment if it was made "to close the transaction"<sup>243</sup>; in such a case the payment is treated as if it were an executed gift.<sup>244</sup> To give rise to a claim for repayment, it will be necessary to establish other circumstances, such as that the payment was made under duress.<sup>245</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 231 The position is different if there is also *other* consideration for the promise; see *The Siboen and the Sibotre* [1976] 1 *Lloyd's Rep.* 293, 334.
- 232 (1846) 2 C.B. 548, 564. See also *Edwards v Baugh* (1843) 11 M. & W. 641, especially at 646; *Callisher v Bischoffsheim* (1870) L.R. 5 Q.B. 449 at 452.
- 233 (1839) 10 A. & E. 309; for the earlier, contrary view see *Stone v Wythipol* (1588) Cro. Eliz. 126; *Jones v Ashburnham* (1804) 4 East 455 and dicta in *Ex p. Banner* (1881) 17 Ch. D. 480, 490 (these dicta being disapproved in *Miles v New Zealand Alford Estate Co* (1885) 32 Ch. D. 266).
- 234 (1839) 10 A. & E. 309, 334; cf. *Colchester BC v Smith* [1992] Ch. 421; *Colonia Versicherung AG v Amoco Oil Co* [1995] 1 *Lloyd's Rep.* 570, 577 (affirmed without reference to this point [1997] 1 *Lloyd's Rep.* 261).
- 235 [2019] EWCA Civ 1105, citing this paragraph at [53].
- 236 *Cook v Wright* (1861) 1 B. & S. 559, 569.
- 237 *Callisher v Bischoffsheim* (1870) L.R. 5 Q.B. 449. See also *Longridge v Dorville* (1821) 5 B. & Ad. 117; *Cooper v Parker* (1855) 15 C.B. 822; *Cook v Wright* (1861) 1 B. & S. 559; *Ockford v Barelli* (1871) 20 W.R. 116; *Holsworthy UDC v Holsworthy RDC* [1907] 2 Ch. 62; *Re Cole* [1931] 2 Ch. 174; *Freedman v Union Group Plc* [1997] E.G.C.S. 28; *Moussaka Inc v Golden Seagull Maritime Inc* [2002] 1 *Lloyd's Rep.* 797 at [14]; *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch. 412 at [79]. For a discussion of the English decisions on a Scottish appeal, see *Hunter v Bradford Property Trust*, 1970 S.L.T. 173. Scots law does not require promises to be supported by consideration but distinguishes for certain purposes between gratuitous and onerous promises.
- 238 *Cook v Wright* (1861) 1 B. & S. 559, 569; *Syros Shipping Co SA v Elaghill Trading Co (The Proodos C)* [1980] 2 *Lloyd's Rep.* 390, 392.

- 239 *Callisher v Bischoffsheim* (1870) *L.R. 5 Q.B.* 449 at 452; cf. *Pitt v P.H.H. Asset Management Ltd* [1994] *1 W.L.R.* 327 at 322, but in that case it is not clear that the party forbearing in fact believed in the validity of his claim; *Moussaka Inc v Golden Seagull Maritime Inc* [2002] *1 Lloyd's Rep.* 797 at [14] ("commercial benefit").
- 240 e.g. *Gloyne v Richardson* [2001] *EWCA Civ* 716; [2002] *2 B.C.L.C.* 669 at [39]. The mistake may be as to law: *Brennan v Bolt Burden* [2004] *EWCA Civ* 1017, [2005] *QB* 303. In *Grains & Fourrages SA v Huyton* [1997] *1 Lloyd's Rep.* 628 there was no compromise since both parties wished from the start to achieve the same result but were mistaken only as to the effect of the steps they had taken to achieve it.
- 241 Matrimonial Causes Act 1973 s.34, re-enacting Maintenance Agreements Act 1957 s.1, below, para.18-087.
- 242 Below, para.6-196.
- 243 *Woolwich Equitable B.S. v IRC* [1993] *A.C.* 70, 165.
- 244 *Woolwich Equitable B.S. v IRC* [1993] *A.C.* 70, 165 citing *Maskell v Horner* [1915] *3 K.B.* 106, 120.
- 245 Below, Ch.10.

## (c) - Actual Forbearance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 7. - Compromise and Forbearance to Sue

(c) - Actual Forbearance

### Actual forbearance may be consideration

- 156 A creditor who, without making any express promise, simply forbears from enforcing a debt or other claim may be held to have impliedly promised to forbear.<sup>246</sup> For example, the acceptance of a cheque in payment of a debt may be evidence of a promise not to sue the debtor so long as the cheque is not dishonoured, or at least for a reasonable time.<sup>247</sup> Where the claim is of such a kind that a promise to forbear (or the performance of it) would constitute consideration for a counter-promise,<sup>248</sup> an actual forbearance may also constitute consideration even though the creditor has not made any express or implied promise to forbear. In *Alliance Bank v Broom*<sup>249</sup> the defendant owed £22,000 to his bank, who pressed him to give security. He promised to do so but the bank made no counter-promise not to sue him. It was held that there was consideration for the defendant's promise as the bank had given, and the defendant received, "some degree of forbearance".<sup>250</sup> On the other hand, in *Miles v New Zealand Alford Estate Co*<sup>251</sup> a company had bought land and then became dissatisfied with the purchase. The vendor later promised to make certain payments to the company, and it was alleged that the consideration for this promise was the company's forbearance to take proceedings to rescind the contract. A majority of the Court of Appeal held that there was no consideration for the vendor's promise as no proceedings to rescind were ever intended; and Cotton LJ added that "it must be shown that there was something which would bind the company not to institute proceedings".<sup>252</sup> Bowen LJ dissented from this proposition,<sup>253</sup> relying on *Alliance Bank v Broom*; but it may be possible to reconcile the two cases by reference to the types of claim forborne. A bank to which £22,000 is owed is virtually certain to take steps to enforce its claim, but a dissatisfied purchaser of land is much less certain to

take proceedings for rescission. It may, therefore, be reasonable to say that mere forbearance will amount to consideration in relation to the former type of claim, but that a promise to forbear is necessary where it is problematical whether the claim will ever be enforced. A promise to forbear is also, of course, necessary where that is what the debtor bargains for.

## Time for which creditor must forbear

- 157 Where the consideration consists of a promise to forbear which specifies no time the creditor must forbear for a reasonable time.<sup>254</sup> There is no such requirement where the consideration consists of actual forbearance: here it is enough that the debtor had “a certain amount of forbearance”.<sup>255</sup>

## Relation between actual forbearance and the promise made in return for it

- 158 Where the consideration is alleged to consist of an actual forbearance, that forbearance must be causally connected with the debtor’s promise. A creditor does not give consideration<sup>256</sup> merely by forbearing to enforce an antecedent debt.<sup>257</sup> In *Wigan v English & Scottish Law Life Assurance Society*<sup>258</sup> a debtor executed an assignment of an insurance policy by way of mortgage in favour of his creditor. Parker J held that the creditor, who knew nothing of the mortgage, had given no consideration for it<sup>259</sup>; but he added that the creditor would have provided consideration if he had been told of the mortgage and if, “on the strength of”<sup>260</sup> it, he had actually forborne to sue for the debt.

## Express or implied request of debtor necessary

- 159 The crucial question, therefore, is whether the creditor has forborne “on the strength of” the debtor’s promise. They will clearly have done so where the debtor has *expressly* requested the forbearance.<sup>261</sup> But such an express request is not necessary. In *Alliance Bank v Broom*<sup>262</sup> the bank’s forbearance was held to constitute consideration even though the defendant had not expressly requested it. Lord Macnaghten later explained the case on the ground that the debtor had impliedly requested forbearance.<sup>263</sup> It seems that an actual forbearance which is not induced by either the express or the implied request of the debtor is no consideration. In *Combe v Combe*<sup>264</sup> a husband during divorce proceedings promised to pay his wife an annual allowance. In an action to enforce this promise, the wife argued, *inter alia*, that she had given consideration for

it by forbearing to apply to the court for a maintenance order. But it was held that there was no consideration as the wife had not forborne at the husband's request.<sup>265</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 246 *Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097; *Thornton Springer v NEM Insurance Co Ltd* [2000] 2 All E.R. 489 at 516.
- 247 *Baker v Walker* (1845) 14 M. & W. 465; *Elkington v Cooke-Hill* (1914) 30 T.L.R. 670; contrast *Hasan v Wilson* [1977] 1 *Lloyd's Rep.* 431, where the debt in respect of which the cheque was given was that of a third party.
- 248 e.g. not if the claim is known to be invalid: above, para.6-050.
- 249 (1864) 2 *Drew. & Sm.* 289; *R v Att-Gen for England and Wales* [2003] UKPC 22, [2003] E.M.L.R. 24 at [31].
- 250 (1864) 2 *Drew. & Sm.* 289 at 292; cf. *Banque Cantonale de Geneve v Sanomi Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm) at [62], quoted above in para.6-038.
- 251 (1886) 32 Ch. D. 267; cf. *Hunter v Bradford Property Trust Ltd*, 1970 S.L.T. 173.
- 252 (1886) 32 Ch. D. 267, 285.
- 253 (1886) 32 Ch. D. 267, 285 at 291; his view was approved by Lord Macnaghten in *Fullerton v Provincial Bank of Ireland* [1903] A.C. 309, 314.
- 254 Above, para.6-049.
- 255 *Alliance Bank v Broom* (1864) 2 *Drew. & Sm.* 289, 292.
- 256 Or, which comes to the same thing, gives only past consideration.
- 257 Above, para.6-035.
- 258 [1909] 1 Ch. 291; cf. *Hopkins v Logan* (1839) 5 M. & W. 241.
- 259 Above, para.6-035.
- 260 [1909] 1 Ch. 291 at 298.
- 261 *Crears v Hunter* (1887) 19 Q.B.D. 341, 344.
- 262 (1864) 2 *Drew. & Sm.* 289; above, para.6-056.
- 263 *Fullerton v Provincial Bank of Ireland* [1903] A.C. 309, 313. For the sufficiency of an implied request from the debtor for the creditor's forbearance, see also *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm) at [60].
- 264 [1951] 2 K.B. 215.
- 265 Quaere whether such a request should not have been implied; see *A.L.G.* (1951) 67 L.Q.R. 456; *Smith* (1953) 69 L.Q.R. 99; *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 C.L.R. 424, especially at 457–460.

## Section 8. - Existing Duties as Consideration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 8. - Existing Duties as Consideration<sup>266</sup>

### General

- 160 Much difficulty arises in determining whether a person who does, or promises to do, what they are already in law bound to do thereby provides consideration for a promise made to them. One possible view is that, as they were already legally bound to do the thing in question, their doing, or promising to do, it has no “value in the eye of the law”<sup>267</sup>: hence it cannot amount to a legal detriment to them, or to a legal benefit<sup>268</sup> to the person already entitled to performance. On the other hand the actual performance of the legal duty may amount to a factual detriment or benefit: it may be a detriment to the party performing the duty since actual performance may be more troublesome to them than the payment of (or the risk of being sued for) damages; while the other party may benefit in the sense of finding their legal remedy for breach of the duty less beneficial than its actual performance. Denning LJ has therefore said that the performance of an existing duty, or the promise to perform it, was always good consideration.<sup>269</sup> This radical view has not been accepted; but the requirement of consideration in this group of cases has been mitigated by recognising that it can be satisfied where the promisee has conferred a factual (as opposed to a legal) benefit on the promisor.<sup>270</sup>

### Footnotes

<sup>1</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); Shatwell (1955) 1 *Sydney Law Review* 289.

<sup>266</sup> Reynolds and Treitel (1965) 7 *Malaya L.Rev.* 1; Aivazian, Trebilcock & Penny (1984) 22 *Osgoode Hall L.J.* 173; Hooley [1991] *J.B.L.* 195; Halson (1991) 107 *L.Q.R.* 649.

- 267 *Thomas v Thomas* (1842) 2 Q.B. 851 at 859; above, para.6-002.
- 268 Above, para.6-005.
- 269 *Ward v Byham* [1956] 1 W.L.R. 496, 498; *Williams v Williams* [1957] 1 W.L.R. 148, 151.
- 270 Below, paras 6-069—6-070.

---

End of Document

© 2022 SWEET & MAXWELL

## (a) - Public Duty

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 8. - Existing Duties as Consideration<sup>266</sup>

(a) - Public Duty

### Where the promisee is under a public duty

- 161 It has been held that a person cannot recover money promised to them in return for their performance of, or promise to perform, a duty imposed by law. In *Collins v Godefroy*,<sup>271</sup> an attorney had been subpoenaed to give evidence on the defendant's behalf and alleged that the defendant had promised to pay him a guinea a day for his loss of time incurred in such attendance. It was held that, as the promisee was under a duty imposed by law to attend, the defendant's promise was given "without consideration". But this reasoning is hard to reconcile with some of the cases to be discussed below, holding that promises of rewards for information leading to the arrest of criminals could be enforced. The better explanation may be found in reasons of public policy: so, for example, a public officer cannot enforce a promise by a private citizen to pay them money for doing their public duty,<sup>272</sup> and a person cannot enforce a promise made in consideration of their forbearing to engage in a course of conduct that is criminal.<sup>273</sup> To uphold such promises would encourage undesirable forms of extortion; and this, rather than want of consideration, accounts for most of the authorities which establish the present rule. It is arguable that, when there are no such grounds of public policy against enforcing the promise, an action on it will not fail for want of consideration merely because the performance rendered in return was already due under a public duty from the promisee. Before 1968 a person who knew that a felony had been committed and had information which might lead to the arrest of the felon was bound to communicate the information to the police: if they failed to do so they were guilty of misprision of felony.<sup>274</sup> Yet promises to pay rewards for such information could be enforced, even by police officers giving the information.<sup>275</sup> Public policy was not offended by such offers, as they might induce people to

look for the information and so promote the interests of justice. The term “felony” is now obsolete in English law<sup>276</sup> and the mere failure to disclose information which might lead to the arrest of a criminal is no longer an offence<sup>277</sup> or a breach of a duty imposed by law. But the old reward cases show that an act may constitute consideration even though there is a public duty to do it.

## Promisee doing more than public duty

- 162 A person who is under a public duty can provide consideration for a promise by doing (or promising to do) more than they were by law obliged to do. In *Glasbrook Brothers Ltd v Glamorgan CC*<sup>278</sup> the owners of a coal mine, who feared violence from strikers, asked, and promised to pay, the police for a greater degree of protection than the police reasonably thought necessary. It was held that the police had provided consideration for this promise by providing the extra protection, and that accordingly the promise was enforceable. The position in cases of this kind is now regulated by statute. Section 25(1) of the Police Act 1996 provides that payment can be claimed for “special police services” rendered at the “request” of the person requiring them. Such a request can be implied from conduct: e.g. where a person organises an event which cannot safely take place without such services. On this reasoning, a football club has been held liable to the police authority for the cost of policing matches played on its ground.<sup>279</sup> Such liability arises irrespective of contract.<sup>280</sup>
- 163 In *Ward v Byham*<sup>281</sup> the father of an illegitimate child wrote to its mother, from whom he was separated, saying that she could have the child and an allowance of £1 a week if she proved that the child was “well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you”. The father refused to continue the payments after the marriage of the mother to another man. It was held that the mother was entitled to enforce the father’s promise even though she was under a statutory duty to maintain the child. One ground for the decision is that the mother had provided consideration by showing that she had made the child happy, etc.: in this way, she could be said to have done more than she was required by law to do,<sup>282</sup> and to have conferred a factual benefit on the father<sup>283</sup> or on the child,<sup>284</sup> even though she may not have suffered any detriment. But if a son’s promise not to bore his father is not good consideration,<sup>285</sup> it is hard to see why a mother’s promise to make her child happy should, for the present purpose, stand on a different footing. There is, with respect, force in Denning LJ’s view that the mother provided consideration by merely performing her legal duty to support the child. There was certainly no ground of public policy for refusing to enforce the promise.

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 266 *Reynolds and Treitel* (1965) 7 *Malaya L.Rev.* 1; *Aivazian, Trebilcock & Penny* (1984) 22 *Osgoode Hall L.J.* 173; *Hooley* [1991] *J.B.L.* 195; *Halson* (1991) 107 *L.Q.R.* 649.
- 271 (1831) 1 *B. & Ad.* 950. See also *Willis v Peckham* (1820) 1 *Brod. & Bing.* 515; *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 *Lloyd's Rep.* 614, 619. For contracts to pay fees to expert witnesses, see *Goulden v Wilson Barca* [2000] 1 *W.L.R.* 167.
- 272 *Wathen v Sandys* (1811) 2 *Camp.* 640; *Morris v Burdett* (1808) 1 *Camp.* 218; *Bilke v Havelock* (1813) 3 *Camp.* 374; cf. *Morgan v Palmer* (1824) 2 *B. & C.* 729, 736 (where the actual decision was that money paid to the official was recoverable by the payee as having been extorted from him *colore officii*: see *Woolwich Equitable B.S. v I.R.C.* [1993] *A.C.* 70, 155, 165, 181, 198).
- 273 *Brown v Brine* (1875) *L.R.* 1 *Ex.D.* 5 (forbearance to commit criminal libel).
- 274 *Sykes v D.P.P.* [1962] *A.C.* 528.
- 275 *England v Davidson* (1840) 11 *A. & E.* 856; *Smith v Moore* (1845) 1 *C.B.* 438; *Neville v Kelly* (1862) 12 *C.B. N.S.* 740; *Bent v Wakefield and Barnsley Union Bank* (1878) 4 *C.P.D.* 1. Contrast *Maryland Casualty Co v Matthews* 209 *F.Supp.* 822 (1962) where a similar claim by a detective failed on grounds of public policy.
- 276 Criminal Law Act 1967 s.1.
- 277 The offence of concealing a “relevant offence” created by s.5(1) of the Criminal Law Act 1967 (as amended by Serious Organised Crime and Police Act 2005 Sch.7 para.40(3)(a)) is much narrower in scope than the former offence of misprision of felony; the statutory offence is committed only if the person withholding the information accepts or agrees to accept some consideration (other than making good the loss) for not disclosing it.
- 278 [1925] *A.C.* 270. cf. *Thoresen Car Ferries v Weymouth Portland BC* [1997] 2 *Lloyd's Rep.* 614 (A’s promise to *make use* of B’s services for which he was under a legal duty to *pay* held to constitute consideration for B’s counter-promise).
- 279 *Harris v Sheffield United F.C. Ltd* [1988] *Q.B.* 77. Contrast *Reading Festival Ltd v West Yorkshire Police Authority* [2006] *EWCA Civ* 524, [2006] 1 *W.L.R.* 2005 where a similar claim against the promoters of a music festival failed, principally on the ground that they had not made any “request” for the police services in respect of which the claim was made.
- 280 Dicta in *Reading Festival Ltd v West Yorkshire Police Authority* [2006] *EWCA Civ* 524 emphasise that a claim under subsection 25(1) of the Police Act 1996 can succeed only if there has been a “meeting of the minds” between the police authority and the promoter (at [54]) and add (at [20]) that the subsection had not “added to or altered the common law position” as stated in the *Glasbrook case* [1925] *A.C.* 270. But it was also said that the police “had the last word on charges” (at [20]) and that “how the police provide the services must always be a matter for them” (at [21]). It is respectfully submitted that an agreement for services which left such a broad discretion to the provider of the services as to what services were to be provided and what the recipient of the services was to pay for them would not normally be sufficiently certain to give rise to a binding contract (see above, para.4-145).
- 281 [1956] 1 *W.L.R.* 496.

- 282 This may be what Morris and Parker LJJ had in mind when saying at 499 that the mother had provided “ample consideration” for the promise.
- 283 See *Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 Q.B. 1, 13*; below, paras 6-069—6-072.
- 284 Consideration need not move to the promisor: above paras 6-041—6-042.
- 285 Above, para.6-025.

## **(b) - Duty Imposed by Contract with Promisor**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 8. - Existing Duties as Consideration<sup>266</sup>

**(b) - Duty Imposed by Contract with Promisor**

### **General**

- <sup>164</sup> When A was bound by contract with B to do, or to forbear from doing, something, the law at one time took the firm view that A's performance of that duty (or their promise to perform it) was no consideration for a new promise by B. For example, it has been held that a promise to pay more than the originally agreed freight for the carriage of goods to the agreed destination cannot be enforced by the carrier<sup>286</sup>; and, where a debt is already due in full, a promise by the debtor to pay it in stated instalments is no consideration for the creditor's promise not to take bankruptcy proceedings in respect of the debt.<sup>287</sup> Later authority has qualified that view, but the extent of the qualification is uncertain.

### **Footnotes**

- <sup>1</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- <sup>266</sup> *Reynolds and Treitel* (1965) 7 *Malaya L.Rev.* 1; *Aivazian, Trebilcock & Penny* (1984) 22 *Osgoode Hall L.J.* 173; *Hooley* [1991] *J.B.L.* 195; *Halson* (1991) 107 *L.Q.R.* 649.
- <sup>286</sup> *Syros Shipping Co SA v Elaghill Trading Co Ltd (The Proodos C)* [1980] 2 *Lloyd's Rep.* 390; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] 1 *Q.B.* 833.
- <sup>287</sup> *Vanbergen v St Edmunds Properties Ltd* [1933] 2 *K.B.* 223.

---

End of Document

© 2022 SWEET & MAXWELL

## **(i) - Cases in which the Promise was held to be Unenforceable**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 8. - Existing Duties as Consideration<sup>266</sup>

### **(i) - Cases in which the Promise was held to be Unenforceable**

#### **Contractual duty to promisor**

- 165 The view that there was no consideration for B's new promise is usually traced back to *Stilk v Myrick*.<sup>288</sup> In that case two of the crew of a ship had deserted during the voyage for which they had contracted to serve and the master promised to divide the wages of the deserters amongst the other nine if replacements for the deserters could not be found (as turned out to be the case). The court rejected a claim brought by one of the promisees against the master for a share of the extra wages promised by the master. According to one of the reports,<sup>289</sup> the claim was rejected on grounds of public policy stated in an earlier similar case,<sup>290</sup> viz that the enforcement of such promises might lead sailors to refuse to perform their contracts unless they were promised extra pay. But according to the other report<sup>291</sup> (which has been said to have "the better reputation")<sup>292</sup> the court doubted that reasoning and based its decision instead on the ground that the nine crew members had provided no consideration by doing what they were already bound by their contracts to do; and it is on this ground that the case is now generally explained.<sup>293</sup>

#### **Public policy**

- 166 The public policy explanation of the rule, stated in para.6-065 above, was always open to the objection that it was based on a danger that was no more than hypothetical: in the cases on seamen's wages, for example, there was no evidence of any refusal on the men's part to perform

their original contracts. Even where there is such evidence, the public policy argument is much reduced in importance now that the law has come to recognise that such a refusal may amount to economic duress.<sup>294</sup> Where the refusal *does* amount to duress, a promise induced by it can be avoided (and money paid in pursuance of it be recovered back) on that ground.<sup>295</sup> This is true even where the promise *is* supported by consideration: for example, where the promisee has undertaken not merely to perform their duties under the original contract, but also to render some relatively small additional service.<sup>296</sup> If, on the other hand, the promisee's refusal to perform the original contract does *not* amount to duress, the promise cannot be impugned merely on the ground that the refusal amounted to an abuse by the promisee of a dominant bargaining position.<sup>297</sup> To allow a promise to be invalidated on this ground even though there was *no* duress would introduce an intermediate category of promises unfairly obtained; and this would (in the words of Lord Scarman) "be unhelpful because it would render the law uncertain".<sup>298</sup>

## Lack of consideration

- 167 The alternative explanation of want of consideration rests upon the view that a promisee suffers no legal detriment<sup>299</sup> in performing what was already due from them, nor does the promisor receive any legal benefit in receiving what was already due to them. But this reasoning takes no account of the fact that the promisee may in fact suffer a detriment: for example, the wages which a seaman could earn elsewhere might exceed those due to them under the original contract together with the damages which he would have to pay for breaking it. Conversely the promisor may in fact benefit from the performance which he receives in consequence of the new promise: in *Stilk v Myrick* the master got the ship home, and this may well have been worth more to him than any damages that he could have recovered from the crew.

## Parallel with cases of part payment of debt

- 168 The explanation of *Stilk v Myrick*<sup>300</sup> that the promisee suffered no legal detriment is consistent with the line of decisions that a creditor is not bound by a promise to accept part payment in full settlement of a debt.<sup>301</sup> The statement in *Pinnel's Case* that "Payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole"<sup>302</sup> was approved by the House of Lords in *Foakes v Beer*<sup>303</sup> even though their Lordships must have been fully aware that the creditor might in practice benefit from getting part payment. Lord Blackburn, who had been tempted to dissent on precisely this ground, said:

"... all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial

to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.”<sup>304</sup>

We shall see that Lord Blackburn’s decision to go along with the majority despite his doubts led the Court of Appeal<sup>305</sup> to refuse to recognise “practical benefit” as consideration in a part-payment case. It has also led the Supreme Court<sup>306</sup> to question whether cases holding that a promise may be enforceable because the promisor obtains a factual benefit, even though the promisee incurs no legal detriment because they were merely performing an existing contractual duty,<sup>307</sup> can be consistent with the decision in *Foakes v Beer*. At the same time, the Supreme Court also indicated that *Foakes v Beer* may need to be reconsidered.

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 Sydney Law Review 289.
- 266 *Reynolds and Treitel* (1965) 7 Malaya L.Rev. 1; *Aivazian, Trebilcock & Penny* (1984) 22 Osgoode Hall L.J. 173; *Hooley* [1991] J.B.L. 195; *Halson* (1991) 107 L.Q.R. 649.
- 288 (1809) 2 Camp. 317; 6 Esp. 129. See also *Harris v Carter* (1854) 3 El. & Bl. 559; *Sanderson v Workington BC* (1918) 34 T.L.R. 386; *Swain v West (Butchers) Ltd* [1936] 1 All E.R. 224.
- 289 (1809) 6 Esp. 129.
- 290 *Harris v Watson* (1791) Peake 102.
- 291 (1809) 2 Camp. 317; in *Harris v Carter* (1854) 3 El. & Bl. 559, both public policy and want of consideration are relied on to explain the rule.
- 292 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705, 712, where the rule in *Stilk v Myrick* was recognised as being still good law, though held inapplicable for reasons stated in paras 6-066—6-067, below; *Coote* [1980] C.L.J. 40; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676, [2005] 1 Lloyd's Rep. 128 at [107], as to which case see also below, paras 6-069—6-072, 6-084—6-086.
- 293 *Harrison v Dodd* (1914) 111 L.T. 47; *Swain v West (Butchers) Ltd* [1936] 3 All E.R. 261; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705, 712; *Pao On v Lau Yiu Long* [1980] A.C. 614, 633; *Sybron Corp v Rochem Ltd* [1983] I.C.R. 801, 817; *Vantage Navigation Corp v Suhail and Saud Building Materials LLC (The Alev)* [1989] 1 Lloyd's Rep. 138, 147; *Hadley v Kemp* [1999] E.M.L.R. 586, 626.
- 294 Below, Ch.10; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] 1 Q.B. 833.

- 295 This would have been the result in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705, if the victim of the duress had not affirmed the contract. For cases in which recovery was allowed on this ground, see *Universe Tankships Inc v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 A.C. 366; *B. & S. Contracts & Designs v Victor Green Publications Ltd* [1984] I.C.R. 419; *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep. 653.
- 296 e.g. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705; below, para.6-073; *Vantage Navigation Corp v Sahail and Saud Building Materials LLC (The Alev)* [1989] 1 Lloyd's Rep. 138, 147.
- 297 *Pao On v Lau Yiu Long* [1980] A.C. 614, 632.
- 298 *Pao On v Lau Yiu Long* [1980] A.C. 614, 632 at 634. This statement was made in a case involving three parties, but is of general application: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 15.
- 299 Above, para.6-005.
- 300 (1809) 2 Camp. 317; 6 Esp. 129.
- 301 See below, para.6-127.
- 302 (1602) 5 Co. Rep. 117a; see also *Cumber v Wane* (1721) 1 Str. 426; *McManus v Bark* (1870) L.R. 5 Ex. 65; *Underwood v Underwood* [1894] P. 204; *Re Broderick* [1986] N.I.J.B. 36, 49–55; *Tilney Engineering v Admuds Knitting Machinery* [1987] C.L.Y. 412; cf. *Bagge v Slade* (1616) 3 Bulst. 162.
- 303 (1884) 9 App. Cas. 605.
- 304 (1884) 9 App. Cas. 605, 622–623.
- 305 In *In Re Selectmove* [1995] 1 W.L.R. 474, 481.
- 306 In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2018] 2 W.L.R. 1603; see below, paras 6-069—6-072. The remarks are obiter, as the case was decided on the ground that a purported oral variation of the contract was ineffective because of a clause requiring any variations to be in writing; see below, para.25-047.
- 307 See next paragraph.

## **(ii) - Valid Consideration due to a Factual Benefit to Promisor**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 8. - Existing Duties as Consideration<sup>266</sup>

**(ii) - Valid Consideration due to a Factual Benefit to Promisor**

### **Factual benefit as consideration**

- <sup>169</sup> The Court of Appeal has treated a factual benefit to the promisor as consideration, holding that where a new promise by B in consideration of A's performing their duty to B under an earlier contract between them is not obtained by duress, and A's performance of the duty may in fact benefit B, A can enforce B's new promise. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>308</sup> B had engaged A as carpentry sub-contractor, for the purpose of performing a contract between B and X to refurbish a number of flats. The amount payable by B to A under the subcontract was £20,000 but B later promised to make extra payments to A, who undertook no additional obligation in return.<sup>309</sup> B made this new promise because B's own surveyor recognised that the originally agreed sum of £20,000 was too low, and because B feared that A (who was in financial difficulties) would not be able to complete his work on time, and so expose B to penalties for delay under his contract with X. It was held that B's promise to make the extra payments to A was supported by consideration in the shape of the "practical benefits"<sup>310</sup> obtained by B from A's performance of his duties under the original contract between them.<sup>311</sup> Since no allegation of duress on A's part had been made by B, the new promise by B to pay extra could not be avoided on this ground. There had been no threat by A to break his original contract; indeed, the initiative for the agreement containing the promise of extra pay seems to have come from B.
- <sup>170</sup> The consideration for B's promise in the *Williams* case appears to have been the factual benefit obtained by B from A's actual performance of his earlier contract with B. This element of factual benefit has been regarded as consideration where a person performs or (promises to perform) a

contractual duty owed to a third party<sup>312</sup>; and the *Williams* case may be welcomed in bringing the two-party cases in line with those involving three parties.<sup>313</sup> But it is by no means clear how the case is, from this point of view, to be reconciled with *Stilk v Myrick* and the line of more recent decisions which have followed that case.<sup>314</sup> As has been suggested above, the master in *Stilk v Myrick* also obtained a factual benefit (in getting the ship home); and such a factual benefit will very often be obtained by B where they secure actual performance from A (as opposed to having to sue them for non-performance of the original contract). Nor is it clear that the decision is compatible with *Foakes v Beer*.

## Reconciling traditional authorities

- 171 In the *Williams* case, *Stilk v Myrick* was not overruled; indeed Purchas LJ described it as a “pillarstone of the law of contract”.<sup>315</sup> But he added that the case might be differently decided today<sup>316</sup>; while Glidewell LJ said that the present decision did not “contravene” but did “refine and limit”<sup>317</sup> the principle of the earlier case; and Russell LJ said that the “rigid approach” to consideration in *Stilk v Myrick* was “no longer necessary or desirable”.<sup>318</sup> However, in a more recent case in which the Court of Appeal had applied the same approach to a promise to allow the debtor an extended period in which to pay,<sup>319</sup> the Supreme Court, obiter, expressed reservations as to whether the decision in the *Williams* case can stand with the decision of the House of Lords in *Foakes v Beer*.<sup>320</sup> Lord Sumption, with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed, said that it was unnecessary to decide the point, but continued<sup>321</sup>:

“It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer*: see in particular ... per Lord Blackburn.<sup>322</sup> There are arguable points of distinction, although the arguments are somewhat forced ... The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer*. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum.”

Thus whether a factual benefit to B in securing A's performance of the earlier contract normally suffices to constitute consideration is now in doubt. But so too is the rule in *Foakes v Beer* and, it seems to follow, the rule in *Stilk v Myrick*. Unless and until the *Williams* case is overruled, however, it appears to be binding on lower courts.<sup>323</sup>

## Relevance of duress

- <sup>172</sup> The insistence in the earlier cases on the stricter requirement of legal benefit or detriment no longer seems justified (if it ever was) by the need to protect B from the undue pressure that A might exert by refusing to perform their original contract; for this need can now be met by the expanding concept of duress.<sup>324</sup> This provides a more satisfactory solution of the present problem since it invalidates promises only where actual duress is established. Where this is not the case, and the promisee has in fact conferred a benefit on the promisor by performing the original contract, there seems to be no good reason for refusing to enforce the new promise and it can be argued that the requirement of consideration should be treated as satisfied.

## Footnotes

- 1 Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 266 *Reynolds and Treitel* (1965) 7 *Malaya L.Rev.* 1; *Aivazian, Trebilcock & Penny* (1984) 22 *Osgoode Hall L.J.* 173; *Hooley* [1991] *J.B.L.* 195; *Halson* (1991) 107 *L.Q.R.* 649.
- 308 [1991] 1 *Q.B.* 1; *Adams and Brownsword* (1991) 53 *M.L.R.* 536; *Chen-Wishart* (1991) 14 *N.Z.U.L.R.* 270; *Hird and Blair* [1996] *J.B.L.* 254.
- 309 The payments under the original contract were found to be due in unspecified instalments while those under the new promise were due as each flat was completed, but no attempt was made to argue that this change in the times when payment was due *might* have been to A's disadvantage and therefore provided consideration. There is perhaps a hint to this effect in Russell LJ's judgment at 19.
- 310 [1991] 1 *Q.B.* at 11, cf. at 19, 23, followed in *An angel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd (No.2)* [1990] 2 *Lloyd's Rep.* 526, where "promisor" and "promisee" appear to have been transposed in a passage at 545; *Lee v GEC Plessey Communications Ltd* [1993] *I.R.L.R.* 383 at [118]–[119], below, paras 6-074–6-077; *Simon Container Machinery Ltd v Emba Machinery Ltd* [1998] 2 *Lloyd's Rep.* 429 at 435; *Attrill v Dresdner Kleinwort Ltd* [2012] *EWHC* 1189 (*QB*) at [178]–[184] (*affirmed on appeal*: [2013] *EWCA Civ* 394, [2013] 3 *All E.R.* 607, *see at* [95]); *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] *EWCA Civ* 553, [2017] *Q.B.* 604 (*reversed on other grounds*, [2018] *UKSC* 24, [2018] 2 *W.L.R.* 1603), paras 6-129–6-133 and 25-047 below.

- 311 In fact, B did not secure the whole of this benefit, but this was because B's wrongful failure to make the extra payments justified A's refusal to continue with the work.
- 312 Below, para.6-080.
- 313 See below, para.6-079.
- 314 Above, para.6-065; see e.g. *South Caribbean Trading Ltd v Trafigura Beheer BV [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128* at [107]–[109].
- 315 [1991] 1 Q.B. 1, 20.
- 316 [1991] 1 Q.B. 1, 21. But he was not prepared to accept the American case of *Watkins v Carrig 21 A. 2d 591 (1941)*, where a contractor who had agreed to do excavating work unexpectedly struck hard rock and was held entitled to enforce a promise to pay nine times the originally agreed sum. The case was said not to represent English law in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron) [1979] Q.B. 705, 714*. It was cited with apparent approval in *Compagnie Noga D'Importation et D'Exportation SA v Abacha [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915* at [54] but on the point that the requirement of consideration was satisfied by rescission of the original contract, followed by the making of a new one: below, paras 6-074—6-077, 6-084—6-086. No mention was made in the *Compagnie Noga* case, above, of the more sceptical references to *Watkins v Carrig* in the *Williams* case and in *The Atlantic Baron*, cited earlier in this note.
- 317 [1991] 1 Q.B. 1, 16.
- 318 [1991] 1 Q.B. 1, 18.
- 319 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553, [2017] Q.B. 604*. In *Re Selectmove Ltd [1995] 1 W.L.R. 474* a differently constituted Court of Appeal had declined to apply the *Williams v Roffey* principle to an obligation to make payment on the ground that it “would in effect leave the principle in *Foakes v Beer* without any application” ([1995] 1 W.L.R. 474, 481).
- 320 (1884) 9 App. Cas. 605.
- 321 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] UKSC 24, [2019] A.C. 119* at [18]. Lord Briggs, who gave a separate judgment, agreed (at [20]) that it would not be desirable for the court to address the issue of consideration, for the reasons which Lord Sumption gives.
- 322 Quoted in para.6-068 above.
- 323 See *Simantob v Shavleyan [2018] EWHC 2005 (QB)* at [127] (upheld without discussing the point: [2019] EWCA Civ 1105).
- 324 The actual decision in the *South Caribbean* case seems to be explicable on the ground that the promisee's “threat of non-compliance” with the original contract was “analogous to economic duress” (at [108]); though the words “analogous to” give rise to some difficulty insofar as they suggest that there was no actual duress: compare the discussion of abuse of dominant bargaining position, above, paras 6-066—6-067.

## **(iii) - Increase in Promisee's Performance**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 8. - Existing Duties as Consideration<sup>266</sup>**

**(iii) - Increase in Promisee's Performance**

### **Promisee promises or does more**

- 173 The promisee may provide consideration for the new promise by doing, or promising, more than they were bound by the original contract to do. Thus in one case<sup>325</sup> a seaman was promoted during the course of the voyage and undertook additional duties: these were held to constitute consideration for a promise to pay him extra wages. The same principle was applied where shipbuilders claimed an increase in the agreed price for a supertanker on the ground that the currency in which that price was to be paid had been devalued. The contract provided for the giving by the builders of a performance guarantee, and it was held that they had provided consideration for the prospective owners' promise to pay the price-increase by making a corresponding increase in their performance guarantee.<sup>326</sup>

### **Change of circumstances**

- 174 The promisee may similarly provide consideration where, before the new promise was made, circumstances have arisen which justify the promisee's refusal to perform the original contract. Thus members of the crew of a ship may be justified in refusing to complete the contractual voyage because so many of their fellows have deserted that its completion will involve hazards not originally contemplated. If they are induced to go on by a promise of extra pay, they do something

which they were not bound by the original contract to do and so provide consideration for that promise.<sup>327</sup>

## Rescission and variation

- 175 The same principle as examined in the previous paragraph applies if the original contract has been brought to an end for some other reason: for example, by the expiry of a fixed duration, or by notice, or by mutual consent.<sup>328</sup> Thus the parties to a contract could rescind it and then make a new agreement providing for the payment of higher wages. Factual difficulties can no doubt arise in distinguishing between: (1) a rescission followed by a new agreement; and (2) a mere variation.<sup>329</sup> But in principle the distinction is clear<sup>330</sup>: in the first of these situations, the original contract is brought to an end and replaced by a new one in respect of which the requirement of consideration is satisfied,<sup>331</sup> while in the second the original contract continues, so that each party is still bound by it and the promisee who seeks to enforce the variation of it provides no consideration merely by performing their obligations under it.<sup>332</sup> This reasoning would not apply where the original contract was void, or voidable at the option of the promisee, or unenforceable against them, so that in such cases performance by them of the work specified in it would, it seems, be consideration for a promise of extra pay; and if the original contract was in fact good but was believed to be defective, the new promise might still be binding on the analogy of the rule that forbearance to litigate an invalid claim may amount to consideration.<sup>333</sup>

## Doubts regarding validity of contract

- 176 Similar reasoning can apply where a doubt as to the validity is raised by a third party with an interest in the point. This possibility is illustrated by a case<sup>334</sup> where solicitors (M) agreed in CFA 1 to represent a client (C) in litigation against D who, in a dispute as to costs, challenged the validity of CFA 1.<sup>335</sup> A second agreement (CFA 2) was then made between M and C by which C promised to pay an additional amount to M (by way of a success fee) for the same services<sup>336</sup> as those undertaken by M under CFA 1. It was held that “[t]he provision of an enforceable obligation [in CFA 2] to provide services in place of one which D asserted to be unenforceable was consideration for a fresh promise to pay”.<sup>337</sup>

## Pay scales

177

The original contract might provide for revision of pay scales,<sup>338</sup> often after negotiations conducted, in accordance with machinery established by the contract, between the employer and the employees (or persons acting on their behalf). With reference to such a situation, it has been said<sup>339</sup> that, where, in the context of such negotiations, “increased remuneration is paid and employees continue to work as before, there is plainly consideration for the increase by reason of the settlement of the pay claim<sup>340</sup> and the continuation of the same employee in the same employment”.<sup>341</sup> The employer’s promise would thus be binding at common law even where it was not matched by a counter-promise by the employees of higher productivity.<sup>342</sup>

## Footnotes

- 1 Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.
- 266 *Reynolds and Treitel* (1965) 7 *Malaya L.Rev.* 1; *Aivazian, Trebilcock & Penny* (1984) 22 *Osgoode Hall L.J.* 173; *Hooley* [1991] *J.B.L.* 195; *Halson* (1991) 107 *L.Q.R.* 649.
- 325 *Hanson v Royden* (1867) *L.R.* 3 *C.P.* 47; cf. *Turner v Owen* (1862) 3 *F. & F.* 176. Semble, such extra pay is recoverable notwithstanding failure to comply with the formal requirements now prescribed by Merchant Shipping Act 1995 s.25.
- 326 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] *Q.B.* 705. See also *Birmingham City Council v Forde* [2009] *EWHC 12 (QB)*, [2009] 1 *W.L.R.* 2732 at [83].
- 327 *Hartley v Ponsonby* (1857) 7 *E. & B.* 872. See also *O’Neil v Armstrong Mitchell & Co* [1895] 2 *Q.B.* 418; *Palace Shipping Co v Caine* [1907] *A.C.* 386; *Liston v S.S. Carpathian (Owners)* [1915] 2 *K.B.* 42.
- 328 See below, paras 6-082 and 25-036.
- 329 See further paras 6-084—6-086 below.
- 330 *Compagnie Noga D’Importation et D’Exportation SA v Abacha* [2003] *EWCA Civ* 1100; [2003] 2 *All E.R. (Comm)* 915 at [57].
- 331 *Compagnie Noga D’Importation et D’Exportation SA v Abacha* [2003] *EWCA Civ* 1100; [2003] 2 *All E.R. (Comm)* 915 at [44]–[61]; below, paras 6-084—6-086.
- 332 Below, paras 6-084—6-086; this was the reasoning of *Stilk v Myrick* in (1809) 2 *Camp.* 317.
- 333 Above, para.6-052; *E. Hulton & Co v Chadwick Taylor Ltd* (1918) 34 *T.L.R.* 230, 231.
- 334 *Birmingham City Council v Forde* [2009] *EWHC 12 (QB)*, [2009] 1 *W.L.R.* 2732.
- 335 *Birmingham City Council v Forde* [2009] *EWHC 12 (QB)*, [2009] 1 *W.L.R.* 2732 at [59].
- 336 For the further point that the requirement of consideration was satisfied by M’s undertaking to provide additional services see above, para.6-073.
- 337 [2009] *EWHC 12 (QB)* at [82]. For rejection of challenges to the validity of CFA 2 on grounds other than want of consideration, see [98]–[163].
- 338 cf. *Finland S.S. Co Ltd v Felixstowe Dock & Railway Co* [1980] 2 *Lloyd’s Rep* 287; *Lombard Tricity Finance Ltd v Paton* [1989] 1 *All E.R.* 918 (contract providing for increase in

interest rates to be made by lender); *Amey Wye Valley Ltd v Hertfordshire DC [2016] EWHC 2368, [2016] B.L.R. 698* (contract for highway maintenance providing for inflation-linked increases in contractor's charges. The case was concerned with the interpretation of this provision; there was no reference in the judgment to the requirement of consideration).

- 339 339 *Lee v GEC Plessey Communications Ltd [1993] I.R.L.R. 383* at [118], applied in *Hershaw v Sheffield City Council [2014] UK EAT 00333, [2014] I.C.R. 1120* at [13]; Freedland, The Personal Employment Contract (2003) 254–255.
- 340 340 The principle referred to in these words appears to be analogous to that stated in para.6-049 above.
- 341 341 The words “and the continuation of the same employee in the same employment” may be hard to reconcile with *Stilk v Myrick (1809) 2 Camp. 317*, above para.6-065, but they are consistent with *Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 Q.B. 1*, above, paras 6-069—6-072, which is the authority cited in *Lee v GEC Plessey Communications Ltd [1993] I.R.L.R. 383* at [119] in support of the view that the requirement of consideration was satisfied in that case as the “employer had both secured a benefit and avoided a detriment”. But see the doubts expressed by the Supreme Court about *Williams v Roffey Bros*, above, para.6-071.
- 342 342 e.g. *Pepper & Hope v Daish [1980] I.R.L.R. 13*. Perhaps it was for this reason that the argument of want of consideration was not raised in *Universe Tankships Inc v International Transport Workers' Federation (The Universe Sentinel) [1983] 1 A.C. 366*.

## (c) - Duty Imposed by Contract with a Third Party

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 8. - Existing Duties as Consideration<sup>266</sup>

(c) - Duty Imposed by Contract with a Third Party

### Introductory<sup>343</sup>

- 178 Two problems arise under this heading. The first is whether, if A is under a contractual duty to B, the *performance* of this duty can constitute consideration for a promise made to A by C. The second is whether A's *promise* to perform their contractual duty to B can constitute consideration for a counter-promise made to A by C.

### Performance of the duty

- 179 It is now generally accepted that actual performance of a contractual duty owed to a third party can constitute consideration.<sup>344</sup> In *The Eurymedon*,<sup>345</sup> A (a firm of stevedores) had unloaded goods from B's ship. Some of these belonged to C who, for present purposes,<sup>346</sup> may be taken to have promised A not to sue him for damaging the goods. It was held that A had provided consideration for this promise by unloading the goods<sup>347</sup> even if he was already bound by a contract with B to unload them. This conclusion seems to be based on the fact that such performance conferred a benefit on C<sup>348</sup>; and the benefit may be regarded either as factual (in the sense that C secured the actual delivery of his goods) or as legal<sup>349</sup> (in the sense that C was not legally entitled to the performance of A's duty to unload, this duty being owed only to B). It would, of course, be open to C to avoid liability if he could show that his promise had been obtained by duress.<sup>350</sup> It is arguable

that this defence is less likely to succeed in a three-party than in a two-party case<sup>351</sup>; but this is not invariably the case. Sailors in a case like *Stilk v Myrick*<sup>352</sup> could exert economic duress on the captain whether their original contract was with them or with a third party.<sup>353</sup> In both types of cases, it is now recognised that performance of a prior contractual duty can constitute consideration for a subsequent promise if that performance amounts to a benefit to the promisor.<sup>354</sup> The promise is therefore binding in the absence of a legally recognised vitiating factor, such as duress.

## Promise of performance

180 There was formerly some support for the view that a promise to perform a contractual duty owed to a third party (as opposed to the actual performance of the duty) could not constitute consideration for a counter-promise. Thus in *Jones v Waite*<sup>355</sup> it was said that a promise by A to C that A would pay a debt which A owed to B was no consideration for a promise made by C to A. This view seems to be based on the idea that A suffers no (legal) detriment by promising to pay a debt that they were already bound to pay; nor did it appear that C gained any benefit as a result of the promise. But C may gain such a benefit: for example, where B is a company in which C has an interest. This was the position in *Pao On v Lau Yiu Long*<sup>356</sup> where the claimants, having entered into a contract with a company, refused to perform it unless the defendants, who were shareholders in the company, guaranteed them against loss which might be incurred as a result of the performance of one of the terms of that contract. The guarantee was given in consideration of the claimants' promise to perform their pre-existing contractual obligations to the company; and was held binding<sup>357</sup> on the ground that "A promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration".<sup>358</sup> This view seems, with respect, to be preferable to that expressed in *Jones v Waite*; for, where a shareholder makes a promise to induce a person to perform a contract with the company, the promise is certainly not gratuitous in a commercial sense. It will, of course, be open to the promisor to avoid liability if they can show that the promisee's refusal to perform the contract with the company amounted to duress<sup>359</sup> not merely with regard to the company, but also with regard to the promisor themselves.

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); Shatwell (1955) 1 Sydney Law Review 289.
- 266 Reynolds and Treitel (1965) 7 Malaya L.Rev. 1; Aivazian, Trebilcock & Penny (1984) 22 Osgoode Hall L.J. 173; Hooley [1991] J.B.L. 195; Halson (1991) 107 L.Q.R. 649.
- 343 See AG Davis (1937) 6 Camb. L.J. 202.

- 344 The above view, as expressed in para.3-073 the 30th edition of this book (para.6-079 in the present edition) is cited with apparent approval in *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2013] EWCA Civ 184, [2013] 2 Lloyd's Rep. 38 at [34]. See too the earlier cases of *Scotson v Pegg* (1861) 6 Hurl. & N. 295 and *Chichester v Cobb* (1866) 14 L.T. 433. *Shadwell v Shadwell* (1860) 9 C.B. N.S. 159 also supports the view that performance of a contractual duty owed to a third party can be good consideration for a promise; see above, para.6-007. For the contrary view, see *McDevitt v Stokes* 192 S.W. (1917). In *Pfizer Corp v Ministry of Health* [1965] A.C. 512 Lord Reid said that there was no contract where a chemist supplied drugs to a patient under the National Health Service in return for a prescription charge, because the chemist is “bound by his contract with the appropriate authority to supply the drug ...” (at 536). But it seems from the context that Lord Reid was considering whether the relationship was consensual and was not thinking of the problem of consideration.
- 345 *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] A.C. 154, 168; followed in *Port Jackson Stevedoring Pty Ltd v Salmon and Spraggan (Australia) Pty Ltd (The New York Star)* [1981] 1 W.L.R. 138 and *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The Antwerpen)* [1994] 1 Lloyd's Rep. 213; *The Mahkutai* [1996] A.C. 650, 664.
- 346 See further para.17-051, below.
- 347 A question may arise as to whether A has indeed performed or begun to perform their contract with B: see *Lotus Cars Ltd v Southampton Cargo Handling Plc (The Rigoletto)* [2000] 2 Lloyd's Rep. 532, 542–545, where it was assumed that performance of a contract with a third party would constitute consideration.
- 348 *The Eurymedon* [1975] A.C. 154, 168 (“for the benefit of the shipper”, i.e. of C).
- 349 See above, para.6-005.
- 350 cf. above, paras 6-066—6-067.
- 351 *Goodhart* (1956) 72 L.Q.R. 490.
- 352 Above, para.6-065.
- 353 In *Stilk v Myrick* the distinction between two- and three-party cases was ignored; no one asked whether the original contract was with the captain (the promisor) or the shipowner, if these were separate persons. The report in 6 *Esp.* 129 makes it clear that the *action* was against the captain. cf. also *Turner v Owen* (1862) 3 F. & F. 176, where improper pressure may have been the ground for the jury’s verdict even before the law recognised the concept of economic duress; and *B. & S. Contractors & Designs v Victor Green Publications Ltd* [1984] I.C.R. 419.
- 354 Above, paras 6-069—6-072; *The Eurymedon* [1975] A.C. 154, 168; cf. below, para.6-080 (in the case of a promise to perform a duty to a third party).
- 355 (1839) 5 Bing.N.C. 341 affirmed without reference to this point (1842) 9 Cl. & F. 101. A dictum in *Pfizer Corp v Ministry of Health* [1965] A.C. 512, 536 could be interpreted to support the same view but appears (from the context) to be based on lack of contractual intention: see above, para.6-079.
- 356 [1980] A.C. 614.
- 357 For rejection of the argument that the consideration was past, see above, para.6-034.

358 [1980] A.C. 614, 632. In *The Eurymedon* [1975] A.C. 154, it was said at 168 that a promise to perform a contractual duty owed by a third party was consideration because it was a *benefit to the promisee*. This is at first sight puzzling, since consideration must be a detriment to the promisee or a benefit to the promisor. The reference, however, was to a case in which A's promise to C was said to be consideration for C's *counter-promise* to A and it was the consideration for that counter-promise which was in issue. In relation to that counter-promise, C was the promisor and the benefit that C got from A's promise satisfied the orthodox test of consideration for C's counter-promise. cf. above para.6-079.

359 cf. above, paras 6-066—6-067.

# Section 9. - Discharge and Variation of Contractual Duties

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 9. - Discharge and Variation of Contractual Duties

## Introduction

- 181 The parties to a contract may agree to rescind it or to vary its terms. This subject is discussed in Ch.25, but it is necessary in the present chapter to say something of the problems of consideration to which such agreements give rise. Indeed one aspect of the matter has already been discussed, for cases such as *Stilk v Myrick*<sup>360</sup> and *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>361</sup> raise a problem of consideration arising from the variation of an existing contract. In those cases, the question was whether the performance by A of their obligations under the old contract could be consideration for a new promise from B. Our present problem is whether there is consideration for a promise by B to accept, in discharge of A's obligations, some performance other than that originally undertaken by A,<sup>362</sup> or to grant A a total release from their obligations under the original contract. Even if there is no such consideration, B's subsequent promise may, nevertheless, have some limited legal effect.<sup>363</sup>

## Footnotes

1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 Sydney Law Review 289.

360 (1809) 2 Camp. 317; 6 Esp. 129; above, para.6-065.

361 [1991] 1 Q.B. 1, above, paras 6-069—6-072.

362 The issue discussed in *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 at [107]–[112] seems to have been of this kind: see below, paras 6-084—6-086.

363 Below, paras 6-089—6-108, 6-144—6-154.

---

End of Document

© 2022 SWEET & MAXWELL

## **(a) - Rescission**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 9. - Discharge and Variation of Contractual Duties**

**(a) - Rescission**

### **Agreements to rescind where each party has outstanding rights**

- 182 The parties to a contract may agree to rescind it at a time when each has outstanding rights under the contract against the other. They most obviously have such rights where the contract is wholly executory and neither party is in breach: for example, where a contract for the sale of goods to be delivered and paid for on a future day is rescinded before that day by mutual consent. They equally have such rights where both parties are, at the time of rescission, in breach; and where the contract is partly executed and obligations remain outstanding on both sides: for example, where a lease for seven years is rescinded by mutual consent after three years of the term have expired. In all such cases, the agreement generates its own consideration in the sense that each party provides consideration for the other's promise to release them by promising to give up their own rights under the contract.<sup>364</sup> It is, of course, essential that *each* party should make such a promise. If only one party does so, the other making no counter-promise, the former party's promise will be "entirely unilateral and unsupported by any consideration".<sup>365</sup>

### **Agreements to rescind where only one party has outstanding rights**

- 183 An agreement to rescind a contract may also be unsupported by consideration (and so lack contractual force) where only one party has outstanding rights under the contract. This will often be the position where the contract has been wholly executed by that party (A) alone and they then promise to release the other party (B) from their obligations. In such a case there is prima

facie no consideration for A's promise since A gets no benefit and B suffers no detriment from the arrangement. The same is true where A is ready and willing to perform but B is not: B is then liable in damages and "rescission" of the contract at this stage would be gratuitous if it merely released B from liability. This is what is meant by the statement that rescission after breach requires separate consideration.<sup>366</sup> Whenever the rescinding agreement does not generate its own consideration, such separate consideration must be provided by B (usually in the form of some additional performance rendered, or promise made, by B) to make A's promise binding. There must, in the traditional terminology, be not merely accord but also satisfaction. The "accord" here refers to the agreement and the "satisfaction" to the consideration for it.<sup>367</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 364 *Foster v Dawber* (1851) 6 Ex.839, 850; cf. *Marseille Fret SA v D. Oltman Schiffahrts GmbH & Co (The Trado)* [1982] 1 *Lloyd's Rep.* 157; *Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600 (Comm), [2006] 1 All E.R. (Comm) at [51]; affd. on other grounds [2006] EWCA Civ 241, [2006] 2 All E.R. (Comm) 104.
- 365 *Collin v Duke of Westminster* [1985] Q.B. 581, 588.
- 366 *Atlantic Shipping & Trading Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250 at 262.
- 367 Below, para.6-127. For an exception to the requirement, see *Bills of Exchange Act 1882* s.62, below, Vol.II, para.36-138. The release prima facie takes effect at the time of the accord: see *Jameson v CEGB* [2000] 1 A.C. 455 at 477 (where the original liability arose in tort).

## **(i) - Requirement of Consideration**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 9. - Discharge and Variation of Contractual Duties**

**(b) - Variation**

**(i) - Requirement of Consideration**

**Agreements to vary contracts**

)84 Four situations call for discussion.

### **(1) Rescission followed by new contract**

)85 First, the parties may agree to rescind an existing contract and to enter into a new one, on different terms, in relation to the same subject-matter. The question whether there is consideration for the rescission then depends on the tests stated in paras 6-082—6-083 above. If these are satisfied, there will also generally be consideration for the promises of both parties made under the new contract. “The same consideration which existed for the old agreement is imported into the new agreement which is substituted for it”. <sup>368</sup>

### **(2) Variation which can prejudice or benefit either party**

)86 Secondly, the parties may agree to vary the contract in a way that can prejudice or benefit either party. Here the *possible* detriment or benefit suffices to provide consideration for the promise of each party. This situation may be illustrated by an agreement to vary the currency in which a

future payment under a contract of sale is to be made.<sup>369</sup> The seller's promise to accept payment in the new currency is supported by consideration since it *may* benefit them and prejudice the buyer as it is possible for the new currency to appreciate in relation to the old between the time of the variation and the time of payment. This possibility of benefit and detriment is sufficient. It is immaterial for the purpose of the requirement of consideration that the new currency in fact depreciates in relation to the old, or even that at the time of the variation it was highly probable that it would so depreciate. On the same principle, the requirement of consideration is satisfied where an agreement for the sale of goods is varied by mutual promises (made before the delivery date originally specified) on the part of the buyer to accept delivery and by the seller to perform their obligations with respect to delivery on a different (later) date. In one such case, it was said that such a variation amounted to "a new agreement supported by mutual promises" and that "sufficient consideration [for the buyer's promise] moved from the promisee"<sup>370</sup> (i.e. the seller). If a variation is, taken as a whole, capable of benefiting either party, the requirement of consideration will be satisfied even though a particular term of the variation is for the sole benefit of one.<sup>371</sup> However, it has been held that there is no consideration for a variation which, though capable of benefiting either party, is in fact made wholly for the benefit of one. For example, a variation as to the place at which a debt is to be paid is capable of benefiting either party; but where such a variation was introduced solely for the benefit of the debtor there was held to be no consideration for a promise by the creditor: e.g. for one to accept part payment in full settlement if the debtor made such payment at the different place.<sup>372</sup>

### (3) Variation which can benefit only one party

187

Thirdly, the parties may agree to vary the contract in a way that is considered to be capable of conferring a legal benefit on one party only: e.g. where one party agrees to pay more for the performance of the other party's original obligation, or to accept less than the other party had originally undertaken without any corresponding variation (that could benefit them) of their own obligation. In some situations of this kind, there is no consideration. Where, for example, after a debt has fallen due, the creditor promises to accept part payment of it in full settlement, the mere part payment does not constitute consideration for the variation,<sup>373</sup> though the creditor's promise may have a limited effect as a waiver, or in equity.<sup>374</sup> Consideration for the creditor's promise could be provided by some further variation which could benefit the creditor: e.g. by the debtor's promise to make the payment *before* the day when the debt becomes due. In other situations falling within the present group, it is arguable<sup>375</sup> that the variation may be supported by consideration if, though capable of conferring a legal benefit on only one party, it can also confer a factual benefit<sup>376</sup> on the other: e.g. where a buyer's promise to pay more than the originally agreed price secures eventual delivery of goods when strict insistence on the original contract would have led to nothing but litigation.

#### (4) “Variation” before conclusion of contract

188 Fourthly, there is the apparently paradoxical possibility that the parties may agree to vary a contract even before that contract has been concluded. This may be the position where A and B negotiate on the basis of formal documents and A represents that the proposed contract will be on terms less favourable to themselves than those set out in the documents. If the documents are nevertheless executed without alteration, the representation may then be enforceable as a collateral contract. The consideration for the promise contained in A's representation is provided by B when they execute the documents, and so enters into the principal contract, at the request of A and in reliance on the representation. This was the position in *Brikom Investments Ltd v Carr*,<sup>377</sup> where the landlords of blocks of flats negotiated with their tenants for the sale of long leases of the flats on terms requiring the tenants to contribute to the cost of (inter alia) roof maintenance. At the time of the negotiations, the roof was in need of repairs, and the landlords promised to execute these “at our own cost”. It was held that one of the tenants had provided consideration for this promise by executing the agreement for the lease, and the lease itself; and that the promise was accordingly binding as a collateral contract.<sup>378</sup> It followed that the landlords could not enforce the term in the lease under which the tenant would (but for the collateral contract) have been liable to contribute to the cost of the roof repair.<sup>379</sup> Greater difficulty would have arisen if the tenant had already entered into the agreement to take the lease *before* the landlord's promise had been made,<sup>380</sup> for in that case the execution of the documents would have been past consideration.<sup>381</sup> The tenants could, however, have succeeded, even in such a case, on an alternative ground. The landlords had been guilty of unreasonable delay in executing the repairs, and the tenants would, by forbearing to take proceedings in respect of that breach,<sup>382</sup> have provided consideration for the landlords' promise to bear the cost of the repairs.

#### Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 Sydney Law Review 289.
- 368 *Stead v Dawber* (1839) 10 A. & E. 57, 66; *Compagnie Nogar D'Importation et D'Exportation SA v Abacha* [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915 per Tuckey LJ, with whose judgment on this point the other members of the court agreed.
- 369 *W.J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189; *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co* [1972] A.C. 741.
- 370 *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. at [105].
- 371 *Ficom SA v Sociedad Cadex Ltd* [1980] 2 Lloyd's Rep. 118, 132.

- 372 *Vanbergen v St Edmunds Properties Ltd* [1933] 2 K.B. 223; cf. *Continental Grain Export Corp v S.T.M. Grain Ltd* [1979] 2 Lloyd's Rep. 460, 476.
- 373 Below, para.6-127.
- 374 Below, paras 6-144—6-154.
- 375 On the analogy of the reasoning of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, above, paras 6-069—6-072, but note the doubts about the compatibility of that case with House of Lords authority, above, para.6-071.
- 376 Above, para.6-005.
- 377 [1979] Q.B. 467.
- 378 Contrast, on the issue of the contractual intention necessary to establish such a contract, *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622, [2007] N.L.J. 1263, above para.4-218.
- 379 This was agreed by all members of the Court of Appeal. For other grounds for the decision, see below, paras 6-143, 6-151.
- 380 From the grounds of appeal as stated on pp.472–473 of the report, it seems that reliance was placed on pre-contract promises or representations; cf. the statement at 490 that the landlord's promise was made “at the time when the leases were granted”. According to Lord Denning MR at 480 “some of the tenants” had *already* signed agreements for leases when the representations were made; but that does not seem to have been the position with regard to any of the cases before the court.
- 381 Above, para.6-029.
- 382 See [1979] Q.B. 467, 490; cf. above, para.6-056. Delay in *executing* the repairs was a breach irrespective of the question of who was to *pay* for them.

## **(ii) - Common Law Mitigations**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 9. - Discharge and Variation of Contractual Duties**

**(b) - Variation**

**(ii) - Common Law Mitigations**

### **Waiver<sup>383</sup> or forbearance at common law**

- 189 A variation which is not contractually binding (e.g. for want of consideration) may nevertheless have certain limited legal effects. These are sometimes said to arise because the promise by a party to relinquish some or all of their rights under a contract amounts to a “waiver” of those rights. Unfortunately, however, “the word ‘waiver’ ... covers a variety of situations different in their legal nature ...”.<sup>384</sup> It is, for example, sometimes used to refer to the variation of a contract which is supported by consideration and therefore binding as a contract.<sup>385</sup> To distinguish between such variations and those which are not supported by consideration, the latter will in the following discussion be referred to as “forbearances”. A forbearance in this sense may in certain circumstances limit the right of the party granting it to enforce their rights under the contract.<sup>386</sup> The exact effects of such a forbearance are discussed in Ch.25; but something must be said here about the distinction between a forbearance and a variation.

### **Forbearance generally revocable**

- 190 The effect of a forbearance of the kind mentioned in the preceding paragraph differs from that of a contractually binding variation which is supported by consideration in that it does not *irrevocably*

alter the rights of the parties under the original contract. The party granting the forbearance *can generally retract it*, provided that they give reasonable notice of their intention to do so to the other party.<sup>387</sup> Thus in *Charles Rickards Ltd v Oppenheim*<sup>388</sup> a contract for the sale of a car provided for delivery on 20 March. The car was not delivered on that day but the buyer continued to press for delivery and finally told the seller on 29 June that he must have the car by 25 July at the latest. It was held that the buyer could not have refused peremptorily to accept the car merely because the original delivery date had gone by, as he had continued to press for delivery; but that he could refuse on the seller's failure to comply with a notice to deliver within a reasonable time. As the notice had given the seller a reasonable time to deliver, the buyer was justified in refusing to take the car after 25 July. A fortiori, the buyer could have refused to take delivery if the original delivery date had been extended only for a fixed time and if delivery had not been made by the end of that time.<sup>389</sup>

## Forbearance may become irrevocable

- 191 A forbearance may, however, become irrevocable as a result of subsequent events: for example if a buyer indicates that they are willing to accept goods of a different quality from those contracted for, and the seller, in reliance on that assurance, so conducts themselves as to put it out of their power to supply goods of the contract quality within the contract period.<sup>390</sup>

## Basis of distinction between variation and forbearance

- 192 The question whether a subsequent agreement amounted to a contractually binding variation or to a forbearance is sometimes said to depend on the intention of the parties.<sup>391</sup> It seems that a statement should be a forbearance if the party making it intended to reserve a power to retract, and a variation if they intended it permanently to affect their rights. In practice, however, neither this nor any other explanation of the distinction provides any very sound basis for distinguishing between the authorities on this subject. The explanation is also open to the objection that it leads to the paradoxical result that, the more a party tried to bind themselves by a subsequent agreement, the less they were likely to be so bound.<sup>392</sup> An attempt to abandon a right altogether would be classified as a variation, and so be invalid without consideration; while an attempt merely to suspend a right would have at least a limited effect as a waiver. The courts were, however, anxious to avoid the injustice which could result from holding that a variation was not binding for want of consideration. Accordingly, they were inclined to interpret the subsequent agreement as a forbearance, so as to give it at least some legal effects.

## Footnotes

- <sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- <sup>383</sup> Ewart, Waiver Distributed; Wilken and Ghaly, The Law of Waiver, Variation and Estoppel; Spence, Protecting Reliance; *Cheshire and Fifoot* (1947) 63 *L.Q.R.* 283; *Stoljar* (1958) 35 *Can. Bar Rev.* 485; *Dugdale and Yates* (1976) 39 *M.L.R.* 680.
- <sup>384</sup> *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (The Laconia)* [1977] A.C. 850, 871; cf. *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850, 882–883; *Telfair Shipping Corp v Athos Shipping Corp (The Athos)* [1981] 2 *Lloyd's Rep.* 74, 87 (a passage approved on appeal: [1983] 1 *Lloyd's Rep.* 127, 134); *Scandinavian Trading Tanker Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 *Lloyd's Rep.* 425, 430, affirmed [1983] 2 A.C. 694; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 *Lloyd's Rep.* 391, 397; *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch. 12 at 28; *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day)* [2002] EWCA Civ 1068; [2002] 2 *Lloyd's Rep.* 487 at [64]; *Oceanografia SA de CV v DSND Subsea AS (The Botnica)* [2006] EWHC 1300 (Comm), [2007] 1 All E.R. (Comm) 28 at [89], [90]; *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14 at [1], [36]–[37], distinguishing between “waiver by election” and “waiver by estoppel”; for this distinction, see also *Lexington Insurance Co v Multinacional de Seguros* [2008] EWHC 1170 (Comm), [2009] 1 All E.R. (Comm) 35 at [52]; *Argo Systems FZE v Liberty Insurance* [2011] EWCA Civ 1572, [2012] 1 *Lloyd's Rep.* 129 at [38], [39]. Waiver by (or in the sense of) election is relevant to loss of a party’s right to rescind a contract on account of the other party’s breach and does not call for further discussion in the present chapter.
- <sup>385</sup> e.g. in *Hickman v Haynes* (1875) L.R. 10 C.P. 598, 604; and (semble) by Roskill and Cumming-Bruce LJ in *Brikom Investments Ltd v Carr* [1979] Q.B. 467; cf. *Shamsher Jute Mills v Sethia (London) Ltd* [1987] 1 *Lloyd's Rep.* 388, 392. In *Royal Boskalis Westminster NV v Mountain* [1997] 2 All E.R. 929 “waiver” is similarly used to refer to a variation which would have been contractually binding if it had not been vitiated by duress and illegality. Only Phillips LJ took the view that there was no “meaningful” consideration. “Meaningful” here seems to mean no more than “adequate;” for it appears from the facts stated at 934 and 958–959 that in the subsequent agreement each party gave up rights existing under the original contract.
- <sup>386</sup> *Phipps* (2007) 123 *L.Q.R.* 286.
- <sup>387</sup> *Banning v Wright* [1972] 1 W.L.R. 972, 981; *Ficom SA v Sociedad Cadex Ltda.* [1980] 2 *Lloyd's Rep.* 118, 131; *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All E.R. (Comm) 204 at [122].
- <sup>388</sup> [1950] 1 K.B. 616; cf. *State Trading Corp of India v Cie Française d'Importation et de Distribution* [1983] 2 *Lloyd's Rep.* 679, 681.

- 389 cf. *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 *Lloyd's Rep.* 46, where similar fixed-term extensions were granted by a seller.
- 390 *Toepfer v Warinco AG* [1978] 2 *Lloyd's Rep.* 569, 576; cf. *Leather Cloth Co v Hieronimus* (1875) *L.R.* 10 *Q.B.* 140 (goods lost while on altered route); *Bottiglieri di Navigazione SpA v Cosco Quindao Shipping Co (The Bunga Saga Lima)* [2005] *EWHC 244 (Comm)*, [2005] 2 *Lloyd's Rep.* 1 at [31], below para.6-105.
- 391 *Stead v Dawber* (1839) 10 *A. & E.* 57, 64.
- 392 At least at common law; equity may nonetheless give effect to a “failed variation”: see para.6-093 below.

## **(iii) - Equitable Mitigations**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 9. - Discharge and Variation of Contractual Duties**

**(b) - Variation**

**(iii) - Equitable Mitigations**

### **Forbearance in equity**

- 193 Equity developed an approach more satisfactory than that taken by the common law to the problem discussed in para.[6-092](#) above by concentrating, not on the intention of the party granting the forbearance, but on the conduct of that party and on its effect on the position of the other party. The leading case is *Hughes v Metropolitan Ry*<sup>393</sup> where a landlord had given his tenant notice requiring him to do repairs within six months. During the six months he began to negotiate with the tenant for the purchase of his lease. When the negotiations broke down, he immediately claimed to forfeit the lease on the ground that the tenant had not done the repairs. The claim was rejected, Lord Cairns saying that if one party leads the other “to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties”.<sup>394</sup> The landlord had by his conduct during the negotiations led the tenant to suppose that he would not enforce his right to forfeit. Hence he could not forfeit immediately the negotiations broke down; he was bound to give the tenant a reasonable time from that date to do the repairs. This equitable doctrine can now be applied to arrangements which might formerly have been regarded as variations ineffective at common law for want of consideration.<sup>395</sup> For reasons to be discussed in para.[6-111](#) below, the doctrine is often (if rather misleadingly) referred to as “promissory” or “equitable” estoppel.

## Requirements

- 194 For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party.<sup>396</sup> Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not “inequitable” for the first party to go back on their promise.<sup>397</sup> The doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships. The points here summarised will be discussed in paras 6-095—6-103 below.

## Relationships within the doctrine

- 195 The legal rights which the promisor or representor is prevented by the equitable doctrine from enforcing normally arise out of a contract between them and the other party. But the doctrine can also apply where the relationship giving rise to rights and correlative duties is non-contractual: e.g. to prevent the enforcement of a liability imposed by statute on a company director for signing a bill of exchange on which the company’s name is not correctly given<sup>398</sup>; or to prevent a man from ejecting a woman, with whom they have been cohabitating, from the family home.<sup>399</sup> On the other hand, it has been said that the doctrine has “no application as between landlord and trespasser”.<sup>400</sup> Hence the mere fact that a landowner has for some time failed or neglected to enforce their rights against a trespasser does not prevent them from subsequently doing so without notice.<sup>401</sup> The doctrine may also be excluded in some situations by statute. Thus it has been held<sup>402</sup> that estoppel or waiver could not preclude a man from withdrawing their consent to the use by a woman of their genetic material since the right to withdraw such consent was expressly given by statute<sup>403</sup> and since the application of waiver or estoppel to limit that right “would conflict with the Parliamentary scheme”.<sup>404</sup>

## Requirement of pre-existing legal relationship

- 196 It has been suggested that the doctrine can apply where, before the making of the promise or representation, there is no legal relationship giving rise to rights and duties between the parties,<sup>405</sup> or where there is only a putative contract between them: e.g. where the promisee is induced to believe that a contract into which they had undoubtedly entered was between them and the

promisor, when in fact it was between the promisee and another person.<sup>406</sup> But it is submitted that these suggestions mistake the nature of the doctrine, which is to restrict the enforcement by the promisor of previously existing rights against the promisee. Such rights can arise only out of a legal relationship existing between these parties before the making of the promise or representation. To apply this doctrine where there was no such relationship would contravene the rule (to be discussed in para.6-106 below) that the doctrine creates no new rights.

## A promise or representation

- <sup>197</sup> There must, next, be a promise (or an assurance or representation in the nature of a promise<sup>407</sup>) which is intended to affect the legal relationship between the parties<sup>408</sup> and which indicates that the promisor will not insist on their strict legal rights,<sup>409</sup> arising out of that relationship, against the promisee. Here, as elsewhere, the law applies an objective test. It is enough if the promise induces the promisee reasonably to believe that the other party will not insist on their strict legal rights.<sup>410</sup> A mere threat to do something is not sufficient.

## The promise or representation must be “clear” or “unequivocal”

- <sup>198</sup> The promise or representation must be “clear” or “unequivocal”, or “precise and unambiguous”. <sup>D</sup> This requirement seems to have originated in the law relating to estoppel by representation<sup>411</sup>; and it is now frequently stated in relation to “waiver”<sup>412</sup> and “promissory estoppel”.<sup>413</sup>

**U** It does not mean that the promise or representation must be express<sup>414</sup>; it may equally well be implied. For example, in *Hughes v Metropolitan Ry.*<sup>415</sup> itself the landlord made no express promise that he would not enforce his right to forfeit the lease; but an implication of such a promise fairly arose from the course of the negotiations between the parties. There is some support for the view that the promise must have the same degree of certainty as would be needed to give it contractual effect if it were supported by consideration.<sup>416</sup> Thus if the statement could not have had contractual force because it was too vague,<sup>417</sup> or if it was insufficiently precise to amount to an offer,<sup>418</sup> or if it did not amount to an unqualified acceptance,<sup>419</sup> it will not bring the equitable doctrine into operation.<sup>420</sup>

The purpose of the requirement that the promise or representation must be “clear” or “unequivocal” is to prevent a party from losing their legal rights under a contract merely because they have granted some indulgence by failing to insist throughout on strict performance of the contract<sup>421</sup>; or merely because they have offered some concession in the course of negotiations for the settlement of a dispute arising out of the contract<sup>422</sup> or merely because they have declared their willingness to continue such negotiations.<sup>423</sup> Thus the requirement was not satisfied where one of the parties to such a negotiation throughout insisted on strict compliance with the terms of the contract<sup>424</sup>; where they accepted less than that to which they were entitled but did so subject to an express reservation of their rights<sup>425</sup>; where an admission that they were liable for certain expenses was made by their solicitor, expressly “without prejudice”<sup>426</sup>; and where a charter’s notice that the ship would be redelivered on a specified date within the contractual “redelivery window” was made expressly “without guarantee” and subject to other qualifications.<sup>427</sup> Failure, in the course of negotiations of this kind, to object to a defect or deficiency in performance is likewise insufficient if the injured party did not know and could not reasonably have known of it<sup>428</sup> or if full performance remained possible and continued to be demanded by that party.<sup>429</sup> On the other hand, failure to object to a known defect or deficiency within a reasonable time of its discovery<sup>430</sup> may be regarded as an unequivocal indication of the injured party’s intention not to insist on their strict legal rights.<sup>431</sup> The position seems to be the same where the defect or deficiency, though not actually known to the injured party, was obvious or could have been discovered by them, if they had taken reasonable steps.<sup>432</sup> But where more than one matter is in dispute between the parties, “emphatic reliance upon some important disputed point does not by itself ... imply any unequivocal representation that compliance with other parts of the bargain is thereby waived”.<sup>433</sup>

## Conduct contrasted with inactivity

- <sup>100</sup> Although a promise or representation may be made by conduct, mere inactivity will not normally suffice for the present purpose since “it is difficult to imagine how silence and inaction can be anything but equivocal”.<sup>434</sup> Unless the law took this view, mere failure to assert a contractual right could lead to its loss; and the courts have on a number of occasions rejected this clearly undesirable conclusion. Thus it has been held that there is “no ground for saying that mere delay, however lengthy, destroys the contractual rights”<sup>435</sup>; that the mere failure to prosecute a claim regarded by both parties as hopeless did not amount to a promise to abandon it<sup>436</sup>; and that, because an insurer’s failure for seven years to raise the defence that the insured was guilty of a breach of warranty amounted to mere “silence and inaction”, it did not give rise to an estoppel,<sup>437</sup> and so did not prevent the insurer from relying on that defence.<sup>438</sup> But mere “silence and inaction” can have this effect where the law imposes a duty to disclose facts or to clarify a legal relationship and the party under the duty fails to perform it.<sup>439</sup>

## Reliance

- ¶101 The first requirement to be discussed under this heading is that the promise or representation must in some way have influenced the conduct of the party to whom it was made. Although the promise need not form the sole inducement,<sup>440</sup> it must (it is submitted) be *some* inducement. Hence the present requirement would not be satisfied if it could be shown that the other party's conduct was not influenced by the promise<sup>441</sup> so that they were not in any way prejudiced by it.<sup>442</sup> But if this is a matter of "mere speculation",<sup>443</sup> or if the promise or representation "was one of the factors ... relied upon",<sup>444</sup> it would form a sufficient inducement. Where the promisee has, after the promise, conducted themselves in the way intended by the promisor, it will be up to the promisor to establish that this conduct was not induced by the promise.<sup>445</sup>

## Whether "detriment" required

- ¶102 There is sometimes said to be a further requirement, namely that the promisee must have suffered "detriment" by acting in reliance on the promise.<sup>446</sup> But it is not necessary for the promisee to have done something they were not bound to do which causes them to suffer loss.<sup>447</sup> It is enough if the promisee has altered their position in reliance on the promise so that it would be inequitable to allow the promisor to act inconsistently with it<sup>448</sup>: for example, if the promisee has forborne from taking steps that they would otherwise have taken to safeguard their legal position (as in *Hughes v Metropolitan Railway*<sup>449</sup> itself); or if they have performed, or made efforts to perform the altered obligation (for example, where a seller after being promised extra time for delivery has continued their efforts to perform after the originally agreed delivery date had gone by). On the other hand, the fact that the promisee has not suffered any prejudice by acting in reliance on the promise, and would not suffer any prejudice were the promisor to insist upon their original rights, may be relevant for the purpose of the requirement to be discussed in para.6-103 below; for in such circumstances it may not be "inequitable" for the promisor to go back on their promise.<sup>450</sup>

## Inequitable

- ¶103 It must be "inequitable" for the promisor to go back on the promise. This requirement cannot be defined with anything approaching precision, but the underlying idea is that the promisee must have acted in reliance on the promise in one of the ways described in para.6-102 above, so that

they can no longer be restored to the position in which they were before they took such action.<sup>451</sup> If the promisee can be<sup>452</sup> restored to that position, it will not be inequitable for the promisor to go back on the promise. In one case<sup>453</sup> the promisor reasserted their strict legal rights only two days after the promise had been made. It was held that this was not “inequitable” since the promisee had not, in this short period, suffered any prejudice by acting in reliance on the promise: they could be, and were, restored to exactly the position in which they had been before the promise was made. Sometimes, moreover, extraneous circumstances may justify the promisor in going back on the promise even without giving reasonable notice of their intention to do so.<sup>454</sup> In *Williams v Stern*<sup>455</sup> the plaintiff gave the defendant a bill of sale of furniture as security for a loan; the bill entitled the defendant to seize the furniture if the plaintiff defaulted in making payments under it. When the fourteenth instalment became due, the plaintiff asked for extra time, and the defendant said that he “would not look to a week”. Three days later he seized the furniture because he had heard that the plaintiff’s landlord intended to distrain it for arrears of rent. It was held that the defendant’s seizure was justified. The defendant’s promise to give time was not binding contractually as the plaintiff had given no consideration for it; nor did it, in the circumstances, bring the equitable doctrine into operation. Brett LJ said: “Has there been any misconduct on the part of the defendant? I think not: it appears that a distress by the plaintiff’s landlord has been threatened; and under these circumstances I do not blame the defendant for changing his mind”.<sup>456</sup> The conduct of the promisee in obtaining the promise may also be relevant to the issue whether the promisor has acted “inequitably” in going back on it.<sup>457</sup>

## Effect of the doctrine generally suspensive

- 104 The equitable doctrine, like the common law doctrine of waiver, generally does not extinguish, but only suspends rights. The landlord in *Hughes v Metropolitan Ry*<sup>458</sup> was not permanently debarred from enforcing the covenant to repair. He could have enforced it by giving reasonable notice to the tenant requiring him to repair.<sup>459</sup> The reason for the general rule is that, in equity, the effect of the representation is to give the court a discretion to give such relief as is just and equitable in all the circumstances<sup>460</sup>; and in cases such as *Hughes v Metropolitan Ry* it would be neither equitable nor in accordance with the intention of the parties to treat the promisor’s rights as having been wholly extinguished.<sup>461</sup> Notice is, however, not required to bring an end to the suspension where, on the true construction of the representation, the circumstances in which it was intended to apply had come to an end<sup>462</sup>; or where notice of termination was not necessary “to allow a reasonable period for the party to whom notice is given to make alternative arrangements”.<sup>463</sup>

## Extinctive effect in exceptional cases

- 105 Subsequent events may, however, give the doctrine an extinctive effect, by way of exception to the general rule stated in para.6-104 above.<sup>464</sup> They can most obviously lead to this result where they make it impossible for the promisee to perform their original obligation. For example, in *Birmingham & District Land Co v L. & N.W. Ry*<sup>465</sup> a building lease bound the tenant to build by 1885. The lessor agreed to suspend this obligation; but in 1886, while the suspension was still in force, the land was compulsorily acquired by a railway company, so that performance of the tenant's obligation became impossible. The tenant recovered statutory compensation from the railway company on the footing that the building lease was still binding; but clearly his obligation to build was utterly extinguished. Even where performance of the original obligation has not literally become impossible, the doctrine may sometimes have an extinctive effect where subsequent events have made it highly inequitable to require such performance, even after reasonable notice.<sup>466</sup>

## Defensive nature of the doctrine

- 106 The equitable doctrine prevents the enforcement of existing rights; but it does not "create new causes of action where none existed before".<sup>467</sup> The point was decided in *Combe v Combe*<sup>468</sup> where a husband, during divorce proceedings, promised to pay £100 per annum to his wife, who in reliance on the husband's promise, forbore from applying to the court for maintenance; and this forbearance did not constitute consideration for the husband's promise.<sup>469</sup> It was held that the equitable doctrine did not entitle the wife to recover the promised payments; nor is there any support in English cases for the view that it could create a cause of action in the narrower sense of creating a new right but "limiting recovery to reliance loss".<sup>470</sup> The view that the doctrine gave rise to no new rights came to be associated with its description as a kind of estoppel (known as "promissory estoppel"<sup>471</sup>) and hence with the rule, established in relation to another kind of estoppel (known as "estoppel by representation"<sup>472</sup>), that "you cannot found a cause of action on an estoppel".<sup>473</sup> It will be submitted below<sup>474</sup> that the analogy between the two kinds of estoppel is (to say the least) imperfect and that it does not satisfactorily account for the rule that the equitable doctrine (or "promissory estoppel") gives rise to no new rights. The more plausible explanation for this restriction on the scope of the equitable doctrine is that the restriction is needed to prevent that doctrine from coming into head-on collision with the rules which lay down the requirements for the creation of a binding contract. The significant point in the present context is that the restriction supposedly<sup>475</sup> preserves consistency between the equitable doctrine and the rule that a promise is not binding as a contract unless it is supported by consideration or made in

a deed.<sup>476</sup> *Combe v Combe* has likewise been relied on in support of the view that the equitable doctrine could not give rise to a cause of action on a promise which lacked contractual force for want, not of consideration, but of certainty and contractual intention.<sup>477</sup> There seems, with respect, to be no reason in principle for distinguishing for the present purpose between promises which lack contractual effect for want of consideration and those which lack such effect for some other reason: the danger of collision between the equitable doctrine and the requirements for the creation of a contract exists, whatever the reason may be why a particular promise lacks contractual force.<sup>478</sup> The view that the equitable doctrine does not create new causes of action seems, indeed, to have been doubted<sup>479</sup> or ignored<sup>480</sup> by dicta in later cases; but the promises in these cases created new rights on the perfectly orthodox ground that they were, in fact, supported by consideration.<sup>481</sup> *Combe v Combe* therefore still stands as the leading English<sup>482</sup> authority for the proposition that the equitable doctrine creates no new rights<sup>483</sup>; and this proposition has been reaffirmed in a number of later cases.<sup>484</sup>

## Modifications increasing a party's obligation

- <sup>107</sup> It appears to follow from the proposition stated at the end of para.6-106 above that the equitable doctrine would not enable employees in a case like *Stilk v Myrick*<sup>485</sup> to recover the extra pay which they had been promised. It could, indeed, be argued<sup>486</sup> that in such a case the cause of action was the original contract of employment and that the subsequent agreement fell within the principle stated by Denning LJ in *Combe v Combe* that consideration was not necessary for the “modification or discharge”<sup>487</sup> of a contract where the conditions required for the operation of the equitable doctrine were otherwise satisfied. This argument may derive some judicial support from a dictum that promissory estoppel “may enlarge the effect of an agreement”<sup>488</sup>; for this could mean that a promise of extra pay on facts such as those of *Stilk v Myrick* could create a cause of action even though it was not supported by consideration. This view is, however, hard to reconcile with the treatment of *Stilk v Myrick* in *Williams v Roffey Bros*<sup>489</sup> and with the fact that the decision in the latter case was based, not on estoppel,<sup>490</sup> but on the ground that the promise of extra pay there was supported by consideration. It is submitted that, when in *Combe v Combe* Denning LJ used the phrase “modification or discharge”, he had in mind a modification which reduced a party’s obligations<sup>491</sup>; for to apply it to a case in which it had the effect of increasing them necessarily amounts to giving the other party new rights of action as a result of a promise for which they have not provided any consideration; and *Combe v Combe* decides that this is not the effect of the equitable doctrine here under discussion.<sup>492</sup> A cause of action on a promise unsupported by consideration may, however, arise under other equitable doctrines: e.g. under the doctrine of “proprietary estoppel”, discussed later in this chapter.<sup>493</sup>

## “Shield and not a sword”

- 108 The essentially defensive nature of the equitable doctrine here under discussion is sometimes expressed by saying that it operates as a shield and not as a sword.<sup>494</sup> This is true in most cases: usually the doctrine protects a promisee (wholly or in part) against enforcement of their original obligation. But the metaphor is apt to mislead<sup>495</sup>: the essential point is that the doctrine excuses (at least temporarily) the performance of the original obligation; and such an excuse may benefit a claimant no less than a defendant. For example, if the creditor’s conduct in *Williams v Stern*<sup>496</sup> (discussed in para.6-103 above) had been “inequitable” the debtor could no doubt have obtained an injunction against a *threatened* seizure of their property. Similarly, a seller may tender delivery after the originally agreed date in reliance on the buyer’s promise to accept such delivery. If the buyer then refuses to accept the delivery, the seller can claim damages.<sup>497</sup>

## Doctrine may deprive promisor of certain defences

- 109 The equitable doctrine can also assist the promisee as claimant in that it may prevent the promisor from relying on a defence that would, but for the promise, have been available to them: e.g. the defence that a claim which the promisee has made against them is time-barred,<sup>498</sup> or that the claim has been satisfied,<sup>499</sup> or that it has been lost by reason of the promisee’s breach of the contract which would, but for the breach, have given rise to the claim,<sup>500</sup> or that the contractual document suffers from some minor formal defect, the effect of which on the validity of the contract is not specified by the statute imposing the formal requirement.<sup>501</sup> In such cases, the doctrine will, once again, enable the promisee to win an action which, but for the doctrine, they would have lost.<sup>502</sup> But it must be stressed that, in cases of this kind, the promisee’s cause of action will have arisen independently of the promise which brought the equitable doctrine into operation: the effect of the doctrine is merely to prevent the promisor from relying on some circumstance which would, if the promise had not been made, *have destroyed the promisee’s original cause of action*. This situation must be distinguished from that in which the promisor’s “defence” is that (apart from the promise) the promisee’s alleged *cause of action never existed at all*. It is submitted that the equitable doctrine should not prevent the promisor from relying on a “defence” of this kind. To allow the doctrine to operate in this way would amount to giving the promisee a new cause of action based on the promise though it was unsupported by consideration; and such a result would be inconsistent with the essentially defensive nature of the equitable doctrine.<sup>503</sup>

## Doctrine may deprive promisee of a defence

- <sup>110</sup> The doctrine may also, somewhat paradoxically, deprive a *promisee* of a defence. This was the position in *Smith v Lawson*<sup>504</sup> where a lessor told the lessee that he would not trouble to collect the small rent which the lessee had previously paid. It was held that the lessee's rent-free occupation did not amount to adverse possession since the lessor was precluded by the doctrine of promissory estoppel from obtaining possession on the ground of non-payment of rent. It followed that the lessee could not rely on her occupation to defeat the lessor's claim for the declaration that he remained freehold owner of the land.

## Analogy with estoppel

- <sup>111</sup> The equitable doctrine is sometimes compared with the doctrine of estoppel by representation and the two have, indeed, certain features in common. Each is based on a representation followed by reliance, and the nature of each is defensive in the sense that neither is capable of giving rise to new rights. On the other hand, there are many significant differences between the two, even though the word "estoppel" is now often used to refer to the equitable doctrine.<sup>505</sup> These differences are reflected in the statement of Millett LJ that the "attempt to demonstrate that all estoppels ... are now subsumed in the single and all-embracing estoppel by representation and that they are all governed by the same principle<sup>506</sup> has never won general acceptance".<sup>507</sup>

**U** The various kinds of estoppel discussed in this book<sup>508</sup> are linked only by the broadest of general principles, that a person's taking of inconsistent positions is in some situations to be discouraged by law: in this sense it can be said that "unconscionability ... provides the link between them".<sup>509</sup> But they nevertheless have "separate requirements and different terrains of application"<sup>510</sup> and therefore "cannot be accommodated within a single principle".<sup>511</sup> An important difference between the two types of estoppel at this stage under discussion<sup>512</sup> relates to the types of representations required to bring them into operation. For the purpose of true estoppel by representation, the traditional view is that there must be a representation of existing fact.<sup>513</sup> Recent authority has modified this view to the extent that "it is now<sup>514</sup> possible for an estoppel by representation to be based on a representation of law"; but the scope of this possibility is somewhat limited.<sup>515</sup> The important point to be made here is that this extension of the scope of estoppel by representation is that it does not affect the further rule that such an estoppel cannot arise where the representation is one of intention as to the promisor's future conduct (or a promise), while this is precisely the type of representation or promise which can bring the equitable doctrine

into operation. For this reason, and because the doctrine was developed in equity, the doctrine is sometimes called “promissory” or “equitable” estoppel.<sup>516</sup> The latter description is, however, misleading as the requirement of a representation of existing fact for the purposes of estoppel by representation was recognised in equity<sup>517</sup> no less than at common law.<sup>518</sup> But, in general, the equitable doctrine only suspends rights,<sup>519</sup> while estoppel by representation, where it operates, has a permanent effect. Moreover, there is a difference in the legal nature of the two doctrines. Estoppel by representation prevents a party from establishing *facts*: i.e. from alleging that the facts represented by them are untrue, even where that is actually the case.<sup>520</sup> The equitable doctrine, by contrast, has nothing to do with proof of facts; it is concerned with the *legal effects* of a promise. There was, for example, no dispute about facts in *Hughes v Metropolitan Ry*<sup>521</sup>: the issue was not whether the repairs had been done or whether the landlord had promised or represented that he would not forfeit the lease; it was simply whether he was (to some extent, at least) bound by that undoubted promise.

## Analogy with waiver

- |12 It is submitted that the characteristics of the equitable doctrine, described in para.6-111, above, indicate that the equitable doctrine is not truly analogous to estoppel by representation. As Denning J (a leading proponent of the modern equitable doctrine) pointed out, the authorities which support that doctrine, “although they are said to be cases of estoppel, are not really such”.<sup>522</sup> The doctrine has closer affinities with the common law rules of waiver, in the sense of forbearance<sup>523</sup>: both are based on promises, or representations of intention; both are suspensive (rather than extinctive) in nature and both are concerned with the legal effects of promises rather than with proof of disputed facts. The main difference between them is that the equitable doctrine avoids the difficulties encountered at common law in distinguishing between a variation and a forbearance.<sup>524</sup>
- |13 There is now much judicial support for these submissions. Thus Lord Pearson in *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* said that “promissory estoppel” was “far removed from the familiar estoppel by representation of fact and seems, at any rate in a case of this kind, to be more like a waiver of contractual rights”.<sup>525</sup> In a number of later cases, “waiver” and “promissory estoppel” (or the rule in *Hughes v Metropolitan Ry*)<sup>526</sup> are treated as substantially similar doctrines,<sup>527</sup> the requirements and effects of the one being stated in terms equally applicable to the other.<sup>528</sup> Indeed, the expressions “waiver” and “promissory estoppel” have been judicially described as “two ways of saying exactly the same thing”,<sup>529</sup> and the courts often use them interchangeably when discussing situations in which it is alleged that one party to a legal relationship has indicated that they will not enforce their strict legal rights against the

other.<sup>530</sup> This usage further supports the view that the equitable doctrine is more closely akin to waiver (in the sense of forbearance) than to true estoppel by representation of fact.

## Distinguished from promises supported by consideration

- |14 Under the equitable doctrine, certain limited effects are given to a promise without consideration. But it is nevertheless in the interests of the promisee to show, if they can, that they did provide consideration so that the promise amounted to a contractually binding variation. Such proof will free them from the many rules that restrict the scope of the equitable doctrine: they need not then show that they have in any way “relied” on the promise, or that it would be “inequitable” for the other party to go back on it; the variation will permanently affect the rights of the promisor and not merely suspend them (unless it is expressed so as to have only a temporary effect); and a contractual variation can not only reduce or extinguish existing rights but also create new ones. Where parties agree to modify an existing contract, the equitable doctrine and its common law counterpart may have reduced, but they have by no means eliminated, the practical importance of the doctrine of consideration.

## Other jurisdictions

- |15 The English view that the doctrine of promissory estoppel gives rise to no cause of action has not been followed in other common law jurisdictions. In the United States, a similar doctrine has long been regarded as being capable of creating new rights, though both the existence and the content of the resulting rights are matters for the discretion of the courts.<sup>531</sup> A line of Australian cases likewise supports the view that promises or representations which, for want of consideration or of contractual intention, lack contractual force may nevertheless (by virtue of an estoppel) be enforceable as if they were binding contracts. The leading Australian case is *Waltons Stores (Interstate) Ltd v Maher*,<sup>532</sup> where A, a prospective lessor of business premises, did demolition and building work on the premises while the agreement for the lease lacked contractual force because it was still subject to contract<sup>533</sup>; he had done so to meet the prospective lessee’s (B’s) requirements and on the assumption, of which B must have known, that a binding contract would be brought into existence. B withdrew from the agreement (relying on his solicitor’s advice that he was not bound by it); and it was held that he was estopped from denying that a contract had come into existence and that the agreement for the lease was therefore specifically enforceable against him. The reasoning of the High Court is complex, but the basis of the decision appears to be that B had knowingly induced A to believe that a binding contract would be brought into existence by exchange of contracts<sup>534</sup> and to act in reasonable reliance on that belief. In English law, such reliance is, in appropriate circumstances, capable of giving rise to a variety of remedies, even where the promise or representation which induces it lacks contractual force. Sometimes the

remedy may be the enforcement of the promise according to its terms, as in cases of proprietary estoppel (to be discussed later in this chapter)<sup>535</sup>; sometimes it may be an award of the reasonable value of work done in the belief that a contract had, or would, come into existence.<sup>536</sup> Neither of these remedies would have been available in the *Waltons Stores* case since proprietary estoppel does not arise where work is done on the promisee's (rather than on the promisor's) land<sup>537</sup> and a claim for the reasonable value of the claimant's work is not available where the promisor is not unjustly enriched by the promisee's work<sup>538</sup> and the promisee is aware of the fact that no binding agreement has come into existence and so takes the risk that the negotiations may fail.<sup>539</sup> Even where the second of these objections can be overcome (e.g. on the ground that the work was done at the request of the promisor and as a result of their assurance that an exchange of contracts would take place) it does not follow that the appropriate remedy is enforcement of the supposed or anticipated contract in its terms<sup>540</sup>: if the basis of the estoppel is reliance induced by the promisor, compensation for reliance loss would appear to be the more appropriate remedy. The Australian doctrine also gives rise to the difficulties that there appear to be no clear limits to its scope, and that this lack of clarity is a regrettable source of uncertainty. The doctrine is, moreover, hard to reconcile with a number of fundamental principles of English law, such as the non-enforceability of informal gratuitous promises (even if relied on)<sup>541</sup> and the rule that there is no right to damages for a wholly innocent non-contractual misrepresentation.<sup>542</sup> While on the facts of some of the cases in which the Australian doctrine has been applied the same conclusions would probably be reached in English law on other grounds,<sup>543</sup> the broad doctrine remains, in the present context, inconsistent with the view that the English doctrine of promissory estoppel (like that of estoppel by representation)<sup>544</sup> does not give rise to a cause of action in the sense of entitling the promisee to enforce a promise in its terms, even though it was unsupported by consideration.<sup>545</sup> It is true that other forms of estoppel, such as proprietary estoppel, may produce this result; but the scope and effects of that doctrine is limited in many important ways<sup>546</sup> and the law would present an incongruous appearance if those limits could be outflanked simply by invoking the broader doctrine of "Australian estoppel".

## Distinguished from estoppel by convention

<sup>116</sup> Estoppel by convention may arise where both

<sup>547</sup>

 parties to a transaction "act on assumed state of facts"

<sup>548</sup>

 or law,

<sup>549</sup>

- U the assumption being either shared by both or made by one and acquiesced in by the other".  
550
- U The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable  
551
- U (typically because the party claiming the benefit has been "materially influenced"  
552
- U by the common assumption)  
553
- U to allow them (or one of them) to go back on it.  
554
- U Such an estoppel differs from estoppel by representation and from promissory estoppel  
555
- U in that it does not depend on any representation or promise.  
556
- U It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party.  
557
- U It seems, however, that the assumption resembles the representation required to give rise to other forms of estoppel to the extent that it must be "unambiguous and unequivocal"  
558
- U ; and this common feature can make it hard to distinguish between these two forms of estoppel.  
559
- U Estoppel by convention has also been said to arise out of an express agreement by which the parties had compromised a disputed claim  
560
- U ; but where such a compromise is supported by consideration (in accordance with the principles discussed earlier in this chapter  
561
- U ) it is binding as a contract,  
562
- U so that there is, it is submitted, no need to rely on estoppel by convention.  
563



Estoppel by convention was recently considered by the Supreme Court in *Tinkler v Revenue and Customs Commissioners*.<sup>564</sup> That case concerned non-contractual dealings between HMRC and a taxpayer, but Lord Burrows (with whom the other Justices agreed) expressed the view that the key principles were equally applicable in the contractual and non-contractual contexts. Lord Burrows cited with approval the following passage of Briggs J in *Revenue and Customs Commissioners v Benchdollar Ltd*<sup>565</sup>:

“(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

It should, however, be borne in mind that, as regards (i), “something must be shown to have ‘crossed the line’ sufficient to manifest an assent to the assumption”.<sup>566</sup>

## Further requirements of estoppel by convention

- <sup>117</sup> This kind of estoppel was discussed in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*.<sup>567</sup> In that case, A had negotiated with the X Bank for a loan to B (one of A’s subsidiaries) for the purpose of acquiring and developing a property in the Bahamas. It was agreed that the loan was to be secured by a mortgage on that property and also by a guarantee from A. In the guarantee, A promised the X Bank, in consideration of the Bank’s giving credit to B, to “pay you … all moneys … due *to you*” from B. This was an inappropriate form of words since the loan to B was not made directly by the X Bank but by one of its subsidiaries, the Y Bank, with money provided by the X Bank: hence, if the guarantee were read literally, it would not apply to the loan since no money was due from B to the X Bank. The Court of Appeal, however, took the view that this literal interpretation would defeat the intention of the parties, and held that, on its true construction, the guarantee applied to the loan made by the Y Bank.<sup>568</sup> But even if the

guarantee did not, on its true construction, produce this result, A was estopped from denying that the guarantee covered the loan by the Y Bank, since, when negotiating the loan, both A and the X Bank had assumed that the guarantee did cover it; in addition, the X Bank continued subsequently to act on that assumption<sup>569</sup> in granting various indulgences to A in respect of the loan to B and of another loan made directly by the X Bank to A. It made no difference that the assumption was not induced by any representation<sup>570</sup> made by A but originated in the X Bank's own mistake: the estoppel was not one by representation but by convention.<sup>571</sup>

- <sup>118</sup> The same principle was applied in *The Vistafjord*<sup>572</sup> where an agreement for the charter of a cruise ship had been negotiated by agents on behalf of the owners. Both the agents and the owners believed throughout that commission on this transaction would be payable under an earlier agreement, but on its true construction this agreement gave no such rights to the agents. It was held that estoppel by convention precluded the owners from relying on the true construction of the earlier agreement, so that the agents were justified in retaining the amount of the commission out of sums received by them from the charterers. An estoppel by convention may, similarly, affect the *amount* payable under a contract. This was the position in *ING Bank NV v Ros Roca SA*,<sup>573</sup> where a dispute had arisen between the claimant bank and the defendant company as to the way in which an “additional fee” payable to the bank by the company was to be calculated. On the true construction of the contract, the amount of the fee was indeed that claimed by the bank; but it was held that the bank was estopped, by reason of its conduct and statements from relying on this construction, and that the bank was entitled only to a lower fee, based on the parties’ common assumption as to the way in which the fee was to be calculated.

## “Communication” passing “across the line”

- <sup>119</sup> To give rise to an estoppel by convention, the mistaken assumption of the party claiming the benefit of the estoppel must, however, have been shared or acquiesced in by the party alleged to be estopped; and both parties must have conducted themselves on the basis of such a shared assumption<sup>574</sup>: the estoppel “requires communications to pass across the line between the parties. It is not enough that each of two parties acts on an assumption not communicated to the other”.<sup>575</sup> Such communication may be effected by the conduct of one party, known to the other.<sup>576</sup> But no estoppel by convention arose where each party spontaneously made a different mistake and there was no subsequent conduct by the party alleged to be estopped from which any acquiescence in the other party’s mistaken assumption could be inferred.<sup>577</sup> An estoppel by convention likewise cannot arise where neither party was aware of the facts on which the alleged common assumption is said to have been based<sup>578</sup>; or where the conduct alleged to have given rise to the estoppel can with equal or greater plausibility, be explained on grounds other than that the party alleged to be estopped shared an assumption made by the other party or as amounting to a communication by

the former to the latter party.<sup>579</sup> Nor can a party (A) invoke such an estoppel to prevent the other (B) from denying facts alleged to have been agreed between A and B if A has later withdrawn from that agreement; for in the light of A's withdrawal it is no longer unjust to allow B to rely on the true state of affairs.<sup>580</sup>

## Assumption of law

- |20 Many judicial statements support the view that the assumption giving rise to an estoppel by convention can be one of "fact or law".<sup>581</sup> The point of the reference to "law" in this formulation appears to be to include within the scope of the doctrine assumptions about the construction of a contract<sup>582</sup>; for, since the construction of a contract is often said to be a matter of "law",<sup>583</sup> all such assumptions would be excluded from the scope of the doctrine (and its scope be unduly narrowed) if it did not include at least assumptions of this kind.<sup>584</sup> The question whether estoppel by convention could be based on assumptions of "law" in a wider sense was the subject of conflicting views in *Johnson v Gore Wood & Co*<sup>585</sup> In that case, a company had brought a claim for professional negligence against a firm of solicitors who were told that a further claim based on the same negligence would be made against them by the company's managing director. The company's claim was settled on terms which limited *some* of the director's personal claims against the solicitors and when the director later brought *other* claims against the solicitors, it was held that this was not an abuse of process. Lord Bingham based this conclusion in part<sup>586</sup> on estoppel by convention: in his view, the terms of the settlement were based on the common assumption that it would not be an abuse of process for the director to pursue the claims which he had in fact brought; and it would be unfair to allow the solicitors to go back on this assumption. All members of the House of Lords agreed with Lord Bingham's conclusion that there was no abuse of process; but Lord Goff was "reluctant to proceed on estoppel by convention"<sup>587</sup> as the common assumption was one of law, a type of assumption which in his view did not give rise to this form of estoppel; while Lord Millett was equally reluctant to "put it on the ground of estoppel by convention" as he had "some difficulty in discerning a common assumption".<sup>588</sup> Lord Millet's difficulty is an entirely factual one but Lord Goff's raises a more difficult issue of principle. Support for the view that estoppel by convention can be based on a common assumption of law is admittedly based only on dicta<sup>589</sup>; but it is arguable that those dicta gain support from cases concerned with mistakes and misrepresentations of law. In these contexts, the distinction between matters of "law" and of "fact" has proved hard to draw and is now discredited.<sup>590</sup> On the other hand, the extension of estoppel by convention to *all* common assumptions of "law" could undermine the security of commercial transactions by allowing a party to resist enforcement merely on account of an assumption as to the *legal effect* of a contract, the terms or meaning of which were not in dispute; and this is a type of assumption which, on the authorities, does not give rise to such an estoppel.<sup>591</sup>

## Effect of estoppel by convention

- 121 The effect of this form of estoppel is to preclude a party from denying the agreed or common assumption of fact or, at least to the extent suggested in para.6-120, above, of law.<sup>592</sup> One such assumption may be that a particular promise has been made<sup>593</sup>: thus it is possible to describe the result in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*<sup>594</sup> by saying that A was estopped from denying that it had promised the X Bank to repay any sum left unpaid by B to the Y Bank. But, although estoppel by convention may thus take effect in relation to a promise, it is quite different in its legal nature<sup>595</sup> from promissory estoppel. In cases of promissory estoppel, the promisor or representor is not estopped from denying that the promise or representation *has been made*: on the contrary, this must be proved to establish that kind of estoppel. The doctrine of promissory estoppel is concerned with the *legal effects* of a promise that has been shown to exist. Where, on the other hand, the requirements of estoppel by convention are satisfied, then this type of estoppel normally operates to prevent a party from denying a *fact*, i.e. that the assumed promise *has been made*, or that a promise contains the assumed term: it does not specify the *legal effects* of the assumed promise or term.<sup>597</sup> In *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*, once A was estopped from denying the *existence* of the promise described above, no question arose as to its legal *validity*. There could be no doubt that that promise was supported by consideration<sup>598</sup>: this was provided by the X Bank in making funds available to the Y Bank to enable it to make a loan to B, and in inducing the Y Bank to make that loan.<sup>599</sup> Where the assumed promise is one that would, if actually made, have been unsupported by consideration, both types of estoppel can operate in the same case: estoppel by convention to establish the existence of the promise, and promissory estoppel to determine its legal effect.<sup>600</sup>

## Estoppel by convention does not operate prospectively

- 122 Estoppel by convention does not operate prospectively, so that “once the common assumption is revealed to be erroneous the estoppel will not apply to future dealings”.<sup>601</sup> Discovery of the fact that the common assumption is false does not, however, “kill the estoppel stone dead there and then. The reliant party is commonly afforded a limited time within which to protect itself from the consequences of discovering the legal or factual position”.<sup>602</sup> In *Revenue and Customs Commissioners v Benchdollar Ltd* that “limited”<sup>603</sup> or “reasonable”<sup>604</sup> time after discovery of the truth by the Revenue was held to be about one month.<sup>605</sup> It followed that the estoppel operated against the defendants (the taxpayers) so as to prevent them from relying on the *Limitation Act 1980* in relation to tax claims which had become statute barred before, but not in relation to tax

claims that had become barred after, the end of that time.<sup>606</sup> So far as the latter claims were concerned, “the prejudice occasioned to the Revenue by loss of the ability to pursue [them] was in no sense reliant on the convention” since “those claims could still be saved by taking prompt protective steps”<sup>607</sup> after the “limited time” had expired.

## Whether estoppel by convention creates new rights

<sup>123</sup> In the *Amalgamated Investment & Property* case<sup>608</sup> the court did not ultimately need to decide whether estoppel by convention can create new rights. This action was brought because the X Bank had sought to apply money due from it to A under another transaction in discharge of A’s alleged liability under its guarantee of B’s debt. Hence the effect of the estoppel was to provide the X Bank with a defence to A’s claim for a declaration that the bank was not entitled to apply the money in that way. Eveleigh LJ said: “I do not think that the bank could have succeeded in a claim on the guaranteee itself”.<sup>609</sup> Brandon LJ seems to have taken the view that the bank could have sued on the guaranteee, but to have based that view on the ground that the loan agreement between A and the X Bank imposed an obligation on A to give the guaranteee: hence it was that agreement, and not the estoppel, which would have given rise to the X Bank’s cause of action, if it had sued on the guaranteee.<sup>610</sup> Lord Denning, MR seems to have expressed the principle of estoppel by convention in such a way as to enable it to give rise to a cause of action<sup>611</sup> but he was alone in stating the principle so broadly.<sup>612</sup>

<sup>124</sup> It is clear that estoppel by convention can operate defensively.<sup>613</sup> It can also deprive the defendant of a *defence*, (similarly to promissory estoppel<sup>614</sup> and estoppel by representation<sup>615</sup>) and therefore enable the claimant to win an action which otherwise they would have lost.<sup>616</sup> In *Rivertrade Ltd v EMG Finance Ltd*<sup>617</sup> Kitchin LJ, with whose judgment Moore-Bick and Ryder LJJ agreed, said that the case was not one:

“... in which an estoppel [was] relied upon to create an enforceable right where none previously existed. It is instead one of those cases in which the estoppel is relied upon to bind the parties to an agreement to an interpretation which it would not otherwise bear.”<sup>618</sup>

Where this was the position, an estoppel by convention could “enlarge the effect of an agreement”.<sup>619</sup> The view that estoppel by convention may have such an effect was conceded by counsel for the defendant; and although the Court approved of this concession,<sup>620</sup> it also seemed

to attach importance to the fact that the estoppel in that case did not “create an enforceable right where none previously existed”.<sup>621</sup> There is a degree of tension between the two positions. No other authority squarely supports the view that estoppel by convention can, of itself, create a new cause of action; and the present position seems to be that it cannot, any more than promissory estoppel or estoppel by representation, produce this effect.<sup>622</sup> However, in principle, estoppel by convention can support a claim if it would succeed if the facts were as the parties had assumed.

<sup>623</sup>



## Invalidity of assumed term

<sup>125</sup> A party is not liable on the basis of estoppel by convention where the alleged agreement would, if concluded, have been ineffective for want of contractual intention,<sup>624</sup> or on account of a formal defect

<sup>625</sup>

(other than a minor one)<sup>626</sup> or unenforceable for want of written evidence of it,<sup>627</sup> or where the term in respect of which such an estoppel is alleged to operate would, if actually incorporated in the contract, have been invalid (e.g. because it amounted to an attempt to deprive a tenant of statutory security of tenure which could not be excluded<sup>628</sup> by contract)<sup>629</sup>; nor does such an estoppel prevent a party from relying on the true legal effect (as opposed to the meaning<sup>630</sup>) of an admitted contract merely because the parties have entered into it under a mistaken view as to that effect.<sup>631</sup>

## “Contractual estoppel”<sup>632</sup>

<sup>126</sup> This form of “estoppel” is said to arise when contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist. The effect of such “contractual estoppel” is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract.<sup>633</sup> Three points must here be made about this concept. The first is that the answer to the question whether the contract term alleged to be of the kind described above in fact has this effect turns on the construction of the contract; and once the court has decided that, as a matter of construction that term is held to preclude one of the parties from denying the existence of a specified state of facts, then nothing of substance is gained by classifying this conclusion under

the rubric of “contractual estoppel”.<sup>634</sup> The second is that, even if that phrase is used, such an “estoppel” would differ from estoppels by convention in that “contractual estoppel” gives effect to a term of a contract which, on its true construction, prevents a party from denying facts specified in that term and in the circumstances (if any) specified in it<sup>635</sup>; while estoppels by convention invoke factors extrinsic to the contract as grounds for precluding the estopped party from denying facts such as the existence of a promise *not* included in the contract on its true construction<sup>636</sup> and of holding them bound by that promise (if the circumstances specified in para.<sup>6-116</sup> above are satisfied) to the extent specified in paras <sup>6-121—6-125</sup> above. The third is that “contractual estoppel” does not give rise to any of the problems of consideration which are our concern in this chapter: the term alleged to give rise to such an estoppel derives its binding force from the fact of being part of a legally binding contract, it being simply assumed that the requirement of consideration is satisfied in relation to the promises constituting that contract. For all these reasons, no further discussion of “contractual estoppel” is called for in this chapter.

## Footnotes

- <sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.
- <sup>393</sup> *(1877) 2 App. Cas. 439*.
- <sup>394</sup> *(1877) 2 App. Cas. 439* at 448; cf. *Smith v Lawson* (1998) *75 P. & C.R. 466*: landlord who had told tenant that he would not ask her to continue to pay rent could not have recovered possession for failure to pay the rent when due. See further para.<sup>6-110</sup>, below.
- <sup>395</sup> e.g. *Charles Rickards Ltd v Oppenheim* [1950] *K.B. 616* (where both common law and equitable principles were applied). The principle in *Hughes v Metropolitan Ry* was said in *Brikom Investments Ltd v Carr* [1979] *Q.B. 467, 489* to be “an illustration of *contractual* variation of strict contractual rights” (italics supplied). This description was apt on the facts of that case, where the promise not to enforce such rights was supported by consideration: above, paras <sup>6-087—6-088</sup>. But the principle stated in *Hughes v Metropolitan Ry* applies even in the absence of such consideration: cf. below, paras <sup>6-148—6-150</sup>.
- <sup>396</sup> *B.P. Exploration (Libya) v Hunt (No.2)* [1979] *1 W.L.R. 783, 812*, affirmed (without reference to the point) [1983] *2 A.C. 352*; *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] *2 Lloyd's Rep. 245, 250*.
- <sup>397</sup> This paragraph has recently been endorsed in *Toucan Energy Holdings Ltd v Wirsol Energy Ltd* [2021] *EWHC 895 (Comm)* at [811] and *Avery-Gee v Sibley* [2021] *EWHC 798 (Ch)* at [30].
- <sup>398</sup> *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] *2 Q.B. 839*. A statement may also prevent the representor from denying the existence of a statutory liability, as in *Robertson v Minister of Pensions* [1949] *1 K.B. 227*, as to which see also para.<sup>6-111</sup> below.
- <sup>399</sup> *Maharaj v Chand* [1986] *A.C. 898*.

- 400 *Morris v Tarrant* [1971] 2 Q.B. 143, 160; cf. *Burrows v Brent LBC* [1996] 1 W.L.R. 1448, 1455, where no attempt was made to invoke the doctrine in favour of a “tolerated trespasser”; for discussion of this phrase, see *Knowsley Housing Trust v White* [2009] UKHL 70, [2009] 1 A.C. 636, above para.4-234; there is no reference in this case to the equitable doctrine discussed in the text above.
- 401 *Lambeth LBC v O’Kane Holdings Ltd* [2005] EWCA Civ 1010; [2006] H.L.R. 2.
- 402 *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [2005] Fam. 1.
- 403 Human Fertilisation and Embryology Act 1990 Sch.3 para.4(1).
- 404 *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727 at [37]; see also at [36] and [120].
- 405 *Evenden v Guildford City F.C.* [1975] Q.B. 917, 924, 926 (actual decision overruled in *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1980] A.C. 506). For the position in Australia, see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 C.L.R. 387; below, para.6-115.
- 406 *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd’s Rep. 456, 466. Some doubt as to the correctness of this case is expressed by Webster J (who decided it) in *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd’s Rep. 570, 596, 604 though the decision was approved on another point in *The Stolt Loyalty* [1993] 2 Lloyd’s Rep. 281, 289–290, 291, affirmed without reference to this point [1995] 1 Lloyd’s Rep. 598. See also *Orion Finance Ltd v J.D. Williams & Co Ltd* [1997] C.L.Y. 986, where no estoppel arose in the absence of a previous legal relationship; *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [89] apparently doubting some of the reasoning in *The Henrik Sif*, but not the outcome since there was undoubtedly “a legal relationship ... whoever were the parties thereto” (though the difficulty remains that the first defendants, against whom the doctrine was said to operate, were not parties to that relationship).
- 407 *James v Heim Galleries* (1980) 256 E.G. 819, 821; *Collin v Duke of Westminster* [1985] Q.B. 581, 595. See also *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 where a letter to tenants of flats setting out the benefits to be obtained from a scheme for acquiring the interest of a superior leaseholder was held not to give rise to a promissory estoppel (at [34]) because, on its true construction, it “did not promise anything” (at [31]).
- 408 *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130 at 134; *Spence v Shell* (1980) 256 E.G. 55, 63; *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [92].
- 409 Or that they will not rely on an available defence: below para.6-109.
- 410 *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd’s Rep. 109, 126; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1979] 1 Lloyd’s Rep. 221 (both these cases concerned “waiver”); cf. below, para.6-098.
- 411 *Low v Bouvierie* [1891] 3 Ch. 82, 106; *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] A.C. 741; *The Shackleford* [1978] 2 Lloyd’s Rep. 154, 159; *Channel Island Ferries Ltd v Sealink UK Ltd* [1987] 1 Lloyd’s Rep. 559, 580, affirmed without reference to this point [1988] 1 Lloyd’s Rep. 323; *Kim v Chasewood Park Residents*

*Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [23]–[26]; *Spliethoff's Bevrachtingskantoor BV v Bank of China* [2015] EWHC 999 (Comm), [2015] 2 Lloyd's Rep. 123 at [156].

- 412 *Finagrain SA Geneva v P. Kruse Hamburg* [1976] 2 Lloyd's Rep. 508, 534; *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (The Laconia)* [1977] A.C. 850, 871; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109, 126; *China National Foreign Trade Transportation Corp v Evoglia Shipping Co of Panama SA (The Mihalios Xilas)* [1979] 1 W.L.R. 1018, 1024; *Avimex SA v Dewulf & Cie.* [1979] 2 Lloyd's Rep. 57, 67; *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 1 Lloyd's Rep. 207, 212; *Bremer Handelsgesellschaft mbH v Finagrain Cie. Commercial Agricole & Financière SA* [1981] 2 Lloyd's Rep. 259, 266; *Scandinavian Tanker Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 431; (affirmed [1983] 2 A.C. 694) *Italmare Shipping Co v Ocean Tanker Co Inc (The Rio Sun)* [1981] 2 Lloyd's Rep. 489 and [1982] 1 Lloyd's Rep. 404; *Telfair Shipping Corp v Athos Shipping Corp (The Athos)* [1983] 1 Lloyd's Rep. 127, 134–135; *Bremer Handelsgesellschaft mbH v Deutsche-Conti Handelsgesellschaft mbH* [1983] 1 Lloyd's Rep. 689; *Super Chem Products Ltd v American Life & General Insurance Co Ltd* [2004] UKPC 2, [2004] 2 All E.R. 358 at [23], where the present requirement was not satisfied; *Fortisbank SA v Trenwick International* [2005] EWHC 399 (Comm), [2005] Lloyd's Rep. I.R. 464 at [32], [35]; *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14 at [38], where the reference seems to be to “promissory estoppel”: see below, para.6-102). For the analogy between waiver and the equitable doctrine here under discussion, see above, para.6-093; below, para.6-111. For the further concept of “waiver by estoppel”, see above, para.6-089.
- 413 *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 812 (affirmed without reference to this point [1983] 2 A.C. 352.); *Spence v Shell* (1980) 256 E.G. 55, 63; *James v Heim Galleries* (1980) 256 E.G. 819, 821; *Société Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep. 695, 700; *Goldsworthy v Brickell* [1987] Ch. 378, 410; *Hiscox v Outhwaite (No.3)* [1991] 2 Lloyd's Rep. 523, 524, 535; *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants* [1999] 2 Lloyd's Rep. 443 at 448, *Thameside MBC v Barlow Securities Group Services Ltd* [2001] EWCA Civ 1; [2001] B.L.R. 113 and *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam), [2003] 4 All E.R. 903 at [303]–[306] (where this requirement was not satisfied), affirmed on other grounds [2004] EWCA Civ 727, [2005] Fam. 1; *Greenhouse v Paysafe Financial Services Ltd* [2018] EWHC 3296 (Comm) at [17]; *Union of Shop, Distributive and Allied Workers v Tesco Stores Ltd* [2022] EWCA Civ 978; for the requirement of an “unequivocal representation in a case of “waiver … by estoppel”, see *Warren v Burns* [2014] EWHC 3671 (QB) at [17] (where this requirement was not satisfied: at [20]); *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [51], [52] and passim; as the promise in this case was held to be supported by consideration (see below, paras 6-129—6-133) it was not strictly necessary to decide the estoppel issue: see at [50]. (The *MWB* case was reversed on other grounds without reference to estoppel, [2018] UKSC 24, [2018] 2 W.L.R. 1603, see below, paras 6-129—6-133 and 25-047.)

- 414 *Spence v Shell* (1980) 256 E.G. 55, 63.
- 415 (1877) 2 App. Cas. 439; cf. *The Post Chaser* [1981] 2 Lloyd's Rep. 695, 700.
- 416 *China-Pacific SA v The Food Corp of India (The Winson)* [1980] 2 Lloyd's Rep. 213, 222; reversed on other grounds [1982] A.C. 939; *Food Corp of India v Antclizo Shipping Corp (The Antclizo)* [1988] 2 Lloyd's Rep. 130, 142, affirmed [1988] 1 W.L.R. 603; *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No.2)* [1990] 2 Lloyd's Rep. 431, 452; *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) Plc* [1992] 1 Lloyd's Rep. 513, 542.
- 417 Above, paras 4-185—4-190; cf. *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [38], [54], where one reason why the claim based on estoppel failed was that the implied agreement on which it was based was not sufficiently certain to have contractual force: see above, para.4-220 and below, para.6-106. The difficulty arising from lack of certainty was said, at [54], to “extend to the estoppel as well as the contractual issue”. cf. in cases of estoppel by convention, below, para.6-116.
- 418 Above, para.4-003.
- 419 *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159, 173, a case of estoppel by representation, to which the requirement of a clear and unequivocal representation also applies: see *Low v Bouverie* [1891] 3 Ch. 82; *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co* [1972] A.C. 741. For the requirement of an “unqualified” acceptance, see above, paras 4-037—4-039.
- 420 *China-Pacific SA v The Food Corp of India (The Winson)* [1980] 2 Lloyd's Rep. 213, 223; reversed on other grounds [1982] A.C. 939; *Drexel Burnham Lambert International NV v El Nasr* [1986] 1 Lloyd's Rep. 356. A promise which lacks contractual force can give rise to a *proprietary estoppel* even though by reason of its uncertainty or incompleteness it lacks contractual force (see below, para.6-161); but in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 (below paras 6-173—6-174, 6-177—6-178) it was held that no such estoppel arose in favour of a party who *knew* that the promise was binding only in honour.
- 421 *Scandinavian Trading Tanker Co A.B. v Flora Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 431, distinguishing *Tankexpress AS v Cie. Financière Belge des Petroles SA* [1949] A.C. 76 on the ground that there the creditor's conduct had resulted in a change in the “accepted method of payments”; *The Scaptrade*, above was affirmed without reference to the present point [1983] 2 A.C. 694; cf. *Cape Asbestos Ltd v Lloyds Bank Ltd* [1921] W.N. 274, 276; *Bunge SA v Compagnie Européenne de Céréales* [1982] 1 Lloyd's Rep. 306; *Bremer Handelsgesellschaft mbH v Raiffeisen Hauptgenossenschaft E.G.* [1982] 2 Lloyd's Rep. 599; *Bremer Handelsgesellschaft mbH v Bunge Corp* [1983] 1 Lloyd's Rep. 476.
- 422 cf. *London & Clydebanks Properties v H.M. Investment Co* [1993] E.G.C.S. 63.
- 423 *Seechurn v Ace Insurance SA* [2002] EWCA Civ 67; [2002] 2 Lloyd's Rep. 390, esp. at [55].
- 424 *V. Berg & Son Ltd v Vanden Avenne-Izegem P.V.B.A.* [1977] 1 Lloyd's Rep. 499; cf. *Edm. J.M. Mertens & Co P.V.B.A. v Veevoeder Import Export Vimex B.V.* [1979] 2 Lloyd's Rep. 372.
- 425 *Finagrain SA Geneva v P. Kruse Hamburg* [1976] 2 Lloyd's Rep. 508; cf. *Cook Industries Inc v Meunerie Liegeois SA* [1981] 1 Lloyd's Rep. 359, 368; *Peter Cremer v Granaria*

- B.V.* [1981] 2 *Lloyd's Rep.* 583; *Bremer Handelsgesellschaft mbH v Deutsche Continental Handelsgesellschaft mbH* [1983] 2 *Lloyd's Rep.* 476.
- 426 *China-Pacific SA v The Food Corp of India (The Winson)* [1980] 2 *Lloyd's Rep.* 213 (reversed on other grounds [1982] A.C. 939).
- 427 *SMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The Zenovia)* [2009] EWHC 739 (Comm), [2009] 2 All E.R. (Comm) 177 at [34].
- 428 *Avimex SA v Dewulf & Cie* [1979] 2 *Lloyd's Rep.* 57.
- 429 *China National Foreign Trade Transportation Corp v Evoglia Shipping Co SA of Panama (The Mihalios Xilas)* [1979] 1 W.L.R. 1018; *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 1 *Lloyd's Rep.* 207, 212–213; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1981] 1 *Lloyd's Rep.* 292, 299; *Peter Cremer v Granaria B.V.* [1981] 2 *Lloyd's Rep.* 583; *The Post Chaser* [1981] 2 *Lloyd's Rep.* 695, 700.
- 430 See *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (The Laconia)* [1977] A.C. 850 (where retention of an underpayment accepted without authority by the payee's bank was held not to amount to a waiver).
- 431 e.g. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem P.V.B.A.* [1978] 2 *Lloyd's Rep.* 109; *Hazel v Akhtar* [2001] EWCA Civ 1883; [2002] 2 P. & C.R. 17 (landlord tolerating habitually late payment of rent).
- 432 See *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1979] 1 *Lloyd's Rep.* 221, where there was a division of opinion on the point in the Court of Appeal.
- 433 *Telfair Shipping Corp v Athos Shipping Corp (The Athos)* [1983] 1 *Lloyd's Rep.* 127, 135.
- 434 *Allied Marine Transport v Vale do Rio Doce Navegação SA (The Leonidas D.)* [1985] 1 W.L.R. 925, 937; cf. *Cook Industries v Tradax Export SA* [1983] 1 *Lloyd's Rep.* 327, 332 ([1985] 2 *Lloyd's Rep.* 454); *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August P. Leonhardt)* [1985] 2 *Lloyd's Rep.* 28, 33; *M.S.C. Mediterranean Shipping Co SA v B.R.E. Metro Ltd* [1985] 2 *Lloyd's Rep.* 239; *Cie Française d'Importation, etc., SA v Deutsche Continental Handelsgesellschaft* [1985] 2 *Lloyd's Rep.* 592, 598; *Food Corp of India v Antclizo Shipping Corp (The Antclizo)* [1986] 1 *Lloyd's Rep.* 181, 187, affirmed 1 W.L.R. 603; *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No.2)* [1990] 2 *Lloyd's Rep.* 431, 452; *HIH Casualty & General Insurance v AXA Corporate Solutions* [2002] EWCA Civ 1253; [2002] 2 All E.R. (Comm) 1053 at [26] (where there was no action in reliance); *Front Carriers Ltd v Atlantic Orient Shipping Corp (The Archimidis)* [2007] EWHC 421 (Comm), [2007] 2 *Lloyd's Rep.* 131 at [45]–[46]; cf. *Tankerederei Ahrenkeil GmbH v Frahuil SA (The Multitank Holsatia)* [1988] 2 *Lloyd's Rep.* 486, 493 (no estoppel as no action in reliance).
- 435 *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305, 315; cf. in another context, *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova)* [1984] 1 *Lloyd's Rep.* 353, 365.
- 436 *Collin v Duke of Westminster* [1985] Q.B. 581.
- 437 *Argo Systems FZE v Liberty Insurance (Pte) (The Copa Casino)* [2011] EWCA Civ 1572, [2012] 1 *Lloyd's Rep.* 129 at [38] (although the reasoning regarding s.33(3) of the Marine Insurance Act 1906 has been rendered obsolete by s.10 of the Insurance Act 2015: see below, Vol.II, para.44-082).

- 438 *Argo Systems FZE v Liberty Insurance (Pte) (The Copa Casino) [2011] EWCA Civ 1572*, [46].
- 439 *MIOM 1 Ltd v Sea Echo ENE (No.2) [2011] EWHC 2715 (Admly)*, [2012] 1 Lloyd's Rep. 142; *Process Components Ltd v Kason Kek-Gardner Ltd [2016] EWHC 2198 (Ch)* at [129], [132]; *Toucan Energy Holdings Ltd v Wirsol Energy Ltd [2021] EWHC 895 (Comm)*; cf. *Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC)*, [2017] 1 Lloyd's Rep. 331.
- 440 cf. below, para.9-045.
- 441 See *Fontana N.V. v Mautner [1979] 254 E.G. 199*; *Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co [1981] 1 Lloyd's Rep. 345, 352*; *Cook Industries Ltd v Meunerie Liegeois SA [1981] 1 Lloyd's Rep. 359, 368*; *Scandinavian Trading Tanker Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade) [1983] 1 All E.R. 301*, affirmed without reference to this point [1983] 2 A.C. 694; *Bremer Handelsgesellschaft mbH v Bunge Corp [1983] 1 Lloyd's Rep. 476*; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH [1983] 1 Lloyd's Rep. 689*; *Lark v Outhwaite [1991] 2 Lloyd's Rep. 132, 142*; *The Nerano [1996] 1 Lloyd's Rep. 1*; *Rowan Companies Inc v Lambert Eggink Offshore Transport Ltd [1999] 2 Lloyd's Rep. 443* at 449; *Kim v Chasewood Park Residents Ltd [2013] EWCA 239*, [2013] H.L.R. 24 at [40] ("no material reliance"; for the actual ground for the decision in this case, see above, para.6-097).
- 442 *Ets. Soules & Cie v International Trade Development Co Ltd [1980] 1 Lloyd's Rep. 129*; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multitank Holsatia) [1988] 2 Lloyd's Rep. 486, 493*.
- 443 *Brikom Investments Ltd v Carr [1979] Q.B. 467, 482*.
- 444 *Brikom Investments Ltd v Carr [1979] Q.B. 467, 490* (per Cumming-Bruce LJ, whose decision was based on the different ground discussed in paras 6-087—6-088, above).
- 445 cf. the similar rule in cases of "proprietary estoppel" stated in para.6-170, below.
- 446 e.g. in *Fontana N.V. v Mautner [1979] 254 E.G. 199*; *Meng Long Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] A.C. 511, 524*; cf. *Wilson (1951) 67 L.Q.R. 344*.
- 447 *W.J. Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 Q.B. 189* at 213; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553*, [2017] Q.B. 604 at [54]; for this case (so far as it relates to estoppel) see also above, para.6-097. The case was reversed on other grounds [2018] UKSC 24, [2018] 2 W.L.R. 1603, see below, para.25-047, without discussion of estoppel.
- 448 *James v Heim Galleries (1980) 256 E.G. 819, 825*; *Société Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser) [1981] 2 Lloyd's Rep. 695, 701*. *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No.2) [1990] 2 Lloyd's Rep. 431, 454*; *Fortisbank SA v Trenwick International Ltd [2005] EWHC 339*; [2005] 2 Lloyd's Rep. I.R. 464 at [13]; *Virulite LLC v Virulite Distribution Ltd [2014] EWHC 366 (QB)*, [2015] 1 All E.R. (Comm) 204 at [121], where the actual decision was that the contract had been varied by a contractually binding agreement (at [112]–[116]; above para.6-090) and "Waiver/Promissory estoppel" (before [117]) was discussed only on the assumption that there had been no such variation.
- 449 (1877) 2 App. Cas. 439, above, para.6-093; cf. *Bottiglieri di Navigazione SpA v Quindao Ocean Shipping Co (The Bunge Saga Lima) [2005] EWHC 244 (Comm)*, [2005] 2 Lloyd's

*Rep. 1* at [31] (“some conduct [including “a failure to act”] which differs from that which would have occurred in the absence of the representation”).

- 450 *Société Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser) [1981] 2 Lloyd's Rep. 695*. The point made in the text above may account for Rix LJ's statement in *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243 [2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14* at [38] that detriment is “probably” a requirement of the operation of this type of “estoppel”. (For the use of “estoppel” to describe the equitable doctrine, see above, para.6-097 and below para.6-111.) The description in *[2008] EWCA Civ 147* at [38] of the “estoppel” in question as “a promise supported not by consideration but by reliance” seems to indicate that the reference in this passage is to the type of “estoppel” here under discussion.
- 451 *Maharaj v Chand [1986] A.C. 898; The Bunge Saga Lima [2005] EWHC 244 (Comm)* at [31] (quoted in footnotes to para.6-105 below).
- 452 It may also not be inequitable for the promisor to go back on a promise where the detriment suffered by the promisee consists of a payment of money to the promisor and the latter has offered to refund that payment. For discussion of this possibility, see *Kim v Chasewood Park Residents Ltd [2013] EWCA Civ 239, [2013] H.L.R. 24* at [43]–[45], where, however, this reasoning was not needed as the alleged promisees had “made it clear that they did not want their money back” (at [45]). The actual decision was that no promissory estoppel had arisen for the reason given in para.6-097 above.
- 453 *Société Italo-Belge pour le Commerce et l'Industrie v Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser) [1981] 2 Lloyd's Rep. 695*; cf. *Bremer Handelsgesellschaft mbH v Bunge Corp [1983] 1 Lloyd's Rep. 476, 484; Marseille Fret SA v D. Oltman Schiffahrts GmbH & Co K.G. (The Trado) [1982] 1 Lloyd's Rep. 157, 160; Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH [1983] 1 Lloyd's Rep. 689; Banner Industrial & Commercial Properties Ltd v Clark Paterson Ltd [1990] 2 E.G.L.R. 139; Transatlantica de Comercio SA v Incrobasa Industrial & Comercio Brazileira SA [1995] 1 Lloyd's Rep. 214, 219*.
- 454 See below, para.6-104 and cf. above, para.6-090 for the requirement of such notice.
- 455 *(1879) 5 Q.B.D. 409*.
- 456 *(1879) 5 Q.B.D. 409* at 413; cf. also *Southwark LBC v Logan (1996) 8 Admin. L.R. 315; Evans v Amicus Healthcare Ltd [2003] EWHC 2161 (Fam), [2003] 4 All E.R. 903* at [309], affirmed *[2004] EWCA Civ 727, [2005] Fam. 1* on the ground stated in para.6-096 above.
- 457 See *D. & C. Builders Ltd v Rees [1966] 2 Q.B. 617*, below, paras 6-128, 6-154 and *South Caribbean Trading Ltd v Trafigura Beheer BV [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128* at [112] (promise obtained by economic duress).
- 458 *(1877) 2 App. Cas. 439*, above, para.6-093.
- 459 cf. *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 1 W.L.R. 761*; (below, para.6-147) *Banning v Wright [1972] 1 W.L.R. 972, 981; Brikom Investments Ltd v Seaford [1981] 1 W.L.R. 863, 869; Société Italo-Belge v Palm & Vegetable Oils (The Post Chaser) [1981] 2 Lloyd's Rep. 695, 701; Meng Long Development Pte Ltd v Jip Hong Trading Co Ltd [1985] A.C. 511, 524; Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga) [1987] 2 Lloyd's Rep. 509, 518* affirmed *[1989] 1 Lloyd's*

*Rep.* 354; *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1391, *The Times*, 26 June 2003; *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14 at [38]; *Hazel v Akhtar* [2001] EWCA Civ 1883; [2002] 2 P. & C.R. 17 at [43]; *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [41]; *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All E.R. (Comm) 204 at [122]; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [56] (“may only be suspensive”). (On appeal to the Supreme Court the estoppel point was not argued and the Court of Appeal’s decision was reversed on other grounds [2018] UKSC 24, [2018] 2 W.L.R. 1603, see below, para.25-047. For the Supreme Court’s remarks about whether there was good consideration, see below, paras 6-129—6-133). No reference to the suspensive nature of the doctrine was made in *Smith v Lawson* (1998) 75 P. & C.R. 466 (below, para.6-110), probably because no attempt was made by the promisor to give reasonable notice of any intention to resume enforcement of his legal rights.

- 460 *Roebuck v Mungovin* [1994] 2 A.C. 224, 234.
- 461 This is also true of cases such as *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 W.L.R. 761 and *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1236, discussed in paras 6-146 and 6-147 below.
- 462 See *Dunbar Assets Plc v Butler* [2015] EWHC 2546 (Ch) at [50]; cf. the discussion of *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130 in para.6-144 below.
- 463 [2015] EWHC 2546 at [50].
- 464 cf. below, paras 6-148—6-150.
- 465 (1888) 40 Ch. D. 268; cf. *W.J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189, where the actual decision was that there was a contractually binding variation: see above, paras 6-084—6-086. See also *Avery-Gee v Sibley* [2021] EWHC 798 (Ch) at [32].
- 466 See *Maharaj v Chand* [1986] A.C. 898; cf. *W.J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189 (where the actual decision was that there was a variation supported by consideration); *Ogilvie v Hope-Davies* [1976] 1 All E.R. 683, 689; cf. *Voest Alpine International GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd’s Rep. 547, 560. See too *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All E.R. (Comm) 204 at [122]–[123].
- 467 *Combe v Combe* [1951] 2 K.B. 215 at 219; the point had been foreshadowed in *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130 at 134.
- 468 [1951] 2 K.B. 215.
- 469 Above, para.6-059.
- 470 *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [91]; for the difficulty of distinguishing in that case between reliance and expectation loss, see *Baird Textile Holdings Ltd v Marks & Spencer Plc* at [81], [82].
- 471 Above, para.6-093, below, para.6-111.
- 472 Below, para.6-111.
- 473 *Low v Bouverie* [1891] 3 Ch. 82 at 101; cf. at 105.
- 474 Below, para.6-111.

- 475 For consideration of the relationship between promissory estoppel and *Foakes v Beer* see para.6-145 below.
- 476 This appears to be the point that Denning LJ had in mind in *Combe v Combe* [1951] 2 K.B. 215 at 219 when he said that he did not want the equitable principle to be “stretched too far lest it be endangered”; cf. *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 486; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 W.L.R. 761, 764; *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, 561; *Drexel Burnham Lambert International NV v El Nasr* [1986] 1 Lloyd’s Rep. 356, 365. Contrast *Vaughan v Vaughan* [1953] 1 Q.B. 762, 768; *Denning* (1952) 15 M.L.R. 1.
- 477 *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737, where *Combe v Combe* is cited at [34], and [87] in support of the view stated in the text above; though an alternative explanation for the result in the *Baird* case is that, in the absence of certainty or contractual intention, the *requirements for the operation* of the equitable doctrine are simply not satisfied (above, paras 4-188, 6-097), so that no question can arise as to its *effects*.
- 478 In *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd’s Rep. 159, 175 it is suggested that the rule that promissory estoppel gives rise to no cause of action “is limited to the protection of consideration” and has “no general application in the field of estoppel”. The estoppel there under discussion was estoppel by representation, and the suggestion is, with respect, hard to reconcile with the statements in *Low v Bouvierie* [1891] 3 Ch. 82 at 101, 105 cited above. Similar difficulty arises from the more tentative suggestion in *Thornton Springer v NEM Insurance Ltd* [2000] 2 All E.R. 489 at 519 that estoppel could lead to the “enforcement of the promise” where no contract was concluded for want of acceptance of an offer, though not where there was no contract for want of consideration. The former situation is one of estoppel by convention (as to which see below, para.6-116); and it is also, with respect, hard to see why one answer should be given to the question whether rule in *Combe v Combe* applies where the promise lacks contractual force for want of consideration and a different one where it lacks such force for want of an effective acceptance. Such a distinction seems also to be inconsistent with the readiness of the Court of Appeal in the *Baird* case ([2001] EWCA Civ 274) to apply the rule in *Combe v Combe* to an alleged promise which lacked contractual force for some reason other than want of consideration. See also *Oceanografia SA de CV v DSND Subsea AS (The Botnica)* [2006] EWHC 1300 (Comm), [2007] 1 All E.R. (Comm) 1 where “waiver” was invoked (at [89]) in the context of failure to comply with one of the requirements of contract formation, in that case the execution of a formal document (above, paras 4-155—4-158). The normal effect of such a waiver is that the party granting it is *bound* by the contract (e.g. above paras 4-057—4-063, 4-079); but in *The Botnica* it resulted in that party’s entitlement to *enforce* a term of the contract. No reference was made to the equitable doctrine here under discussion or to the normally defensive nature of that doctrine or of waiver.
- 479 *Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097, 1104-1105; Atiyah (1974) 38 M.L.R. 65; and see Allan (1963) 79 L.Q.R. 238; the point was left open in *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd’s Rep. 456, 466–468 (as to which see above, para.6-096).

- 480 *Evenden v Guildford City F.C.* [1975] Q.B. 917, 924, 926; *Napier* [1976] C.L.J. 38; and see next note.
- 481 See *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1980] A.C. 506, overruling *Evenden's* case, above. Lord Wilberforce remarked at 518 that “To convert this [contract] into an estoppel is to turn the doctrine of promissory estoppel … upside down”.
- 482 For the position in other common law jurisdictions, see para.6-115, below.
- 483 cf. the position in cases of estoppel by representation, below, para.6-111.
- 484 *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 1 W.L.R. 444, 457; *Aquaflite Ltd v Jaymar International Freight Consultants Ltd* [1980] 1 Lloyd's Rep. 36; *Syros Shipping Co SA v Elaghill Trading Co (The Proodos C)* [1980] 2 Lloyd's Rep. 390, 391; *James v Heim Galleries* (1980) 256 E.G. 819, 821; *Brikom Investments Ltd v Seaford* [1981] 1 W.L.R. 863; cf. *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133, 152; *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737; *Newport City Council v Charles* [2008] EWCA Civ 1541 at [27]–[28]; *Haden Young Ltd v Laing O'Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) at [167]–[169]. The defensive nature of promissory estoppel is also by implication recognised in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [61], where promissory estoppel is in this respect contrasted with proprietary estoppel: see below, para.6-191. A dictum in *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2016] 4 All E.R. 490 at [73] (quoted in footnotes to para.6-125, below) seems to suggest that promissory estoppel can “provide a cause of action”, but the point does not seem to have been argued, no cases are cited in support, and it should be treated as having been made per incuriam.
- 485 [1809] 2 Camp. 317; 6 Esp. 129; above, para.6-065.
- 486 See *Hiscox v Outhwaite (No.3)* [1991] 2 Lloyd's Rep. 524, 535.
- 487 [1951] 2 K.B. 215, 219.
- 488 *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [88]; *Durham v BAI (Run Off) Ltd* [2008] EWHC 2692 (QB), [2009] 2 All E.R. 26 at [269] (discussing estoppel by convention, below paras 6-116—6-125) and [278] (“the *Baird Textile* exception”) (this issue was not pursued on further appeal: [2010] EWCA Civ 1096, [2011] 1 All E.R. 605; [2012] UKSC 14, [2012] 1 W.L.R. 867).
- 489 [1991] 1 Q.B. 1, above, paras 6-069—6-072.
- 490 Though there are references to estoppel in that case at pp.13 (“not yet fully developed”) and 17–18 (this reference seems to be estoppel by convention, the relevance of which to the case is doubted in para.6-121, below).
- 491 As in *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130, below para.6-144, this being the case under discussion in *Combe v Combe* [1951] 2 K.B. 215.
- 492 *Syros Shipping Co SA v Elaghill Trading Co (The Proodos C)* [1980] 2 Lloyd's Rep. 390.
- 493 Below, paras 6-155—6-193, especially para.6-181.
- 494 *Combe v Combe* [1951] 2 K.B. 215, 224; *The Proodos C* [1980] 2 Lloyd's Rep. 390, 391 (“time honoured phrase”); *Lark v Outhwaite* [1991] 2 Lloyd's Rep. 132, 142; *Hiscox v Outhwaite (No.3)* [1991] 2 Lloyd's Rep. 524, 535.

- 495 *Azov Shipping Co v Baltic Shipping Co* [1999] 2 *Lloyd's Rep.* 159 at 175 (“largely inaccurate”); *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] *EWCA Civ* 274; [2002] 1 *All E.R. (Comm)* 737 at [54] (“misleading aphorism”).
- 496 (1879) 5 *Q.B.D.* 409.
- 497 cf. *Hartley v Hymans* [1920] 3 *K.B.* 475, applying the corresponding common law doctrine: above, para.6-089; *Johnson v Gore Wood* [2002] 2 *A.C.* 1 at [40]. And see *Jackson* (1965) 81 *L.Q.R.* 223.
- 498 See *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 *Lloyd's Rep.* 245, above, para.6-105; the Australian case of *Commonwealth of Australia v Verwayen* (1990) 170 *C.L.R.* 394 (discussed by Spence (1991) 107 *L.Q.R.* 221) could, in England, be decided on the same ground (*Baird Textile Holdings Ltd v Marks & Spencers Plc* [2001] *EWCA Civ* 274; [2002] 1 *All E.R. (Comm)* 737 at [98]) though it was actually based on the wider Australian principle referred to in para.6-115, below. No reference was made to *The Ion* (cited above in this note) in *Newport City Council v Charles* [2008] *EWCA Civ* 1541, [2009] 1 *W.L.R.* 1884 where the rule that estoppel by representation is “a shield only and cannot found a cause of action” (at [27]) was held to prevent a local authority from relying on this form of estoppel to avoid a time bar imposed by statute on claims for the recovery of premises which it owned but had let to the representor on a secure tenancy. The two cases can perhaps be distinguished on the ground that, in the *Newport* case, the time bar had been imposed by the very statute which had given the claimant the right, within the specified time, to recover possession of the premises. But for this point, there would have been considerable force in the argument that the claimant’s cause of action was based, not on the representations giving rise to the estoppel, but on its title to the premises.
- 499 cf. in cases of estoppel by representation, *Burrowes v Lock* (1805) *Ves.* 470, as explained in *Low v Bouverie* [1891] 3 *Ch. 82*.
- 500 *Argo Systems FZE v Liberty Insurance (Pte) (The Copa Casino)* [2011] *EWCA Civ* 1572, [2012] 1 *Lloyd's Rep.* 129 (where, for the reason given in para.6-100 above, the in some respects analogous doctrine of “waiver by estoppel” did not apply).
- 501 *Shah v Shah* [2001] *EWCA Civ* 527; [2002] *Q.B.* 35 at [31] (a case of estoppel by representation).
- 502 This may be the force of the statement in *Evans v Amicus Healthcare Ltd* [2003] *EWHC* 2161 (Fam); [2003] 4 *All E.R.* 903 at [303] that promissory estoppel “is not, of itself, the cause of action, although it may be an element in it”; affirmed, without reference to this point, [2004] *EWCA Civ* 727, [2005] *Fam. 1* (above, para.6-096).
- 503 cf. the criticism (above, para.6-096) of *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 *Lloyd's Rep.* 456. For the position in relation to estoppel by convention see below, paras 6-123—6-124.
- 504 (1998) 75 *P. & C.R.* 466.
- 505 See the cases referring to “promissory” or “equitable” cited below.
- 506 See e.g. Lord Denning MR’s statement in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 2 *Q.B.* 73 at 122 (“one general principle shorn of limitations”), which was cited with apparent approval by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 *A.C.* 1 at 33. However, it is not clear whether (a) this citation

is part of Lord Bingham's *ratio* in that case; or (b) the apparent approval is shared by Lords Hutton and Cooke who agree generally with the part of Lord Bingham's speech in which it occurs. cf. also the reference, in another context, to a possible "move to a more uniform doctrine of estoppel" in *Scottish Equitable Plc v Derby [2001] EWCA Civ 369; [2001] 2 All E.R. 818* at [48].

- 507 *First National Bank Plc v Thomson [1996] Ch. 231, 236; Tinkler v Revenue and Customs Commissioners [2021] UKSC 39, [2022] A.C. 886* at [28]; *Jones v Lydon (No.1) [2021] EWHC 2321 (Ch)* at [58]; cf. *Republic of India v India S.S. Co Ltd (The Indian Endurance) (No.2) [1998] A.C. 878* at 913; *National Westminster Bank Plc v Somer [2001] EWCA Civ 970; [2002] 1 All E.R. 198* at [38], [39]; dicta in *Baird Textile Holdings Ltd v Marks & Spencer Plc [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737* at [38], [50], [83], [84] perhaps incline in the other direction but cannot be regarded as conclusive, per Millett LJ, cited with apparent approval in *Monde Petroleum SA v Western Zagros Ltd [2016] EWHC 1472 (Comm), [2016] 2 Lloyd's Rep. 229* at [227].
  
- 508 i.e. estoppel by representation (below, para.9-110) promissory estoppel (discussed here), estoppel by convention (below, paras 6-116 et seq.) and proprietary estoppel (below paras 6-155 et seq.).
- 509 *Johnson v Gore Wood & Co [2002] 2 A.C. 1* at 41; *Gillet v Holt [2001] Ch. 210* at 225, per Walker LJ, cited with approval by Lord Neuberger in *Fisher v Brooker [2009] UKHL 41, [2009] 1 W.L.R. 1764* at [63]. In *Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55, [2008] 1 W.L.R. 1752* at [59] Lord Walker refers with apparent approval to a "broad or unified approach to equitable estoppel". But in this speech he uses "equitable estoppel" to mean *proprietary* estoppel: see below, para.6-155; so that his approval is of a "unified approach" to the various situations within *this* kind of estoppel (below, para.6-156): not to such an approach to all of the *other* kinds of estoppel discussed in this chapter. In *Thorner v Major [2009] UKHL 18, [2009] 1 W.L.R. 776*, Lord Walker (at [67]) while expressing no concluded view on the point seems to regard promissory estoppel as distinct from proprietary estoppel: see below, para.6-189. Proprietary estoppel is likewise distinguished from estoppel by representation in *Newport City Council v Charles [2006] EWCA Civ 1541* at [27], though neither of these forms of estoppel there applied: see paras 6-109 above and 6-168 below.
- 510 *Republic of India v India S.S. Co Ltd (The Indian Endurance) (No.2) [1998] A.C. 878* at 913–914, where Lord Steyn distinguished between estoppels by convention and by acquiescence; cf. *ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, [2012] 1 W.L.R. 472* at [59]–[60]. See also *Donegal International Ltd v Zambia [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397* at [495], distinguishing between estoppels by convention and by representation and referring with apparent approval to the text above in a previous edition of this book.
- 511 *Johnson v Gore Wood & Co [2000] 2 A.C. 1* at 41. See also *Prime Sight Ltd v Lavarello [2013] UKPC 22, [2014] A.C. 436* at [30], referring to *Johnson v Gore Wood [2002] 2 A.C. 1* at 39–40, where "Lord Goff expressed reservation about attempting to encapsulate the many circumstances capable of giving rise to an estoppel within a single formula, in part because consideration remains a fundamental principle of the law of contract and is not to be reduced out of existence by the law of estoppel" (at [30], per Lord Toulson).

- 512 i.e. estoppel by representation and promissory estoppel.
- 513 *Jordan v Money* (1854) 5 H.L. Cas. 195, criticised by *Jackson* (1965) 81 L.Q.R. 84; cf. *Halliwell*, 5 L.S. 15. See too *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 1 Lloyd's Rep. 67, 76; *China-Pacific SA v The Food Corp of India (The Winson)* [1980] 2 Lloyd's Rep. 213, 222 (reversed on other grounds [1982] A.C. 939); *Spence v Shell* (1980) 256 E.G. 55, 63; *T.C.B. Ltd v Gray* [1986] Ch. 621, 634 (affirmed [1987] Ch. 458); *Roebuck v Mungovin* [1994] 2 A.C. 224, 235; cf. *Janred Properties v Ente Nazionale per il Turismo* [1987] F.L.R. 179 (implied representation that approval had been given). So-called “estoppel by convention” is similarly based on a common assumption of fact or (at least to some extent) on one of “law”: see below, para.6-120.
- 514 i.e. after the rejection of the distinction in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 between mistakes of fact and of law in the context of claims for the return of money paid under a mistake (below, paras 32-052, 32-053) and the recognition of the possibility that an assumption of law can give rise to an estoppel by convention (below, para.6-120).
- 515 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] 1 All E.R. 553 at [35], stating that “it will very often be the case that a statement about law will not be capable of giving rise to a relevant estoppel”.
- 516 e.g. *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] A.C. 741, 758; *Ogilvy v Hope-Davies* [1976] 1 All E.R. 683, 689; *B.P. Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 W.L.R. 783, 812 (affirmed [1983] 2 A.C. 352, without reference to this point); *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 1 Lloyd's Rep. 245, 259; *Peter Cremer v Granaria B.V.* [1981] 2 Lloyd's Rep. 583, 587; *Société Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep. 695, 700; *Roebuck v Mungovin* [1994] 2 A.C. 224, 235. *Amherst v James Walker Goldsmiths & Silversmiths Ltd* [1983] Ch. 305, 316 somewhat puzzlingly seems to distinguish between “promissory” and “equitable” estoppel. Terminological difficulty is compounded by occasional use of the phrase “equitable estoppel” to refer to true estoppel by representation; see below.
- 517 *Jordan v Money*, above, was itself an appeal from the Court of Appeal in Chancery. See also *Piggott v Stratton* (1859) 1 De G.F. & J. 33, 51; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) L.R. 6 H.L. 352, 360; *Maddison v Alderson* (1883) 8 App. Cas. 467, 473; *Chadwick v Manning* [1896] A.C. 231, 238.
- 518 Estoppel by representation of fact was recognised at common law at least as long ago as *Freeman v Cooke* (1848) 2 Ex. 654; but sometimes this form of estoppel is (confusingly) referred to as “equitable estoppel” e.g. in *Lombard North Central Plc v Stobart* [1990] Tr.L.R. 105, 107. In that case, an estoppel arose from a finance company’s statement that no more than £1,003 was due under a conditional sale, when the actual sum due was nearly five times as much. This statement was clearly a representation of fact rather than a promise.
- 519 Above, para.6-104.
- 520 This point accounts for the rule that estoppel by representation does not give rise to a cause of action: *Low v Bouverie* [1891] 3 Ch. 82 at 101, 105. If, for example, there are two warehousemen, A and B, and A represents to C that goods which have been bought by C

are in B's warehouse when they are not, then the fact that A is estopped from denying the truth of the representation does not make A liable to C as a bailee of those goods. The rule that *promissory estoppel* does not give rise to a cause of action is based on different grounds explained in para.6-106 above.

- 521 (1877) 2 App. Cas. 439, above, para.6-093. In *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130 (below para.6-144) the fact that the promise had been made was likewise not in dispute.
- 522 *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130, 134.
- 523 Above, para.6-089.
- 524 Above para.6-092.
- 525 [1972] A.C. 741, 762.
- 526 (1877) 2 App. Cas. 439; above, para.6-093.
- 527 e.g. *Ogilvy v Hope-Davies* [1976] 1 All E.R. 683, 688–689; *Finagrain SA Geneva v P. Kruse Hamburg* [1976] 2 Lloyd's Rep. 508, 534; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1979] 1 Lloyd's Rep. 221, 226; *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 488, 489, 490; *Scandinavian Trading Tanker Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 430 (affirmed without reference to this point [1983] 2 A.C. 694); *Edo Corp v Ultra Electronics Ltd* [2009] EWHC 689 (Ch), [2009] 2 Lloyd's Rep. 349 at [28]; *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All E.R. (Comm) 204; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 (reversed on other grounds [2018] UKSC 24, [2018] 2 W.L.R. 1603, see below, para.25-047; the estoppel point was not argued in the Supreme Court) at [64], describing “waiver” in the context of the discussion in the text above as “akin to promissory estoppel”. cf. *Bremer Handelsgesellschaft mbH v Finagrain Cie. Commercial Agricole & Financière* [1981] 2 Lloyd's Rep. 259, where Lord Denning MR refers at 263 to “the principle … in *Hughes v Metropolitan Railway*” while Fox LJ refers at 266 to “waiver”; In *W.J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189, 212 waiver is described as an instance of the principle of *Hughes v Metropolitan Ry* (above), which, however, is said to be of “wider” scope; cf. *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd's Rep. 245 where an agreement not to plead a contractual time bar was held not to take effect as a “waiver” (at 249) but to give rise to an “equitable or promissory estoppel” (at 250). In *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 485, 489 the principle of *Hughes v Metropolitan Ry* (above) is, unusually, regarded as distinct from “promissory estoppel” but rather as an illustration of “waiver”, thus suggesting a difference between these two concepts—perhaps because in the *Brikom* case the waiver amounted to a contractual variation supported by consideration: cf. below, para.6-151. In *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No.2)* [1990] 2 Lloyd's Rep. 431, 449 “waiver” is distinguished from “equitable estoppel” on the ground that the former doctrine requires the party who is alleged to have lost their rights to know the material facts, while the latter is not subject to any such requirements. But when “waiver” is said to be subject to this requirement, the reference is to “waiver” in the sense of election between remedies (below, para.27-060) and not to the “waiver” in the sense of relinquishing rights; and it is this latter type of waiver which is here under discussion.

- 528 e.g. *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 1 *Lloyd's Rep.* 207, 212–213; *Peacock v Imagine Property Developments Ltd.* [2018] EWHC 1113 (TCC) at [61]–[72].
- 529 *Prosper Homes v Hambro's Bank Executor Trustee Co* (1980) 39 P. & C.R. 395, 401; cf. *The Nerano* [1996] 1 *Lloyd's Rep.* 1, 6 (“really one and the same thing”).
- 530 See the authorities cited in the penultimate and ante-penultimate footnotes above.
- 531 Restatement, Contracts §90 and Restatement 2d, Contracts §90. In English law, the need to use the doctrine to give rise to a cause of action is less acute than in the United States, where the courts are less ready than the English courts to “invent” consideration (above para.6-010). *(1988)* 164 C.L.R. 387; *Duthie* 104 L.Q.R. 362; *Sutton* 1 J.C.L. 205.
- 532 Above, paras 4-159—4-161.
- 533 For this requirement, see above, para.4-162.
- 534 e.g. in *Dillwyn v Llewelyn* (1862) 4 D.F. & G. 517 below, paras 6-157, 6-181.
- 535 e.g. in *William Lacey (Hounslow) Ltd v Davis* [1954] 1 Q.B. 428; *Countrywide Communications Ltd v ICL Pathways Ltd* [2002] C.L.C. 325; *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752.
- 536 Below, para.6-168; proprietary estoppel would also probably have been excluded on the ground that A had no belief that a right had been or would be created in their favour while the agreement remained “subject to contract”: see *Att-Gen of Hong Kong v Humphreys Estates (Queens Gardens)* [1987] 1 A.C. 114; this obstacle can be overcome if one party induces the other to believe that they will not withdraw: see *Att-Gen of Hong Kong v Humphreys Estates (Queens Gardens)* at 124; but this qualification can scarcely enable the party by whom the interest in property is to be created to rely on proprietary estoppel.
- 537 Such enrichment was the crucial factor leading to the award of a quantum meruit in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 even though the claimant knew that the anticipated contract was binding in honour only and so took the risk of its never becoming legally binding.
- 538 *Regalian Properties Plc v London Dockland Development Corp* [1995] 1 W.L.R. 212.
- 539 There was no such enforcement in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752, as to which see above.
- 540 Above, para.6-002.
- 541 e.g. *Oscar Chess Ltd v Williams* [1957] 1 W.L.R. 370.
- 542 See, e.g. *Commonwealth of Australia v Verwayen* (1990) 179 C.L.R. 394, which could be explained in English law on the ground stated in the footnotes to para.6-109.
- 543 *Low v Bouverie* [1891] 3 Ch. 82; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 *Lloyd's Rep.* 547, 557.
- 544 Above, para.6-106.
- 545 e.g. by the requirements that the promisee must believe that legal rights have been, or will be, created in their favour, and that these are rights in or over the promisor's property: see below, para.6-168; and by the further requirements derived from *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 and *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 and discussed in paras 6-164—6-167 and 6-173—6-176 below.

- 547 There can be no such estoppel where one party is not yet in existence: see *Rover International Ltd v Cannon Film Sales Ltd* (1987) 3 B.C.C. 369, reversed in part on other grounds [1989] 1 W.L.R. 912 (company not yet formed).
- 548 In *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 it was argued at [63] that “fact” here referred to “present fact”, but Carnwath LJ said that the “understanding” giving rise to the estoppel could “relate to the factual or legal basis on which a current transaction is proceeding, even if that understanding includes reference to events in the future” (at [64(i)]). This view is indirectly supported by Rix LJ who adopted Carnwath LJ’s “solution in terms of estoppel by convention” even though his preference was for the view that the estoppel arose from a “promissory representation” so that it could give rise to a promissory estoppel (at [85]–[86]). See too *Asprey Capital Ltd v Rediresi Ltd* [2021] EWHC 2662 (Comm) at [31].
- 549 See below, para.6-120.
- 550 *Republic of India v India Steamship Co (The Indian Endurance) (No.2)* [1998] A.C. 878, 913; and see *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vista fjord)* [1988] 2 Lloyd’s Rep. 343, 351; *Phillip Collins Ltd v Davis* [2000] 3 All E.R. 808 at 823; *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [2005] 2 Lloyd’s Rep. 588 at [2]; *Stevensdrake Ltd v Hunt* [2017] EWCA Civ 1173, [2017] 4 Costs L.R. 781; *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39 at [51]–[52]; *Jones v Lydon (No.1)* [2021] EWHC 2321 (Ch) at [56]. In *ABN AMRO Bank NV v Royal and Sun Alliance Insurance Plc* [2021] EWCA Civ 1789, [2022] 1 W.L.R. 1773 at [87] Sir Geoffrey Vos MR held that “an estoppel by convention based on acquiescence can only exist where the parties are subjectively in agreement; i.e. where ... the party making the representation knows that the other party has a different understanding”. It has been emphasised “[t]he assumption must be clear in its meaning, in its scope and in its impact on the legal relationship between the parties”: *Geoquip Marine Operations AG v Tower Resources Cameroon SA* [2022] EWHC 531 (Comm) at [126]. See too *Dawson* (1989) L.S. 16.
- 551 *Crédit Suisse v Allerdale BC* [1995] 2 Lloyd’s Rep. 315, 367–370 (where this requirement was not satisfied); affirmed on other grounds [1997] Q.B. 362; *Gloyne v Richardson* [2001] EWCA Civ 716, [2001] 2 B.C.L.C. 669 at [41] (below, para.6-119); cf. *Townsend v Persistence Holdings* [2013] UKPC 12, where vendors of a property terminated the contract under a term entitling them to do so if a licence requisite for its lawful performance were not granted within 12 months. It was held that acts done by the purchaser in relation to the property did not estop the vendor from terminating, apparently because “what happened was precisely what the contract envisaged would, or at least could, happen” (at [38]).
- 552 See the *Stevensdrake case* [2017] EWCA Civ 1173, approving the above phrase at [61] and [96].

- 553 *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) at [51], relying on Robert Goff J in *Amalgamated Investment and Property Co Ltd v Texas Commerce Bank International Ltd* [1982] Q.B. 84 at 104 F–G (the reference to p.“34” in [44] of the Official Transcript of the *Mears* case appears to be a misprint).
- 554 *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd’s Rep. 343, 352; *Hiscox v Outhwaite (No.1)* [1992] 1 A.C. 562, affirmed on other grounds at 585; *The Indian Endurance (No.2)* [1998] A.C. 878, 913; *Mitchell v Watkinson* [2014] EWCA Civ 1472, [2015] L. & T.R. 22 at [51]; *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2020] EWHC 337 (Ch), [39] (citing this paragraph); cf. *Edray Ltd v Canning* [2015] EWHC 2744; *Preedy v Dunne* [2016] EWCA Civ 805, [2016] C.P. Rep. 44. For the difficulties of applying estoppel by convention so as to bind members of a company pension scheme, see *Trustee Solutions v Dubery* [2006] EWHC 1426 (Ch), [2007] I.C.R. 412 (not considered on appeal: [2007] EWCA Civ 771, [2008] I.C.R. 101 at [12]). For the requirements of estoppel by convention “arising out of non-contractual dealings”, see *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch) at [52], cited in *Grieveson v Grieveson* [2011] EWHC 1367 (Ch) at [27] and *First National Trustco (UK) Ltd v Page* [2019] EWHC 1187 (Ch) at [99]–[135].
- 555 cf. the discussion of the distinction between various kinds of estoppel in para.6-111, above.
- 556 *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84, 131–132 below, paras 6-117—6-118; *Republic of Serbia v ImageSat International NV* [2008] EWHC 2853 (Comm), [2010] 1 Lloyd’s Rep. 235 at [71]; *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2016] 4 All E.R. 490 at [73]; *Monde Petroleum SA v Western Zagros Ltd* [2016] EWHC 1472 (Comm), [2016] 2 Lloyd’s Rep. 229 at [227]. See also *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC), [2017] 1 Lloyd’s Rep. 333 at [98]–[118].
- 557 This passage was cited with apparent approval in *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2016] 4 All E.R. 490 at [74], in turn quoting from the judgment of the Court below [2014] EWHC 1366 (Ch). In the *Dixon* case, it was further held that such an estoppel was not “confined to cases of mistake” but could extend to cases in which the common assumption of the parties had arisen simply because they had forgotten the true facts since “a mistaken recollection [was] not … legally different from a state of forgetfulness” (at [79]). In this case the erroneous common assumption of parties to a share transfer arose because they had forgotten that valid rights of pre-emption existed in relation to the shares. See too *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39 at [32].
- 558 *Smithkline Beecham Plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2007] Ch. 71 at [102], where this point was “not disputed” and the concession was evidently approved by the Court; cf. *Commercial Union Assurance Plc v Sun Alliance Group Plc* [1992] 1 Lloyd’s Rep. 475,

481. A passage from *Troop v Gibson* [1986] 1 E.G.L.R. 1 cited in *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 734 at [84] must be read as denying the requirement of a representation rather than the quality of clarity of the common assumption: see the reference there to “sufficient clarity and certainty of the common assumption”; cf. *Baird Textile Holdings Ltd v Marks & Spencer Plc* at [38]; cf. the *Republic of Serbia case* [2008] EWHC 2853 (Comm) at [71], [81]. The present requirement was doubted in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 at [64(iii)] but, as only one of the authorities cited in this note (viz *Troop v Gibson*) was, in this context, drawn to the attention of the Court of Appeal in the *ING* case, the doubt there expressed may call for further consideration. In *Aras v National Bank of Greece SA* [2018] EWHC 1389 (Comm) at [115] it was said that what is required “is clarity over what comprises the common assumption (if there is such a common assumption) as determined by the Court and not by the parties”.

•559 *Menolly Investments 3 SARL v Cemp SARL* [2009] EWHC 516 (Ch), 125 Con. L.R. 75 at [153], [184].

•560 *Colchester BC v Smith* [1992] Ch. 421, 434.

•561 Above, paras 6-049 et seq.

•562 *Colchester BC v Smith*, above, at 435.

•563 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] 1 All E.R. 553 at [179]. cf. *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd's Rep. 388 where, as a “contract by conduct” had come into existence (see above, paras 4-034—4-035) it was “not necessary to determine” an issue relating to estoppel by convention: see at [21], [37]. In *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2016] 4 All E.R. 490 the Court of Appeal did “not think that there must be expression of accord” and that the common assumption could be “inferred from conduct, or even silence ...” (at [92]), though this view did not dispense with the requirement, discussed in para.6-119 below, that “something must be shown to have ‘crossed the line’ to manifest an assent to the assumption” (at [92]). “Silence”, could it seems, only satisfy this requirement in cases where the party alleged to be estopped was under a “duty to speak”, as, for example in *Process Components Ltd v Kason Kek-Gardner Ltd* [2016] EWHC 2198 (Ch): see at [129]–[132].

564 [2021] UKSC 39.

565 [2021] UKSC 39 at [45], citing [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174 at [52].

566 *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2016] 4 All E.R. 490 at [92]; *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39 at [49]–[50]; below, para.6-119.

567 [1982] Q.B. 84. See also *Astilleros Canarios SA v Cape Hatteras Shipping Co SA* [1982] 1 Lloyd's Rep. 518, 527; *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) at [51].

- 568 cf. on the issue of construction, *TCB Ltd v Gray [1987] Ch. 458; Bank of Scotland v Wright [1990] B.C.C. 663*.
- 569 Contrast *Crédit Suisse v Allerdale BC [1995] 1 Lloyd's Rep. 315, 367*, where this requirement was not satisfied as the conduct of the party alleged to be estopped had not “influenced the mind” of the other party; the decision was affirmed on other grounds *[1997] Q.B. 362*.
- 570 A dictum in the *Crédit Suisse case [1996] 2 Lloyd's Rep. 315*, 367 which appears to treat representation as a requirement of estoppel by convention is, with respect, inconsistent with the treatment of that doctrine in the *Amalgamated Investment* case.
- 571 cf. *Government of Swaziland Central Transport Administration v Leila Maritime Co Ltd (The Leila) [1985] 2 Lloyd's Rep. 172*; as to which see below; *Thornton Springer v NEM Insurance Co Ltd [2000] 2 All E.R. 489* at 516–518.
- 572 *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord) [1988] 2 Lloyd's Rep. 343*. cf. also *Kenneth Allison Ltd v A.E. Limehouse & Co [1992] 2 A.C. 105, 127* per Lord Goff.
- 573 *[2011] EWCA Civ 353, [2012] 1 W.L.R. 472*.
- 574 *Empresa Lineas Maritimas Argentinas v The Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 2 Lloyd's Rep. 517* (where neither of these requirements was satisfied); *Astilleros Canarios SA v Cape Hatteras Shipping Co SA [1982] 1 Lloyd's Rep. 518, 527; Heinrich Hanno & Co B.V. v Fairlight Shipping Co (The Kostas K.) [1985] 1 Lloyd's Rep. 231, 237; The Vistafjord [1988] 2 Lloyd's Rep. 343; Thor Navigation Inc v Ingosstrakh Insurance [2005] EWHC 19 (Comm), [2005] 1 Lloyd's Rep. 547 at [66]; Yuchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital (2009) Ltd [2018] EWHC 2580 (Comm), [2019] 1 Lloyd's Rep. 457 at [95]*.
- 575 *Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No.2) [1990] 2 Lloyd's Rep. 395, 405*, following *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pty Ltd (The August P. Leonhardt) [1985] 2 Lloyd's Rep. 28, 35; Hiscox v Outhwaite (No.3) [1991] 2 Lloyd's Rep. 524, 533; The Indian Endurance [1998] A.C. 878, 913; Republic of Serbia v ImageSat International NV [2009] EWHC 2853, [2010] 1 Lloyd's Rep. 325 at [69]; Tinkler v Revenue and Customs Commissioners [2021] UKSC 39 at [49]–[50]*.
- 576 As in *The Vistafjord [1988] 2 Lloyd's Rep. 343, 351* (“very clear conduct crossing the line ... of which the other party was fully cognisant”). An even stricter requirement was stated in *Bank Leumi (UK) Plc v Akrill [2014] EWCA Civ 907*, where it was said that there was no estoppel by convention because the assumption in question had not been “expressly communicated” (at [55], italics supplied) between the parties, though there is also judicial support for the view that the common assumption could be inferred from conduct (see below) or even from “silence”: see *Dixon v Blindley Heath Investments Ltd [2015] EWCA Civ 1023, [2016] 4 All E.R. 490* at [92], quoted above, paras 6–117—6–118.
- 577 *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pty Ltd (The August P. Leonhardt) [1985] 2 Lloyd's Rep. 28, reversing [1984] 1 Lloyd's Rep. 332*, which had been followed in *Government of Swaziland Central Transport Administration v Leila Maritime Co Ltd (The Leila) [1985] 2 Lloyd's Rep. 172*. The present status of *The Leila* therefore remains in some doubt but the two cases can be reconciled on the ground that in *The Leila* there was, while

- in *The August P. Leonhardt* there was not, conduct by the party alleged to be estopped from which acquiescence in the other party's mistaken belief could be inferred.
- 578 *HIH Casualty & General Insurance v AXA Corporate Solutions* [2002] EWCA Civ 1253; [2002] 2 All E.R. (Comm) 1053 at [32].
- 579 *Blankley v Central Manchester etc. NHS Trust* [2014] EWHC 168 (QB), [2014] 2 All E.R. 1104 at [58]–[60]; *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2020] EWHC 337 (Ch) at [40].
- 580 *Gloyne v Richardson* [2001] EWCA Civ 716; [2001] 2 B.C.L.C. 669 at [41]; *Zvi Construction Co LLC v Notre Dame University (USA) in England* [2016] EWHC 1924 (TCC), [2016] B.L.R. 604 where it was said at [64] that the estoppel which operated in relation to the dispute before the Court did not apply to any future disputes, presumably because by the time they arose the truth would have been revealed in the instant proceedings. But where the common assumption was that intellectual property was vested in one of the parties sharing that assumption it was held that the other party was “permanently (like a tenant or bailee) estopped from denying” that the property was so vested and that a licence agreement relating to it had been terminated: *Process Components Ltd v Kason Kek-Gardner Ltd* [2016] EWHC 2198 (Ch) at [136], apparently cross referring to [128].
- 581 *Amalgamated Investment case* [1982] 2 Q.B. 84 at 122, 126; *The Vistafjord* [1988] 2 Lloyd's Rep. 343 at 351; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570 at 596; *Republic of India v India Steamship Co (The Indian Endurance) (No.2)* [1998] A.C. 878 at 913; *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) at [51]. cf. *NRAM v McAdam* [2014] EWHC 4174 (Comm), [2015] 1 All E.R. (Comm) 1239 at [29], [2015] EWCA Civ 751, [2016] 2 All E.R. (Comm) 333 at 43; *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2016] 4 All E.R. 490 at [73].
- 582 See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [47] (“some common assumption, which may include an assumption that words will bear a certain meaning”). Such an assumption could also be called one of “private rights” and hence of fact: below, para.9-020.
- 583 e.g. *Carmichael v National Power Plc* [1992] 1 W.L.R. 2042 at 2049; *Hay v Gilgove* [2013] EWCA Civ 412, [2013] I.C.R. 1139 at [24], [29].
- 584 For a recent case in which estoppel by convention arose from a shared mistaken assumption as to the true construction of a contract, see *Zvi Construction Co LLC v Notre Dame University (USA) in England* [2016] EWHC 1924 (TCC), [2016] B.L.R. 604 at [64]. For earlier cases in which a shared assumption as to the construction of the contract gave rise to an estoppel by convention, see above, paras 6-117—6-118.
- 585 [2002] 2 A.C. 1.
- 586 See [2002] 2 A.C. 1 at 34 for an alternative ground for Lord Bingham's decision. Lords Cooke and Hutton agreed with Lord Bingham on the “abuse of process” point but without referring to estoppel by convention.
- 587 [2002] 2 A.C. 1 at 40.
- 588 [2002] 2 A.C. 1 at 61.
- 589 See the cases cited in the footnotes above.
- 590 Below, para.8-052, 32-052.

- 591 Below para.6-125. For other limits to the principle that an assumption of law may give rise to estoppel by convention, see *Durham v BAI (Run Off) Ltd [2008] EWHC 2692 (QB), [2009] 2 All E.R. 26* at [268]; for the appeals in this case, see above, para.6-107.
- 592 *Amalgamated Investment & Property case [1982] Q.B. 84, 126, 130.*
- 593 Such an assumption is one of fact (and not as to the future): below, para.9-019.
- 594 *[1982] Q.B. 84*; above, paras 6-117—6-118.
- 595 Above, para.6-111.
- 596 In this respect its legal nature resembles that of estoppel by representation: see above, para.6-111.
- 597 *The Vistafjord [1988] 2 Lloyd's Rep. 343, 351* (“not dependent on contract but on common assumption”). For this reason the citation in *Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 Q.B. 1*, 17–18 of the *Amalgamated Investment & Property* case (above, paras 6-117—6-118) seems, with respect, to be of doubtful relevance. In the *Williams* case there was no doubt that the promise had been made; and the actual decision was that it was supported by consideration and thus binding contractually: above, paras 6-069—6-072.
- 598 This was also true in *The Vistafjord [1988] 2 Lloyd's Rep. 343* and paras 6-117—6-118.
- 599 It is enough for consideration to move from the promisee (the X bank); it need not move to the hypothetical promisor (A): above paras 6-040 et seq.
- 600 e.g. (apparently) *Troop v Gibson [1986] 1 E.G.L.R. 1*. See too *Yuchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital (2009) Ltd [2018] EWHC 2580 (Comm), [2019] 1 Lloyd's Rep. 457* at [83].
- 601 *Hiscox v Outhwaite [1992] 1 A.C. 562* at 575, per Lord Donaldson MR (affirmed *[1992] 1 A.C. 562*, 585 on other grounds); *Phillip Collins Ltd v Davis [2000] 3 All E.R. 808* at 823. *Tamil Nadu Electricity Board v ST-CMS Electricity Company Private Ltd [2007] EWHC 1713 (Comm), [2007] 2 All E.R. (Comm) 701* at [105], [128].
- 602 *Revenue and Customs Commissioners v Benchdollar Ltd [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174* at [60], per Briggs J.
- 603 *[2009] EWHC 1310 (Ch)* at [60].
- 604 At [61].
- 605 At [61].
- 606 At [85].
- 607 At [65]. See similarly *Tinkler v Revenue and Customs Commissioners [2021] UKSC 39* at [74]–[77].
- 608 *[1982] Q.B. 84*; above, paras 6-117—6-118.
- 609 *[1982] Q.B. 84, 126.*
- 610 *[1982] Q.B. 84, 126* at 132; cf. *Dumford Trading A-G v OAO Atlantyrbflot [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289* at [39], where Rix LJ referred to Brandon LJ’s view in the *Amalgamated Investment case [1982] Q.B. 84, 131–132* as the likely answer to the argument that the estoppel was being used “as a sword rather than a shield”. In *Baird Textile Holdings Ltd v Marks & Spencer Plc [2001] EWHC 274, [2002] 1 All E.R. (Comm) 737* at [88] Mance LJ said that he “would prefer” the view of Brandon LJ to that of Lord Denning MR. The alleged estoppel in the *Baird* case was regarded at first instance as one “by convention” (at [20]) but it is far from clear whether the Court of Appeal so regarded it. In *Mears Ltd v*

*Shoreline Housing Partnership Ltd [2015] EWHC 1396 (TCC)* at [88] Akenhead J said that he “would prefer” Brandon LJ’s view in the *Amalgamated Investment* case to that there expressed by Lord Denning MR.

- 611 *[1982] Q.B. 84* at 122. A similar view may be hinted at in *Williams v Roffey Bros & Nicholls (Contractors) Ltd [1999] Q.B. 1* at 17–18; but as to the relevance of this see above, para.6-121. In *NRAM v McAdam [2015] EWCA Civ 751, [2016] 2 All E.R. (Comm) 333* “estoppel by convention and/or contractual estoppel” is referred to at [52] and [56] but there is no reference to the question whether “estoppel by convention” can give rise to a cause of action. For the position in cases of “contractual estoppel”, see below, para.6-126.
- 612 *Keen v Holland [1984] 1 W.L.R. 251, 261–262*; and see above. In *Wilson Bowden Properties Ltd v Milner and Bardon [1996] C.L.Y. 1229* the cause of action arose out of the undisputed contract and not out of the estoppel.
- 613 *The Vistafjord [1988] 2 Lloyd's Rep. 343*; above, paras 6-117—6-118. In *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep. 570*, the estoppel would likewise (if supported on the facts) have operated defensively; cf. also *Mitsui Babcock Energy Ltd v John Brown Energy Ltd (1996) 51 Con. L.R. 129, 185–186* where the effect of the estoppel would (if the contract in question had not existed) again have been to *restrict* the plaintiff’s rights by reference to the terms of the (in that event non-existent) contract; see too *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd Unreported 28 February 2019 (Commercial Court)* at [30].
- 614 Above, para.6-109.
- 615 *Burrowes v Lock (1805) 10 Ves. 470*, as explained in *Low v Bouverie [1891] 3 Ch. 82*.
- 616 *Furness Withy (Australia) Ltd v Metal Distributors (UK) Ltd (The Amazonia) [1990] 1 Lloyd's Rep. 236; Azov Shipping Co v Baltic Shipping Co [1999] 1 Lloyd's Rep. 159* at 175–176; *Revenue and Customs Commissioners v Benchdollar Ltd [2009] EWHC 1310 (Ch)* (above, paras 4-208—4-209, 6-122); *Mears Ltd v Shoreline Housing Partnership Ltd [2013] EWCA Civ 639, [2013] B.L.R. 393* at [19]–[24] and *[2015] EWHC 1396 (TCC)* at [64]–[69]; *Rivertrade Ltd v EMG Finance Ltd [2015] EWCA Civ 1295, [2016] 2 B.C.L.C. 226* at [50].
- 617 *[2015] EWCA Civ 1295; [2016] 2 B.C.L.C. 226*.
- 618 At [50].
- 619 At [48].
- 620 *[2015] EWCA Civ 1295* at [48].
- 621 At [50], quoted above.
- 622 cf. *Russell Brothers (Paddington) Ltd v John Elliott Management Ltd (1995) 11 Const. L.J. 377*, denying that estoppel by convention can be used as a sword. See too *Smithkline Beecham Plc v Apotex Europe Ltd [2006] EWCA Civ 658, [2007] Ch. 71* at [103], [107] and [110]; *Haden Young Ltd v Laing O'Rourke Midlands Ltd [2008] EWHC 1016 (TCC)* at [69]; *Transgrain Shipping BV v Deiulemar Shipping Ltd [2014] EWHC 4202 (Comm), [2015] 1 Lloyd's Rep. 461* at [39]; *Dixon v Blindley Heath Investments Ltd [2015] EWCA Civ 1023, [2016] 4 All E.R. 490* at [73].
- 623 cf. *Dixon v Blindley Heath Investments Ltd [2015] EWCA Civ 1023, [2016] 4 All E.R. 490* at [73]; *Thornton Springer v NEM Insurance Co Ltd [2000] 2 All E.R. 489* at 516–518; *Geoquip*

*Marine Operations AG v Tower Resources Cameroon SA* [2022] EWHC 531 (Comm) at [127]–[129].

- 624 *Orion Insurance Plc v Sphere Drake Insurance* [1922] 1 Lloyd's Rep. 239. But an estoppel by convention may be based on an arrangement which, for want of contractual intention, lacks contractual force where the liability in respect of which it is invoked arises otherwise than under a contract: *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch) at [51].
- 625 *Yaxley v Gotts* [2000] Ch. 162 at 182. A party may, however, be liable on an agreement which does not comply with the formal requirements of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 on the basis of a *proprietary estoppel* amounting, or giving rise also, to a constructive trust: see *Kinane v Mackie Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345, below paras 6-158, 7-049. Such liability arises by virtue of s.2(5) of the 1989 Act; see *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 (below, paras 6-173—6-178) at [29], [93]; *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [99]. See also *Howe v Gossop* [2021] EWHC 637 (Ch), [2022] 1 P. & C.R. 15. For the relationship between proprietary estoppel and constructive trusts, see below, para.6-158. The requirements of proprietary estoppel (below, paras 6-163—6-176) differ widely from those of estoppel by convention (above, paras 6-116—6-120).
- 626 cf. *Shah v Shah* [2001] EWCA Civ 527; [2001] 4 All E.R. 138 at [31] (deed signed and witnessed but not signed in presence of attesting witness); contrast *Shah v Shah* at [28] (deed not signed at all); *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] 1 All E.R. 553 at [43] (deed signed but not witnessed and therefore “did not even appear to comply with” s.1(3) of the Law of Property (Miscellaneous Provisions) Act 1989). In both these cases, the estoppels were unsuccessfully invoked.
- 627 *Actionstrength Ltd v International Glass Engineering SpA* [2003] UKHL 17; [2003] 2 A.C. 541.
- 628 The principle stated in the text above does not apply where the statutory right or defence *can* be excluded by contract (e.g. to the defence that the claim in question is statute-barred by lapse of time): *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174.
- 629 See *Keen v Holland* [1984] 1 W.L.R. 251; cf. *Wilson v Truelove* [2003] EWHC 750, [2003] W.T.L.R. 609; *Laroche v Spirit of Adventure (UK) Ltd* [2008] EWHC 788 (QB), [2008] 2 Lloyd's Rep. 34 at [73], affirmed [2009] EWCA Civ 12, [2009] 2 All E.R. 175 without reference to the present point; contrast *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1989] 1 Lloyd's Rep. 403 (illegality under foreign statute); *Godden v Merthyr Tydfil Housing Association* (1997) 74 P. & C.R. D1. For discussion of a similar point in relation to estoppel by representation, see *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] H.L.R. 18 (above, para.6-109), where the outcome was said at [18]–[21] to depend on whether this type of estoppel would “frustrate” the purpose of the statute; this reasoning could also apply in relation to estoppel by convention.
- 630 Above, para.6-120.

- 631 *Keen v Holland* [1984] 1 W.L.R. 251; *Hamed El Chiaty & Co (t/a Travco Nile Cruise Lines) v Thomas Cook Group (The Nile Rhapsody)* [1992] 2 Lloyd's Rep. 399, 408, where, however, the court treated the contract as rectified so as to correct the mistake; affirmed [1994] 1 Lloyd's Rep. 382, without reference to estoppel by convention.
- 632 *Loi* [2015] L.M.C.L.Q. 346; *Braithwaite* (2016) 132 L.Q.R. 120.
- 633 *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [57]; *Springwell Navigation Corp v J P Morgan Chase Bank* [2010] EWCA Civ 1221 at [157]–[170]; *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [230]; *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637 at [47]–[48] and [91]–[95].
- 634 See *Olympic Airlines SA v ACG Acquisition xx LLC* [2013] EWCA Civ 369, [2013] 1 Lloyd's Rep 658, where the phrase “contractual estoppel” occurs in a statement of the grounds of appeal (at [16]) and in a quotation from the judgment at first instance (at [46]). But the concept forms no part of the reasoning which led Tomlinson LJ (with whose judgment Kitchin and Toulson LJJ agreed) to conclude that the lessee of an aircraft was, in the circumstances which had occurred, precluded by a term of the contract from denying that the aircraft was, at the time of delivery, in an airworthy condition: that conclusion was based simply on the construction of that term. In *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] A.C. 436 a deed of assignment of an underlease expressed to have been made in consideration of a sum of money “now paid by the Assignee” was held to have “estopped” the assignor’s trustee in bankruptcy from asserting that the payment had not been made; but no reference was made to the concept of “contractual estoppel”, the ground of decision being simply that the assignee was “on ordinary contractual principles to rely on the terms of the deed …”, i.e. (apparently) on its true construction. There is, with respect, force in the statement in the *Crédit Suisse case* [2014] EWHC 3103 (Comm) at [309] that “contractual estoppel” is no more than a “convenient label” for describing a situation which lacks a “defining characteristic of estoppels”, viz, “a detriment in some form or other”.
- 635 e.g. *Olympic Airlines SA v ACG Acquisition xx LLC* [2013] EWCA Civ 369, [2013] 1 Lloyd's Rep. 658. cf. *M'Cance v London and North Western Ry Co* (1864) 3 Hurl. & C. 343.
- 636 See the cases discussed in paras 6-117—6-118 above, distinguishing between issue of construction and issues of estoppels by convention.

## (a) - General Rule

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 10. - Part Payment of a Debt

(a) - General Rule

### General common law rule

- <sup>127</sup> At common law, the general rule is that a creditor is not bound by a promise to accept part payment in full settlement of a debt. An accrued debt can be discharged by the creditor's promise only if the promise amounts, or gives rise, to an effective accord and satisfaction.<sup>637</sup> A counter-promise by the debtor to pay only part of the debt provides no consideration for the accord, as it is merely a promise to perform part of an existing duty owed to the creditor. And the actual payment is no satisfaction under the rule in *Pinnel's Case* that "Payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole".<sup>638</sup> This rule was approved by the House of Lords in *Foakes v Beer*.<sup>639</sup> Mrs Beer had obtained a judgment against Dr Foakes for £2,090 19s. Sixteen months later, Dr Foakes asked for time to pay. A written agreement<sup>640</sup> was made under which Mrs Beer undertook not to take "any proceedings whatsoever" on the judgment, in consideration of an immediate payment by Dr Foakes of £500 and on condition<sup>641</sup> of his paying specified instalments "until the whole of the said sum of £2,090 19s. shall have been paid and satisfied". Some five years later, when Dr Foakes had paid £2,090 19s., Mrs Beer claimed £360<sup>642</sup> for interest on the judgment debt. The House of Lords upheld her claim and the actual result does not appear to be unjust; for it seems that in making the agreement Mrs Beer intended only to give Dr Foakes time to pay and not to forgive interest.<sup>643</sup>

## Effects of the rule

- |28 The rule established in *Foakes v Beer* may sometimes have performed the useful function of protecting a creditor against a debtor who too ruthlessly exploited the tactical advantage of being a potential defendant in litigation. This point is well illustrated by *D. & C. Builders Ltd v Rees*.<sup>644</sup> The defendant owed £482 to a firm of builders. Six months after payment had first been demanded, the defendant's wife (acting on his behalf) offered the builders £300 in full settlement. The builders accepted this offer as they were in desperate straits financially and there was some evidence that the defendant's wife knew this.<sup>645</sup> It was held that they were nevertheless entitled to the balance; and the majority<sup>646</sup> of the Court of Appeal based their decision to this effect on the rule in *Foakes v Beer*.
- |29 On the other hand, it is arguable that the function of protecting the creditor in such a situation is now more satisfactorily performed by the expanding concept of economic duress<sup>647</sup> than by the rule in *Pinnel's Case*; and that the rule therefore no longer serves any useful purpose. In some circumstances, an agreement to accept part payment of a debt in full settlement may be a perfectly fair and reasonable transaction.<sup>648</sup> Moreover, in *Foakes v Beer* the rule was criticised<sup>649</sup> on the ground that part payment was often in fact more beneficial to the creditor than strict insistence on his legal rights. A factual benefit<sup>650</sup> of a similar kind has been accepted as sufficient consideration for a promise to make an extra payment for the performance of an existing contractual duty owed by the promisee to the promisor<sup>651</sup>; and the law would be more consistent, as well as more satisfactory in its practical operation, if it adopted the same approach to cases of part payment of a debt. Agreements of the kind here under discussion would then be binding unless they had been made under duress. But it has been held that this departure from the rule in *Foakes v Beer* could be made only by the House of Lords<sup>652</sup> (or now by the Supreme Court); and this seems to be confirmed by dicta in *MWB Business Exchange Centres v Rock Advertising Ltd*<sup>653</sup> ("the *MWB case*"), in which the Supreme Court, though deciding the case on other grounds,<sup>654</sup> cast doubt on the decision of the Court of Appeal on the consideration point.
- |30 In the *MWB case*, office premises managed by the claimants were occupied by the defendants under a licence agreement between the defendants and the claimants. The defendants having fallen into arrears with payments due from them to the claimants, the parties agreed on 27 February 2012 to vary their original licence agreement by "rescheduling" the payments due from the defendants to the claimants (so as in effect to give the defendants extra time to pay). One of the rescheduled payments (of £3,500) was made on that day, but on 30 March 2012 the claimants exercised their right under the original contract to lock the defendants out of the premises.<sup>655</sup> Shortly afterwards the claimants gave notice terminating the (original) agreement<sup>656</sup>; they then sued for arrears of

licence fees and damages. The defendants relied on the variation agreement (rescheduling their payments); and one of the issues before the Court of Appeal was whether the claimants' promise to (in effect) give the defendants extra time to pay was supported by consideration. In answering this question in the affirmative,<sup>657</sup> the Court applied the reasoning of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>658</sup>; that is, it held that the requirement of consideration was satisfied because the variation agreement had conferred "practical benefits"<sup>659</sup> on the claimants. *Foakes v Beer*<sup>660</sup> and *Re Selectmove*<sup>661</sup> were distinguished on the ground that they applied *only* where the sole benefit accruing to the creditor from the performance of the variation agreement took the form of receiving part payment of a debt already legally due to them, instead of insisting on payment of the whole.<sup>662</sup> In support of this view, Arden LJ in the *MWB case* referred to the well-known statement in *Pinnel's Case* that the rule there laid down, and approved in *Foakes v Beer*, is subject to the "rider" that "the gift of a horse, hawk or robe etc. shall be good satisfaction ...".<sup>663</sup> It is sometimes assumed that the provision of such benefits satisfies the requirement of consideration because the debtor was not bound by the original contract to provide them<sup>664</sup>; but the ensuing discussion will show that, on the approach taken by the Court of Appeal, the requirement of consideration may (though it will not necessarily) be satisfied where the debtor's performance which confers the "practical benefit" on the creditor was already due from the debtor to the creditor under the original contract before that contract was varied by agreement between them; indeed that was the position in the *Williams case*<sup>665</sup> itself.

- |31 It is convenient here to discuss the consideration issue in the *MWB case* by reference to Arden LJ's starting point for this discussion. This was to refer to the way in which the judge in the Court below had dealt with the point: he had found that the "variation agreement conferred on [the claimant] the practical benefit of continuing occupation by" the defendant and thus (in Arden LJ's own words) that "of avoiding a void", the noun "void" being here used:

"... in the sense in which it is used in property management to refer to unoccupied and therefore unproductive property, which may cause loss in the form of loss of rent *and in other ways.*"<sup>666</sup>

Substantially the same point is made by Kitchin LJ,<sup>667</sup> who in addition agreed with Arden LJ on this issue<sup>668</sup>; while McCombe LJ agreed with both of the other judgments.<sup>669</sup> Both these judgments also identify a second "practical benefit" obtained by the claimants. This was the benefit which they obtained by reason of the facts that, in performance of the variation agreement they had received a payment of £3,500, and that they would, under that agreement, be "likely to recover more than [they] would by enforcing the terms of the original agreement".<sup>670</sup>

However, this second “practical benefit” differs, or may differ, from the benefit that a debtor may provide by way of a horse, a hawk or a robe<sup>671</sup> in that those benefits are assumed to be of a kind that the debtor is *not* obliged under the original contract to provide. Rather, it seems closely to resemble the benefit described by Lord Blackburn in *Foakes v Beer*,<sup>672</sup> but reluctantly there regarded by him as *not* amounting to consideration, a point on which that case was followed in *Re Selectmove*.<sup>673</sup> It is therefore hard to accept that the second “practical benefit” identified in the *MWB* case would, on its own, have satisfied the requirement of consideration. And it was precisely this objection which, on appeal, led the Supreme Court to cast doubt on both this aspect of the *MWB case* and the decision in the *Williams case*. The Supreme Court’s reversal of the Court of Appeal’s decision in the *MWB case* was on a different ground, namely that the purported oral variation was ineffective because of a clause requiring that any variation be in writing,<sup>674</sup> but Lord Sumption, with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed, having said that it was unnecessary to decide the consideration point, continued<sup>675</sup>:

“It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer*: see in particular p.622 per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in *In re Selectmove Ltd*, and declined to follow *Williams v Roffey*. The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer*. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum.”

- |33 Thus it seems that the Supreme Court did not regard the distinction drawn by the Court of Appeal between the facts of the *MWB case* and cases like *Foakes v Beer* and *Re Selectmove* as valid though at the same time it expressed willingness to review the decision in *Foakes v Beer*. Unless and until the decision in *Foakes v Beer* is qualified or reversed by the Supreme Court, a promise by a creditor to accept part payment in full settlement of a debt, or to accept deferred payment, without more, is to be treated as made without consideration, even if the creditor gets a practical benefit

from the arrangement.<sup>676</sup> In the meantime, its operation is mitigated by limitations on its scope at common law<sup>677</sup> and in equity. These are discussed in the following paragraphs.

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 637 *Commissioners of Stamp Duties v Bone* [1977] A.C. 511, 519 (“A debt can only be truly released by agreement for valuable consideration or under seal.”.) This principle appears to have been overlooked in a dictum in *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 488, according to which a “waiver” of instalments of rent would bind the landlord. The actual promise of the landlord in that case was supported by consideration: above, paras 6-087—6-088; below, para.6-151.
- 638 (1602) 5 Co. Rep. 117a; *Cumber v Wane* (1721) 1 Str. 426; *McManus v Bark* (1870) L.R. 5 Ex. 65; *Underwood v Underwood* [1894] P. 204; *Re Broderick* [1986] N.I.J.B. 36, 49–55; *Tilney Engineering v Admods Knitting Machinery* [1987] C.L.Y. 412; cf. *Bagge v Slade* (1616) 3 Bulst. 162.
- 639 (1884) 9 App. Cas. 605.
- 640 Drawn up by Dr Foakes’ solicitor: (1884) 9 App. Cas. at 625.
- 641 Dr Foakes made no *promise* to pay the instalments.
- 642 *Beer v Foakes* (1883) 11 Q.B.D. 221, 222.
- 643 Lords Fitzgerald and Watson thought that the agreement did not, on its true construction, cover interest. Lords Selborne and Blackburn sympathised with this view but felt unable to adopt it as the operative part of the document was too “clear” to be controlled by the recital: see (1884) 9 App. Cas. at 610, 614, 615.
- 644 [1966] 2 Q.B. 617; *Chorley* (1966) 29 M.L.R. 165; *Cornish* (1966) 29 M.L.R. 428; and see below, para.6-154.
- 645 [1966] 2 Q.B. at 625.
- 646 Lord Denning MR based his decision on a different ground: below, para.6-154.
- 647 cf. above, paras 6-066—6-067.
- 648 e.g. on the facts of *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130; below, para.6-144.
- 649 Especially by Lord Blackburn: (1884) 9 App. Cas. at 617–622; see also Lord Selborne at 613 and *Couldery v Bartrum* (1881) 19 Ch. D. 394, 399, where Jessel MR called the rule “a most extraordinary peculiarity of English law”.
- 650 Above, para.6-003.
- 651 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, above paras 6-069—6-072.
- 652 *Re Selectmove* [1995] 1 W.L.R. 474, where the Court of Appeal refused to apply the principle of *Williams* case, in the present context; *Peel* (1994) 110 L.Q.R. 353; *Collier v P & M.J.*

*Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643 at [27(i)], [44] (as to which see also below, last footnote to this paragraph); *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 at [89].

653 [2016] EWCA Civ 553, [2017] Q.B. 604, reversed (on other grounds) [2018] UKSC 24, [2018] 2 W.L.R. 1603.

654 See below, para.25-047.

655 [2016] EWCA Civ 553 at [4].

656 [2016] EWCA Civ 553 at [4].

657 [2016] EWCA Civ 553 at [49], [66], [67], [87].

658 [1991] 1 Q.B. 1, above paras 6-069—6-072.

659 [2016] EWCA Civ 553 at [42].

660 (1884) 9 App. Cas. 605; above, para.6-127.

661 [1995] 1 W.L.R. 474; above paras 6-129—6-133.

662 See [2016] EWCA Civ 553 at [39], [85]—[87].

663 At [85], below, para.6-138.

664 e.g. at [41] (“some other act that he was not bound by the contract to perform”); cf. at [84], explaining *Re Selectmove* [1995] 1 W.L.R. 474 on the ground that there was no “extra” benefit to the promisor.

665 [1991] 1 Q.B. 1, above paras 6-068, 6-069—6-072.

666 [2016] EWCA Civ 553 at [72], italics supplied; e.g. perhaps by reducing the rental value of other units in the same building.

667 At [48] (“would retain [the defendant] as licensee”).

668 At [49].

669 At [67].

670 At [48].

671 See below, para.6-138.

672 (1884) 9 App. Cas. 605 at 622, quoted in the *MWB case* [2016] EWCA Civ 553 at [39].

673 [1995] 1 W.L.R. 474, see above, paras 6-129—6-133.

674 See below, para.25-047.

675 At [18]. Lord Briggs, who gave a separate judgment, agreed that it would not be desirable for the court to address the issue of consideration, for the reasons which Lord Sumption gives: at [20].

676 See *Simantob v Shavleyan* [2018] EWHC 2005 (QB) at [127], though on the facts of the case the debtor provided consideration by agreeing not to raise various possible defences to the claim (see at [141]—[142], and upheld on this basis at [2019] EWCA Civ 1105).

677 In *Collier v P & M.J. Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643 Arden LJ said at [3] that “the rule does not apply where the debt arises from the provision of services: *Williams v Roffey* [1991] 1 Q.B. 1”; but that *Re Selectmove* [1995] 1 W.L.R. 474 had “confirmed that a promise to pay part of the money to which the creditor is already entitled is not good consideration”. The reference to “the rule” in the first part of this statement appears to be to “the rule in *Pinnel’s case*” (at [3]) (1603) 5 Co. Rep. 117a (above, para.6-127) but it is respectfully submitted that this rule was not under consideration in the *Williams case*.

The issue in that case was not whether payment of *less* than the amount due could be good consideration for the creditor's promise to forgo the balance. It was whether performance (in full) of the agreed services could be consideration for a promise by the recipient of the services (the debtor) to pay *more* than the originally agreed sum: see above, paras 6-069—6-072. In the *Collier case*, the actual decision was that the debtor had an arguable case based on the doctrine of promissory estoppel: see below, paras 6-148—6-150.

## **(b) - Limitations at Common Law**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 10. - Part Payment of a Debt**

**(b) - Limitations at Common Law**

### **Disputed claims**

- <sup>134</sup> The rule stated in para.[6-127](#) above does not apply where the creditor's claim (or its amount) is disputed in good faith.<sup>678</sup> In such a case, the value of the creditor's claim is doubtful and the debtor therefore provides consideration by paying something, even though it is less than the amount claimed. The requirement of consideration is satisfied even though the amount paid is small in relation to the amount claimed, and even though the creditor has a good chance of succeeding on the claim; for the law will not generally investigate the adequacy of consideration.<sup>679</sup> The agreement to accept a reduced amount may also amount to a compromise of the disputed claim<sup>680</sup>; if so, the requirement of consideration can be satisfied under the rules, discussed earlier in this chapter,<sup>681</sup> relating to compromises of, and forbearances to enforce, invalid or doubtful claims. However, where the defendant admits liability for a sum less than that claimed, payment of that smaller sum is no consideration for the claimant's promise to accept payment of that sum in full settlement of the larger claim. The rule in *Foakes v Beer* applies since, once a binding admission has been made to pay the smaller sum, the payment of it amounts to no more than the performance of what, at that stage, is legally due from the defendant.<sup>682</sup>

### **Unliquidated claims**

<sup>135</sup>

For reasons similar to those given in para.<sup>6-134</sup> above, the general rule applies only if the original claim is a “liquidated” one, i.e. a claim for a fixed sum of money, such as one for money lent or for the agreed price of goods<sup>683</sup> or services. It does not apply where the creditor’s claim is an unliquidated one,<sup>684</sup> such as a claim for damages or for a reasonable remuneration (where none is fixed by the contract). The value of such a claim is again uncertain; and even if the overwhelming probability is that it is worth more than the sum paid, the possibility that it may be worth less suffices to satisfy the requirement of consideration.

## Unliquidated claims becoming liquidated

- <sup>136</sup> An originally unliquidated claim may subsequently become liquidated by act of the parties. This appears to have happened in *D. & C. Builders v Rees*,<sup>685</sup> where it does not seem that the contract specified the amount to be paid to the builders. When they presented their account they had only an unliquidated claim; and if they had at this stage accepted the £300 in full settlement they would not have been protected by the rule in *Foakes v Beer*.<sup>686</sup> That rule became applicable only because the defendant had, by retaining the account without objection, impliedly agreed that it correctly stated the sum due, and so turned the builders’ claim into a liquidated one.<sup>687</sup>

## Claim partly liquidated and partly unliquidated

- <sup>137</sup> A creditor may have two claims against the same debtor, one of them liquidated and the other unliquidated; or a single claim which is partly liquidated and partly unliquidated. If the debtor pays no more than the liquidated amount, and if their liability to pay this amount was undisputed, the payment of it will not constitute consideration for a promise by the creditor to accept that payment in full settlement of the *whole* of the claim or claims in question. In *Arrale v Costain Civil Engineering Ltd*<sup>688</sup> an employee was injured at work. Legislation in force at the place of work gave him a right against the employers to a fixed lump sum of £490, for which the employers did not dispute liability; and it was assumed that he also had a common law right to sue the employers in tort for unliquidated damages. It was held that any promise which he might have made not to pursue the common law claim was not made binding by the employers’ payment of the £490. The employers had provided no consideration for such a promise since in making the payment, they merely did what they were already bound to do.<sup>689</sup>

## Variation in the debtor’s performance

- <sup>138</sup>

Consideration for a creditor's promise to accept part payment of a debt in full settlement can be provided by the debtor's doing some act that they were not previously bound by the contract to do.<sup>690</sup> For example, payment of a smaller sum at the creditor's request before the due day is good consideration for a promise to forgo the balance, since it is a benefit to the creditor to be paid before they were entitled to payment, and a corresponding detriment to the debtor to pay early.<sup>691</sup> The same rule applies, mutatis mutandis, where payment of a smaller sum is made at the creditor's request at a place different from that originally fixed for payment,<sup>692</sup> or in a different currency.<sup>693</sup> Again, payment of a smaller sum accompanied at the creditor's request by the delivery of a chattel is good consideration for a promise to forgo the balance: "The gift of a horse, hawk or robe, etc. in satisfaction is good. For it shall be intended that a horse, hawk or robe, etc., might be more beneficial than the money ...".<sup>694</sup>

## Other benefit to creditor

- <sup>139</sup> We have seen that the Court of Appeal has held that a promise to pay a supplier of services more than the agreed sum for performing their part of the contract can be supported by consideration in the form of a benefit in fact obtained by the other party as a result of that party's obtaining the promised performance<sup>695</sup>; and that conversely, the decision of the Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* would have meant that a promise by the supplier to accept less than the agreed sum may be supported by a similar consideration. But both cases are now in doubt because of dicta in the *MWB* case in the Supreme Court.<sup>696</sup> It is certain that the mere receipt of the smaller sum cannot, indeed, constitute the consideration: that possibility is precluded by *Foakes v Beer*.<sup>697</sup> The same would seem to be true of other merely "practical" benefits, such as in the *An angel Atlas*<sup>698</sup> case, where a shipbuilder's promise to reduce the price which the buyers had agreed to pay was held to have been supported by consideration, and one way in which the buyers to whom the reduction was promised had provided consideration was by accepting delivery on the day fixed for such acceptance. Even if the buyers were already bound to take delivery on that day, they had conferred a benefit on the shipbuilder by so doing since they were "core customers"<sup>699</sup> and their refusal to take delivery might have led other actual or potential customers to cancel (or not to place) orders. But though the court held this to constitute consideration, that conclusion must now be treated as doubtful.

## Forbearance to enforce cross-claims

- <sup>140</sup> A debtor may provide consideration for the creditor's promise not only by doing an *act* that they were not previously bound to do, but also by a *forbearance*. Thus, where the debtor has a claim against the creditor, the debtor's forbearance to enforce that claim can constitute consideration

for the creditor's promise not to claim part of the debt. For example, where a landlord promises to accept part payment of rent in full settlement, the tenant may provide consideration for this promise by forbearing to sue the landlord for breach of the latter's obligation to keep the premises in repair.<sup>700</sup>

## Composition with creditors

- <sup>141</sup> The doctrine of consideration gives rise to some difficulty in relation to composition agreements by which a debtor who cannot pay all their creditors in full induces them to agree with themselves and with each other to accept part payment in full settlement of their claims.<sup>701</sup> The binding force of such agreements is well established,<sup>702</sup> in spite of the rule in *Foakes v Beer*.<sup>703</sup> One possible reason for the validity of such agreements is that it would be a fraud on the other parties for a creditor who had accepted a composition to claim the balance of their original debt.<sup>704</sup> An alternative view is that the consideration for the creditor's promise is to be found in the promise of every other creditor to forgo part of their own debt<sup>705</sup>; but this consideration does not move from the promisee (i.e. the debtor) unless they also join in the agreement.<sup>706</sup> In that event there may be consideration in the shape of a benefit to each creditor<sup>707</sup>: they are certain of some payment, while in the scramble for priorities which might take place if there were no composition agreement they might get nothing at all.

## Part payment of debt by a third party

- <sup>142</sup> Part payment by a third party, if accepted by the creditor in full settlement of the debtor's liability, is a good defence to a later claim by the creditor for the balance.<sup>708</sup> This rule seems not to depend on any contract between debtor and creditor, so that it can apply even though no promise has been made to the debtor and even though no consideration has moved from them.<sup>709</sup> The rule has therefore been explained on other grounds. One such ground is that it would be a fraud<sup>710</sup> on the third party to allow the creditor, in disregard of their promise to the third party, to sue the debtor for the balance of the debt. The difficulty with this reasoning is that the mere breach of a promise does not amount to fraud at common law: it has this effect only if the promisor had no intention of performing their promise when they made it.<sup>711</sup> A second reason for the rule is that the court will not help the creditor to break their contract with the third party by allowing them to obtain a judgment against the debtor. On the contrary, it has been held that where A (the creditor) expressly contracts with B (the third party) not to sue C (the debtor) and A nevertheless does sue C, then B can intervene so as to obtain a stay of the action.<sup>712</sup> This possibility would extend to the case where the consideration provided by B was a *promise* by B to pay A: it thus goes beyond the cases in which

B had *actually paid* A. A third explanation is suggested by *Hirachand Punamchand v Temple*<sup>713</sup> where the defendant was indebted on a promissory note to the claimant, who accepted a smaller sum from the defendant's father in full settlement. It was held that the claimant could not later recover the balance of the debt from the defendant because the promissory note was extinct: the position was the same as if the note had been cancelled.<sup>714</sup> This reasoning again does not depend on any contract between the claimant and the defendant, for the cancellation of a promissory note can release a party liable on it irrespective of contract and without consideration.<sup>715</sup> The debtor may also, if the requirements of the Contracts (Rights of Third Parties) Act 1999 are satisfied,<sup>716</sup> be able to take the benefit of any term in the contract between the creditor and the person making the payment, which may exclude the debtor's liability for the balance; and they will be able to do so without having to show that they provided any consideration for the creditor's promise to accept the part payment in full settlement.<sup>717</sup>

## Collateral contract

- <sup>143</sup> An agreement to accept part payment of a debt may take effect as a collateral contract if the requirements of contractual intention and consideration are satisfied. This was the position in *Brikom Investments Ltd v Carr*<sup>718</sup> where a tenant's liability to contribute to the maintenance costs of a block of flats was held to have been reduced by a collateral contract under which the landlord undertook to execute certain roof repairs at his own expense.<sup>719</sup> The landlord's claim for contribution in this case was probably unliquidated; but the principle seems to be equally applicable where a creditor enters into a collateral contract to accept part payment in full settlement of a liquidated claim.

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); Shatwell (1955) *1 Sydney Law Review* 289.
- 678 *Cooper v Parker* (1855) 15 C.B. 822; *Re Warren* (1884) 53 L.J. Ch. 1016; *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd* (No.2) [1990] 2 *Lloyd's Rep.* 526, 544; for other consideration in this case, see *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd* (No.2) at 545 and below, para.6-139; *Huyton SA v Peter Cremer GmbH* [1999] 1 *Lloyd's Rep.* 620 at 629; *Simantob v Shavleyan* [2019] EWCA Civ 1105.
- 679 Above, paras 6-015—6-016. But the fact that the sum received is much smaller than that claimed may be evidence that the recipient has not accepted it in full settlement: *Rustenburg Platinum Mines Ltd v Pan Am* [1979] 1 *Lloyd's Rep.* 19.

- 680 *North Sea Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230, [2011] 2 All E.R. (Comm) 1024 at [42], [58].
- 681 Above, paras 6-051—6-053.
- 682 *Ferguson v Davies* [1997] 1 All E.R. 315 per Henry LJ; Evans LJ's judgment is based on the ground that, as a matter of construction, the claimant had not accepted the smaller sum in full settlement. Aldous LJ agreed with both the other judgments.
- 683 A claim may be "liquidated" even though it is disputed and even though the dispute relates to its amount: e.g. where it is for the price of goods and the buyer alleges short delivery: *Aectra Refining and Manufacturing Inc v Exmar N.V. (The New Vanguard)* [1994] 1 W.L.R. 1634.
- 684 *Wilkinson v Byers* (1834) 1 A. & E. 106; *Ibberson v Neck* (1886) 2 T.L.R. 427. [1966] 2 Q.B. 617; above, para.6-128.
- 685 (1884) 9 App. Cas. 605; above, para.6-127.
- 686 cf. *Amantilla v Telefusion* (1987) 9 Con. L.R. 139, where a builder's quantum meruit claim, which had not been disputed, was treated as "liquidated" for the purpose of **Limitation Act 1980** s.29(5)(a).
- 688 [1976] 1 Lloyd's Rep. 98; cf. *Rustenburg Platinum Mines Ltd v Pan Am* [1979] 1 Lloyd's Rep. 19, 24.
- 689 Per Stephenson and Geoffrey Lane LJ; Lord Denning MR based his decision on a different ground: below, para.6-154.
- 690 e.g. *Re William Porter & Co* [1937] 2 All E.R. 261; *Ledingham v Bermejo Estancia Co Ltd* [1947] 2 All E.R. 748.
- 691 *Pinnel's Case*, above, para.6-127.
- 692 *Pinnel's Case*, above, para.6-127.
- 693 cf. above, paras 6-084—6-086.
- 694 *Pinnel's Case* (1602) 5 Co. Rep. 117a, above, para.6-127. Cases which formerly supported the view that part payment by a negotiable instrument, made at the request of the creditor and accepted by them in full settlement, discharged the debt were overruled in *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 617.
- 695 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, above, paras 6-069—6-072.
- 696 [2018] UKSC 24, [2018] 2 W.L.R. 1603), see paras 6-129—6-133 above.
- 697 (1884) 9 App. Cas. 605, above, para.6-127.
- 698 *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd (No.2)* [1990] 2 Lloyd's Rep. 526. For other consideration in that case, in the form of reducing "a previously ill-defined understanding to 'precise terms,' and so settling a potential dispute", see *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd (No.2)* at 544.
- 699 *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd (No.2)* at 544.
- 700 *Brikom Investments Ltd v Carr* [1979] Q.B. 467, as explained in paras 6-087—6-088, above.
- 701 Provision for publicity and substantial agreement among creditors is made by **Deeds of Arrangement Act 1914** (repealed in part by **Insolvency Act 1985** s.235 and Sch.10 Pt III, and amended by **Insolvency Act 1986** s.439(2)). Oral agreements are not caught by the 1914

**Act:** *Hughes & Falconer v Newton* [1939] 3 All E.R. 869. “Voluntary arrangements” under Insolvency Act 1986, Pts. I and VIII can, by virtue of ss.5(2) and 260(2) (as amended by Small Business, Enterprise and Employment Act 2015 Sch.9 paras 6 and 67), bind even a creditor who was not present when the proposal was approved, or dissented from the proposal, “as if he were a party to the voluntary arrangement:” see *Johnson v Davies* [1999] Ch. 117 at 138; cf. *Re Cancol Ltd* [1996] 1 All E.R. 37. *Re a Debtor* (No.259 of 1990) [1992] 1 W.L.R. 226.

- 702 *Good v Cheesman* (1831) 2 B. & Ad. 328; *Boyd v Hind* (1857) 1 H. & N. 938; an agreement to pay a dividend may, if the parties so intend, operate as satisfaction: *Bradley v Gregory* (1810) 2 Camp. 383.
- 703 (1894) 9 App. Cas. 605; above, para.6-127.
- 704 *Wood v Roberts* (1818) 2 Stark. 417; *Cook v Lister* (1863) 13 C.B. N.S. 543, 595.
- 705 *Boothbey v Snowden* (1812) 3 Camp. 175.
- 706 As in *Good v Cheesman* (1831) 2 B. & Ad. 328 where the debtor also made an assignment for the benefit of his creditors. But even if the debtor is not a promisee, they may be able to enforce the promise under the Contracts (Rights of Third Parties) Act 1999: see below, paras 20-091 et seq.
- 707 In *West Yorkshire Darracq Agency Ltd v Coleridge* [1911] 2 K.B. 326, the same principle was applied although the creditors got nothing; but it is hard to see how this application of the rule can be justified. The consideration was said (at 329) to be benefit to the debtor, but he was the person *to whom* the promise was made, and benefit to the promisee is obviously no consideration. If it were, there would be consideration for every gratuitous promise. Even in such a case, the debtor may get the benefit of the agreement if, when they are sued by one creditor, the other (or others) can intervene to stay the action: see *Snelling v John G. Snelling* [1973] 1 Q.B. 87, below, para.20-073. The debtor will not, however, be able to avoid the requirement of consideration by relying on the Contracts (Rights of Third Parties) Act 1999 since this applies only in favour of “a person who is *not* a party” to the contract (s.1(1)); and in the case of a composition agreement the debtor typically *will* be a party.
- 708 *Welby v Drake* (1825) 1 C.&P. 557; *Cook v Lister* (1863) 13 C.B.N.S. 543 at 595; *Bracken v Billingshurst* [2003] EWHC 1333 (TCC); [2003] All E.R. (D) 488 (Jul).
- 709 As in *Hirachand Punamchand v Temple* [1911] 2 K.B. 339, below.
- 710 See *Welby v Drake* (1825) 1 Car. & P. 557; *Cook v Lister* (1863) 13 C.B. N.S. 543.
- 711 Below, para.9-010.
- 712 See *Snelling v John G. Snelling Ltd* [1973] 1 Q.B. 87 (below, para.20-073), distinguishing *Gore v Van der Lann* [1967] 2 Q.B. 31 where no promise was made not to sue C.
- 713 [1911] 2 K.B. 330.
- 714 [1911] 2 K.B. 330 at 336; cf. in the case of joint debts, *Johnson v Davies* [1999] Ch. 117, 130. In *Chelsea Building Society v Nash* [2010] EWCA Civ 1247 B and C were jointly and severally indebted to A who agreed with B to accept part payment “in full and final settlement”. It was held that this agreement prevented A from suing C for the share of the debt attributed by A to C as the agreement between A and B was not shown by A to have either expressly or impliedly to have reserved A’s rights against C. In the Court of Appeal A also relied for the first time on the rule in *Pinnel’s Case* (1602) Co. Rep. 117a (above, para.6-127)

but it was held that this point could not be taken at this late stage as the opportunity to find relevant facts (presumably relating to the limitations on the scope of that rule discussed in paras 6-134 et seq. above) had been irretrievably lost (at [40]).

- 715 Bills of Exchange Act 1882 s.62; below, paras 25-018 and Vol.II, para.36-138.
- 716 Below, paras 20-091 et seq.
- 717 Above, para.6-047, below para.20-108. For the purposes of the Act it is the debtor who, in the example given above, is the “third party”.
- 718 [1979] Q.B. 467. Contrast, on the issue of contractual intention necessary to establish a collateral contract, *Business Environment Bow Lane Ltd v Deanwater Estates Ltd [2007] EWCA Civ 622, [2007] L. & T.R. 26*, above para.4-218.
- 719 For the consideration supporting this promise, see above, paras 6-087—6-088; for other grounds for the decision, see below, para.6-151.

## (c) - Limitations in Equity

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 10. - Part Payment of a Debt

(c) - Limitations in Equity

### Equitable forbearance

- <sup>144</sup> Under the equitable doctrine of *Hughes v Metropolitan Ry*<sup>720</sup> a promise by a contracting party not to enforce his strict legal rights has (even where it is not supported by consideration) at least a limited effect in equity. Before 1947, this doctrine had not been applied where a creditor's promise to accept part payment of a debt in full settlement was not supported by any consideration moving from the debtor.<sup>721</sup> Such an extension of the rule seemed to be barred by *Foakes v Beer*.<sup>722</sup> The possibility of making the extension was, however, suggested in 1947 in *Central London Property Trust Ltd v High Trees House Ltd*.<sup>723</sup> In that case a block of flats had been let for 99 years to the defendants in 1937 at a rent of £2,500 a year. In January 1940 the landlords agreed to reduce this rent to £1,250 a year because of wartime conditions as a result of which only a few of the flats were let. After the end of the war, when the flats were fully let, the landlords claimed the full rent, and tested their claim by suing for rent at the original rate for the last two quarters of 1945. Denning J upheld the claim on the ground that, as a matter of construction, the agreement of 1940 was intended to apply only while the war-time difficulties of sub-letting lasted, and that it had therefore ceased to operate in the early part of 1945, when these difficulties had come to an end. But he also said that the landlords would have been precluded by the equitable doctrine of *Hughes v Metropolitan Ry*<sup>724</sup> from recovering the full rent for a period which was covered by the agreement of 1940. He added: "The logical consequence no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration".<sup>725</sup> The requirements of the equitable doctrine have already been discussed.<sup>726</sup> A number of further points give rise to difficulty in its application to promises to accept part payment in full settlement of a debt; these points are considered in paras 6-145—6-154 below.

## Suspensive nature of the doctrine

- <sup>145</sup> The first difficulty is to reconcile Denning J's statement in the *High Trees* case, quoted in para.6-144 above, with the actual decision in *Foakes v Beer*.<sup>727</sup> If Mrs Beer could go back on her promise not to claim interest, why could not the landlords in the *High Trees* case go back on their promise not to ask for the full rent in (say) 1941, when the war-time difficulties of subletting still prevailed? One possibility is to say that "That aspect was not considered in *Foakes v Beer*"<sup>728</sup> which was decided on purely common law principles, without reference to equity,<sup>729</sup> and is therefore "no longer valid"<sup>730</sup>; but this reasoning is open to the objection that the rule in *Pinnel's Case*<sup>731</sup> (on which *Foakes v Beer* was based) was recognised in equity no less than at common law.<sup>732</sup> Another possibility, and the one which does least violence to the authorities, is to say that the creditor's right to the balance of their debt is (save in exceptional cases<sup>733</sup>) not extinguished but only suspended.<sup>734</sup> This is generally the sole effect of the rule in *Hughes v Metropolitan Ry.*<sup>735</sup> and in the present context it would give effect to the intention of the parties where the purpose of the arrangement was merely to give the debtor extra time to pay,<sup>736</sup> rather than to extinguish the debt. Of course where the intention is to extinguish, and not merely to suspend, the creditor's right to the balance, the suggestion that they are permanently bound by their promise to accept part payment in full settlement<sup>737</sup> may seem to be an attractive one.<sup>738</sup> But such an extension of the principle of *Hughes v Metropolitan Ry* would require the overruling of *Foakes v Beer*. It is, no doubt, with such difficulties in mind that Lord Hailsham L.C. has said that the *High Trees* principle "may need to be reviewed and reduced to a coherent body of doctrine by the courts".<sup>739</sup>

## Continuing obligations

- <sup>146</sup> For the present, the better view is that the principle only suspends rights; but the meaning of this statement is not entirely clear where the promisee is under a continuing obligation to make a series of payments, e.g. of rent under a lease,<sup>740</sup> of royalties under a licence to use a patent,<sup>741</sup> or of instalments under a hire-purchase agreement.<sup>742</sup> In such cases the statement may mean one of two things: first, that the creditor is entitled to payment in full only of amounts which fall due after the expiry of a reasonable notice of the retraction of the promise,<sup>743</sup> or, secondly, that they are then entitled, not only to future payments in full, but also to the balance of past ones. Of course the latter interpretation of the rule might sometimes be at variance with the intention of the parties at the time of the promise.<sup>744</sup> On the other hand it is hard to see why a debtor whose liability accrues from time to time should, for the purpose of the present rule, be in a more favourable position than one whose liability is to pay a single lump sum; nor is it clear which of the two possible rules should

apply where a debtor who owed a lump sum promised to pay it off in instalments and the creditor first made, and then gave reasonable notice revoking, a promise to accept reduced instalments. In such a case, it is at least arguable that the intention of the creditor (on the true construction of the promise<sup>745</sup>) is only to give extra time for payment. Hence the total debt remains due, and the only effect of the promise is to extend the period over which it is to be repaid.<sup>746</sup>

- <sup>147</sup> In *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*<sup>747</sup> a licence for the use of a patent provided that the licensees should pay “compensation” if they manufactured more than a stated number of articles incorporating the patent. The owners of the patent agreed in 1942 to suspend the obligation to pay compensation until a new agreement was made. No such agreement had been made by 1944, when disputes arose between the parties. In 1945 the owners claimed to have revoked their suspension and to be entitled to the “compensation” as from 1 June 1945. This claim failed, the Court of Appeal holding that the arrangement to suspend claims for compensation was binding until proper notice of its termination had been given; and that no such notice had been given. The owners then brought the present action claiming compensation as from 1 January 1947. The House of Lords upheld the claim on the ground that, by then, sufficient notice had been given of the ending of the suspension period. It seems to have been assumed that the defendants were no longer liable to pay the sums which would, under the original contract, have fallen due during the suspension period. But this point was not directly considered by the House of Lords; so that the case does not conclusively determine the precise results that flow, in cases of continuing obligations, from the suspensive nature of the doctrine.

## Extinctive effects in exceptional cases

- <sup>148</sup> There may, moreover, be exceptional situations in which the creditor’s promise can wholly extinguish their rights. We have seen that, under the rule in *Hughes v Metropolitan Ry*,<sup>748</sup> a promise cannot be retracted where subsequent events make it impossible to perform the original obligation.<sup>749</sup> That principle cannot, as such, be applied to cases of part payment of a debt, since performance of the original obligation, being one to pay money, can never become literally impossible. But there is also support for the view that a forbearance cannot be retracted where it would, even after reasonable notice, be highly inequitable to require performance of the original obligation<sup>750</sup>; and this aspect of the principle could be applied to cases of the present kind, with the result that the promise becomes “final and irrevocable if the promisee cannot resume his position”.<sup>751</sup> Thus the creditor’s right to the balance of a debt might be extinguished if in reliance on their promise the debtor had undertaken new commitments in relation to the subject-matter: if, for example, the tenant in the *High Trees* case had used the rebate to modernise the flats.<sup>752</sup> There is some support in the authorities for the view that the creditor’s right may be extinguished (as opposed to being suspended) even where the debtor’s reliance on the creditor’s promise goes no further than merely paying the part of the debt which the creditor had agreed to accept in full

settlement. This had been the view of Lord Denning MR in *D & C Buildings Ltd v Rees*.<sup>753</sup> His actual decision there was that it was not “inequitable” for the creditor to go back on his promise to accept part payment of the debt in full settlement as there had been no “true accord” to this effect.<sup>754</sup> But he went on to say that “where there has been a *true accord*” and “the debtor *acts upon* that accord by paying the lesser sum, then it is inequitable for the creditor afterwards to insist on the balance”.<sup>755</sup>

- <sup>149</sup> In *Collier v P & M.J. Wright (Holdings) Ltd*<sup>756</sup> Arden LJ relied on this dictum in support of the view that, if a creditor promised to accept part payment in full settlement of a debt, and the debtor relied on that promise by making the stipulated payment, then the debtor’s defence on the ground of promissory estoppel was one which had a real prospect of success.<sup>757</sup> She accepted that “the effect of promissory estoppel is usually suspensory only” but added that “if the effect of resiling is sufficiently inequitable, a debtor may be able to show that the right to recover the debt is not merely postponed but extinguished”.<sup>758</sup> There may, indeed, as is pointed out in para.6-154 below, be special circumstances in which promissory estoppel may, exceptionally, have such an extinctive effect; but the difficulty to which the *Collier* case gives rise is that the judgments do not identify any such circumstances beyond (a) the creditor’s promise to accept part payment in full settlement and (b) the debtor’s making the stipulated part payment.<sup>759</sup> If these circumstances were sufficient for the application of promissory estoppel with extictive effect, the difficulty mentioned in the discussion of the *High Trees* case<sup>760</sup> in para.6-145 above would again arise: that is, there would be a direct conflict between such an application and the outcome in *Foakes v Beer*.<sup>761</sup>
- <sup>150</sup> No doubt, the law as laid down in *Foakes v Beer* may, for reasons given in paras 6-129—6-133, be defective, at least in its operation in some situations. But any such defect would be more satisfactorily dealt with by a reconsideration by the Supreme Court of *Foakes v Beer* than by continuing to regard that case as good law while seeking to bypass its consequences by invoking the doctrine of promissory estoppel. The latter course would provide no clear guidance as to which of the two conflicting principles would apply in any particular situation and so be a source of undesirable uncertainty. The point is well illustrated by the *D & C Builders* case itself where the judgment of Lord Denning was based on the doctrine of promissory estoppel,<sup>762</sup> while those of Danckwerts and Winn LJJ were based on the rule in *Foakes v Beer*<sup>763</sup> and conflict between these two approaches was avoided in the *D & C Builders* case only by Lord Denning’s conclusion that promissory estoppel was of no avail by reason of the debtor’s conduct in securing the creditor’s promise.<sup>764</sup> In the *Collier* case, it was assumed that there was no such objectionable conduct on the debtor’s part. The conflict between the two approaches was thus a real one and the judgments do not provide any principled basis for its resolution.

In *Brikom Investments Ltd v Carr*<sup>765</sup> long leases of flats obliged the tenants to pay, not only rent and a maintenance charge, but also contributions in respect of certain “excess expenses” incurred by the landlords in keeping the structure in repair. In the course of the negotiations leading to the execution of the leases, the landlords had promised to put the roof into repair “at our own cost”. This was held to amount to a collateral contract<sup>766</sup> with one of the original tenants, precluding the landlords from enforcing against her the provision in the lease requiring her to contribute to the cost of the roof repairs. It was further held that claims for contributions to the cost of those repairs could not be made against assignees and sub-assignees of original tenants, even though there was no collateral contract with these persons. Lord Denning, MR based this conclusion on the *High Trees* principle which, in his view, was available not only between the original parties, but also in favour of and against their assigns.<sup>767</sup> The extinguive effect of the principle in these circumstances can perhaps be supported on the ground that the original tenants, the assignees and the sub-assignees had all, in reliance on the landlords’ promise, undertaken fresh commitments by entering into long leases of the flats. Roskill and Cumming-Bruce LJJ, on the other hand, treated the case, not as one of “promissory estoppel”,<sup>768</sup> but as one of “waiver”.<sup>769</sup> It seems that the latter expression here refers to a variation supported by consideration,<sup>770</sup> for the consideration provided by the tenants<sup>771</sup> could equally support the landlords’ promise whether that promise was regarded as a collateral contract or as a variation. On this interpretation of the case, there is no difficulty in accounting for the extinguive effect of the landlords’ promise. It amounted to a variation supported by consideration, so that the liability of the original tenants to contribute to the cost of the repairs in question was extinguished; and once it had been so extinguished it was not revived on assignment of the leases.

## Requirements

- 152 Granted that the equitable principle can apply to cases of part payment of a debt, it is in this context subject to the usual requirements on which its operation depends. These have already been considered<sup>772</sup> but two of them call for further discussion at this point.

## Whether detriment necessary

- 153 The equitable principle is sometimes said to be analogous to the doctrine of estoppel by representation.<sup>773</sup> According to this analogy, the principle would operate only in favour of a person who had suffered some “detriment” in the sense in which that word is used in that branch of the law.<sup>774</sup> Where, as in the *High Trees* case, a tenant pays only half the agreed rent they suffer no such “detriment”; and although ingenious attempts have been made to find some other “detriment” in the *High Trees* case,<sup>775</sup> the better view is that “detriment” of the kind required for the purpose

of estoppel by representation is not an essential requirement of the operation of the equitable principle.<sup>776</sup> This is the position under the rule in *Hughes v Metropolitan Ry*<sup>777</sup> on which the *High Trees* case is based; and no such requirement of “detriment” is mentioned by Denning J in the *High Trees* case itself or in his later statements of the principle.<sup>778</sup> All that is necessary is that the promisee should have acted in reliance on the promise in such a way as to make it inequitable to allow the promisor to act inconsistently with it.<sup>779</sup> This requirement was satisfied on the facts of the *High Trees* case, no less than on those of *Hughes v Metropolitan Ry*.

## Inequitable

- 154 By making the part payment, the debtor acts in reliance on the creditor’s promise, and so makes it prima facie “inequitable” for the creditor peremptorily to go back on their promise. But other circumstances may lead to the conclusion that it would not be “inequitable” for the creditor to reassert their claim for the full amount<sup>780</sup>: this would, for example, be the position where the debtor had failed to perform their promise to pay the smaller amount.<sup>781</sup> Another such circumstance may be the conduct of the debtor in obtaining the creditor’s promise. This possibility may be illustrated by further reference to *D. & C. Builders Ltd v Rees*.<sup>782</sup> Lord Denning, MR there stressed the fact that the builders’ promise to accept £300 in full settlement of their claim for £482 had been obtained by taking undue advantage of their desperate financial position. In these circumstances it was not “inequitable” for the builders to go back on their promise, so that the *High Trees* principle did not apply. The difficulty with this reasoning is that most debtors who offer part payment in full settlement try to exert some kind of “pressure” against their creditors. The law now recognises that it is possible for such “pressure” to amount to duress,<sup>783</sup> and where it has this effect, a promise obtained as a result of it should clearly not bring the *High Trees* principle into operation.<sup>784</sup> Where, on the other hand, there is no duress, the *High Trees* principle should not be excluded merely because it could be said that the promise has been “improperly obtained”. Such an intermediate category between promises obtained by duress and those not so obtained should here, as elsewhere,<sup>785</sup> be rejected as “unhelpful because it would render the law uncertain”.<sup>786</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); Shatwell (1955) 1 Sydney Law Review 289.
- 720 (1877) 2 App. Cas. 439; above, para.6-093.
- 721 The doctrine had been applied in *Buttery v Pickard* (1946) 62 T.L.R. 241 to a landlord’s promise to accept payment of part of the rent in full settlement, but in that case consideration

did move from the tenant in the shape of her forbearance to exercise her contractual right to terminate the lease (though this was not the ratio decidendi to the case).

- 722 *(1884) 9 App. Cas. 605*, above, para.6-127.
- 723 *[1947] K.B. 130*; *Denning (1952) 15 M.L.R. 1*; *Wilson (1951) 67 L.Q.R. 330*; *Sheridan (1952) 15 M.L.R. 325*; *Bennion (1953) 16 M.L.R. 441*; *Guest (1955) 30 A.L.J. 187*; *Turner (1964) 1 N.Z.U.L.Rev. 185*; *Campbell (1964) 1 N.Z.U.L.Rev. 232*.
- 724 *(1877) 2 App. Cas. 439*; above, para.6-093.
- 725 *[1947] K.B. 130, 134*; cf. *Combe v Combe [1951] 2 K.B. 215, 220*.
- 726 Above, paras 6-093 et seq.
- 727 *(1884) 9 App. Cas. 605*; above para.6-127.
- 728 *High Trees case [1947] K.B. 130* at 135; this sentence does not occur in any of the other reports of the case (*[1947] L.J.R. 77*, *(1946) 175 L.T. 333*, *(1946) 62 T.L.R. 557*, *[1956] 1 All E.R. 256n.*); see also *Arrale v Costain Civil Engineering Ltd [1976] 1 Lloyd's Rep. 98, 102*. The argument, with respect, lacks plausibility since *Hughes v Metropolitan Ry (1877) 2 App. Cas. 439* had been decided only seven years before *Foakes v Beer* and Lords Selborne and Blackburn heard the appeals in both cases.
- 729 *High Trees case [1947] K.B. 130, 133*.
- 730 *Arrale v Costain Civil Engineering Ltd [1976] 1 Lloyd's Rep. 98* at 102.
- 731 *(1602) 5 Co. Rep. 117a*; above, para.6-127.
- 732 *Re Warren (1884) 53 L.J. Ch. 1016*; *Bidder v Bridges (1887) 37 Ch. D. 406*.
- 733 Below, paras 6-148—6-150.
- 734 *Ajayi v R.T. Briscoe (Nig.) Ltd [1964] 1 W.L.R. 1326, 1330*; *Unger (1965) 28 M.L.R. 231*; cf. *Re Venning [1947] W.N. 196*. *Gordon [1963] C.L.J. 222* objects to giving the creditors' promise even this limited effect, arguing that the equitable principle is limited to relief against forfeiture. But though *Hughes v Metropolitan Ry* was a case of this kind, the equitable principle had developed since 1877 and is no longer restricted to such cases: see *Wilson [1965] C.L.J. 93*.
- 735 Above, para.6-104.
- 736 e.g. in *Ajayi v R.T. Briscoe (Nig.) Ltd [1964] 1 W.L.R. 1326*: see below, para.6-146. This seems also to have been the position in *Foakes v Beer*: see above, para.6-127.
- 737 Originally made by Lord Denning in the *High Trees* case at 134 and repeated by him in *D. & C. Builders Ltd v Rees [1966] 2 Q.B. 617, 624*; cf. *W.J. Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 Q.B. 189, 213*; and at 218, 220; but in that case there was consideration: above, paras 6-084—6-086.
- 738 Provided, at any rate, that there was no duress: cf. above, paras 6-129—6-133. cf. *Stevensdrake Ltd v Hunt [2016] EWHC 1111 (Ch) at [65] (affirmed without discussion of this point: [2017] EWCA Civ 1173, [2017] 4 Costs L.R. 781)*, which is not easy to reconcile with earlier authorities such as *Foakes v Beer (1884) 9 App. Cas. 605* above para.6-127.
- 739 *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co [1972] A.C. 741, 758*; cf. *Baird Textile Holdings Ltd v Marks & Spencer Plc [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [49]* ("not yet ... fully developed").
- 740 As in the *High Trees* case, above, para.6-144.

- 741 As in the *Tool Metal case* [1955] 1 W.L.R. 761, discussed in para.6-147, below.
- 742 As in *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326.
- 743 *Banning v Wright* [1972] 1 W.L.R. 972, 981; cf. *W.J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189, 213; in *Bottiglieri di Navigazione v Cosco Quindao Ocean Shipping Co (The Bunge Saga Lima)* [2005] EWHC 244 (Comm), [2005] 1 Lloyd's Rep. 1 it was said at [31] that “no revocation can be retrospective”; but this statement is, with respect, open to question for the reason given in the footnotes to para.6-105.
- 744 This would be so in cases like the *High Trees* case and the *Tool Metal* case (below, para.6-147) but probably not in a case like *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326, as the promise there “was not intended to be irrevocable:” *Meng Long Development Pte Ltd v Jip Hong Trading Pte Ltd* [1985] A.C. 511, 524. *J.T. Sydenham & Co Ltd v Enichem Elastometers Ltd* [1989] E.G.L.R. 257, 260 (discussed by *Cartwright* [1990] C.L.J. 13) purports to give the “estoppel” an extinguishing effect; but the amount of rent due in that case was in dispute, so that the actual decision is explicable on the ground stated in para.6-134, above.
- 745 cf. *Dunbar Assets Plc v Butler* [2015] EWHC 2546 (Ch).
- 746 *Hardwick v Johnson* [1978] 1 W.L.R. 683 (where the creditor was said at 691 to have agreed to “postpone” the debtor’s obligation to pay instalments).
- 747 [1955] 1 W.L.R. 761; *Smith* (1955) 18 M.L.R. 609.
- 748 (1877) 2 App. Cas. 439.
- 749 Above para.6-105.
- 750 Above para.6-105.
- 751 *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326, 1330; in *Bottiglieri di Navigazione v Cosco Quindao Ocean Shipping Co (The Bunge Saga Lima)* [2005] EWHC 244 (Comm), [2005] 1 Lloyd's Rep. 1, above para.6-146: it was said at [31] that it would have been “inequitable to permit retraction”. The case was not concerned with “waiver” of an obligation to pay money.
- 752 cf. *Mitchell* (1951) *Univ. of W. Australia Law Rev.* 245, 251. The principle is somewhat similar to that which underlies the defence of “change of position” in an action for the recovery of money paid; for recognition of this defence, see *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548; below paras 32-199, Vol.II, 43-047.
- 753 [1966] 2 Q.B. 617; above, para.6-128.
- 754 At 625.
- 755 At 625; and see below, para.6-154.
- 756 [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643; *Trukhtanov* (2008) 124 L.Q.R. 364.
- 757 [2007] EWCA Civ 1329 at [21], [37]-[40], [50]; Longmore LJ was more sceptical: see [2007] EWCA Civ 1329 at [45]-[49].
- 758 [2007] EWCA Civ 1329 at [37].
- 759 See too *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [61]-[63] and [92] (reversed on other grounds: [2018] UKSC 24, [2018] 2 W.L.R. 1603, see below, para.25-047).
- 760 [1947] K.B. 130, stated above in para.6-144.

- 761 The citation of the *High Trees* case in the *Collier case [2007] EWCA 1329* at [37] does not help to resolve the difficulty discussed in the text below, i.e. that of reconciling what is described in the latter case (at [42]) as “the brilliant obiter dictum of Denning J, as he then was, in the *High Trees* case” with the outcome in *Foakes v Beer* (above, para.6-127): see above, para.6-145. Nor does the citation in the *Collier* case at [37] of “the *Tool Metal* case” [1955] 1 W.L.R. 761 help to resolve this difficulty: see the discussion of that case in para.6-147 above.
- 762 See para.6-154 below.
- 763 See para.6-128 above. Danckwerts LJ did indeed begin his judgment by saying ([1962] 2 Q.B. 617 at 625–626): “I agree with the judgment of the Master of the Rolls”. But his own reasoning is entirely concerned with the rule in *Foakes v Beer* and his conclusion (at 627) is that “the county court judge was right in applying the rule in *Foakes v Beer*”.
- 764 [1966] 2 Q.B. 617, 625; below, para.6-154.
- 765 [1979] Q.B. 467.
- 766 Above, paras 6-087—6-088; contrast on the issue of contractual intention necessary to establish a collateral contract, *Business Environment Bow Lane Ltd v Deanwater Estates Ltd [2007] EWCA Civ 622, [2007] L. & T.R. 26*, above para.4-218.
- 767 [1979] Q.B. 467, 484–485.
- 768 [1979] Q.B. 467 at 485, 490.
- 769 [1979] Q.B. 467 at 488, 490.
- 770 cf. above, para.6-089.
- 771 Above, paras 6-087—6-088. Roskill LJ at 489 refers to *Hughes v Metropolitan Ry (1877) 2 App. Cas. 439* (above, para.6-093) as stating a principle of “contractual variation of strict contractual rights”. It is respectfully submitted that this phrase should be interpreted to refer simply to *variations of contracts*, rather than to *contractually binding variations*; for the principle clearly applies to variations which are not contractually binding (but revocable on reasonable notice) because they are not supported by consideration.
- 772 Above, paras 6-094 et seq.
- 773 Above, para.6-111.
- 774 cf. above, para.6-102.
- 775 *Wilson (1951) 67 L.Q.R. 330, 344.*
- 776 cf. *Denning (1952) 15 M.L.R. 1, 6–8.*
- 777 (1877) 2 App. Cas. 439.
- 778 e.g. in *Combe v Combe [1951] 2 K.B. 215* at 220.
- 779 Above, para.6-103; *Tool Metal case [1955] 1 W.L.R. 761, 764; Beesly v Hallwood Estates Ltd [1960] 1 W.L.R. 548, 560; affirmed [1961] Ch. 105*, as to which see below, paras 6-202—6-203; *Ajayi v R.T. Briscoe (Nig.) Ltd [1964] 1 W.L.R. 1326, 1330.*
- 780 cf. above, para.6-105.
- 781 *Re Selectmove [1995] 1 W.L.R. 474, 481*, where the debtor’s promise was not to pay *less* but to pay *late*. cf. *Burrows v Brent LBC [1996] 1 W.L.R. 1448*, where decision was based on lack of contractual intention and not on want of consideration. For this case, see also *Knowsley Housing Trust v White [2006] UKHL 70, [2009] 1 A.C. 636* (above, para.4-234);

there was no reference to the equitable doctrine here under discussion in either the *Burrows* or the *Knowsley* case.

782 [1966] 2 Q.B. 617; above para.6-128; *Winder* (1966) 82 L.Q.R. 165; cf. *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep. 98, 102.

783 Below, paras 10-020, 10-025.

784 The same would be true where the creditor's promise had been obtained by misrepresentation, e.g. as to the debtor's ability to pay. In the *D & C Builders case* [1966] 2 Q.B. 617, Danckwerts LJ at 626 suggested that there had been such a misrepresentation by the defendant's wife on his behalf, while Winn LJ said that there was no finding to this effect. If such a false representation were now made dishonestly and induced the creditor to accept part payment in full settlement, the representor could be criminally liable under s.2 of the Fraud Act, 2006.

785 Above, paras 6-066—6-067.

786 *Pao On v Lau Yiu Long* [1980] A.C. 614, 634. cf. *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep. 620, where the requirement of consideration was satisfied (above para.6-134); and there was no duress (below para.10-034). It was said at 629 that "the submissions relating to consideration and duress inter-relate". No separate argument seems to have been advanced that, in the absence of duress, the agreement might be open to attack on the ground that it had been "improperly obtained".

## **(a) - Nature of the Doctrine**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 11. - Proprietary Estoppel**

**(a) - Nature of the Doctrine**

### **Introductory**

- 155 Proprietary estoppel is said to arise in certain situations in which a person has done acts in reliance on the belief that they have, or that they will acquire, rights in or over another's property. Usually, but not invariably, that property will be land.<sup>787</sup> The "classic example" of proprietary estoppel involves one party building on another's land, believing it to be their property. Where the requirements of proprietary estoppel are satisfied, the landowner is precluded from denying the existence of the rights in question, and may indeed be compelled to grant them. Because the estoppel precludes them from denying the existence of rights in property, it has come to be known as "proprietary estoppel".<sup>788</sup> It is distinct<sup>789</sup> from promissory estoppel, both in the conditions which must be satisfied for it to come into operation and in its effects. But under both doctrines some legal effects can be given to promises which are not contractually binding for want of consideration; and it is this aspect of proprietary estoppel which calls for discussion in the present chapter.

### **Scope of proprietary estoppel**

- 156 Proprietary estoppel operates in a variety of situations so disparate that it was once described by Robert Goff J as "an amalgam of doubtful utility".<sup>790</sup> The cases can be divided broadly into three categories.<sup>791</sup> In the first, one person acts under a mistake as to the existence or as to the

extent of their rights in or over another's land. The landowner might then, even though the mistake was in no way induced by them, be prevented from taking advantage of it, particularly if they "stood by" knowing of the mistake, or actively encouraged the mistaken party to act in reliance on their mistaken belief.<sup>792</sup> These are cases of so-called "acquiescence".<sup>793</sup> The second strand of cases involve not merely "acquiescence" by the landowner, but a representation by them, which is reasonably relied upon by the claimant to their detriment. This category of "representation" cases is based upon orthodox principles of estoppel, and is sometimes thought to encompass all claims for proprietary estoppel.<sup>794</sup> However, a third strand has more recently developed, based upon "promise".<sup>795</sup> If A promises B that B will have a right in relation to A's property, and B reasonably relies on that promise to their detriment, then B may have a claim in proprietary estoppel.<sup>796</sup> This promise-based principle is an odd form of estoppel, since its effect is not limited to preventing a party from asserting a fact or exercising a right. In any event, it is often difficult to determine to what extent the promise can be enforced, even though it may not be supported by consideration, or fail to satisfy the other requirements (such as those of certainty or form<sup>797</sup>) of a binding contract.

## Footnotes

- <sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.
- <sup>787</sup> See para.6-169 below.
- <sup>788</sup> *Jones v Jones* [1977] *1 W.L.R.* 438, 442; *Pascoe v Turner* [1979] *1 W.L.R.* 431, 436; *Re Sharpe* [1980] *1 W.L.R.* 219, 233; *Greasley v Cooke* [1980] *1 W.L.R.* 1306, 1311; cf. *Midland Bank Plc v Cooke* [1995] *4 All E.R.* 562, 573 ("equities in the nature of an estoppel"). In *Cobbe v Yeoman's Row Management Ltd* [2008] *UKHL* 55, [2008] *1 W.L.R.* 1752 at [3] and [14]–[29] Lord Scott uses the expression "proprietary estoppel" to refer to the doctrine, while Lord Walker generally refers to the doctrine simply as "equitable estoppel". In that case he uses the expression "proprietary estoppel" only when quoting from or summarising other sources in which it occurs (e.g. at [48], [67], [73] and [78]); and where he so uses it he does without disapproval. In *Thorner v Major* [2009] *UKHL* 18, [2009] *1 W.L.R.* 776 at [29] and passim, Lord Walker uses the words "proprietary estoppel" to refer to the doctrine. For the use of "equitable estoppel" to mean "proprietary estoppel", see also *Secretary of State for Transport v Christos* [2003] *EWCA Civ* 1073, (2004) *1 P. & C.R.* 17, e.g. at [42].
- <sup>789</sup> *Fontana N.V. v Mautner* (1980) 254 *E.G.* 199, 207; and see below, paras 6-189—6-192.
- <sup>790</sup> *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] *Q.B.* 84, 103.
- <sup>791</sup> A proprietary estoppel does not "have to fit neatly" into the "pigeon holes" of the "pure acquiescence" or "assurance" (or "encouragement") categories, for example: *Hoyl Group Ltd v Cromer Town Council* [2015] *EWCA Civ* 782, [2015] *H.L.R.* 43 at [72].
- <sup>792</sup> *Wilmott v Barber* (1880) 15 *Ch. D.* 96; cf. *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] *Q.B.* 133 note; *Coombes v Smith* [1986] *1 W.L.R.* 808; *Matharu v Matharu*,

*The Times*, 13 May 1994. In *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764, Lord Neuberger at [62] said that these “standing by” cases provided the “classic example” of proprietary estoppel.

- 793 *Wilmott v Barber* (1880) 15 Ch. D. 96, 105; in *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17 the alleged estoppel was likewise based on acquiescence, so that no question arose as to the enforceability of any promise. The claim failed as the defendant had drawn the claimant’s attention to the defendant’s interest in good time and so had not acted unconscionably in asserting that interest against the claimant.
- 794 *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [14]; see too *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [29].
- 795 See generally *McFarlane and Sales* (2015) 131 L.Q.R. 610.
- 796 The promise may be inferred or implied: *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107; *Keelwalk Properties Ltd v Walker* [2002] EWCA Civ 1076 at [63]; *Walsh v Singh* [2009] EWHC 3219 (Ch), [2010] F.C.R. 117; *MacDonald v Frost* [2009] EWHC 2276 (Ch), [2009] W.T.L.R. 1815; *Williams v Lawrence* [2011] EWHC 2001.
- 797 See, e.g. *Yaxley v Gotts* [2000] Ch. 162; *Kinane v Mackie-Conteh* [2000] Ch. 162, below, para.6-158.

## **(b) - Bases of Liability**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 11. - Proprietary Estoppel**

**(b) - Bases of Liability**

### **Expenditure on another's land in reliance on a promise**

<sup>157</sup> In *Dillwyn v Llewelyn*<sup>798</sup> a father executed a memorandum “presenting” a named estate to his son “for the purpose of furnishing himself with a dwelling house”. The son spent £14,000 in building a house on the land; and it was held (after the father’s death) that he was entitled to have the fee simple of the estate conveyed to him. Many later cases similarly give some degree of legal enforceability to a promise by a landowner in reliance on which the promisee has spent money on making improvements to the promisor’s land: for example, where A built a bungalow on B’s land in reliance on B’s promise that A could stay there for the rest of their life<sup>799</sup>; where B purported to make a gift of a cottage to her son A “provided he did it up” and A incurred considerable expense in doing so<sup>800</sup>; where A spent money (or allowed money to which he was entitled to be spent<sup>801</sup>) on extending or improving B’s house in reliance on a similar promise by B<sup>802</sup>; where, in reliance on such a promise, A actually did the work of improvement themselves<sup>803</sup>; and where a tenant, whose lease had been terminated, spent money on improving the premises in reliance on the landlord’s promise to grant them a new lease.<sup>804</sup> Cases of this kind can sometimes be explained on the basis of unjust enrichment: in all of them, the landowner would benefit unjustly if they were allowed to disregard their promise and to take back the land after they had induced the promisee to make improvements to it. But the unjust enrichment explanation will not account for cases in which the doctrine has been applied even though the promisee’s expenditure on another’s land did not result in any benefit to the owner of that land.<sup>805</sup>

## Proprietary estoppel and constructive trust

<sup>158</sup> The explanation of proprietary estoppel as a mechanism for preventing unjust enrichment<sup>806</sup> perhaps accounts for the view that liability, where such an estoppel operates, is based on “an implied or constructive trust”.<sup>807</sup> While this view does not assert that the two concepts “can or should be completely assimilated”,<sup>808</sup> it recognises that there is a significant area of overlap between them.<sup>809</sup> Many of the cases in which the relationship between the two concepts was considered were concerned, not with want of consideration, but with the question whether proprietary estoppel could be a ground on which a person could be held liable on a transaction which failed to comply with formal requirements, such as those imposed by [s.2 of the Law of Property \(Miscellaneous Provisions\) Act 1989](#).<sup>810</sup> This question is discussed in [Ch.7](#) below<sup>811</sup>; here it suffices to say that the relation between the two concepts depends on a distinction between two types of cases. The first is that in which one of the elements capable of giving rise<sup>812</sup> to proprietary estoppel is an “agreement, or at least an expression of common understanding, exchanged between the parties as to the existence, or intended existence, of a proprietary interest ...”.<sup>813</sup> The second type of case is that in which proprietary estoppel can arise without any such element of agreement: e.g. where “a landowner stands by while his neighbour mistakenly builds on the former’s land”.<sup>814</sup> In cases of the first kind, the two concepts overlap in the sense that the same facts can give rise, not only to a proprietary estoppel, but also to a constructive trust.<sup>815</sup> It is also possible, in cases of the first kind described in the text above, for relief to be given on the ground of proprietary estoppel<sup>816</sup> even though the facts do *not*, for want of a sufficiently “clear agreement” give rise to any constructive trust.<sup>817</sup> In cases of the second kind, there is no such overlap, so that, even if the requirements of proprietary estoppel are satisfied, there will not, for this reason alone, be a constructive trust.<sup>818</sup>

## Other acts done in reliance on the promise

<sup>159</sup> The operation of proprietary estoppel is not confined to cases in which the promisee has incurred expenditure on, or done work to, the promisor’s land. It can also apply where the promisee has conferred some other benefit on the promisor<sup>819</sup>; and even where no work has been done on the promisor’s land and they have not received any other benefit. This indeed appears from one of the illustrations given by Lord Westbury in [Dillwyn v Llewelyn](#): if “A gives a house to B, but makes no formal conveyance, and the house is afterwards included, with the knowledge of A, in the marriage settlement of B, A would be bound to complete the title of the parties claiming under the settlement”.<sup>820</sup> Similarly, the doctrine operated in the absence of any expenditure on the promisor’s land in [Crabb v Arun DC](#)<sup>821</sup> In that case A (a local authority) by its conduct represented

to B that B had a right of way from his land over adjoining land owned by A. In reliance on that representation, B sold part of his own land, so that the only access from the remainder to the nearest public highway was by means of the right of way across A's land. It was held that B had a right to cross A's land for the purpose of access to his retained land. Detrimental reliance by the promisee here gave rise to a proprietary estoppel even though no benefit was conferred on the promisor.<sup>822</sup>

## Alternative explanation: contract

- <sup>160</sup> In *Dillwyn v Llewelyn* Lord Westbury, while referring to the parties of the transaction as "donor" and "donee" also said that the son's expenditure "supplied a valuable consideration originally wanting"<sup>823</sup>; and in discussing a hypothetical example similar to the facts of the case before him he concluded "that the donee acquires a right from the subsequent transaction to call upon the donor to perform that contract and to complete the imperfect donation".<sup>824</sup> These passages may suggest that he regarded the memorandum as a kind of unilateral contract<sup>825</sup> by which the father promised to convey the land if the son built a house on it. The terms of the memorandum make it improbable that a modern court would so regard it; it is more likely that these terms would now be regarded as negativing contractual intention.<sup>826</sup> However, in a number of later cases the rights of a person who has expended money on the property of another have been explained as being based on contract<sup>827</sup>; and such an explanation is sufficiently plausible to make reliance on a doctrine of proprietary estoppel unnecessary.<sup>828</sup> A unilateral contract to transfer an interest in land has been held to arise out of a promise to make the transfer if the promisee would pay instalments due under a mortgage on the house<sup>829</sup>; it can equally arise out of a promise to make the transfer if the promisee will make improvements to the land, or indeed do any other act.<sup>830</sup>
- <sup>161</sup> But there are, it is submitted, obstacles to treating all cases of proprietary estoppel as depending on contract. One is that the promises in cases of this kind are often made in a family context and lack contractual force because they were made without contractual intention.<sup>831</sup> Another is that the promise may lack consideration because the party relying on the estoppel made no counter-promise and so incurred no obligation, and that the arrangement was one in which it would not be in accordance with the intention of the parties to treat it as a unilateral contract.<sup>832</sup> A third is that the terms of the alleged contract are often too vague to satisfy the requirement of certainty.<sup>833</sup> A fourth is that, even if the promise or representation has the force of a contract, that contract can bind only the promisor and so cannot be enforced against any third party, against whom a proprietary estoppel may nevertheless arise.<sup>834</sup> A fifth is that many arrangements which can give rise to proprietary estoppel are made without any attempt to comply with the stringent formal requirements now imposed on the making of contracts for the disposition of interests in land.<sup>835</sup> Failure to comply with these requirements does not prevent such arrangements from giving rise in

certain circumstances to a proprietary estoppel,<sup>836</sup> but it does prevent them from taking effect as contracts. The possibility of explaining proprietary estoppel on the basis of contract is therefore in practice likely to be restricted to cases where the arrangement does *not* purport to dispose of an interest in land.<sup>837</sup> A sixth is that the explanation of proprietary estoppel as based on contract also fails to take account of the fact that the promisee's remedy in cases of proprietary estoppel may fall short of awarding them the full amount of the expectation interest to which they are in principle entitled for breach of contract, at least where the value of that interest can be established with sufficient certainty. In cases of proprietary estoppel the court may, under the principles discussed in para.6-183 below, award less than the value of their expectations. This fact (among others),<sup>838</sup> supports the view that remedies based on proprietary estoppel are distinct from those for breach of contract. A final and related point follows from a difference between contract and proprietary estoppel explained in the unreported case of *Walton v Walton*,<sup>839</sup> where Hoffmann LJ said that, while "a contract, subject to the narrow doctrine of frustration, must be performed, come what may", what he called "equitable" estoppel "looks backwards from the moment when the promise fails to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept".<sup>840</sup> This process of looking backwards may lead not only to the conclusion of awarding the promisee less than the value of his expectation, but also to that of awarding him nothing at all.<sup>841</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 Sydney Law Review 289.
- 798 (1862) 4 D.F. & G. 517.
- 799 *Inwards v Baker* [1965] 2 Q.B. 507.
- 800 *Voyce v Voyce* (1991) 62 P. & C.R. 290; *Q v Q* [2008] EWHC 1874, [2009] 1 F.L.R. 935.
- 801 *Arif v Anwar* [2015] EWHC 124 (Fam), [2016] F.L.R. 359 at [68], [69].
- 802 *Hussey v Palmer* [1972] 1 W.L.R. 1286; *Pascoe v Turner* [1979] 1 W.L.R. 431; *Durrant v Heritage* [1994] E.G.C.S. 134; *semble* spending money on mere maintenance would not suffice: *Griffiths v Williams* [1978] E.G.D. 919. cf. *Maharaj v Chand* [1986] A.C. 898 (where, because of local legislation, proprietary estoppel was not argued).
- 803 *Eves v Eves* [1975] 1 W.L.R. 1338; *Jones v Jones* [1977] 1 W.L.R. 438; *Ungurian v Lesnoff* [1990] Ch. 206; *Clough v Kelly* (1996) 72 P. & C.R. D22 (where the claimant had also spent money on the premises); cf. *Jiggins v Brisley* [2003] EWHC 841; [2003] 1 W.T.L.R. 1141 (provision of purchase money and money to pay for improvements); see also *Van Leathen v Brooker* [2006] EWHC 1478, [2006] 1 F.C.R. 697, below para.6-170.
- 804 *J.T. Developments v Quinn* (1991) 62 P. & C.R. 33.
- 805 *Canadian Pacific Railway v The King* [1931] A.C. 414; *Armstrong v Sheppard & Short* [1959] 2 Q.B. 384.
- 806 See para.6-157 above.

- 807 *Sen v Headley* [1991] Ch. 425, 440; *Re Dale* [1994] Ch. 31, 47; *Lloyds Bank Plc v Carrick* [1996] 4 All E.R. 630, 640; cf. *Drake v Whipp* (1996) 28 H.L.R. 531; *Yaxley v Gotts* [2000] Ch. 162 at 176, 193; *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch. 372 at 382; see also *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52, [2014] 1 W.L.R. 1163 at [28].
- 808 *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [13]; *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [24]–[29]; *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [14], [20].
- 809 *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 45 at [24]; cf. *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [128]; *Q v Q* [2008] EWHC 1874 (Fam), [2009] 1 F.L.R. 934 at [112], [113]; *Herbert v Doyle* [2010] EWCA Civ 1095, [2009] W.T.L.R. 589 at [54]–[55]; *Williams v Lawrence* [2011] EWHC 2001 (Ch), [2011] W.T.L.R. 1455 at [26].
- 810 e.g. *Yaxley v Gotts* [2000] Ch. 162; *Kinane v Mackie-Conteh* [2005] EWCA Civ 45.
- 811 See paras 7-049, 7-056 below and above, footnotes to para.4-243.
- 812 i.e. if the conditions specified in paras 6-162—6-170 below are satisfied.
- 813 *Kinane v Mackie-Conteh* [2005] EWCA Civ 45 at [51]; cf. [50], citing *Yaxley v Gotts* [2000] Ch. 162, 180.
- 814 *Yaxley v Gotts* at [176], cited in *Kinane v Mackie-Conteh* at [47].
- 815 *Kinane v Mackie-Conteh* [2005] EWCA Civ 45 at [51]; *S v S* [2006] EWHC 2892 (Fam), [2007] F.L.R. 1123 at [59]; *Brightlingsea Haven v Morris* [2008] EWHC 1928, [2009] 2 P & C.R. 11 at [40]. See too *Stack v Dowden* [2007] UKHL 17 at [37], [128]. See also paras 7-047—7-059.
- 816 *Arif v Anwar* [2015] EWHC 124 (Fam) at [69].
- 817 [2015] EWHC 124 (Fam) at [47], [68].
- 818 This follows from the reasoning of *Kinane v Mackie-Conteh* [2005] EWCA Civ 45 at [51] and of *S v S* [2006] EWHC 2892 (Fam) at [59].
- 819 e.g. *Tanner v Tanner* [1975] 1 W.L.R. 1346 (services rendered to promisor in managing his property); *Campbell v Griffin* [2001] EWCA Civ 999; [2001] W.T.L.R. 981 (lodger caring for elderly couple); *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 (gardener-handyman caring for childless widow); cf. *Plimmer v Mayor of Wellington* (1884) 9 App. Cas. 699 and *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379 (where the landowner benefited from improvements to his land but also—and more significantly—in other ways); *Grant v Edwards* [1986] Ch. 638, 657; contrast *Howard v Jones* (1988) 19 Fam. Law 231 (contribution to running costs of another property insufficient).
- 820 (1862) 4 D.F. & G. 517, 521. See too *Crabb v Arun DC* [1976] Ch. 179.
- 821 [1976] Ch. 179. The case was described in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84, 121 as one of “estoppel by convention”; but this would require a dealing between A and B on the basis of a common assumption (above, paras 6-117—6-119) while in *Crabb's* case the dealing was between B and the purchaser from him. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 C.L.R. 387, 403, *Crabb's* case was described as one of “promissory estoppel” (see above, para.6-093); but the requirements of that doctrine (in particular, the requirement of a pre-

existing legal relationship: above, para.6-096) were not satisfied in *Crabb's* case, and the effect of the estoppel differed from promissory estoppel in giving rise to a new right: cf. above, para.6-106.

822 cf. *Hammersmith & Fulham BC v Top Shop Centres Ltd* [1990] Ch. 237; *Evans v HSBC Trust Co (UK) Ltd* [2005] W.T.L.R. 1289 (as to which see also para.6-172 below) and *Joyce v Epsom and Ewell BC* [2012] EWCA Civ 1398, [2013] 1 E.G.L.R. 21, where the detriment consisted of work done by the promisee in the expectation of being granted a right of way over adjoining land owned by the defendants: see at [21]. This “encouragement” (at [39] and see above, para.6-156) gave rise to the proprietary estoppels described in para.6-181 below.

823 (1862) 4 D. F. & G. 517, 521.

824 (1862) 4 D. F. & G. 517 at 522.

825 Above, para.4-102.

826 Above, para.4-238.

827 e.g. *Plimmer v Mayor of Wellington* (1884) 9 App. Cas. 699 as explained in *Canadian Pacific Railway v The King* [1931] A.C. 414, 428; *Eves v Eves* [1975] 1 W.L.R. 1338; *Tanner v Tanner* [1975] 1 W.L.R. 1346; cf. *Re Sharpe* [1980] 1 W.L.R. 219, 224; and see *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379 (where there was a contract between the defendant and the claimant’s predecessor in title).

828 See *Lloyds Bank Plc v Carrick* [1996] 4 All E.R. 630. See also *Yaxley v Gotts* [2000] Ch. 162 at 179; *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam. 211 at [35]–[36].

829 *Errington v Errington* [1952] 1 K.B. 290; above, para.4-105.

830 e.g. *Tanner v Tanner* [1975] 1 W.L.R. 1346; merely to maintain the house in repair could be sufficient for the present purpose, even if it did not suffice to raise a proprietary estoppel: see above, para.6-157.

831 *Walton v Walton* Unreported 14 April 1994, per Hoffmann LJ, cited in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [57] (“in many cases of promises made in a family or social context, there is no intention to create an immediately binding contract”).

832 *J.T. Developments v Quinn* (1991) 62 P. & C.R. 33.

833 Above, para.4-169. See *Gillett v Holt* [2001] Ch. 210 at 230; *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch. 372; *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [10], [49]–[50]; if the party claiming the benefit of a proprietary estoppel knows that the agreement has no contractual force because it lacks certainty or is incomplete, this fact may prevent the estoppel from arising, as in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752, below, paras 6-173–6-174. See also paras 6-164–6-167 below for the discussion in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 of the degree of certainty which a non-contractual promise or representation must have to give rise to a proprietary estoppel; and paras 6-177 and 6-178 for the relationship on this point between the *Thorner* case and the *Cobbe* case, above.

834 *Stallion v Albert Stallion Holdings (Great Britain) Ltd* [2009] EWHC 1950 (Ch), [2010] 2 F.L.R. 78 (a divorce settlement agreed between husband and wife could not have bound a third party; but where a representation was made on behalf of that third party a claim in proprietary estoppel could succeed).

- 835 Law of Property (Miscellaneous Provisions) Act 1989 s.2(1)–(3). Previously the contract could be *made* informally, but Law of Property Act 1925 s.40 (replacing part of Statute of Frauds 1677 s.4, and now repealed) had required either a note or memorandum in writing as evidence of the contract, or “part performance” of the contract. The latter requirement could be satisfied by the conduct of the promisee giving rise to proprietary estoppel. cf. the reference to “part performance” in *Dillwyn v Llewelyn (1862) 4 D.F. & G. 517, 521*.
- 836 See above, para.6-125. cf. Law Com. No.164 (1987) para.5.5.
- 837 For the view that proprietary estoppel can apply where the subject-matter of the promise is property other than land, see below, para.6-169. For the definition of “interest in land” within s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, see s.2(6). An irrevocable licence can be a sufficiently certain “interest in land” for the purpose of satisfying the second of the requirements of proprietary estoppel stated in para.6-174 below: see *Cobbe v Yeoman’s Row Management Ltd [2008] UKHL 55, [2008] 1 W.L.R. 1752* at [21], [22], per Lord Scott.
- 838 Such as the discretionary nature of the remedy: below, paras 6-183, 6-193.
- 839 *Unreported 14 April 1994*, cited in *Thorner v Major [2009] UKHL 18, [2009] 1 W.L.R. 776* at [52].
- 840 Cited in *Thorner v Major [2009] UKHL 18, [2009] 1 W.L.R. 776* at [57] and [101]; the context indicates that “equitable” in the passage so cited refers to proprietary estoppel.
- 841 See below, para.6-187.

## **(c) - Conditions Giving Rise to Liability**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 11. - Proprietary Estoppel**

**(c) - Conditions Giving Rise to Liability**

### **Main elements of proprietary estoppel**

- <sup>162</sup> There are said to be “three main elements” of proprietary estoppel: a representation made or assurance given to the claimant, reliance by the claimant on that representation or assurance, and detriment suffered by the claimant in consequence of such reliance.<sup>842</sup> These requirements are discussed in paras 6-163—6-178 of this chapter. Our concern in these paragraphs will be with situations in which the representation or assurance is one which amounts to a promise,<sup>843</sup> or one from which a promise can be inferred, but that promise is one which for some reason (such as want of consideration, the absence of contractual intention or failure to comply with formal requirements) lacks contractual force. There can be no proprietary estoppel of the kind here under discussion where the statement relied on was not a promise at all: for example, where that statement was contained in a letter which “did not promise anything”.<sup>844</sup>

### **Kinds of promises capable of giving rise to a proprietary estoppel**

- <sup>163</sup> A promise may give rise to a proprietary estoppel even though it is not express but is implied: for example, from the fact that the parties acted on the common assumption that one of them was to have the right to reside on the other’s property.<sup>845</sup> The promise must be of such a kind that it is reasonable for the promisee to rely on it; the promisor must have been aware of the fact that the promisee would so rely on it, though “the particular act of [the promisee’s] reliance”<sup>846</sup> need not

have been known to, or foreseen by, the promisor, and the promisor must have intended that the promisee would so rely on it.<sup>847</sup> Whether this last requirement is satisfied depends on “an objective assessment”<sup>848</sup> of the promisor’s intention or, to put the same point in another way, on whether the promisee had reasonably understood the promise or representation to be one on which they could rely.<sup>849</sup> The promise must also induce the promisee to believe that a legal right has been, or will be, created in their favour.<sup>850</sup> There can normally be no such belief, and hence no proprietary estoppel, if the promise expressly disclaims legal effect: for example, in one case<sup>851</sup> it was held that no proprietary estoppel arose out of an agreement for the transfer of a number of flats “subject to contract”, it being well known that the effect of these words was to negative the intention to be legally bound.<sup>852</sup> The promisee may have formed “the confident and not unreasonable hope”<sup>853</sup> that the promise would not be withdrawn; but no *belief* to this effect had been encouraged<sup>854</sup> by the promisor or relied on by the promisee. Similar reasoning applies where the promise in terms reserves a right to the promisor wholly to revoke the promise.<sup>855</sup> The position is the same where the promise, even though it does not in terms reserve a power to revoke, is in its nature revocable and this is a matter of common knowledge so that the promisee must be taken to have been aware of the risk of its being revoked. This will often be the position where the promise is one to make a will in favour of the promisee; but it does not follow as a matter of law that such a promise cannot give rise to proprietary estoppel. In *Gillet v Holt*<sup>856</sup> the claimant had worked for nearly 40 years in the defendant’s farming business in reliance on the defendant’s frequently repeated promises to leave him the bulk of his estate; the claimant had also in various other ways relied on those promises. It was held that the promises were “more than a statement of revocable intention”<sup>857</sup>; and that they were capable of giving rise, and did give rise, to a proprietary estoppel.

## “Character or quality” of the promise

- <sup>164</sup> The “character or quality of the representation or assurance made to the claimant” in a case of alleged proprietary estoppel by “encouragement” was said by Lord Walker to have been the “main issue” in *Thorner v Major*.<sup>858</sup> In a later passage,<sup>859</sup> he amplified this statement by putting the question whether the representation or assurance must (as in cases of promissory estoppel and estoppel by representation)<sup>860</sup> be “clear and unequivocal” and, if so, just what this requirement meant in cases of proprietary estoppel. In *Thorner v Major*, David Thorner had, from 1976, worked without pay on a farm belonging to his father’s cousin Peter Thorner. David continued to work there without pay (receiving only pocket money from his father until Peter’s death in 2005). Before then, Peter (who was “taciturn”, “a man of few words” and “not given to direct talking”)<sup>861</sup> had on a number of occasions extending over many years given David to understand that he would, on Peter’s death, inherit the farm, but Peter had never made any explicit promise to this effect to David. In reliance on Peter’s conduct and statements, David had reasonably formed the expectation that he would inherit the farm on Peter’s death and had forborne from pursuing “one of the other

opportunities ... available to him".<sup>862</sup> On Peter's death intestate, David brought a claim against Peter's personal representatives<sup>863</sup> based on proprietary estoppel<sup>864</sup> (no attempt being made to argue that there was any contract between Peter and David). In upholding this claim, the House of Lords considered two main issues. The first was whether Peter's representation that David would inherit the farm was sufficiently clear to give rise to proprietary estoppel: this issue will be discussed in paras 6-165—6-167 below. The second was whether, even assuming that Peter had clearly represented that David would inherit something, that representation was sufficiently clear with respect to exactly what it was that David would inherit or (in the words of Lord Scott in the *Cobbe* case) whether the requirement of "clarity as to the interest in the property in question"<sup>865</sup> was satisfied: this issue will be discussed in para.6-175 below.

## "Clear enough" in context

- <sup>165</sup> In upholding the proprietary estoppel claim in *Thorner v Major*,<sup>866</sup> Lord Walker referred to the view that, in cases of such an estoppel, there was no requirement of any "clear and unequivocal" representation<sup>867</sup>; and that, indeed, where such an estoppel was based on mere "acquiescence",<sup>868</sup> there was no requirement of any representation at all.<sup>869</sup> Lord Walker said that he would "prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be *clear enough*. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context".<sup>870</sup> The words here italicised were approved by Lord Rodger who pointed out that they gave rise to the further question: clear enough "To whom"<sup>871</sup>; and, it may be added, for what purpose? Both these questions were answered by Lord Walker's adoption<sup>872</sup> of a passage from the judgment of Hoffmann LJ in the unreported case of *Walton v Walton*<sup>873</sup>: "The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made".<sup>874</sup> The second of these sentences is reflected in Lord Hoffmann's speech in *Thorner v Major* itself where he said that the trial judge had found "not only that it was reasonable for David to have understood Peter's words and acts to mean that 'he would be Peter's successor to [the farm]' but that it was reasonable for him to rely upon them. These findings of fact were in my opinion sufficient to support the judge's decision".<sup>875</sup>

## Three qualifications of "clear and unequivocal" requirement

- <sup>166</sup> Lord Neuberger in *Thorner v Major* accepts the proposition "that there must be some sort of an assurance which is 'clear and unequivocal' before it can be relied on to found an estoppel"<sup>876</sup>;

but he subjects that proposition to three qualifications. First, he expresses his agreement with Lord Walker's emphasis on the principle that "the effect of words must be assessed in their context", adding that "a sentence, which would be ambiguous and unclear in one context, [can] be a clear and unambiguous assurance in another context" and that this point was underlined by the fact that "perhaps the classic case of proprietary estoppel is based on silence or inaction, rather than statement or action"<sup>877</sup> —factors that (for reasons given in para.6-100 above) would not normally give rise to promissory estoppel or estoppel by representation.<sup>878</sup> Secondly, "it would be quite wrong to be unrealistically rigorous when applying the 'clear and unambiguous' test".<sup>879</sup> This test is then, in effect, reformulated: "at least normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely".<sup>880</sup> Thirdly, there may be cases in which the assurance "could reasonably be understood as having more than one possible meaning"<sup>881</sup> or, in other words, was ambiguous: in such cases Lord Neuberger, perhaps somewhat cautiously,<sup>882</sup> suggests that "the ambiguity should not deprive the person who reasonably relied on the assurance of all relief: it may well be right, however, that he should be accorded relief on the basis of the interpretation least beneficial to him".<sup>883</sup> This interesting suggestion is not in terms or in substance repeated in any of the other speeches; but it can, with respect, be said to reflect the flexibility of the principled discretion which enables the courts to fashion the remedy in cases of proprietary estoppel.<sup>884</sup> The suggestion also derives some support from the similar rule (discussed in para.29-092 below) governing the assessment of damages for breach of alternative obligations.

## Conclusion on "character or quality" <sup>885</sup>

- <sup>167</sup> The requirement of a "clear and unequivocal" assurance, representation or promise forms the starting point of the discussions in *Thorner v Major*<sup>886</sup> by Lords Walker and Neuberger of the question whether, in that case, Peter's conduct and statements were such as to give rise to a proprietary estoppel in favour of David. But, in giving an affirmative answer to that question, these speeches so much qualify the requirement (in ways described in paras 6-165 and 6-166 above) that it may respectfully be doubted whether the requirement will in future cases continue to be the best starting point for the discussion of the character or quality of the assurance necessary to give rise to a proprietary estoppel. The qualifications of the "clear and unequivocal" requirement all lead to the conclusion that the crucial questions in cases of proprietary estoppel by "encouragement"<sup>887</sup> are whether the person invoking the estoppel can establish that (in Lord Neuberger's words) "he reasonably understood the statement or action to be an assurance on which he could rely"<sup>888</sup> and whether they did then reasonably rely on it to their detriment. Similar statements can be found in the speeches of Lords Hoffmann, Scott, Rodger and Walker<sup>889</sup>; and it is of particular interest that Lord Hoffmann in his speech in *Thorner v Major* treats this as the decisive question without expressly<sup>890</sup> insisting on any further requirement that the assurance must be "clear and

“unequivocal”. It is respectfully submitted that, in any consideration of the “character and quality” of the representation, discussion of the “clear and unequivocal” point as a separate requirement amounts to an unnecessary intermediate stage in deciding whether an assurance or promise is such as to be capable of giving rise to a proprietary estoppel. If the nature of the assurance or promise is such as to give the promisee reasonable grounds for thinking that they could rely on it, and if they did reasonably rely on it, then there is no point in insisting on any *further* requirement that the assurance must be “clear and unequivocal”. Both these requirements pose essentially the same question; and to treat the second as if it imposed a requirement additional to the first is not only unnecessary but also potentially misleading. It should be added that when Lord Scott accepts “the requirement that a representation, if it is to found a claim based on proprietary estoppel must be clear and unequivocal”<sup>891</sup> he does so in the context of other questions than those discussed in the present paragraph: that is, of the questions whether the representation adequately identifies the property alleged to be affected by the estoppel and whether the operation of any such estoppel may be affected by a supervening change of the representor’s circumstances. The effect of *Thorner v Major* on these questions is discussed in paras 6-175 and 6-188 below.

## Promise must be one to create rights in or over property of the promisor

- <sup>168</sup> To give rise to a proprietary estoppel, the promise or representation must contain a statement to the effect that the promisee either has an interest in the property in question or that such an interest will be created in their favour.<sup>892</sup> The rights which the promisee believes to have been created must, as a general rule, be rights in or over the property of the promisor.<sup>893</sup> Thus a representation by a planning authority to the effect that a landowner does not need permission to carry out development on their *own* land is not capable of giving rise to a proprietary estoppel.<sup>894</sup>

## Subject-matter of the promise

- <sup>169</sup> In the cases to which the doctrine has so far been applied, the subject-matter of the promise has almost always been (or at least included<sup>895</sup>) land, but the prevailing view is that the doctrine can also apply where the subject-matter of the promise is property of some other kind,<sup>896</sup> e.g. “in relation to chattels or choses in action”<sup>897</sup> or to intellectual property: it has, for example, been held to be capable of applying to a promise relating to a licence to publish a magazine in a specified geographical region.<sup>898</sup> But, even where the doctrine applies to promises relating to such kinds of property, it will in one respect remain narrower than that of so-called promissory estoppel<sup>899</sup>: the promise must relate to the acquisition of an interest in the property that is the subject-matter of the promise. It is not enough that the promise should merely (in some other way) relate to property:

for example, the doctrine of proprietary estoppel would not apply on the facts of *Central London Property Trust Ltd v High Trees House Ltd.*<sup>900</sup>

## Detrimental reliance by promisee

- <sup>170</sup> The promisee must have relied on the promise or representation to their detriment.<sup>901</sup> Although “reliance and detriment may in the abstract be regarded as different concepts, in applying the principles of proprietary estoppel, they are often intertwined”,<sup>902</sup> so much so that they will here be treated as a single requirement. This requirement has been doubted<sup>903</sup>; but in the absence of any such reliance it is hard to see why failure to perform a merely gratuitous promise should be regarded as giving rise to any legal liability. The element of detrimental reliance is necessary to satisfy “the essential test of unconscionability”<sup>904</sup> which is a necessary condition for the operation of proprietary estoppel; and the existence of the requirement is further supported by the rules (to be discussed in para.6-179 below) as to the revocability of the promise. The detriment must be “substantial”, i.e. such as to make it “unjust or inequitable to allow the assurance to be disregarded”<sup>905</sup>; and the question whether it has this character is to be judged “as at the moment when the person who has given the assurance seeks to go back on it”.<sup>906</sup> Where a promise has been made which is capable of inducing detrimental reliance, and which is in fact followed by such reliance, the question may arise whether the reliance was actually induced by the promise. The burden on this issue is on the promisor: that is, it is up to the promisor, in order to escape liability, to show that the promisee would have done the acts in question anyway (even if the promise had not been made).<sup>907</sup> The position appears to be different where a proprietary estoppel arises because both parties have acted under a mistake as to their rights in the land.<sup>908</sup> Here it seems to be up to the party relying on the proprietary estoppel to show that their conduct in relation to the property was in fact induced by their belief that they had an interest in it.<sup>909</sup>

## Balance of detriment and benefit

- <sup>171</sup> The promisee’s conduct in reliance on the promise may result in their both suffering a detriment and gaining a benefit. This was the position in *Henry v Henry*,<sup>910</sup> where the owner of a share in the relevant land promised one of her younger relations that the share would be his if he cultivated the land and cared for her (the promisor) until her death. The promisee had complied with these requirements; and by doing so he had not only suffered a detriment in that he “deprived himself of the opportunity of a better life elsewhere”<sup>911</sup> but also gained the benefit of living rent free on the land “for decades”<sup>912</sup> and taking part of the produce for his own benefit. The Privy Council

held that the detriment suffered by the promisee must be weighed against the “countervailing advantages which he enjoyed as a consequence of [his] reliance”<sup>913</sup> and that, as the detriment was “not outweighed”<sup>914</sup>

<sup>914</sup>

by those advantages, a proprietary estoppel arose in his favour.

## Whether promise or reliance must relate to specific property

<sup>172</sup> The authorities are divided on the further question whether, to give rise to a proprietary estoppel, the promise or reliance must relate to identifiable property. According to one case, the promisee’s conduct must relate to “some specific asset” in which an interest is claimed; so that proprietary estoppel did not arise merely because B rendered services to A in the expectation of receiving some indeterminate benefit under A’s will.<sup>915</sup> But in another case reliance on a similar expectation (induced by A’s promise) was held to be sufficient even though it did not relate to any “particular property”.<sup>916</sup> The latter case can perhaps be explained on the ground that the promise did to some extent identify the property.<sup>917</sup> It is submitted that the view that the promise must relate to identified or identifiable property<sup>918</sup> is to be preferred<sup>919</sup>; for without some such limitation on the scope of proprietary estoppel the doctrine could extend to any gift promise on which the promisee had relied to their detriment. Such a very broad doctrine would be fundamentally inconsistent with the doctrine of consideration<sup>920</sup> and, indeed, with the rule that the doctrine of *promissory* estoppel gives rise to no new rights.<sup>921</sup>

## Unconscionable conduct by promisor

<sup>173</sup> Reference has been made in para.6-170 above to the point that the “essential test of unconscionability” is a necessary condition for the operation of proprietary estoppel; and the function of this requirement calls for further consideration in the light of the decision of the House of Lords in *Cobbe v Yeoman’s Row Management Ltd.*<sup>922</sup> In that case an oral agreement “in principle” had been reached between a landowner (D) and a property developer (C). The purpose of the agreement was to secure the redevelopment and disposal of residential property owned by D, but the agreement lacked contractual force as it left significant aspects of the scheme to be settled by further negotiation,<sup>923</sup> and then to be embodied in a formal agreement, between the parties, each of whom regarded the agreement at this stage as binding in honour only. C made considerable efforts and incurred considerable expense in securing the necessary planning permission; but on the day when the planning authority resolved to grant the permission D withdrew from the agreement. In the lower courts,<sup>924</sup> this conduct on D’s part was, by reason

of its unconscionableness, regarded as “sufficient to justify the creation of a ‘proprietary estoppel equity’”<sup>925</sup> in favour of C. Their decision was reversed by the House of Lords which unanimously held that C had no such proprietary claim.<sup>926</sup>

- <sup>174</sup> In rejecting the proprietary estoppel claim, Lord Scott<sup>927</sup> said that “to treat a ‘proprietary estoppel equity’ as requiring ... simply unconscionable behaviour” was a “recipe for confusion”<sup>928</sup> and he listed two further

“... ingredients for a proprietary estoppel ... These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting.”<sup>929</sup>

He in substance repeated these points in a later passage:

“Proprietary estoppel requires ... clarity as to what it is that the object of the estoppel [i.e. the defendant] is to be estopped from denying, or asserting, and clarity as to the interest in the property<sup>930</sup> in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will ... risk becoming unprincipled and therefore unpredictable, if it has not already done so.”<sup>931</sup>

In the *Cobbe* case, neither requirement was satisfied since the “agreement in principle”, was, as C knew, incomplete and binding in honour only, so that C could not allege that D was bound by it; and since, at the time of D’s withdrawal, C was not asserting any expectation that he would acquire a proprietary right.<sup>932</sup> His expectation was “the wrong sort of expectation”<sup>933</sup>; namely one that further negotiations between him and D would fill the gaps in the “agreement in principle” and that the agreement, thus completed, would be embodied in a formal written agreement and so become a binding contract. He was expecting to get a contractual, rather than a proprietary, right.<sup>934</sup>

- <sup>175</sup> The question whether there was sufficient “clarity as to the interest in the property in question”<sup>935</sup> arose again in *Thorner v Major*,<sup>936</sup> where Peter’s assurances (the nature of which is discussed in paras 6-165—6-167 above) were to the effect that David would inherit “the farm” (i.e. Steart Farm); and where the area to which that expression referred changed, as a result of disposals and acquisitions during the years in which that assurance had repeatedly been made. This fact was held not to be an obstacle to David’s proprietary estoppel claim since (in Lord Walker’s words) the parties’ “common understanding was that Peter’s assurance related to whatever the farm consisted of at Peter’s death ... This fits in with the retrospective operation of proprietary estoppel noted in *Walton v Walton*”,<sup>937</sup> an unreported decision of the Court of Appeal referred to with approval in

*Thorner v Major*.<sup>938</sup> Hoffmann LJ had there (in a passage already quoted in para.6-161 above) said that “equitable estoppel” (an apparent reference to proprietary estoppel) “looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have happened, it would be unconscionable for the promise not to be kept”.<sup>939</sup> Such “circumstances” could, therefore, either reduce or increase the extent of the property known as “Steart Farm”, to which the proprietary estoppel related. Lord Neuberger similarly said that “the extent of the farm might change, but … there is … no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter’s death”.<sup>940</sup> That was also the view of Lord Scott: “Peter’s representation that David would inherit Steart Farm speaks, at least where Peter remained the owner of an agricultural entity known as Steart Farm, as from his death and if, at that time, evidence were available to identify Steart Farm with certainty, David’s claim in equity cannot … be rejected for want of certainty of subject-matter”.<sup>941</sup> The fact that Lord Scott took this view is of particular significance as he evidently saw no inconsistency between it and his rejection of the proprietary estoppel claim in the *Cobbe* case on the ground of lack of “clarity as to the interest in the property in question”.<sup>942</sup>

- <sup>176</sup> In the *Cobbe* case, Lord Walker<sup>943</sup> also rejected the claim based on proprietary estoppel (which he there called “equitable estoppel”).<sup>944</sup> His policy reasons for so doing seem to resemble (though they are not expressed in the same language as) Lord Scott’s. While accepting the flexibility of the doctrine, Lord Walker starts with the point that it is “not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side”<sup>945</sup> since, if it were so used, it would impair the certainty which was important in property transactions, especially in those of a commercial nature.<sup>946</sup> This reasoning can be said to resemble Lord Scott’s view that such a broad application of proprietary estoppel would be a “recipe for confusion”<sup>947</sup>; but Lord Walker’s more specific reasons for rejecting the proprietary estoppel claim seem to differ in two important respects. First, Lord Walker’s main ground for dismissing the proprietary estoppel claim has no counterpart in Lord Scott’s speech. That ground was stated by Lord Walker to be that C’s proprietary estoppel claim “seems to me to fail on the simple but fundamental point that, as persons experienced in the property world, both parties knew that there was no legally binding contract, and that either was free to discontinue the negotiations without legal liability, that is liability in equity as well as at law. [C] was therefore running a risk … He ran a commercial risk with his eyes open”.<sup>948</sup> Lord Scott makes no express reference to *this* risk, though it may be reflected in his discussion of the reasons why the first of the “ingredients” of proprietary estoppel (discussed in para.6-174 above) had not been established. The only “risks” to which Lord Scott expressly refers as having been taken by C were the different risks “that planning permission might be refused” and that the enterprise “might leave him with an inadequate profit or even none at all”.<sup>949</sup> Secondly, Lord Scott rejects the proprietary estoppel claim in spite of the fact that D’s conduct was “unconscionable”, regarding that circumstance as not “sufficient to justify the creation of a ‘proprietary estoppel equity’”.<sup>950</sup> Lord Walker, by contrast, rejects that claim,

not only on the ground given above (i.e. that C “ran a commercial risk with his eyes open”) <sup>951</sup> but also on the further ground that C “knew that [D] was bound in honour only, and so in the eyes of equity her [D’s] conduct, although unattractive, was not unconscionable”. <sup>952</sup> One possible explanation of this difference between the two speeches is that Lord Scott’s concern was to deny that unconscionable conduct, even if proved, was a *sufficient* condition, while Lord Walker’s was to emphasise that such conduct was a *necessary* condition (which had not been satisfied) for the operation of proprietary estoppel. Another possibility is that while Lord Scott denied that even actually unconscionable conduct was sufficient for this purpose, Lord Walker was, more narrowly, concerned to deny the sufficiency of conduct that was not *actually* unconscionable but only unconscionable “in the eyes of equity”, <sup>953</sup> or, in other words, by virtue of a legal fiction. On the first of these views, the question then arises what *further* requirement, other than unconscionable conduct, must be satisfied as a necessary condition of the operation of proprietary estoppel. As the foregoing discussion in paras 6-173 and 6-174 shows, the answer to this question given by Lord Scott differs from that given by Lord Walker, though on the facts of the *Cobbe* case both answers led to the same result. <sup>954</sup>

## Relationship between the Cobbe and Thorner cases

<sup>177</sup> On the issue of proprietary estoppel, the outcome of the *Cobbe* case <sup>955</sup> differed from that of *Thorner v Major* <sup>956</sup> and the question arises whether this difference in outcome reflects a difference in legal principle between the two cases. In discussing this question, a number of preliminary points must be made. First, of the five members of the Appellate Committee of the House of Lords in the *Cobbe* case, three (Lords Hoffmann, Scott and Walker) were also members of that Committee in *Thorner v Major*. Of those three, only one (Lord Walker) commented on the former decision in his speech in the latter, the most detailed discussion of the relationship between the two cases being contained in Lord Neuberger’s speech in *Thorner v Major*. Secondly the respondents (i.e. the defendants) in *Thorner v Major* “did not contend that this House’s decision in *Cobbe v Yeoman’s Row Management* … has severely curtailed, or even virtually extinguished, the doctrine of proprietary estoppel”. <sup>957</sup> In *Thorner v Major* Lord Walker described the view that this was the effect of the *Cobbe* case as a “rather apocalyptic one” <sup>958</sup> though he accepted that the *Cobbe* case was “certainly relevant to the second issue” <sup>959</sup> in the *Thorner* case; but on that issue the two cases were distinguished on their facts and not considered to give rise to any conflict of legal principle. <sup>960</sup> Thirdly, Lord Neuberger in *Thornton v Major* said that “Concentrating on the perceived morality of the parties’ behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in *Cobbe* …” <sup>961</sup> This statement of the underlying policy is in substance the same as that contained in passages from the speeches of Lords Scott and Walker in the *Cobbe* case which are cited in paras 6-174 and 6-176 above, so that, on this point at least, there is no conflict of policy between the two cases. But in the same paragraph of his speech Lord Neuberger also said that “it would represent a regrettable and substantial emasculation of

the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case".<sup>962</sup> It is accordingly under the heading of the alleged "Uncertainty as to the extent of the property"<sup>963</sup> that Lord Neuberger discusses the distinction between the two cases. There is no such discussion under his heading of "Reasonable reliance"<sup>964</sup> where he deals with the question (described by Lord Walker as "The main issue before the House")<sup>965</sup> whether Peter's assurance had been sufficiently clear to make it reasonable for David to act in reliance on it. It may not always be easy to distinguish between these two issues, but the distinction is, with respect, at least helpful for purposes of exposition.

- <sup>178</sup> A useful starting point for concluding this discussion of the distinction between the two cases is perhaps that the facts of each of them were said by Lord Neuberger to be "unusual",<sup>966</sup> though, as might be expected where this was the case, they were unusual in different ways. The unusual feature of *Thorner v Major* lay in the oblique, indirect nature of the utterances by which Peter induced David to believe that David would inherit Steart Farm<sup>967</sup>; the unusual feature of the *Cobbe* case lay in "the total uncertainty as to the nature or terms of any benefit (property interest, contractual right or money) and, if a property interest, as to the nature of that interest (freehold, leasehold or charge) to be accorded to Mr Cobbe".<sup>968</sup> There was "no doubt about the physical identity of the property",<sup>969</sup> as there was in *Thorner v Major*, where that doubt was resolved in the way explained in para.<sup>6-175</sup> above. A second distinction between the two cases lay in the nature of the relationship between the parties. In the *Cobbe* case, that relationship was an "entirely at arm's length and commercial" one, in which "the parties could well have been expected to enter into a contract" but had "consciously chosen not to do so".<sup>970</sup> In those circumstances it would have been wrong to allow estoppel to be used as, in effect, a mechanism to enforce an agreement which had deliberately been left incomplete<sup>971</sup> and which also failed to comply with the formal requirements for contracts for the disposition in land. In *Thorner v Major*, by contrast, the relationship between the parties "was familial and personal" and "at no time had either of them even started to contemplate entering into a formal contract as to the ownership of the farm after Peter's death".<sup>972</sup> It is true that, from a legal point of view, the non-contractual nature of Peter's assurance could be said to result from lack of contractual intention and that the same explanation could be used to account, at least in part, for the non-contractual nature of the relationship of the parties in the *Cobbe* case. But there this conclusion followed from a deliberate choice of the parties, while in *Thorner v Major* it followed as a matter of course from the nature of the relationship between them. In such cases of "familial and personal" relationships, the fact that the relevant promise or assurance was not intended to be legally binding has never been regarded as an obstacle to giving effect to it by way of proprietary estoppel. On the contrary, in cases of this kind, the fact that the promise had no contractual force for want of contractual intention has traditionally and typically been the precise ground for equitable intervention by way of proprietary estoppel.<sup>973</sup> This point is further supported by Lord Neuberger's explanation of the reason why s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 (which lays down the formal requirements for

the making of a contract for the disposition of an interest in land) was regarded as relevant to the outcome in *Cobbe*'s case<sup>974</sup> but was not relevant in *Thorner v Major*, where the claim was "a straightforward estoppel claim without any contractual connection".<sup>975</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 842 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [15], [29], [42]; *Crossco No.4 Unlimited v Jolan Ltd*, Note [2011] EWCA Civ 1629, [2012] 2 All E.R. 754 at [114]; *Burton v Liden* [2016] EWCA Civ 275, [2017] 1 F.L.R. 310 at [16]; *Davies v Davies* [2014] EWCA Civ 565 at [29]; see also *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P. & C.R. 10 at [38]; *Moore v Moore* [2018] EWCA Civ 2669, [2019] 1 F.L.R. 1277 at [24]–[25]. *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 (reversed on other grounds [2018] UKSC 24, [2018] 2 W.L.R. 1603, see below, para.25-047) where the "three main elements" of proprietary estoppel are stated ([2016] EWCA Civ 553 at [65]) but it was held that no such estoppel arose because (1) the right claimed by the person relying on the estoppel was not "a proprietary right" and (2) that person had not "suffered any detriment".
- 843 See [2009] UKHL 18 at [2] ("promise or assurance").
- 844 *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [31]–[34].
- 845 e.g. *Re Sharpe* [1980] 1 W.L.R. 219; *Ashby v Kilduff* [2010] EWHC 2034 (Ch), [2010] 3 F.C.R. 80 at [72]. However, it seems that only proprietary estoppel "by acquiescence" can be grounded on silence and inaction: *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [61], [84]. Positive assurances cannot generally be found from "silence": see para.6-100 above.
- 846 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [5].
- 847 *Gillett v Holt* [2001] Ch. 210, 229.
- 848 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [17]; cf. at [60].
- 849 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [5], [26], [78]; *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 F.L.R. 875 at [42]; affirmed [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607, where the trial judge's finding that a promise had been made was not challenged on appeal (see at [28]) and the Court of Appeal concluded that "there was sufficient reliance and detriment" (at [38]).
- 850 See *Kinane v Mackie-Conneh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345 at [29].
- 851 *Att-Gen of Hong Kong v Humphreys Estates (Queen's Gardens)* [1987] 1 A.C. 114; the case was said in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 C.L.R. 387, 404 to be "not a case of proprietary estoppel" but (apparently) one of *promissory estoppel*. But most of the authorities relied on in the *Humphreys Estates* case were cases of proprietary estoppel; the leading cases on promissory estoppel were not cited; and if the requirements of

encouragement and reliance had been satisfied the estoppel would have created a new right, which in English law is not the effect of promissory estoppel: above para.6-108.

852 Above, paras 4-214—4-215. See also *Saloman v Akiens* [1993] 1 E.G.L.R. 101 (no proprietary estoppel arising from agreement “subject to lease”); *Crossco No.4 Unlimited v Jolan Ltd, Note* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [133] (“where parties have been dealing on the basis that their negotiations are ‘subject to contract’, proprietary estoppel will not ordinarily be available”). cf. the discussion of *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 in paras 6-174 and 6-176 below.

853 *Humphreys Estates case* [1987] 1 A.C. 114, 124.

854 cf. above para.6-156; *Brinnand v Ewens* (1987) 19 H.L.R. 415; and (in a different context) *Kelly v Liverpool Maritime Terminals* [1988] I.R.L.R. 310, where authorities on proprietary estoppel are cited in a case unconnected with property.

855 *Taylor v Dickens* [1998] F.L.R. 806, as explained in *Gillett v Holt* [2001] Ch. 210 at 227.

856 [2001] Ch. 210.

857 [2001] Ch. 210, 228.

858 [2009] UKHL 18, [2009] 1 W.L.R. 776 at [30].

859 At [52].

860 See above, para.6-097, below, para.9-111.

861 [2009] UKHL at [37], quoting from [31] and [32] of the judgment at first instance.

862 [2009] UKHL at [40].

863 At [32].

864 At [1], [2].

865 *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [28]; below, para.6-174.

866 [2009] UKHL 18, [2009] 1 W.L.R. 777.

867 At [54], where Lord Walker noted that this view had been expressed in a number of editions of “Treitel, Law of Contract”, including the then current 12th edition by Peel. The same view (as that quoted by Lord Walker) was stated in para.3-162 of the 30th edition of the present book.

868 See above, para.6-156.

869 [2009] UKHL 18 at [55]; and see below, para.6-191.

870 At [56], italics supplied. See also *Burton v Liden* [2016] EWCA Civ 275 at [24], where the context in which the representation was made was said to be “hugely important” and Lord Walker’s test of reasonable clarity in that context (stated in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 777 at [56], quoted in the text above) was held to have been satisfied.

871 At [36].

872 At [57].

873 Unreported 14 April 1994, cited in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [52].

874 Quoted in [2009] UKHL 18 at [57].

875 At [6]. See also *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 F.L.R. 875 at [53] (*affirmed* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607).

876 *[2009] UKHL 18* at [84].

877 At [84] referring to the “acquiescence” cases (above, para.6-156).

878 See further para.6-191 below.

879 *[2009] UKHL 18* at [85].

880 At [84].

881 At [86].

882 See the words “it seems to me that, at least normally ...” (at [86]).

883 At [86]. In the unreported case of *Walton v Walton* (14 April 1994) Hoffmann LJ had, in a passage quoted in *Thorner v Major* [2009] UKHL 18 at [56] said that “the promise must be unambiguous”; but the fact that he does not refer in the latter case to this requirement may indicate that he no longer strictly insisted on it.

884 See below, paras 6-183—6-187.

885 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [30].

886 [2009] UKHL 18, [2009] 1 W.L.R. 776. Lord Hoffmann at [9] expressed his agreement with the speeches of Lords Walker and Neuberger on the “identifiable property” issue (discussed in para.6-175 below); Lord Scott at [11] expressed his “broad agreement” with the same speeches; and Lord Rodger at [18] expressed his agreement with those speeches.

887 See above, para.6-156.

888 *[2009] UKHL 18* at [85].

889 At [5], [17], [26], [60].

890 Lord Hoffmann’s statement at [6] (quoted in para.6-165 above) contains no reference to any need for an “unequivocal” assurance. Nor does his discussion at [8], read as a whole, support any such requirement: see the last sentence of para.6-165 above.

891 At [18].

892 This requirement was not satisfied in *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] 1 W.L.R. 1884; see also above, para.6-109 above.

893 One exception to this general rule occurs where the promisor makes two promises, of which the first relates to their own land while the second relates to that of the promisee; if the two promises are so closely linked as to form in substance a single transaction, the doctrine of proprietary estoppel might apply to that transaction as a whole: *Salvation Army Trustee Co v West Yorks Metropolitan CC* (1981) 41 P. & C.R. 179. See also *Lester v Woodgate* [2010] EWCA Civ 199, [2010] 2 P. & C.R. 21 at [3]: “Although proprietary estoppel ... is largely concerned with cases in which the defendant acquires some right over the claimant’s property as a result of the latter’s conduct towards him, I can see no reason why the principles involved are not of equal application to cases in which the defendant is alleged to have committed an act of nuisance by interfering with an easement over his own land. In both cases, the claimant’s conduct *relates to his property rights* and the estoppel bars the enforcement of the claimant’s legal rights”.

894 *Western Fish Products Ltd v Penwith DC* [1981] 2 All E.R. 204 (decided in 1978); cf. *Lloyds Bank Plc v Carrick* [1996] 4 All E.R. 630 (no proprietary estoppel in favour of a purchaser of land as by virtue of the contract he had become equitable owner of the land).

895 *Re Basham* [1986] 1 W.L.R. 1498.

- 896 *Western Fish Products Ltd v Penwith DC* [1981] 2 All E.R. 204 (decided in 1978) at 217; cf. the reference at 218, and in *Crabb v Arun DC* [1976] Ch. 179, 187, to the decision of the Court of Appeal in *Moorgate Mercantile Co v Twitchings* [1976] Q.B. 225; that decision was reversed by the House of Lords: [1977] A.C. 890.
- 897 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [14] per Lord Scott ("in principle equally available in relation to chattels or choses in action"); see too *Strover v Strover* [2005] EWHC 860 (Ch), [2005] W.T.L.R. 1245 at [39].
- 898 *Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch) at [61]; the actual decision in this case was that *no* proprietary estoppel arose since other requirements of the doctrine were not satisfied: see at [72], [75].
- 899 See above, paras 6-093, 6-109, 6-144.
- 900 [1947] K.B. 130; above, para.6-144. cf. *Sami v Hamit* [2018] EWHC 1400 (Ch) at [40]–[43].
- 901 *Greasley v Cooke* [1980] 1 W.L.R. 1306; *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133n; *Grant v Edwards* [1986] Ch. 638, 657; *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [21], [42]; cf. *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107, 132; *Hammond v Mitchell* [1991] 1 W.L.R. 1127; *Van Leathem v Booker* [2005] EWCA Civ 1478, [2006] F.C.R. 697. The fact that there was no such reliance was one reason why the claim based on proprietary estoppel failed in *Western Fish Products Ltd v Penwith DC* [1981] 2 All E.R. 204, see at 217; in *Coombes v Smith* [1986] 1 W.L.R. 808; in *Att-Gen of Hong Kong v Humphreys Estates (Queen's Gardens)* [1987] A.C. 114; and in *H v M (Property Occupied by Wife's Parents)* [2004] EWHC 625, [2004] F.L.R. 16.
- 902 *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988 at [55]; cf. *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 F.L.R. 875 at [59], affirmed [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607, where the Court of Appeal concluded at [38] that "there was sufficient reliance and detriment".
- 903 By Lord Denning MR in *Greasley v Cooke* [1980] 1 W.L.R. 1306, 1311.
- 904 *Gillett v Holt* [2001] Ch. 210 at 232, a dictum cited with approval by Lord Neuberger in *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764 at [63], stating the requirement of detriment to be "part of a broad enquiry into unconscionability". In that case the requirement was not satisfied: see at [63], [71] and [11]; *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [21], [42]; *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345 at [29]; *Hopper v Hopper* [2008] EWHC 228 (CL), [2008] 1 F.C.R. 557 at [111]. In *Habberfield v Habberfield* [2019] EWCA Civ 890 the Court of Appeal held that it would have been unconscionable for the promisor to rescile from a promise to transfer the running of the farm to the promisee on the promisor's retirement (and that the promisee would inherit the farm upon the promisor's death), even though the promisee later rejected an offer to run the farm in partnership with the promisee: the partnership offer would not have fulfilled the promisee's expectation (at [30]) and was not presented as a final offer (at [44]).
- 905 *Gillett v Holt* [2001] Ch. 210, 232.
- 906 *Gillett v Holt* [2001] Ch. 210 at 232. See also *Mulholland v Kane* [2009] NICH 9.
- 907 *Greasley v Cooke* [2001] Ch. 210; *Grant v Edwards* [1986] Ch. 638, 657; *Re Basham* [1986] 1 W.L.R. 1498; *Hammersmith & Fulham BC v Top Shop Centres Ltd* [1990] Ch. 237; *Wayling*

*v Jones* (1993) 69 P. & C.R. 170, 172; *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P. & C.R. 16 at [94].

908 Above, para.6-156.

909 *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133 note; cf. *Coombes v Smith* [1986] 1 W.L.R. 808.

910 [2010] UKPC 3, [2010] 1 All E.R. 988.

911 [2010] UKPC 3, [2010] 1 All E.R. 988 at [61].

912 [2010] UKPC 3, [2010] 1 All E.R. 988 at [27] citing [12] of the judgment at first instance.

913 [2010] UKPC 3 at [51]; see also at [53].

914 [2010] UKPC 3 at [61]. In *Anaghara v Anaghara* [2020] EWHC 3091 (Ch) at [34] Zacaroli J relied upon *Henry v Henry* for the proposition that where a party's detriment flows from its failure to act in a different way "it would be unreasonable to expect chapter and verse as to the hypothetical counterfactual".

915 *Layton v Martin* [1986] 2 F.L.R. 277, cited with apparent approval, but distinguished by Lord Walker in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [63]; for discussion of the present requirement in that case, see below, para.6-175.

916 *Re Basham* [1986] 1 W.L.R. 1498, 1508.

917 By referring to the promisor's cottage. In *Gillett v Holt* [2001] Ch. 210 the property was likewise identified, if not very precisely; cf. *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [50], where the promise again related in part to the promisor's house.

918 In *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [61], Lord Walker uses the expression "identified property" but is not, at this stage, concerned with any distinction between identified and identifiable property. Other cases support the view that identifiability (as opposed to identification) suffices: e.g. *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607 (at [48]).

919 This view is supported, though perhaps not conclusively, by repeated references in Lord Scott's speech in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [18], [19], [20] to a "certain interest in land" and at [28] to "clarity as to the interest in the property". If there is no certainty or clarity in "the property" it is unlikely for this requirement to be satisfied with regard to the "interest" in it.

920 e.g. above, paras 6-002, 6-029.

921 Above, para.6-106.

922 [2008] UKHL 55, [2008] 1 W.L.R. 1752. For an extended discussion of this case and of *Thorner v Major* [2005] UKHL 18, [2009] 1 W.L.R. 776 (above para.6-164), see *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWHC 803 (Ch), where estoppel claims failed as their factual bases were not established (affirmed on appeal: [2011] EWCA Civ 1619, [2012] 2 All E.R. 754).

923 Above, para.4-145.

924 [2005] EWHC 266 (Ch), [2005] W.T.L.R. 625; [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964.

925 [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [28].

- 926 However, C was entitled to a quantum meruit on the basis of having rendered services in pursuance of a contract which was expected to materialise but never came into existence: *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [42].
- 927 With whose speech Lord Hoffmann; Brown and (except on a point relating to the amount of the quantum meruit claim: see at [44], [96]) Lord Mance agreed.
- 928 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [16].
- 929 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [16].
- 930 See also *Capron v Government of Turks and Caicos Islands* *[2010] UKPC 2* at [36]–[40]; *Crossco No 4 Unlimited v Jolan Ltd, Note* *[2011] EWCA Civ 1619*, *[2012] 2 All E.R. 754* at [114].
- 931 *[2008] UKHL 55* at [28].
- 932 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [15]. C's constructive trust claim also failed (at [30]–[38]) for reasons beyond the scope of this chapter.
- 933 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [20].
- 934 C's claim for specific performance of the “agreement in principle” had been abandoned as that agreement was not enforceable: *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [9], so that it was not open to him to argue that he had, by virtue of that agreement, become owner in equity of the property.
- 935 *Cobbe v Yeoman's Row Management Ltd* *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [28].
- 936 *[2009] UKHL 18*, *[2009] 1 W.L.R. 776*, above, para.6-164.
- 937 *[2009] UKHL 18* at [62]; cf. at [101], per Lord Neuberger.
- 938 At [57] and see above, para.6-161.
- 939 See the passage quoted in *Thorner v Major* *[2008] UKHL 18* at [57].
- 940 At [95]. Lord Hoffmann at [9] agreed with Lords Walker and Neuberger on this point. Lord Rodger express his agreement with Lord Walker's speech “on the first point” (i.e. on that discussed in paras 6-164—6-167 above); and at [28] with Lord Neuberger's reasons.
- 941 At [18].
- 942 *Cobbe v Yeoman's Row Management Ltd* *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [28]; above, para.6-174.
- 943 With whose speech Lord Brown agreed.
- 944 See above, para.6-155.
- 945 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [46].
- 946 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [81].
- 947 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [16]; above para.6-174.
- 948 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [91].
- 949 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [6].
- 950 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [28].
- 951 i.e. in addition to the ground stated by him at [91] that “he ran a commercial risk with his eyes open”.
- 952 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [92] (italics supplied).
- 953 *[2008] UKHL 55*, *[2008] 1 W.L.R. 1752* at [92].

- 954 See *Herbert v Doyle* [2010] EWCA Civ 1095, [2015] W.T.L.R. 1573; *Matchmove Ltd v Dowding and Church* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 at [30]–[32].
- 955 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752, above, paras 6-173—6-176.
- 956 [2009] UKHL 18, [2009] 1 W.L.R. 776; above, paras 6-164—6-167, 6-175. For other cases relevant to the relationship between the *Cobbe* and *Thorner* cases, see e.g. *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988 (above, para.6-176); *Herbert v Doyle* [2010] EWCA Civ 1095, esp. at [57]; *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWHC 803 (Ch), affirmed [2011] EWCA Civ 1619, [2012] 2 All E.R. 754; and *Mulholland v Cane* [2009] NICh 9.
- 957 [2009] UKHL 18 at [31].
- 958 At [31].
- 959 At [31]. The “second issue” was that of clarity as to the interest in the property in question; it is discussed in para.6-174 above.
- 960 [2009] UKHL 18 at [63], [64] and see para.6-178 below.
- 961 At [98]; and at [92]: it was not enough for Mr Cobbe to be “simply seeking a remedy for the unconscionable behaviour of Yeoman’s Row”.
- 962 [2009] UKHL 18 at [98].
- 963 Before [90].
- 964 Before [74].
- 965 Before [52].
- 966 At [81] (referring to the *Thorner* case) and [99] (referring to the *Cobbe* case).
- 967 See paras 6-164—6-167 above.
- 968 [2009] UKHL 18 at [94].
- 969 At [94].
- 970 At [96].
- 971 cf. the rule that a proprietary estoppel cannot generally arise out of an agreement expressed to be “subject to contract” (above, para.6-163).
- 972 [2009] UKHL 18 at [97]. For the “distinction between domestic and commercial cases” in the present context, see also *Crossco No.4 Unlimited v Jolan Ltd, Note* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [80], [121]; *Sahota v Prior* [2019] EWHC 1418 (Ch) at [32]–[33].
- 973 See, for example, above para.6-157.
- 974 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [29].
- 975 *Thorner v Major* [2009] UKHL 15, [2009] 1 W.L.R. 776 at [99]; above, para.6-125.

## (d) - Effects of the Doctrine

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 11. - Proprietary Estoppel

(d) - Effects of the Doctrine

### Revocability

- [79] We have seen that proprietary estoppel will not arise at all where the promise to confer a benefit on the promisee is revocable in the sense that it reserves a power to the promisor wholly to deprive the promisee of that benefit.<sup>976</sup> But even where the promise does not allow the promisor do this, and so is capable of giving rise to a proprietary estoppel, the extent of the promisee's rights under the estoppel may be limited by terms of the promise giving the promisor a power of putting an end to those rights. Thus if the landowner promises to allow the promisee to stay on the land "until I decide to sell", then the promisee cannot, merely by spending money on improvements to the land, acquire any right to stay there for a longer period.<sup>977</sup> Even where the promise is not expressed to be revocable, it can be revoked before the promisee has acted on it. Thus in *Thorner v Major*<sup>978</sup> Peter could not, in the absence of any "clear indication that [his] statement was revocable", "freely" have gone back on it "once [it] ... had been maintained by Peter and acted on by David for a substantial period".<sup>979</sup> In this respect proprietary estoppel resembles so-called promissory estoppel (under which promises are similarly revocable<sup>980</sup>) and differs from contractually binding promises which are not revocable unless they expressly, or impliedly, provide that they are revocable. The cases on proprietary estoppel assume that, once the requisite action in reliance on the representation has taken place, the promisee cannot be restored to their original position. Where he has made improvements to land, this will generally be the case. Where a restoration of the status quo is physically possible, it seems that a promise giving rise to a proprietary estoppel could be revoked, even after the promisee had acted on it, if the promisor had in fact restored the promisee to the

position in which he was before he had acted in reliance on the promise, or (it seems) if the promisee has made it clear that he does not wish to be restored to that position.<sup>981</sup>

## Operation of a proprietary estoppel

- <sup>180</sup> Where the conditions required to give rise to a proprietary estoppel have been satisfied, the effect of the doctrine is said to be to confer an “equity” on the promisee. Two further questions then arise: namely, what is the extent of that “equity”, and what are the remedies for its enforcement.<sup>982</sup> In practice these questions tend to merge into each other.

## Extent of the equity

- <sup>181</sup> At one extreme, the promisee may be entitled to conveyance of the fee simple in the property which is the subject-matter of the promise, as in *Dillwyn v Llewelyn*.<sup>983</sup> On the other hand, in *Inwards v Baker*,<sup>984</sup> where a son had also built a house for himself at his father’s suggestion on the latter’s land, the result of the estoppel was only to entitle the son to occupy the house for life. Similar results were reached in a number of later cases in which the promisee made improvements to the promisor’s property (or otherwise acted to his detriment) in reliance on a promise, or common understanding, that the promisee would be able to reside in the property for as long as he or she wished to do so,<sup>985</sup> or for some shorter period: e.g. until her children had left school<sup>986</sup>; or that a lease of the premises would be granted to him<sup>987</sup>; or that he was entitled to an equitable charge on the land.<sup>988</sup> Such cases can be reconciled with *Dillwyn v Llewelyn* by reference to the terms of the respective promises<sup>989</sup>: in the former case, the promise was expressed in terms of a gift of the property, while in the latter cases it amounted to no more than an assurance that the promisee would be entitled to reside in the property for the specified period.

## Availability of estoppel against third parties

- <sup>182</sup> Where the circumstances are such as to give rise to an estoppel against the landowner, the estoppel is equally available against a third party who claims later to have obtained title to the land by way of gift from the landowner.<sup>990</sup> Proprietary estoppel may also be available against a purchaser from the promisor: e.g. where the purchaser had notice of the promisee’s equity or knew of facts giving rise, under legislation governing land registration, to an overriding interest.<sup>991</sup>

## Remedy: principled discretion

- <sup>183</sup> The remedy in cases of proprietary estoppel is “extremely flexible”, its object being “to do what is equitable in all the circumstances”. <sup>992</sup> Although the court thus has a considerable discretion with regard to the remedy in cases of proprietary estoppel, that discretion is not “completely unfettered” <sup>993</sup> and a “principled approach” <sup>994</sup> must be taken to its exercise. In giving effect to the “equity” <sup>995</sup> account must be taken, not only of the claimant’s expectations “but also of the extent of his detrimental reliance” <sup>996</sup>; and there must also be “proportionality between the expectation and the detriment”. <sup>997</sup> For the purpose of achieving such “proportionality” regard must be had to the degree of precision of the promise giving rise to the expectation. Where this amounts to an assurance that an interest in specific property will be transferred in return for specified acts, then an order for the specific enforcement of that promise (once the acts have been done) may be the appropriate remedy. <sup>998</sup> Where, on the other hand, the terms of the promise are less precise, amounting only to an assurance that some indeterminate benefit will be conferred on the promisee, so that the expectations reasonably arising from it are, at least objectively, uncertain, then the court will not give effect in full to expectations which the promisee may in fact have formed if they are “uncertain or extravagant or out of all proportion to the detriment which the claimant has suffered”. <sup>999</sup> In such cases, compensation in money is likely to be the more appropriate remedy. That compensation must be proportionate to the detriment, but need not be its precise equivalent <sup>1000</sup>: the fact that the detriment was incurred in response to a promise indicating (though in vague terms) some higher level of recompense is also to be taken into account. In *Habberfield v Habberfield* Lewison LJ said:

“Looking back from the moment when assurances are repudiated, the nearer the overall outcome comes to the expected reciprocal performance of requested acts in return for the assurance, the stronger will be the case for an award based on or approximating to the expectation interest created by the assurance. That does no more than to recognise party autonomy to decide for themselves what a proportionate reward would be for the contemplated detriment.” <sup>1001</sup>

## Starting point: terms of the promise

- <sup>184</sup> In exercising its discretion with regard to the proper remedy in cases of proprietary estoppel, the court will obviously take as its starting point the terms of the assurance or promise, as reasonably interpreted by the promisee. Thus in *Thorner v Major* <sup>1002</sup> the promise made by Peter to David

was that David would on Peter's death inherit the farm owned by Peter (Stearn Farm). David's proprietary estoppel claim had originally extended to the whole of Peter's net estate<sup>1003</sup> but the order in his favour was confined to Steart Farm and certain related assets.<sup>1004</sup> Peter had indeed at one stage made (and then revoked) a will leaving the whole of his residuary estate to David but as "David knew nothing about this"<sup>1005</sup> the estoppel did not extend to parts of that estate unconnected with the farm. In other cases, the amount awarded may be reduced to take into account benefits received by the promisee,<sup>1006</sup> or to ensure an outcome proportionate to the detriment suffered by the promisee in reliance on the assurances given to them.<sup>1007</sup> The court may also take into account the conduct of the promisor after the facts giving rise to the estoppel.<sup>1008</sup>

## Compensation in money

- 185 A remedy by way of compensation in money may often be more satisfactory for the promisee, and has the advantage for the promisor that they would not be impeded in dealing with the property for an indefinite time.<sup>1009</sup> Such a remedy was granted in *Dodsworth v Dodsworth*<sup>1010</sup> where the promisees spent £700 on improvements to the promisor's bungalow in reliance on an implied promise (not intended to have contractual force) that they could live there as if it were their home. The Court of Appeal held that to give the promisees a right of occupation for an indefinite time would confer on them a greater interest than had been contemplated by the parties; and that the most appropriate remedy was to repay them their outlay on the improvements. Compensation in money will also be the more appropriate remedy where, as a practical matter, the promise which gave rise to the estoppel cannot be specifically enforced: for example, where its performance would involve joint occupation of premises by, and co-operation between, members of a family who later quarrel,<sup>1011</sup> or between a couple whose relationship has broken down.<sup>1012</sup> Compensation in money may, again, be the most appropriate remedy because it will achieve a result that is fair, not only between the promisee and the deceased promisor's estate, but also between beneficiaries who share that estate on the promisor's death.<sup>1013</sup> Where there is evidence that the improved property has increased in value by reason of market fluctuations, it is submitted that the amount recoverable by the promisee should be increased correspondingly; conversely, it should be reduced where the market value of the property has declined.<sup>1014</sup>
- 186 In *Dodsworth v Dodsworth*<sup>1015</sup> the court awarded compensation even though, when the action was brought, the promisee was still in possession of the improved property. More commonly this form of remedy is granted where the promisee is no longer in possession, having either left voluntarily<sup>1016</sup> or been lawfully ejected as a result of legal proceedings.<sup>1017</sup> Where the promisee has been wrongly ordered to give up possession, compensation in money is similarly available,<sup>1018</sup> though in such a case the court may alternatively order the promisee to be put back into possession

of the premises.<sup>1019</sup> The compensation has been assessed in a variety of ways: at the cost of improvements made with the promisee's money<sup>1020</sup>; at a proportionate interest in the property<sup>1021</sup>; at the reasonable value of the right of occupation, based (presumably) on the cost to the promisee of equivalent alternative accommodation<sup>1022</sup>; or by applying the more general principle that the remedy in cases of proprietary estoppel must reflect the reasonable expectations of the promisee and the detriment suffered by them in reliance on the promise.<sup>1023</sup> The flexibility of the remedy also enables the court to combine monetary compensation with specific relief: for example, in *Gillet v Holt*<sup>1024</sup> the promisee was awarded part of the property to which the promise referred, together with a cash payment to compensate him for his exclusion from the farming business on that property.

## Balance of hardship

- 187 The court may deny the promisee a remedy where, on balance, greater hardship would be produced by giving effect to the promise than by allowing the promisor to go back on it. This was the position in *Sledmore v Dalby*,<sup>1025</sup> where the promisee had contributed to major improvements to the property but at the time of the proceedings had already enjoyed 20 years' rent-free occupation and was gainfully employed, while the promisor was a widow living on social security benefits. The promisee's claim to be entitled to a licence for life to stay in the house was in these circumstances rejected and the promisor was held entitled to possession. In fashioning the appropriate remedy, the court can also take account of the interests of third parties, for example, of blood relatives of the promisor with whom the latter had been on close terms<sup>1026</sup>; of the promisor's wife, who, as well as the promisee, lived in the house which was the subject of the estoppel<sup>1027</sup>; and of one of the promisor's daughters where the promise had given rise to a proprietary estoppel in favour of his son.<sup>1028</sup>

## Change of circumstances

- 188 One situation in which a change of circumstances, after the events capable of giving rise to a proprietary estoppel, may affect either the existence or the extent of the promisee's remedies for proprietary estoppel is that discussed in para.6-187 above, in which the relevant change was that the promisee had not only suffered detriment but had also obtained benefits in consequence of the events relied on to establish the estoppel. Other situations in which different changes of circumstances may either curtail or extend the rights of the person relying on the estoppel were discussed in *Thorner v Major*<sup>1029</sup> in the context of the argument there advanced that the area of land comprised in "Steart Farm" (the property to which Peter's assurance related) varied between the time when Peter first made that assurance and the time when it fell to be performed, i.e. at

Peter's death. That argument was there rejected for the reasons discussed in para.6-175 above. The overriding principle there stated was that proprietary estoppel "looks backward from the moment when the promise falls due to be performed", as opposed to the time when it was made, and "asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept" <sup>1030</sup>; another way the point was put was that "Peter's representation that David would inherit Steart Farm speaks, at least where Peter remained the owner of an agricultural entity known as Steart Farm, as from his death". <sup>1031</sup> It is inherent in these formulations that, in cases of proprietary estoppel, events between the making of the promise and the time when the promise falls to be performed are relevant to the extent of the promisee's equity. In *Thorner v Major* this principle operated in David's favour, Steart Farm having increased (if only slightly) in size between the time when Peter first made the promise and the time when he died; but the speeches in that case also consider the possibility of the converse situation of a decrease of the size of the farm during that time: e.g. because Peter had needed to dispose of part of the land to pay for nursing care "in a decrepit old age". <sup>1032</sup> No definite answer needed to be, or was, given to such questions in *Thorner v Major*, but the discussions there of such hypotheses seem to accept the possibility that such changes of circumstances could be taken into account in shaping the remedy for proprietary estoppel. This view is also supported by a number of factors recognised in the earlier authorities as being relevant to that issue. For example, in some cases the rights of the promisee were extended (perhaps sometimes unduly) because, after making the promise, the promisor had conducted themselves in a way that had incurred the disapproval of the court. <sup>1033</sup> Conversely, those rights could be curtailed in the exercise of the "principled discretion" described in para.6-183 above, and in particular by the principle that there must be "proportionality between the [promisee's] expectation and the detriment [suffered by them]". <sup>1034</sup> If, for example, in *Thorner v Major* the value of Steart Farm had, after Peter's original assurance but before his death, increased by a hundredfold because planning permission had in that interval been given to develop the whole of Steart Farm as a new housing estate, <sup>1035</sup> then it might have been arguable that David's claim should have been scaled down so as to give him reasonable, or even generous, compensation for his detrimental reliance on Peter's promise, or at least that the resulting windfall should be shared in reasonable or fair proportions between David and the persons entitled to Peter's estate on his intestacy. Where A's promise leads B to form an expectation of inheriting A's property, there is also the possibility that the promise might be subject to an express or implied condition of survivorship so that B's death during A's life-time would defeat the proprietary estoppel claim on behalf of B's estate. <sup>1036</sup> There is finally the point that a promise giving rise to proprietary estoppel may, within the limits discussed in para.6-179 above, be revocable; and, where this is the position, the revocation of the promise within those limits will prevent the operation of the estoppel.

## Footnotes

<sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); Shatwell (1955) 1 Sydney Law Review 289.

- 976 Above, para.6-163. However, the estoppel may operate conditionally where the promisee has acted in reliance on the promise but the terms of the promise show that the promisor did not intend to give up his title to the land gratuitously: *Thorner v Major* [2009] UKHL 18 at [48]; cf. *Bradbury v Taylor* [2012] EWCA Civ 1208, [2013] W.T.L.R. 29 at [52]; *Moore v Moore* [2018] EWCA Civ 2669, [2019] 1 F.L.R. 1277 at [89]–[99]; *Malik v Kalyan* [2010] EWCA Civ 113.
- 977 *E. & L. Berg Homes v Gray* (1979) 253 E.G. 473.
- 978 [2009] UKHL 15, [2009] 1 W.L.R. 776; for the facts of this case, see above, para.6-164.
- 979 *Thorner v Major* [2009] UKHL 15 at [89].
- 980 Above, para.6-104.
- 981 See *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [45].
- 982 *Crabb v Arun DC* [1976] Ch. 179, 193, per Scarman LJ.
- 983 (1862) D. F. & G. 517; above, para.6-157; *Durant v Heritage* [1994] E.G.C.S. 134; *Q v Q* [2008] EWHC 1874 (Fam), [2009] 1 F.L.R. 935 at [143]–[147]; *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607 at [27], [45]–[50], [52]; *Bradbury v Taylor* [2012] EWCA Civ 1208, [2013] W.T.L.R. 29.
- 984 [1965] 2 Q.B. 507; above, para.6-157.
- 985 *Jones v Jones* [1977] 1 W.L.R. 438; *Re Sharpe* [1980] 1 W.L.R. 219; *Greasley v Cooke* [1980] 1 W.L.R. 1306.
- 986 *Tanner v Tanner* [1975] 1 W.L.R. 1346 (where there was a contract: cf. above, para.6-160); *Yaxley v Gotts* [2000] Ch. 162 (where the remedy was based on constructive trust).
- 987 *J.T. Developments v Quinn* (1991) 62 P. & C.R. 33.
- 988 As in *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345: see at [1], [36]; cf. *McGuane v Welch* [2008] EWCA Civ 785, [2008] 2 P. & C.R. 24 at [47] where a charge on the property in question was held to be the appropriate way of satisfying the equity arising by virtue of the proprietary estoppel.
- 989 cf. *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345 at [33] (“a remedy appropriate to the expectations that the defendant has indeed”; the last word of this phrase appears to be a misprint, probably for “induced”).
- 990 *Voyce v Voyce* (1991) 62 P. & C.R. 290.
- 991 *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988: see at [34].
- 992 *Roebuck v Mungavin* [1994] 2 A.C. 224 at 235; *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 998 at [52]; cf. the remedy granted in *Gillet v Holt* [2001] Ch. 210, below, para.6-186. *Gardner* (1999) 115 L.Q.R. 348. For the flexibility of the remedy in cases of proprietary estoppel, see also *Moore v Moore* [2018] EWCA Civ 2669, [2019] 1 F.L.R. 1277; *Clark v Clark* [2006] EWHC 275, [2006] 1 F.C.R. 421. It is unclear whether an equity arising out of proprietary estoppel can fit within the established framework of equitable tracing: *Sangha v Sangha* [2021] EWHC 1599 (Ch) at [312]–[324].
- 993 *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [43].
- 994 *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [43].
- 995 See above, para.6-181.
- 996 *Jennings v Rice* [2002] EWCA Civ 159 at [49].

- 997 *Jennings v Rice* [2002] EWCA Civ 159 at [36], cf. at [56]; *Henry v Henry* [2010] UKPC 3 at [66]; *Fischer v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1761 at [11]; for the importance of “proportionality” in assessing the amount of monetary relief available to the promisee, see also *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P. & C.R. 10 at [38]; see *Habberfield v Habberfield* [2019] EWCA Civ 890 at [57]; *Guest v Guest* [2020] EWCA Civ 387, [2020] 1 W.L.R. 3480. cf. *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607.
- 998 *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 F.C.R. 501 at [45]. cf. *Joyce v Epsom and Ewell BC* [2012] EWCA Civ 1398, [2013] 1 E.G.L.R. 24, where the remedy was by way of a declaration that the party relying on the estoppel was entitled to the grant of the promised right of way.
- 999 *Jennings v Rice* [2002] EWCA Civ 159 at [50].
- 1000 *Jennings v Rice* [2002] EWCA Civ 159 at [43] at [51].
- 1001 [2019] EWCA Civ 890 at [68]. In that case, the judge had been correct to “scale down” the remedy, even though the claimant had fulfilled her side of the bargain: the remedy is flexible, and it will not generally be equitable to award the claimant more than her expectation (at [70]).
- 1002 [2009] UKHL 18, [2009] 1 W.L.R. 776; above, para.6-164.
- 1003 [2009] UKHL 18 at [13].
- 1004 At [9], [13], [48] and [66].
- 1005 At [44].
- 1006 *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988.
- 1007 *Jennings v Rice* [2002] EWCA Civ 159, [2005] W.T.L.R. 367.
- 1008 *Crabb v Arun DC* [1976] Ch. 179; *Pascoe v Turner* [1979] 1 W.L.R. 431.
- 1009 cf. criticisms of the law by Browne-Wilkinson J in *Re Sharpe* [1980] 1 W.L.R. 219, 226.
- 1010 [1973] E.G.D. 233; to the extent that the reasoning is based on the provisions of Settled Land Act 1925 s.1, it is criticised in *Griffiths v Williams* [1978] E.G.D. 919. cf. *Campbell v Griffin* [2001] EWCA Civ 990, [2001] W.T.L.R. 981; *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367; *Evans v HSBC Trust (UK) Ltd* [2005] W.T.L.R. 1299, above, para.6-172.
- 1011 *Burrows and Burrows v Sharp* (1991) 23 H.L.R. 82; cf. *Baker v Baker* (1993) 25 H.L.R. 408 (where the action was for damages).
- 1012 *Clough v Killey* (1996) 72 P. & C.R. D22.
- 1013 See *Mulholland v Kane* [2009] NICH 9, [2009] W.T.L.R. 1521 at [20], [21]; for this case, see above, para.6-170.
- 1014 cf. in a case of undue influence, *Cheese v Thomas* [1994] 1 W.L.R. 129.
- 1015 [1973] E.G.D. 233.
- 1016 As in *Hussey v Palmer* [1972] 1 W.L.R. 1286 and *Eves v Eves* [1975] 1 W.L.R. 1328.
- 1017 As in *Plimmer v Mayor of Wellington* (1884) 9 App. Cas. 699.
- 1018 *Tanner v Tanner* [1975] 1 W.L.R. 1346 (where there was a contract).
- 1019 *Tanner v Tanner* [1975] 1 W.L.R. 1346.
- 1020 *Hussey v Palmer* [1972] 1 W.L.R. 1286; *Burrows and Burrows v Sharp* (1991) 23 H.L.R. 82.
- 1021 *Eves v Eves* [1975] 1 W.L.R. 1338.
- 1022 *Tanner v Tanner* [1975] 1 W.L.R. 1346; *Baker v Baker* (1993) 25 H.L.R. 408.
- 1023 Above, paras 6-183—6-184.

1024 [2001] Ch. 210; above, para.6-163.

1025 (1996) 72 P. & C.R. 196. cf. *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988 (where the benefits obtained by the claimant in consequence of his action in reliance on the promise were taken into account in reduction, but not in extinction of his proprietary estoppel claim).

1026 *Evans v HSBC Trust Co (UK) Ltd* [2005] W.T.L.R. 1299, above para.6-172.

1027 *Stallion v Albert Stallion Holdings (Great Britain) Ltd* [2009] EWHC 1950 (Ch) at [136].

1028 *Suggitt v Suggitt* [2011] EWHC 903 (Ch), taking into account the demands of “fairness and justice to all” (at [65]); affirmed [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607, without further reference to the “balance of hardship” point discussed in the text above.

1029 [2009] UKHL 18, [2009] 1 W.L.R. 776; above para.6-164.

1030 [2009] UKHL 18 at [57] and [101], quoting from the judgment of Hoffmann LJ in the unreported case of *Walton v Walton* (14 April 1994), above, paras 6-161, 6-175.

1031 [2009] UKHL 18 at [18].

1032 At [19]; cf. at [65], [107].

1033 e.g. *Crabb v Arun DC* [1976] Ch. 179; *Pascoe v Turner* [1979] 1 W.L.R. 431.

1034 See above, para.6-183.

1035 At [48] parts of Steart Farm are said to have had development value, but there is no suggestion that this had, at any relevant time, increased the value of the farm dramatically (as in the example given in the text above).

1036 When at [74] Lord Neuberger said that there was “nothing special, as a matter of principle, in relation to a statement about leaving property in a will” he was, as the context indicates, referring to a different point from that mentioned in the text above: i.e. to the point whether a statement by A that he would leave property to B amounted to a “commitment” by A or only to a “statement of A’s current intention”.

## (e) - Comparison with Other Doctrines

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 11. - Proprietary Estoppel

(e) - Comparison with Other Doctrines

### Proprietary and promissory estoppels

- [89] Proprietary and promissory estoppels have a number of points in common. Both can arise from promises<sup>1037</sup>; consideration is not, while action in reliance is, a necessary condition for their operation<sup>1038</sup>; and both are, within limits, revocable.<sup>1039</sup> Perhaps for this reason, Lord Scott has described “proprietary” estoppel as “a sub-species of ‘promissory’ estoppel—if the right claimed is a proprietary right”.<sup>1040</sup> But Lord Walker has said that he had “some difficulty”<sup>1041</sup> with this observation; and there are also important differences<sup>1042</sup> between the two doctrines.

### Proprietary estoppel in some respects narrower than promissory estoppel

- [90] The scope of proprietary is in two respects narrower than that of promissory estoppel. First, proprietary estoppel is restricted to situations in which one party acts under the belief that they have or will be granted an interest in or over “identified property”<sup>1043</sup> (generally land) of another. This requirement has been judicially described as “one of the main distinguishing features”<sup>1044</sup> between the two kinds of estoppel since a promissory estoppel may arise out of *any* promise that strict legal rights will not be enforced: there is no need for those rights to relate to land or other property. Secondly, proprietary estoppel requires the promisee to have acted to their detriment,<sup>1045</sup> while promissory estoppel may operate even though the promisee merely performs a pre-existing duty and so suffers no detriment in the sense of doing something that they were not previously

under a legal obligation to do.<sup>1046</sup> This difference between the two doctrines follows from the fact that promissory estoppel is (unlike proprietary estoppel) concerned only with the variation or abandonment of rights arising out of a pre-existing legal relationship between promisor and promisee.

## Proprietary estoppel in other respects wider than promissory estoppel

<sup>191</sup> On the other hand, the scope of proprietary is in two other respects wider than that of promissory estoppel. First, promissory estoppel arises only out of a representation or promise that is “clear” or “precise and unambiguous”.<sup>1047</sup> Proprietary estoppel, by contrast, can arise where there is no actual promise: for example, in cases of so-called “acquiescence”, where one party makes improvements to another’s land under a mistake and the other either knows of the mistake<sup>1048</sup> or seeks to take unconscionable advantage of it.<sup>1049</sup> This type of proprietary estoppel is typically based on “silence and inaction rather than on any statement or action”.<sup>1050</sup> That would not normally be true of promissory estoppel.<sup>1051</sup> Even where proprietary estoppel is based on “encouragement”,<sup>1052</sup> so that some statement in the nature of a promise, representation or assurance must be established to give rise to it, the requirement that such a statement must be “clear enough”<sup>1053</sup> falls short of any requirement that it must be “precise”<sup>1054</sup>; and since a proprietary estoppel can be based on an “assurance which can reasonably be understood as having more than one meaning”,<sup>1055</sup> there can be no requirement for the purpose of proprietary (as there is for the purpose of promissory)<sup>1056</sup> estoppel that the representation must be “unambiguous”. Secondly (and most significantly), while promissory estoppel is essentially defensive in nature,<sup>1057</sup> proprietary estoppel can give rise to a cause of action.<sup>1058</sup> The promisee is not merely entitled to raise the estoppel as a defence to an action of trespass or to a claim for possession: the court can make an order for the land to be conveyed to them,<sup>1059</sup> or for compensation<sup>1060</sup> or for such other remedy as it regards as appropriate in the exercise of its “principled discretion”.<sup>1061</sup> Although the authorities support this second distinction between the two kinds of estoppel, they have not, as yet, provided any convincing explanation or justification for it.<sup>1062</sup> It is submitted that the explanation is in part historical and terminological. In the early cases, proprietary estoppel was explained in terms of *acquiescence*<sup>1063</sup> or *encouragement*.<sup>1064</sup> Hence no conflict with the requirement that *promises* must be supported by consideration was perceived; or where it was perceived the facts were said to give rise to a contract.<sup>1065</sup> Promissory estoppel, on the other hand, dealt principally with the renegotiation of contracts; it obviously depended on giving binding effect to promises, and did so in the context of releases and variations, in which the common law requirement of consideration had long been established.<sup>1066</sup> The rule that promissory estoppel gives rise to no cause of action was evolved to prevent what would otherwise have been an obvious conflict between promissory estoppel and consideration.<sup>1067</sup> In cases of proprietary estoppel there

was no such conflict where liability was based on “acquiescence”; and where it was based on “encouragement” the conflict, though sometimes real enough, was at least less obvious. There are, moreover, two aspects of proprietary estoppel which help to justify the distinction. These are that the acts done by the promisee are not ones which they were under any previous legal obligation to perform; and that generally their effect would be unjustly to enrich the promisor if they were allowed to go back on their promise.<sup>1068</sup> In these respects, the facts on which proprietary estoppel is based provide more compelling grounds for relief<sup>1069</sup> than those commonly found in cases of promissory estoppel.

## Common basis of proprietary and promissory estoppel?

- <sup>192</sup> While these two doctrines are in the respects discussed in para.6-191 above distinct it can also be argued that they have a common basis, viz that it would be unconscionable for the promisor to go back on their promise after the promisee has acted in reliance on it; and that the precise labels to be attached to them are “immaterial”.<sup>1070</sup> It is perhaps for these reasons that the distinction between the two kinds of estoppel was described as “not … helpful” by Scarman LJ in *Crabb v Arun DC*.<sup>1071</sup> That decision was, in a later case, said to illustrate “a virtual equation of promissory and proprietary estoppel”,<sup>1072</sup> perhaps because it extended the operation of proprietary estoppel beyond the situations originally within its scope, viz those in which the promisor would be unjustly enriched by the work done by the promisee on the promisor’s land unless some legal effect were given to the promise. Nevertheless it is submitted that the doctrines are distinct in the respects stated above.<sup>1073</sup> Attempts to unite them by posing “simply” the question whether it would be “unconscionable”<sup>1074</sup> for the promisor to go back on their promise are, for reasons given earlier in this chapter,<sup>1075</sup> unhelpful,<sup>1076</sup> insofar as they detract attention from the other conditions which must also be satisfied to bring each of the two doctrines into operation<sup>1077</sup> and from the differences in their respective legal effects.<sup>1078</sup>

## Proprietary estoppel and contract contrasted

- <sup>193</sup> We have seen that some cases which have been said to support the doctrine of proprietary estoppel have been explained on the alternative basis that there was a contract between the parties.<sup>1079</sup> But often no such explanation is possible; for proprietary estoppel can operate even though the conditions required for the creation of a contract are not satisfied.

<sup>1080</sup>

**U** The need to discuss the doctrine in this chapter arises precisely because a promise may give rise to a proprietary estoppel even though it is not supported by consideration; and it can also have this effect even though it cannot take effect as a contract because it is not sufficiently certain, because there is no contractual intention or (sometimes) because it fails to comply with formal requirements. Moreover, the effect of a proprietary estoppel differs from that of a contract. Sometimes, indeed, the result of a proprietary estoppel is to give effect to the promise in the terms in which it was made<sup>1081</sup>; but such a result does not follow as of right. We have seen that the promisee's remedy may depend, not only on the terms of the promise, but also on other factors, such as the extent of the promisee's detrimental reliance on it; the proportionality of that reliance to their reasonable expectations induced by the promise; and changes of circumstances, such as the conduct of the promisor after the facts giving rise to the estoppel. By contrast, the rights arising under a binding contract are fixed at its formation and not subject to variation in the light of the court's approval or disapproval of the subsequent conduct of one of the parties. For this reason, and because proprietary estoppel may be revocable,<sup>1082</sup> it will generally be more advantageous to a party to show (if they can) the existence of a binding contract than to rely on a proprietary estoppel.

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 1037 Above, paras 6-097, 6-156. For use of the expression "promissory estoppel" see above, para.6-111.
- 1038 Above, paras 6-101, 6-157.
- 1039 Above, paras 6-104, 6-179.
- 1040 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [14]; the dictum does not go on to consider the differences between the two doctrines discussed in paras 6-190 and 6-191 below.
- 1041 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [67].
- 1042 Discussed in paras 6-190 and 6-191 below.
- 1043 *Thorner v Major* [2009] UKHL 18, [2007] 1 W.L.R. 776 at [61].
- 1044 *Thorner v Major* [2009] UKHL 18, [2007] 1 W.L.R. 776 at [61].
- 1045 Above, para.6-170.
- 1046 Above, para.6-102.
- 1047 Above, para.6-097.
- 1048 Above, para.6-156; *Wilmott v Barber* (1880) 15 Ch. D. 96, 105 (the claim in that case failed as the party against whom it was made did not know of the extent of his own rights or of the other party's mistake).
- 1049 *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133.
- 1050 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [84], per Lord Neuberger.
- 1051 Above, para.6-100.

- 1052 For the distinction between cases of “acquiescence” and cases of “encouragement”, see above, para.6-156.
- 1053 See para.6-165 above and see the submission made in para.6-167 above.
- 1054 In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 (above paras 6-173, 6-174) it was held that no proprietary estoppels arose out of an agreement which lacked contractual force because it was incomplete (and so not sufficiently precise) but the crucial point in that case was that the party claiming the benefit of the estoppels *knew* that the agreement was binding in honour only: see above, para.6-174.
- 1055 *Thorner v Major*, above, at [86], per Lord Neuberger; above, para.6-166.
- 1056 Above, para.6-097; an ambiguous representation can scarcely be “unequivocal”.
- 1057 Above, para.6-106.
- 1058 *Crabb v Arun DC* [1976] Ch. 179, 187; *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133, 148; *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] H.L.R. 18 at [23] (where proprietary estoppel was, in this respect, contrasted, not with promissory estoppel, but with estoppel by representation); *Thorner v Major* [2008] UKHL 18, [2009] 1 W.L.R. 779 at [61].
- 1059 e.g. *Dillwyn v Llewelyn* (1862) 4 D. F. & G. 517.
- 1060 e.g. *Eves v Eves* [1975] 1 W.L.R. 1338.
- 1061 See above, paras 6-183—6-184.
- 1062 In *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [61], Lord Walker relies, as a justification for the rule that proprietary estoppel can give rise to a cause of action, on *Crabb v Arun DC* [1976] Ch. 179, 187, where Lord Denning MR based the rule that “some estoppels [for example, proprietary estoppel] do give rise to a cause of action” (italics supplied) on his own earlier judgment in *Moorgate Mercantile Co Ltd v Twitchings* [1976] Q.B. 225. He had there said at 242 that the effect of an estoppel of, apparently, this kind was that the true owner’s “own title in the property ... has been held to be limited or extinguished and new rights and interests have been created therein” (italics supplied). Read together, these passages from Lord Denning’s two judgments amount to this, that proprietary estoppel “give[s] rise to a cause of action” because “new rights ... have been created therein” (i.e. the property). But this explanation seems (with respect) simply to restate in different words the proposition which it seeks to prove. In relation to promissory estoppel, statements that such an estoppel gives rise to no cause of action, and that it creates no new rights (above, para.6-106) are merely two ways of saying the same thing; and the same is (with respect) true of the statements that proprietary estoppel does create a cause of action and that it can create new rights.
- 1063 *Wilmott v Barber* (1880) 15 Ch. D. 96, 105.
- 1064 *Ramsden v Dyson* (1866) L.R. 1 H.L. 129, 170. cf. the repeated use in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 777 of the word “assurance” (in apparent preference to “promise”) as one of the three main elements of proprietary estoppel (e.g. at [15], [25], [72]), though the expression “promise or assurance” is also used (e.g. at [12]) by Lord Hoffmann, who in his earlier unreported judgment in *Walton v Walton*, quoted in *Thorner v Major* at [57], had repeatedly used “promise” in this context. In *Thorner v Major* “assurance” outnumbers “promise” by 61 to 24.

- 1065 *Dillwyn v Llewelyn* (1862) 4 D. F. & G. 517, 522; above, para.6-160.
- 1066 Above, paras 6-082—6-088.
- 1067 See above, para.6-106.
- 1068 See the reference to the landowner's "profit" in *Ramsden v Dyson* (1866) L.R. 1 H.L. 129, 141 and cf. above, para.6-157.
- 1069 See Fuller and Eisenberg, Basic Contract Law, 3rd edn, p.70; "Unjust enrichment presents a more urgent case for judicial intervention than losses through reliance which do not benefit the defendant". cf. *Fuller and Perdue* (1936) 46 Yale L.J. 52, 56.
- 1070 *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133, 153, cf. above, para.6-189; where, however, a distinction is also drawn between "promissory estoppel" and the principle in *Ramsden v Dyson* (1866) L.R. 1 H.L. 129 (i.e. proprietary estoppel).
- 1071 [1976] Ch. 179, 193.
- 1072 *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133, 153; cf. above, para.6-189; the use of "promissory estoppel" to describe a typical proprietary estoppel situation in *Griffiths v Williams* [1978] E.G.D. 919, 921 may be a misprint.
- 1073 At paras 6-190 and 6-191; cf. above, para.6-170. Lord Scott's dictum in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [14] (quoted in para.6-189 above) falls short of stating that the requirements and effects of the two doctrines are identical.
- 1074 *Taylors Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133, 155; cf. *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank* [1982] Q.B. 84, 104, 122. cf. also the reference in *Gillett v Holt* [2001] Ch. 210 at 232 to "the essential test of unconscionability" in cases of proprietary estoppel (above, para.6-170).
- 1075 Above, para.6-111.
- 1076 cf. *Haslemere Estates Ltd v Baker* [1982] 1 W.L.R. 1109, 1119 where Megarry VC, rejecting the argument that proprietary estoppel arises "whenever justice and good conscience requires it", said "I do not think that the subject is as wide and indefinite as that". See also *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [16], [17], [28] and [46], emphasising that unconscionability (or judicial disapproval) of the conduct of the party alleged to be estopped is not a sufficient (though it may be a necessary) condition of the operation of proprietary estoppel. Dicta emphasising the flexibility of the remedy (above, para.6-183) must be read subject to the requirement of adopting a "principled approach" (above, para.6-183) to this aspect of the doctrine and not be taken to refer to conditions of liability.
- 1077 See above, paras 6-093—6-103, 6-162—6-178.
- 1078 See above, paras 6-104—6-110, 6-179—6-188.
- 1079 Above, para.6-160.
- 1080 See above, para.6-161. However, if a contract has been terminated for breach by the innocent party, then the contract-breaker cannot rely upon proprietary estoppel where the relevant promise is contained in the (now-terminated) contract: *Gordon v Havener* [2021] UKPC 26 at [15].
- 1081 e.g. *Dillwyn v Llewelyn* (1862) 4 D. F. & G. 517, above, paras 6-159, 6-160.

1082 Above, para.6-179.

---

End of Document

© 2022 SWEET & MAXWELL

## (a) - Defective Promises

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 12. - Special Cases

(a) - Defective Promises <sup>1083</sup>

### Defective promise as consideration

- <sup>194</sup> Mutual promises are generally consideration for each other,<sup>1084</sup> but difficulty is sometimes felt in treating one of the promises as consideration for the other if the former suffers from some defect, by reason of which it is not legally binding. The law on this topic is based on expediency rather than on any supposedly logical deductions which might be drawn from the doctrine of consideration. The question whether a defective promise can constitute consideration for a counter-promise depends on the policy of the rule of law making the former promise defective.

### Policy considerations

- <sup>195</sup> One group of cases concerns contracts made between persons, one of whom lacks contractual capacity. A minor can enforce a promise made to them under such a contract even though the only consideration for it is their own promise, which does not bind them by reason of their minority.<sup>1085</sup> The same rule applies where a person is entitled to avoid a contract on account of their mental incapacity.<sup>1086</sup> The reason for these rules is that it is the policy of the law to protect the person under the incapacity, and not the other party, who is therefore not allowed to rely on that incapacity. It has, on the other hand, been said that a promise by which the Crown purported to fetter its discretion would not constitute consideration where, under the principles discussed in Ch.13 below,<sup>1087</sup> that promise did not bind the Crown.<sup>1088</sup> A contrasting group of cases concerns

contracts which are unenforceable because of illegality. Obviously the illegal promise cannot be enforced and if both promises are illegal the consequence that neither can be enforced follows from the policy of the invalidating rule or rules rather than from the fact that an illegal promise cannot constitute consideration.<sup>1089</sup> But in some cases only one of the promises is contrary to public policy: this is, for example, often the position where the contract is in restraint of trade.<sup>1090</sup> In such a case, the party who makes the promise not to compete cannot enforce the counter-promise (often to pay a sum of money) if the promise not to compete, which is contrary to public policy, constitutes the sole consideration for the counter-promise.<sup>1091</sup> Indeed, where one of the two promises is illegal, the counter-promise cannot be enforced even if there was *some* other consideration for it, but the *main* consideration for it was the illegal promise. The reason for this rule lies in the policy of the law to discourage illegal bargains.<sup>1092</sup>

## Performance of defective promises

- <sup>196</sup> Where a defective *promise* does not constitute consideration, the *performance* of it can nevertheless sometimes provide consideration for the counter-promise. For example a mere promise to negotiate has no contractual force<sup>1093</sup> and so cannot constitute consideration for a counter-promise; but actually carrying on the negotiations can satisfy the requirement of consideration.<sup>1094</sup> Likewise, where a promise would not bind the Crown because it purported to fetter the Crown's discretion, the actual performance of the promise can nevertheless constitute consideration for a counter-promise.<sup>1095</sup> A similar principle applies where a victim of fraud, misrepresentation, duress or undue influence can sue but not be sued: by suing, they affirm the contract, make their own promise binding, and so supply consideration. But where the promise of one party is illegal even its performance does not entitle that party to enforce the counter-promise,<sup>1096</sup> for the law must not give them any incentive to perform the illegal promise.

## Promise defective by statute

- <sup>197</sup> Where one of the promises is defective by statute, the statute may expressly solve the problem whether the person giving the defective promise can sue on the counter-promise.<sup>1097</sup> Thus a party who gives a promise which is defective under [s.4 of the Statute of Frauds 1677](#), or under [s.34 of the Matrimonial Causes Act 1973](#), may, in spite of not being bound by that promise, be entitled to enforce the counter-promise,<sup>1098</sup> and this may be so even though for other purposes (such as the validity of a disposition) their promise, precisely because it is void, cannot constitute consideration.<sup>1099</sup> Where a statute invalidates a promise but does not provide for the effect of its invalidity on the other party's counter-promise, the general rule seems to be that the invalid

promise is not good consideration<sup>1100</sup>; but, unless that promise is illegal, the party giving it can sue on the counter-promise if they actually perform their promise.<sup>1101</sup>

## Both promises defective by statute

- 198 A statute may also invalidate *both* promises. Formerly, this was the position with regard to contracts “by way of gaming or wagering”, which were “null and void” under **section 18 of the Gaming Act 1845**. This section has been repealed by the **Gambling Act 2005**,<sup>1102</sup> **section 335(1)** of which provides that, as a general rule, “[t]he fact that a contract relates to gambling shall not prevent its enforcement”. This subsection does not prejudice “any rule of law preventing the enforcement of a contract on the ground of unlawfulness ...”<sup>1103</sup> so that where (for example) a party had, in relation to the gambling contract committed an offence under the **2005 Act**,<sup>1104</sup> then, under the law relating to the effects of illegality on contracts,<sup>1105</sup> the illegality would often, though not necessarily,<sup>1106</sup> prevent that party from enforcing the other party’s promise; and where both parties had committed such an offence or such offences, then these rules would often, though again not necessarily,<sup>1107</sup> lead to the result that neither party’s promise would be legally enforceable by the other. The promises of each party would also be legally unenforceable where the Gambling Commission was satisfied that a bet was “substantially unfair” and on that ground made an order by virtue of which “any contract ... in relation to the bet [was] void”.<sup>1108</sup> It is also possible for the promises of both parties to be void under other legislation: for example, under **section 4 of the Marine Insurance Act 1906**, by which a contract of marine insurance is void where the assured has no “insurable interest”, as defined by the Act.<sup>1109</sup>
- 199 In such cases, the making or performance of one of the promises would clearly not make the other promise enforceable. This conclusion follows simply from the fact that both promises are void by statute, so that there is no need to enquire whether the making or performance of one of the promises can constitute consideration for the other. The question whether the making or performance of such a void promise could constitute consideration might, however, arise in the context other than that of the enforceability of the counter-promise: for example, in the context of the question whether the performance could constitute consideration for the purpose of a rule of law by which a transfer or disposition of property was effective only if made for valuable consideration. This was the question which arose in *Lipkin Gorman v Karpnale Ltd*<sup>1110</sup> where stolen money had been used by a thief for gambling at a club of which he was a member and it was held that the club had not received the money for valuable consideration so as to be entitled, as against the victim of the theft, to retain it. We have noted that the club had not provided consideration for the member’s payment by exchanging the money for gaming chips.<sup>1111</sup> The present point is that the club had not provided consideration for the payments made to it by the member and received by it in good faith by allowing him to gamble in the club or by promising to pay, or actually paying him, in respect

of any bets won by him. This aspect of the decision was based on section 18 of the Gaming Act 1845 and is undermined by the repeal of that section by the Gambling Act 2005 and by the general rule, laid down in that Act, that contracts relating to gambling are legally enforceable. Under that rule, the club's promises to its members, or the performance of those promises, would clearly constitute good consideration for the club's receipt of the member's payments. A number of other problems which could arise under the 2005 Act on facts such as those of the *Lipkin Gorman* case are discussed below in Vol.II, paras 43-049—43-051.

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 1083 *Treitel* (1961) 77 *L.Q.R.* 83.
- 1084 See above, para.6-008.
- 1085 *Holt v Ward Clarenceux* (1732) *Stra.* 937; below para.11-049.
- 1086 Below, para.11-094 (“voidable at his or her option”). The circumstances in which such a right of avoidance arises are discussed in paras 11-075—11-093 below.
- 1087 Below para.13-010.
- 1088 *R. v Att-Gen for England and Wales* [2003] UKPC 22, [2002] *E.M.L.R.* 24 at [31]. There seems to be no strong policy reason in such a case for allowing enforcement by the Crown of the other party's promise where the contract remains executory.
- 1089 As suggested in *Nerot v Wallace* (1789) 3 *Term Rep.* 17, 23.
- 1090 Below, para.18-119 et seq.
- 1091 e.g. *Wyatt v Kreglinger & Fernau* [1933] 1 *K.B.* 793.
- 1092 See *Goodinson v Goodinson* [1954] 2 *Q.B.* 118 (the actual decision is obsolete in view of Matrimonial Causes Act 1973 s.34, below, para.6-197).
- 1093 Above, para.4-168.
- 1094 *Sepong Engineering Construction Co Ltd v Formula One Management Ltd* [2000] 1 *Lloyd's Rep.* 602 at 611, where it was also said that damages for breach of the resulting contract would be no more than nominal. The same reasoning applied when, before the Corporate Bodies Contracts Act 1960, unsealed promises made by a corporation did not bind it: see *Fishmonger's Corp v Robinson* (1843) 5 *Man. & G.* 131; *Kidderminster Corp v Hardwick* (1873) *L.R.* 9 *Ex.* 13; *Re Dale* [1994] *Ch.* 31, 38.
- 1095 *R. v Att-Gen for England and Wales* [2003] UKPC 22, [2003] *E.M.L.R.* 24 at [31]; and see para.6-195.
- 1096 e.g. *Wyatt v Kreglinger & Fernau* [1933] 1 *K.B.* 793.
- 1097 See *Laytharp v Bryant* (1836) 2 *Bing.N.C.* 735.
- 1098 Below, para.18-088. For more elaborate provisions of this kind, see Financial Services and Markets Act 2000 ss.20, 26–30.
- 1099 *Re Kumar* [1993] 1 *W.L.R.* 224, where the void promise was held not to constitute consideration for the purpose of Insolvency Act 1986 s.339. The common law rule that,

because a wife's promise not to seek a court order for maintenance was of no effect in law, it could not constitute consideration for her husband's promise for maintenance was described as "unfortunate" by Lord Phillips P in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 A.C. 534 at [39]. The rule has been reversed by statute: see below, para.18-088.

1100 *Clayton v Jennings* (1770) 2 Wm. Bl. 706.

1101 *Rajbenback v Mamon* [1955] 1 Q.B. 283 as explained in (1961) 77 L.Q.R. 83, 95; cf. *Unger* (1956) 19 M.L.R. 99.

1102 2005 Act ss.334(1), 356(3), 356(1) and Sch.16. The 2005 Act is discussed in Vol.II, paras 43-003 et seq.

1103 2005 Act s.335(2), below, Vol.II, para.43-017.

1104 See below, Vol.II, paras 43-018, 43-019.

1105 See below, paras 18-022 et seq.

1106 See the discussion in *Ritz Hotel Casino Ltd v Al Dahir* [2014] EWHC 2847 (QB) (below, Vol.II, para.43-019) of the effects of "unlawfulness" on the enforceability of a contract relating to gambling under s.335(2) of the Gambling Act 2005; and cf. below para.18-196 and Vol.II, para.43-043. The actual decision on the *Ritz Hotel* case (above) was that there had been *no* "unlawfulness": see below, Vol.II, para.43-019.

1107 See previous footnote.

1108 ss.336(2) and (3), below, Vol.II, para.43-022.

1109 In spite of its title, the Act applies (where appropriate) to contracts of insurance generally: see *Locker & Woolf Ltd v W. Australian Insurance Co Ltd* [1936] 1 K.B. 408 at 416.

1110 [1991] 2 A.C. 548.

1111 Above, paras 6-018—6-019.

## **(b) - Unilateral Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 12. - Special Cases**

**(b) - Unilateral Contracts**

### **Commencing performance as consideration**

- <sup>100</sup> In the case of a unilateral contract, <sup>1112</sup> the promisee clearly provides consideration if they complete the stipulated act or forbearance (such as walking to York, or not smoking for a year). <sup>1113</sup> This amounts in law to a detriment to the promisee; and the promisor may also obtain a benefit, but in any event requested the promisee's performance. It was suggested in Ch.4 that commencement of performance can amount to acceptance of an offer of a unilateral contract, <sup>1114</sup> and it is here submitted that such commencement can also amount to consideration; for it may in law be a detriment to the promisee to walk only part of the way to York, or to refrain from smoking for part of the year. Difficult questions of fact may, indeed, arise in determining whether performance has actually begun and whether such a beginning was made "on the strength of" <sup>1115</sup> the promise. This is particularly true where the stipulated performance is a forbearance; but if an actual forbearance to sue can constitute good consideration, <sup>1116</sup> it must in principle be possible to tell when a forbearance has begun. Thus commencement of performance (whether of an act or of a forbearance) may provide both an acceptance and consideration, and may accordingly deprive the promisor of their right to withdraw the promise. <sup>1117</sup> Of course, the promisor's liability to pay the amount promised (e.g. the £100 for walking to York) does not accrue <sup>1118</sup> before the promisee has fully performed the required act or forbearance. The present point is merely that, after part performance by the promisee, the promisor cannot withdraw with impunity. <sup>1119</sup>

<sup>101</sup>

The further suggestion has been made that a unilateral contract may be made as soon as the offer is received by the offeree<sup>1120</sup>; and this could be interpreted to mean that the contract was binding even before the offeree had acted on it in any way. But at this stage the offeree has clearly not provided any consideration, and in the case in which the suggestion was made no problem of consideration arose as the offeree had in fact completed the required act<sup>1121</sup> before any attempt to withdraw the offer was made. Except in the case of bankers' irrevocable credits,<sup>1122</sup> the better view is that an offer of a unilateral contract is not binding on receipt of the offer, but only when the offeree has begun to render the required performance.

## Footnotes

- <sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- <sup>1112</sup> Above, paras 4-102 et seq.
- <sup>1113</sup> See *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch. 231, 238.
- <sup>1114</sup> Above, para.4-102.
- <sup>1115</sup> *Wigan v English & Scottish Law Life Assurance Association* [1909] 1 Ch. 291, 298; above, para.6-058.
- <sup>1116</sup> See above, para.6-056.
- <sup>1117</sup> For the contrary view see Wormser in Selected Readings on the Law of Contracts, p.307—but he recanted in (1956) 3 *Journal of Legal Education* 146.
- <sup>1118</sup> Unless, perhaps, such a promise is divisible: e.g. where the promise is to pay the walker a specified sum per mile. It would be a question of construction whether such a promise imposed an “entire” or a “divisible” obligation: see below, paras 24-026 et seq. In the example given in the text above, the promisor’s obligation would probably be regarded as “entire”.
- <sup>1119</sup> The above passage (para.3-168 in the 29th edition of this book) is cited with apparent approval in *Schweppes v Harper* [2008] EWCA Civ 444 at [42] by Waller LJ who there dissented on the different issue, whether the agreement was sufficiently certain to have contractual force: see above, para.4-188.
- <sup>1120</sup> *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd* [1986] 1 A.C. 207, 224 (“when the invitation was received”).
- <sup>1121</sup> By submitting the requested bid: cf. above para.4-050.
- <sup>1122</sup> Below, para.6-218.

## (c) - Firm Offers

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 12. - Special Cases

(c) - Firm Offers

### Consideration for firm offers

- !02 A “firm” offer is one containing a promise not to withdraw it for a specified time. Such a promise does not prevent the offeror from withdrawing the offer within that period since *prima facie* such a promise will be unsupported by consideration.<sup>1123</sup> Consideration for such a promise is most obviously provided if the offeree pays (or promises to pay) a sum of money for the promise and so buys an option.<sup>1124</sup> Consideration may also be provided by some other promise: for example, in the case of an offer to sell a house, the offeree may provide consideration for the offeror’s promise to hold the offer open by promising to apply for a mortgage on the house; and, in the case of an offer to buy shares, the offeree may provide consideration for the offeror’s promise not to withdraw the offer for a specified time by promising not to dispose of those shares elsewhere during that time. The performance of the offeree’s promise in such cases could likewise provide consideration for the offeror’s promise to keep the offer open.
- !03 In one case a vendor of land entered into a so-called “lock-out” agreement by which he promised a prospective purchaser not to consider other offers if that purchaser would exchange contracts within two weeks; and it was said that “the promise by the [purchaser] to get on by limiting himself to just two weeks”<sup>1125</sup> constituted consideration for the vendor’s promise not to consider other offers. The case is not strictly one of a firm offer since the vendor’s promise would not in terms have prevented him from simply deciding not to sell at all; but the practical effect of a binding “lock-out” agreement may be to prevent the vendor from withdrawing his offer; and the reasoning quoted above could apply to the case of a firm offer. On the facts of the case from which it is taken, the

reasoning gives rise to some difficulty since it does not appear that the purchaser made any promise to exchange contracts within two weeks. It seems more plausible to say that the vendor's promise had become binding as a unilateral contract under which the purchaser had provided consideration by actually making efforts to meet the deadline, even though he had not promised to do so. Similar reasoning can apply if a seller of land promises to keep an offer open for a month, asking the buyer during that period to make efforts to raise the necessary money. If the buyer makes such efforts (without promising to do so), it is arguable that he has by part performance accepted the seller's offer of a unilateral contract to keep the principal offer open. Similarly, it is possible for a person, to whom a promise not to revoke an offer for the sale of a house has been made, to provide consideration for that promise by incurring the expense of a survey.<sup>1126</sup> Consideration may also be provided by the promisee's entering into another contract with the promisor.<sup>1127</sup> On the other hand, the equitable doctrine of *Hughes v Metropolitan Ry*<sup>1128</sup> and of the *High Trees* case<sup>1129</sup> will not avail the offeree since it does not create new causes of action where none existed before.<sup>1130</sup> Nor does it seem probable that the offeree will be able to claim damages in tort<sup>1131</sup> under the principles laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*<sup>1132</sup>

## Exceptions

- <sup>104</sup> The general rule that a promise to keep an offer open is not binding has been criticised<sup>1133</sup>; indeed, there are some situations in which it has been said that “the market would disdain to take”<sup>1134</sup> the point that such a promise was not binding. The rule does not, of course, apply if the promise does not need to be supported by consideration because it is made in a deed; and it is rejected by the Vienna Convention on Contracts for the International Sale of Goods.<sup>1135</sup> It is also subject to a common law exception in the law of insurance where an underwriter who initials a slip under an “open cover” arrangement is regarded as making a “standing offer” which the insured can accept from time to time by making “declarations” under it. The underwriter’s commitment is regarded as binding even though there is no consideration for his implied promise not to revoke the “standing offer”.<sup>1136</sup> But even with these mitigations, the rule can still cause hardship to an offeree who has acted in reliance on the promise to keep the offer open.<sup>1137</sup> On the other hand, the rule does sometimes provide necessary protection for the offeror: e.g. when an offer is made by a customer on a form provided by a supplier and expressed to be irrevocable; or when the period of irrevocability is not specified, so that the offeror is left subject to an indefinite obligation without acquiring any corresponding right. Any further development of the law on the point will require a balancing of these conflicting factors.<sup>1138</sup>

## Footnotes

- 1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.
- 1123 *Cooke v Oxley* (1790) 3 *Term Rep.* 653; *Routledge v Grant* (1828) 4 *Bing.* 653; *Head v Diggon* (1828) 3 *M. & Ry* 97; *Dickinson v Dodds* (1876) 2 *Ch. D.* 463; above, para.4-114.
- 1124 The legal characteristics of such an option have been variously described: (1) as a contract: *Greene v Church Commissioners for England* [1947] Ch. 467, 476, 478 (disapproving a dictum in *Beesly v Hallwood Estates Ltd* [1960] 1 *W.L.R.* 549, 555, actual decision affirmed [1961] Ch. 105 but dicta at first instance are disapproved on a point not here under discussion in *Bolton MBC v Torrington* [2003] *EWCA Civ* 1634, [2004] Ch. 66); though not one of sale: *Chippenham Golf Club v North Wiltshire RDC* (1992) 64 *P. & C.R.* 527; (2) as a transaction which, even though it is not a contract, gives rise to an interest in property: *Re Button's Lease* [1964] Ch. 263, 270–271; *Armstrong & Holmes Ltd v Holmes* [1994] 1 *All E.R.* 826; (3) as a unilateral contract: *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 945; *Little v Courage* (1995) 70 *P. & C.R.* 469, 474; (4) as a conditional contract: *Bircham & Co Nominees (No.2) Ltd v Worrell Holdings Ltd* [2001] *EWCA Civ* 773; (2001) 82 *P. & C.R.* 427 at [45]; *Coaten v PBS Corp* [2006] *EHRC* 1781, [2007] 1 *P. & C.R. DG* 11 at [33]; (5) as an irrevocable offer: *Re Gray* [2004] *EHRC* 1538, [2005] 1 *W.L.R.* 815 at [25]; contrast the *Coaten* case, above; and (6) as being *sui generis*: *Spiro v Glencrown Properties* [1991] Ch. 537. And see *Mowbray*, 74 *L.Q.R.* 242; *Lücke*, 3 *Adelaide L.Rev.* 200.
- 1125 *Pitt v P.H.H. Asset Management Ltd* [1994] 1 *W.L.R.* 327, 332; for other consideration in this case, see above. para.6-052; *Tye v House* [1997] 2 *E.G.L.R.* 171.
- 1126 cf. *Ee v Kakar* (1979) 40 *P. & C.R.* 223 (a case not concerned with a “firm” offer).
- 1127 See *Habibsons Bank Ltd v Standard Chartered Bank* [2010] *EWCA Civ* 1335, [2011] Q.B. 943 at [23] (lenders held to have provided consideration for a “standing offer” by entering into a “Facility Agreement” with the borrower).
- 1128 (1877) 2 *App. Cas.* 439; above, para.6-093.
- 1129 [1947] K.B. 130; above, para.6-144.
- 1130 Above, para.6-106.
- 1131 cf. *Holman Construction Ltd v Delta Timber Co Ltd* [1972] N.Z.L.R. 1081; and see *Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 *W.L.R.* 1195, 1202.
- 1132 [1964] A.C. 465; below, para.9-098.
- 1133 Law Revision Committee, 6th Interim Report, Cmd. 5449 (1937), para.38; Law Commission Working Paper No.60 (1975).
- 1134 *Jaglon v Excess Insurance Ltd* [1972] 2 Q.B. 250, 258; cf. *County Ltd v Girozentrale Securities* [1996] 3 All E.R. 834 where an “offer to subscribe” for shares was described at 837 as “not legally binding but regarded by City convention as binding in honour unless some unforeseen exceptional circumstances supervened”. It seems that the commitment was given not to the company but to the underwriter, or by prospective investors to each other, so that the principles discussed in para.4-029 above did not apply. For the view that the statement in question in the *Jaglon* case was not an offer at all, but an acceptance (and binding as such) see *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856, 863–864.
- 1135 Above, para.4-080; art.16(2).

- 1136 *Citadel Insurance Co v Atlantic Union Insurance Co* [1982] 2 *Lloyd's Rep.* 543, 546; contrast the nature of “preliminary” slips: these were said in *Beazley Underwriting Ltd v Travellers Companies Inc* [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241 at [173] as “nothing more than quotation slips”: i.e. presumably offers without any indication that they would be kept open for a specified or ascertainable time, or perhaps mere invitations to treat (see above, para.4-014).
- 1137 e.g. where a builder enters into a contract in reliance of offers from sub-contractors to supply services or materials and expressed to be “firm” for a fixed period. For conflicting American authorities, see *James Baird Co v Gimbel Bros*, 64 F. 2d. 344 (1933); *Drennan v Star Paving Co* 51 Cal. 2d. 409, 333 P. 2d. 757 (1958); for a review of Canadian authorities, see *Northern Construction Co v Gloge Heating & Plumbing* (1984) 6 D.L.R. (4th) 450 (holding the sub-contractor bound by his offer).
- 1138 See Law Com. Working Paper 60 (1975).

## (d) - Auction Sales without Reserve

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 12. - Special Cases

(d) - Auction Sales without Reserve

### Auctioneer liable

- 105 Where goods are put up for auction without reserve, there is no contract *of sale* if the auctioneer refuses to knock the goods down to the highest bidder; but the auctioneer is liable to the highest bidder on a separate promise that the auction will be without reserve.<sup>1139</sup> It can be argued that there is no consideration for this promise as the bidder is not bound by their unaccepted bid.<sup>1140</sup> But it has been held that there is both a detriment to the bidder, since they run the risk of being bound, and a benefit to the auctioneer, as the bidding is driven up.<sup>1141</sup> Hence there is consideration for the auctioneer's separate promise, and it makes no difference to the auctioneer's liability *on this promise* that they would not be liable if they did not put the goods up for sale at all (since an advertisement of an auction is not an offer to hold it),<sup>1142</sup> or that there was no contract *of sale* because of their refusal to accept the highest bid.<sup>1143</sup>

### Footnotes

1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); Shatwell (1955) 1 Sydney Law Review 289.

1139 *Warlow v Harrison* (1859) 1 El. & El. 309; *Harris v Nickerson* (1873) L.R. 8 Q.B. 286, 288; *Johnson v Boyes* [1899] 2 Ch. 73, 77.

1140 See *Slade* (1952) 68 L.Q.R. 238; *Gower* (1952) 68 L.Q.R. 457; *Slade* (1953) 69 L.Q.R. 21.

1141 *Barry v Davies* [2000] 1 W.L.R. 1962 at 1967.

1142 *Harris v Nickerson* (1873) *L.R.* 8 *Q.B.* 286; above para.4-026.

1143 *Harris v Nickerson* (1873) *L.R.* 8 *Q.B.* 286.

---

End of Document

© 2022 SWEET & MAXWELL

## **(e) - Novation of Partnership Debts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 12. - Special Cases**

**(e) - Novation of Partnership Debts**

### **Novation between old and new partners**

- !06 When the composition of a partnership changes, it is usual to arrange that liability for the debts owed by the existing partners should be transferred by novation<sup>1144</sup> to the new partners.

### **Retiring partner replaced**

- !07 A and B are in partnership; A retires and C is admitted as a new partner; it is agreed between A, B and C, and the creditors of the old firm of A and B, that A shall cease to be liable for the firm's debts, and that C shall undertake such liability. The result is that the creditors can sue C and can no longer sue A. They provide good consideration for C's promise to pay by abandoning their claim against A<sup>1145</sup>; and A provides good consideration for their promise to release them by procuring a substitute debtor, C.

### **Retiring partner not replaced**

- !08 A and B are in partnership; A retires; it is agreed between A, B and the creditors of the firm that A shall cease to be liable and that B shall be solely liable. It seems that the creditors cannot sue A, but it is hard to see what consideration moves from them. In one case it was said that there was

consideration in that a remedy against a single debtor might be easier to enforce than one against several, all of whom were solvent<sup>1146</sup>; thus the creditors benefit by the release of A. This is a possible, if invented, consideration.<sup>1147</sup>

## Debts incurred before partnership

- !09 The situation discussed in the preceding paragraph should be distinguished from that in which the original liability is incurred by an individual who then enters into a partnership. This was the position in *Re Burton Marsden Douglas*<sup>1148</sup> where A, a solicitor, incurred liabilities to a client (X) and then entered into partnership with B and C. It was held that B and C were not liable for the liabilities incurred by A to X before A had entered into the partnership with B and C. There had been no novation of those liabilities since (a) there had been no agreement to novate them and (b) if there had been such an agreement, there would have been no consideration for any promise by B and C to X to discharge those liabilities since there had been no promise by X to release A.

## Footnotes

1 Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 *Sydney Law Review* 289.

1144 Below, para.22-089; *Partnership Act 1890* s.17(3). Problems of the kind here discussed do not arise in the same form in the case of limited liability partnership incorporated under the *Limited Liability Partnerships Act 2000* since the liabilities of the partnership are those of the body corporate incorporated under ss.1–3 of that Act; these are not affected by a change in the membership of the body. Section 6(3) of the Act deals with the different question of the extent to which acts of a person who has ceased to be a member can still impose liability on the partnership.

1145 cf. the reasoning of *Classic Maritime Inc v Lion Diversified Holdings Berhad [2009] EWHC 1142 (Comm), [2010] 1 Lloyd's Rep. 59* at [46] and [41].

1146 *Lyth v Ault* (1852) 7 Ex. 669; *Thompson v Percival* (1834) 5 B. & Ad. 925 is based on reasoning which is obsolete after *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 617; above, para.6-138.

1147 Above, para.6-010.

1148 [2004] EWHC 593 (Ch), [2004] 3 All E.R. 222.

## **(f) - Bailments without Reward**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Consideration<sup>1</sup>

Section 12. - Special Cases

**(f) - Bailments without Reward**

### **Gratuitous bailment**

<sup>110</sup> A gratuitous bailment may be for the benefit of the bailee or for the benefit of the bailor.

#### **(1) For benefit of bailee**

<sup>111</sup> The first possibility is illustrated by *Bainbridge v Firmstone*<sup>1149</sup> where the defendant asked for and received permission from the plaintiff to weigh two boilers belonging to the plaintiff. In performing this operation, the defendant damaged the boilers, and the plaintiff claimed damages for breach of the defendant's promise to return the boilers in good condition. The defendant argued that, as he was not paid to weigh or look after the boilers, no consideration for his promise had been provided by the plaintiff; but the court rejected this argument. Patteson J said: "I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time".<sup>1150</sup> This consideration would also support some other promise by the defendant, e.g. a promise to repair the boilers. It is more doubtful whether there would be any consideration moving from the defendant for any promise by the plaintiff to allow the defendant to have possession of the boilers. A mere promise to return the boilers might not suffice on the ground that it was no more than a promise to perform a duty imposed by law on all bailees; but a promise to repair the boilers or to improve them in some way, or one to look after them for a fixed time, would probably be regarded as consideration moving from the defendant.<sup>1151</sup>

## (2) For benefit of bailor

<sup>112</sup> The second possibility would, for example, arise where a thing was deposited by A with B, not for use but for safe-keeping, without reward. In such a case, A's parting with the possession is hardly a detriment to them; and B's duty to look after the thing<sup>1152</sup> does not arise out of a contractual promise<sup>1153</sup> but is imposed by law.<sup>1154</sup> It follows that B's *only* duty is that imposed by law. Thus B is under no obligation before they actually receive the thing; and if they promised to do anything which went beyond the duty imposed by law (for example, to keep the thing in repair) they would be bound by their promise only if A had provided some consideration for it apart from the delivery of the chattel.<sup>1155</sup> To constitute such consideration, it is not necessary to show that B obtained any benefit from the bailment: thus it is enough if A reimburses (or promises to reimburse) B for any expenses that B has incurred for the purpose of performing their promise.<sup>1156</sup> This follows from the principle that consideration may consist *either* in a benefit to the promisor (B) *or* in a detriment to the promisee (A).<sup>1157</sup>

## (3) Promises defining gratuitous bailee's custodial duty

<sup>113</sup> The liability of a gratuitous bailee for breaches of duty as such a bailee calls for further discussion in the light of the decision of the Court of Appeal in *Yearworth v North Bristol NHS Trust*.<sup>1158</sup> In that case, men who had been treated for cancer and had undergone chemotherapy, were told that this might lead to their becoming infertile, and were given the opportunity of having samples of their semen frozen and stored by the defendant, whose fertility unit “extended, and broke, a particular promise to the men, namely that ‘the sperm will be stored … at minus 196C’”.<sup>1159</sup> In consequence of the breach, the sperm thawed and became useless. It was held that the defendant had become a gratuitous bailee of the sperm and was liable as such to the men for breach of its duty under the bailment; and this duty was described<sup>1160</sup> as “a breach not just of the duty owed by every gratuitous bailee but of a specific promise extended by the trust to the men”. These words may seem to be inconsistent with the view, taken in sub-para.(2) above, that a gratuitous bailee was subject only to the duty imposed on such as bailees by virtue of the bailment and was not bound by any promise going beyond that duty unless the bailor had provided some consideration for that promise.<sup>1161</sup> It is, however, submitted that there is no such inconsistency since a distinction must be drawn between a “specific promise” which serves merely to define the scope of B's *custodial* duty as bailee and one which purports to impose on B further duties, going beyond that duty. The passage of the judgment quoted above appears to refer back to an earlier statement which deals with the situation “where the gratuitous bailee has extended, and broken, a particular promise to his bailor … that the chattel will be stored in a particular place or in a particular way”<sup>1162</sup>: e.g. where they have promised to store goods

under cover but stored them in the open and they were destroyed or damaged in consequence of having been so stored. Here the bailee would be in breach of the custodial duty which is the central feature of the bailment relationship. The defendant's breach of duty in the *Yearworth* case was of this nature, performance of the promise to keep the sperm at the specified temperature being essential to its preservation. The same could *not* be said of the example given in the text above of a promise to keep the thing bailed in repair. Performance of such a promise would go beyond the essential custodial duty of the bailee since the promise would not merely define the way in which that duty was to be performed but would impose an additional duty to carry out the repairs and so to improve the thing which has been bailed. It is submitted that the problem here discussed arises at least in part because the distinction drawn in the *Yearworth* case<sup>1163</sup> between breach of "the duty owed by every gratuitous bailee" and breach of a "specific promise" made by such a bailee uses categories of which the first is unduly general and which are not mutually exclusive. Both these points follow from the fact that the scope of the duty owed by a gratuitous bailee may well depend on a "particular promise" of the kind referred to in the judgment,<sup>1164</sup> i.e. on one as to where and how the thing bailed will be stored. That was the type of promise under consideration in the *Yearworth* case; and where such a promise is made there is no distinction of substance between the "particular promise" referred to in one part in the judgment<sup>1165</sup> and the "specific promise" referred to in another.<sup>1166</sup> Whether such a promise is described as a "particular" or as a "specific" one, its effect is to define the custodial duty of the gratuitous bailee; and this is so whether or not the promise has contractual force. It follows that, in such cases, the concept of a "duty owed by every gratuitous bailee"<sup>1167</sup> is (with respect) one of limited practical value.

## Footnotes

<sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) 1 Sydney Law Review 289.

<sup>1149</sup> (1838) 8 A. & E. 743.

<sup>1150</sup> At 744.

<sup>1151</sup> cf. *Verral v Farnes* [1966] 1 W.L.R. 1254, a case relating to land; followed in *Milton v Farrow* (1980) 255 E.G. 449.

<sup>1152</sup> For this duty, see *Coggs v Bernard* (1703) 2 Ld. Raym. 909; *Mitchell v Ealing LBC* [1979] Q.B. 1; *Port Swettenham Authority v T.W. Wu & Co* [1979] A.C. 580, 590.

<sup>1153</sup> For the view that a bailment can come into existence "without consideration passing from the bailor [A] to the bailee [B]" see also *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] Q.B. 1 at [48]. B's liability was there said to be based on "an assumption of responsibility" but not necessarily to "lie in tort", the Court being "strongly attracted to the view that B's liability was *sui generis*" (citing Palmer on Bailment, 2nd edn (1991) at pp.44 et seq.). For this case, see also below, sub-para.(3).

<sup>1154</sup> *Morris v C.W. Martin Ltd* [1966] 1 Q.B. 716, 731; *Compania Continental del Peru v Evelpis Shipping Corp (The Agia Skepi)* [1992] 2 Lloyd's Rep. 467, 472.

- 1155 cf. *Charnock v Liverpool Corp* [1968] 1 W.L.R. 1498; below, para.20-011.
- 1156 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16, 27.
- 1157 Above, paras 6-015—6-016.
- 1158 [2009] EWCA Civ 37, [2009] 2 All E.R. 986.
- 1159 At [49].
- 1160 At [58].
- 1161 Above, at sub-para.(2).
- 1162 [2009] EWCA Civ 37 at [48].
- 1163 At [58].
- 1164 At [48], quoted above.
- 1165 At [48].
- 1166 At [58].
- 1167 At [58].

## **(g) - Gratuitous Services**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 12. - Special Cases**

**(g) - Gratuitous Services**

### **Promise to perform services gratuitously lacks consideration**

- <sup>114</sup> Normally a promise to render services without reward is not supported by consideration and is therefore not binding contractually. For example, where A gratuitously promises to insure B's property but fails to do so, A is not liable to B for breach of contract if the property is destroyed or damaged.<sup>1168</sup> A firm of solicitors is likewise not bound by its promise not to charge its client for work done after a specified date, since, without more, such a promise is not supported by any consideration;<sup>1169</sup> and, where an architect (A) had provided professional services as such for friends (B) free of charge, one reason<sup>1170</sup> why there was no contract between A and B was that the requirement of consideration had not been satisfied.<sup>1171</sup> Occasionally, it may be possible to find consideration in the indirect financial benefit which the promisor obtains from the arrangement, e.g. in the form of favourable publicity.<sup>1172</sup>

### **Liability in tort for negligent performance**

- <sup>115</sup> Even where the promise is not supported by consideration, the promisor may be liable in tort for negligence if they actually render the gratuitous services but fails to perform a duty to exercise due care in rendering them and so causes loss. A banker giving a negligent reference or an accountant giving a negligent report on the financial position of a company could be liable in tort on this ground, even though they made no charge to the person to whom the information was given.<sup>1173</sup>

Similarly, where A gratuitously promised to insure B's property but did so negligently, with the result that the policy did not cover the loss which occurred, A was held liable to B in tort<sup>1174</sup>; and, where the relationship between the supplier (A) of the gratuitous services and their recipient (B) was not contractual for the reasons stated in para.6-214 above, A was held liable to B in tort for having failed to exercise reasonable care in performing the services which A had in fact rendered.<sup>1175</sup> In one case, a person was even held liable in damages for negligently giving free advice to a friend in connection with the purchase of a second-hand car which turned out to be seriously defective.<sup>1176</sup>

## Non-feasance and misfeasance

- <sup>!16</sup> The most important distinction between the two groups of cases discussed in paras 6-214 and 6-215 above is that between non-feasance and misfeasance in the performance of a promise to render gratuitous service. For this purpose, non-feasance means complete failure to pursue a *promised course of action*, while misfeasance means carelessness in the pursuit of that course of action, leading to failure to achieve a *promised result*. The first group of cases shows that non-feasance does not (in the absence of consideration<sup>1177</sup>) make the promisor liable to the promisee in contract, while the second shows that misfeasance can make them so liable in tort. There is no liability in tort for simply doing nothing after having promised to render services gratuitously; for to impose such liability would amount to holding “that the law of England recognises the enforceability of a gratuitous promise. On the face of it, this would be inconsistent with fundamental principle”.<sup>1178</sup> In cases of pure non-feasance, the promisee will therefore have a remedy only if they can show that they provided consideration for the promisor's promise to render the service. If they can show this they may also be in a better position with regard to damages even in cases of misfeasance.<sup>1179</sup> There may be an exception to the general rule that there is no liability in tort for pure omissions. This exception was said to apply in *Lennon v Metropolitan Police Commissioner*,<sup>1180</sup> where A represented to B that A would take steps to safeguard some specified financial interest of B's (in that case B's housing allowance as a police officer on his transfer from one force to another) and that representation amounted to an “express assumption of responsibility for a particular matter”.<sup>1181</sup> A's failure to exercise due care in discharging that responsibility could then make him liable to B in tort, and such liability was said to cover “acts of omission”.<sup>1182</sup> It may, however, be respectfully doubted whether A's allegedly wrongful conduct in this case did not amount to misfeasance in the sense in which this expression has been used in this paragraph, i.e. to failure to achieve a *promised result*.
- <sup>!17</sup> In *Gore v Van der Lann*<sup>1183</sup> a corporation issued a free travel pass to the claimant who “in consideration of my being granted a free pass” undertook that the use of the pass by her should be subject to certain conditions. One of these was that she would not sue the corporation or its

servants for loss or injury suffered while she was boarding, alighting from, or being carried in, the corporation's vehicles. The claimant was injured while boarding a corporation bus; and it was held that the issue and acceptance of the free pass amounted to a contract.<sup>1184</sup> Willmer LJ said that "Each party gave good consideration by accepting a detriment in return for the advantages gained".<sup>1185</sup> The parties were, as a result of the issue of the pass, brought into a relationship of passenger and carrier which gave rise to duties quite independently of contract; and it was the promise not to enforce these obligations which constituted the consideration moving from the claimant. In the absence of such a relationship, the person to whom the gratuitous service was promised would not provide consideration for that promise merely by making a counter-promise not to sue for loss or damage caused by the defective performance of the services. It follows that, if in *Gore v Van der Lann* the pass had been issued for a specified period but had been withdrawn before the end of that period, then the holder would have had no claim in contract in respect of that premature withdrawal. Similarly, if A promised to carry B's goods to London free of charge and B promised not to sue A for negligently damaging them in the course of that operation, then A would not be under any contractual liability for failing to pick up the goods. But they might be liable if they did pick them up and then unloaded them short of the agreed destination.

## Footnotes

<sup>1</sup> Sutton, Consideration Reconsidered (1974); Cartwright, Formation and Variation of Contracts, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.

<sup>1168</sup> *Argy Trading & Development Co Ltd v Lapid Developments Ltd* [1977] *1 W.L.R.* 444; cf. the New York case of *Thorn v Deas*, 4 Johns. 84 (1809); later American authorities are divided: Corbin, Contracts, para.205, n.54.

<sup>1169</sup> *Ashia Centur Ltd v Barker Gillette LLP* [2011] *EWHC* 148 (QB); the client argued that it had provided consideration by forbearing immediately to instruct new solicitors but this argument was rejected as there was no evidence of any conduct on the client's part to support a finding of such forbearance (at [19], [20]).

<sup>1170</sup> For other reasons why there was no contract between A and B, see above, paras 3-028, 3-035.

<sup>1171</sup> *Burgess v Lejonvarn* [2017] *EWCA Civ* 254, [2017] *B.L.R.* 277 at [71], referring to the reasoning of the Court below [2016] *EWHC* 40 (TCC) at [152] and affirming the decision of that Court.

<sup>1172</sup> cf. *De la Bere v Pearson* [1908] *1 K.B.* 280, 287.

<sup>1173</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] *A.C.* 465; cf. below, para.9-098.

<sup>1174</sup> *Wilkinson v Coverdale* (1793) *1 Esp.* 75.

<sup>1175</sup> *Burgess v Lejonvarn* [2017] *EWCA Civ* 254, [2017] *B.L.R.* 277 at [88], [128].

<sup>1176</sup> *Chaudhry v Prabhakar* [1989] *1 W.L.R.* 29; the defendant conceded that he owed a duty of care to the claimant and two members of the Court of Appeal seem to have regarded this concession as correct; *Brown* [1989] *L.M.C.L.Q.* 148. Contrast *Henderson v Merrett Syndicates Ltd* [1995] *2 A.C.* 145, 181, suggesting that there may be no liability in respect of services rendered on "an informal occasion".

- 1177 Or of privity of contract: see *Hamble Fisheries Ltd v L. Gardner & Son Ltd (The Rebecca Elaine) [1999] 2 Lloyd's Rep. 1* at 5.
- 1178 *G.A.F.L.A.C. v Tanter (The Zephyr) [1985] 2 Lloyd's Rep. 529, 538*, disapproving the contrary view expressed at first instance [1984] 1 Lloyd's Rep. 58, 85 and there based on authorities which were all cases of misfeasance. *The Zephyr* itself was also such a case: [1984] 1 Lloyd's Rep. 58 at 79, 86 ("he was making the position steadily worse"). A fortiori, there is no liability in tort for pure omission where *no* promise has been made: see *Reid v Rush & Tompkins Group Plc [1990] 1 W.L.R. 212* and *Van Oppen v Clerk to the Bedford Charity Trustees [1990] 1 W.L.R. 235* though in the latter case it was said at 260 that a voluntary assumption of responsibility by one party followed by reliance on it by the other might in exceptional cases give rise to such liability. The scope of the exception is not clear; in the last two cases it was held that there was *no* duty on respectively an employer and a school to advise an employee or the parents of a pupil to insure against foreseeable risks of injury; cf. *Outram v Academy Plastics Ltd [2001] I.C.R. 367* at 372: generally no liability in tort "for pure omission", the omission taking the form of an employer's failure, without breach of contract, to advise an employee as to his membership of the employer's pension scheme. Liability in tort for pure omission may exceptionally arise where there is a "duty to act": see *White v Jones [1995] 2 A.C. 207* at 261, 268, 295 below, para.20-035; but it is submitted that no such duty would arise merely from the making of a gratuitous promise. For a further possible exception, see below at the end of this paragraph.
- 1179 Because they will then be able to recover damages for loss of bargain.
- 1180 [2004] EWCA Civ 130, [2004] 1 W.L.R. 2594 at [34].
- 1181 [2004] EWCA Civ 130, [2004] 1 W.L.R. 2594 at [34].
- 1182 [2004] EWCA Civ 130, [2004] 1 W.L.R. 2594 at [20].
- 1183 [1967] 2 Q.B. 31; *Harris* (1967) 30 M.L.R. 584; *Odgers* (1970) 86 L.Q.R. 69; and see above, para.4-230 on the issue of contractual intention.
- 1184 This contract was void, so far as it purported to exclude liability for personal injury, by virtue of s.151 of the Road Traffic Act 1960 (now Public Passenger Vehicles Act 1981 s.29); below, para.17-138.
- 1185 [1967] 2 Q.B. 31, 42.

## **(h) - Irrevocable Credits**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 6 - Consideration<sup>1</sup>**

**Section 12. - Special Cases**

**(h) - Irrevocable Credits**

### **Bankers' irrevocable credits**

- <sup>118</sup> Where a banker issues (or confirms) an irrevocable credit, the generally held commercial view is that the banker's promise to the beneficiary is binding as soon as it is communicated to the beneficiary, and before the latter has acted on it in any way.<sup>1186</sup> If, as seems probable, this view also represents the law, it constitutes a clear exception to the doctrine of consideration.<sup>1187</sup>

### **Footnotes**

<sup>1</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*, 2nd edn (2020); *Shatwell* (1955) *1 Sydney Law Review* 289.

<sup>1186</sup> Below, Vol.II, para.36-512.

<sup>1187</sup> For explicit recognition of such an exception in the United States, see UCC s.5–105; cf. *United City Merchants Ltd v Royal Bank of Canada (The American Accord)* [1982] Q.B. 208, 225, *reversed on other grounds* [1983] 1 A.C. 168. Under the *Contracts (Rights of Third Parties) Act 1999* (below, paras 20-091 et seq.) the beneficiary might have a claim against the bank as a third party identified in the contract between the bank and its customer; there is no requirement, in such cases, of consideration moving from the third party: above, para.6-047. But his rights under the Act would be less secure than his common law rights in two respects. First, they would be subject under s.3(2) to any defences which the bank might have against its customer. And, secondly they could be defeated or diminished by rescission or variation

of the contract by subsequent agreement between the bank and its customer before the seller had *either* communicated his assent to the bank *or* relied on the credit, and the bank either was aware of, or reasonably should have foreseen such reliance: see s.2(1) and paras 20-111 and 20-112 below.

## Section 1. - In General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Form

Section 1. - In General

*Simon Whittaker*

### The general rule

- 101 The general rule of English law is that contracts can be made quite informally: no writing or other form is necessary. At common law there was only one exception to this rule according to which a corporation had to contract under seal, but the last vestiges of this rule were abolished in 1960.<sup>1</sup> At present, all formal requirements in the law of contract are contained in legislation which deals with specific contracts. There are four main purposes for making such formal requirements.<sup>2</sup> First, they may serve as clear evidence of a transaction and of its terms. Secondly, they may have a cautionary effect, thereby deterring hasty, premature or ill-considered contracts being made. Thirdly, they may have a “channelling” function, offering “a legal framework into which a party may fit his actions”.<sup>3</sup> Thus, formalities may mark off transactions from one another and create a standardised form of transaction.<sup>4</sup> Fourthly, formal requirements may be used as a device to protect the weaker parties to contracts. There has been an increasing tendency to impose such requirements with this last purpose in view: for example, in the cases of tenants, employees, debtors and sureties under consumer credit agreements<sup>5</sup> and consumers of certain classes of services, such as package holidays<sup>6</sup> or “timeshare” accommodation.<sup>7</sup> Formal requirements are discussed in relation to a number of specific contracts in Vol.II of this work.<sup>8</sup> In the present volume, which deals with general principles, there would be no point in attempting to make an exhaustive list of contracts for which formal requirements are imposed by statute. But four general matters may usefully be discussed here: types of formal requirement; the effects of non-compliance; the impact of estoppel; and contracts made by electronic communications.

## Types of formal requirement

- 102 Legislative requirements of form differ widely from one another. In a few cases, contracts are required to be made by deed: this is true, for example, of a lease for more than three years.<sup>9</sup> More frequently the requirement is that certain contracts must be in, or evidenced in, writing; but even requirements of this kind vary a good deal in stringency. Some statutes simply require, in general terms, that the contract must be in writing, or that there must be a note or memorandum in writing.<sup>10</sup> Others set out the formal requirements in great detail and even specify the size of the lettering and the colour of the print and paper.<sup>11</sup> Yet others do not require the contract to be, or to be evidenced in, writing at all, but only require one party to give the other written notice of specified terms of the contract.<sup>12</sup> The form of a contract may also affect the regulation which it attracts, rather than going to its validity. Thus, for example, the scheme of rules governing “construction contracts” as first enacted under [Pt II of the Housing Grants, Construction and Regeneration Act 1996](#) applied only “where the construction contract is in writing”, any other agreement between the parties being “effective for the purposes of this Part only if in writing”.<sup>13</sup> However, “[t]his was interpreted restrictively by the courts such that all of the non-trivial terms of construction contracts had to be ‘in writing’ for [Part 2](#) to apply”. The Act was amended so as to remove this general requirement, whilst prescribing that various matters must nonetheless be in writing.<sup>14</sup>

## Duties of information as requirements of form

- 103 The law sometimes imposes on a business or professional a pre-contractual duty to provide information relating to certain matters, as in the case of consumer credit agreements.<sup>15</sup> Information requirements are particularly prevalent in EU contract law directives and these requirements were implemented in the UK legislation; after IP completion day, they form part of “retained EU law”.<sup>16</sup> The requirements have been imposed on traders towards consumers generally<sup>17</sup> as regards contracts concluded in certain circumstances (“distance contracts” and “off-premises contracts”<sup>18</sup>) and in respect of certain types of contract such as “time-share”<sup>19</sup> and package travel, package holidays and package tours.<sup>20</sup>

## The requirement of transparency in consumer contracts

104



It could be thought that the requirement of transparency imposed on traders as regards the written terms consumer contracts by the [Consumer Rights Act 2015 s.68\(1\)](#) and understood as requiring that the terms are in “plain and intelligible language” and legible

<sup>21</sup>

**U** is a requirement of form. It certainly does require contracts to be written in a clear and comprehensible way, but it goes further than this as it has been held that it cannot be “reduced merely to their being formally and grammatically intelligible” and requires that the “consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from” the term in question.

<sup>22</sup>

**U** A failure in this requirement does not in itself affect the contract’s validity, but it may contribute to the unfairness of the relevant term or terms and so render them not binding on the consumer.

<sup>23</sup>

**U** It will also attract enforcement measures from the relevant consumer protection regulators.

<sup>24</sup>

**U**

## Effect of non-compliance

**D**<sup>105</sup> Non-compliance with statutory requirements of form may produce various effects. It may make the contract void,<sup>25</sup> or unenforceable,<sup>26</sup> or unenforceable by one party<sup>27</sup> or enforceable only on an order of the court.<sup>28</sup> It may simply deprive the transaction of certain effects which it would have had, if the formal requirement had been observed, without generally impairing its validity or enforceability; this would be the case, for example, if a lease for more than three years were not made by deed

<sup>29</sup>

**U**; if an assignment of a chose in action were made orally<sup>30</sup>; or if the sort of promise which is normally contained in a bill of exchange or promissory note were made orally. In some cases, a failure to satisfy a statutory requirement of form may have no effect on the validity of the contract, while in others cases it may do so in the light of the purposes of the requirement and the evidence on the facts.<sup>31</sup> Failure to comply with formal requirements may also be a criminal offence, and in some cases this is the sole consequence of failure which is actually specified in the relevant statute.<sup>32</sup> The civil consequences of failure to comply with a statutory requirement of form in such a case would presumably depend on the court’s view of the objects which the legislature sought

to achieve in imposing the requirement.<sup>33</sup> If the requirement was imposed to protect one of the parties to a contract, that party would probably be able to enforce the contract notwithstanding the formal defect; whether the other party could enforce it would depend on the law's general approach to illegality discussed elsewhere in this book.<sup>34</sup>

## Requirements of form and estoppel

- 106 As will be described in more detail below in relation to contracts for the sale or other disposition of an interest in land, the application of the various doctrines of estoppel have sometimes caused difficulty in relation to contracts invalid for want of the applicable formality.<sup>35</sup> In this regard, the House of Lords in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA*<sup>36</sup> in the context of s.4 of the Statute of Frauds made clear that while in an appropriate case where there had been a clear representation by a party that the contract was valid (despite any want of formality) an estoppel may arise,<sup>37</sup> the courts should not found an estoppel simply on the informal agreement itself.<sup>38</sup> As Lord Hoffmann observed:

“The terms of the Statute of Frauds therefore show that Parliament, although obviously conscious that it would allow some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious. This means that while normally one would approach the construction of a statute on the basis that Parliament was unlikely to have intended to cause injustice by allowing people to break promises which had been relied upon, no such assumption can be made about the statute ... [I]t must not be construed in a way which would undermine its purpose.”<sup>39</sup>

## Contracts made by electronic communications

- 107 The need for informality in electronic commerce has led to the law governing formal requirements for contracts being subject to considerable legislative intervention, both at the EU and at the national level. While the relevant EU law itself no longer applies to the UK after IP completion day,<sup>40</sup> its effect is still felt in UK national law and, in addition, the Trade and Cooperation Agreement between the UK and the EU makes specific provision requiring the parties “to ensure that contracts may be concluded by electronic means”.

41

**U** The starting point for this discussion is the [Electronic Communications Act 2000](#) which created a power in the appropriate Minister to issue statutory instruments in order to modify provisions of:

“... any enactment or subordinate legislation ... in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications”

for a number of purposes, including the making of contracts.<sup>42</sup> This should be seen in the context at the time of art.9(1) of the European Directive on Electronic Commerce 2000<sup>43</sup> which provides that:

“Member States *shall* ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their being made by electronic means.”<sup>44</sup>

Article 9 continues by allowing Member States to provide for exceptions to this principle notably in “contracts that create or transfer rights in real estate, except for rental rights”<sup>45</sup> and “contracts of suretyship granted and on collateral securities furnished by persons acting outside their trade, business or profession”.<sup>46</sup> Where it applies, this obligation on Member States is not limited to the conclusion of the contract, but extends to all aspects of the contractual process.<sup>47</sup>

## Impact on formality requirements

At first sight, art.9 of the Electronic Commerce Directive might appear to have required the United Kingdom to revise a good deal of its law of contractual formalities, much of which requires a contract to be contained or evidenced in writing and/or signed, neither of these appearing to be able to be achieved by electronic means. However, the Law Commission advised the Government that in general requirements of “writing” and of “signature” can be fulfilled via some electronic means without any changes being made to the law.<sup>48</sup> So, as to “writing” this requirement can be fulfilled by electronic mail and website trading, but not by electronic data interchange as this does not involve any visible text so as to satisfy [s.5 of the Interpretation Act 1978](#)’s definition of writing.<sup>49</sup> Its view was that “writing” does not need any “physical memorial”, such as paper.<sup>50</sup> Secondly, the Law Commission’s view was that requirements of signature can generally be interpreted in a functional way, by asking whether or not the conduct of a would-be signatory indicates an

authenticating intention to a reasonable person, though each requirement must be considered in its own statutory context.<sup>51</sup> Following this approach, a requirement of signature can in principle be fulfilled in a number of ways: by “electronic signature” using a dual-key encryption system and a certification authority<sup>52</sup>; by use of a manuscript signature scanned into a computer and incorporated into an email or other document; by a person typing their name or initials or by setting up a system by which this occurs automatically<sup>53</sup>; and even by a purchaser on a website “clicking” a button after entering onto the web details of the goods that they wish to purchase, confirming payment and personal details.<sup>54</sup> The Law Commission concluded that:

“... there is no need for general legislative reform, because we consider that legislation is not only unnecessary but also risky. It is difficult to envisage a simple global reform that would be effective in all eventualities ... [So], it is only in very rare cases that the statute book will conflict with Article 9 of the Electronic Commerce Directive.”<sup>55</sup>

To the extent to which legislative change were needed, it could have been effected by exercise of the power contained in [s.8 of the Electronic Communications Act 2000](#). One particular context in which this could have been relevant was [s.2 of the Law of Property \(Miscellaneous\) Provisions Act 1989](#). For, as will be explained, in this context it has been said that “signature” must be given its ordinary linguistic meaning, so as to require each of the parties to contracts for the sale or other disposition of an interest in land to write their names with their own hands upon the document,<sup>56</sup> although some or all of the contracts contained within this category may come within one of the exceptions to art.9 of the EU Directive so as to have allowed English law to retain a formal requirement which is inconsistent with the effectiveness of a contract made by electronic means.<sup>57</sup> However, after the UK’s departure from the EU came into full effect on IP completion day,<sup>58</sup> this discussion appears hypothetical as on that date the UK was no longer subject to EU law itself and, in particular, to the Electronic Commerce Directive which did not *itself* become part of retained EU law.<sup>59</sup> On the other hand, as will be seen in the following paragraphs, other aspects of EU law relevant to contractual formalities have become part of retained EU law (if in an amended form) and, moreover, its requirement of informality is reflected in the Trade and Cooperation Agreement’s provisions governing “digital trade.”<sup>60</sup>

## Electronic signatures

109

As has been seen,

D

[61](#)

**U** the expression “electronic signature” may refer to a number of different things, but since 1999 it has acquired a specific legal meaning, as then the EU legislator enacted the Electronic Signatures Directive 1999,<sup>62</sup> the purposes of which were to facilitate the use of “electronic signatures” and to contribute to their legal recognition, and to establish a legal framework for electronic signatures and certain certification services. This directive expressly did not cover aspects relating to the conclusion or validity of contracts or other legal obligations where there are requirements as regards form imposed by national or Community law, nor the rules and limits governing the use of documents.<sup>63</sup> An “electronic signature” was defined by the Directive as:

“... data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication.”<sup>64</sup>

The United Kingdom implemented the Electronic Signatures Directive 1999 by two instruments. First, [s.7 of the Electronic Communications Act 2000](#) provided for the admissibility in evidence of electronic signatures and certification by any person of such a signature:

“... in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data”

and followed for this purpose the definition of “electronic signature” in the Directive.<sup>65</sup> On its terms, this provision was broad enough to include evidence for the purposes of formal requirements of a contract (such as [s.2 of the Law of Property \(Miscellaneous Provisions\) Act 1989](#)<sup>66</sup>), but, if it were so interpreted, it would have gone beyond the scope of the requirements of the 1999 Directive. Secondly, the [Electronic Signatures Regulations 2002](#) provided for the supervision and liability of “certification-service providers” (i.e. persons who issue certificates or provide other services related to electronic signatures) and for consequential matters relating to data protection.<sup>67</sup>

## The “eIDAS Regulation”

- 110 However, the Electronic Signatures Directive 1999 was repealed and replaced by the EU Electronic Identification and Electronic Trust Services Regulation 2014 (the “eIDAS Regulation”, applicable in general from 1 July 2016),<sup>68</sup> which lays down the conditions under which Member States mutually recognise “electronic identification means of natural persons and legal persons falling under a notified electronic identification scheme of another Member State”,<sup>69</sup> and “rules for trust services, in particular for electronic transactions”; and which establishes:

“... a legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and certificate services for website authentication.”<sup>70</sup>

After IP completion day, the eIDAS Regulation itself (as an EU regulation) no longer applies in the UK, but it became part of retained EU law by operation of the [European Union \(Withdrawal\) Act 2018](#)<sup>71</sup> subject to a series of amendments<sup>72</sup> which refocused its scope on the UK and removed Ch.II’s provisions on electronic identification.<sup>73</sup> The following discussion will start by explaining the EU Regulation itself (the “EU eIDAS Regulation”) and how its provisions on the significance of electronic signatures were implemented in UK law, noting how this changed on IP completion day on the amendment of the retained EU law eIDAS Regulation (the “retained eIDAS Regulation”).

## No denial of effect of electronic signature

**D**<sup>111</sup> Article 25(1) and (2) of the EU eIDAS Regulation provide (and the amended retained eIDAS Regulation also provides) that:

- (1) An electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.
- (2) A qualified electronic signature shall have the equivalent legal effect of a handwritten signature.

74



However, following the pattern of the 1999 Directive, the EU eIDAS Regulation also provides expressly that it:

“... does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form.”

75



(This provision was retained in UK law, though the reference to “national or Union law” was replaced by one to “law”).

<sup>76</sup>

**U** Instead, the main purpose of the EU Regulation itself is to ensure that businesses and individuals can use their own national electronic identification schemes (eIDs) to access public services in other EU countries where electronic identification schemes are available. It also aims to create a European internal market for electronic trust services—electronic signatures, electronic seals, time stamps, etc.—by ensuring that they will work across borders and have the same legal status as traditional paper-based processes.

<sup>77</sup>

**U** By way of implementation of some aspects of the eIDAS Regulation, the United Kingdom revoked and replaced the [Electronic Signature Regulations 2002](#) by the [Electronic Identification and Trust Services for Electronic Transactions Regulations 2016](#).

<sup>78</sup>

**U** The [2016 Regulations](#) also amended [s.7](#) of the [Electronic Communications Act 2000](#) so as to follow the simplified definition of “electronic signature” in the eIDAS Regulation as:

“... so much of anything in electronic form as—

- (a)is incorporated into or otherwise logically associated with any electronic communication or electronic data; and
- (b)purports to be used by the individual creating it to sign.”

<sup>79</sup>



The main import of [s.7](#) of the 2000 Act remained the same, viz to make general provision for the recognition of electronic signatures as evidence in legal proceedings

<sup>80</sup>

**U** and this did not change on IP completion day. The [2016 Regulations](#) also made new provision for electronic seals and related certificates, electronic time stamps and related certificates, electronic documents and related certificates, and electronic registered delivery service and related certificates.

<sup>81</sup>

**U** However, as earlier noted,

<sup>82</sup>

**U** neither the eIDAS Regulation itself nor the retained eIDAS Regulation affect the law governing the definitions of signature for the purposes of formal requirements of English contract law

83

**U**; nor does its provision for “electronic seals” affect the common law or statutory requirements for the execution of a deed.

84

**U** It is submitted that the degree of uncertainty as to the impact of [s.7 of the Electronic Communications Act 2000](#) in relation to these same formalities remains after its amendment by the [2016 Regulations](#).

85

**U**

## Significance of the Trade and Cooperation Agreement

**D** The Trade and Cooperation Agreement concluded between the UK and the EU included a title governing “Digital Trade”,

86

**U** and this title includes provision affecting formal requirements governing the conclusion of contracts by electronic means. Article 205(1) (formerly art.DIGIT.10(1)) Conclusion of contracts by electronic means states that:

“Each Party shall ensure that contracts may be concluded by electronic means and that its law neither creates obstacles for the use of electronic contracts nor results in contracts being deprived of legal effect and validity solely on the ground that the contract has been made by electronic means.”

This reflects almost identical provision in art.9 of the Electronic Commerce Directive 2000,

87

**U** and art.205 also follows art.9 by recognising a number of exceptions (such as for contracts that establish or transfer rights in real estate or contracts of suretyship made by consumers), though rather more exceptions than the Directive.

88

**U** The purpose of the general rule in the Agreement is to ensure that, in general, the UK and the EU will not introduce legal requirements of form which undermine the effectiveness

of electronic commerce; and provisions in the European Union (Future Relationship) Act 2020 (which implemented the Agreement in UK law

89

U ) mean that the UK's commitment to maintain this aspect of the Directive's requirements is reflected in its domestic law.

## Electronic documents and deeds

112 Following the recommendations of the Law Commission,

90

U the Land Registration Act 2002 made provision for the creation of a framework in which it will be possible to transfer and create interests in registered land by electronic means through a network controlled by the Land Registry.

91

U In order to permit this, Pt 8 of the Act makes provision for the fulfilment electronically of formality requirements by the transactions in question, doing so by assimilating certain qualifying electronic documents to deeds for the purposes of any enactment requiring the dispositions to which those documents relate to use a deed. However, the system of electronic conveyancing which these legislative provisions envisaged has not been brought into being and the Law Commission has made recommendations that would enable a modified scheme to be brought into effect.

92

U Nevertheless, it is the Land Registry's current practice

93

U to accept so-called “*Mercury* signatures”

94

U (where the form of signature involved is a scanned manuscript signature being added to the final version of the deed) for the purposes of registration transfers and certain other deeds.

95

U The Land Registry also accepts “Conveyancer-certified electronic signatures” as regards most documents where a listed series of steps have been followed, one of which is that a conveyancer provides HM Land Registry with a certificate concerning the signature,

96

U noting that:

“... the signing will require the use of an operating system or a platform that manages the electronic signing process, including the creation of the electronic signature.”

<sup>97</sup>



## Footnotes

- 1 Corporate Bodies' Contracts Act 1960; *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2018] 2 W.L.R. 1603 at [7], in which the SC held that the common law gives effect to a term of a contract which requires specified formalities, such as an “no oral modification clause”. See also, below, para.[7-036](#).
- 2 *Fuller* (1941) 41 Col.L.Rev. 799; Law Commission No.164 (1987), pp.6–7; Whittaker in Birks and Pretto (eds), Themes in Comparative Law in Honour of Bernard Rudden (2002), p.199.
- 3 *Fuller* (1941) 41 Col.L.Rev. 799, 801.
- 4 Law Com. No.164 (1987), p.7.
- 5 *Landlord and Tenant Act 1985* s.4 (provision of rent books); *Consumer Credit Act 1974* ss.60, 61, 105 (form and content of agreement; form of securities) and see Vol.II, paras [41-082—41-083](#).
- 6 The Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634) (in force 1 July 2018) reg.7, replacing Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) reg.9; on which see Vol.II, paras [40-145 et seq.](#)
- 7 Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) reg.15, replacing the Timeshare Act 1992 (as amended) on which see Vol.II, paras [40-157—40-160](#).
- 8 See Vol.II, Chs 36, 39, 41, [42](#) and [47](#).
- 9 Law of Property Act 1925 ss.52, 54, as amended by Law of Property (Miscellaneous Provisions) Act 1989 s.1(8), Sch.1 para.2.
- 10 e.g. Statute of Frauds 1677 s.4 discussed Vol.II, paras [47-043 et seq.](#)
- 11 e.g. Regulations made or to be made by the Secretary of State under the Consumer Credit Act 1974 s.60; see Vol.II, para.[41-082](#).
- 12 e.g. *Landlord and Tenant Act 1985* s.4; Employment Rights Act 1996 ss.1–2, 4–6 (as amended); Estate Agents Act 1979 s.18.
- 13 Housing Grants, Construction and Regeneration Act 1996 s.107 (which defined what was meant by agreement in writing for this purpose) on which see *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270, [2002] 1 W.L.R. 2344; *Hatmet Ltd v Herbert (t/a LMS Lift Consultants)* [2005] EWHC 3529 (TCC) at [23]; *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC), [2009] T.C.L.R. 1. Section 107 of the 1996 Act was repealed as explained in the following footnote.

- 14 UK Government's Explanatory Notes to the [Local Democracy, Economic Development and Construction Act 2009](#). The [Housing Grants, Construction and Regeneration Act 1996](#) s.107 was repealed by the [Local Democracy, Economic Development and Construction Act 2009](#) Sch.7(5) para.1. The various matters which must be in writing are contained in [s.108](#) of the [1996 Act](#) (as inserted by [s.139](#) of the [2009 Act](#)).
- 15 On which see Vol.II, paras [41-078—41-079](#). See also, e.g. [Estate Agents Act 1979](#) s.18.
- 16 On which see above, para.[1-020](#) et seq.
- 17 Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 art.5 implemented in UK law by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#) especially reg.9 (“on-premises contracts”), and see Vol.II, paras [40-063](#) et seq. especially paras [40-105—40-106](#).
- 18 Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 art.6 implemented in UK law by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#) especially regs 10–11, 13, and see Vol.II, paras [40-063](#) et seq. especially paras [40-099—40-106](#).
- 19 Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/30 art.4 implemented in UK law by the [Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 \(SI 2010/2960\)](#) regs 12–13 on which see Vol.II, paras [40-157—40-163](#).
- 20 Directive 90/314/EEC on package travel, package holidays, and package tours [1990] O.J. L158/59 arts 3 and 4 implemented in UK law by the [Package Travel, Package Holidays and Package Tours Regulations 1992 \(SI 1992/3288\)](#) regs 7 and 8. The 1990 Directive was repealed by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 which was implemented in UK law by the [Package Travel and Linked Travel Arrangements Regulations 2018 \(SI 2018/634\)](#) (in force 1 July 2018) on which see Vol.II, paras [40-144—40-156](#).
- 21 [Consumer Rights Act 2015](#) s.64(3), defining the “transparency” of terms for the purposes of Pt 2 of the Act.
- 22 *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282, 30 April 2014* at paras 71 and 75; and see Vol.II, para.[40-370](#).
- 23 [Consumer Rights Act 2015](#) s.62, and see Vol.II, paras [40-301—40-302](#) and [40-428—40-434](#). If the term may have more than one meaning it will attract the special rule of interpretation in [s.69 of the 2015 Act](#): see Vol.II, para.[40-434](#).
- 24 [Consumer Rights Act 2015](#) s.70(1) and [Sch.3](#), on which see Vol.II, paras [40-433](#) and [40-442](#) et seq.
- 25 Bills of Sale Act (1878) Amendment Act 1882 s.9; Law of Property (Miscellaneous Provisions) Act 1989 s.2.

- 26 e.g. *Law of Property Act 1925* s.40 subsequently repealed and replaced by *s.2 of the Law of Property (Miscellaneous Provisions) Act 1989* see above, paras 1-074, 1-078 and below, paras 7-047—7-048.
- 27 Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) regs 20–24 (“right of withdrawal”).
- 28 Consumer Credit Act 1974 ss.65 and 127.
- 29 Law of Property Act 1925 s.52(1) (“void for the purpose of conveying or creating a legal estate”); and see s.54 and the *Law of Property (Miscellaneous Provisions) Act 1989* s.2(5)(a).
- 30 Below, paras 22-007, 22-016, 22-037.
- 31 e.g. *David Roberts Art Foundation Ltd v Riedweg [2019] EWHC 1358 (Ch), [2019] W.T.L.R. 741* (Chief Master Marsh), which concerned an exception to the general requirement that dispositions in land by charitable trustees can be made only on the order of the Charities Commission or the court: *Charities Act 2011 Pt 7* and esp. s.117(1) and (2). The exception (contained in s.117(2)(b) of the Act) imposed certain requirements (set out in s.119) of advertising and the obtaining of a professional survey; s.122(2) imposed a further requirement of the making of a statement in the contract for the disposition of land including to the effect that the vendor is a charity and whether or not it is an exempt charity. In considering the validity of an (unexecuted) contract of sale of land by a charity, the HC distinguished between a failure by a charity to make the requisite statutory statement, which does not lead to the invalidity of the contract (“whether by being void, voidable or unenforceable”) as such “an outcome would be disproportionate to the role played by the statement in the statutory regime” (at [89]). On the other hand, the requirement as to advertising “ought to be interpreted in light of the overriding test that emerges from section 119(1)(c) namely that the terms of the disposition are the best that can reasonably be obtained for the charity”; equally, if the court is satisfied that the disposal achieves the best price reasonably obtainable, the transaction would not be unenforceable because a surveyor’s report was obtained later than envisaged by the statute. In both respects, however, the charity had failed to provide cogent evidence and so summary judgment was refused: at [101].
- 32 e.g. *Landlord and Tenant Act 1962* s.1, repealed and replaced by *Landlord and Tenant Act 1985* s.4; *Shaw v Groom [1970] 2 Q.B. 504*.
- 33 cf. the approach of the court in *David Roberts Art Foundation Ltd v Riedweg [2019] EWHC 1358 (Ch)* noted above in this paragraph.
- 34 See below, paras 18-189 et seq.
- 35 See below, paras 7-051—7-060.
- 36 *[2003] UKHL 17, [2003] 2 A.C. 541*.
- 37 e.g. *Shah v Shah [2001] EWCA Civ 527, [2001] 4 All E.R. 138* at [33] in the context of the formal requirements for deeds in s.1 of the *Law of Property (Miscellaneous Provisions) Act 1989* and see above, para.1-100.
- 38 *[2003] UKHL 17* at [9], [25].
- 39 *[2003] UKHL 17* at [20]. On the *Statute of Frauds* s.4, see Vol.II, paras 47-043—47-062.
- 40 See above, paras 1-020 et seq.
- 41

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (24 December 2020), art.205 (formerly art.DIGIT.10) Conclusion of contracts by electronic means which also provides for exceptions to this general position: see below, para.[7-011A](#). On this Agreement and its implementation in UK law generally see above, para.[1-030](#).

[42](#) [Electronic Communications Act 2000 s.8\(1\)](#).

[43](#) Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] O.J. L178/1.

[44](#) Emphasis added.

[45](#) Directive 2000/31 art.9(2)(a).

[46](#) Directive 2000/31 art.9(2)(c).

[47](#) Directive 2000/31, Recital 34; *Beale and Griffiths (2002) L.M.C.L.Q. 467, 468*.

[48](#) Law Commission, Electronic Commerce: Formal Requirements in Commercial Transactions (2001), available in full at <http://lawcommission.justice.gov.uk> and see a shorter version in *Beale and Griffiths (2002) L.M.C.L.Q. 467* to which the following references will relate.

[49](#) *Beale and Griffiths (2002) L.M.C.L.Q. 467, 471–472*. The [Interpretation Act 1978 s.5](#) states that: “‘Writing’ includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly”.

[50](#) *Beale and Griffiths (2002) L.M.C.L.Q. 467, 472*.

[51](#) *Beale and Griffiths (2002) L.M.C.L.Q. 467, 473*.

[52](#) And see below, paras [7-009](#)—[7-010](#).

[53](#) In *J Pereira Fernandes SA v Mehta [2006] EWHC 813 (Ch), [2006] 2 All E.R. 881* at [25]–[30], it was held that the automatic insertion of an email address in a message by an internet service provider did not constitute a signature by the writer of the message as it did not represent any intention to authenticate the message by the writer. However, Judge Pelling QC accepted that: “[I]f a party or a party’s agent sending an e-mail types his or her or his or her principal’s name to the extent required or permitted by existing case law in the body of an e-mail, then … that would be sufficient signature for the purposes of [section 4 \[of the Statute of Frauds\]](#)” (at [31]), the learned judge noting the position of the Law Commission to this effect. In *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265, [2012] 1 Lloyd’s Rep. 542* at [32] it was common ground before (and accepted by) the CA that an electronic signature is sufficient for the purposes of [s.4 of the Statute of Frauds](#) and that a first name, initials or perhaps a nickname will suffice, as long as it was done in a manner which indicates that it is intended to authenticate the document. And in *Bassano v Toft [2014] EWHC 377 (QB), [2014] E.C.C. 14* at [42]–[44] it was held that clicking an electronic “I accept” button and thereby generating a document sent to the other party bearing the “signatory’s” typed name constituted signature for the purposes of [s.61 of the Consumer Credit Act 1974](#): see Vol.II, para.[41-085](#). The Law Commission has recently reaffirmed its general view as to the ways in which an electronic signature can be established: Electronic Execution of Documents, Law Com. No.386 (3 September 2019) paras 3.42 et seq., discussing cases where a disputed electronic or non-handwritten signature has been

held not to have satisfied a statutory requirement for a signature. The government's response to the Law Commission's report Electronic Execution of Documents (by the Right Hon. R. Buckland QC MP, Lord Chancellor and Secretary of State for Justice, 3 March 2020) agreed with the Law Commission's conclusion that "formal primary legislation is not necessary to reinforce the legal validity of electronic signatures".

**54** *Beale and Griffiths (2002) L.M.C.L.Q. 467, 473–474.* See also generally Law Commission, Electronic Execution of Documents, Law Com. No.386 (3 September 2019), esp. Ch.3 and Law Society, Executing a Document Using an Electronic Signature (21 July 2016, reviewed in May 2020), which also includes as a possible signature "a person using a finger, light pen or stylus and a touchscreen to write their name electronically in the appropriate place (for example, next to the relevant party's signature block) in the contract".

**55** *Beale and Griffiths (2002) L.M.C.L.Q. 467, 473.*

**56** *Firstpost Homes Ltd v Johnson [1995] 1 W.L.R. 1567*, 1574–1577 and see below, paras [7-041](#)—[7-044](#) criticising this position and distinguishing these observations.

**57** Directive 2000/31 art.9(2)(a), above, para. [7-007](#).

**58** On which see above, paras [1-023](#) et seq.

**59** This follows from its character as a EU directive not therefore falling into one of the categories of retained EU law foreseen by the [European Union \(Withdrawal\) Act 2018 ss.2–4](#), on which see above, paras [1-023](#)—[1-025](#). On the other hand, UK legislation (primary or secondary) which implemented the directive became part of retained EU law under [s.2 of the 2018 Act](#) and this appears to include the [Electronic Communications Act 2000 s.8\(1\)](#), whose Explanatory Notes stated that the Act is similar to and sought to implement the Electronic Commerce Directive.

**60** Below, para. [7-011A](#).

**61** Above, para. [7-008](#). See also Law Commission, Electronic Execution of Documents, Law Com. No.386 (3 September 2019), esp. Ch.3; Law Society, Executing a Document Using an Electronic Signature (21 July 2016 reviewed in May 2020); Land Registry, Practice Guidance 82: electronic signatures accepted by HM Land Registry (28 March 2022).

**62** Directive 1999/93 on a Community framework for electronic signatures [2000] O.J. L13/12.

**63** Directive 1999/93 art.1.

**64** Directive 1999/93 art.2(1).

**65** [Electronic Communications Act 2000 s.7\(2\)](#) (as enacted).

**66** On which see below, paras [7-013](#) et seq.

**67** [SI 2002/318](#).

**68** Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] O.J. L257/73 art.52(2) (with the exceptions there noted).

**69** art.1(a).

**70** Regulation (EU) 910/2014 art.1.

**71** [s.3](#) (as amended by the [European Union \(Withdrawal Agreement\) Act 2020 s.25\(2\)](#)). On the significance of "retained EU law" see above, paras [1-030](#) et seq.

- 72 The [Electronic Identification and Trust Services for Electronic Transactions \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (SI 2019/89) reg.2 and Sch. Pt 1 (the reference in reg.1(2) to these regulations coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), s.41(4) and Sch.5 para.1).
- 73 Ch.2; arts 6–12.
- 74 See also EU eIDAS Regulation recital 21.
- 75 EU eIDAS Regulation art.2(3).
- 76 Retained eIDAS Regulation art.2(3) (as amended by [SI 2019/89](#) reg.2(1)(a) and Sch. para.3).
- 77 See EU Commission, <https://ec.europa.eu/digital-single-market/en/trust-services-and-eid>, where it is noted that the EU Regulation is being reviewed.
- 78 [SI 2016/696](#). On IP completion day, the [2016 Regulations](#) were subject to minor amendment: [SI 2019/89](#) reg.2(1)(d), Sch. para.60.
- 79 [2000 Act](#) s.7(2) as amended by [SI 2016/696](#) reg.5, Sch.3 para.1(2). The definition of certification of such an electronic signature was amended to similar effect: [2000 Act](#) s.7(3) as amended by [SI 2016/696](#) reg.5, Sch.3 para.1(3).
- 80 [Electronic Communications Act 2000](#) s.7(1). See also Law Commission, [Electronic Execution of Documents](#), Law Com. No.386 (3 September 2019) para.3.19 where it is also noted that there are opposing views as to whether s.7 is relevant to the question as to the extent to which existing statutory signature requirements are capable of being satisfied electronically.
- 81 [Electronic Communications Act 2000](#) ss.7A–7D (as inserted by [SI 2016/696](#) reg.5, Sch.3 para.1(4)).
- 82 Regulation (EU) 910/2014 art.2(3). Later general statements in the Regulation, such as the statement in art.25(2) that “[a] qualified electronic signature shall have the equivalent legal effect of a handwritten signature” must be read subject to the general definition of the scope of the Regulation in art.2(3).
- 83 As regards the EU eIDAS Regulation, this position was taken by the Law Commission, [Electronic Execution of Documents](#), Law Com. No.386 (3 September 2019) paras 3.32–3.34 noting art.2(3) of the eIDAS Regulation and giving by way of examples of a contractual formality in the situations where the law requires a signature to be witnessed or to be “in a specified form (such as being handwritten)”. “Signature” is relevant to the formal requirements imposed, inter alia, by the [Law of Property \(Miscellaneous Provisions\) Act 1989](#) s.1 in relation to deeds (on which see above, para.1-085); by s.2 of the same Act in

relation to contracts for the sale or other disposition of an interest in land (on which see below, paras 7-013 et seq. and esp. paras 7-041—7-045); and by the **Statute of Frauds** s.4 in relation to contracts of guarantee (on which see Vol.II, paras 47-043 et seq. and esp. para.47-058). The position as regards the so-called rule in *L'Estrange v F Graucob Ltd [1934] 2 K.B. 394* which governs the incorporation of written terms by signature (on which see below, para.15-005) is more arguable as it is not completely clear that the incorporation of contract terms relates to the “conclusion and validity of contracts or other legal or procedural obligations relating to form” within the meaning of the exclusion from the scope of the eIDAS Regulation reg.2(3).

- 84 See above, paras 1-080 et seq.
- 85 On this uncertainty, see above, paras 7-009—7-010. For further discussion of “signature” and electronic communications see Emmet & Farrand on Title (2022), paras 2-041—2-041.06.
- 86 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (24 December 2020) (“TCA”) Pt Two Heading One Title III “Digital Trade” whose scope is defined to include “measures of a Party affecting trade enabled by electronic means” except audio-visual services: TCA art.196 (formerly art.DIGIT.2). On the TCA generally see above, para.1-030.
- 87 Above, paras 7-007—7-008.
- 88 TCA art.205(2) (formerly art.DIGIT.10(2)); Electronic Commerce Directive art.9(2).
- 89 Above, para.1-030.
- 90 Law Commission, Land Registration for the Twenty-First Century, A Conveyancing Revolution (2001), Law Com. No.271 and see above, para.1-083.
- 91 See Smith, Property Law, 9th edn (2017), pp.113–115 discussing the **Land Registration Act 2002** and noting that in 2011 the Land Registry halted the e-conveyancing project: Land Registry Annual Report and Accounts 2010–2011, p.26; Megarry and Wade, The Law of Real Property, 8th edn (2012) by Harpum, Bridge and Dixon, paras 7-160—7-166; Emmet & Farrand on Title (2022), paras 9-003—9-005.
- 92 See further Law Commission, Updating the Land Registration Act 2002, Law Com. No.380 (July 2018) Ch.20, noting (at paras 20.2 and 20.9) that, though progress has been made, the electronic system envisaged by the 2002 Act had not been developed, and making recommendations on three specific issues: the requirement for simultaneous completion and registration, the power to “switch on” electronic conveyancing and the power to “switch off” paper-based conveyancing, and the ability to overreach an interest under a trust if a single conveyancer has signed a deed on behalf of multiple trustees. See also Department

of Housing, Communities and Local Government, Improving the home buying and selling process: summary of responses to the call for evidence and government response (April 2018). According to Emmet & Farrand on Title (2021), para.9-002, “a revival [of the move to electronic conveyancing] may be under way” by virtue of the [Land Registration \(Amendment\) Rules 2018 \(SI 2018/70\)](#) (in force 6 April 2018), r.6 of which revoked the [Land Registration \(Electronic Conveyancing\) Rules 2008 \(SI 2008/1750\)](#). Emmet & Farrand quotes the explanatory memorandum to the [2018 Rules](#), para.7.3 which states that: “HM Land Registry is building a new digital mortgage service and will build other digital services in the future. The principal rules will specify that all transactions of registered land that have to be registered can be carried out using electronic documents with electronic signatures, once the registrar is satisfied that adequate arrangements are in place, and publishes a notice to that effect”. The memorandum refers to the [Land Registration Rules 2003 \(SI 2003/1417\)](#) rr.[54A–54D](#) entitled “Electronic dispositions” (as inserted by the [2018 Rules Sch.1 para.11](#)). For documents noting the developing practices of the Land Registry in this respect since May 2020 see <https://www.gov.uk/government/publications/electronic-signatures-accepted-by-hm-land-registry-pg82>.

•93

This refers to *R. (on the application of Mercury Tax Group Ltd) v HMRC [2008] EWHC 2721 (Admin), [2009] S.T.C. 743.*

•94

Land Registry, Practice Guidance 82: electronic signatures accepted by HM Land Registry (28 March 2022), para.2 (which outlines the steps necessary for this purpose where a transfer is involved); the Land Registry Practice Guidance lists the deeds which it accepts as “*Mercury* signed” at Appendix 1.

•95

Practice Guidance 82: electronic signatures accepted by HM Land Registry, para.3.

•96

Practice Guidance 82: electronic signatures accepted by HM Land Registry, para.3; Appendix 1 contains details of the dispositions and other dealings that can be signed using a conveyancer-certified electronic signature.

## Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Form

Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land

### Legislative history

- )13 The [Statute of Frauds](#) was passed in 1677 and in [ss.4](#) and [17](#) it required that six classes of contracts must be supported by written evidence. Its object was to prevent fraudulent claims based on false evidence, but in practice it worked badly as it enabled contracting parties to rely on what were considered to be technical defences. Hence the statute was, whenever possible, whittled down by judicial construction and it was largely repealed by the [Law Reform \(Enforcement of Contracts\) Act 1954](#). Nevertheless, the statute still applies to contracts of guarantee<sup>98</sup> and its provisions governing any “contract or sale of lands, tenements or hereditaments, or any interest in or concerning them” in [s.4](#) were re-enacted in a modified form in [s.40 of the Law of Property Act 1925](#), which applies to contracts for the sale or disposition of interests in land made on or before 26 September 1989.<sup>99</sup> However, by the [Law of Property \(Miscellaneous Provisions\) Act 1989 s.2](#), the [Law of Property Act 1925 s.40](#) was itself repealed and new requirements were enacted which apply to all contracts for the sale or other disposition of interests in land made on or after 27 September 1989. The following paragraphs discuss the law under the [1989 Act](#) and while on occasion cases decided under the old law may be referred to where of use for the interpretation of the new, care must be taken in doing so. As Peter Gibson LJ observed in *Firstpost Homes Ltd v Johnson*<sup>100</sup>:

“... the [Act of 1989](#) seems to me to have a new and different philosophy from that which the [Statute of Frauds 1677](#) and [s.40 of the Act of 1925](#) had. Oral contracts are no longer permitted. To my mind it is clear that Parliament intended that questions as to whether there was a contract, and what were the terms of the contract, should be readily ascertained by looking at the single document said to constitute the contract.”

## Law of Property (Miscellaneous Provisions) Act 1989 s.2

- )14 The law relating to the formal requirements of contracts for the sale or other disposition of an interest in land was significantly changed by the [Law of Property \(Miscellaneous Provisions\) Act 1989 s.2](#). This provision, which followed recommendations for reform of the law by the Law Commission in its report, Formalities for Contracts for Sale etc. of Land<sup>101</sup> superseded [s.40 of the Law of Property Act 1925](#)<sup>102</sup> in relation to contracts made on or after 27 September 1989.<sup>103</sup> Section 2(1) states:

“A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.”

This change was prompted by a concern to settle the uncertainty surrounding [s.40](#), in particular as regards the status of letters made “subject to contract” as memoranda for the purposes of that section<sup>104</sup> and the ambit of the doctrine of part performance after the decision of the House of Lords in *Steadman v Steadman*.<sup>105</sup> Section 2 makes a strict formal requirement whose effect is to preclude the existence of any contract for the sale or other disposition of land unless it is *made* in writing. Unlike the position under the old law, written evidence by way of a memorandum or note of the contract is clearly not enough. Moreover, the doctrine of part performance, at least in its normal form, is abolished.<sup>106</sup> On the other hand:

“... the demise of the doctrine of part performance has not brought about such wide-ranging effects as might at first have been supposed ... and has simply thrown a heightened emphasis upon the application of alternative equitable doctrines,”<sup>107</sup>

notably, constructive trust and proprietary estoppel.<sup>108</sup>

### Agreements made “subject to contract”

- )15 In *Enfield LBC v Arabaj*<sup>109</sup> the Court of Appeal held that, quite apart from the question whether the formal requirements contained in [s.2 of the 1989 Act](#) had been satisfied, a letter which was headed “subject to contract” and which was relied on by a tenant as creating a new tenancy, clearly

envisioned that a new lease would be completed before the parties were bound, with the result that, while this qualification was in force, the relationship did not become binding on either party unless and until there was an exchange of lease and counterpart.

## Footnotes

- 98 See Vol.II, Ch.47.
- 99 For discussion of the old law under s.40 of the Law of Property Act 1925, see Chitty on Contracts, 29th edn (2008), paras 4-010—4-051. Chapter 4 of the from the 29th edition is also available as a PDF to online subscribers of this edition on Westlaw. For an example of the continuing use of this law, see below, para.7-017, regarding the meaning of “disposition” for the purposes of s.2 of the 1989 Act.
- 100 [1995] 1 W.L.R. 1567 at 1576 and see *McCausland v Duncan Lawrie Ltd* [1996] 4 All E.R. 995, 1001.
- 101 Law Commission, Formalities for Contracts for Sale etc. of Land Law Com. No.164 (1987). While the Law Commission’s report may be of use in the interpretation of the 1989 Act, care needs to be taken in so doing, given that “Parliament chose to enact in s.2(1) of the 1989 Act a regime which differs materially from that proposed by the Law Commission in its draft Bill”: *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715 at [41] and see also *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch. 259 at 283–285, 295 (on “exchange of contracts”, below, para.7-039).
- 102 Law of Property (Miscellaneous Provisions) Act 1989 s.2(8).
- 103 Law of Property (Miscellaneous Provisions) Act s.5(3), (4).
- 104 Law Com. No.164 (1987), paras 1.4–1.6.
- 105 [1976] A.C. 536 and see Law Com. No.164, para.1.9.
- 106 This part of para.7-014 in an earlier edition was quoted with approval by Simon Brown LJ in *Godden v Merthyr Tydfil Housing Association* [1997] 1 N.P.C. 1.
- 107 Gray and Gray, Elements of Land Law, 5th edn (2008), para.8.1.34.
- 108 Below, paras 7-049—7-060.
- 109 [1995] E.G.C.S. 164.

## **(a) - Contracts within s.2 of the Law of Property (Miscellaneous Provisions) Act 1989**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Form

Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land

**(a) - Contracts within s.2 of the Law of Property (Miscellaneous Provisions) Act 1989**

### **General**

- <sup>116</sup> The formal requirements in the [1989 Act](#) apply to contracts<sup>110</sup> for the “sale or other disposition of an interest in land”.<sup>111</sup>

### **“Sale or other disposition of an interest in land”**

- <sup>117</sup> The [1989 Act](#) itself defines the term “interest in land” for the purposes of the formal requirements in [s.2](#) as “any estate, interest or charge in or over land”.<sup>112</sup> [Section 2\(6\)](#) of the [1989 Act](#) specifies that *disposition* has the same meaning for the purposes of [s.2](#) as for the [Law of Property Act 1925](#), which provides that this term “includes a conveyance and also a devise, bequest, or an appointment of property contained in a will” and that “conveyance”:

“... includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will.”<sup>113</sup>

Thus, for example, a contract which would create an option the exercise of which would release a charge on land would fall within s.2.<sup>114</sup>

## “Interest in land”: case-law under the Statute of Frauds

- ¶18 Under earlier case-law, s.4 of the Statute of Frauds was applied to many contracts that concerned land even though they were not contracts of sale.<sup>115</sup> Thus an agreement to convey an equity of redemption in land was within the statute, for a court of equity treated the equity of redemption as the land itself, or at all events as an interest in land.<sup>116</sup> Contracts for the disposition of an interest in land were held to include: an agreement that if the plaintiff, the tenant of a farm, would surrender her tenancy to her landlord, and would prevail on her landlord to accept the defendant as his tenant in place of the plaintiff, the defendant would pay the plaintiff £100<sup>117</sup>; an agreement by the defendant, the landlord of a house, to put certain furniture into the house in consideration that the plaintiff would become tenant thereof<sup>118</sup>; an agreement to grant a lease of furnished premises<sup>119</sup>; and an agreement by the plaintiff to let a house to the defendant, to sell him furniture and fixtures therein, and to make alterations and improvements in the house, the defendant agreeing to take the house, and to pay for the furniture, fixtures and alterations.<sup>120</sup> An agreement to extend the time for acceptance, or an agreement that an acceptance which is out of time shall be treated as valid so as to create a contract, was held not to be an agreement which the statute required to be evidenced in writing, provided that the note or memorandum contained in the signed offer is otherwise sufficient.<sup>121</sup> An agreement to sell a debt, secured by bond and also by a mortgage of land,<sup>122</sup> or to sell debentures of a company possessed of land charging all its property whatsoever and wheresoever,<sup>123</sup> was held to be within s.4 of the Statute of Frauds. An agreement by A, who had borrowed a sum of money from his bankers in July, to repay the loan out of the rent of a farm to become due to him at the Michaelmas following,<sup>124</sup> was held within the section; so also was an agreement for regulating the height of a party wall, which was to be pulled down and rebuilt, and the position and shape of skylights on either side of it.<sup>125</sup>

## Section 2 and “executory” or “contingent” agreements

- ¶19 It has been held that s.2 of the 1989 Act applies equally to an executory agreement, that is in this context, an agreement which was made at a time when neither of its parties possessed any proprietary interest in the property in question,<sup>126</sup> and to an agreement contingent on another event, such as the giving of consent by a landlord to the assignment of a lease.<sup>127</sup>

## “Contracts for the disposition of an interest” and “contracts of disposition”

- <sup>120</sup> The formal requirements created by [s.2](#) apply to “contracts *for* the sale or other disposition of an interest in land”.<sup>128</sup> This raises the question whether they apply to contracts *of* sale or other disposition of an interest in land, i.e. contracts by which the contract itself transfers the interest as opposed to imposing an obligation on the party (transferor) to do so. In *Target Holdings Ltd v Priestley*<sup>129</sup> an oral agreement to vary the terms of repayment of a loan under an executed second mortgage contract was held to fall outside the terms of [s.2 of the 1989 Act](#). According to Judge Hicks QC, the legislative history of [s.2](#) and [ss.51 to 55 of the Law of Property Act 1925](#) (which concern the *disposition* of interests as opposed to contracts *for* the disposition of interests) disclose that a distinction had been consistently drawn between contracts *for* the disposition of land and contracts *of* disposition of land. According to the learned judge, the second mortgage fell into the latter category and so outside the ambit of [s.2](#): this provision should not be applied to instruments for which the formal or evidential requirements are governed by [ss.51–55 of the 1925 Act](#). As a result, in his view, any variation of the second mortgage also fell outside the ambit of [s.2](#). In *McLaughlin v Duffill*<sup>130</sup> the Court of Appeal approved the distinction drawn by Judge Hicks QC in *Target Holdings Ltd v Priestley* in the context of the question whether an agent’s authority to sign on behalf of a party to an instrument itself requires writing, it being held that writing is not required by [s.2 of the 1989 Act](#) for the conferral of such authority for contracts *for* the disposition of an interest in land, in contrast to contracts *of* disposition of an interest in land for which writing is required by [s.53\(1\)\(a\) of the Law of Property Act 1925](#).<sup>131</sup> A similar approach was taken by the Court of Appeal in *Eagle Star Insurance Co Ltd v Green*,

<sup>132</sup>

**U** where it held that a mortgage executed by deed must fulfil the formal requirements for a deed (contained in [s.1 of the Law of Property \(Miscellaneous Provisions\) Act 1989](#)) rather than the formal requirements for a contract for the disposition of an interest in land (contained in [s.2 of the same Act](#)). So, a mortgage executed by deed does not have to comply with the formal requirements of [s.2 of the 1989 Act](#), but a contract to create a mortgage would have to do so, as would an equitable mortgage or charge arising out of the deposit of documents which have been held to find their basis in an implied contract.<sup>133</sup> Similarly, in *Rollerteam Ltd v Riley*, under the terms of a settlement agreement A agreed to pay B and C certain sums of money if B executed declarations of trust by deed over two London properties in favour of A and D. B executed the declarations of trust, but A paid only a much lesser sum, arguing that the settlement agreement was for the disposition of interests in land and did not satisfy the formal requirements in [s.2 of the 1989 Act](#). The Court of Appeal observed that:

“... section 2 of the 1989 Act applies only to executory contracts for the future sale or other disposition of an interest in land, and does not apply to a contract which itself effects such a disposition.”<sup>134</sup>

The contract before the court was construed as being a unilateral contract, A agreeing to pay the money to B and C in exchange for the “performance” in the shape of the execution of the two declarations of trust.<sup>135</sup> As a result, at no point did B undertake an executory or future obligation to execute the two deeds and so the agreement included an immediate disposition of interests in land rather than being a contract for the disposition of interests in land; it therefore fell outside the scope of s.2.<sup>136</sup>

## Variations

- <sup>121</sup> In *McCausland v Duncan Lawrie Ltd*<sup>137</sup> the Court of Appeal held that material variations of contracts of sale, etc. of an interest in land also have to fulfil the formal requirements contained in s.2 of the 1989 Act. According to the court this means that the contract as varied has to be in writing and incorporated in one document, or each document if contracts were exchanged, and signed by or on behalf of each party to the contract.

<sup>138</sup>

 On the facts of *McCausland*, the variation was held to be material as it attempted to advance the contractual date for completion and therefore the time when either party might make time of the essence by service of a notice to complete<sup>139</sup>; and it has later been held that in a contract for the sale of land the price is always a material term so that “any variation to the price, even a modest one, is a variation of a material term for these purposes”.<sup>140</sup> On the other hand, the Court of Appeal has held that s.2 does not apply to an agreement by a party to a contract to waive a term inserted for his benefit as such an agreement does not vary the contract.<sup>141</sup>

## Boundary agreements between neighbours

- <sup>122</sup> In *Joyce v Rigolli*<sup>142</sup> the Court of Appeal considered whether a boundary agreement between neighbouring landowners constituted “a contract for the sale or other disposition of an interest in land” within the meaning of s.2 of the 1989 Act. In this respect, the court adopted the distinction drawn by Megarry J in *Neilson v Poole*,<sup>143</sup> in the context of the requirement of registration of

such an agreement as an “estate contract” within s.10(1) of the Land Charges Act 1925, between agreements which constitute an exchange of land and those by which the parties merely intend to “demarcate” an unclear boundary referred to in title documents, “a contract merely to demarcate and confirm [not being] a contract to convey”.<sup>144</sup> According to the Court of Appeal, for a contract to be one “for” selling or disposing of land within the meaning of s.2:

“... it must have been part of the parties’ purposes, or the purposes to be attributed to them, in entering into such a contract that the contract should achieve a sale or other disposition of land. The fact that the effect of their contract is that land or an interest in land is actually conveyed, when that effect was neither foreseen nor intended nor was it something which ought to have been foreseen or intended, is not the acid test.”<sup>145</sup>

Where, therefore, an agreement has a disposing effect, but no disposing purpose, s.2 does not apply, whether or not the transfer of land is trivial.<sup>146</sup> Moreover, s.2 remains inapplicable even if (as on the facts of *Joyce v Rigolli*) one of the parties to a demarcation agreement consciously thought that he was giving up a small amount of land<sup>147</sup>: the important public policy in upholding informal boundary agreements which are “act[s] of peace, quieting strife and averting litigation”<sup>148</sup> means that Parliament could not have intended s.2 to apply to transfers of land pursuant to demarcating boundary agreements simply because a trivial transfer or transfers of land were consciously involved. It should, moreover, be presumed, until the contrary is shown, that any transfer of land effected by such an agreement is trivial for this purpose.<sup>149</sup> The Court of Appeal has further held that there is no need for there actually to have been a boundary dispute for an agreement to demarcate a boundary to fall within the principle set out in *Joyce v Rigolli*.<sup>150</sup> Indeed, it has been held that the principles in *Joyce v Rigolli* are not restricted to boundary or demarcation agreements, as they turn rather on the question whether the agreement in question counts as a “contract for the sale or other disposition of an interest in land” that is, whether it has a “disposing purpose”.<sup>151</sup> As a result, a contract under which two neighbouring landowners compromised a dispute between them as to whether one had acquired adverse possession over the land of which the other was the registered proprietor fell outside s.2 on the basis that the parties had no such disposing purpose, even though it had a (non-trivial) disposing effect.<sup>152</sup>

## Options and rights of pre-emption

<sup>123</sup>

In *Spiro v Glencrown Properties Ltd*

<sup>153</sup>

 the question arose whether an option granted by a vendor of land is a “contract for the sale or other disposition of an interest in land” within the meaning of s.2(1) of the 1989 Act.

154

**U** Hoffmann J held that it was, but that the notice by which the option was exercised was not: the section

“... was intended to prevent disputes over whether the parties had entered into a binding agreement or over what terms they had agreed. It prescribes the formalities for recording their mutual consent. But only the grant of the option depends upon consent. The exercise of the option is a unilateral act. It would destroy the very purpose of the option if the purchaser had to obtain the vendor’s countersignature to the notice by which it was exercised.”

155

**U**

As Scott LJ observed in a later case, the alternative view which Hoffmann J rejected, and according to which the exercise of options is subject to the section’s formal requirements, would mean that it “had by an unintended side wind destroyed the enforceability of options”.

156

**U** The approach of Hoffmann J has been held to apply equally to a “put option” in a lease (i.e. one where it is the potential grantor or lessor who is to exercise it), as well as to a “call option” (as in *Spiro v Glencrown Properties Ltd*,

157

**U** where it is the potential grantee or purchaser who can exercise the option).

158

**U** On the other hand, the position of a right of pre-emption (under which a person holding an interest grants another person a right to acquire it if he chooses to sell) is less clear.

159

**U** As regards registered land, a right of pre-emption is deemed by statute to have effect “from the time of creation as an interest capable of binding successors in title” and this strongly suggests that it should be regarded as an “interest in land” for the purposes of s.2

160

**U**; but as regards unregistered land a right of pre-emption has been held to confer:

“... no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer.”

161

**U**

For this reason, the **1989 Act** is thought not to apply to any contract which creates a right of pre-emption over unregistered land.

<sup>162</sup>

**U** However, this leaves the question as to the application of **s.2** to any subsequent agreement arising from the right of pre-emption. In *Bircham & Co, Nominees Ltd v Worrell Holdings Ltd*,<sup>163</sup>

**U** a clause in a lease was held to have created a mere right of pre-emption (as opposed to an option) in a landlord in respect of its tenant's interest in the land and the tenant notified the landlord of the circumstances giving rise to the latter's opportunity to acquire this interest in exercise of this right. In these circumstances, the Court of Appeal held that any "acceptance" by the landlord of this offer by the tenant in its notice could take effect only by contract and had therefore to conform to the formal requirements of **s.2 of the 1989 Act**.

## Equitable mortgages

<sup>124</sup> In *United Bank of Kuwait Plc v Sahib*,<sup>164</sup> the Court of Appeal held that equitable mortgages or charges arising out of a deposit of documents of title found their basis in an implied contract and that such a contract could exist only if the rigorous formal requirements of **s.2 of the Law of Property (Miscellaneous Provisions) Act 1989** are satisfied.<sup>165</sup> But it is less clear whether this provision applies where the equitable mortgage secures a guarantee which would attract the less rigorous requirements of **s.4 of the Statute of Frauds**.<sup>166</sup> In *Deutsche Bank AG v Ibrahim*,<sup>167</sup> which was decided under **s.40 of the Law of Property Act 1925**,<sup>168</sup> the plaintiff bank sought a declaration that a deposit of documents of title by the defendants created an enforceable equitable mortgage in its favour. However, the court accepted the defendants' argument that where a third party pledges property with a creditor for the purposes of providing security for the liability of a debtor, that third party is a guarantor up to the value of the pledged property and the transaction is therefore governed by the formal requirements contained in **s.4 of the Statute of Frauds** rather than **s.40 of the Law of Property Act 1925**, and therefore held that the doctrine of part performance was inapplicable.<sup>169</sup> However, as one commentator has noted, there was no clear reason given by the court for giving priority to **s.4 of the Statute of Frauds** in this way, particularly given that the plaintiff had relied on the equitable mortgage rather than on the guarantee.<sup>170</sup> It may be thought instead that where two analyses of a transaction exist in parallel, each with their own formal requirements, the more demanding set of requirements should prevail, and, if this were accepted, then **s.2 of the 1989 Act** would apply to cases like *Deutsche Bank AG v Ibrahim*. It is submitted, however, that a better view would be to apply those formal requirements which apply to the analysis of the transaction on which the claimant is relying before the court. Thus, where a claimant seeks a remedy such as

foreclosure which can only be justified by treating the transaction as an equitable mortgage, [s.2](#) of the 1989 Act should apply.<sup>171</sup>

## Equitable leases

- <sup>125</sup> Before the [1989 Act](#), a lease which was required to be made by deed<sup>172</sup> but which had been merely put in writing could take effect in equity as a contract to create a legal lease as the writing would satisfy the formal requirements of [s.40 of the Law of Property Act 1925](#).<sup>173</sup> However, this equitable relief depended on the availability of specific enforcement of a contract to create the lease and this would clearly not be available if this contract were a nullity owing to its failure to comply with the formal requirements of [s.2](#).<sup>174</sup> While under the old law a purely oral contract to create a lease could be enforceable as long as there existed sufficient part performance, with the exception of short leases,<sup>175</sup> such an oral contract for a lease would also fall foul of [s.2](#).

## Conditions in planning agreements

- <sup>126</sup> In *Jelson Ltd v Derby City Council*<sup>176</sup> it was held that a planning agreement made between a developer and a local authority under [s.106 of the Town and Country Planning Act 1990](#) under which the developer agreed to transfer the housing site to a third party was a contract for the purposes of the formal requirements contained in [s.2 of the Law of Property \(Miscellaneous Provisions\) Act 1989](#) and had failed to fulfil these requirements for want of signature in that third party.<sup>177</sup> However, in *Milebush Properties Ltd v Tameside MBC*<sup>178</sup> Arnold J refused to follow this approach, preferring instead the view taken by Neuberger J (as he then was) in *RG Kensington Management Co Ltd v Hutchinson IDH Ltd*<sup>179</sup> and the doubts expressed as to *Jelson* in *Nweze v Nwoko*.<sup>180</sup> In Arnold J's view, "it would substantially frustrate the statutory scheme contained in section 106 of the [Town and Country Planning Act 1990] to interpret section 2 of the 1989 Act as invalidating section 106 agreements which benefit third parties".<sup>181</sup>

## "Lock-out agreements"

- <sup>127</sup> Where a prospective vendor of land agrees with a prospective purchaser for a clear specified period not to deal with any other purchaser and this agreement is supported by consideration,<sup>182</sup> this agreement is in principle enforceable and is commonly known as a "lock-out agreement".<sup>183</sup>

Although such an agreement clearly relates to the sale of land, the Court of Appeal has confirmed that its negative nature means that it is not a contract for the sale of any interest in land and is not therefore subject to the requirements of [s.2 of the 1989 Act](#).

[184](#)



## Contracts to sell land to third party

- 128 In *Nweze v Nwoko*<sup>185</sup> the Court of Appeal held that a compromise agreement between two parties to an executed contract of sale of land under which, *inter alia*, the buyer agreed to sell the property with vacant possession at the best price available on the open market (so as to be in a position to pay the price of the earlier purchase to the sellers) was not a contract *for* the sale or other disposition of an interest in land within the meaning of [s.2](#). In doing so, Waller LJ relied on the Law Commission's Report, Formalities for Contracts for Sale, etc. of Land,<sup>186</sup> which "is clearly concerned with contracts or dispositions under which land or an interest in land is actually sold or disposed of".<sup>187</sup> While the compromise agreement required the buyer to sell the property (to a third party), it did not itself effect a sale of the property.<sup>188</sup>

## Mutual wills

- 129 Where two testators, such as a husband and wife, make mutual non-revocable wills, in principle a court will enforce the underlying contract against the estate of the survivor.<sup>189</sup> Where such a contract is for the sale or disposition of an interest in land, then it must conform to the formal requirements of [s.2 of the 1989 Act](#): "an undertaking not to revoke a testamentary disposition is the same in effect as a promise to make that disposition".<sup>190</sup> So, for example, where two persons with a joint interest in real property execute mutual wills in identical form, it has been held that there is no contract since their underlying agreement is void for failing to comply with these requirements.<sup>191</sup> For, "if the mutual will compact falls to be regarded as one agreement, it is clear that there is no single document signed by both parties", nor is it possible to construe the handing over of the parties' respective wills to the same solicitor for safe-keeping as "an exchange of contracts" within the meaning of [s.2\(3\) of the 1989 Act](#).<sup>192</sup> If, on the other hand, the mutual will compact is analysed as two contracts, one by each party in mirror image terms, then neither will fulfils the formal requirements of [s.2](#) as neither is signed by both parties nor do either of them contain any terms as to the consideration for the undertaking (and the precondition for its becoming binding upon each of them), namely that the other shall maintain his or her will unrevoked until death. As a result, neither will incorporates all the terms or even the essential terms as [s.2\(1\)](#) requires.<sup>193</sup> Despite

this, a court may give the underlying agreement represented by mutual wills some effect in equity by way of constructive trust,<sup>194</sup> as it may be judged inequitable after the death of one of the parties to frustrate that person's expectations by the other seeking to pass on property received otherwise than in accordance with its terms.<sup>195</sup> In this respect, a distinction appears to be drawn between mutual wills where the gifts are expressed as gifts in land or in interests in land (where there is no binding contract owing to the effects of s.2 and therefore no constructive trust arising as a result of there being such a binding contract)<sup>196</sup> and where they are expressed as gifts of the residue of an estate even though this contains only immovable property (where s.2 does not apply).<sup>197</sup> However, this distinction has been criticised on the basis that it seems "rather capricious, even unprincipled, to make the success of a claim for mutual wills" depend on the way in which the gifts are drafted.<sup>198</sup> Instead, it was suggested that the constructive trust of mutual wills might arise from a proprietary estoppel rather than from a contract; this would mean that the nullity of such an underlying contract as a result of s.2 of the 1989 Act would not rule out the existence of a constructive trust.<sup>199</sup>

## Part 36 settlements

- 130 In *Orton v Collins* the question arose whether a settlement that is alleged to arise under CPR Pt 36 which, if implemented, would require the sale or other disposition of an interest in land falls within s.2 of the 1989 Act, so as to require in particular that the settlement is contained in one document rather than two for it to be enforced.<sup>200</sup> It was held that while "a Pt 36 offer may well create a contract and probably does so in the vast majority of cases", it can be enforced by the court even where for some reason there is no contract as "the regime of Pt 36 ... does not depend upon contract law"<sup>201</sup>; the parties' obligation to perform such a settlement is *sui generis* and rests on the court's jurisdiction to administer "justice according to law in a regular, orderly and effective manner".<sup>202</sup>

## Partnerships

- 131 In *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd*<sup>203</sup> it was held that an overall bargain for the creation of a joint venture involving the development of premises which consisted of a number of individual contracts could include contracts falling within and attracting the formal requirements of s.2 of the 1989 Act and that this remained the case even though the contract was expressed as a partnership. In so holding, the court rejected the argument, based on nineteenth century authority,<sup>204</sup> that an oral partnership agreement can be validly made but that if the partnership assets include land, then the land is held on a constructive trust for the partnership<sup>205</sup>: unlike the Statute of Frauds, the 1989 Act created a "substantive rule of law which prohibits the

making of an oral contract for the sale or disposition of an interest in land” even if “it is wrapped up in an alleged partnership”.<sup>206</sup>

## Composite agreements

- 132 In *North Eastern Properties Ltd v Coleman* the Court of Appeal considered the question as to how the requirements of s.2 of the 1989 Act apply to composite agreements.<sup>207</sup> There the parties to a series of contracts for the sale of flats expressly kept out of their written agreement that part of their earlier oral agreement according to which the buyer would receive a “finder’s fee” of 2 per cent of the purchase price for each contracting purchaser of the flats payable on exchange of contract. The written contract also contained a clause according to which “[t]his Agreement contains the entire agreement between the parties”. Briggs J (with whom Longmore and Smith LJ agreed) noted that even though:

“... it was no part of Parliament’s intention by enacting s.2 of the 1989 Act to make it easier for people who have genuinely contracted to escape their contractual obligations ... because of the rigorous discipline which [s.2 of the Act] imposes upon parties to land contracts, it does ... enable persons who have genuinely contracted”

to escape their contractual obligations by looking around “for express terms which have not found their way in the final form of land contract which they have signed”.<sup>208</sup> Having reviewed “the apparent disharmony constituted by the dicta on this point”,<sup>209</sup> Briggs J reconciled their differences as follows:

“(i)Nothing in section 2 of the 1989 Act is designed to prevent parties to a composite transaction which includes a land contract from structuring their bargain so that the land contract is genuinely separated from the rest of the transaction in the sense that its performance is not made conditional upon the performance of some other expressly agreed part of the bargain ...<sup>210</sup>

(ii)By contrast, the parties to a composite transaction are not free to separate into a separate document expressly agreed terms, for example as to the sale of chattels or the provision of services, if upon the true construction of the whole of the agreement, performance of the land sale is conditional upon the chattel sale or service provision. That would, albeit for reasons which seem to me to frustrate rather than serve the purposes for which the 1989 Act was passed, fall foul of section 2(1), however purposively construed. So would a series of separate contracts for the sale of separate parcels of land, if each was conditional upon the performance of the other.

(iii)Since the splitting into separate contracts of parts of a composite transaction is inherently likely to give rise to uncertainties as to whether performance of the

one is conditional upon performance of the other, the parties are free, and in my opinion should positively be encouraged, to make plain by express terms whether or not that conditionality exists. To do so serves rather than evades or frustrates the purposes of section 2, an important part of which is to encourage clarity rather than uncertainty in land transactions.”<sup>211</sup>

While the:

“... normal purpose for the inclusion of an entire agreement clause is to dispose of the risk that some collateral contract or additional terms may be discovered in the undergrowth of the parties’ negotiations”,

such a clause could also

“... serve the valuable purpose, (in a composite transaction which includes, but does not entirely consist of, a land contract), of ensuring that the land contract will not accidentally be construed as conditional upon the other expressly agreed terms, so as to render the land contract void under section 2.”<sup>212</sup>

In the circumstances of the case, commercial common sense dictated that the entire agreement clause should be construed in this way. Furthermore, on the “unusual facts” of the case before the Court, and even without the entire agreement clause, Briggs J held that performance of the land contracts was not conditional upon performance of the finder’s fee agreement.<sup>213</sup>

## Collateral contracts

- 133 Related to the question of the application of s.2 of the 1989 to composite transactions is the approach of the courts to contracts collateral to a contract for the sale or other disposition of an interest in land. So, while s.2(1) of the 1989 Act makes clear that “all the terms which the parties have expressly agreed” must be incorporated in one document or, “where contracts are exchanged, in each” this does not prevent the existence of a valid contract (which does not have to satisfy s.2’s formal requirements) *collateral to* the main contract for the sale or other disposition of an interest in land (which does).<sup>214</sup> So, for example, in *Record v Bell*<sup>215</sup> the question arose whether the formal requirements contained in s.2 had been satisfied where a contract in two parts had been duly signed by the respective parties and was awaiting exchange and then some term was orally agreed immediately prior to exchange and was confirmed by the exchange of letters. On the facts, the vendor had made an undertaking as to the state of his title in order to induce the buyer to exchange contracts.<sup>216</sup> The court held that it resulted from s.2 of the 1989 Act that such a term would only be incorporated into the contract of sale if the latter referred to it,<sup>217</sup> but it felt able to construe the

oral agreement as to the new term as an independent collateral contract, which was valid so long as it was not itself a sale of an interest in land.<sup>218</sup> In this way, the requirements of s.2 had been fulfilled. However, in *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* the Court of Appeal took a more restrictive approach to the recognition of such a collateral agreement, though s.2 had not been relied on.<sup>219</sup> There the parties entered discussions and exchanged correspondence (all “subject to contract”) towards the renewal of a lease, the negotiations concerning provision in the draft lease concerning the lessee’s repairing covenants. The lease was executed with the provision in question amended, but (according to the lessee) not in the way which had earlier been agreed. The lessee therefore contended that this agreement in the course of negotiations could take effect as a collateral contract. For this purpose, the Court of Appeal agreed<sup>220</sup> with Lightman J in *Inntrepreneur Pub Co Ltd v East Crown Ltd*<sup>221</sup> that the question whether a pre-contractual statement made in the course of negotiations should be treated as having contractual force rested on a finding of the parties’ objective intention based on the totality of the evidence and that for this purpose:

“... one important consideration will be whether the statement is followed by further negotiations and a written contract not containing any term corresponding to the statement”<sup>222</sup>

as there “the prima facie assumption will be that the written contract includes all the terms the parties wanted to be binding between them”.<sup>223</sup> Another consideration will be any lapse of time between the statement and the making of the contract; and, finally, “a representation of fact is much more likely intended to have contractual effect than a statement of future fact or future forecast”.<sup>224</sup> More generally, the Chancellor of the High Court, Sir Andrew Morritt, recognised that:

“... the law relating to collateral contracts is well-established but in connection with sales or leases of land needs to be applied with caution if not the suspicion to which Lord Moulton referred in *Heilbut Symons v Buckleton*.<sup>225</sup> Thus, if the promise said to be binding as a collateral contract is in truth one of the terms for the sale or other disposition of land it will be unenforceable unless it is contained in the written contract required by s.2 ... In a normal conveyancing transaction in a commercial context with both parties represented by experienced solicitors the usual course of dealing is to ensure that all agreed terms are put into the contract and the conveyance, transfer or lease. Accordingly those who assert a collateral contract in relation to a term not so contained must show that it was intended to have contractual effect separate from the normal conveyancing documents.”<sup>226</sup>

On the facts, the Court of Appeal found that on executing the lease<sup>227</sup> the parties had not intended to conclude a collateral contract relating to the tenant’s covenants, this view being supported by the fact that the representation relied on related to “future events in unforeseeable circumstances”,

a commitment which would be “wholly uncommercial”<sup>228</sup>; that the statement in question was followed by further negotiations<sup>229</sup>; and that these negotiations were followed by the actual amendment of the lease which was executed, which “is to be seen as the parties’ considered agreed conclusion of the negotiations”.<sup>230</sup>

## Excluded contracts

<sup>134</sup> **D** Section 2(5) of the 1989 Act excludes from its formal requirements contracts to grant short leases,  
<sup>231</sup>

**U** contracts regulated under the Financial Services and Markets Act 2000, other than a regulated mortgage contract, a regulated home reversion plan, a regulated home purchase plan or a regulated sale and rent back agreement<sup>232</sup> and those made in the course of a public auction. The last of these exclusions represented a change, as such contracts were subject to a requirement of a written memorandum under the Law of Property Act 1925 s.40.<sup>233</sup> The Law Commission considered that the retention of this requirement fulfilled no cautionary or protective purpose as the practice is that the auctioneer may sign as agent for both the purchaser and vendor.<sup>234</sup>

## Footnotes

<sup>110</sup> Jenkins (1993) Conv. 13, 18 et seq. contends that the term “contract” for the purposes of s.2 of the 1989 Act does not include “arrangements” effected by deed. However, it is difficult to see why a court should wish to allow avoidance of the special formal requirements imposed on contracts for the sale, etc. of interests in land contained in s.2, simply because such a contract is contained in a deed. The historical differences between covenant and assumpsit on which Jenkins relies should not be permitted to defeat the clear purpose of s.2 which was to make one set of clear requirements in relation to this type of contract in the interests of certainty.

<sup>111</sup> Law of Property (Miscellaneous Provisions) Act 1989 s.2(1).

<sup>112</sup> Law of Property (Miscellaneous Provisions) Act 1989 s.2(6) (as amended). The Trusts of Land and Appointment of Trustees Act 1996 removed the reference to any interest “in or over the proceeds of sale of land”.

<sup>113</sup> Law of Property Act 1925 s.205(1)(ii).

<sup>114</sup> *Tuscola (110) Ltd v Y2K Co Ltd [2016] EWHC 1124 (Ch)* at [205]–[213] (though it was held that no such contract had been concluded).

<sup>115</sup> *McManus v Cooke (1887) 35 Ch. D. 681, 687–690*, noting that s.4 of the Statute of Frauds (as enacted) provided that: “no action shall be brought whereby ... to charge any person ... upon

any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them”.

- 116 *Massey v Johnson* (1847) 1 Exch. 241, 255.
- 117 *Cocking v Ward* (1845) 1 C.B. 858, 867; followed in *Kelly v Webster* (1852) 12 C.B. 283. (In both these cases there was a “part performance”, but this could not assist the plaintiffs in courts of common law before the Judicature Acts.)
- 118 *Mechelen v Wallace* (1837) 7 A. & E. 49.
- 119 *Inman v Stamp* (1815) 1 Stark. 12; *Edge v Strafford* (1831) 1 Cr. & J. 391; *Thursby v Eccles* (1900) 17 T.L.R. 130.
- 120 *Vaughan v Hancock* (1846) 3 C.B. 766.
- 121 *Morrell v Studd and Millington* [1913] 2 Ch. 648, 658.
- 122 *Toppin v Lomas* (1855) 16 C.B. 145.
- 123 *Driver v Broad* [1893] 1 Q.B. 744.
- 124 *Ex p. Hall* (1879) 10 Ch. D. 615.
- 125 *McManus v Cooke* (1887) 35 Ch. D. 681.
- 126 *Singh v Beggs* (1996) 71 P. & C.R. 120; *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094 at [106] (CA prepared to accept this proposition on the “rather slender authority” of *Singh v Beggs*). cf. *McManus v Cooke* (1887) L.R. 35 Ch. D 681 (executory contract within s.4 of the Statute of Frauds 1677).
- 127 *Representative Body of the Church in Wales v Newton* [2005] EWHC 631 (QB), [2005] All E.R. (D) 163 (Apr).
- 128 A variation in the beneficial interests of the parties in the net proceeds of sale of a house has been held not to constitute the disposition of an interest in the house: *Lancashire Mortgage Corp Ltd v Scottish and Newcastle Plc* [2007] EWCA Civ 684, [2007] All E.R. (D) 68 (Jul) at [54].
- 129 [1999] Lloyd’s Rep. Bank. 175.
- 130 [2008] EWCA Civ 1627, [2010] Ch. 1 at [20]–[24]
- 131 See also *Helden v Strathmore Ltd* [2011] EWCA Civ 542, [2011] Bus. L.R. 1592 at [27] where a claim advanced to the court was described by Lord Neuberger MR (with whom Smith and Elias LJ agreed) as proceeding on a “fundamental misunderstanding of the reach and purpose of [s.2], ... [which] is concerned with contracts for the creation or sale of legal estates or interests in land, not with documents which actually create or transfer such estates or interests”. See also *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 at [8].
- 132 [2001] EWCA Civ 1389 and see similarly *Campbell v Chief Land Registrar* [2022] EWHC 200 (Ch) at [30]–[41].
- 133 *United Bank of Kuwait Plc v Sahib* [1997] Ch. 107 on which see below, para.7-024. cf. *Clark v Chandler* [2002] EWCA Civ 1249, [2003] 1 P. & C.R. 15 at [13]–[17] where the document could not be construed as an immediate and unconditional disposition so as to fall outside the requirements of s.2 of the 1989 Act and within s.53(1)(c) of the Law of Property Act 1925.
- 134 [2016] EWCA Civ 1291, [2017] Ch. 109 at [38] (Henderson LJ with whom David Richards and Tomlinson LJ agreed).

- 135 [2016] EWCA Civ 1291 at [44]–[45].
- 136 [2016] EWCA Civ 1291 at [45].
- 137 [1997] 1 W.L.R. 38; *Eyestorm Ltd v Hoptonacre Homes Ltd* [2007] EWCA Civ 1366, [2007] All E.R. (D) 284 (Dec). cf. *Morall v Krause* [1994] E.G.C.S. 177 (decided under the Law of Property Act 1925 s.40).
- 138 The Court of Appeal thereby followed the approach of the House of Lords in *Morris v Baron & Co* [1918] A.C. 1, 31 and 29 and Willes J in *Noble v Ward* (1867) L.R. 2 Ex. 135, 137, though in relation to different formal requirements. cf. *H.L. Estates Ltd v Parker-Lake Homes Ltd* [2003] EWHC 604, [2003] All E.R. (D) 245 (Apr). See also *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* [2021] EWHC 3015 (Ch) at [95].
- 139 cf. *HL Estates Ltd v Parker-Lake Homes Ltd* [2003] EWHC 604 (Ch).
- 140 *MP Kemp Ltd v Bullen Developments Ltd* [2014] EWHC 2009 (Ch) at [37].
- 141 *Glen Courtney v Corp Ltd* [2006] EWCA Civ 518 at [12]–[14] applied by *Oakley v Harper McKay Developments Ltd* [2018] EWHC 3405 (Ch) at [73]–[79]. See also *Ladywalk LLP v Revenue and Customs Commissioners* [2020] UKFTT 207 (TC) at [253]–[257] (agreement was “a further contractual arrangement that operates by reference to, and takes its meaning from” the earlier contract for the sale of land but did not vary it: at [257]); *Park v Hadi* [2020] EWHC 2687 (QB) at [53] (a change from a contract to assign a lease (void for lack of formality) to a contract to buy the shares of the company of the tenant is not a variation, but a replacement of the original contract with a different kind of contract, and cf. below, para.25-036).
- 142 [2004] EWCA Civ 79, [2004] All E.R. (D) 203 (Feb) applied in *Styles v Smith* [2005] EWHC 3224 (QB), [2005] All E.R. (D) 167 (Dec).
- 143 (1969) 20 P. & C.R. 909.
- 144 *Neilson v Poole* (1969) 20 P. & C.R. 909, 918–920.
- 145 *Joyce v Rigolli* [2004] EWCA Civ 79 at [31], per Arden LJ. These observations should not be interpreted as meaning that s.2 applies where the parties intended the contract to effect an immediate disposition of an interest in land, as it applies only to executory contracts: *Rollerteam Ltd v Riley* [2016] EWCA Civ 1291, [2017] Ch. 109 at [40]–[42], as noted above, para.7-020.
- 146 *Yeates v Line* [2012] EWHC 3085 (Ch), [2013] 2 W.L.R. 844 at [30].
- 147 *Joyce v Rigolli* [2004] EWCA Civ 79 at [30], [32].
- 148 *Nielson v Poole* (1969) 20 P. & C.R. 909, 919, per Megarry J.
- 149 *Joyce v Rigolli* [2004] EWCA Civ 79 at [32]–[34]. cf. at [45] Sir Martin Nourse referring to the “de minimis principle”; *Yeates v Line* [2012] EWHC 3085 (Ch), [2013] 2 W.L.R. 844 at [30]. cf. *Nata Lee Ltd v Abid* [2014] EWCA Civ 1652, [2015] 2 P. & C.R. 3 at [28]–[34] (agreement to move boundary so as to transfer land from one neighbour to another falls under s.2’s formal requirements).
- 150 *Melhuish v Fishburn* [2008] EWCA Civ 1382 at [21]–[22].
- 151 *Yeates v Line* [2012] EWHC 3085 (Ch), [2013] 2 W.L.R. 844 at [35].
- 152 *Yeates v Line* [2012] EWHC 3085 (Ch) at [36]–[37].

- 153 [1991] Ch. 537; and see Jenkins [1993] Conv. 13.
  - 154 As Scott LJ remarked in a later case “[i]t is evident that the draftsman of this section did not take account of options”: *Trustees of the Chippenham Golf Club v North Wiltshire DC* (1991) 64 P. & C.R. 527, 530.
  - 155 [1991] Ch. 537, 541, per Hoffmann J; *Bircham & Co, Nominees Ltd v Worrell Holdings Ltd* [2001] EWCA Civ 775, (2001) 82 P. & C.R. 34 at [39]–[45].
  - 156 *Trustees of the Chippenham Golf Club v North Wiltshire DC* (1991) 64 P. & C.R. 527, 530; and see further *Tootal Clothing Ltd v Guinea Properties Ltd* (1991) 64 P. & C.R. 452, 455.
  - 157 [1991] Ch. 537. See also *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [11].
  - 158 *Active Estates Ltd v Parness* [2002] EWHC 893, [2002] B.P.I.R. 865.
  - 159 Smith, Property Law, 9th edn (2017), pp.103–104; Emmet & Farrand on Title (2022), paras 2.085–2.089.
  - 160 Land Registration Act 2002 s.115; Smith, Property Law, 9th edn (2017), p.104. cf. Emmet & Farrand on Title (2022), para.2.089.
  - 161 *Mackay v Wilson* (1947) 47 S.R. (NSW) 315, 325, per Street J quoted with approval by Goff and Stephenson LJJ in *Pritchard v Briggs* [1980] Ch. 338, 390 and 423 respectively.
  - 162 Smith, Property Law, 9th edn (2017) p.104, but see the discussion in Emmet & Farrand on Title (2022), para.2.086; Megarry and Wade, The Law of Real Property, 8th edn (2012) by Harpum, Bridge and Dixon, para.15-018.
  - 163 [2001] EWCA Civ 775, (2001) 82 P. & C.R. 34.
- 164 [1997] Ch. 107; *Dean v Allin and Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep. 249 at [43].
- 165 *Ross v Bank of Commerce* [2012] UKPC 3 at [20]. cf. *De Serville v Argee Ltd* (2001) P. & C. R. D12 where it was observed that *United Bank of Kuwait v Sahib* [1997] Ch. 107 did not hold that all liens were contract-based, but merely that any lien created by deposit of title deeds alone was contract-based. This leaves the possibility of a document which intends to make an immediately effective disposition of an interest in land taking effect as long as it conforms to the formal requirements contained in the Law of Property Act 1925 s.53(1)(a) and see, above, para.7-020.
- 166 See below, Vol.II, paras 47-043 et seq.

- 167 *Financial Times*, 13 December 1991 and 15 January 1992, noted by *Baughen* [1992] Conv. 330.
- 168 See above, para. 7-013.
- 169 cf. above, para. 7-014.
- 170 *Baughen* [1992] Conv. 330 at 332.
- 171 *Baughen* [1992] Conv. 330 at 332.
- 172 The **Law of Property (Miscellaneous Provisions) Act 1989** s.1 changed the law relating to the formal requirements for deeds, abolishing the requirement of sealing and replacing it with requirements of a clear intention as to the making of a deed, of signature and of attestation: see above, paras 1-084 et seq.
- 173 Gray, Elements of Land Law, 2nd edn (1993), p.744.
- 174 *Howell* [1990] Conv. 441, 443.
- 175 See below, para. 7-034.
- 176 [1999] E.G.C.S. 88.
- 177 [1999] E.G.C.S. 88 transcript at [44].
- 178 [2010] EWHC 1022 (Ch) at [61]–[66], [2010] 2 E.G.L.R. 93 (affirmed on other grounds [2011] EWCA Civ 270, [2011] All E.R. (D) 195 (Mar)).
- 179 [2002] EWHC 1180, [2003] 2 P. & C.R. 13 at [57].
- 180 [2004] EWCA Civ 379, (2004) 2 P. & C.R. 33 at [21] and see further below, para. 7-028.
- 181 [2010] EWHC 1022 (Ch) at [66].
- 182 Such an agreement would be valid in the absence of consideration if contained in a deed, but this would possess its own formal requirements: see above, paras 1-084 et seq.
- 183 *Walford v Miles* [1992] 2 A.C. 128, 139.
- 184 *Pitt v P.H.H. Asset Management Ltd* [1994] 1 W.L.R. 327. cf. *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* [2021] EWHC 3015 (Ch) at [87]–[95] (agreement to use best endeavours and to act in good faith to conclude a conditional sale of land agreement (which was coupled with an exclusivity agreement) was contractually enforceable, but was not an agreement for the sale of an interest in land).
- 185 [2004] EWCA Civ 379, [2004] 2 P. & C.R. 33. See similarly *Payne v Zafirovoyloy* [1994] C.L.Y. 3513. (Eastbourne CC) and cf. *Simmons v Simmons* [1996] C.L.Y. 2874. See also *Young v Lauretani* [2007] EWHC 1244 (Ch), [2007] 2 F.L.R. 1211 (agreement to apply proceeds of sale of property to the reduction of the mortgage of another property not within s.2).
- 186 (1987) No.164.
- 187 *Nweze v Nwoko* [2004] EWCA Civ 379 at [25].
- 188 [2004] EWCA Civ 379 at [31].
- 189 *Re Goodchild* [1997] 1 W.L.R. 1216, CA; *Olins v Waters* [2008] EWCA Civ 782, [2009] Ch. 212. Even where a will is stated to be irrevocable or where, the testator has agreed contractually with another person not to revoke it, a subsequent testament will be admitted to probate, even though its making constitutes a breach of contract: e.g. *Re Heys (Deceased)* [1914] P. 192.

- 190 *Healey v Brown* [2002] 19 E.G.C.S. 147, transcript at [19], per David Donaldson QC and see *Jiggins v Brisley* [2003] EWHC 841, [2003] W.T.L.R. 1141 at [66].
- 191 *Healey v Brown* [2002] 19 E.G.C.S. 147. cf. *Olins v Walters* [2007] EWHC 3060 (Ch) at [31] (affirmed on other grounds), [2008] EWCA Civ 782.
- 192 *Healey v Brown* [2002] 19 E.G.C.S. 147 at [20], per David Donaldson QC. On these aspects of the formal requirements, see below, para.7-039.
- 193 *Healey v Brown* [2002] 19 E.G.C.S. 147.
- 194 This is expressly preserved by s.2(5) of the 1989 Act and see below, para.7-049.
- 195 *Healey v Brown* [2002] 19 E.G.C.S. 147 at [26], [27]; *Olins v Waters* [2008] EWCA Civ 782, [2009] Ch. 212 at [36], [37] and [41].
- 196 *Healey v Brown* [2002] EWHC 1405 (Ch) at [27] (distinguishing, at [28], the position as regards constructive trusts arising out of a secret trust).
- 197 *Olins v Walters* [2007] EWHC 3060 (Ch), [2008] W.T.L.R. 339 at [30] and see *Legg v Burton* [2017] EWHC 2088 (Ch), [2017] 4 W.L.R. 186 at [22].
- 198 *Legg v Burton* [2017] EWHC 2088 (Ch) at [23] per HH Judge Paul Matthews.
- 199 [2017] EWHC 2088 (Ch) at [24]–[27].
- 200 [2007] EWHC 803 (Ch), [2007] 3 All E.R. 863 especially at [53].
- 201 *Orton v Collins* [2007] EWHC 803 (Ch) at [60] and [62], per Peter Prescott QC.
- 202 [2007] EWHC 803 (Ch) at [62] referring to the overriding objective found in CPR Pt 1.
- 203 [2004] EWHC 2547 at [193]–[195], [200]–[204]. The decision was affirmed on other grounds: [2005] EWCA Civ 1355, [2006] 1 P. & C.R. DG20.
- 204 *Forster v Hale* (1800) 5 Ves. Jr. 308; *Dale v Hamilton* (1846) 5 Hare 369.
- 205 [2004] EWHC 2547 at [200]–[204].
- 206 [2004] EWHC 2547 at [203], per Lewison J. cf. *Bennett v Bennett* [2018] EWHC 1931 (Ch) at [295]–[296] where it was held, obiter, that s.2 does not apply to a contract of partnership formed for the purpose of buying and conducting business on land owned by a stranger to the partnership.
- 207 [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715.
- 208 [2010] EWCA Civ 277 at [43].
- 209 [2010] EWCA Civ 277 at [46]–[53], notably *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P. & C.R. 452, 456 (treated by the CA in *North Eastern Properties v Coleman* as expressly obiter): [2010] EWCA Civ 277 at [49]; *Godden v Merthyr Tydfil Housing Association* [1997] 1 N.P.C. 1; *Grossman v Hooper* [2001] EWCA Civ 615, [2001] 2 E.G.L.R. 8 at [34]–[35]. These cases are discussed and explained in *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 at [34]–[48].
- 210 Citing Chadwick LJ in *Grossman v Hooper* [2001] EWCA Civ 615, [2001] 2 E.G.L.R. 82 at [20].
- 211 [2010] EWCA Civ 277 at [54]. See also [2010] EWCA Civ 277 at [81] (Longmore LJ). The question whether a particular undertaking constitutes a promise to do something if the other party enters the agreement which is subject to s.2 of the 1989 Act or whether it instead constitutes an express term of that agreement is a question of fact and, therefore, may not be capable of resolution before trial: *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 at [31]–[33].

- 212 [2010] EWCA Civ 277 at [57], per Briggs J.
- 213 [2010] EWCA Civ 277 at [58]–[64].
- 214 cf. above, para.7-032.
- 215 [1991] 1 W.L.R. 853. See *Harpum* [1991] C.L.J. 399.
- 216 *Record v Bell* [1991] 1 W.L.R. 853 at 862.
- 217 [1991] 1 W.L.R. 853 at 860.
- 218 [1991] 1 W.L.R. 853 at 861–862.
- 219 [2007] EWCA Civ 622, [2007] L. & T.R. 26.
- 220 [2007] EWCA Civ 622 at [46], [60]–[61]. The CA also relied on the leading general authority on collateral warranty, *Heilbut Symons & Co v Buckleton* [1913] A.C. 30. *Record v Bell* [1991] 1 W.L.R. 853 was not discussed.
- 221 [2000] 2 Lloyd's Rep. 611 at 615.
- 222 [2007] EWCA Civ 622 at [23].
- 223 [2000] 2 Lloyd's Rep. 611 at 615.
- 224 [2000] 2 Lloyd's Rep. 611 at 615.
- 225 [1913] A.C. 30 at 47.
- 226 *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622 at [42], [43].
- 227 It was held that this was the relevant time owing to the negotiations being “subject to contract”: [2007] EWCA Civ 622 at [45].
- 228 [2007] EWCA Civ 622 at [47] (Sir Andrew Morritt).
- 229 [2007] EWCA Civ 622 at [60] (Lloyd LJ).
- 230 [2007] EWCA Civ 622 at [57] (May LJ).
- 231 Under the Law of Property Act 1925 s.54(2): 1989 Act s.2(5)(a). See, e.g. *Looe Fuels Ltd v Looe Harbour Commissioners* [2008] EWCA Civ 414, [2009] L. & T.R. 3 (oral agreement for a lease at a rent which would cover the landlord’s total capital outlay in three years held to be “at the best rent which can reasonably be obtained” within the meaning of s.54(2)). Where a lease does not come within s.54(2), it cannot come within the exception in s.2(5) (a) of the 1989 Act and is therefore subject to the formal requirements in s.2 of the 1989 Act. If these formal requirements are not met then the lease cannot take effect in equity as a specifically enforceable agreement for a lease under the doctrine in *Walsh v Lonsdale* (1882) 21 Ch. D. 9: *Procter v Procter* [2021] EWCA Civ 167, [2021] Ch. 395 at [92]–[94].
- 232 Law of Property (Miscellaneous Provisions) Act 1989 s.2(5) (as amended). Under s.2(6) of the 1989 Act “regulated mortgage contract”, “regulated home reversion plan”, “regulated home purchase plan” and “regulated sale and rent back agreement” must be read with Financial Services and Markets Act 2000 s.22, any relevant order under that section and Sch.2 to that Act.
- 233 *Kenworthy v Schofield* (1824) 2 B. & C. 945, 947; *Bartlett v Purnell* (1836) 4 A. & E. 792; *Phillips v Butler* [1945] Ch. 358.

234 Law Com. No.164 (1987), para.4.11. For another exclusion from the ambit of s.2, see Channel Tunnel Rail Link Act 1996 ss.41(1) and 56(1).

## **(b) - Formal Requirements**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 7 - Form**

**Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land**

**(b) - Formal Requirements**

**“Made in writing”**

**D** 135 As has been noted, the most important change introduced by the [1989 Act](#) was that contracts for the sale, etc. of an interest in land:

“... can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document, or where contracts are exchanged, in each.”<sup>235</sup>

So, for example, where it was held that a single contract was contained partly in a letter between the parties and partly in signed writing (which made no express reference to the earlier agreement in the letter), then the requirements of [s.2](#) were not fulfilled as all the express terms of the contract were not contained in “one document” as is required.<sup>236</sup> On the other hand, [s.2\(3\)](#) explains that:

“The terms may be incorporated in a document either by being set out in it or by reference to some other document.”

[237](#)



No longer is a note or memorandum which may serve as evidence of the contract enough.

## “All the terms which the parties have expressly agreed in one document”: generally

- 136 At first sight, the omission of an express term of an oral agreement would seem to have the effect of rendering the whole contract a nullity as one can “only be made … by incorporating all the terms … expressly agreed”.<sup>238</sup> However, s.2(4) of the Act recognises the power of the court to order the rectification of a written document so as to conform with the express terms of the oral agreement which it records and provides that where a written document relating to the sale of land has been so rectified, “the contract shall come into being, or be deemed to have come into being, at such a time as may be specified in the order”. In *Firstpost Homes Ltd v Johnson*,<sup>239</sup> the Court of Appeal explained what is meant by the requirement that the contract be made in one document. There, an owner of certain farm property had agreed orally with a director of a company to sell the property to it at a cost of £1,000 per acre. The director had then typed a letter purporting to come from the owner agreeing to sell the land at this price, with a place for her signature and with an enclosed plan, which showed the land in question outlined in colour and which was signed by the director. The Court of Appeal held that, on these facts, the requirements of s.2 of the 1989 Act had not been fulfilled, as the letter and the plan constituted two documents (the former referring to the latter as being enclosed with it), but the letter (which allegedly contained the contract) had not been signed by the director on behalf of the company as was required.<sup>240</sup> This decision was applied in *Francis v F Berndes Ltd*,<sup>241</sup> where the document allegedly recording the agreement “was in form no more than a counter-signed offer, and … did not set out in writing the obligation to purchase” by the claimants.<sup>242</sup> While:

“… this is a highly technical distinction, and one which may be productive of injustice in cases where the nature of the ‘missing’ term is obvious once the document is construed in its factual context, … one of the main purposes of the 1989 Act was to produce certainty in relation to contracts for the sale of land, and to reduce as far as possible the need for extrinsic evidence to establish the terms of the contract.”<sup>243</sup>

In this respect, Lord Sumption has drawn attention to the useful role of entire agreement clauses which usually provide that the document sets out “the entire agreement between the parties and supersede[s] all proposals and prior agreements, arrangements and understandings between the parties”.<sup>244</sup> In the context of contracts for the sale of land, such a clause can serve the important function of ensuring that a contract is not avoided under s.2 of the 1989 Act on the ground that the terms are not all contained in one document.<sup>245</sup>

*Shelford v Revenue and Customs Commissioners* illustrates the impact of s.2's requirement that all the terms agreed by the parties must be contained in one document in a very different context.<sup>246</sup> In that case, the First-tier Tribunal (Tax Chamber) considered four arrangements made by the deceased (D) with a view to removing the value of his home from his estate: (i) a trust deed by which D transferred the property to trustees (D and his solicitor), with D retaining a life interest in possession in the property; (ii) a sale by D of his life interest to the trustees for a price (its current value) on standard terms (which included an entire agreement clause); (iii) a loan agreement under which D loaned the trustees the same sum as the price; and (iv) a deed of assignment by D of the benefit of the loan agreement to his children. In these circumstances, the tribunal held that the sale of the house and the loan in fact formed part of a composite agreement: the true effect of the documents was that D agreed to sell the house to the trustees with completion to occur (and the price paid) on notice following his death.<sup>247</sup> This being the case, it held the sale agreement void under the *s.2 of the 1989 Act* in that it did not incorporate all the terms of the contract of sale of the freehold, the tribunal rejecting the arguments that the loan formed a collateral agreement or that, on its terms, the sale agreement incorporated the loan agreement by reference.<sup>248</sup> The entire agreement clause did not affect this decision.<sup>249</sup> Moreover, the fact that the two agreements did not reflect the true agreement of the parties meant that, even if read together, they could not satisfy the requirement of s.2 as to the incorporation of all the terms of the sale.<sup>250</sup>

## **“All the terms which the parties have expressly agreed in one document” and rectification**

138 Section 2(4) of the 1989 Act provides that:

“Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.”

The Act therefore expressly acknowledges the possibility of a court rectifying a document so as to allow a contract to conform to its formal requirements. In *Firstpost Homes Ltd v Johnson* the Court of Appeal noted that while on its terms the letter contained no commitment by the company to purchase the property, the company could have applied to the court to rectify the letter so as to reflect the oral agreement.<sup>251</sup> In *Robert Leonard (Developments) Ltd v Wright*,<sup>252</sup> the Court of Appeal exercised its power to order rectification of the terms of documents exchanged by the parties' solicitors by telephone so as to include reference to the sale of the chattels which had been included in the parties' previous oral contract, and the court also ordered that this rectified contract should be deemed to come into being from the date of the exchange of documents. The Court of Appeal recognised that allowing rectification detracted from the legislative purpose of s.2 which

was to prevent disputes either as to whether the parties had entered into a binding agreement or as to what terms they had agreed, but the availability of rectification showed that:

“... it was clearly the intention of the Act that the all terms requirement should not be so inflexible as to cause hardship or unfairness where there has been a mistake resulting in a venial non-compliance with the Act.”<sup>253</sup>

In *Oun v Ahmad*<sup>254</sup> Morgan J agreed that a court could sometimes apply the conventional rules governing rectification of written instruments,<sup>255</sup> even though the effect of rectification in the context of the 1989 Act is to rescue an otherwise invalid agreement.<sup>256</sup> Morgan J further held, however, that the court could not order rectification of a document so as to include all the terms of the would-be contract where there was an express agreement to omit a term or terms from the written record of the agreement since in these circumstances there was no mistake in the recording of the agreement.<sup>257</sup> And in *Francis v F. Berndes Ltd*<sup>258</sup> Henderson J followed this approach, holding that, unless available on “conventional grounds”, rectification should not be ordered so as to save an agreement from invalidity owing to the formal requirements in s.2 whatever the explanation for the omission of an express term may be:

“Ignorance of the 1989 Act, or a misapprehension about its operation, cannot ... suffice, because the policy which underpins section 2 is the need for certainty in contracts for the sale of land and the avoidance of disputes about what the parties agreed which can be resolved only by recourse to extrinsic evidence.”<sup>259</sup>

## “Exchange of contracts”

<sup>139</sup> In *Commission for the New Towns v Cooper (Great Britain) Ltd*,<sup>260</sup> the Court of Appeal explained the significance of the alternative formal requirement in s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 that all the terms of the contract which the parties have expressly agreed be incorporated “where contracts are exchanged, in each [document]”. According to Stuart-Smith LJ<sup>261</sup> the expression “exchange of contracts”, even if not a term of art, possesses the following features:

“1. Each party draws up or is given a document which incorporates all the terms which they have agreed, and which is intended to record their proposed contract. The terms that have been agreed may have been agreed either orally or in writing or partly orally or [sic: and] partly in writing.

- 2.The documents are referred to as ‘contracts’ or ‘parts of contract’, although they need not be so entitled. They are intended to take effect as formal documents of title and must be capable on their face of being fairly described as contracts having that effect.
- 3.Each party signs his part in the expectation that the other party has also executed or will execute a corresponding part incorporating the same terms.
- 4.At the time of execution neither party is bound by the terms of the document which he has executed, it being their mutual intention that neither will be bound until the executed parts are exchanged.
- 5.The act of exchange is a formal delivery by each party of its part into the actual or constructive possession of the other with the intention that the parties will become actually bound when exchange occurs, but not before.
- 6.The manner of exchange may be agreed and determined by the parties.”

As a result, the Court of Appeal held (through strictly obiter) that this requirement was not satisfied by the mere exchange of a signed letter of offer and a signed letter of acceptance, even if each had contained the (same) express terms of the contract as alleged.<sup>262</sup> Moreover, as a result of the requirement of the third feature of an “exchange of contracts” as set out by Stuart-Smith LJ, there can be no “exchange of contracts” within the meaning of s.2(1) where the documents in question contain substantial differences.<sup>263</sup> While in general the time for considering whether a document complies with s.2 is the time of the agreement, there is no rule preventing the exchange of a document which has been assembled, or altered, by the signatory or with his authority, after signature.<sup>264</sup> So, for example, in *Rabiu v Marlbray Ltd* a contract for the purchase of a 999-year lease of a London hotel room was made at a “sales fair” by a purchaser by signing a standard first page of the contract, the purchaser at the same time instructing solicitors to proceed to exchange of contracts.<sup>265</sup> This contract satisfied the requirements of s.2, as the document exchanged by the purchaser’s duly authorised solicitors had contained all its terms, even though the purchaser had signed only the first page.<sup>266</sup>

## Signature

140 Section 2(3) requires that:

“The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.”

This provision requires both parties to the contract to sign,<sup>267</sup> though it recognises the possibility of valid signature by the agent of either vendor or purchaser.<sup>268</sup>

## Meaning of “signature”

- ¶41 What is required for a party to be held to have signed a document for the purposes of **s.2 of the 1989 Act** has been the subject of some controversy. In *Firstpost Homes Ltd v Johnson*<sup>269</sup> the director of the claimant company (the purchaser) agreed orally with the defendant (the seller) to buy some land and he prepared a letter for her to sign addressed to himself. She signed the letter, but he did not do so, signing only the enclosed plan of the property. First, the Court of Appeal in *Firstpost Homes Ltd* held that the letter and the plan could not form a single document so as to comply with **s.2**’s requirements of signature; instead, the letter was one document which incorporated the terms in the plan (a second document) by reference, and the plan had not been signed by the purchaser.<sup>270</sup> In these circumstances, the Court of Appeal held that the requirements of **s.2** had not been satisfied. For this purpose, the Court considered what is required for a document to be “signed” and, in particular, whether this requires a manuscript signature and, secondly, it made clear the need for the signature to authenticate the whole document.
- ¶42 Having held that the letter and the plan could not form a single document so as to comply with **s.2**’s requirements of signature, Peter Gibson LJ considered whether, if the letter was itself a contract, the name and address of the purchaser as addressee of the letter could constitute the purchaser’s signature. He held that it could not and observed that “it is an artificial use of language to describe the printing or the typing of the name of an addressee in the letter as the signature by the addressee when he has printed or typed that document” and quoted with approval a dictum of Denning LJ in *Goodman v J. Eban Ltd* according to which “[i]n modern English usage, when a document is required to be ‘signed by’ someone, that means that he must write his name with his own hand upon it”.<sup>271</sup>
- U** In doing so, Peter Gibson LJ expressly rejected the “liberal interpretation” of the statutory formalities in earlier authorities<sup>272</sup>
- U** given the “new and different philosophy” of the requirements of **s.2 of the 1989 Act**<sup>273</sup>
- U** and he rejected recourse to this “ancient baggage, particularly when it does not leave the “signed” with a meaning which the ordinary man would understand it to have” though he added that “[t]his decision is of course limited to a case where the party whose signature is said to appear on a

contract is only named as the addressee of a letter prepared by him. No doubt other considerations will apply in other circumstances”.

<sup>274</sup>

 Despite this qualification, the Court of Appeal in *Firstpost Homes Ltd* clearly considered that a “signature” for the purposes of s.2 required that the party “write his name with his own hand upon [the document]”.

<sup>275</sup>



<sup>143</sup> However, this view as to what is required for signature has been the subject of increasing criticism.

<sup>276</sup>

 In particular, the Law Commission has noted that the decision in *Firstpost Homes Ltd* “focused on the fact that the alleged signature of the buyer was of the buyer as addressee of the letter, rather than on the fact that it was not handwritten” and has argued that it should be confined to its facts.<sup>277</sup> In its view, *Firstpost Homes Ltd* “reiterated the principle that a signature must demonstrate an intention of the party to authenticate the document”, and it noted that the High Court in *Re Stealth Construction Ltd*<sup>278</sup> “has subsequently said that, in principle, a string of emails, containing the typed signatures of the parties, could create a contract satisfying the requirements of section 2”.<sup>279</sup> The Law Commission’s conclusion was that the “case law has developed to accommodate increasingly frequent use of technology”.<sup>280</sup> This approach was approved by the High Court in *Neocleous v Rees*, which concerned a claim for specific performance of an alleged contract of compromise which involved a disposition of an interest in land contained in an exchange of emails.<sup>281</sup> The claimants argued that “the typed name of the sender at the foot of an email, whether entered by the sender or generated by the software used to manage emails, renders the document “signed” within the meaning of s.2(1) so long as the inclusion of the name was for the purpose of giving authenticity to the document”<sup>282</sup>; the defendants countered that s.2 requires a handwritten name or at least a facsimile of a handwritten name, relying on *Firstpost Homes* as authority that the proper test is “whether an ‘ordinary man’ would understand it to have been signed”.<sup>283</sup> In their submission, the defendant’s solicitor’s name in type at the end of an email is not enough, in particular where automatically generated.<sup>284</sup> In this respect, HH Judge Pearce considered what such an “ordinary person” would consider to be a signature *at the time of his decision*, rather than at the time of the Court of Appeal’s decision in *Goodman* (in 1954)<sup>285</sup> and concluded that:

“Many an ‘ordinary person’ would consider that what is produced when one stores a name in the Microsoft Outlook ‘Signature’ function with the intent that it is automatically posted on the bottom of every email is indeed a ‘signature’.”<sup>286</sup>

Accordingly, Judge Pearce was able to *apply* the approach of the Court of Appeal in *Firstpost Homes Ltd* (which he considered binding on him) on the basis that it requires recourse to the test of the ordinary person rather than a particular view of what such a person would have understood by signature at some point in the past.<sup>287</sup> He therefore held that words which include the sender's name automatically added at the end of an email are *capable* of constituting the sender's signature, the proper test being "whether the name was applied with authenticating intent".<sup>288</sup> For this purpose, no distinction should be drawn between a manually typed name at the end of an email and an "automatically" generated name as the latter "involved the conscious action at some stage of a person entering the relevant information and settings" in the email software.<sup>289</sup> In both situations, "the presence of the name indicates a clear intention to associate oneself with the email —to authenticate it or to sign it".<sup>290</sup> In this way, and with respect, the approach taken by the court in *Neocleous v Rees* manages to uphold the proper authority of the Court of Appeal in *Firstpost Homes Ltd*, while allowing the law to reflect the practical changes to transactional practice of the electronic age.

## Use of initials

- 144 While Peter Gibson LJ in *Firstpost Homes Ltd* referred to a party writing his *name* on the document,<sup>291</sup> it has been held that a party can sign a document by writing only his initials, provided that it is clear that he intended to authenticate the full terms of the document.<sup>292</sup>

## Authentication of the whole instrument

- 145 In *Firstpost Homes Ltd*, Peter Gibson LJ accepted that the principle laid down by the House of Lords in *Caton v Caton*<sup>293</sup> in relation to the *Statute of Frauds 1677* to the effect that the party's signature must be inserted in such a way as to authenticate the whole instrument applies equally to the requirement of signature made by *s.2 of the 1989 Act*. Thus, where a letter in which A agrees to sell a piece of land to B refers to a plan of the land in question and the court considers that the letter and the plans constitute a single document, B's signature of the plan may well not constitute authentication of the whole.<sup>294</sup> Similarly, while a manuscript initialling of a document may constitute its "signature", the mere initialling of corrections at the margins of a document does not constitute its signing for the purposes of *s.2 of the 1989 Act*, as it does not evidence assent to the whole document.<sup>295</sup>

## Signature by agent

<sup>146</sup> **Section 2(3)** requires signature “by or on behalf of each party to the contract”.

<sup>296</sup>

**U** Clearly, no difficulty arises where an authorised agent signs on behalf of a principal who is named in the document otherwise satisfying the section.

<sup>297</sup>

**U** On the other hand, a signature made without authority clearly does not satisfy the section (as not made *on behalf of* the would-be party) and it is to be noted that a solicitor is not necessarily authorised to sign the writing on behalf of his client merely as a result of the solicitor-client relationship.

<sup>298</sup>

**U** However, where a person with authority to sign does so “as agent only” and no principal is named or identifiable from the document, it has been said that the section is presumably not satisfied as one of its parties is not named,

<sup>299</sup>

**U** this view apparently resting on the proposition that the identity of the contracting party is a term of the contract, all the terms of the contract being required to be incorporated in the document by **s.2(1)**.

<sup>300</sup>

**U** A similar argument can be put as regards the significance of signature by the agent of an undisclosed principal

<sup>301</sup>

**U** and in both cases this strict approach can be supported from the purpose of the section in terms of certainty.

<sup>302</sup>

**U** On the other hand, the Law Commission’s Working Paper which led to the Act intended to “let the ordinary principles of agency operate”

<sup>303</sup>

**U** and it can be argued that an agent: “signs ‘on behalf of’ the principal whenever he signs with authority to do so and intending to act for his principal” and if this were accepted, it would allow both unnamed and undisclosed principals to enforce or be liable under the contract.

<sup>304</sup>

**U** It would certainly be a surprising (and practically very inconvenient) effect of the 1989 Act if signature by the agent of an undisclosed principal were held insufficient to satisfy its formal requirements and it would mark a significant change from the old law

305

**U** apparently not envisaged in course of the preparation of the Act.

306

**U**

## Footnotes

- 235 Law of Property (Miscellaneous Provisions) Act 1989 s.2(1).
- 236 *Dolphin Quays Development Ltd v Mills [2006] EWHC 931, [2007] 1 P. & C.R. 12.*
- 237 For discussion of the incorporation of terms by reference to some other document see *Jones v Forest Fencing Ltd [2001] EWCA Civ 1700* at [7] and [17]–[21]; *Glen Courtney v Corp Ltd [2006] EWCA Civ 518* at [11] and [30]; *Shelford v Revenue and Customs Commissioners [2020] UKFTT 53 (TC), [2020] S.F.T.D. 437* (below, para.7-037) and *Sismey v Salandron [2022] W.T.L.R. 281* at [44]–[49].
- 238 Law of Property (Miscellaneous Provisions) Act 1989 s.2(1). Section 2 does not affect the court's approach to the construction of the contract, so that the usual principles apply, including as to the relevance of background facts where appropriate and the correction of mistakes: *Westvilla Properties v Dow Properties Ltd [2010] EWHC 30 (Ch), [2010] 2 P. & C.R. 19* at [19]–[20]; *Rabiu v Marlbray Ltd [2013] EWHC 3272 (Ch)* at [14] and [91] (one of several joined cases reversed on other grounds sub nom. *Marlbray Ltd v Laditi [2016] EWCA Civ 476*) and see on construction generally below paras 15-047 et seq. The questions discussed in this paragraph are to be distinguished from the question as to whether and, if so, how s.2 applies to composite transactions, that is, where the parties have chosen to structure their agreement so that the land contract is separated from the rest of the transaction, on which see above, para.7-032.
- 239 *[1995] 1 W.L.R. 1567.*
- 240 See below, paras 7-040—7-046.
- 241 *[2011] EWHC 3377 (Ch), [2012] 1 All E.R. (Comm) 735.*
- 242 *[2011] EWHC 3377 (Ch)* at [26].
- 243 *[2011] EWHC 3377 (Ch)* at [27], per Henderson J. cf. *Kuznetsov v Camden LBC [2019] EWHC 805 (Ch)* at [50] and [56] (a letter signed by one party and returned signed by the other party which incorporated all terms essential to the contract and omitted no other terms can satisfy the requirements of s.2 (appeal from striking out)).
- 244 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24, [2018] 2 W.L.R. 1603* at [14].

- 245 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 at [14] referring to *McGrath v Shah* (1898) 57 P & C.R. 451, 459 where a similar point was made in relation to the earlier formal requirements in the Law of Property Act 1925 s.40(1). On “entire agreement clauses” more generally, see above, para.15-031.
- 246 [2020] UKFTT 53 (TC), [2020] S.F.T.D. 437.
- 247 [2020] UKFTT 53 (TC) at [71].
- 248 [2020] UKFTT 53 (TC) at [77]–[84]. As a result, the tribunal held the deed of assignment void on the ground of common fundamental mistake as there were no sale proceeds on which the deed could “bite”: at [85]. The result was that the house formed part of D’s estate for tax purposes.
- 249 [2020] UKFTT 53 (TC) at [79]. The entire agreement clause incorporated by reference from the Standard Conditions of Sale (3rd Edition) stated that “This Agreement constitutes the entire contract between the Seller and the Buyer and may only be varied or modified (whether by way of collateral contract or otherwise) in writing under the hands of the Seller and the Buyer or their respective Solicitors” (quoted, [2020] UKFTT 53 (TC) at [20]) but the aspect of the entire agreement clause argued before the tribunal was that it permitted no oral variation, whereas the tribunal held that the loan agreement did not constitute a collateral agreement to the sale agreement and therefore did not directly address the significance of the “entire contract” aspect of the clause.
- 250 [2020] UKFTT 53 (TC) at [83].
- 251 *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1576, 1577 and cf. above, para.7-036.
- 252 [1994] N.P.C. 49. See also *Peters v Fairclough Homes Ltd Unreported 20 December 2002, Ch D* at [26]–[27] (contractual document rectified so as to include longstop date included in correspondence between solicitors). cf. *Enfield LBC v Arajah* [1995] E.G.C.S. 164 (where apparently the possibility of rectification was not raised).
- 253 [1994] N.P.C. 49 at [10], per Henry LJ.
- 254 [2008] EWHC 545 (Ch), [2008] All E.R. (D) 270 (Mar).
- 255 [2008] EWHC 545 (Ch) at [55] and see [2008] EWHC 545 (Ch) at [36] referring to the 1989 Act s.2(4) which states that after rectification “the contract shall come into being, or be deemed to have come into being”. For the law of rectification generally see above, paras 5-057 et seq.
- 256 [2008] EWHC 545 (Ch) at [36] referring to 1989 Act s.2(4) which states that after rectification “the contract shall come into being, or be deemed to have come into being”.
- 257 [2008] EWHC 545 (Ch) at [42]–[48]. Morgan J accepted the difference between the case before him and contracts where “there are two separate contracts and not one composite contract”: [2008] EWHC 545 (Ch) at [33] and see cf. para.7-032.
- 258 [2011] EWHC 3377 (Ch), [2012] 1 All E.R. (Comm) 735.
- 259 [2011] EWHC 3377 (Ch) at [43].
- 260 [1995] Ch. 259.
- 261 [1995] Ch. 259, 285.
- 262 The Court of Appeal distinguished its earlier unreported decision in *Hooper v Sherman* 30 November 1994 which took a different position, adding that it had been made on the basis of a wrong concession by counsel: [1995] Ch. 259, 289, 295. cf. *Kuznetsov v Camden LBC*

[2019] EWHC 805 (Ch), [2019] R.V.R. 325 at [49]–[59] (*Commission for the New Towns v Cooper (Great Britain) Ltd* does not establish that a letter which was signed by one party and returned signed by the other party (and in this sense “exchanged”) cannot satisfy the requirements of s.2 as it may be “made in writing … incorporating all the terms which the parties have expressly agreed” (appeal from striking out)).

- 263 *De Serville v Argee Ltd* (2001) 82 P. & C.R. D12. See also, above, para.7-029 (mutual wills).
- 264 *Rabiu v Marlbray Ltd* [2013] EWHC 3272 (Ch) at [14], relying on *Koenigsblatt v Sweet* [1923] 2 Ch. 314 at 320 and 326 (decided under the Statute of Frauds s.4); *Gavaghan v Edwards* [1962] 1 Ch. 220, CA (decided under the Law of Property Act 1925 s.40). While the judgment in *Rabiu v Marlbray Ltd* was the subject of considerable criticism (and was reversed in part) by the CA sub nom. *Marlbray Ltd v Laditi* [2016] EWCA Civ 476, [2016] 1 W.L.R. 5147 (on which see below, para.7-046 (note)), the points in the text were not subject to appeal.
- 265 [2013] EWHC 3272 (Ch).
- 266 [2013] EWHC 3272 (Ch) at [88]–[91] and [94].
- 267 Under s.40 of the Law of Property Act 1925, signature was necessary only for “the party to be charged” without it being signed by the other party: *Barber v Rowe* [1948] 2 All E.R. 1050. Under the 1989 Act, a third party who is intended as transferee of the interest in property need not sign: *RG Kensington Management Co Ltd v Hutchinson IDH Ltd* [2002] EWHC 1180, [2003] 2 P. & C.R. 13 at [57] not following *Jelson Ltd v Derby CC* [1999] 3 E.G.L.R. 1991; *Nweze v Nwoko* [2004] EWCA Civ 399, (2004) 2 P. & C.R. 33 at [21] above, paras 7-026 and 7-028.
- 268 See below, para.7-046.
- 269 [1995] 1 W.L.R. 1567.
- 270 [1995] 1 W.L.R. 1567 at 1573 (Peter Gibson LJ, with whom Hutchinson LJ agreed; Balcombe LJ gave a separate judgment agreeing with Peter Gibson LJ).
- 271 [1995] 1 W.L.R. 1567 at 1575 quoting Denning LJ (dissenting) in *Goodman v J. Eban Ltd* [1954] 1 Q.B. 550 at 561. However, while he expressed some sympathy for the view that a manuscript signature should be required (at 555), Sir Raymond Evershed MR (with whom Romer LJ agreed at 563) held that, following the established approach in the authorities, “the essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one’s name or ‘signature’ so as personally to authenticate the document” (at 557) and so a rubber stamp of the signed name of a firm of solicitors *could* satisfy the requirement of signature by the solicitor of a bill of costs under the *Solicitors Act 1932* s.65: at 557–559.
- 272 [1995] 1 W.L.R. 1567 at 1574–1575, discussing in particular *Evans v Hoare* [1892] 1 Q.B. 593 decided in the context of the Statute of Frauds 1677 s.4.
- 273 [1995] 1 W.L.R. 1567 at 1576.
- 274 [1995] 1 W.L.R. 1567 at 1576 and see similarly at 1577 (Balcombe LJ).

- 275 [1995] 1 W.L.R. 1567 at 1575 quoting Denning LJ as noted above. This view of the CA's position is also taken by Emmet & Farrand on Title (2022), para.2-041.01.
- 276 See in particular Emmet & Farrand on Title (2022) para.2-041.01 which criticises Peter Gibson LJ's treatment of *Goodman v J. Eban Ltd* [1954] 1 Q.B. 550 and argues that "there is nothing in the Law Commission's Report, the Parliamentary debates or the [1989] statute itself to indicate any intention to depart from the established meaning of 'signed'". Even so, Emmet & Farrand concludes that, taking account in particular the decision of the CA in *Firstpost Homes Ltd* "conveyancers should be as cautious as practicable and prefer as a matter of safest practice 'wet ink' signatures for contracts for the sale of land": Emmet & Farrand on Title at para.2.041.04, not following the view expressed by the Law Society in its practice note, Execution of documents at virtual signings or closings (16 February 2010, available at <http://www.lawsociety.org.uk>). This Law Society practice note was updated in the context of the Covid-19 pandemic (7 May 2020) with practical suggestions as regards electronic signatures: available at <https://www.lawsociety.org.uk/topics/business-management/execution-of-a-document-using-and-electronic-signature>. And see also Hewitson (2021) Conv. 120.
- 277 Law Com. No.386, para.3.51 citing Smith, Internet Law and Regulation, 4th edn (2007), para.10-113, n.79. See also Law Commission, Electronic Execution of Documents, Consultation Paper No.237 (21 August 2018) Ch.3 esp. para.3.57.
- 278 *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 B.C.L.C. 297 at [44]–[45] (the point had apparently been conceded). See also *Ramsay v Love* [2015] EWHC 65 (Ch) at [7], where Morgan J observed (obiter and in the context of s.1(3) rather than s.2 of the 1989 Act) that the statements in *Firstpost Homes Ltd v Johnson* which require signature by an executing party to be made with a pen in his own hand were not designed to distinguish between signing in such a way and by the use of a signature writing machine. cf. *Butts Park Ventures (Coventry) Ltd v Bryant Homes Central Ltd* [2003] EWHC 2487 (Ch), [2004] B.C.C. 207 at [9]–[10] (dispute as to whether a photocopied signature would qualify as a "signature" for the purposes of s.2).
- 279 Law Com. No.386, para.3.53.
- 280 Law Com. No.386, para.3.53. Nevertheless, the Law Commission suggested that the government should consider whether a more general legislative statement should be introduced in the interests of clarification of the position: Ch.4.
- 281 [2019] EWHC 2462 (Ch), [2020] 2 P. & C.R. 4 (Chancery Division District Registry (Manchester), HH Judge Pearce).
- 282 [2019] EWHC 2462 (Ch) at [30].
- 283 [2019] EWHC 2462 (Ch) at [44].
- 284 [2019] EWHC 2462 (Ch) at [45].
- 285 [2019] EWHC 2462 (Ch) at [51].
- 286 [2019] EWHC 2462 (Ch) at [51].
- 287 [2019] EWHC 2462 (Ch) at [52].

- 288 [2019] EWHC 2462 (Ch) at [53], adopting the approach in *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All E.R. 881 for the purposes of the Statute of Frauds s.4.
- 289 [2019] EWHC 2462 (Ch) at [54].
- 290 [2019] EWHC 2462 (Ch) at [55]. The insertion of “Many thanks” after the text of the email and the automatic signature was seen as showing an intention to connect the name with its contents: at [57].
- 291 [1995] 1 W.L.R. 1567 at 1575 and see above, para.7-042.
- 292 *Newell v Tarrant* [2004] EWHC 772, (2004) 148 S.J.L.B. 509 at [47].
- 293 (1867) L.R. 2 H.L. 127.
- 294 *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1573 (though on the facts the Court of Appeal held that the letter and plan before them constituted *two* documents: see above, para.7-036).
- 295 *Newell v Tarrant* [2004] EWHC 772, (2004) 148 S.J.L.B. 509 at [48].
- 296 Signature is required by each party to the contract, not each party to the prospective conveyance or transfer: *RG Kensington Management Co v Hutchinson* [2002] EWHC 1180, [2003] 2 P. & C.R. 13. For this purpose an agent’s authority may be oral or in writing: *McLaughlin v Duffill* [2008] EWCA Civ 1627, [2010] Ch. 1 especially at [21]–[24], distinguishing the rule requiring writing for the authorisation of signature by an agent of “dispositions of an interest in land” to which s.53(1)(a) of the Law of Property Act 1925 applies. It has been said that, where a party (A) to a contract signs on behalf of another person (B) but without that person’s actual or ostensible authority, ratification by B can operate so as to render him or her party to the contract, and in this case the requirements of s.2 are satisfied: *Simpole v Chee* [2013] EWHC 4444 (Ch) at [8]–[10]. Where A signs a document setting out a contract of sale with B in respect of obligations expressed as joint and several, not only on his own behalf but also on behalf of C in respect of her joint and several obligations but without her authority, in principle the contract is valid between A and B as long as it is, on an objective interpretation, not conditional on C’s having authorised him to sign on her behalf, as the joint and several provision of the contract makes it clear that A and C do not constitute a “composite” purchaser: *Marlbray Ltd v Laditi* (on appeal from sub nom. *Rabiu v Marlbray Ltd*) [2016] EWCA Civ 476, [2016] 1 W.L.R. 5147 at [56] and [68]. If in these circumstances the document signed by A and B contains all the terms of the several contract, then it satisfies the requirements of s.2 of the 1989 Act, it being irrelevant that A did not sign identifying the precise capacity in which he did so, i.e. as principal obligor under his several contract: [2016] EWCA Civ 476 at [71]. A is therefore bound under his contract with B, even though C is not. Where a person signs a contract, the question whether he does so in his capacity of trustee only or also in his personal capacity depends on what a reasonable reader of the contract, knowing the background to it, would have understood to have been the case: *Amari Lifestyle Ltd v Warnes* [2017] EWHC 1891 (Ch), [2018] 2 W.L.R. 416 at [22]–[29].
- 297 Bowstead and Reynolds on Agency, 22nd edn (2020), para.8-004. As regards companies, the Companies Act 2006 s.43(1) allows a company to make a contract, either by its being made “by a company, by writing under its common seal or (b) on behalf of a company,

by a person acting under its authority, express or implied". Section 43(2) provides that "formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of a company" and this clearly applies to the requirements of s.2 of the 1989 Act. On the other hand, s.44(1) and (2) of the 2006 Act require that a *document* "by a company" be executed "by the affixing of its common seal" or by signature "on behalf of the company ... by two authorised signatories, or ... by a director of the company in the presence of a witness who attests the signature". The view has been expressed that a company can satisfy the formal requirements of s.2 of the 1989 Act by signature by a single authorised agent of the company under s.43(1)(b) of the 2006 Act on the basis that s.2(3) of the 1989 Act requires signature "by or on behalf of each party to the contract" (emphasis added) and s.43 allows contracts to be made *on behalf of* a company, whereas s.44 governs documents (including contracts) made *by* a company: *Mars Capital Finance Ltd v Hussain [2021] EWHC 2416 (Ch)* at [89]–[107] (Mr M.H. Rosen QC), not following the view expressed by Lewison J (as he then was) in *Williams v Redcard [2010] EWHC 1078 (Ch)* at [12] (affd sub nom. *Williams v Redcard Ltd [2011] EWCA Civ 466, [2011] 4 All E.R. 444* on the assumption that s.44 applied) who considered that the s.44 requirements were necessary to satisfy s.2 of the 1989 Act (finding them satisfied on the facts). Moreover, the position taken by Mr Rosen QC in *Mars Capital Finance Ltd* finds support from *Northwood (Solihull) Ltd v Fearn [2022] EWCA Civ 40, [2022] 1 W.L.R. 661* where Lewison LJ (as he had become, with whom Newey and Snowden LJJ agreed) observed generally that if the "giver or signatory of [a statutory notice] is authorised, then the giving and signing of the notice counts as giving or signing the notice by the principal", a position that applies equally to companies: *[2022] EWCA Civ 40* at [25]–[26]. This supports the view that signature "on behalf of" a party to the contract under s.2(3) of the 1989 Act may be satisfied by signature by a company's authorised agent under s.43 of the 2006 Act rather than requiring the additional formalities of s.44 of the 2006 Act. On the requirements in ss.43 and 44 of the 2006 Act more generally, see below, paras 12-009 and 12-010. cf. *Braymist Ltd v Wise Finance Co Ltd [2002] EWCA Civ 127, [2002] 3 W.L.R. 322* (a person who signs a contract for the purchase of land as agent of a company not yet incorporated and who can, therefore, sue on the contract by virtue of s.36C(1) of the Companies Act 1985 (now s.51 of the Companies Act 2006), is properly to be treated as having signed the agreement on its own behalf for the purposes of s.2 of the Act 1989) and *Royal Mail Estates Ltd v Maple Teesdale (a firm) [2015] EWHC 1890 (Ch), [2016] 1 W.L.R. 942*.

❶298 Emmet & Farrand on Title (2022), para.2.042.

❶299 Bowstead and Reynolds on Agency, para.8-004.

❶300 Above, para.7-036.

❶301 Bowstead and Reynolds on Agency, para.8-004.

❶302 Above, para.7-014.

- 303 Law Com. Working Paper No.92 (1985), s.5.16.
- 304 Bowstead and Reynolds on Agency, para.8-004.
- 305 Bowstead and Reynolds on Agency, para.8-003 citing, inter alia, *Basma v Weekes [1950] A.C. 441*.
- 306 cf. *Government of Sierra Leone v Davenport [2003] EWHC 2769, [2003] All E.R. (D) 99 (Nov)* at [69] where some of these difficulties were noted.

## **(c) - The Effect of Failure to Comply with the Formal Requirements**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 2 - Formation of Contract**

**Chapter 7 - Form**

**Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land**

**(c) - The Effect of Failure to Comply with the Formal Requirements**

**Effect of non-compliance**

<sup>147</sup> Unlike s.40 of the Law of Property Act 1925, which made unenforceable those contracts which did not comply with its requirements,  
<sup>307</sup>

**U** any contract not complying with the requirements contained in s.2 of the 1989 Act is void and ineffective,  
<sup>308</sup>

**U** as a contract governed by the section “can only be made in writing”. As a result, it is clear that neither party to an oral contract falling under s.2’s requirements has any remedy to enforce the contract’s obligations; and, in particular, the vendor cannot sue for the price nor does he have a vendor’s lien for the price.  
<sup>309</sup>

**U**

**The fate of the doctrine of part performance**

<sup>148</sup>

The Law Commission considered that the principal effect of a failure to comply with the contractual formalities rendering the contract void would be to exclude the operation of the doctrine of part performance<sup>310</sup>: “[w]ithout writing there will be no contract for either party to perform”.<sup>311</sup> Certainly, the courts could hardly use the doctrine of part performance as such to enforce an oral agreement. However, the doctrine is itself merely part of a wider equitable principle, viz that equity will not allow a statute to be used as an engine of fraud<sup>312</sup> and this principle is left untouched by the Act: indeed, it has been considered difficult to see how the operation of such a principle could be excluded by the legislature.<sup>313</sup> In *Singh v Beggs*<sup>314</sup> Neill LJ doubted the view that s.2 of the 1989 Act had “abolished” the doctrine of part performance, observing (if obiter) that:

“It is true that it is provided by s.2(8) of the 1989 Act, that section 40 of the Law of Property Act 1925 will cease to have effect, but the doctrine [of part performance] is an equitable doctrine, and it may be that in certain circumstances the doctrine could be relied on.”<sup>315</sup>

However, the Court of Appeal has later accepted that the doctrine has not survived the 1989 Act, while at the same time qualifying the strict application of the formal requirements by the doctrine of constructive trust.<sup>316</sup> For this purpose, the Law Commission recognised that circumstances may arise in which justice would be denied if a strict requirement of writing were universally upheld. Its view, reflected in s.2(5) of the 1989 Act,<sup>317</sup> was that any potential injustice could be avoided by judicial use of the techniques of collateral contracts, constructive trust or equitable estoppel. This has indeed occurred, although use of proprietary estoppel has been controversial.<sup>318</sup> However, in determining the circumstances in which it will be appropriate to rely on any of these techniques, the courts are likely to bear in mind the general considerations outlined by the House of Lords in *Actionstrength Ltd v International Glass Engineering IN.GLEN SpA*<sup>319</sup> as to the proper limits of equitable qualifications on or supplements to statutory rules entailing the formal invalidity of a contract, notably, the importance of not frustrating the purpose of the statutory provisions by simply enforcing invalid executory agreements by another, equitable name.<sup>320</sup> In this respect, while in common with its predecessor, s.40 of the Law of Property Act 1925, s.2 of the 1989 Act can be seen as based on a perceived need to protect people from being liable on the basis of oral utterances which are ill-considered, ambiguous or completely fictitious,<sup>321</sup> it was intended to go further and to introduce a greater certainty into the law and stricter formal requirements.<sup>322</sup>

## Constructive trust

Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989 specifically precludes that section's requirements from affecting "the creation or operation of ... constructive trusts". In *Yaxley v Gots*

323

 Robert Walker LJ considered that the relevant "species of constructive" trust for this purpose is one based on "common intention" and is to be found where, in the words of Lord Bridge in *Lloyds Bank Plc v Rosset*

324

 there is an:

"... agreement, arrangement or understanding' actually reached between the parties, and relied on and acted on by the claimant ... Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights."

325



In *Yaxley v Gots* itself, A made an oral agreement to give B the ground floor of a house which he (A) was proposing to buy in exchange for B's supplying labour and materials to convert the house into flats and managing the letting of the property. The house was purchased in the name of A's son, C, who subsequently refused to grant B any interest in the property and B, believing A to be the owner, performed his side of the bargain, supplying labour, materials and management services. At first instance, it was held that C had adopted the oral agreement between A and B and that C was bound by proprietary estoppel to grant a 99-year lease of the ground floor to B. The Court of Appeal upheld this result, rejecting A and C's argument based on s.2 of the 1989 Act, but preferring to rely on the ground of constructive trust rather than proprietary estoppel, though seeing these as running together on the facts.

326

 While the oral agreement between A and B was not a valid contract by reason of the 1989 Act, which had abolished the doctrine of part performance and required all contracts for the sale or disposal of land to be in writing, the agreement could be enforced on the basis of a constructive trust in circumstances where, previously, the doctrine of part performance might have been relied upon.

327

 Similarly, in *Kinane v Mackie-Conteh*

328

 the claimant had loaned money to a company of which one of the defendants was managing director, this loan being intended to be secured by a charge on a house in the form of a "security agreement" signed by himself and his wife. The Court of Appeal held that, while the security agreement fell under the formal requirements found in s.2 of the 1989 Act, on the facts "a proprietary estoppel overlapping with a constructive trust" was established so as to come within

the exception found in s.2(5) of the 1989 Act, in that the defendants had encouraged the claimant in his erroneous belief that the agreement created an enforceable obligation.

329

**U** And in *Ali v Dinc* it was considered uncontroversial that a transaction transferring an interest in land void for failing the formality requirements in s.2 should be unwound,

330

**U** and while generally this would be restricted to personal remedies based on unjust enrichment, sometimes it would extend to proprietary remedies:

“... the personal obligation to make restitution of the particular assets received under the void contract was rendered proprietary once the defendant was on notice that the assets (or whatever now remained of them in the defendant's hands) were not to be treated as the recipient's own and restitution was in order.”

331



As a result, once a defendant transferee of property is put on notice of the void character of the transaction, he will hold that property on constructive trust for the transferor; conversely, the transferor must also make counter restitution of anything which he received under the void contract.

332

**U** A further and distinct way in which a constructive trust may avoid the formal requirements imposed by s.2 of the 1989 Act may be found in the application of the so-called *Pallant v Morgan* equity.

333

**U** Where A and B agree that A will acquire some specific property for the joint benefit of A and B, and B, in reliance on A's agreement, refrains from attempting to acquire the property, then equity will not permit A, when he acquires the property, to keep it for his own benefit, to the exclusion of B. It has been said that because this equity is in the nature of a constructive trust, it is unaffected by s.2(1) the 1989 Act.

334



## Quistclose trust

Furthermore, a *Quistclose* trust

335

 may apply in the context of a contract rendered void by failure to fulfil the formal requirements in [s.2 of the 1989 Act](#).

336

 Under this doctrine:

“A trust may arise where one person, A, advances money to another, B, on the understanding that B is not to have the free disposal of the money and that it may only be applied for the purpose stated by A. The effect of the trust is to reserve in A the beneficial interest in the money, so providing him with some proprietary security for his advance.”

337



In *Ali v Dinc* the High Court held that a transfer of property other than money under a contract void for lack of formality under [s.2 of the 1989 Act](#) could give rise to a *Quistclose* trust.

338

 In that case, it was sufficiently clear that the arrangement between the parties to an agreement under which two properties were transferred by A to B was that B's use of the properties was restricted to the purpose of raising funds that were to be given to A, and that B appreciated that, apart from this permitted use, it was A and not he himself (B) who was beneficially entitled to the properties despite the transfer of legal title to himself (B).

339

 Although the fulfilment of this purpose was still possible, B had used the properties in breach of the restrictions on his power to do so and in these circumstances A was entitled to terminate the arrangement with B and enforce his resulting trusts.

340



## Estoppel generally

- 151 Despite the absence of any express saving provision in [s.2](#) as is provided for constructive trusts, in *McCausland v Duncan Lawrie Ltd*<sup>341</sup> Neill LJ considered that the “doctrine of estoppel” (without further specification) was “plainly arguable” to give some effect to the agreement underlying a

fairly trivial variation of a contract for the sale etc. of an interest in land, the variation itself being void for informality.<sup>342</sup> Morritt LJ observed that:

“Section 2 does not give rise to any illegality if its terms are not observed and the need for an estoppel arises in just those circumstances where there is no enforceable contract. For my part I would not place weight on the contention that an estoppel such as the vendor would advance is impossible as a matter of law but it still has to be made out as a matter of fact.”<sup>343</sup>

The issue could not, therefore, be determined in an application to strike out a plaintiff’s claim. In *Yaxley v Gotts*,<sup>344</sup> Robert Walker LJ had:

“... no hesitation in agreeing ... that the doctrine of estoppel may operate to modify (and sometimes perhaps even to counteract) the effect of section 2 of the Act of 1989. The circumstances in which section 2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion that section 2 as a ‘no-go area’ would be unsustainable.”<sup>345</sup>

Nevertheless, in deciding whether or how it may apply, the courts must take into account the Act’s policy of the need for certainty as to the formation of bargains of this type in the general public interest.<sup>346</sup> As will be seen, however, the question of the appropriateness of recourse to the doctrine of proprietary estoppel where an agreement between the parties is void for failure of the formal requirements of s.2 has been more controversial.<sup>347</sup>

## Promissory estoppel (“forbearance in equity”)

- 152 The Law Commission considered that “promissory estoppel” might apply to qualify the strictness of the formal requirements of s.2 of the 1989 Act.<sup>348</sup> In the present context, however, the so-called doctrine of promissory or equitable estoppel, sometimes known as “forbearance in equity”, would not improve a vendor’s position owing to its essentially defensive nature, for promissory estoppel cannot create a new cause of action in substitution for the contractual action denied for want of formality.<sup>349</sup> Moreover, as Lewison LJ has observed, “it would be surprising if one could do by promissory estoppel what one could not do by informal contract”<sup>350</sup> and, moreover, in the case of promissory estoppel, “there is no question of a constructive trust of land arising” so as to fall within the exception to the formality requirements provided by the 1989 Act s.2(5).<sup>351</sup>

## Estoppel by convention

- 153 It is fairly clear that the courts will not allow the application of estoppel by convention so as simply to give effect to an agreement rendered a nullity by [s.2 of the 1989 Act](#). In *Godden v Merthyr Tydfil Housing Association*<sup>352</sup> a building contractor claimed damages for breach of an oral agreement with a Housing Association, under which he had agreed to purchase a particular site, obtain planning permission for the building of seven houses and prepare the site for development, the Housing Association agreeing to reimburse him for the costs of this acquisition and work and that it would enter a contract with him for the construction of the houses. In response to the Housing Association's claim that this agreement failed the formal requirements of [s.2 of the 1989 Act](#), the builder argued that since both parties had contracted in ignorance of this provision, the Housing Association was precluded by the doctrine of estoppel by convention from relying on this provision so as to deny that there was indeed an agreement reached between the parties. According to Simon Brown LJ, with whom Thorpe LJ and Sir John Balcombe agreed, this submission:

“... necessarily involves saying that, although Parliament has dictated that a contract involving the disposition of land made otherwise than in compliance with [s.2](#) is void, the defendants are not allowed to say so. That, to my mind, is an impossible argument ... [I]f it were soundly made, it is difficult to see why it should not operate to escape the intended constraints of [s.2](#) in virtually all cases.”<sup>353</sup>

In Simon Brown LJ's view, the doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid.<sup>354</sup> So, for example, where the effect of the assurance on which the alleged estoppel is based is tantamount to a variation of the contract (itself void as failing to comply with [s.2](#)), then giving effect to the estoppel would subvert the policy behind [s.2 of the 1989 Act](#).<sup>355</sup>

## Proprietary estoppel<sup>356</sup>

- 154 In its work towards the [1989 Act](#) the Law Commission saw proprietary estoppel as a particularly attractive technique for the avoidance of injustice caused by a rigid adherence to the new formality rules because, unlike the doctrine of part performance, it does not simply enforce the underlying agreement but allows a flexible remedy which can vary according to the particular circumstances.<sup>357</sup> As has earlier been explained, there are three main elements of proprietary estoppel: a representation made or assurance given to the claimant, reliance by the claimant on that representation or assurance and detriment suffered by the claimant in consequence of such reliance.<sup>358</sup> It is to be noted, however, that the representation or assurance must have encouraged

the claimant to believe that he has or will in the future enjoy some right or benefit over the owner's property<sup>359</sup> and so, even if adopted by a court in a case where an agreement for the sale of land did not satisfy the formal requirements of s.2, it would apply only so as to give a remedy to a would-be purchaser<sup>360</sup>: any claim by a would-be vendor would not be for a right to land nor indeed for a specific asset, but for a sum of money, a simple claim for a debt.<sup>361</sup>

155 The difficulties in applying the contrasting approaches to the three main requirements of proprietary estoppel found in the speeches of the House of Lords in *Cobbe v Yeoman's Row Management Ltd*<sup>362</sup> and *Thorner v Major*<sup>363</sup> have already been discussed.<sup>364</sup> The following paragraphs will discuss how the courts have applied the doctrine of proprietary estoppel in the context of the formal requirements of s.2 and their differing approaches as to the appropriateness of so doing.

365



## Earlier cases on use of proprietary estoppel

156 An example of the application of proprietary estoppel in this context may be found in *Wayling v Jones*.<sup>366</sup> In that case, A had promised his companion of some ten years, B, that he would bequeath B the business in which he worked at very low wages, but A died without having done so. The Court of Appeal held that B was entitled to rely on a proprietary estoppel against A's executors and therefore ordered them to pay the proceeds of sale of the business to B. If, by contrast, B had alleged that he had *contracted* with A that the latter would bequeath him the business in return for working for low wages, his claim would have failed for lack of fulfilling the formal requirements in s.2 of the 1989 Act.<sup>367</sup> In *Yaxley v Goffs*,<sup>368</sup> Robert Walker LJ considered that where a constructive trust is based on "common intention", then it is "closely akin to, if not indistinguishable from, proprietary estoppel".<sup>369</sup> So, while the Court of Appeal substituted constructive trust for proprietary estoppel (on which the trial judge had relied) as the basis for its decision, this case has been seen as authority for the proposition that:

"... the doctrine of estoppel may operate to modify and counteract the effect of section 2(2) [of the 1989 Act]; and that section 2(5) can cover cases of the equitable intervention of proprietary estoppel which coincide with or overlap the concept of a constructive trust, even though section 2(5) does not expressly refer to proprietary estoppel."<sup>370</sup>

On the other hand, in *Kinane v Mackie-Conteh*<sup>371</sup> Arden LJ and Neuberger LJ expressed contrasting views as to whether a proprietary estoppel “unassociated with a constructive trust” would avoid the formal requirements found in s.2. According to Neuberger LJ:

“... one must ... avoid regarding [subsection 2(5)] as an automatically available statutory escape route from the rigours of section 2(1) of the 1989 Act, simply because fairness appears to demand it. A provision such as section 2 ... was enacted for policy reasons which, no doubt, appeared sensible to the legislature ... the Court should not allow its desire to avoid what might appear a rather harsh result in a particular case to undermine the statutory policy.”<sup>372</sup>

He concluded, therefore, that a “mere estoppel, unassociated with a constructive trust” might not avoid the formal requirements of s.2, especially given the decision of the House of Lords in *Actionstrength Ltd v International Glass Engineering IN.GLEN SpA.*<sup>373</sup> However, here Arden LJ did not agree, and emphasised that the latter decision was concerned with s.4 of the Statute of Frauds 1677 which contains no exception to its formal requirements equivalent to s.2(5) of the 1989 Act. In her view, proprietary estoppel could form the basis of disapplying s.2(1):

“... the cause of action in proprietary estoppel is ... not founded on the unenforceable agreement but upon the defendant’s conduct which, when viewed in all relevant aspects, is unconscionable.”<sup>374</sup>

## Cobbe v Yeoman's Row Management Ltd

- 157 However, a very different approach to the appropriateness of recourse to proprietary estoppel in the context of s.2 of the 1989 can be seen in the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd.*<sup>375</sup> There a company which owned a building had orally agreed in principle with a property developer that it would sell the building to him if he obtained planning permission for its redevelopment, this agreement fixing a price and specifying an “overage” payment if the gross resale of the building exceeded a certain sum. The director of the company encouraged the developer to expect that her company would fulfil this agreement even after she had decided not to do so but to renegotiate for more money, and then (acting for the company) reneged on the agreement on the same day on which planning permission was granted. In these circumstances, the House of Lords held that proprietary estoppel could not apply as the person (the property developer) wishing to rely on the doctrine could not point to anything which the other person (the land-owner) could be estopped from relying on or denying in relation to a certain interest in land, but instead could point only to an expectation that that other person would enter into a contract with them on terms some of which remained to be negotiated.<sup>376</sup> In so holding, Lord Scott of

Foscote (with whom Lords Hoffmann, Brown of Eaton-under-Heywood and Mance agreed) cast doubt on the use of proprietary estoppel as a means of escaping the formal requirements of [s.2 of the 1989 Act](#). Lord Scott expressed the view (though recognising this as not being necessary for the decision of the House) that:

“... proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of [section 2](#) is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute.”<sup>377</sup>

Unlike resulting, implied or constructive trusts, the statute does not recognise any exception from the formal requirements for proprietary estoppel.<sup>378</sup>

## Thorner v Major

- <sup>358</sup> In *Thorner v Major*<sup>379</sup> a somewhat differently constituted House of Lords (Lords Hoffmann, Scott of Foscote, Rodger of Earlsferry, Walker of Gestingthorpe and Neuberger of Abbotsbury) took a more positive view of the role of proprietary estoppel in relation to the requirements of the [1989 Act](#), although, as has been explained,<sup>380</sup> its context was domestic rather than commercial. In relation to the [1989 Act](#) Lord Neuberger observed that:

“The notion that much of the reasoning in *Cobbe*’s case ... was directed to the unusual facts of that case is supported by the discussion, at para 29, relating to [section 2 of the Law of Property \(Miscellaneous Provisions\) Act 1989](#). [Section 2](#) may have presented Mr Cobbe [the developer] with a problem, as he was seeking to invoke an estoppel to protect a right which was, in a sense, contractual in nature ... and [section 2](#) lays down formalities which are required for a valid “agreement” relating to land. However, at least as at present advised, I do not consider that [section 2](#) has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection. It was no doubt for that reason that the defendants, rightly in my view, eschewed any argument based on [section 2](#).”<sup>381</sup>

This observation therefore suggests a distinction between claims for proprietary estoppel based on an assurance reasonably relied on and made in a family or domestic context (where [s.2](#)’s requirements of formality are not relevant) and those based on an agreement which would (otherwise) qualify as a contract (where [s.2](#)’s requirements of formality are relevant and, arguably, should not be circumvented).

## Herbert v Doyle

159

In *Herbert v Doyle*

D 382

**U** the Court of Appeal, on an application for permission to appeal, considered the approaches taken by the House of Lords in *Cobbe* and *Thorner v Major* to the requirement of certainty as regards constructive trust in the context of [s.2 of the 1989 Act](#). Arden LJ (with whom Morgan and Jackson JJ agreed) noted that while the distinction between proprietary estoppel and constructive trust must be kept in mind,

“it appears from *Cobbe* that, in some situations at least, both doctrines have a requirement for completeness of agreement with respect to an interest in property. Certainty as to that interest in those situations is a common component. A relevant situation would be where the transaction is commercial in nature”

as was the case on the facts before her.<sup>383</sup> Arden LJ saw “a common thread running through the speeches of Lord Scott and Lord Walker” in *Cobbe*:

“... that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with [section 2\(1\)](#)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of [section 2\(5\) of the 1989 Act](#).<sup>384</sup>”

Arden LJ saw this interpretation of *Cobbe* as consistent with Lord Neuberger’s position on the need for certainty in *Thorner v Major*.<sup>385</sup> For Arden LJ, on the facts before her, the relevant question was “whether, subject to [section 2 of the 1989 Act](#), there was a valid contract” and for this purpose Arden LJ agreed with the finding of the trial judge below that the agreement of the parties was sufficiently certain.<sup>386</sup> This suggests that where the agreement is sufficiently certain (notably, where it is not made subject to contract nor is merely “an agreement to agree”), then this agreement may provide the basis for the recognition of a constructive trust or for proprietary estoppel (subject to their own conditions).

## Effects of proprietary estoppel

- 160 One important aspect of the difference between proprietary estoppel and constructive trust lies in the former's greater flexibility of remedial response,<sup>387</sup> although sometimes, the effect of the application of the two doctrines will be the same.<sup>388</sup> For:

“... if there is a constructive trust the court must usually give effect to it, often by ordering a transfer of the relevant proprietary interest, whereas if there is an estoppel the court will give a remedy that reflects the value of the equity in question.”<sup>389</sup>

## Restitution: recovery of money paid by purchaser<sup>390</sup>

- 161 The availability of restitution of money paid under an agreement which failed to comply with the formal requirements of [s.40 of the Law of Property Act 1925](#) thereby rendering the contract unenforceable depended on whether the vendor or purchaser defaulted. The general rule was that if the vendor defaulted, the purchaser might recover his deposit on the ground of total failure of consideration.<sup>391</sup> It was, however, possible that, even here, consideration for the payment would not have failed if the vendor had done acts of part performance of the contract and these acts benefited the purchaser.<sup>392</sup> If, on the other hand, the purchaser defaulted, he could not recover a deposit paid on the ground of failure of consideration as the consideration for the payment could not be said to have failed.<sup>393</sup>

## Nullity of contract under s.2 of the 1989 Act does not prevent passing of property in deposit

- 162 It could be thought that the fact that a contract is void for want of the requisite formal requirements of [s.2 of the 1989 Act](#) prevents the passing of property in any money paid under a contract to the other contracting party. However, in *Sharma v Simposh Ltd* the Court of Appeal noted “an important point of principle” in this respect, that is that:

“Property may pass between parties who are involved in a purchase transaction which is contractually ineffective. Property may pass by delivery with the necessary intention, and that may occur even in the context of a contract which is void for illegality.”<sup>394</sup>

*Sharma v Simposh Ltd* concerned a contract void for failure to conform to the requirements of s.2 and the Court of Appeal considered that the general principle which it had identified applied equally to this situation so that the question whether property in a deposit paid under the contract depended on the intention with which the payment was made.<sup>395</sup>

“Was the payment intended to be conditional on the [buyer] completing the transaction or was it intended to be unconditional? If the former, the [vendor] would have obtained only a conditional title to the money and would have been bound to return it on the transaction falling through. If the property passed unconditionally, the defendant was *prima facie* entitled to retain it.”<sup>396</sup>

However, the fact that property was intended to pass and did pass does not exclude the possibility of a claim for restitution, but such a claim depends on the claimant being able to establish a recognised ground of restitution.<sup>397</sup> In this respect, two possible grounds could be relevant: failure of consideration and mistake of law.

## Failure of consideration and its significance

<sup>398</sup> A first possible ground of restitution of money paid under an agreement which fails to fulfil the requirements of *s.2 of the 1989 Act* is that the consideration for the payment has failed. If the notion of consideration is understood as the basis on which the payment was made,<sup>398</sup> then this basis would normally be the existence of the contract of sale with the result that, under the new requirements, failure to comply with the formalities would nullify the contract so as to deprive the payment of its basis. If, on the other hand, the receipt of any promised benefit by the purchaser (such as, for example, by entering possession) were to be taken as preventing the failure of consideration even under this non-existent contract, then recovery would be denied. In *Sharma v Simposh Ltd* the Court of Appeal expressly adopted the former interpretation of failure of consideration thereby endorsing the position of Professor Birks,<sup>399</sup> and this view was explicitly approved by the majority of the Supreme Court in *Patel v Mirza* in the context of an illegal transaction rather than one void under *s.2*, where Lord Toulson observed that:

“A defendant’s enrichment is *prima facie* unjust if the claimant has enriched the defendant on the basis of a consideration which fails. The consideration may have been a promised counter-performance (whether under a valid contract or not), an event or a state of affairs, which failed to materialise.”<sup>400</sup>

*Sharma v Simposh Ltd* itself concerned the restitutionary consequences of nullity of a contract on the ground of its failure to satisfy the formal requirements in s.2 of the 1989 Act and the Court of Appeal noted in this respect that, prior to the Act, the Law Commission had suggested that a purchaser who pays a deposit under an oral agreement for the purchase of land will generally be entitled to recover his deposit if the sale does not go ahead, “for the state of affairs contemplated as the reason for the payment will have failed to materialise”.<sup>401</sup> However, the Court of Appeal held that on the facts of the case before it, which concerned an agreement:

“... to attempt to create an option giving the claimants the right to buy [a building under construction] within the period leading to its completion for an agreed price in exchange for a non-refundable deposit”,<sup>402</sup>

there was no failure of consideration “[s]ince the claimants obtained the benefit for which the payment was made”,<sup>403</sup> that is:

“... the defendant took the property off the market pending completion and kept open its offer to sell it to the claimants at a fixed price.”<sup>404</sup>

In the result, therefore, the Court of Appeal saw the benefit obtained under the contract (even though void for informality) as preventing failure of consideration. Moreover, as the claimants had obtained the benefit for which the payment was made and given that they had decided not to proceed with the purchase of the property owing to a sharp fall in the financial market,<sup>405</sup> there was “no merit in their claim and no injustice in the defendant retaining the money. The justice of the matter is entirely on the defendant’s side”.

<sup>406</sup>



- 164 It could be thought that where a buyer has paid the full purchase price under a contract for the sale of land and entered into possession of the land for a period, it would be unjust to allow him to rely on the statutory invalidity in order to claim back the price, leaving the seller to any possible counterclaim in restitution on the ground of the buyer’s unjust enrichment in enjoying the property during the period. However, in *Singh v Sanghera* the High Court accepted that:

“... the result of a finding that the ‘contract’ under which the parties were acting was void is that any party must restore benefits the retention of which would unjustly enrich that party.”<sup>407</sup>

So, where a contract for the disposition of an interest in land (there, the sale of goodwill of a supermarket, including a lease of premises) was void under s.2, the purchasers were held entitled

to recover the price paid as “[t]he business they purchased, and its goodwill, meant nothing without the lease, and, as the agreement to acquire the business including the lease was void, they acquired nothing”.<sup>408</sup> Conversely, the sellers were entitled to recover based on the purchasers’ unjust enrichment for benefits derived from the void contract, these including the value of original stock and in respect of indemnity arrangements in relation to the businesses’ bank accounts.<sup>409</sup>

## Restitution: recovery of money paid by purchaser under a mistake of law

165

As the previous paragraphs indicate, the established ground for recovery of money paid under a contract for the sale, etc. of an interest of land defective for want of formality has been a failure of consideration. However, in *Kleinwort Benson v Lincoln City Council*<sup>410</sup> the House of Lords allowed a party to a contract void under the ultra vires doctrine to recover payments made under it on the ground that at the time of payment it laboured under a mistake of law as to the validity of the contract: restitution for mistaken payments applies in principle to mistakes of law as to mistakes of fact.<sup>411</sup> While, therefore, this decision was not made in the context of a contract which failed to comply with the formal requirements of s.2 of the 1989 Act, the abolition of the mistake of law rule was put in very general terms and it could well be argued that where a purchaser of land pays money under an agreement for the sale etc. of an interest in land thinking it to be a valid contract, but which as a matter of law is void for want of formality, then that purchaser should be able in principle to recover the money on the ground of this mistake of law, whether or not consideration for the payment can be said to have failed. However, such a reopening of executed land transactions may be thought undesirable by future courts. In this respect, it is to be recalled that in *Tootal Clothing Ltd v Guinea Properties Ltd* (which was not cited to the House of Lords in *Kleinwort Benson v Lincoln City Council*), Scott LJ expressed the view that:

“... section 2 [of the 1989 Act] is of relevance only to executory contracts. It has no relevance to contracts which have been completed. If parties choose to complete an oral land contract or a land contract that does not in some respect or other comply with section 2, they are at liberty to do so. Once they have done so, it becomes irrelevant that the contract they have completed may not have been in accordance with section 2.”

<sup>412</sup>



While in *Kleinwort Benson v Lincoln City Council* Lord Goff of Chieveley (with whom Lord Browne-Wilkinson, Lord Lloyd of Berwick, Lord Hoffmann and Lord Hope of Craighead agreed on this point) rejected a restriction on the ambit of restitution on the ground of mistake of law for the case where a transaction is completed,<sup>413</sup> he did so by reference to the cause of the voidness

of the contracts before him, i.e. interest rate swap transactions. These had been held void on the ground that they were ultra vires the local authorities which had entered them and, as Lord Goff concluded:

“... it is incompatible with the ultra vires rule that an ultra vires transaction should become binding on a local authority simply on the ground that it has been completed.”<sup>414</sup>

According to Lord Hope, “the purpose of the ultra vires doctrine is to protect the public” and therefore “it would be unsatisfactory if restitution were to be possible only in the case of uncompleted transactions”,<sup>415</sup> though he put his rejection of the restriction in very general terms.<sup>416</sup> It is submitted that a future court could take the view that the policy underlying the invalidity of informal transactions relating to land would not be defeated by a rule which prevented the restitution of monies paid under them where they are wholly executed.<sup>417</sup> For, while the formalities required by the [1989 Act](#) may to a degree serve a protective purpose of would-be purchasers, the main reason for the requirements is the need for certainty in transactions and where a transaction had been completed there should be no concern on this ground.<sup>418</sup> On the other hand, a court could instead take a position similar to that taken by the Court of Appeal in *Godden v Merthyr Tydfil Housing Association* in relation to the application of the doctrine of estoppel by convention to a land transaction void for informality, where it held that a court should not uphold a transaction declared invalid on grounds of general public policy.<sup>419</sup> If it did, or if the full force of restitution on the ground of mistake of law is not otherwise restrained, then any payments made under a transaction which was thought valid by the payer, but was void for informality may be recovered.

## Restitution: benefits conferred other than money

- <sup>466</sup> Under the [Law of Property Act 1925 s.40](#), a *purchaser* of an interest in land under a contract unenforceable under that provision was able to recover on a quantum meruit for improvements to the land if the vendor allowed him to go on to effect them, but then repudiated the contract, as the permission to enter might be taken as acquiescence in the work being done.<sup>420</sup> Similarly, in *Deglman v Guaranty Trust Co of Canada and Constantineau*,<sup>421</sup> the defendants' predecessor in title had promised to bequeath a house to the plaintiff, her nephew, if he performed various household tasks. He performed the tasks, but she did not leave the house to him in her will. The Supreme Court of Canada held his acts were not sufficient to satisfy the doctrine of part performance and thus to avoid the effect of the Statute of Frauds, but further held that the plaintiff was entitled to recover on a quantum meruit for the work he had done in the expectation of some

remuneration and at his aunt's request. This law could apparently also apply under s.2 of the 1989 Act,<sup>422</sup> unless the court were to hold that such recovery would undermine the purpose of the statutory requirements in avoiding disputes as to what was agreed.<sup>423</sup>

- 167 On the other hand, if the *vendor* of an interest in land improves it at the request of the purchaser and in anticipation of the contract going ahead, it is not clear whether the purchaser will be liable on a quantum meruit in respect of the work, because although he has requested the work done, he has not benefited from its execution.<sup>424</sup> Dicta in the decision of the Court of Appeal in *Brewer Street Investments Ltd v Barclays Woollen Co Ltd*<sup>425</sup> suggest that a vendor should not recover where a contract has failed to materialise owing to his own fault, but should do so only where it is owing to the purchaser's fault, or perhaps, circumstances beyond either's control. However, the case concerned an agreement made expressly "subject to contract" which failed to proceed further and it is submitted that, whatever the position under s.40 of the Law of Property Act 1925, a distinction based on the respective fault of the parties is inappropriate to recovery in respect of benefits conferred under a contract nullified under the 1989 Act: a party could not be described as "at fault" merely for relying on the statutory invalidity of an agreement which he has made—an invalidity part of whose purpose was his own protection.<sup>426</sup> On the other hand, if a purchaser is allowed to enter possession under a contract void for failing to fulfil the requirements of s.2 of the 1989 Act, a vendor should be able to recover on a quantum meruit for the purchaser's enjoyment of the property, this clearly counting as a benefit for this purpose.<sup>427</sup>

## Footnotes

- 307 *Leroux v Brown* (1852) 12 C.B. 801; *Steadman v Steadman* [1976] A.C. 536, 540, 551, 556; *Elias v George Sahely & Co (Barbados) Ltd* [1983] A.C. 646, 650.
- 308 *Godden v Merthyr Tydfil Housing Association* (1997) 74 P. & C.R. D1 at D3 ("void"); *Yaxley v Goffs* [2000] Ch. 162 especially at 175 ("void"); *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715 at [57] ("void"); *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1571 ("ineffective"). However, as Snell's Equity 34th edn (2019, updated 2021), para.12-046 observes, "s.2, on its express wording, does not purport to deny all legal effects to a promise, or to render an *agreement* void: it clearly applies only to contractual claims" (emphasis added), arguing that this allows the operation of the doctrine of proprietary estoppel on which see below, paras 7-054—7-060. cf. *Jelson Ltd v Derby City Council* [1999] E.G. 88 (C.S.) where the court held that it could apply a "blue pencil" test to a clause in a contract failing to comply with the 1989 Act and uphold the remainder of the agreement: it is submitted that this approach conflicts with the judicial treatment of "composite agreements" and rectification: above, paras 7-032, 7-038. In *Keay v Morris*

*Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 the CA held that its earlier extempore decision in *Tootal Clothing Ltd v Guinea Properties Management Ltd* (1992) 64 P. & C.R. 452 especially at 455–456 was not authority for the proposition that, in a case in which the parties have purportedly made a contract falling within s.2, but have in fact created a nullity because not all the terms of the sale were included in it, then once the land elements of the purported contract have been completed, either side can then enforce any non-land terms that either were or should have been included in it ([2012] EWCA Civ 900 at [40], [44]–[46]), thereby disapproving Lewison J in *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2004] EWHC 2547 (Ch), [2005] 2 P. & C.R. 105 at [198]. As Rimer LJ (with whom Patten and Laws LJJ agreed) observed: “[t]he proposition that a void contract can, by acts in the nature of part performance, mature into a valid one is contrary to principle and wrong”: [2012] EWCA Civ 900 at [47].

- 309 *Ali v Dinc* [2020] EWHC 3055 (Ch), [2021] 2 P. & C.R. 19 at [210]–[212] and [217] (affirmed by the CA on the basis that the HC’s findings of fact had been open to it on the pleadings: [2022] EWCA Civ 34).

310 See above, para.7-014.

311 Law Com. No.164 (1987), para.4.13.

312 *Lincoln v Wright* (1859) 4 De G. & J. 16; *Maddison v Alderson* (1883) 8 App. Cas. 467.

313 See Goff and Jones, *The Law of Restitution*, 5th edn (1998), p.580.

314 (1996) 71 P. & C.R. 120.

315 (1996) 71 P. & C.R. 120, 122.

316 *Yaxley v Gotts* [2000] Ch. 162 at 178 (although the point about part performance was agreed by counsel) and see below, para.7-049.

317 “[N]othing in this section affects the creation or operation of resulting, implied or constructive trusts”.

318 Below, paras 7-049—7-060.

319 [2003] UKHL 17, [2003] 2 A.C. 541 (in the context of the Statute of Frauds 1677 s.4) and see above, para.7-006 and Vol.II, para.47-061.

320 [2003] UKHL 17 at [8]–[9], [20]–[26], [35], [52]. See further below, paras 7-051—7-060.

321 cf. in similar terms, [2003] UKHL 17 at [20], per Lord Hoffmann concerning the Statute of Frauds generally.

322 See above, para.7-014.

- 323 [2000] Ch. 162.

- 324 [1991] 1 A.C. 107, 132.

- 325 [2000] Ch. 162 at 180. See similarly *David Vincent S v Susan Ann S (now M)* [2006] EWHC 2892 (Fam), [2007] 1 F.L.R. 1123 at [56]; *Ely v Robson* [2016] EWCA Civ 774, [2017] 1 P. & C.R. DG1; *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094 at [107]–[111]. See also *Dowding v Matchmove Ltd* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 esp. at [35]–[36] (oral agreement complete in all essential terms intended by both parties to be binding

immediately, relied upon by claimants to their detriment). It has been held that where an agreement for the disposition of an interest in land is made subject to a condition, then no constructive trust can arise until the condition is fulfilled so as to allow the “beneficiary” under the would-be trust (the would-be transferee) to require the would-be “trustee” (the would-be transferor) to transfer the beneficial interest (the interest in land in question): *Representative Body of the Church in Wales v Newton* [2005] EWHC 631 (QB), [2005] All E.R. (D) 163 (Apr) especially at [64].

•326 [2000] Ch. 162 at 180, 181 and 193.

•327 *Yaxley v Gotts* [2000] Ch. 162 at 179–181.

•328 [2005] EWCA Civ 45, [2005] W.T.L.R. 345.

•329 [2005] EWCA Civ 45 at [28]–[32]. cf. *McGuane v Welch* [2008] EWCA Civ 785, [2008] 2 P. & C.R. 24 where the CA held on the facts that “[a] constructive trust could not be properly inferred or imposed by the court as, to do so, was inconsistent with the express agreement of the parties that the Lease would be held by [the appellant] on an express trust for [the respondent] for a period of three years after which the deed of transfer of the Lease to [the respondent] would take effect”: [2008] EWCA Civ 785 at [35], per Mummery LJ.

•330 *Ali v Dinc* [2020] EWHC 3055 (Ch), [2021] 2 P. & C.R. 19 at [220] (the HC’s decision was affirmed by the CA on the basis that its findings of fact had been open to it on the pleadings): [2022] EWCA Civ 34). See also below, para. 7-050 on the relevance of a *Quistclose* resulting trust on the facts.

•331 *Ali v Dinc* [2020] EWHC 3055 (Ch) at [222] (Sarah Worthington QC), following the position taken by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] A.C. 669 at 715.

•332 *Ali v Dinc* [2020] EWHC 3055 (Ch) at [223]–[224].

•333 *Pallant v Morgan* [1953] Ch. 43; *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch. 372; *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754; *Farrar v Miller* [2018] EWCA Civ 172, [2018] 2 P. & C.R. DG3.

•334 *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2004] EWHC 2547 at [219] (where it was held inapplicable on the facts); *Farrar v Miller* [2018] EWCA Civ 172, [2018] 2 P. & C.R. DG3 esp. at [43] and [49]. See also *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* [2021] EWHC 3015 (Ch) at [284]–[308] esp. at [304] where it was held that there was no *Pallant v Morgan* equity essentially because the pre-acquisition agreement did not contemplate that the claimant would acquire an interest in land on the defendant acquiring

such an interest, but instead that the claimant would acquire such an interest when a further, conditional sale agreement was entered into between them.

•335 On *Quistclose* trusts generally see Snell's Equity, 34th edn (2019, updated 2021), paras 25-033–25-036, which sees a standard *Quistclose* trust as a form of resulting trust.

•336 *Ali v Dinc* [2020] EWHC 3055 (Ch), [2021] 2 P. & C.R. 19 at [232]–[248]; [2021] 2 P. & C.R. 19 (the HC's decision was affirmed by the CA on the basis that its findings of fact had been open to it on the pleadings: [2022] EWCA Civ 34).

•337 Snell's Equity at para.25-033.

•338 [2020] EWHC 3055 (Ch), [2021] 2 P. & C.R. 19 at [234] (affirmed on the basis that the HC's findings of fact had been open to it on the pleadings: [2022] EWCA Civ 34). cf. also above, para.7-049 concerning constructive trust.

•339 [2020] EWHC 3055 (Ch) at [248] and [254].

•340 [2020] EWHC 3055 (Ch) at [252]–[252]. The HC determined the remedial consequences of enforcement of A's proprietary interest in the properties arising under those resulting trusts in the particular context: see at [255]–[264] and [373]–[378].

341 [1997] 1 W.L.R. 38.

342 [1997] 1 W.L.R. 38 at 45.

343 [1997] 1 W.L.R. 38 at 50. Tucker LJ agreed. cf. *King v Jackson* [1998] 03 E.G. 138.

344 [2000] Ch. 162.

345 [2000] Ch. 162 at 174.

346 [2000] Ch. 162 at 174–175 and cf. the approach of the HL in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 A.C. 541, above, para.7-006 and below, paras 7-047—7-048.

347 Below, paras 7-054—7-060.

348 Law Commission, Working Paper No.92, para.5.8.

349 cf. above, paras 6-093 et seq. especially para.6-106.

350 *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [33].

351 [2015] EWCA Civ 1123 at [33].

352 (1997) 74 P. & C.R. D1. On estoppel by convention generally, see above, paras 6-116—6-125.

353 (1997) 74 P. & C.R. D1, D3. Simon Brown LJ thereby approved the statement found in Halsbury's Laws of England, 4th edn, Vol.16, para.962.

354 In *Yaxley v Gotts* [2000] Ch. 162, 174 Robert Walker LJ agreed that estoppel by convention in the context of s.2 of the 1989 Act was “impossible”; Clarke LJ considered it “likely to fail”: at 182.

- 355 *MP Kemp Ltd v Bullen Developments Ltd* [2014] EWHC 2009 (Ch) at [123] (though not stating that the estoppel in question would be by convention and not deciding whether the effect of the estoppel on the facts was tantamount to a variation), applying the approach of the HL in *Actionstrength Ltd v International Glass Engineering IN.GLEN SpA* [2003] UKHL 17 (decided in relation to the Statute of Frauds s.4), on which see above, paras 7-047—7-048 and Vol.II, para.47-061.
- 356 See above, paras 6-155 et seq.
- 357 Law Com. No.164 (1987), para.5.5.
- 358 *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [15], [29], [72] and see above, paras 6-164 et seq.
- 359 Megarry and Wade, The Law of Real Property, 8th edn (2012) by Harpum, Bridge and Dixon paras 16-007, 16-011. In *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2 [36]–[38] it was emphasised that proprietary estoppel arises from a representation that the claimant would acquire a *certain* interest in land.
- 360 *Davis* (1993) 13 O.J.L.S. 101, 103.
- 361 (1993) 13 O.J.L.S. 101, 104 and see *Godden v Merthyr Tydfil Housing Association* (1997) 74 P. & C.R. D1.
- 362 [2008] UKHL 55, [2008] 1 W.L.R. 1752.
- 363 [2009] UKHL 18, [2009] 1 W.L.R. 776.
- 364 Above, paras 6-163 et seq.
- 365 In *Gordon v Havener* [2021] UKPC 26 at [15] (Lord Burrows JSC), the PC referred to the paragraphs in the previous edition equivalent to paras 7-056—7-059 to support the proposition that proprietary estoppel can sometimes be invoked where a contract is void, but held that the doctrine “cannot ... be invoked by a contract-breaker where the relevant promise is contained in the contract, or is inextricably tied up with the contractual promise, and that contract has been terminated for breach by the innocent party”.
- 366 [1995] 2 F.L.R. 1029.
- 367 cf. *James v Evans* [2001] C.P. Rep. 36 (no defence of proprietary estoppel on the facts).
- 368 [2000] Ch. 162, above, para.7-049.
- 369 [2000] Ch. 162 at 180; *McGuane v Welch* [2008] EWCA Civ 785, [2008] 2 P. & C.R. 24 at [37], per Mummery LJ. cf. Lord Walker’s “lesser enthusiasm” for the complete assimilation of “common intention” constructive trust and proprietary estoppel in *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [37]. See further *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094 at [107]–[111].
- 370 *Lancashire Mortgage Corp Ltd v Scottish and Newcastle Plc* [2007] EWCA Civ 684, [2007] All E.R. (D) 68 (Jul) at [55], per Mummery LJ (emphasis added).
- 371 [2005] EWCA Civ 45, [2005] W.T.L.R. 345.
- 372 [2005] EWCA Civ 45 at [40].
- 373 [2003] UKHL 17, [2003] 2 A.C. 541.
- 374 [2005] EWCA Civ 45 at [29].

- 375 [2008] UKHL 55, [2008] 1 W.L.R. 1752. See also at *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2, [33]–[40].
- 376 See further above, paras 6-162 et seq.
- 377 [2008] UKHL 55 at [29].
- 378 [2008] UKHL 55 at [29] and see *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [33] (doubting the law as expressed in *Yaxley v Goffs* [2000] Ch. 162 noted above, para.7-056) by reference to Lord Scott of Foscote's view). Lord Walker in *Cobbe* considered that it was not “necessary or appropriate to consider the issue of section 2” of the 1989 Act: [2008] UKHL 55 at [93].
- 379 [2009] UKHL 18, [2009] 1 W.L.R. 776. The decision was applied in *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 F.L.R. 875.
- 380 Above, paras 6-164—6-167.
- 381 [2009] UKHL 18 at [99] referring to *Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [129].
- 382 [2010] EWCA Civ 1095, [2010] N.P.C. 100. See also *Kinnear v Whittaker* [2011] EWHC 1479 (QB), [2011] All E.R. (D) 78 (Jun) (allowing the possibility of proprietary estoppel and preferring the approach of the CA in *Yaxley v Goffs* [2000] Ch. 162 (above, para.7-049) to the approach found in Lord Scott's speech in *Cobbe*, quoted above, para.7-057); *Ghazaani v Rowshan* [2015] EWHC 1922 (Ch) at [192] and [197] (allowing the possibility of proprietary estoppel/constructive trust in the “exceptional circumstances” of the case); *Muhammad v ARY Properties Ltd* [2016] EWHC 1698 (Ch) at [32]–[50] and *Pinisetty v Manikonda* [2017] EWHC 838 (QB), [2017] 5 Costs L.O. 565 at [39]–[42] (agreement not sufficiently certain to be enforced); *Farrar v Miller* [2018] EWCA Civ 172, [2018] 2 P. & C.R. DG3 at [50]–[63] (where Kitchin LJ, with whom Floyd and Patten LJ agreed (at [84] and [85]), expressed the view that a claim for proprietary estoppel is not barred by s.2 of the 1989 Act, though he left the determination of the issue to trial); *Raza v Chaudhary* [2019] EWHC 1720 (Ch) at [40] (conditions for proprietary estoppel not established on the facts); *Sahota v Prior* [2019] EWHC 1418 (Ch) at [19]–[35] (proprietary estoppel established in a “domestic case”, although it concerned estoppel relating to a disposition of land rather than a contract for its disposition (at [29])); *Kensington Mortgage v Mallon* [2019] EWHC 2512 (Ch) at [37], [65], [141]–[151]; *Wills v Souvray* [2020] EWHC 939 (Ch) at [251]–[256] (allowing a claim for proprietary estoppel “irrespective of the fact that there is no agreement in writing for the purpose” of s.2 of the 1989 Act (at [256])); *Howe v Gossop* [2021] EWHC 637 (Ch), [2022] 1 P. & C.R. 15 esp. at [53]–[55] and [72]–[73] (oral agreement to transfer for consideration a piece of land adjacent to intended transferees' house for use as a garden; proprietary estoppel accepted as a defence to the intended transferors' claim for possession (which was held unconscionable in the circumstances) and a declaration granted so as to allow the transferees to use the land as a garden during their lives or until they sold the house, since in neither case would these effects enforce the oral agreement; the court denied that proprietary estoppel could arise in the context only in exceptional circumstances); *Kirkbright v Toseva* [2021] EWHC 2320 (TCC) at [26]–[30]; *Smoke Club Ltd v Network Rail Infrastructure Ltd* [2021] UKUT 78 (LC), [2022] L. & T.R. 11 at [64]–[78] (no agreement on the terms necessary for a final, binding agreement and therefore no assurance of a binding commitment given).

- 383 [2010] EWCA Civ 1095 at [56].
- 384 [2010] EWCA Civ 1095 at [57]. See also *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [107] and [133]. According to the CA in *Dowding v Matchmove Ltd* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 at [32], Arden LJ was not intending to describe three different situations in which s.2(5) would not apply, but rather to describe the *Cobbe* case in three different ways, which taken together meant that the party “never expected to acquire an interest in the property otherwise than under a legally enforceable contract” (quoting Lord Scott in *Cobbe* [2008] UKHL 55 at [37]).
- 385 [2010] EWCA Civ 1095 at [58] referring to [2009] UKHL 18 at [93].
- 386 [2010] EWCA Civ 1095 at [71] and [73]) and see similarly Morgan LJ [2010] EWCA Civ 1095 at [91].
- 387 Goff and Jones, The Law of Restitution, 7th edn (2007), p.579–580.
- 388 Megarry and Wade, The Law of Real Property 8th edn (2012) by Harpum, Bridge and Dixon, para.11-032.
- 389 *Representative Body of the Church in Wales v Newton* [2005] EWHC 631 (QB), [2005] All E.R. (D) 163 (Apr) at [62], per Antony Edwards-Stuart QC. For general discussions of the remedial flexibility of proprietary estoppel see *Jennings v Rice* [2002] EWCA Civ 159, [2002] All E.R. (D) 324 (Feb); *Powell v Benny* [2007] EWCA Civ 1283, [2007] All E.R. (D) 71 (Dec); *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P. & C.R. 10 esp. at [39]–[42]; *Gardner* (1999) 115 L.Q.R. 438 and (2006) 122 L.Q.R. 492 and above, paras 6-183—6-188.
- 390 See Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), Ch.12, preferring to describe this law as “restitution on the ground of failure of basis”. See further below, paras 32-063 et seq.
- 391 *Pulbrook v Lawes* (1876) 1 Q.B.D. 284, 289, subject to the discretion of the court under the Law of Property Act 1925 s.49(2).
- 392 cf. Goff and Jones, The Law of Restitution, 7th edn (2007), paras 1-059—1-062. If the acts of part performance were sufficient to satisfy the doctrine of part performance, then the contract might be enforced in equity: *Steadman v Steadman* [1976] A.C. 536.
- 393 *Thomas v Brown* (1875-76) L.R. 1 Q.B.D. 714, 723 subject to the discretion granted to the court under the Law of Property Act 1925 s.49(2).
- 394 [2011] EWCA Civ 1383, [2013] Ch. 23 at [43] per Toulson LJ (with whom Black and Laws LJ agreed) and referring to *Singh v Ali* [1960] A.C. 167.
- 395 [2011] EWCA Civ 1383 at [44].
- 396 [2011] EWCA Civ 1383 at [44] per Toulson LJ.
- 397 [2011] EWCA Civ 1383 at [55].
- 398 Birks, An Introduction to the Law of Restitution (revised edn, 1989), p.223; and see Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), para.12-003, and below, paras 32-063 et seq.
- 399 [2011] EWCA Civ 1383, [2013] Ch. 23 at [24] quoting Birks, cited in previous note. Failure of consideration was “the only suggested ground” of recovery of the deposit: [2011] EWCA Civ 1383 at [55] and cf. below, para.7-065.
- 400 [2016] UKSC 42, [2017] A.C. 467 referring to Burrows, A Restatement of the English Law of Unjust Enrichment (2012), p.86, para.15 (Baroness Hale of Richmond, Lords Kerr of

Tonaghmore, Wilson and Hodge agreed generally with Lord Toulson). On *Patel v Mirza* more generally, see below, paras 18-023 et seq. and 18-241 et seq., which includes discussion of the positions of the minority of the SC. For restitution on failure of basis, see below, para.32-063.

- 401 [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [25]. See also Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 13-25, 13-32 and 14-08.
- 402 [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [9].
- 403 [2011] EWCA Civ 1383 at [55], per Toulson LJ giving judgment of the Court.
- 404 [2011] EWCA Civ 1383 at [26] (the reasons given by the judge below).
- 405 [2011] EWCA Civ 1383 at [8].
- 406 [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [55], per Toulson LJ. *Sharma v Simposh* was applied by the CA in *Marlbray Ltd v Laditi* (on appeal from sub nom. *Rabiu v Marlbray Ltd*) [2016] EWCA Civ 476, [2016] 1 W.L.R. 5147 at [81]–[93], [96], esp. at [92] where it was held that a deposit paid by a joint and several purchaser off-plan of a long lease of a flat in a large block should not be returned on the basis of a failure of consideration, even if the contract was void under s.2 of the 1989 Act (which it was held not to be), as the purchaser had the benefit of the specific unit chosen being taken off the market; the flat had been secured at a specific price; the developer had (apparently) completed the works with the deposit as collateral; and the purchaser had become entitled to 10 free days at a London hotel. For this purpose, it made no difference that the deposit was held by a third-party stakeholder: [2016] EWCA Civ 476 at [99]. cf. however, *Ali v Dinc* [2020] EWHC 3055 (Ch), [2021] 2 P. & C.R. 19 at [283] (affd [2022] EWCA Civ 34) where Sarah Worthington QC (Hon.) sitting as a Deputy High Court Judge stated that where the intended contract is void “[t]here is a total failure of basis, for both parties, since both parties will have performed on the basis of a binding contract when there is not one”.
- 407 [2013] EWHC 956 (Ch) at [33], per HH Judge Purle QC.
- 408 [2013] EWHC 956 (Ch) at [33].
- 409 [2013] EWHC 956 (Ch) at [38]–[41].
- 410 [1998] 2 A.C. 349. See also *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558 and Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 9-101 et seq.
- 411 See further, below, paras 32-053 et seq.
- 412 (1991) 64 P. & C.R. 452, 455. cf. *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 at [42] where Rimer LJ interpreted this passage as saying “no more than that the fact that any agreed land transaction may not be compliant with section 2 does not prevent the parties proceeding to its practical completion (for example, in the most conventional case, by an assurance of the land interest against payment of the price)”; followed by *Ali v Dinc* [2020] EWHC 3055 (Ch) at [216] (affirmed on the basis that the HC’s findings of fact had been open to it on the pleadings: [2022] EWCA Civ 34); *Mars Capital Finance Ltd v Hussain* [2021] EWHC 2416 (Ch) at [108]–[109]. See also *Kuznetsov v Camden LBC* [2019] EWHC 805 (Ch) at [45] (the observation in *Tootal Clothing* applies

only where the contract has been completed and not, therefore, where an alleged party has entered possession under a compulsory purchase order (appeal from striking out)).

413 [1998] 2 A.C. 349, 385–387. Lord Goff thereby rejected an argument to this effect found in *Birks* (1993) 23 U.W.A.L.R. 195, 230.

414 [1998] 2 A.C. 349, 387.

415 [1998] 2 A.C. 349, 415.

416 [1998] 2 A.C. 349, 415–416 and see *Burrows* [1995] R.L.R. 15, 18–19.

417 cf. *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558 where the HL considered whether the statutory tax regime under which the payments in question were paid was incompatible as a matter of policy with restitutive recovery on the ground of mistake of law and found that it was not. See further Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), at para.2-21 where it is observed generally that “[t]he courts may refuse to allow a claim in unjust enrichment where this would lead to the enforcement of a transaction that a statute deems to be unenforceable. To decide whether a claim should be allowed, the courts must identify the policy of the statute and then decide whether this would be stultified if restitution were awarded”.

418 See *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1576, per Peter Gibson LJ, quoted above, para.7-013.

419 (1997) 74 P. & C.R. D1 at D3. cf. *McCausland v Duncan Lawrie Ltd* [1997] 1 W.L.R. 38, 45, 50 and see above, para.7-053.

420 *Pulbrook v Lawes* (1876) L.R. 1 Q.B.D. 284.

421 [1954] 3 D.L.R. 78 and cf. below, paras 32-095—32-096.

422 cf. *Bentley & Coughlan* [1989] 10 L.S. 325.

423 cf. below, paras 32-095—32-096. It may be thought that a more appropriate basis for recovery on facts such as *Deglman* would be proprietary estoppel, on which see above, paras 7-054—7-060.

424 cf. below, para.32-090 referring to *Craven-Ellis v Canons Ltd* [1936] 2 K.B. 403 (void contracts) and 29-086 (unenforceable contracts) referring to *Deglman v Guaranty Trust Co of Canada and Constantineau*.

425 [1954] 1 Q.B. 428, 434, 437, 438.

426 See Law Com. No.164 (1987), para.2.9.

427 Goff and Jones, *The Law of Restitution*, 5th edn (1998), p.581. This passage does not appear in subsequent editions. cf. above, paras 7-063—7-064 regarding *Singh v Sanghera* [2013] EWHC 956 (Ch).

# Chapter 8 - Common Mistake

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

## Chapter 8 - Common Mistake<sup>1</sup>

*Hugh Beale*

**D** Replace footnote 1 with: See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan, Mistakes in Contract Law* (2010).

## Footnotes

- <sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan, Mistakes in Contract Law* (2010).

## Section 1. - Introduction to Mistake

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 1. - Introduction to Mistake

### Types of mistake

- ¶01 As explained in the introduction to Ch.5, the doctrine of mistake in the law of contract deals with two rather different situations. In the first, there is some mistake or misunderstanding in the communications between the parties which prevents there being an effective agreement (for instance, if the parties misunderstand each other) or at least means that there is no agreement on the terms apparently stated (for instance, if one party in an offer states terms which the other party knows the first party does not intend, but nonetheless the other purports to accept). This first category of mistake, which can generally be referred to as “mistake as to the terms or identity”, includes “mutual misunderstanding”, where each is mistaken as to the terms intended by the other,<sup>2</sup> and “unilateral mistake”, where only one of the parties is mistaken over the terms of the contract<sup>3</sup> or the identity of the other party.<sup>4</sup> These issues are dealt with in Ch.5. In the second situation, the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law.<sup>5</sup> Cases in this category are now usually referred to as “common” mistake,<sup>6</sup> for normally the mistake is legally relevant only if both parties have contracted under the same misapprehension. It is this second situation that is dealt with in this chapter.

### Mistakes as to facts and mistakes as to terms

- ¶02 In other words, the distinction between the two situations drawn in the previous paragraph is one between mistakes as to the terms and mistakes as to the facts or law.<sup>7</sup> It is common to categorise

the situations in which the doctrine of mistake affects a contract<sup>8</sup> into cases of “common mistake”, “unilateral mistake” or “mutual misunderstanding”.<sup>9</sup> This is useful, but it highlights only one of the distinctions between the cases. For the purposes of the law, there is a second and vital distinction between common mistake on the one hand and unilateral mistake or mutual misunderstanding on the other. The doctrine of mistake takes account of a mistake as to the factual circumstances in which the contract is made only if the mistake was common, i.e. both parties made substantially the same mistake—for example, when an agreement was made to rent a room overlooking the route of a coronation procession, that both parties believed that the procession was scheduled to take place on the date concerned when in fact it had been cancelled.<sup>10</sup> Common mistake cases are ones in which:

“... both parties make the same mistake of fact or law relating to the subject-matter or the facts surrounding the formation of the contract.”<sup>11</sup>

(As will be seen, the mistake must also be fundamental.<sup>12</sup>) In contrast, where only one of the parties is mistaken as to the facts—a “unilateral” mistake as to the facts—there is no basis for relief under the doctrine of mistake.<sup>13</sup> A unilateral mistake or a mutual misunderstanding will only operate where the mistake or misunderstanding is about the terms of the contract—for example, the price or the contractual description of what is being sold<sup>14</sup>—and in cases of mistaken identity.<sup>15</sup>

## Money paid under mistake of fact

- 103 Mistake may also entitle a party who has paid money under the mistake to recover it back on the basis of restitution (or unjust enrichment).<sup>16</sup> The subject of the recovery of money paid under a mistake is principally dealt with in Ch.32 of this work.

## “Mistake” implies a positive belief

- 104 It seems that relief will only be granted under the doctrine of mistake if one or both parties entered the contract under a positive belief which was incorrect, rather than merely not having thought about a particular issue.

17

**U** Thus in all the cases in which a contract has been held to be void<sup>18</sup> for common mistake, it seems that the parties had a positive belief that X was the case when it was not, rather than merely making no assumptions about whether X was so or not.<sup>19</sup>

## Mistakes that are not legally relevant

**D**<sup>105</sup> Thus there are many situations that may loosely be called cases of “mistake” in which the contract will nonetheless be binding. One example is the case considered earlier, in which one party enters the contract under a mistake as to the facts which the other party does not share.<sup>20</sup> Suppose I buy a ring mistakenly thinking it is a gold ring. Nothing is said by the vendor as to what the ring is made of<sup>21</sup>; but he knows that it is not gold. Even if he knows that I think the ring to be made of gold, I cannot avoid the contract on the ground of mistake, though I would never have entered into it had I known the true position. The mistake does not relate to the terms of the contract, which are simply to sell and buy the specific ring, so neither mutual nor unilateral mistake is relevant. Nor does the doctrine of common mistake apply: though the mistake may be fundamental, it is not shared.<sup>22</sup> A second example of a mistake that is not legally relevant is where the mistake is shared by both parties<sup>23</sup> but it is not sufficiently fundamental to render the contract void.<sup>24</sup>

<sup>24</sup>



## Underlying policy

**D**<sup>106</sup> There are, of course, in modern contract law many circumstances in which liability may be imposed on a party for the consequences of facts that are unknown to one of (or both) the parties. This may be the result of the implication of appropriate terms by statute<sup>25</sup> or at common law, or by the normal process of construction, or as the result of doctrines that have a limited application, such as misrepresentation<sup>26</sup> or the duty of disclosure that applies to some insurance contracts.<sup>27</sup> But subject to this, a mistake about the facts surrounding the contract is relevant only if it is made by both parties and is fundamental. A mistake as to the facts made by party A only is legally irrelevant, even if the other party B knows of it, unless the mistake was caused by a misrepresentation by B.<sup>28</sup> Mere silence as regards a material fact which the one party is not bound to disclose to the other is not a ground of invalidity, for the principle that in relation to sale is referred to as caveat emptor (“let the buyer beware”) is still the starting point of the English law of contract.<sup>29</sup> This

sets English law apart from many of the continental systems, which not only seem to give relief in cases of shared mistake more readily than does English law but which also may allow a party who has made a unilateral mistake about the subject matter to avoid the contract provided the mistake was sufficiently serious.

30

 The restrictive approach to mistake seems to represent a strong policy underlying English contract law. As Lord Atkin said<sup>31</sup>:

“It is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—i.e. agree in the same terms on the same subject-matter—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.”<sup>32</sup>

## Mistake and unconscionability

- 107 A qualification must be made to the general rule that a mistake as to the facts that is not shared, and was not induced by a misrepresentation by the other party, is legally irrelevant. Facts that bring a case within the category covered by the rules on “mistake” may, in an extreme case, give one party the right to avoid the contract on the ground of unconscionability.<sup>33</sup> Broadly speaking, if one party is suffering from what is sometimes termed a “special disability”,<sup>34</sup> such as “poverty, or ignorance, or lack of advice”,<sup>35</sup> and the other party consciously takes advantage of the disability, the first party may be entitled to avoid the contract. In many unconscionability cases the first party was in fact making the contract under a misapprehension as to the facts, typically as to the value of the property he was selling.<sup>36</sup> There is some suggestion that the doctrine may sometimes be used more broadly to prevent one party taking unconscientious advantage of the other’s mistake. In *Bank of Credit and Commerce International SA (In Liquidation) v Ali (No.1)*<sup>37</sup> Lord Nicholls said that where the party to whom a general release was given knew that the other party has or might have a claim and knew that the other party was ignorant of this, to take the release without disclosing the existence of the claim or possible claim could be unacceptable sharp practice. The law would be defective if it did not provide a remedy, and while the case did not raise the issue, he had no doubt that the law would provide a remedy.<sup>38</sup> It is obvious that the unconscionability doctrine has the potential to undermine the principle that a mistake as to the factual circumstances is irrelevant unless it is a common mistake, and the courts will no doubt restrict it to cases of “special disability”.

## Effects of mistake

- 108 The first type of mistake described in para.8-001 (termed above “mistake as to the terms or as to identity”) is sometimes said to operate so as to negative consent, the second (termed above “common mistake”) so as to nullify consent.<sup>39</sup> In other words, in the first case, the parties may not have in fact reached an agreement; in the second, the common mistake renders the agreement ineffective as a contract. In either case, if the mistake is operative the contract is said to be void ab initio. This is correct in cases of common mistake; although there was authority for the proposition that some common mistakes that would not make the contract void would nonetheless give either party the right to avoid it, the Court of Appeal has disapproved this line of cases.<sup>40</sup> The proposition that in cases of unilateral mistake and of mutual misunderstanding the contract is also void ab initio must be treated with more reservation. This was explained in Ch.5.<sup>41</sup>

## Common law and equity

- 109 Until recently it could be argued that what has been said above about the circumstances in which the law takes account of a mistake by both parties to a contract represented the position at common law; and that the rules of equity “cut across this distinction”.<sup>42</sup> This referred to the line of cases to the effect that in some circumstances a common mistake would give either party the right to avoid a contract that was not void for mistake at common law,<sup>43</sup> based on a rule of equity. Now that these cases have been disapproved,<sup>44</sup> and if the interpretation of certain cases of unilateral mistake that was offered in Ch.5<sup>45</sup> is accepted, it seems that there is no inconsistency between common law and equity. Equity will on occasion supplement the remedies available at common law: for example, a mistake may entitle a party to a contract that has been reduced to writing to have the document rectified if it is not expressed in accordance with the parties’ true intentions, or does not reflect the terms that the claimant intended and the other party knew him to intend.<sup>46</sup>
- 110 The only apparent “divergence” between the treatment of mistake cases in common law and in equity is that the hardship that would be caused by granting specific performance of a contract made under either unilateral or common mistake may lead to the court refusing specific performance as a matter of discretion even though the mistake does not render the contract void or have any other effect at common law.<sup>47</sup> As this is merely the denial of a particular remedy, and the contract remains binding in other respects (e.g. the claimant would still be entitled to damages if the contract were not performed<sup>48</sup>) this is not a contradiction of the common law rules.<sup>49</sup> Thus in

cases of contractual mistake, common law and equity are consistent and equity plays only a minor role. Therefore in this edition of this work there is no separate treatment of “Mistake in Equity”.<sup>50</sup>

## Is there a separate doctrine of mistake?

- ¶11 Any “doctrine” of mistake in English contract law seems to have emerged only in the late nineteenth or even the twentieth century,<sup>51</sup> and from time to time commentators have argued that the doctrine is redundant or that the cases are better explained on some other basis.<sup>52</sup> Thus it has been said that cases of common mistake may be explained as resting on the construction of the contract, and in particular on an implied condition precedent<sup>53</sup>; while cases of unilateral and mutual mistake may be no more than an application of the rules of offer and acceptance.<sup>54</sup> From a conceptual point of view there is force in these arguments, and it is certainly hard to discern a single “doctrine” of mistake when the two categories of case described above are subject to quite different rules. However in this work it is assumed that there are distinct rules on mistake dealing with each category, and in particular in the case of the “common” mistakes dealt with in this chapter. This is partly because the courts have recognised distinct rules of common mistake<sup>55</sup> and partly because common mistake is what may be called a “functional category”. In factual terms, a party may claim that both he and the other party made the contract under an unstated misapprehension of some kind as to some fact bearing on the contract.<sup>56</sup> We need to know what self-induced “mistakes” or (to use a word that does not have legal connotations) “misapprehensions” the law will take account of and what the parties’ rights will be. Whether the rules that are applied are simply applications of more general rules, such as the doctrine of implied conditions is from a functional viewpoint irrelevant; they are the rules that govern these types of mistake.

## Mistake and misrepresentation

- ¶12 In earlier paragraphs the factual situation to which the rules on mistake apply was described as one in which one party, or both they and the other party, have entered the contract under a “self-induced” misapprehension. This is to differentiate it from a closely similar situation that the law treats in a different fashion, under the rubric of misrepresentation. If one party has entered the contract relying on a statement made by the other party about some fact that is material to the contract, and the statement was untrue, the first party will normally have a remedy for misrepresentation. At least if they act promptly they will normally be entitled<sup>57</sup> to avoid the contract for misrepresentation, and this is so whether the misrepresentor, when they made the untrue statement, was acting fraudulently, negligently or wholly innocently.<sup>58</sup> In one sense, all cases of misrepresentation are also cases of “misapprehension”, as at least one party, and often both the parties, entered the contract believing the facts to be different to what they were. Because

one party has misled the other, the law gives relief even though the misapprehension is about the facts surrounding the contract<sup>59</sup> and is not of the seriousness that we will see is required for relief to be given on the ground of mistake. However, if the right to rescind has been lost, for example because of the lapse of time,<sup>60</sup> the misrepresentee may have an effective remedy only if they can show that the contract was void for mistake.

## Misrepresentation and common mistake

- 113 Relief may be given on the ground of misrepresentation whether the resulting misapprehension was only on the part of the misrepresentee, as when they are the victim of a fraudulent misrepresentation by the other, or whether both parties were under the same misapprehension, as in cases of “innocent” misrepresentation. The misrepresentation cases are treated differently simply because one party chose to make a statement of fact on which the other party relied when they entered the contract.<sup>61</sup> It probably happens far more frequently that one party states the facts as they believe them, and the other party enters the contract relying to some extent on that statement,<sup>62</sup> than that each enters the contract relying on their own, equally mistaken view of the facts. This goes some way to explain why there are relatively few cases in which a party seeks to escape from a contract on the ground of common mistake: they will often be able to rescind the contract for misrepresentation, while it seems that the other party, the misrepresentor, will be precluded from arguing that the contract is void for common mistake.<sup>63</sup> Nonetheless, shared “self-induced” mistake over the facts does happen, and the rules that apply in this type of case form the subject matter of the present chapter.

## Common mistake and construction of the contract

- 114 The question of the effect of common mistake in the law of contract is basically one of the allocation of risk as to the facts being as assumed.<sup>64</sup> In most situations one or other of the parties will be considered to have assumed the risk of the ordinary uncertainties which exist when an agreement is concluded.<sup>65</sup> Where contracts of sale of goods are concerned, for example, the seller will normally be held to have assumed the risk that the goods do not correspond to their description, or, if the seller sells in the course of a business, that they may be defective, under express or implied terms, except insofar as the usual conditions are validly excluded, or may in the particular circumstances be inapplicable.<sup>66</sup> The risk that for other reasons the goods will be less useful than the parties envisaged will be borne by the buyer. Thus it has been said that one must first determine whether the contract itself, by express or implied condition (promissory or non-promissory) or otherwise, provides who bears the risk of the relevant mistake. Only if the contract is silent on the

point is there scope for invoking the rules or “doctrine” of mistake.<sup>67</sup> It has been pointed out that if the enquiry whether the construction of the contract is only as to:

“... whether either party has given an undertaking as to the matter at issue (i.e. if that is what is meant by a provision as to ‘who bears the risk of the relevant mistake’), and the answer is that neither has ...”

that does not preclude a second enquiry as to the effect of the mistake; but if it includes asking whether, if neither bears the risk, the contract is as a matter of construction subject to an implied condition precedent that the facts assumed existed, there seems to be no scope for asking whether the contract is void for mistake.<sup>68</sup> In other words, if it does include asking whether the contract is subject to such a condition, there is no room for an independent doctrine of common mistake.<sup>69</sup> Although the courts have held that there is a separate doctrine of mistake,<sup>70</sup> this is a formidable argument. It will be submitted that it can really be met only by admitting that, in cases which involve the kind of facts to which the doctrine of common mistake might apply, the process of construction and the application of the rules of mistake are really merely alternative ways of formulating the same thing and reaching the same result.<sup>71</sup> We will see later, however, that sometimes courts have held a contract to be ineffective because as a matter of construction it was subject to an implied condition which has not been fulfilled, in circumstances in which the requirements of common mistake do not seem to have been met.<sup>72</sup>

## Footnotes

<sup>1</sup> See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright*, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan*, *Mistakes in Contract Law* (2010).

<sup>2</sup> See above, para.5-019.

<sup>3</sup> Above, paras 5-002 and 5-022 et seq.

<sup>4</sup> Above, paras 5-036 et seq. The composite phrase “mistake as to terms or identity” is used as the “mistake of identity” cases do not involve a mistake over the terms of the contract; but as was seen, these cases depend on the terms of the offer or acceptance, so they are usefully considered in Ch.5 also. Chapter 5 also deals with non est factum and rectification, including rectification for common mistake, which is based on different principles to the doctrine of common mistake that is discussed in the current chapter.

<sup>5</sup> On mistakes as to the law, see below, para.8-052.

<sup>6</sup> The 29th and earlier editions of this work used the phrase “mutual mistake”, following the terminology used by Lord Atkin in *Bell v Lever Bros* [1932] *A.C.* 161, and until recently

some other works adhered to this usage: e.g. Beatson, Anson's Law of Contract, 28th edn (2002), Ch.8. It is now more common to refer to this type of mistake as "common mistake" (e.g. Beatson, Burrows and Cartwright (eds), Anson's Law of Contract, 31st edn (2020), Ch.8; Cheshire, Fifoot and Furmston, Law of Contract, 17th edn (2017), Ch.8). The courts have also referred to common mistake: e.g. *Great Peace Shipping Ltd v Tsaviris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679. One reason for using the phrase "common mistake" is to reduce the risk of confusion with what is termed here "mutual misunderstanding" (where the parties are at cross-purposes as to the terms of the contract): see above, para.5-019.

7 As to mistake of law, see below, para.8-052.

8 Compare those cases in which the mistake is not legally relevant, below, para.8-005.

9 Above, para.8-001.

10 *Griffith v Brymer* (1903) 19 T.L.R. 434.

11 Beatson, Burrows and Cartwright (eds), Anson's Law of Contract, 31st edn (2020), p.296.

12 Below, para.8-015.

13 *Smith v Hughes* (1871) L.R. 6 Q.B. 597; *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685; *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [280]–[285].

14 See above, para.5-025.

15 See above, paras 5-036 et seq.

16 See below, paras 32-037 et seq.

•17 cf. Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.12-03.

In *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108, a case of a mistake affecting a voluntary settlement, Lord Walker said (at [108]–[109]) that a mistake is different from ignorance, inadvertence and misprediction as to the future. A mistake encompasses two states of mind, namely an incorrect conscious belief or an incorrect tacit assumption as to a present matter of fact or law, but does not encompass mere causative ignorance but for which the claimant would not have acted as he did. See also *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [143(i)], citing this paragraph; and *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* [2018] EWHC 1348 (Comm), [2018] 4 W.L.R. 97 at [87].

18 Or voidable in equity, under a line of cases no longer accepted as good law: see below, para.8-055.

19 As to cases of unilateral mistake as to the terms, see above, para.5-022.

20 See above, para.8-002.

21 Therefore there is no misrepresentation: compare below, para.8-012.

22 Compare Anson's famous "Dresden china" example: Anson's Law of Contract, 28th edn, p.324 (second scenario). The example is omitted from the 31st edition by Beatson, Burrows and Cartwright (eds) (2020) but it is explained that a unilateral mistake of fact or law does not render the contract void or give rise to an equitable jurisdiction to set aside the contract: p.296. *Friedmann* (2003) 119 L.Q.R. 68, 79–81 argues that in such a case relief should be given, by analogy of cases of innocent misrepresentation.

- 23 Again it is assumed that neither party has stated what he believes to be the facts. If he had, the other might have a remedy for misrepresentation. See below, para.[8-012](#).
- 24 See below, para.[8-015](#). Note that the grounds on which a voluntary settlement may be set aside because of a mistake on the part of the settlor are much wider: see *Pitt v Holt [2013] UKSC 26* discussed below, para.[32-058](#). *Kennedy v Kennedy [2014] EWHC 4129 (Ch)* (rescission of self-contained and severable part of settlement); *Co-operative Bank Plc v Hayes Freehold Ltd [2017] EWHC 1820 (Ch)* at [130]–[132]; *Bainbridge v Bainbridge [2016] EWHC 898 (Ch)* at [6] (applying the remedy of rescission, as for misrepresentation, see below, para.[9-135](#)); *JTC Employer Ser Trustees Ltd v Khadem [2021] EWHC 2929 (Ch)*. Whether a transaction is subject to the narrower rules that apply to contracts or the wider grounds that apply to voluntary settlements depends on whether there was consideration for the transfer: *Van der Merwe v Goldman [2016] EWHC 790 (Ch)*, [2016] 4 W.L.R. 71.
- 25 For example, the terms as to fitness for purpose that are implied into a contract for the sale of goods where the goods are sold in the course of a business: see *Sale of Goods Act 1979 s.14*, below, Vol.II, paras [46-094](#)—[46-112](#).
- 26 See below, para.[8-012](#) and generally Ch.9.
- 27 See below, paras [9-169](#) et seq.
- 28 In which case the rules on misrepresentation apply: see below, Ch.9.
- 29 *Bell v Lever Brothers Ltd [1932] A.C. 161, 227*; *Keates v Lord Cadogan (1851) 10 C.B. 591*; *Smith v Hughes (1871) L.R. 6 Q.B. 597, 603*; *Turner v Green [1895] 2 Ch. 203*.
- 30 For French and German Law see Beale, Fauvarque-Cosson, Rutgers, Tallon and Vogenauer (eds), Casebooks on the Common Law of Europe: Contract Law, 3rd edn (2018), Ch.14, section 3; for a broader survey of the European legal systems, Sefton-Green, Mistake, Fraud and Duties to Inform in European Contract Law, 2nd edn (2009) and Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.15-35. See also Friedmann (2003) *119 L.Q.R. 68*, who demonstrates the links between the English doctrine of mistake and the “objective” principle in contract (on which see above, para.[4-003](#)); H. Beale, Mistake and Non-disclosure of Facts: Models for English Contract Law (2012).
- 31 *Bell v Lever Bros Ltd [1932] A.C. 161, 224* (referring to common mistake, but the policy appears to be a general one).
- 32 The reasons for this narrow approach in cases of common mistake are explored in *MacMillan (2003) 119 L.Q.R. 625, 657–658*.
- 33 See below, paras [10-161](#) et seq.
- 34 A phrase used by Deane J in *Commercial Bank of Australia v Amadio (1983) 151 C.L.R. 447, 474*; see below, para.[10-166](#).
- 35 *Alec Lobb Ltd v Total Oil (Great Britain) Ltd [1983] 1 W.L.R. 87, 94–95*, per Peter Millett QC sitting as a Deputy High Court Judge (reversed in part [*1985] 1 W.L.R. 173*); below, para.[10-166](#).
- 36 e.g. *Boustany v Piggott (1995) 69 P. & C.R. 298 (PC)*; below, para.[10-167](#).

- 37 [2001] UKHL 8, [2002] 1 A.C. 251, in which the House of Lords held that a general release was not effective to release a claim for “stigma” damages (see below, para.29-166) that neither party could have known about.
- 38 [2001] UKHL 8 at [32]–[33]. Lord Bingham preferred not to address this question (at [20]), and so it seems did Lord Clyde (at [87]).
- 39 *Bell v Lever Bros Ltd* [1932] A.C. 161, 217.
- 40 See below, paras 8-055 et seq.
- 41 See above, paras 5-029—5-035.
- 42 See the 28th edition of this work, para.5-001.
- 43 Above, para.8-001.
- 44 See below, paras 8-055 et seq.
- 45 Above, paras 5-029—5-035. These paragraphs discuss the relationship between rectification and unilateral mistake as to the terms at common law. There was very little authority to suggest that unilateral mistake as to the facts was a ground for rescission in equity, and what there was has recently been rejected.
- 46 See above, paras 5-057 et seq.
- 47 See below, para.8-061.
- 48 See, e.g. *Wood v Scarth* (1855) 2 K. & J. 33 (equity), (1858) 1 F. & F. 293 (law).
- 49 cf. cases in which specific performance may be refused because of the hardship that would result because of a subsequent change of circumstances: see below, para.8-061 and para.30-049.
- 50 cf. Chitty, 28th edn, paras 5-060 et seq.
- 51 See below, paras 8-017 et seq.
- 52 e.g. *Slade* (1954) 70 L.Q.R. 385.
- 53 *Smith* (1994) 110 L.Q.R. 400. See below, para.8-014.
- 54 e.g. *Slade* (1954) 70 L.Q.R. 385; Atiyah, Essays in Contract (1986), Ch.9.
- 55 e.g. *Bell v Lever Bros* [1932] A.C. 161; *Associated Japanese Bank International Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679.
- 56 Or a “mistake” that resulted from a misrepresentation but the right to rescind for misrepresentation has been lost. See below, para.8-012.
- 57 Subject in some cases to a statutory discretion in the court: see below, paras 9-112 et seq.
- 58 The law on misrepresentation is described in Ch.9.
- 59 One party might also make a misrepresentation as to the terms of the contract, for example as to the contents of a written contract that the other party is being asked to sign. Where the statement is that a particular term is or is not in the document, the result will normally be determined by the rules that determine the content of the contract: see Ch.15 (Express terms), in particular paras 15-023 et seq. (parol evidence rule) and Ch.17 (Exemption clauses). Where the misrepresentation is as to the meaning of a clause in the contract the courts have also fashioned a remedy: below, paras 9-024 and 17-063.
- 60 See below, para.9-145.

- 61 One justification given for granting a remedy even when the misrepresentor was acting wholly innocently is that the statement may put the other party off from making further enquiries that might have revealed the truth: see below, para.9-051.
- 62 See below, para.9-045.
- 63 See below, para.8-040.
- 64 *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 W.L.R. 164; *McTurnan, An Introduction to Common Mistake in English Law* (1963) 41 Can. Bar Rev. 1; Swan, “The Allocation of Risk in the Analysis of Mistake and Frustration” in Reiter and Swan, *Studies in Contract Law* (1980); American Law Institute’s Restatement of Contracts (2d), para.152.
- 65 *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [143(ii)], citing this sentence of the paragraph.
- 66 e.g. *Gloucestershire CC v Richardson* [1969] 1 A.C. 480 (normal implied term did not apply when contractor had no right to object to supplier nominated by employer and supplier would contract only on limited liability terms).
- 67 *Associated Japanese Bank International Ltd v Credit du Nord SA* [1989] 1 W.L.R. 255, 268; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [74]–[75]; *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch) at [68]–[69], referring to this paragraph. See also *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1035; *Grains & Fourriers SA v Huyton* [1997] 1 Lloyd’s Rep. 628. Thus, in *Kalsep Ltd v X-Flow BV, The Times, 3 May 2001* it was held that the risk of the mistake which had been made was allocated to one party by an express clause of the agreement. In *Standard Chartered Bank v Banque Marocaine De Commerce Exterieur* [2006] EWHC 413 (Comm), [2006] All E.R. (D) 213 (Feb) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party. In *Natixis SA v Marex Financial* [2019] EWHC 2549 (Comm), [2019] 2 Lloyd’s Rep. 431 it was held that the sellers were obliged to deliver “objectively genuine” warehouse receipts (at [174]); this precluded an argument that the contract was void for common mistake when it turned out that the receipts were forgeries (at [181]).
- 68 *Smith* (1994) 110 L.Q.R. 400, 407. See also Morgan (2018) 77 C.L.J. 559, discussing recent cases.
- 69 *Smith* (1994) 110 L.Q.R. 400, 419. The court might conclude that the contract has not allocated the risk to either party, but the conditions for common mistake are not fulfilled (e.g. because the mistake is not sufficiently fundamental), so that the loss lies where it falls. But this does not demonstrate that there is a separate doctrine of mistake, as the same might occur on a “construction” approach.
- 70 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [73] and [82], discussed below, para.8-034.
- 71 See below, paras 8-029 and 8-062—8-063.
- 72 See *Graves v Graves* [2007] EWCA Civ 660, [2007] 3 F.C.R. 26, discussed below, para.8-063.

---

End of Document

© 2022 SWEET & MAXWELL

## Section 2. - Introduction to Common Mistake

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 2. - Introduction to Common Mistake<sup>73</sup>

### Common mistake

- ¶15 Where the mistake is common, that is shared by both parties, there is consensus ad idem, but the law may nullify this consent if the parties are mistaken as to some fact or point of law<sup>74</sup> which lies at the basis of the contract. In summary, if: (i) the parties have entered a contract under a shared and self-induced<sup>75</sup> mistake as to the facts or law<sup>76</sup> affecting the contract; (ii) under the express or implied terms of the contract neither party is treated as taking the risk of the situation being as it really is<sup>77</sup>; (iii) neither party was responsible for or should have known of the true state of affairs<sup>78</sup>; and (iv) the mistake is so fundamental that it makes the “contractual adventure” impossible, or makes performance essentially different to what the parties anticipated,<sup>79</sup> the contract will be void.

### Different conceptual bases

- ¶16 While it is clear on the authorities that a doctrine of common mistake exists in English law, the situation is complicated by the fact that there are three possible conceptual routes which have been employed in considering whether a fundamental mistake has the result that a party can in effect escape from the contract and recover any payment made or other benefit transferred: (1) that there has been a total failure of consideration; (2) that the contract is subject to an express or implied condition that the facts were as the parties believed them to be, or (to use a modern formulation derived from the same argument) that it would be invalid if, on the true construction of the contract, the essence of the obligations are impossible to perform; and (3) that there is a separate doctrine of mistake. We will see that these grounds were not always kept distinct and the

leading cases seem to combine the three in a way that makes it hard to state the rules in a simple form. A further issue is whether there is, or was, a separate rule for mistake in equity under which the contract would be treated as voidable rather than void. The Court of Appeal<sup>80</sup> has now made it clear that no such doctrine can have survived the decision of the House of Lords in the leading case of common mistake, *Bell v Lever Bros.*<sup>81</sup>

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan, Mistakes in Contract Law* (2010).
- 73 See *Cheshire* (1944) 60 *L.Q.R.* 175, 177; *Tylor* (1948) 11 *M.L.R.* 257, 262; *Slade* (1954) 70 *L.Q.R.* 385, 396; *Bamford* (1955) 32 *S.A.L.J.* 166; *Atiyah* (1957) 73 *L.Q.R.* 340; *Atiyah and Bennion* (1961) 24 *M.L.R.* 421; *McTurnan* (1963) 41 *Can. Bar Rev.* 1; *Stoljar* (1965) 28 *M.L.R.* 265, 275; *Smith* (1994) 110 *L.Q.R.* 400.
- 74 On mistake of law see below, para.8-052.
- 75 In other words, it is not a case where one party's mistaken belief was induced by a representation by the other party; cf. para.8-013, above. If it was, the first party will normally have a remedy for misrepresentation, see Ch.9, below.
- 76 See below, para.8-052.
- 77 See below, paras 8-037—8-040. In *John Lobb Ltd v John Lobb SAS [2021] EWHC 1226 (Ch)* at [24] it was correctly pointed out that this formulation differs from that of the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace) [2002] EWCA Civ 1407, [2003] Q.B. 679*, quoted in para.8-035 below. The reasons for the difference are explained below, para.8-037.
- 78 In such cases the relevant party will normally be treated as bearing the risk of the mistake: see below, para.8-039.
- 79 Again this formulation differs from that of the Court of Appeal in *The Great Peace*; see further below, paras 8-041—8-051. It is close, if not substantially identical, to the summary of the doctrine given by Peter MacDonald Eggers QC, sitting as a deputy High Court judge, in *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd [2018] EWHC 1348 (Comm), [2018] 4 W.L.R. 97* at [76].
- 80 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace) [2002] EWCA Civ 1407, [2003] Q.B. 679*. See below, para.8-055.
- 81 [1932] A.C. 161.

## Section 3. - Different Approaches Before Bell v Lever Bros

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 3. - Different Approaches Before Bell v Lever Bros

### Total failure of consideration

- <sup>117</sup> There are a number of early cases in which the parties had bought and sold something which, unknown to either of them, was very different to what they thought or even did not exist at all; but the seller tried to claim the price or to retain the price paid. Thus in *Strickland v Turner*<sup>82</sup> the purchaser of an annuity on the life of a man who was, unknown to both parties, already dead, was able to recover the purchase price from the vendor on the basis of total failure of consideration, as the annuity had ceased to exist at the time of the contract for sale. In *Gompertz v Bartlett*<sup>83</sup> an unstamped bill of exchange was sold by the defendant to the plaintiff on a non-recourse basis. The parties believed that it was a foreign bill but it was shown in fact to have been drawn in England and it was therefore unenforceable for want of a stamp. The buyer sued to recover the price paid. The Court of Queen's Bench held that this was not merely a case of the bill being of poor quality, when the seller would have been liable only if he had given an express warranty or had been fraudulent. The bill did not meet the description of "a foreign bill" by which it was sold and the buyer was entitled to recover the price.

### Couturier v Hastie

- <sup>118</sup> In *Couturier v Hastie*<sup>84</sup> there was a sale of a cargo of corn which was believed to be in transit from Salonica to the United Kingdom. Unknown to either party the cargo had deteriorated and had already been sold by the master of the ship. The liability of the purchaser to pay the price depended upon the construction of the contract. If the contract was a contract for the sale of that specific cargo of corn, then the consideration for the contract had totally failed and the seller was not entitled to

the price. If, however, as the seller contended, it was a contract for the sale of the adventure, the seller had performed his side of the contract by offering to deliver the shipping documents and the purchaser was liable to pay the purchase price. The House of Lords, confirming the decision of the Exchequer Chamber that had reversed a contrary decision by the Court of Exchequer, held that the contract was for the sale of a cargo and therefore the purchaser was not bound to pay.

## Seller liable for non-delivery

- 119 Neither *Couturier v Hastie* nor *Gompertz v Bartlett* was decided on the ground of mistake invalidating the contract. In each case there was what would later be termed a total failure of consideration.<sup>85</sup> For the purposes of the decision it did not matter whether the contract was valid or void; the purchaser could not be compelled to pay for what he had never received. It seems more likely that the court thought that the contract was valid and that the seller would have been liable, had he been sued, for damages for failure to deliver the subject matter of the contract. Certainly this seems to have been the view of Parke B. In *Barr v Gibson*<sup>86</sup> the parties had bought and sold a ship that, unknown to either of them, had already become stranded on rocks in the Gulf of St Lawrence. Parke B. said that the sale as a “ship” implied a contract that the subject of the transfer did exist in the character of a ship. In *Couturier v Hastie* in the Court of Exchequer, he said that where there is a sale of a specific chattel, there is an implied undertaking that it exists.<sup>87</sup>

## Kennedy's case

- 120 In *Kennedy v Panama, New Zealand and Australian Royal Mail Co*<sup>88</sup> the prospectus of a company offering shares stated that fresh capital was required in order to fulfil a lucrative mail contract with the Postmaster of New Zealand. The contract proved to be beyond the Postmaster’s authority to make and the plaintiff, who had purchased shares in reliance on the prospectus, claimed to repudiate the transaction on the ground that there had been a total failure of consideration. The Court of Queen’s Bench refused to allow him to do so. In deciding whether or not that had been a total failure of consideration so as to entitle the buyer to get his money back, Blackburn J referred to the Roman law on mistake and its distinction between mistakes as to substance, which in Roman law would invalidate the contract,<sup>89</sup> and mistakes as to quality, which would not; and held that as the misunderstanding about the shares went only to quality, there was no total failure of consideration. It is easy to see how this might be interpreted as saying that a mistake as to substance might make the contract void in English law. It is not clear that this was what was meant<sup>90</sup>; and in any event, the fact that a mistake has led to there being a total failure of consideration cannot lead straight to the conclusion that the contract is void, since it might be that the seller is liable for non-performance. In other words, total failure is not an independent ground on which a contract may be held void: rather, it is a possible basis for an action for the recovery of money when the

contract is void.<sup>91</sup> There will equally be a total failure of consideration when one party has simply failed to perform.<sup>92</sup> Even in cases in which at the time of sale the goods might have been said no longer to exist<sup>93</sup> (when in Roman law there could be no contract for want of an object<sup>94</sup>), in English law there might be an implied promise that the thing existed, so that the seller would be liable for failing to deliver.

## Development of an independent doctrine of common mistake

- 121 The cases of total failure of consideration seem to have played a central role in the development of a doctrine of mistake in English law, but one that involved their being given a rather different interpretation. The great work of Pothier was very influential.<sup>95</sup> His statement, derived from the Roman law, that if there was no object (because, for example, the thing sold had ceased to exist before the contract was made) there could be no contract of sale, was cited by counsel for the seller<sup>96</sup> in *Couturier v Hastie*<sup>97</sup> and may have formed the basis for s.6 of the Sale of Goods Act 1893.<sup>98</sup> This stated:

“Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void.”

The draftsman stated that the rule might be based on mutual mistake or impossibility of performance, and cited *Couturier v Hastie*.<sup>99</sup>

- 122 The notion that a contract might be void for mistake may also have been influenced by the development of the idea that a contract depends upon agreement. It has been said that with the emergence of the theory of *consensus ad idem*, “it became possible to treat misrepresentation, undue influence and mistake as factors vitiating consent”.<sup>100</sup> At any event, in the early years of the last century there were a few cases in which contracts entered on the basis of a common mistake were held to be void.<sup>101</sup>

## Express or implied condition

- 123 Meanwhile situations of “common mistake” were also sometimes approached on the basis of that the contract might be subject to a condition that the facts were as the parties believed them to be, just as “frustration” cases were explained on the basis that there was an implied condition that

the facts would remain as they were. The foundations of the doctrine of frustration were laid in 1863 in the judgment of Blackburn J in *Taylor v Caldwell*.<sup>102</sup> In that case the subject-matter of the contract had been destroyed by fire after the contract had been made and before the date for its performance. The Court of Queen's Bench held that performance of the contract was excused by reason of an implied term:

“... in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.”<sup>103</sup>

The same approach was applied when subsequent events made the contract a completely different venture from that which the parties had contemplated.<sup>104</sup> The courts would later abandon the notion that the doctrine of frustration rests on an implied term.<sup>105</sup> Though in 1916 Earl Loreburn was still basing frustration on an implied condition of the contract,<sup>106</sup> in the “coronation cases” that arose out of the sudden cancellation of the coronation of King Edward VII<sup>107</sup> the question was said to be whether the parties must have contemplated a particular state of affairs as forming the foundation of the contract. If, because of some event for which neither party was responsible, the contract becomes impossible because the state of things assumed by the parties as the foundation of the contract ceases to exist, the contract will be frustrated.<sup>108</sup> In *Griffith v Brymer*<sup>109</sup> Wright J applied the same principle to a case of common mistake, one in which the contract had been made after the announcement of the cancellation of the procession, and held that the agreement was void because it was made on a misapprehension that went to the whole root of the matter. Thus common mistake cases were sometimes dealt with by analogy to frustration, which was derived originally from the notion of an implied condition.

## Cases in equity

- <sup>104</sup> In the eighteenth and nineteenth centuries there were many cases in the courts of equity in which it was held that relief could be given where an agreement had been made under a mistake. It is not easy to discern the basis for relief. Some cases were based on a wide notion of fraud in equity<sup>110</sup> which has probably not survived the decision of the House of Lords in *Derry v Peek*.<sup>111</sup> Others seem to have involved undue influence.<sup>112</sup> Yet others give no real hint of the basis of relief but their facts were similar to those involving total failure of consideration.<sup>113</sup> While some cases suggest that equity might grant rescission on the basis of a common mistake that was not induced by one of the parties, “no coherent equitable doctrine of mistake can be spelt from them”.<sup>114</sup>

It appears that rescission was granted in *Cooper v Phibbs*.<sup>115</sup> A had agreed to take a lease of a fishery in Ireland from B, though contrary to the belief of both parties at the time A was himself tenant in tail of the fishery. The proceedings were brought in equity<sup>116</sup> and the House of Lords ordered that the agreement should be set aside. However the respondents had a lien on the fishery for the money they had spent on its improvement. Lord Westbury said that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as proceeding upon a common mistake.<sup>117</sup>

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan*, Mistakes in Contract Law (2010).
- 82 (1852) 7 *Ex.* 208, 155 *E.R.* 919.
- 83 (1853) 2 *El. & Bl.* 849, 118 *E.R.* 985.
- 84 (1856) 5 *H.L.C.* 673, *HL*; (1853) 9 *Ex.* 102 (*Ex.Ch.*); (1852) 8 *Ex.* 40.
- 85 In *Gompertz v Bartlett* (1853) 2 *El. & Bl.* 849, 854, 118 *E.R.* 985, 987 Lord Campbell CJ said that the money paid for the bill could be recovered as it was paid in mistake of the facts. See Lord Atkin's comment in *Bell v Lever Bros* [1932] *A.C.* 161, 222, on *Gompertz v Bartlett* and *Gurney v Wormesley* (1854) 4 *El. & Bl.* 133: "In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of the consideration".
- 86 (1838) 3 *M. & W.* 390; 150 *E.R.* 1196.
- 87 8 *Ex.* 40, 55; 155 *E.R.* 1250, 1257.
- 88 (1867) *L.R.* 2 *Q.B.* 580.
- 89 *Lawson* (1936) 52 *L.Q.R.* 79 argued that the Roman texts were not wholly clear on the effect of such a mistake. If the thing did not exist at all, there would be no object and therefore no contract; that did not depend on a doctrine of mistake but on the lack of an object.
- 90 In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] *EWCA Civ* 1407, [2003] *Q.B.* 679 at [59] the Court of Appeal agreed with this comment.
- 91 Although when a contract is void for common mistake either party will be able to obtain restitution (see, e.g. *Peel* (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.22-021), there is some uncertainty as to the basis of the restitutive remedy. One possibility is that restitution is permitted simply because the contract is void: *Treitel* at paras 22-022—22-023. When a contract is void for mistake there will usually be a total failure of

consideration, as was held to be the case in *Strickland v Turner* (1852) 7 Ex. 208, but it has been argued that this does not necessarily follow from the fact that the contract is void, as it might nonetheless have been completely executed: Burrows, Law of Restitution, 3rd edn (2011), p.386. But even in such a case it seems that either party would be able to recover on the basis that he had performed under a mistake: see Treitel at para.22-024. Mistake appears to have been the basis of recovery in *Pritchard v Merchant's and Tradesman's Mutual Life Assurance Society* (1858) 3 C.B.(N.S.) 622, 645. See Burrows at pp.387–388.

92 See below, paras 32-063 et seq., which follows modern terminology by referring to “failure of basis” rather than the traditional “failure of consideration”.

93 As in *Barr v Gibson* (1838) 3 M. & W. 390, 150 E.R. 1196.

94 See *Lawson* (1936) 52 L.Q.R. 79, noted above.

95 See *Simpson* (1975) 91 L.Q.R. 247, 266–269.

96 Who argued that this was not a case of a sale of something that had ceased to exist but a sale of an expectation. Counsel for the defendant was not called upon.

97 (1856) 5 H.L.C. 673.

98 See now *Sale of Goods Act 1979* s.6, which is identical.

99 See Chalmers, The Sale of Goods Act 1893 (1894), p.17, cited in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [52].

100 Steyn J in *Associated Japanese Bank International Ltd v Credit du Nord SA* [1989] 1 W.L.R. 255, 264.

101 *Scott v Coulson* [1903] 2 Ch. 249 (contract for sale of life assurance policy when person whose life was assured was already dead. Vaughan Williams LJ at p.252, said the contract was void at law); *Galloway v Galloway* (1914) 30 T.L.R. 531 (separation deed between parties who incorrectly thought they were married held void).

102 (1863) 3 B. & S. 826, 122 E.R. 309.

103 (1863) 3 B. & S. 826, 833–834.

104 *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125.

105 See below, Ch.26.

106 *F.A. Tamplin Steamship Co Ltd v Anglo-Mexican Products Co Ltd* [1916] 2 A.C. 397, 403–404.

107 See below, paras 26-033—26-034.

108 See the judgments of Lord Alverstone CJ in *Hobson v Pattenden & Co* (1903) 19 T.L.R. 186 and *Clark v Lindsay* (1903) 19 T.L.R. 202; and of Vaughan Williams LJ in *Krell v Henry* [1903] 2 K.B. 740, 749.

109 (1903) 19 T.L.R. 434.

110 e.g. *Hitchcock v Giddings* (1817) 4 Price 135, 146 E.R. 418 (fraud in equity for a party to bargain and sell as if he had title to the property when he had none).

111 (1889) 14 App. Cas. 337: below, para.9-056.

112 e.g. *Cocking v Pratt* (1750) 1 Ves. Sen. 400, 27 E.R. 1105. On undue influence, see below, paras 10-072 et seq.

- 113 e.g. *Bingham v Bingham* (1748) 1 Ves. Sen. 126, 27 E.R. 934 (purchaser bought an estate which later was found already to have belonged to him; “a plain mistake such as the court was warranted to give relief against”). In *Cochrane v Willis* (1865) L.R. 1 Ch. 58 an agreement was made on the basis that a tenant for life was alive when in fact he had died. The Court of Appeal held that it would be contrary to all the rules of equity and common law to enforce it or hold a party bound by it.
- 114 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [100], quoting Goff and Jones, Law of Restitution, 5th edn (1998), 288 (see more recently 9th edn (2016), para.40-07). On the “mistake” cases in equity before 1875 see Macmillan, Mistakes in Contract Law (2010), Ch.3.
- 115 (1867) L.R. 2 H.L. 149.
- 116 See *Matthews* (1989) 105 L.Q.R. 599.
- 117 See also *Earl of Beauchamp v Winn* (1873) L.R. 6 H.L. 223, 233. Lord Westbury’s suggestion that the contract is merely “liable to be set aside” has been criticised in the House of Lords: see below, para.8-056.

## (a) - Bell v Lever Bros

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 4. - Mistake at Common Law

(a) - Bell v Lever Bros

### Bell v Lever Bros

- 126 The law on common mistake was extensively reviewed by the House of Lords in *Bell v Lever Brothers Ltd.*<sup>118</sup> There an action was brought by Lever Brothers for the recovery of money paid to the two defendants under the following circumstances. Lever Brothers had large interests in Africa and set up a subsidiary company, called the Niger Company, to control them there. The defendants were members of the board of the Niger Company and received large salaries in respect of their service agreements with Lever Brothers. One of the conditions of their service agreements was that they were not to make any private profit for themselves by doing business on their own account while serving the company. The defendants did in fact make such profits, unknown to Lever Brothers and undisclosed by the defendants. Lever Brothers, having made other arrangements for their interests in Africa, desired to terminate the service agreements with the defendants before their expiry, and accordingly entered into compensation agreements with them whereby the defendants consented to terminate their service agreements in consideration of the payment to them of large sums of money. After the money had been paid, Lever Brothers discovered the breaches of their service agreements committed by the defendants, which would have entitled the company to dismiss them summarily without notice or compensation. They therefore claimed to recover the sums which they had paid on the ground, *inter alia*, that they had entered into the compensation agreements under the mistaken assumption that the service contracts could only have been determined by them with the consent of the defendants.

At the trial of the action, the jury found that there was no evidence of fraud on the part of the defendants, and that when they entered into the compensation agreements they had not directed their minds to their previous breaches of duty. The case was therefore one of common (or as their Lordships described it, mutual)<sup>119</sup> mistake, as both parties had made the same mistaken assumption. Wright J held that this assumption that a state of facts existed which entitled the defendants to compensation was essential to the agreement; consequently there could be no binding contract, and Lever Brothers were therefore entitled to recover the money paid. This decision was unanimously affirmed by the Court of Appeal. Scrutton and Greer LJ both held that if the contract is made on the basis of a state of facts which is fundamental to the contract, and which turns out not to exist, the contract is void. Greer LJ based this on an implied condition,<sup>120</sup> Scrutton LJ on either an implied term or mutual mistake as to the assumed foundation of the contract, which he regarded as “only another way of putting the proposition”.<sup>121</sup> In the House of Lords an appeal by the defendants was allowed by a majority of three to two. Lord Blanesburgh,<sup>122</sup> one of the majority, based his opinion largely on the fact that mutual mistake had not been originally pleaded. The other two majority opinions, those of Lord Atkin<sup>123</sup> and Lord Thankerton,<sup>124</sup> both rested on the ground that the mistake was not sufficiently fundamental to avoid the contract, although they reached this conclusion by somewhat different paths. Lord Warrington of Clyffe (with whom Lord Hailsham agreed) dissented, not on the law but on its application to the facts.<sup>125</sup>

## Lord Atkin's analysis

- 128 In his speech Lord Atkin gave a number of instances in which a common mistake would nullify the parties' consent. He accepted that there is indeed a separate doctrine of mistake that, when the mistake is shared, may “nullify consent”.<sup>126</sup> First, he said that when there is a sale of a thing that has ceased to exist, or that already belongs to the buyer, the contract will be void. Then he stated that:

“... mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.”<sup>127</sup>

Applying this test to the facts of the case, Lord Atkin concluded that the contracts to terminate the defendants' service agreements were not void merely because it turned out that the agreements had already been broken and could have been terminated otherwise.

“The contract released is the identical contract in both cases, and the party paying for the release gets exactly what he bargains for.”<sup>128</sup>

- 129 Lastly, Lord Atkin turned to what he calls “an alternative way of expressing the result of a mutual mistake”. He accepted a proposition formulated by counsel for the respondents:

“Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided; i.e. it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact.”<sup>129</sup>

However, Lord Atkin seemed to think this alternative way of expressing the result of a mutual mistake as one that gives little guidance as to when a condition should be implied that the facts are as the parties believed them to be:

“... [if] the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true. But we have not advanced far on the inquiry whether the contract does contain such a condition ... The implications to be made are to be no more than are ‘necessary’ for giving business efficacy to the transaction; and it appears to me that as to both existing and future facts a condition should not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts [Lord Atkin referred to a number of cases on frustration] ... We therefore get a common standard for mutual mistake and implied conditions, whether as to existing or as to future facts.”<sup>130</sup>

Thus it seems that Lord Atkin viewed saying that the contract was subject to an implied condition precedent and saying that it was void for mutual mistake as different ways of putting the same thing, and that he regarded the latter as having more explanatory power as to when the contract will fail. The last sentence of the passage quoted also suggests that he thought there is a direct parallel between common mistake and frustration. Lord Thankerton, in contrast, rejected the implied term approach: the frustration cases had “no bearing on the question of error or mistake as rendering a contract void owing to failure of consideration”.<sup>131</sup>

## A separate doctrine

- 130

Thus *Bell v Lever Bros* seemed to establish the existence in English law of a doctrine of common mistake which is separate from the effect of an implied condition, though often it will lead to the same results.

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan*, Mistakes in Contract Law (2010).
- 118 [1932] *A.C.* 161. The background to the case and its progress through the courts are explored in *MacMillan* (2003) 119 *L.Q.R.* 625.
- 119 See above, para.8-001.
- 120 [1931] 1 *K.B.* 577, 595.
- 121 [1931] 1 *K.B.* 577, 585.
- 122 [1932] *A.C.* 161, 167. Lord Blanesburgh also held that the payments were irrecoverable as: (i) the defendants' service contracts were made with the Niger Company and not with the plaintiffs; and (ii) the payments were in part voluntary, since they greatly exceeded in value the unexpired portion of the service agreements.
- 123 [1932] *A.C.* 161, 210.
- 124 [1932] *A.C.* 161, 229.
- 125 [1932] *A.C.* 161, 200. On the difference between the majority and minority views see below para.8-027.
- 126 [1932] *A.C.* 161, 217.
- 127 [1932] *A.C.* 161 at 218.
- 128 [1932] *A.C.* 161, 223–224. In contrast, it seems the minority considered the subject-matter to be not just a contract of employment but a binding contract of employment: see [1932] *A.C.* 161 at 208–209.
- 129 [1932] *A.C.* 161, 225.
- 130 [1932] *A.C.* 161, 225–226.
- 131 [1932] *A.C.* 237.

## **(i) - Analysis after Bell v Lever Bros**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 4. - Mistake at Common Law

(b) - The Modern Doctrine

(i) - Analysis after Bell v Lever Bros

McRae's case

- 131 The notion of a doctrine of common mistake was not accepted throughout the common law world. In *McRae v Commonwealth Disposals Commission*<sup>132</sup> the defendants sold to the plaintiffs an oil tanker said to be lying on a certain reef off New Guinea. The plaintiffs thereupon fitted out a salvage expedition, but found that there was no tanker at the place indicated, nor even any such reef. They brought an action against the defendants claiming damages for breach of contract. The High Court of Australia held that the plaintiffs were entitled to succeed. The principal ground was that the Commission had promised that the tanker existed. They should have known that it had never existed, whereas the plaintiffs knew nothing except what the defendants told them. It followed that no condition could be implied into the contract that it was to be void if the tanker was not in existence. Dixon and Fullagar JJ, giving the leading judgment, doubted whether there was a doctrine of common mistake in contract. They thought that in cases such as *Couturier v Hastie*, the fundamental question is:

“What did the promisor really promise? Did he promise to perform his part in all events, or only subject to the mutually contemplated original or continued existence of a particular subject matter? ... the problem is fundamentally one of construction.”<sup>133</sup>

However they said that if there is a doctrine of common mistake, a party cannot rely on a mistake consisting “of a belief which is entertained without any reasonable ground, and ... deliberately induced by him in the mind of the other party”.<sup>134</sup>

## Subsequent cases

- <sup>132</sup> Notwithstanding the views expressed in *McRae's* case, the doctrine was applied by the Privy Council in *Sheikh Bros Ltd v Ochsner*,<sup>135</sup> where the parties' mistake had led them to make a contract that was impossible to perform. The case was decided under the Indian Contract Act 1872 s.20, which enacts that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void, but the English authorities on the law of mistake were expressly cited to the Board. The contract was for the production of a stated amount of sisal on a piece of land and was held to be void when the land turned out to be incapable of producing the quantity contracted for. In *Nicholson and Venn v Smith-Marriott*<sup>136</sup> Hallett J said that the buyers could have treated a contract for the sale of table linen which the parties believed to have been the property of Charles I when it was in fact Georgian as not binding on them.

## The Associated Japanese Bank case

- <sup>133</sup> In *Associated Japanese Bank International Ltd v Crédit du Nord SA*<sup>137</sup> Steyn J gave a detailed account of the doctrine. The plaintiffs had entered a sale and lease-back agreement with B and the defendants had guaranteed the performance of B's obligations under the lease. It was then discovered that the machines purportedly sold and leased back did not exist and the arrangement was a fraud perpetrated by B. Steyn J held that the defendants were not liable on the guarantee, which was expressly or by necessary implication subject to a condition precedent that the leases related to machines that existed.<sup>138</sup> He went on to say that in his view the guarantee was also void for common mistake. Steyn J said that *Bell v Lever Bros* had decided that a mistake might render a contract void provided it rendered the subject-matter essentially different from what the parties believed to exist.<sup>139</sup> The doctrine was subsequently applied in a number of other cases.<sup>140</sup>

## The Great Peace

- <sup>134</sup> In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)*<sup>141</sup> the principal point was the rejection of the equitable doctrine that had been developed by earlier decisions of the same court. However, the judgment contains a valuable discussion of the doctrine

of mistake at common law. The Court of Appeal also were quite clear that there is a separate doctrine of common mistake, which will apply “where that which is expressly defined as the subject matter of a contract does not exist”.<sup>142</sup> But as to mistakes in relation to the quality of the subject matter of the contract, the Court favoured a different approach to Lord Atkin’s. It preferred to approach the question of common mistake as a parallel to the doctrine of frustration. Although originally frustration was based on an implied condition, and that approach was still favoured in some twentieth-century cases,<sup>143</sup> it has since been rejected as unrealistic. The modern approach is to say that frustration takes place whenever a supervening event that occurs without the fault of either party and is not provided for in the contract so changes the nature of the outstanding obligations from what the parties could reasonably have contemplated that it would be unjust to hold them to the literal terms of the contract.<sup>144</sup> Equally the Court of Appeal were quite clear that the doctrine of common mistake is a rule of law, not based on an implied term.<sup>145</sup> However:

“... the implication of a term of the same nature as that which was applied under the doctrine of frustration, as it was then understood ... was a more solid jurisprudential basis for the test of common mistake that Lord Atkin was proposing.”<sup>146</sup>

A mistake, including one as to some quality of the subject-matter, will render a contract void only if the non-existence of the state of affairs assumed by the parties rendered the contract or the contractual adventure impossible.<sup>147</sup>

## Elements of common mistake

135 According to the Court of Appeal:

“... the following elements must be present if common mistake is to avoid a contract:  
(i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render contractual performance impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.”<sup>148</sup>

In what follows we will discuss these elements in more detail, and consider how the doctrine may apply in particular fact situations.

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright, Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan, Mistakes in Contract Law* (2010).
- 132 (1951) 84 *C.L.R.* 377; *Tommey v Finextra* (1962) 106 *S.J.* 1012.
- 133 (1951) 84 *C.L.R.* 377, 407–408.
- 134 (1951) 84 *C.L.R.* 377, 408.
- 135 [1957] *A.C.* 136.
- 136 See (1947) 177 *L.T.* 189, 192. The case was said to have been wrongly decided on this point in *Solle v Butcher* [1950] 1 *K.B.* 671, 692, but that case itself has been disapproved: see below, para.8-058.
- 137 [1989] 1 *W.L.R.* 255.
- 138 [1989] 1 *W.L.R.* 255, 263. On this point see below, para.8-037.
- 139 [1989] 1 *W.L.R.* 255, 266.
- 140 In *Re Cleveland Trust Plc* [1991] *B.C.L.C.* 424 the common law of mistake was applied to a bonus issue of shares which was held to be void when a subsidiary's dividend, which was to pay for the issue, was held to be ultra vires. In *Grains & Fourriers SA v Huyton* [1997] 1 *Lloyd's Rep.* 628 the parties believed the results in two certificates of analysis to have been transposed. An agreement to rectify them was void when it was discovered that there had been no transposition, so the rectification would produce the very result it was supposed to avoid.
- 141 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] *EWCA Civ* 1407, [2003] *Q.B.* 679; K. Low, “Coming to Terms With the Great Peace in Common Mistake”, in J. Neyers, R. Bronaugh and S. Pitel (eds), *Exploring Contract Law* (2009) 319.
- 142 [2002] *EWCA Civ* 1407 at [55].
- 143 See para.26-010, below.
- 144 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] *EWCA Civ* 1407, [2003] *Q.B.* 679 at [70], quoting *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] *A.C.* 675, 700. See further below, para.26-013.
- 145 [2002] *EWCA Civ* 1407 at [73] and [82].
- 146 [2002] *EWCA Civ* 1407 at [61].
- 147 [2002] *EWCA Civ* 1407 at [76]. In *Chancery Client Partners Ltd v MRC 957 Ltd* [2016] *EWHC 2142 (Ch)*, [2016] *Lloyd's Rep. F.C.* 578 it was held that the contract was not void for common mistake because its performance was not impossible (at [37]). See also *National Private Air Transport Co v Kaki* [2017] *EWHC 1496 (Comm)* at [25(iii)].

148 [2002] EWCA Civ 1407 at [76].

---

End of Document

© 2022 SWEET & MAXWELL

## **(ii) - Conditions for Common Mistake to Render Contract Void**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 4. - Mistake at Common Law

(b) - The Modern Doctrine

**(ii) - Conditions for Common Mistake to Render Contract Void**

### **Common assumption as to the existence of a state of affairs**

- 136 We saw earlier that mistake requires that the parties have a positive belief in something which is not in fact true<sup>149</sup>; and that where the mistake is as to the nature of the subject matter or the factual circumstances, relief on the ground of mistake is possible only where the parties made the same mistake.<sup>150</sup> They may not have to believe precisely the same thing but they must make “substantially” the same mistake.<sup>151</sup>

### **Risk not allocated to either party**

- 137 It is evident that in order to decide whether the subject matter has turned out to be essentially different or the contractual adventure has turned out to be impossible, and therefore the contract is void for “mistake”, the court must construe the contract and, in particular, consider the contractual allocation of risk. In *The Great Peace*<sup>152</sup> the Court of Appeal quoted Steyn J’s words in the *Associated Japanese Bank* case:

“Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied

condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake.”<sup>153</sup>

In the summary of the rules of mistake from *The Great Peace* quoted above,<sup>154</sup> the court refers to a warranty by one party or the other that the state of affairs exists. That may be the case either because the law allocates a particular risk to one party (e.g. where the goods do not conform to the contract)<sup>155</sup> or because that is the correct interpretation on the facts.<sup>156</sup> But the Court points out that relief on the ground of mistake may also be precluded because the risk is allocated under the contract in other ways than by a warranty, for example when the correct interpretation is that the buyer takes the risk that the property sold is less valuable than the parties suppose, or that each party takes the risk that the facts will turn out to be less favourable than he hopes.<sup>157</sup> We will see a particular application of an allocation of the risk of this kind when we come to consider compromise agreements which turn out to have been made on a mistaken assumption about the law.<sup>158</sup>

## **Non-existence of the state of affairs must not be attributable to the fault of either party**

<sup>138</sup> The most obvious meaning of this is that the contract will not be void if one party should have known the truth, since they could have prevented the parties from making the mistake they did.<sup>159</sup> The rule that a party who should have known the truth cannot rely on common mistake at common law was first stated by Steyn J in the *Associated Japanese Bank* case<sup>160</sup>: he derived it from *McRae's* case, in which the High Court of Australia had said that a party cannot rely on a mistake consisting:

“... of a belief which is entertained without any reasonable ground, and ... deliberately induced by him in the mind of the other party.”<sup>161</sup>

Steyn J also referred to a similar requirement stated in *Solle v Butcher*,<sup>162</sup> one of the “equitable mistake cases which is no longer treated as good law”.<sup>163</sup> It has been pointed out that Steyn J’s principle goes further than what is stated in *McRae's* case, since the latter refers only to cases in which one party should have known the truth and (by a promise or representation) induced the other party to share the same mistaken belief.

<sup>164</sup>

**U** In those circumstances the party who induced the other's belief will almost invariably have committed at least a negligent misstatement if not (as in *McRae's* case) a breach of warranty, and he should not be permitted to avoid liability by arguing that the resulting contract was void. But it is submitted that relief on the ground of mistake should be denied in at least two further cases.<sup>165</sup>

## One party in better position to discover the truth

139 The first is the situation encompassed by Steyn J's wider principle. If a party entered the contract relying on their own self-induced mistake rather than any misrepresentation by the other, they will only wish to argue that the contract is void for common mistake if otherwise they would bear the risk of the facts being as in truth they are. Thus in *Griffith v Brymer*,<sup>166</sup> had the contract not been void the hirer would have had to pay the agreed fee even though there would be no procession to watch. If he could have discovered the true situation and have prevented either party from being mistaken, it seems appropriate to place the risk on him by preventing him from arguing that the contract was void. The rule will give parties who have reasonable means to discover the truth an incentive to do so. It is submitted that Steyn J's wider principle should be followed.

## Misrepresentor cannot rely on common mistake

140 The second situation is where the party who is claiming that the contract is void induced the other party's mistake, and the other party to enter the contract, by an innocent, non-negligent misrepresentation. Although the issue is unlikely to arise in practice, it is submitted that in principle the misrepresentor should not be able to raise common mistake as a defence to a claim for remedies for misrepresentation—for example, if the other party were to seek an indemnity for costs or liabilities incurred as part of the process of rescission.<sup>167</sup>

## Non-existence of the state of affairs must render contractual performance impossible

141 In *The Great Peace* the Court of Appeal appears to assume that where the subject matter of the contract does not exist, the contract will necessarily be one that cannot be performed.<sup>168</sup> In other cases, even if performance in a literal sense is possible, the mistake may be such that the contractual venture is impossible and the contract will again be void. Each of these propositions needs examination. We will consider first cases in which it turns out that property "sold" no longer exists, or already belongs to the buyer.<sup>169</sup> We will then turn to cases in which the subject matter

differs in quality from what the parties believed and the Court of Appeal's preferred explanation in terms of the impossibility of the contractual venture.<sup>170</sup>

## Sale of thing that has ceased to exist

<sup>142</sup> Lord Atkin said<sup>171</sup>:

"So the agreement of A and B to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact were agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is deemed useless, the consent is nullified. As codified in the [Sale of Goods Act](#) the contract is expressed to be void if the seller was in ignorance of the destruction of the specific chattel. I apprehend that if the seller with knowledge that a chattel was destroyed purported to sell it to a purchaser, the latter might sue for damages for non-delivery though the former could not sue for non-acceptance, though I know of no case where the seller has so committed himself."

Although we have seen that the nineteenth-century cases of sales of a non-existent thing were unclear as to whether the contract was void or merely not enforceable by the seller,<sup>172</sup> there are cases that apply [s.6](#) and hold the contract to be void.<sup>173</sup> There are two questions that remain unclear, however. One is posed by the fact that Lord Atkin's statement and [s.6](#) refer strictly to those cases where the subject matter of the contract has once been in existence, but has subsequently perished before the contract is made. The question is whether the same principles apply where the subject matter of the contract has never been in existence at all. The second is whether the fact that the subject matter of the contract has perished always renders the contract void, particularly if the seller should have known the truth. These questions will be considered in the following paragraphs.

## Sale of goods that have never existed

<sup>143</sup> Although such a case is outside both [s.6 of the Sale of Goods Act 1979](#) and Lord Atkin's dictum, there seems no reason why in an appropriate case the same principle should not apply, with the result that (subject to what is said in the next paragraph) the contract will be void. Such facts did arise in the Australian case of *McRae v Commonwealth Disposals Commission*<sup>174</sup> though, as we have seen, the High Court held that the contract was not void for other reasons.<sup>175</sup>

## Seller responsible if should have known that goods have ceased to exist

- 144 Although Lord Atkin appears to refer to an absolute rule that if the subject matter has ceased to exist, the sale must be void, it is submitted that this is not the case except perhaps in cases to which s.6 of the Sale of Goods Act applies.<sup>176</sup> We have seen that earlier cases sometimes based the doctrine of common mistake on an implied condition, in parallel with the doctrine of frustration. This made it clear that the condition would not occur, and thus the contract would not be void, unless the mistake came about without the fault of either party. In other words, the court may refuse to imply such a condition where it would be inappropriate, and it would normally be inappropriate to do so when one of the parties should have known the true situation and therefore could have prevented the mistake.<sup>177</sup> Lord Atkin's acceptance of the "alternative way of formulating the effect of a mutual mistake" seems to accept that whether the contract will be nullified will depend on its construction. This is reflected also in the summary found in the judgment in *The Great Peace*.<sup>178</sup> If the seller should have known that the goods no longer exist, he will be treated as warranting that the goods do exist and this will exclude the doctrine of common mistake.

## Section 6 cases

- 145 Where, however, the case is one of the sale of goods which have perished before the contract was made, s.6 of the Sale of Goods Act 1979 may preclude such a result, since it provides that the contract will be void.<sup>179</sup> It is possible that the parties are unable to vary this rule by contrary agreement.<sup>180</sup> In the light of *McRae*'s case and the fact that under s.6 a seller who knows that the goods no longer exist may nonetheless commit himself to deliver, it seems unlikely that a modern court would accept that s.6 necessarily has the effect that a seller who ought to have known that the goods no longer exist will escape liability. It is submitted that even though s.6 is not expressly stated to apply only if the parties have not agreed otherwise, it is a statement of the "default position" which will apply unless in the circumstances the contract should be construed otherwise.<sup>181</sup>

## Sale of non-existent goods: a question of construction

- 146 In reliance upon the *McRae* decision, it has been suggested that a contract concerning non-existent subject-matter is always valid and binding unless a condition can be implied to the contrary.<sup>182</sup> It is submitted that the question is really one of the construction of the contract. Normally, the parties will be taken to have contracted on the basis that the subject-matter of their agreement was in existence: the inference is that neither party assumed the risk of such mischance.<sup>183</sup> Prima facie,

therefore, the contract will be void. But if (as was argued in *Couturier v Hastie*<sup>184</sup>) one of the parties contracts to purchase an adventure, he binds himself to pay in any event. Conversely, if the seller either expressly or impliedly assumes responsibility that the subject-matter of the contract is in existence, he will be liable in damages if in fact it is non-existent. As we have seen, a seller will be normally be taken to have assumed responsibility for facts about which he should have known.

## Sale of property already belonging to the buyer

¶47 Lord Atkin said:

“Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intend to effect a transfer of ownership; such a transfer is impossible; the stipulation is naturali ratione inutilis.”<sup>185</sup>

In support, he cited the case of *Cooper v Phibbs*<sup>186</sup> and Lord Westbury’s statement that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as proceeding upon a common mistake. Lord Atkin said that the only criticism that could be made of this statement was that the agreement “would appear to be void rather than voidable”. We will consider the last point below.<sup>187</sup> It is submitted that the position with sales of property that belong to the buyer is directly parallel to that of sales of goods that do not exist. The question is again one of the construction of the contract. Normally the parties will be taken to have contracted on the basis that the subject-matter did not already belong to the buyer. *Prima facie*, therefore, if that turns out to be the case the contract will be void. However, if one party should have known the truth the contract will be binding on him; he will be taken to have assumed responsibility.<sup>188</sup>

## Mistakes as to quality of subject matter

¶48 On mistakes as to the quality of the subject matter, Lord Atkin said:

“... mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.”<sup>189</sup>

Lord Thankerton, though phrasing his view in a negative sense, seems to have agreed with Lord Atkin: he said that a common mistake would not avoid the contract unless it related “to something which both must necessarily have accepted in their minds as an essential and integral part of the subject matter”.<sup>190</sup> Lord Blanesburgh, who would not have allowed the plea of mistake to be put forward at such a late stage, nonetheless said that he was in “entire accord” with what Lord Atkin said.<sup>191</sup>

- 149 In the light of Lord Atkin’s statement it has been suggested that a distinction should be drawn between a mistake as to the substance of the thing contracted for, which will avoid the contract, and mistake as to its qualities, which will be without effect.<sup>192</sup> Moreover, all the examples given by Lord Atkin were aimed at supporting his conclusion that the contracts in question in *Bell v Lever Bros* were not void, and are ones in which he said that the contract would not be void because the mistake did not make the thing essentially different:

“A buys B’s horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty. A agrees to take on lease or to buy from B an unfurnished dwelling-house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy.”<sup>193</sup>

There is thus some doubt whether a common mistake as to the quality of the subject matter will ever render a contract void for mistake.

## Impossibility of the contractual venture

- 150 In *The Great Peace* the Court said that the cases cited by Lord Atkin in support of his statement “form an insubstantial basis for his formulation”.<sup>194</sup> One was *Kennedy v Panama, New Zealand and Australian Royal Mail Co*,<sup>195</sup> in which, as we saw earlier, it is not clear that Blackburn J was intending to say that a mistake as to substance would make a contract void at English law. The other was *Smith v Hughes*,<sup>196</sup> which does not appear to be relevant.<sup>197</sup> However, the Court said that just as a contract may be frustrated if subsequent events make the contractual adventure impossible, so a contract may be void for common mistake if the mistake is as to:

“... the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.”<sup>198</sup>

Where it is possible to perform the letter of the contract but it is alleged that there was a common mistake in relation to a fundamental assumption which renders performance of the essence of the obligation impossible it is a matter of construction to decide whether this is the case.<sup>199</sup>

“... it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances. In some cases it will be possible to identify details of the ‘contractual adventure’ which go beyond the terms that are expressly spelt out, in others it will not.”<sup>200</sup>

## What mistakes may frustrate contractual venture?

- 151 Clearly a contract which turns out to be literally impossible to perform may be void for mistake, provided the other conditions set out above are met. But what other kinds of case may fall within the phrase, “frustration of the contractual venture”—or, for that matter, following Lord Atkin’s formulation, make the subject matter “essentially different from the thing it was believed to be”?<sup>201</sup> The cases give examples: a contract for “a room with a view” when in fact there was no procession to look at<sup>202</sup>; a guarantee of a lease of machines when in fact no machines existed<sup>203</sup>; possibly the sale of a life insurance policy on someone the parties did not know was already dead.<sup>204</sup> Beyond this it is not easy to generalise. However it has been argued that an appropriate test for determining whether a mistake is fundamental is to ask the parties “what are you contracting about”? If they would both identify the subject matter in terms that are correct (e.g. in *Bell v Lever Bros* they would have answered, “[w]e are contracting about a service agreement”) the mistake is not fundamental. If they would identify the subject matter in terms that in fact are not correct, the mistake is fundamental.<sup>205</sup> This argument is attractive but it presupposes that the correct test is one of the identity of the subject matter. That fits Lord Atkin’s analysis<sup>206</sup> but not necessarily that in *The Great Peace*. In *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd*, Peter MacDonald Eggers QC, sitting as a deputy High Court judge, suggested that:

“... the test determining the application of the doctrine of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract, and (b) comparing the disparity between the assumed state of affairs and the actual state

of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical.”<sup>207</sup>

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan*, Mistakes in Contract Law (2010).
- 149 Above, para.8-004.
- 150 Above, para.8-005.
- 151 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 *W.L.R.* 255, 268.
- 152 [2002] *EWCA Civ* 1407, [2003] *Q.B.* 679 at [80].
- 153 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 *W.L.R.* 255, 268.
- 154 See para.8-035.
- 155 See above, para.8-014.
- 156 In *Standard Chartered Bank v Banque Marocaine De Commerce Exterieur* [2006] *EHWC* 413 (*Comm*), [2006] *All E.R. (D)* 213 (*Feb*) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party. See also *Butters v BBC Worldwide Ltd* [2009] *EHWC* 1954 (*Ch*) at [68]–[69]; *Dana Gas PJSC v Dana Gas SUKUK Ltd* [2017] *EHWC* 2928 (*Comm*), [2018] 1 *Lloyd's Rep.* 177 at [66]–[78]; *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* [2018] *EHWC* 1348 (*Comm*), [2018] 4 *W.L.R.* 97 at [73]–[75]. In *Natixis SA v Marex Financial* [2019] *EHWC* 2549 (*Comm*), [2019] 2 *Lloyd's Rep.* 431 it was held that the sellers were obliged to deliver “objectively genuine” warehouse receipts (at [174]); this precluded an argument that the contract was void for common mistake when it turned out that the receipts were forgeries (at [181]).
- 157 See [2002] *EWCA Civ* 1407 at [81], referring to the judgment of Hoffmann LJ in *William Sindall Plc v Cambridgeshire CC* [1994] 1 *W.L.R.* 1016 at 1035, that: “Such allocation of risk can come about by rules of general law applicable to contract, such as ‘caveat emptor’ in the law of sale of goods or the rule that a lessor or vendor of land does not impliedly warrant that the premises are fit for any particular purpose, so that this risk is allocated by the contract to the lessee or purchaser”.
- 158 Below, para.8-053.
- 159 In *Natixis SA v Marex Financial* [2019] *EHWC* 2549 (*Comm*), [2019] 2 *Lloyd's Rep.* 431 at [211] it was said that on this point the boundaries of the doctrine are uncertain. It is possible that there is an exception to the meaning suggested in the text when *s.6 of the Sale of Goods Act 1979* applies, since that section seems at first sight to state an absolute rule that the contract is void: but it will be submitted that this is not the correct interpretation

of the section, which should be interpreted as stating the *prima facie* position. See below, para.8-045. In *National Private Air Transport Co v Kaki [2017] EWHC 1496 (Comm)* the state of affairs was attributable to the claimant's fault because it resulted from the claimant's non-performance of another contract (see at [25(ii)]). However, it has been said that where the mistake means that the contract is legally impossible to perform (not in the sense that it would be illegal but simply that it is not workable), it will be void and there will be a failure of consideration without the need to enquire whether the mistake was more the fault of one party rather than another: *Lehman Brothers International (Europe) (In Administration) v Exotix Partners LLP [2019] EWHC 2380 (Ch), [2020] Bus. L.R. 67* at [202]–[203]. But in this case the mistake was over the terms of the agreement and it seems more appropriate to analyse the case as one in which the parties never reached an effective agreement: see above, para.5-014.

- 160 *Associated Japanese Bank (International) Ltd v Crédit du Nord [1989] 1 W.L.R. 255, 268.* Steyn LJ's dictum was applied in *National Private Air Transport Co v Kaki [2017] EWHC 1496 (Comm)* at [25(i)].
- 161 *(1951) 84 C.L.R. 377, 408.*
- 162 *[1950] 1 K.B. 671, 693.* Steyn J also noted that the civilian doctrine of error in *substantia* is qualified by the principles governing culpa in contrahendo: *[1989] 1 W.L.R 255, 269.*
- 163 See below, para.8-058.
- 164 Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.15-22; Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.8-005.
- 165 The second is considered in para.8-040.
- 166 *(1903) 19 T.L.R. 434.* See above, para.8-023.
- 167 See below, para.9-138.
- 168 *[2002] EWCA Civ 1407* at [55].
- 169 Below, paras 8-042—8-047.
- 170 Below, paras 8-048—8-051.
- 171 *Bell v Lever Bros Ltd [1932] A.C. 161, 217.*
- 172 Above, paras 8-017—8-019.
- 173 e.g. *Turnbull v Rendell (1908) 27 N.Z.L.R 1067; Barrow, Lane & Ballard Ltd v Phillip Phillips & Co [1929] 1 K.B. 574*, in which A agreed to buy and B to sell 700 specific bags of nuts lying in a particular warehouse. Unknown to both parties, 109 bags had been stolen prior to the sale. The contract was held void. However, it should be noted that the surviving bags were delivered and paid for; the action was brought by the sellers for the price of the missing bags.
- 174 *(1950) 84 C.L.R. 377.*
- 175 Above, para.8-031.
- 176 On this point see below, para.8-045.
- 177 cf. *The Great Peace [2002] EWCA Civ 1407, [2003] Q.B. 679* at [84] (“... whether ... one or other party has taken responsibility ... is another way of asking whether one or other party has taken the risk ... and the answer to this question may well be the same as the answer to

the question of whether the impossibility of performance is attributable to the fault of one party or the other”).

- 178 See above, para.8-035.
- 179 cf. *Atiyah* (1957) 83 *L.Q.R.* 340, 348; **Sale of Goods Act 1979 s.55**. An extensive discussion of the meaning of “perish”, in the context of the New Zealand equivalent of s.7, can be found in *Oldfields Asphalts v Govedale Coolstores* (1994) Ltd [1998] 3 *N.Z.L.R.* 479.
- 180 See Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.8-010.
- 181 cf. Twigg-Flessner and Canavan (eds), *Atiyah and Adams’ Sale of Goods*, 14th edn (2021), pp.75–77; Benjamin’s *Sale of Goods*, 11th edn (2020), para.1-132. Alternatively, it might be held that the seller was liable for breach of a collateral warranty (see below, para.15-018, though there might be problems over consideration, see Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.8-010) or in tort for damages for negligent misstatement, if such should exist, under the principle stated in *Hedley Byrne & Co v Heller & Partners* [1964] A.C. 465. It is doubtful whether he could be liable under **Misrepresentation Act 1967 s.2(1)**, as that subsection applies “where a person has entered a contract” and thus may not apply when the contract is void for mistake.
- 182 *Svanosio v McNamara* (1956) 96 *C.L.R.* 186; *Slade* (1954) 70 *L.Q.R.* 385; *Shatwell* (1955) 33 *Can. Bar Rev.* 164; *Atiyah* (1957) 73 *L.Q.R.* 340.
- 183 *Couturier v Hastie* (1856) 5 *H.L.C.* 673, 681; *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co* [1929] 1 *K.B.* 574, 582; Corbin, *Contracts* (1960) Vol.3, para.600; American Law Institute’s *Restatement of Contracts* (1932), paras 456, 460 and *Restatement of Contracts* (2d), para.263; Uniform Commercial Code s.2-613.
- 184 (1856) 5 *H.L.C.* 673; see above, para.8-018.
- 185 *Bell v Lever Bros* [1932] A.C. 161, 218. In *Lictor Anstalt v MIR Steel UK Ltd* [2014] EWHC 3316 (Ch) the parties thought that a piece of plant was a chattel belonging to one of them when in fact it was annexed to land belonging to the other. It was argued that a contract to rent the plant to the second party was void for common mistake, but it was held that the agreement was not void, as aspects of the agreement were still capable of performance (at [210]–[216]).
- 186 (1867) L.R. 2 H.L. 149. See above, para.8-025.
- 187 Below, para.8-056.
- 188 If the seller should have known, the practical difference will be slight or nil, as the buyer will recover the money they have paid on either supposition; and by definition they have the property. It is conceivable that the buyer might be held to have agreed to pay in any event (compare the argument in *Couturier v Hastie* (1856) 5 *H.L.C.* 673, above, para.8-018) but this seems very unlikely. The buyer might have to pay anyway if they and not the seller should have known.
- 189 [1932] A.C. 161, 218.
- 190 *Bell v Lever Bros* [1932] A.C. 161, 236.
- 191 [1932] A.C. 161, 198–199. In *Dana Gas PJSC v Dana Gas SUKUK Ltd* [2017] EWHC 2928 (Comm), [2018] 1 *Lloyd’s Rep.* 177 Leggatt J said that Lord Thankerton’s and Lord Atkin’s suggestions that “the existence of contractual rights and obligations depends on the parties’ subjective states of mind is not consistent with the objective approach which is fundamental

to the modern English law of contract” (at [60]; and see also at [61]). Such an approach would rule out any doctrine of mistake beyond cases of impossibility, as the very idea of mistake presupposes a belief that is different to the objectively ascertainable facts.

192 *Tylor* (1948) 11 M.L.R. 257.

193 [1932] A.C. 161, 224.

194 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [61].

195 (1867) L.R. 2 Q.B. 580.

196 (1871) L.R. 6 Q.B. 597. See above, para.5-025.

197 See *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [59]–[60].

198 [2002] EWCA Civ 1407 at [76].

199 [2002] EWCA Civ 1407 at [82].

200 [2002] EWCA Civ 1407 at [74]. Thus the test now seems to be whether performance of the contract or the contractual venture has turned out to be impossible. See also *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [143(iii)]. In *Dana Gas PJSC v Dan Gas Sukuk Ltd* [2017] EWHC 1896 (Comm) HHJ Waksman QC said (at [65]) that common mistake is not confined to cases where the contract is impossible to perform, but he cited the headnote to *The Great Peace* [2003] Q.B. 679 (which speaks of the contract performance being essentially different from the performance the parties had contemplated) rather than what was said by the Court of Appeal itself (at [76], quoted in para.8-035); and in any event it seems to have been arguable in the *Dana Gas* case that the contractual venture was impossible, see at [68]. In *Dana Gas PJSC v Dana Gas SUKUK Ltd* [2017] EWHC 2928 (Comm), [2018] 1 Lloyd’s Rep. 177 at [65] Leggatt J said that the two approaches may essentially amount to the same thing, citing dicta in *Kyle Bay Ltd (t/a Astons Nightclub) v Underwriters Subscribing under Policy No.019057/08/01* [2007] EWCA Civ 57, [2007] 1 C.L.C. 164 at [24]–[25] (on which see below, para.8-053); and see also *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* [2018] EWHC 1348 (Comm), [2018] 4 W.L.R. 97, at [65]. Earlier in his judgment in the *Dana Gas* case, Leggatt J had appeared to rule out any doctrine based on the parties’ subjective beliefs: see above, para.8-048.

201 See above, para.8-048.

202 *Griffith v Brymer* (1903) 19 T.L.R. 434, above, para.8-023.

203 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, cited with apparent approval in *The Great Peace* [2002] EWCA Civ 1407 at [93].

204 *Scott v Coulson* [1903] 2 Ch. 249. In *The Great Peace* [2002] EWCA Civ 1407 the Court seems to have had some difficulty in explaining this decision but did not say it was wrong (at [87]–[88]).

205 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.8-020.

206 But not his example of the picture thought to be an Old Master, where the parties would presumably have said they were buying and selling “a Rembrandt” rather than just “a picture”: see Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.8-021.

207 [2018] EWHC 1348 (Comm), [2018] 4 W.L.R. 97 at [66]. The judge added that there is no precise test to measure what constitutes a fundamental assumption, or a fundamental or radical difference between the assumed and actual state of affairs, but it is not sufficient

if both parties would not have entered into the contract had they known of the true state of affairs; it is necessary that the mistaken assumption induced the contract, but that is not sufficient (at [69]–[72]). On the facts the mistake was not sufficiently fundamental to render the agreements void, see at [87].

## Section 5. - Mistakes of Law

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 5. - Mistakes of Law

### Mistakes as to law

- <sup>152</sup> Until recently, it was established that, for a common mistake to be operative at common law,<sup>208</sup> and (when it was thought that there might be a separate equitable right to rescind)<sup>209</sup> in equity,<sup>210</sup> it must be a mistake as to fact and not one as to law. This did not apply when an error as to the meaning of a document resulted in a mistake as to private rights which led to a party attempting to buy his own property.<sup>211</sup> Moreover, a question of foreign law is a question of fact.<sup>212</sup> The rule that a mistake of pure law could not invalidate a contract seems to have been based on the rule that only a mistake of fact would entitle a party to claim restitution on the grounds of mistake.<sup>213</sup> In *Kleinwort Benson Ltd v Lincoln City Council* the House of Lords held that the latter rule is not part of English law.<sup>214</sup> It was not immediately clear whether this would affect the law of common mistake. The grounds on which a payment made by mistake may be recovered are wider than those on which a contract may be void for common mistake.<sup>215</sup> This is said to be because of the policy favouring finality of contracts.<sup>216</sup> Thus a mistaken payment may be recovered without showing that the mistake was fundamental or that the recipient shared the payer's mistake.<sup>217</sup> However, it has been accepted by the Court of Appeal that in principle a fundamental common mistake as to law may render a contract void; the principle underlying the decision in the *Kleinwort Benson* case<sup>218</sup> is not confined to restitution. However, on the facts (which involved a compromise agreement) the agreement was not void for common mistake.<sup>219</sup>

## Mistake of law and compromise agreements

- 153 In *Brennan v Bolt Burdon*<sup>220</sup> the Court of Appeal accepted that a mistake of law may render a contract void. However, there is not a mistake of law if the relevant law was merely in doubt, as the majority held it was in this case; the parties could have discovered that the relevant decision was under appeal. In addition, when combined with the “declaratory theory of law” espoused in the *Kleinwort Benson* case, that when a decision is overturned the previous view of the law was mistaken,<sup>221</sup> the mistake of law rule would threaten the finality of compromise agreements. In the view of Maurice Kay LJ and Bodey J, a compromise agreement is one under which each party should be treated as accepting the risk that their view of the law might subsequently turn out to be mistaken.<sup>222</sup> The court left open the question whether a mistake of law could ever invalidate a compromise agreement if, as a matter of construction, the compromise applies.<sup>223</sup> To exempt compromises altogether from the mistake of law rule might not be inconsistent with the *Kleinwort* case, as Lord Goff<sup>224</sup> and Lord Hope<sup>225</sup> had suggested that in a restitution case there might be a defence of “settlement of an honest claim”. Maurice Kay LJ doubted if a mistake of law would ever render performance impossible.<sup>226</sup> Sedley LJ considered that in mistake of law cases the test of impossibility was too narrow; he would apply a test of whether the mistake destroyed the subject matter.<sup>227</sup> Subsequently the Court of Appeal<sup>228</sup> has said that in practice it makes little difference which approach is followed: on Sedley LJ’s approach the contract would be void only if the mistake renders “the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist”.<sup>229</sup> On the facts before the court, this test was not satisfied. However, Lord Hoffmann has suggested that a party who pays a sum demanded when he is doubtful whether or not he is liable should not always be treated as taking the risk.<sup>230</sup>
- In *Elston v King*<sup>231</sup> Marcus Smith J accepted that a mistake of law might sometimes render a contract void<sup>232</sup> but held that it is important to distinguish a mistake from a misprediction of what a court will decide on a point of law that is known to be doubtful.<sup>233</sup> The judge said that it is not quite clear how the requirement of impossibility applies in compromise cases but accepted that the mistake must at least render the subject matter of the contract radically different from what the parties agreed.<sup>234</sup>

## Mistake of law and consent orders

- 154 In *S v S*<sup>235</sup> it was held that a mistake of law was not a sufficient ground to set aside a consent order<sup>236</sup> made in ancillary relief proceedings, though there was no such mistake on the facts. One ground for the decision, that the *Kleinwort* principle was confined to restitution cases, was later

rejected in *Brennan v Bolt Burdon*<sup>237</sup> but Maurice Kay LJ expressed sympathy with the other ground, that public policy favouring an end to litigation must prevail.<sup>238</sup>

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; *Macmillan*, Mistakes in Contract Law (2010).
- 208 *Beesley v Hallwood Estates Ltd* [1960] 1 *W.L.R.* 549, 563, affirmed [1961] *Ch. 105*.
- 209 See above, para.8-009.
- 210 *Stone v Godfrey* (1854) 5 *De G.M. & G.* 76, 90; *Rogers v Ingham* (1876) 3 *Ch. D.* 351, 357; *Alcard v Walker* [1896] 2 *Ch.* 369, 375; *Re Diplock* [1948] *Ch.* 465 (affirmed sub nom. *Ministry of Health v Simpson* [1951] *A.C.* 251); *Whiteside v Whiteside* [1950] *Ch.* 65, 74; see below, paras 32-049—32-050. However in *Solle v Butcher* [1950] 1 *K.B.* 671 the Court of Appeal assumed that no relief could be given where the mistake was purely one of law.
- 211 *Cooper v Phibbs* (1867) *L.R.* 2 *H.L.* 149. As we have seen, on the facts of this case the contract would now to be regarded as void: above, para.8-047.
- 212 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 *Lloyd's Rep.* 236.
- 213 *Bilbie v Lumley* (1802) 2 *East 469*: see below, paras 32-049 et seq.
- 214 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 *A.C.* 349; below, para.32-052.
- 215 Below, paras 32-039—32-040.
- 216 See the authors cited in paras 32-039—32-040.
- 217 See below, paras 32-039—32-040.
- 218 [1999] 2 *A.C.* 349.
- 219 *Brennan v Bolt Burdon* [2004] *EWCA Civ* 1017, [2005] *Q.B.* 303.
- 220 [2004] *EWCA Civ* 1017, [2005] *Q.B.* 303.
- 221 [1999] 2 *A.C.* 349, e.g. 378–379 (Lord Goff), 399 (Lord Hoffmann), cf. 410 (Lord Hope).
- 222 [2004] *EWCA Civ* 1017 at [31] and [39]; cf. above, para.8-037. Bodey J would imply a term to that effect (at [42]). Sedley LJ reached the same result by considering the agreement in its factual matrix (at [64]).
- 223 cf. *Bank of Credit and Commerce International SA (In Liquidation) v Ali (No.1)* [2001] *UKHL* 8, [2002] 1 *A.C.* 251, in which the House of Lords held that a general release was not effective to release a claim for “stigma” damages that neither party could have known about.
- 224 [1999] 2 *A.C.* 349, 382G.
- 225 [1999] 2 *A.C.* 349, 412F–G.
- 226 [2004] *EWCA Civ* 1017 at [22].
- 227 [2004] *EWCA Civ* 1017 at [60].

- 228 *Kyle Bay Ltd (t/a Astons Nightclub) v Underwriters Subscribing under Policy No.019057/08/01 [2007] EWCA Civ 57, [2007] 1 C.L.C. 164* at [24]–[26].
- 229 Steyn J in *Associated Japanese Bank (International) Ltd v Crédit du Nord SA [1989] 1 W.L.R. 255, 268.*
- 230 *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners [2006] UKHL 49, [2007] 1 A.C. 558* at [27]; see below, para.32-043.
- 231 *[2020] EWHC 55 (Ch), [2020] Pens. L.R. 16, noted by Trotter (2021) 137 L.Q.R. 212.*
- 232 The judge was not asked to consider whether compromises are exempt from the rules on common mistake as a matter of public policy: see at [23]–[25].
- 233 *[2020] EWHC 55 (Ch)* at [27]–[30].
- 234 *[2020] EWHC 55 (Ch)* at [38], accepting the formulation of George HHJ at first instance.
- 235 *[2003] Fam. 1.*
- 236 On consent orders see below, para.8-060.
- 237 *[2004] EWCA Civ 1017, [2005] Q.B. 303.*
- 238 *[2004] EWCA Civ 1017* at [12].

## Section 6. - No Separate Rule in Equity

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 6. - No Separate Rule in Equity

### No separate doctrine of common mistake in equity

- <sup>155</sup> In *The Great Peace*<sup>239</sup> the Court of Appeal held that there is no separate jurisdiction in equity to set aside a contract on the ground of common mistake if the contract is not void at common law. This decision, it is to be hoped, ends years of uncertainty following the earlier decision of the Court of Appeal in *Solle v Butcher*.<sup>240</sup> The Supreme Court has accepted, obiter, that *Solle v Butcher* has been effectively overruled by *The Great Peace*.<sup>241</sup>

### Previous authority on common mistake in equity<sup>242</sup>

- <sup>156</sup> We saw earlier that before *Bell v Lever Bros Ltd*<sup>243</sup> no coherent equitable doctrine of mistake had developed.<sup>244</sup> In that case Lord Atkin did not advert to a separate equitable doctrine; he approved Lord Westbury's words in *Cooper v Phibbs*<sup>245</sup> subject to the remark that "the agreement would appear to be void rather than voidable".<sup>246</sup> At least so far as common mistake is concerned, the modern equitable principle of rescission was developed by the Court of Appeal in the case of *Solle v Butcher*.<sup>247</sup> Drawing upon the various cases in which contracts have been set aside on the ground of mistake, together with those in which the defendant has been given the option to rescind or accept rectification,<sup>248</sup> the Court of Appeal enunciated a new doctrine of mistake in equity: that the courts have a discretionary jurisdiction to grant such relief as in the circumstances seems just, including setting aside the contract on terms. In that case, the defendant leased to the plaintiff a dwelling-house which both parties erroneously believed to have been so altered in structure that

it had become a “new” dwelling-house and fell outside the restrictions imposed by the Rent Acts. The controlled rent of the house was £140 per annum, but the rent inserted in the lease was £250 per annum. The plaintiff claimed to recover the money overpaid, and, in his defence, the defendant counter-claimed for rescission of the lease on the ground of mutual mistake. The majority of the Court of Appeal<sup>249</sup> considered that there had been a mutual mistake of fact. They ordered that the lease should be rescinded, but on the terms that the plaintiff should choose whether to accept the rescission or claim a new lease at the full rent of £250 per annum. In his judgment Denning LJ said<sup>250</sup>:

“It is now clear that a contract will be set aside if the mistake of one party has been induced by the material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake ... A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative or respective rights, provided that the misapprehension was fundamental, and that the party seeking to set it aside was not himself at fault.”

Denning L.J said that the correct interpretation of *Bell v Lever Bros* was that:

“... if the parties have agreed in the same terms on the same subject matter, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground.”<sup>251</sup>

Lord Denning MR (as he by then was) applied this doctrine again in the Court of Appeal case of *Magee v Pennine Insurance*.<sup>252</sup> In this case the court held by a majority<sup>253</sup> that an agreement by an insurance company to pay £385 on the occurrence of the risk insured against was invalidated because the policy was voidable, though this was only discovered later, but the second member of the majority, Fenton Atkinson LJ, did not make it clear whether he regarded the contract as void or voidable.<sup>254</sup> The supposed equitable rule was applied in a number of cases at first instance.<sup>255</sup> In *Associated Japanese Bank International Ltd v Crédit du Nord SA* Steyn J said that he would have been prepared to set the contract aside even if he had not found it to be void at common law.<sup>256</sup> And in *West Sussex Properties Ltd v Chichester DC*<sup>257</sup> the Court of Appeal had considered itself bound by the decision, but apparently without argument because counsel had accepted that it was good law unless and until overturned by the House of Lords.<sup>258</sup>

## Scope of supposed equitable jurisdiction

- 157 Even if it was accepted that there was an equitable jurisdiction to set aside a contract on terms on the ground of a mutual mistake, there remained doubt about how the jurisdiction was to be exercised. First, it was suggested above that the common law doctrine will not apply if the risk is one which the contract expressly or by implication puts on one of the parties.<sup>259</sup> Given the general importance of upholding agreements and the agreed allocation of risk,<sup>260</sup> it would have been surprising if relief were given in equity in these circumstances. However, the only explicit limitation upon the equitable doctrine was that the party seeking relief should not be at fault, and it has to be said that relief was sometimes given when the normal allocation of risk would suggest that it should be denied. In *Grist v Bailey*<sup>261</sup> a vendor sold property subject to an existing tenancy which both parties thought was protected, when in fact both the protected tenant and her husband were dead. Although neither the vendor nor her solicitor were personally at fault, it seems more natural to put the risk of this kind of mistake occurring on the vendor; yet the contract was set aside.<sup>262</sup> Perhaps it was relevant that if it had been upheld the purchaser would have received a considerable windfall at the vendor's expense. Secondly, it seemed that there must be some difference between common law and equity in the seriousness of the mistake which was necessary for the doctrine to operate, or it would be hard to see why the contract in *Solle v Butcher* was not void at common law. However, it is not easy to see the difference between a mistake rendering the thing contracted for essentially different from what it was believed to be (or rendering the contractual adventure impossible) and a fundamental mistake (the supposed test in equity).<sup>263</sup> In the *Associated Japanese Bank case*<sup>264</sup> Steyn J merely remarked that the equitable doctrine "will give relief against mistake in cases where the common law will not". In *William Sindall Plc v Cambridgeshire CC*<sup>265</sup> Evans LJ said:

"... the difference may be that the common law rule is limited to mistakes with regard to the subject matter, whilst equity can have regard to a wider and perhaps unlimited category of 'fundamental' mistake."

## Rejection of the equitable doctrine

- 158 In *The Great Peace* case, the contract for salvage services to be provided by *The Great Peace* to *The Cape Providence* was made on a shared assumption that *The Great Peace* was the nearest available ship to *The Cape Providence*, being some 35 miles away. It was then discovered that in fact she was 410 miles away and the defendants, after finding a nearer vessel that could render assistance,

purported to cancel the contract. At first instance,<sup>266</sup> Toulson J rejected the argument that the contract was void for mistake at common law. The contract did involve the necessary implication that *The Great Peace* was capable of providing the services contracted for. Had she been far away from *The Cape Providence*, there would have been a failure of an implied condition precedent. As *The Great Peace*, though not as the parties thought the nearest vessel, could have reached *The Cape Providence* within 22 hours, the mistake did not turn the contract into something essentially different from that for which the parties bargained.<sup>267</sup> The contract was therefore not void at law.<sup>268</sup> He then turned to the supposed equitable doctrine, noting the unanswered problems, the small number of decided cases and the unsatisfactory nature of them. He held, first, that there is no right to rescind in equity on grounds of common mistake a contract which is valid and enforceable at common law.<sup>269</sup> Secondly, to hold that the court has a discretion to set aside a contract entered into under a fundamental mistake if the court considers that the general justice of the case merits it “puts palm tree justice in place of party autonomy”.<sup>270</sup> He appeared to favour a third view, that Lord Denning’s statement in *Solle v Butcher* that the court has jurisdiction to set aside a contract on grounds of mutual mistake was “over broad”.<sup>271</sup>

- 159 In the Court of Appeal, both the judge’s decision on the facts and his view that there is no separate equitable jurisdiction were upheld. Delivering the judgment of the court, Lord Phillips MR examined at length the decision in *Cooper v Phibbs*,<sup>272</sup> and concluded that though “the House of Lords … approached the case on the basis that in equity alone did the agreement fail”, and the speeches did not define the nature of the mistake that would justify the intervention of equity, there was nothing to indicate that the House intended to go beyond those cases in which a party agrees to purchase a title he already owns.<sup>273</sup> He then turned to *Bell v Lever Bros* and pointed out that counsel for the appellants had cited *Cooper v Phibbs*, but in support of the submission, not that equity might provide relief where the common law would not, but that a common mistake had to be as to the subject matter of the contract if it was to render the contract void.<sup>274</sup> He concluded that the House did not overlook a separate right to rescind; they considered that the intervention of equity “took place in circumstances where the common law would have ruled the contract void for mistake”.<sup>275</sup> There is no separate right in equity to set aside a contract on the ground of common mistake if the contract is not void at common law. None of the cases that follow *Solle v Butcher*:

“… defines the test of mistake that gives rise to the [supposed] equitable jurisdiction to rescind in a manner that distinguishes this from a test of mistake that renders a contract void in law.”<sup>276</sup>

Nor is it possible “to define satisfactorily two different qualities of mistake, one operating in law and one in equity”.<sup>277</sup> Coherence can be restored only:

“... by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where the contract is valid and enforceable on ordinary principles of contract law.”<sup>278</sup>

As this was the first occasion on which the Court of Appeal had heard full argument on the relation between *Bell v Lever Bros* and *Solle v Butcher*, it was open to the court to hold that *Solle v Butcher* cannot stand with the earlier decision of the House of Lords.<sup>279</sup>

## Mistake and equity after The Great Peace

- ¶60 The decision of the Court of Appeal rejects emphatically the notion that there is any separate equitable jurisdiction to rescind a contract on the ground of common mistake: the contract will be either fully binding or void.<sup>280</sup> If it is void there is no scope for the court to impose terms on either party, as the previous decisions of the Court of Appeal had done.<sup>281</sup> This does not prevent the court requiring a party to make payments to the other on general principles of restitution. This happened in *Cooper v Phibbs*,<sup>282</sup> where payments were ordered in respect of improvements.

## Refusal of specific performance

- ¶61 The decision in *The Great Peace* does not prevent a common mistake that is not sufficient to make the contract void being used as a defence to an action for specific performance. Specific performance is a discretionary remedy, and, in the exercise of its discretion, a court may refuse an order for specific performance on the ground of a mistake by the defendant.<sup>283</sup> Although the cases are nearly all ones in which the defendant unilaterally misunderstood the terms,<sup>284</sup> it is submitted that the same approach should apply in a case in which the contract has been made under a common mistake that was not sufficient to invalidate the contract at common law, if to enforce the contract specifically would cause particular hardship to the defendant.<sup>285</sup>

## Footnotes

1 See generally *Cheshire* (1944) 60 L.Q.R. 175; *Tylor* (1948) 11 M.L.R. 257; *Slade* (1954) 70 L.Q.R. 385; *Stoljar* (1965) 28 M.L.R. 265; *Stoljar, Mistake and Misrepresentation: A Study in Contractual Principles* (1968); *Smith* (1994) 110 L.Q.R. 400; *Friedmann* (2003) 119 L.Q.R.

68; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; Macmillan, Mistakes in Contract Law (2010).

239 *The Great Peace* [2002] *EWCA Civ 1407*, [2003] *Q.B. 679*.

240 [1950] 1 *K.B.* 671. The Court of Appeal in Singapore has hinted that it might not follow *The Great Peace* [2002] *EWCA Civ 1407*. See *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] *SGCA* 2, [2005] 1 *S.L.R.* 502 at [66]–[73]. The case was one of unilateral mistake. It is noted by *Yeo* in (2005) 121 *L.Q.R.* 393.

241 *Pitt v Holt* [2013] *UKSC* 26, [2013] 2 *A.C.* 108 at [115]. The case involved rectification of a voluntary settlement.

242 See *Cartwright* (1987) 103 *L.Q.R.* 594; *Slade* (1954) 70 *L.Q.R.* 385.

243 [1932] *A.C.* 161.

244 See above, paras 8-024—8-025.

245 (1867) *L.R.* 2 *H.L.* 149, quoted above, para.8-025.

246 [1932] *A.C.* 161, 218.

247 [1950] 1 *K.B.* 671.

248 See above, paras 5-075 et seq.

249 Denning and Bucknill LJ (Jenkins LJ dissenting).

250 [1950] 1 *K.B.* 671, 692.

251 [1950] 1 *K.B.* 671, 691. In *Associated Japanese Bank International Ltd v Crédit du Nord SA* [1989] 1 *W.L.R.* 255, 267 Steyn J said that Lord Denning's "interpretation of *Bell v Lever Bros Ltd* does not do justice to the speeches of the majority".

252 [1969] 2 *Q.B.* 507.

253 Winn LJ dissented on the ground that the case was indistinguishable from *Bell v Lever Bros Ltd* [1932] *A.C.* 161.

254 [1969] 2 *Q.B.* 507, 517; see *The Great Peace* [2002] *EWCA Civ 1407*, [2003] *Q.B. 679* at [139]–[140]. The equitable doctrine seems to have been applied by the Court of Appeal in *Nutt v Read* (2000) 32 *H.L.R.* 761, but "the proceedings had been beset by muddle and confusion" (see *The Great Peace* [2002] *EWCA Civ 1407*, [2003] *Q.B. 679* at [148]; *Islington London BC v UCKAC* [2006] *EWCA Civ 340*, [2006] 1 *W.L.R.* 1303 at [19]–[21]) and it seems that the point was not argued.

255 See *Peters v Batchelor* (1950) 100 *L.J. News.* 718; *Grist v Bailey* [1967] *Ch.* 532; *Laurence v Lexcourt Holdings Ltd* [1978] 1 *W.L.R.* 1128; *London Borough of Redbridge v Robinson Rentals* (1969) 211 *E.G.* 1125. (Contrast *Svanosio v McNamara* (1956) 96 *C.L.R.* 186; *Slade* (1954) 70 *L.Q.R.* 385, 407; *Shatwell* (1955) 33 *Can. Bar Rev.* 164; *Atiyah and Bennion* (1961) 24 *M.L.R.* 421, 439.) In *Clarion Ltd v National Provident Institution* [2000] 1 *W.L.R.* 1888 Rimer J held that the grounds for rescission were not made out.

256 [1989] 1 *W.L.R.* 255, 270. See above, para.8-033.

257 [2000] *All E.R. (D)* 887.

258 In the court below junior counsel had sought to challenge the correctness of *Solle v Butcher*: see *The Great Peace* [2002] *EWCA Civ 1407*, [2003] *Q.B. 679* at [160].

259 See above, para.8-037.

260 See above, para.8-006.

- 261 [1967] Ch. 532.
- 262 In *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1035, Hoffmann LJ suggested that this case and *Laurence v Lexcourt Holdings Ltd* [1978] 1 W.L.R. 1128 might have been decided differently if the judges at first instance had adverted to the question of the contractual allocation of risk. *Magee v Pennine Insurance* [1969] 2 Q.B. 507 was also criticised on this ground: Atiyah, Introduction to the Law of Contract, 6th edn (2006), p.181.
- 263 See above, para.8-056.
- 264 [1989] 1 W.L.R. 255, 270.
- 265 [1994] 1 W.L.R. 1016, 1035.
- 266 (2001) 151 N.L.J. 1696, [2001] All E.R. (D) 152 (Nov).
- 267 [2001] All E.R. (D) 152 (Nov) at [56].
- 268 [2001] All E.R. (D) 152 (Nov) at [62].
- 269 [2001] All E.R. (D) 152 (Nov) at [118]. He added that, if he was wrong, that he did not know what is the test for determining the nature of the fundamental mistake necessary to give birth to such a right.
- 270 [2001] All E.R. (D) 152 (Nov) at [119]–[120].
- 271 [2001] All E.R. (D) 152 (Nov) at [121]. Toulson J continued that, if he was wrong and there were a discretion to set aside for common mistake which is valid on ordinary principles of contract law, he declined to exercise the discretion on the facts of the case (at [123]).
- 272 (1867) L.R. 7 H.L. 149.
- 273 [2002] EWCA Civ 1407, [2003] Q.B. 679 at [110].
- 274 [2002] EWCA Civ 1407 at [113].
- 275 [2002] EWCA Civ 1407 at [118].
- 276 [2002] EWCA Civ 1407 at [153].
- 277 [2002] EWCA Civ 1407.
- 278 [2002] EWCA Civ 1407 at [157].
- 279 [2002] EWCA Civ 1407 at [160]. cf. *Midwinter* (2003) 119 L.Q.R. 180.
- 280 This does not appear to affect the jurisdiction to set aside a consent order. Except in matrimonial cases (as to which see *de Lasala v de Lasala* [1980] A.C. 546, 560 and *Thwaite v Thwaite* [1982] Fam. 1, 7–8), a judgment given or an order made by consent, being founded on the agreement of the parties, may be set aside if it was entered into under a mutual mistake of fact or in ignorance of a material fact if the mistake would justify the setting aside of an agreement on the same grounds (*Att-Gen v Tomline* (1877) 7 Ch. D. 388. See also *Hickman v Berens* [1895] 2 Ch. 638; *Allcard v Walker* [1896] 2 Ch. 369; *Wilding v Sanderson* [1897] 2 Ch. 534). In *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch. 273 the mortgagees of certain factory premises allowed the defendants to sell, under a consent order, trade machinery on the premises in the belief, shared by both parties, that the machinery was affixed to the realty. It subsequently appeared that it had been unlawfully detached, and so properly belonged to the mortgagees. The order was set aside. (See also *Furnival v Bogle* (1827) 4 Russ. 142; *Wilding v Sanderson* [1897] 2 Ch. 534; *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170; *Walker v Lundborg* [2008] UKPC 17; *British Red Cross v Werry* [2017] EWHC 875 (Ch), [2017] W.T.L.R. 441.) But a consent order cannot be set aside on

the ground of a mistake where the mistake would not suffice to impeach the agreement on which the order was based: *Purcell v F.C. Trigell Ltd [1971] 1 Q.B. 358*; cf. *Chanel Ltd v F.W. Woolworth & Co Ltd [1981] 1 W.L.R. 485*.

281 See above, para.8-056. In *The Great Peace [2002] EWCA Civ 1407*, at [161], Lord Phillips, MR said: “Just as the **Law Reform (Frustrated Contracts) Act 1943** was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to give greater flexibility to our law of mistake than the common law allows”.

282 *(1867) L.R. 7 H.L. 149*.

283 *Townshend v Stangroom (1801) 6 Ves. Jr. 328*.

284 See above, para.8-024.

285 “It would be dangerous to attempt an exhaustive definition of the cases in which the court will refuse specific performance”: Brett LJ in *Tamplin v James (1879) 15 Ch. D. 215, 221*. For a recent case, in which it appears that both parties were mistaken as to the facts, see *Heath v Heath [2009] EWHC 1908 (Ch), [2009] 2 P. & C.R. DG21* at [26] (“specific performance is a discretionary remedy and mistake may ... still be a relevant factor in refusing equitable relief, at all events where the mistake has been induced by the words or conduct of the person seeking specific performance. In such a case ... the mistake may also amount to, or be practically indistinguishable from, a misrepresentation”). In *UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch)* at [280], [284] the court accepted that specific performance might be refused if the claimant was seeking to take advantage of a mistake by the defendant that was not one as to the terms of the contract, but on the facts the defendant was not disadvantaged (see at [496]).

## Section 7. - Mistake and Construction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Common Mistake<sup>1</sup>

Section 7. - Mistake and Construction

### Construction: an alternative route

- 162 It must now be taken as established that there is at common law a doctrine of common mistake, a rule of law distinct from any question of implying a condition on the facts of the case. However, as was suggested earlier,<sup>286</sup> construction of the contract, without reference to “mistake”, remains an alternative route by which the courts may reach its conclusion.<sup>287</sup> This is likely to cause some confusion unless the courts accept that when they apply the process of construction to a case in which, factually speaking, the parties have entered the contract under a shared misapprehension as to the surrounding facts, they are normally merely applying “an alternative formulation” of the doctrine of common mistake. Normally the outcome will be the same whichever approach is applied.<sup>288</sup>

### Contract void as a matter of construction where no common mistake

- 163 In exceptional circumstances the outcomes may differ according to whether the case is analysed in terms of common mistake or as a matter of construction. On occasion the courts have held that a contract is ineffective because on the facts it was subject to an implied condition precedent which has failed, even though the conditions for common mistake were not met—in particular because the contract or contractual venture may not have been impossible to perform. One example is *Financings Ltd v Stimson*.<sup>289</sup> The defendant offered to take a car on hire-purchase, his offer acknowledging that he had examined the car and had satisfied himself that it was in good condition. Before his offer had been accepted the car was stolen and damaged. It was held that his offer was subject to the implied condition that the car remained in substantially the same condition as

when he saw it, so that the offer could no longer be accepted.<sup>290</sup> In that case the court emphasised that the condition was as to the offer, rather than the contract once formed.<sup>291</sup> The same does not apply however to *Graves v Graves*.<sup>292</sup> In that case divorcees had agreed that the wife would rent a property from the husband; they had assumed that the wife would be eligible for housing benefit which would pay 90 per cent of the rent. It turned out that the wife was not eligible. Thomas LJ, delivering the only full judgment, referred to Steyn J's words in the *Associated Japanese Bank* case that one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake.<sup>293</sup> Following this approach, he held that it was necessary to imply a condition in the agreement that if housing benefit was not payable, the tenancy would come to an end, and it was not necessary to consider either mistake or frustration.<sup>294</sup>

## Footnotes

- 1 See generally *Cheshire* (1944) 60 *L.Q.R.* 175; *Tylor* (1948) 11 *M.L.R.* 257; *Slade* (1954) 70 *L.Q.R.* 385; *Stoljar* (1965) 28 *M.L.R.* 265; *Stoljar*, Mistake and Misrepresentation: A Study in Contractual Principles (1968); *Smith* (1994) 110 *L.Q.R.* 400; *Friedmann* (2003) 119 *L.Q.R.* 68; *Cartwright*, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); *Macmillan* (2003) 119 *L.Q.R.* 625; Macmillan, Mistakes in Contract Law (2010).
- 286 Above, para.8-014.
- 287 See, e.g. *Associated Japanese Bank International Ltd v Crédit du Nord SA* [1989] 1 *W.L.R.* 255. *Chandler, Deveney and Poole* [2004] *J.B.L.* 34 argue that as the result of the abolition of the equitable jurisdiction, courts may resort more frequently to the construction technique, which may give them more flexibility.
- 288 e.g. in *Standard Chartered Bank v Banque Marocaine De Commerce Exterieur* [2006] *EWHC 413 (Comm)*, [2006] *All E.R. (D)* 213 (Feb) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party. See also *Butters v BBC Worldwide Ltd* [2009] *EWHC 1954 (Ch)* at [68]–[69].
- 289 [1962] 1 *W.L.R.* 1184, CA.
- 290 See further Atiyah, Essays in Contract (1986), Ch.10.
- 291 Peel (ed.), Treitel on The Law of Contract, 15 edn (2020), para.2-067.
- 292 [2007] *EWCA Civ* 660, [2008] *H.L.R.* 10.
- 293 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 *W.L.R.* 255, 268, quoted above, para.8-037.
- 294 [2007] *EWCA Civ* 660 at [38]–[42].

# Chapter 9 - Misrepresentation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

*Hugh Beale*

**D** Replace footnote 1 with: See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).

## Footnotes

- <sup>1</sup> See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).

## Section 1. - In General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 1. - In General

### Preliminary

- <sup>101</sup> The modern law relating to misrepresentation is a somewhat complex amalgam of rules of common law, equity and (as the result of the [Misrepresentation Act 1967](#))<sup>2</sup> statute law. It is also complicated by the fact that misrepresentation may constitute an actionable tort in certain circumstances, as well as providing grounds for relief in the law of contract. Prior to the enactment of the [Misrepresentation Act 1967](#), the position broadly speaking was that a misrepresentation which induced a person to enter into a contract gave the representee the right to rescind the contract, subject to certain conditions, but generally gave him no right to damages unless the misrepresentation was fraudulent, or, in some cases, negligent, or unless the representation amounted to a term of the contract. Since the coming into force of the [Misrepresentation Act](#) the representee who entered a contract as the result of a misrepresentation will always be able to claim damages for negligent misrepresentation in circumstances in which he could have recovered damages had the misrepresentation been fraudulent. In addition the Act gives the court a discretion to refuse to permit a representee to rescind a contract, but to award him damages in lieu of rescission, if the misrepresentation is negligent or wholly innocent; but it leaves the representee with an absolute right to rescind where the misrepresentation is fraudulent. The [Act of 1967](#) does not, however, alter the rules as to what constitutes an effective misrepresentation. It has been said that the rules on misrepresentation have developed piecemeal, and that some of the rules, which were developed when the remedies for misrepresentation were narrower than they now are, may not now operate well. Given the present state of the law, especially in the light of the decision in *Royscot Trust Ltd v Rogerson*<sup>3</sup> that the rules of fraud attach to liability for "negligent" misrepresentation under the [Misrepresentation Act 1967 s.2\(1\)](#), it has been said that the court should not be too ready to find that a misrepresentation has been made

4

U ; but this statement has also been doubted.<sup>5</sup>

## Prohibitions on misrepresentations in consumer cases

- 102 The Unfair Commercial Practices Directive<sup>6</sup> requires Member States to prohibit, and to provide “adequate and effective” means to combat, unfair commercial practices. These are defined so as to include misleading actions<sup>7</sup> and misleading omissions.<sup>8</sup> However unfair commercial practices within the meaning of the Directive did not necessarily give rise to civil remedies for individual consumers, as the Directive is “without prejudice to contract law and, in particular, to the rules of validity, formation or effect of a contract”.<sup>9</sup> Accordingly the Regulations made in 2008<sup>10</sup> to implement the Directive prohibit unfair commercial practices, but originally provided that an agreement shall not be void or unenforceable by reason only of a breach of the Regulations. In many cases the consumer would have a remedy under the general law of misrepresentation, but not all unfair commercial practices will amount to a misrepresentation. The question of whether a remedy for unfair commercial practices should be given to individual consumers was referred to the Law Commissions, which recommended that consumers who are the victims of misleading or aggressive practice by a trader should have a civil law remedy, including the right to “unwind the contract” if the consumer acts quickly or, if the consumer waits more than three months or the goods or services supplied have been fully consumed, the right to a “discount”; and damages for further loss unless the trader can show that it used due diligence. These remedies should replace those under the [Misrepresentation Act 1967](#) so far as the latter apply to business to consumer cases; other common law and statutory remedies should not be affected.<sup>11</sup> The Law Commission’s recommendations were implemented by the [Consumer Protection \(Amendment\) Regulations 2014](#),<sup>12</sup> which amend the [Consumer Protection from Unfair Trading Regulations 2008](#). The amendments apply to any contract made on or after 1 October 2014. The remedies are explained in Vol.II, Ch.40.<sup>13</sup>

## Criminal fraud

- 103 Fraudulent misrepresentation may also be an offence under the [Fraud Act 2006](#). The definition of fraud for the purposes of the criminal law is different from the civil law definition.<sup>14</sup>

## Misrepresentation and contractual terms

- 104 Before the **Misrepresentation Act** was passed, the law relating to misrepresentation was generally concerned solely with misrepresentations made before the contract was entered into, and not with misrepresentations which actually constituted contractual terms. Although the word “misrepresentation” is literally applicable to a contractual term which consists of a false statement of fact (as opposed to a promise of future conduct), the term was commonly confined to misrepresentations which did not constitute contractual terms, simply because the law relating to contractual terms (whether promises as to future conduct or misrepresentations of fact) differed from the law relating to misrepresentations which were not contractual terms. Moreover, there was also some authority for the proposition that if a misrepresentation was made before a contract was entered into, and the misrepresentation was subsequently incorporated into the contract as a contractual term, the law relating to misrepresentation was not applicable, and the case had to be dealt with as one involving a contractual term and nothing else.<sup>15</sup> Since the passing of the **Act of 1967** this is no longer the case,<sup>16</sup> and it will often be necessary in any one situation to inquire carefully as to the effect of a misrepresentation both as a pre-contractual statement *and* as a contractual term. Where these effects differ (as they often do) it is in some cases a matter of considerable difficulty to determine with any certainty the effect of the **Misrepresentation Act** on the law relating to contractual misstatement.<sup>17</sup>

## Terminology

- 105 For many years it was usual to divide misrepresentations into two categories, fraudulent and innocent misrepresentation. The latter category included misrepresentations that were made negligently, for, at least until the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller and Partners Ltd*<sup>18</sup> it was thought that there was generally no difference between a negligent and a completely innocent misrepresentation. But since that decision, and the passing of the **Misrepresentation Act**, which also distinguishes in some respects between negligent (or more accurately, those which were made without reasonable grounds, but it is convenient to refer to them as negligent<sup>19</sup>) and completely innocent misrepresentations, it has clearly become necessary to recognise that there are now three categories of misrepresentations. It seems better, therefore, to reserve the term “innocent misrepresentation” for representations which are neither fraudulent nor negligent, though it must be appreciated that there are many cases in which the term has been used to include negligent misrepresentation.

## Footnotes

- 1 See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).
- 2 The Act was based on the recommendations in the Law Reform Committee's Tenth Report, Cmnd.1782 (1962) but with one important change, as to which see below, para.[9-152](#). For a contemporaneous appraisal of the Act, see *Attiyah and Treitel*, "*Misrepresentation Act 1967*" (1967) 30 *M.L.R.* 369.
- 3 [1991] 2 *Q.B.* 297; see below, para.[9-087](#).
- 4 *Avon Insurance v Swire* [2000] 1 *All E.R. (Comm)* 573, 633, Rix J. See also *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] *EWHC 1392 (Comm)*, [2011] 1 *Lloyd's Rep.* 123 at [85]; *SK Shipping Europe Ltd v Capital VLCC 3 Corp, Capital Maritime and Trading Corp, "The C Challenger"* [2022] *EWCA Civ* 231 at [38].
- 5 *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] *EWHC 484 (Comm)*, [2011] 1 *C.L.C.* 701 at [223], Hamblen J ("The fact that Parliament (as interpreted by the Court of Appeal) has thought it right to provide a broad measure of compensation where a contract has been made as a result of a misrepresentation should not affect the prior question whether there has been a misrepresentation.") Hamblen J referred to the decision in *Royscot Trust Ltd v Rogerson* [1991] 2 *Q.B.* 297 as controversial; see below, para.[9-087](#).
- 6 Directive 2005/29 on unfair commercial practices [2005] O.J. L149/22. A useful summary of the Directive and its impact will be found in *Twigg-Flesner* (2005) 121 *L.Q.R.* 386.
- 7 *Consumer Protection from Unfair Trading Regulations 2008* (SI 2008/1277) reg.29; *Business Protection from Misleading Marketing Regulations 2008* (SI 2008/1276) reg.29. See now below, Vol.II, paras [40-166](#) et seq.
- 8 Directive 2005/29 art.7.
- 9 Directive 2005/29 art.3(2). EU Member States are now required by art.11a of the Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 to provide consumers who have been the victim of an unfair commercial practice with compensation for damage and a price reduction or termination of the contract; but the measures do not have to be applied until May 2022, so the UK is unaffected. See below, Vol.II, para.[40-003](#).
- 10 *Consumer Protection from Unfair Trading Regulations 2008* (SI 2008/1277) and *Business Protection from Misleading Marketing Regulations 2008* (SI 2008/1276). These Regulations form part of retained EU law; see above, paras [1-016—1-025](#).
- 11 Law Commission and Scottish Law Commission Report: *Consumer Redress for Misleading and Aggressive Practices* (Law Com. No.332, Scot Law Com. No.226 (2012)).
- 12 SI 2014/870.

- 13 See below, Vol.II, paras 40-181 et seq.
- 14 See below, para.9-059.
- 15 *Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All E.R. 1167, 1171; Leaf v International Galleries [1950] 2 K.B. 86.*
- 16 Misrepresentation Act 1967 s.1(a): see below, para.9-121.
- 17 Below, paras 9-125 and 9-165.
- 18 *[1964] A.C. 465.*
- 19 See below, para.9-085.

## Section 2. - What Constitutes Effective Misrepresentation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 2. - What Constitutes Effective Misrepresentation<sup>20</sup>

**D** Replace footnote 20 with: The general requirements for misrepresentation (in the context of an action for damages for fraud) were set out by Jacobs J in *Vald Nielsen Holding A/S v Baldorino [2019] EWHC 1926 (Comm)* at [130]–[159]; and see further *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* at [112]–[122]; *[2022] EWCA Civ 231* at [31] and *Ivy Technology Ltd v Martin [2022] EWHC 1218 (Comm)* at [338]–[370].

### Footnotes

- <sup>1</sup> See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- <sup>20</sup> The general requirements for misrepresentation (in the context of an action for damages for fraud) were set out by Jacobs J in *Vald Nielsen Holding A/S v Baldorino [2019] EWHC 1926 (Comm)* at [130]–[159]; and see further *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* at [112]–[122].

## (a) - False Statement of Fact

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 2. - What Constitutes Effective Misrepresentation<sup>20</sup>

(a) - False Statement of Fact

**Statement must be false**

- <sup>106</sup> It is an obvious requirement of misrepresentation that the statement relied on be false. The question is not solely one of looking at the words used: the question is how the words would be understood by a reasonable person in the factual context.<sup>21</sup> As to what amounts to falsity, in *Avon Insurance v Swire*<sup>22</sup> Rix J adopted as representing the common law the test that was laid down in *Marine Insurance Act 1906 s.20(4)*,<sup>23</sup> so that a statement will be treated as true if it is substantially correct and the difference would not have induced a reasonable person to enter the contract. The last phrase reflects the requirement of materiality discussed below.<sup>24</sup> This test has also been adopted outside the context of insurance.<sup>25</sup>

**Ambiguity**

- <sup>107</sup> If a statement is ambiguous, the representee must prove that they understood the statement in a sense in which it is in fact false.

<sup>26</sup>



## Statements of fact

)108

The traditional rule is that a misrepresentation must be a false statement of fact,<sup>27</sup> past or present, as distinct from a statement of opinion, a statement of intention or a mere commendatory statement. However, the distinction between a statement of fact on the one hand and a statement of opinion or intention on the other, is not clear cut. We shall see that a statement of opinion or of intention may itself be a misrepresentation if the maker does not in fact hold the opinion or have the intention stated. Also a statement of opinion may amount to an implied representation that the maker has reasonable grounds for the opinion,<sup>28</sup> and a statement of intention that he reasonably believes that he can carry out his intentions.<sup>29</sup> Conversely, a statement that on the face of it is one of fact may only amount to statement of opinion if the person to whom it is made knows or should know that the maker is not in possession of the facts and thus can only be giving his opinion.<sup>30</sup> The question is whether the statement is one “upon which the representee was intended,<sup>31</sup> and was entitled, to rely”.<sup>32</sup>

“In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used.”

<sup>33</sup>



## Puffs and statements of opinion

)109

Mere “puffs” do not amount to representations.<sup>34</sup> A mere statement of opinion which proves to have been unfounded, will not be treated as a misrepresentation<sup>35</sup>; for as a general rule these cannot be regarded as representations of fact, except in so far as they show that the opinion or intention is held by the person expressing it.<sup>36</sup> The statement must be construed as it would reasonably be understood by the recipient in the context in which the statement was made.<sup>37</sup>

## Statement of opinion amounts to statement of fact if not honestly held

)110

However, in certain circumstances a statement of opinion (or of intention) may be regarded as a statement of fact, and therefore as a ground for avoiding a contract if the statement is false. Thus, if it can be proved that the person who expressed the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact.

<sup>38</sup>

**U** If a person states as his opinion something which he does not in fact believe, or which given the facts known to him, he could not honestly hold, he makes a false statement of fact. So where, at a sale of property, the vendor described the occupier as “a most desirable tenant”, while in fact he knew that the rent was considerably in arrear, this was held to entitle the purchaser to rescind the contract.<sup>39</sup>

## Statement of opinion may carry implication that grounds for belief

In *Brown v Raphael*,<sup>40</sup> the purchaser of an absolute reversion in a trust fund expectant on the death of an annuitant was likewise held entitled to rescind: the particulars of sale stated that estate duty would be payable on the death of the annuitant, “who is believed to have no aggregable estate”; the vendor’s solicitors honestly believed this to be true but had no reasonable grounds for this belief. The Court of Appeal held that as the vendor was in a far stronger position than the purchaser to ascertain the facts, there must be implied a further representation that the former had reasonable grounds for his belief.<sup>41</sup> If, on the other hand, it is clear that the person who expressed the opinion had no real way of knowing whether or not it was correct, no such implication can be made.<sup>42</sup> In *Economides v Commercial Union Assurance Co Plc*

<sup>43</sup>

**U** it was held that a statement by an insured, a private person with no specialist knowledge, of the value of the contents of a flat which contained his parents’ belongings as well as his own, did not carry an implication that he had an objectively reasonable basis for the value stated. Thus a statement of the value which the insured made honestly was not a misrepresentation even though it was inaccurate. Equally, propositions put forward by parties engaged in negotiating the settlement of a dispute are likely to be treated as mere statements of opinion and, at least when the negotiations are conducted by experienced professionals in good faith, are unlikely to be treated as including a representation that they are based on reasonable grounds.<sup>44</sup> The fact that there was a relationship between the parties is not enough, as a matter of law, to create an implied representation that there is a reasonable basis for the opinion.<sup>45</sup> Subject to the principle illustrated by *Brown v Raphael*,<sup>46</sup> an opinion expressed in good faith is not to be held to be a misrepresentation merely because it

turns out to be incorrect.<sup>47</sup> But a statement of opinion which is published as if it were a fact may be regarded as a statement of fact.<sup>48</sup>

## Apparent statement of fact may be no more than expression of opinion

- 112 A statement that taken in isolation might seem to be one of fact may in the circumstances only amount to an expression of opinion, and one without any implied representation that the maker of the statement has facts to back it up. The statement must be construed as it would reasonably be understood by the recipient in the context in which the statement was made.<sup>49</sup> Thus a statement as to the nature of a policy made to an experienced loss adjuster who had a copy of the policy schedule that described it correctly, and who was thought to have a copy of the policy itself, was regarded as “a contention, not as a representation”<sup>50</sup> —in other words, it was merely an expression of opinion. The terms of the contract may also create a “contractual estoppel” to the effect that a statement which might otherwise amount to one of fact will be treated as merely one of opinion.<sup>51</sup> On the other hand, the fact that the party who makes a statement is known not to have personal knowledge does not prevent the statement from being one of fact if he can reasonably be expected to obtain the information and to pass it on.<sup>52</sup>

## Express contractual warranties and representations

- 113 It is not uncommon for a contract to contain a warranty that certain facts are correct. A party who merely gives a contractual warranty does not necessarily represent that the fact warranted is true so as to give the other party an alternative claim for misrepresentation if the warranty is broken.  
<sup>53</sup>

 Making an offer may amount to a representation that in general terms the offeror intends and has the ability to perform the proposed contract, as they understand it,

<sup>54</sup>

 but merely offering for signature a document containing a warranty is not a representation of the truth of the facts warranted.

<sup>55</sup>

 It is different if there was a previous representation, followed by a warranty; in that case the other party will have a choice of remedies.

<sup>56</sup>

**U** Moreover, the fact of the warranty tends to imply that the party giving the warranty has reasonable grounds for believing the facts warranted.

<sup>57</sup>



## Representations made in the contract

- )14 It is also possible that the contract provides that one party represents certain facts to be true. Where the facts were stated before the contract was made and the representation induced the representee to enter the contract, the contractual provision seems to act merely as a confirmation that the statements were made and can be relied on,<sup>58</sup> and if they turn out to have been incorrect the representee will have the normal remedies (subject to any restrictions imposed by the contract<sup>59</sup>).<sup>60</sup> If the representations were made for the first time in the contract, or if the representee had not relied on an earlier iteration of them, the position is less clear. Subject to other provisions of the contract,<sup>61</sup> the separate inclusion of representations<sup>62</sup> in the contract seems to make sense only if the representor is implicitly agreeing that the representee will have a remedy for misrepresentation—for example, rescission—if the representation turns out to have been incorrect. However, it has been pointed out that damages under s.2(1) of the Misrepresentation Act 1967 may not be available, as that section applies only where a person “has entered a contract after a misrepresentation has been made to him ...”.<sup>63</sup>

## Information passed on

- )15 If a person passes on information which has been supplied to him:

“... he may simply pass it on as information, or he may adopt it as his own statement of fact. If he passes it on merely as information, he may be guilty of a misrepresentation if he does not fairly set out the information (e.g. where he passes on parts of a surveyor’s report but omits qualifications to the surveyor’s opinion). But otherwise he does not adopt it as his own. He may also make implicit representations by passing on the information”,

such as that he is not aware of anything that prevented it from being accurate.<sup>64</sup> Whether the party is passing the information on or adopting it is a question of interpretation on the facts.<sup>65</sup> Representations made to an intermediary such as a broker and then passed on by the intermediary to the party who concluded the contract “on behalf of” another company “to be nominated” are to

be treated in the same way as representations made to an agent negotiating a contract on behalf of an unnamed or undisclosed principal, even if the identity of the principal was not only not known, but not knowable at the date the contract was concluded, or if the representee was a company that had not been incorporated at the time the representation was made.<sup>66</sup>

## Statement of intention not honestly held

- ¶16 A statement of intention may be looked upon as a misrepresentation of existing fact if, at the time when it was made, the person making the statement did not in fact intend to do what he said or knew that he did not have the ability to put the intention into effect; for the promisor's state of mind was not what he led the other party to believe it to be.<sup>67</sup> Thus, where a man ordered goods having at the time the intention not to pay for them, he was held to have made a fraudulent misrepresentation.<sup>68</sup> Equally, if a person makes a statement of an intention that he should have known he was not able to carry out, in appropriate circumstances he may be held to have made an implied representation that he did have that ability.<sup>69</sup> There is no doubt that a statement as to the intentions of a third party is a statement of fact and can constitute a misrepresentation in the ordinary way.<sup>70</sup>

## Statement as to future may carry implication of fact

- ¶17 A statement of intention or as to the future may carry the implication that the party making it does not know of facts that will make it impossible to carry out the intention.

71

U But "there is no rule of law that any particular statement carries with it any particular implication. All depends upon the particular statement in its particular context".<sup>72</sup>

## Implied representations

- ¶18 *Brown v Raphael*<sup>73</sup> could be regarded as a case of an implied representation; there are a number of other cases which can also be regarded as instances of implied representations, though this category overlaps with that of representations by conduct.<sup>74</sup> Thus in *Spice Girls Ltd v Aprilia World Service BV*<sup>75</sup> it was held that a pop group had made an implied misrepresentation when they continued

with arrangements to publicise the defendant's products when they knew that one member of the group was intending to leave the group shortly, which would prevent the contract being carried out and the defendants deriving any benefit from the arrangement. It has been held that a description of premises as "offices" may amount to an implied representation as to the availability of the appropriate planning consents.<sup>76</sup> The essential issue is whether in all the circumstances it has been impliedly represented that there exists some state of facts different from the truth. In the case of an implied statement,

"... the court has to ... consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context."<sup>77</sup>

In evaluating the effects of the statement or conduct in such circumstances, a helpful test is whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all circumstances necessarily have been informed of it.

<sup>78</sup>

 The court should not be too ready to find an implied representation.<sup>79</sup>

## Liability in tort for incorrect opinions and forecasts

<sup>119</sup>

This form of liability is considered later,<sup>80</sup> but it is mentioned here because in an action in tort it may not be necessary to show that the statement complained of was a representation in the sense which this term has traditionally borne in the law of contract. Thus, where there is a sufficient "special relationship" to give rise to liability in tort under *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,<sup>81</sup> it would seem immaterial that the statement consists of mere opinion. Certainly the distinction between statements of existing facts and predictions seems less important in tort cases. For instance, in *Esso Petroleum Co v Mardon*<sup>82</sup> an action for damages for negligent misrepresentation succeeded where a petrol company, negotiating with a prospective tenant about a lease of a filling station, had offered a forecast of the probable sales potential of the filling station. In *McNally v Welltrade International Ltd*<sup>83</sup> an employment agency was held liable to an employee for implied representations as to the plaintiff's suitability for a job from which he was dismissed. And in *Box v Midland Bank Ltd*<sup>84</sup> it was said that the distinction between fact and opinion had become much less important since *Esso Petroleum Ltd v Mardon*.<sup>85</sup> In these cases liability is based on an assumption of responsibility to take reasonable care and failure to do so; whether the defendant assumed responsibility to give factual information or an opinion does not matter.

<sup>86</sup>

**U** However, cases in which an incorrect forecast has given rise to a remedy for misrepresentation, as opposed to negligent misstatement on the *Hedley Byrne* principle, can be explained as involving implicit representations of existing fact, such as that the speaker has taken reasonable care in making the forecast.<sup>87</sup>

## Statements of law

**D**<sup>20</sup> It used commonly to be said that a statement of law cannot be treated as a misrepresentation.

**D**<sup>88</sup>

**U** But the proposition was always in need of qualification and it is now more accurate to say that a statement of law will amount to a misrepresentation unless, in the circumstances, it reasonably appeared that the statement was put forward as nothing more than an opinion on which it would not be reasonable to rely. First, a statement of law may be regarded as a statement of opinion, but just as a statement of opinion may be a representation of fact, so too a statement of law may amount to a representation, or misrepresentation, as the case may be. So a wilful misstatement of law would always amount to a misrepresentation

**D**<sup>89</sup>

**U** and even an innocent misstatement of law might do so where it carries an implication of fact which is itself untrue. Secondly, the question whether a statement is one of law or fact gives rise to no small difficulty,

**D**<sup>90</sup>

**U** especially as statements of law and of fact are so frequently intermingled. It has been said that the dichotomy between statements of fact and statements of law is too neat, and is apt to mislead.

**D**<sup>91</sup>

**U** It seems that the courts tend to regard statements of mixed law and fact, and statements capable of having either meaning, as statements of fact,

**D**<sup>92</sup>

**U** and therefore as representations; that they also regard statements as to the purport, effect and objects of documents as representations

**D**<sup>93</sup>

**U**; and in *Cooper v Phibbs*,

**D**<sup>94</sup>

**U** a statement as to private rights, as distinct from the general law, was regarded as a statement of fact.

95

**U** So a representation that planning permission exists for a particular use is a representation of fact, and not of law

96

**U**; similarly with a representation by a landlord that he accepts liability for repairs under a lease.

97

**U** On the other hand a statement of law made separately from a statement of fact was held not to be a misrepresentation.

98

**U** This seems to rest on a distinction between a statement of an abstract proposition of law, which was not regarded as a misrepresentation, and a statement applying the law to the facts of a particular situation which, at least in some circumstances, may constitute a misrepresentation.

99

**U** But thirdly, in the law of restitution the distinction between a payment made under a mistake of fact and one made under a mistake of law has been held by the House of Lords not to be part of English law,

100

**U** and, in the light of this, it was held in *Pankhania v Hackney LBC*

101

**U** that the “misrepresentation of law” rule is no longer good law. Thus, for the purposes of the law of misrepresentation, the distinction between statements of law and statements of fact is no longer maintainable and that even an incorrect statement of an abstract proposition of law may amount to a misrepresentation unless it is apparent that all that is being offered is an opinion without implication that the speaker has reasonable grounds for that opinion.

102

**U** It is submitted that the underlying principle here is the same as that suggested in the previous paragraph, viz that even a statement as to the law may be a misrepresentation if it was reasonable, in all the circumstances, for the representee to rely upon it.

103

**U** In any event a statement of foreign law is here (as elsewhere in the law) treated as a statement of fact.

104

**U**

## Non-disclosure

- 121 The general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances.<sup>105</sup> So, for example, in *Percival v Wright*,<sup>106</sup> a company director who had inside information about certain facts likely to enhance the value of the company's shares was held to be under no duty to disclose this fact to a shareholder from whom he bought some shares. For the same reason it is not possible to set up an estoppel on the basis of an omission to disclose unless a duty to disclose can be established in the particular circumstances of the case.<sup>107</sup> Tacit acquiescence in another's self-deception does not itself amount to a misrepresentation, provided that it has not previously been caused by a positive misrepresentation.<sup>108</sup> But there are exceptions to the general rule that there is no duty to disclose. First, there are many statutory exceptions.<sup>109</sup> Secondly, there are exceptions at common law where in particular types of contract there has been held to be a duty of disclosure (often categorised as contracts *uberrimae fidei*).<sup>110</sup> These include cases where there is a fiduciary relationship between the parties<sup>111</sup> and where the relationship between the parties is one of trust and confidence.<sup>112</sup> There may also be a duty to disclose where failure to disclose some fact distorts a positive representation. It is also possible for a person to be guilty of misrepresentation by conduct.<sup>113</sup> Cases of fiduciary relationships and relationships of trust and confidence are dealt with later.<sup>114</sup> Misrepresentation by conduct and cases in which a failure to disclose a fact distorts a positive misrepresentation are dealt with in the following paragraphs.

## Misrepresentation by conduct

- 122 As previously mentioned, a person may be guilty of misrepresentation by conduct.  
 <sup>115</sup> It is sometimes hard to distinguish misrepresentation by conduct from implied representation, but normally it is unnecessary to do so.<sup>116</sup> In the simplest case, conduct may be intended to convey information in precisely the same way as the written or spoken word. Thus a person who went into a shop in a university town wearing cap and gown (when such costume was still customary) would be representing that he was an undergraduate,<sup>117</sup> a person who sits down in a restaurant and orders a meal impliedly represents that he has the means to pay,<sup>118</sup> and more generally it has been said in a well-known dictum that "a nod or a wink or a shake of the head or a smile"<sup>119</sup> may amount to a representation if it is intended to induce the other party to believe in a certain state of facts. It is well

established that a mere ordering of goods in the course of business carries a representation that the buyer is not aware that he will be unable to pay for them<sup>120</sup>; a mere payment of money by A to B may in appropriate circumstances (e.g. where A is B's employer) amount to a representation by A that B is entitled to the money so paid<sup>121</sup>; and it has been held in a criminal case that tendering of obsolete foreign bank notes to a currency dealer is a representation that the notes are current tender of some value.<sup>122</sup> Other important criminal cases concerning representations by conduct relate to the use of bank (cheque) cards and credit cards. In *R. v Charles*<sup>123</sup> the House of Lords held that use of a cheque card amounts to a representation that the user has authority, as between himself and his bank, to use his card. Thus, even though payment of the cheque may be guaranteed by the bank, and may in fact be made by the bank, the use of the card will amount to a false representation if it is, in the circumstances, unauthorised by the bank. In *R. v Lambie*<sup>124</sup> the House of Lords likewise held that use of a credit card to purchase goods amounts to a representation that the user has the authority of the credit card company to use the card. So even if the credit card company has a previous contract with the seller whereby it undertakes to pay for goods acquired with the use of the card, irrespective of amount, there will be a false representation if the user exceeds the limits agreed between him and the credit card company. The importance of these decisions for the civil law is that they justify the seller or supplier in rescinding the contract of sale and reclaiming the goods in the event of the fraud being discovered while the goods are still in the possession of the buyer.

## Conduct intended to conceal facts

- <sup>123</sup> Conduct may amount to a representation where the conduct is not so much intended to convey information as to conceal facts from the other party. There are nineteenth-century cases in which a seller of goods was held guilty of misrepresentation where it was shown that he had deliberately concealed defects in the goods being sold, as, for instance, by nailing down planks and closing the seams of a rotten ship,<sup>125</sup> or by plugging a hole in a gun with soft metal<sup>126</sup>; and more recently the deliberate covering up of dry rot in a building was held to amount to fraud.<sup>127</sup> This principle has not been fully developed by the courts, and it is uncertain whether it would extend to conduct which is not intended solely to conceal defects; it is, for instance, not clear whether the vendor of a house could be held guilty of misrepresentation if he papered a room, partly to hide the defective state of the plaster, but partly because it needed decorating in any event.

## Partial non-disclosure<sup>128</sup>

- <sup>124</sup> Although total non-disclosure does not amount to a misrepresentation, a partial non-disclosure may do so. This may happen in a number of different ways. Thus a statement may be a misrepresentation

even though it is literally true if it implies certain additional facts which are themselves false. A striking instance of this possibility is *Goldsmith v Rodger*<sup>129</sup> in which the defendant who was negotiating for the purchase of the plaintiff's yacht informed the plaintiff, after paying a visit to the yacht, that she had rot in her keel. The Court of Appeal held that this statement implied that the defendant had actually examined the keel, and as he had not done so, this was itself a misrepresentation, whether or not the yacht did have rot in her keel. Again, a statement may amount to a misrepresentation if facts are omitted which render that which has actually been stated false or misleading in the context in which it is made.<sup>130</sup> So, for example, where a shop assistant told a customer that a receipt for the cleaning of a dress which she was required to sign excluded liability for damage to beads and sequins, and in fact the receipt excluded all liability, this was held to be a misrepresentation.<sup>131</sup> It will be observed that these cases of partial non-disclosure can either be explained as cases of actual misrepresentation, or as cases in which there is a duty to disclose certain facts by reason of the facts actually stated. Until the passing of the *Misrepresentation Act 1967*, it was immaterial which explanation was adopted since the effect of an actual misrepresentation and the breach of a duty to disclose (where such a duty exists) were generally the same. But since the passing of this Act this is no longer the case as the Act applies to misrepresentations, but not to the breach of duties of disclosure. It is thought that cases of partial non-disclosure will normally be treated as cases of actual misrepresentation falling within the Act, but it has been held that cases of complete non-disclosure will not.<sup>132</sup>

## Representation ceases to be true

- 125 A statement may be made which is true at that time but which subsequently ceases to be true to the knowledge of the representor before the contract is entered into. In such circumstances a failure to inform the representee of the change in circumstances will itself amount to a misrepresentation,<sup>133</sup> unless in the context it is quite clear to the reasonable recipient of the information that the party who gives it accepts no responsibility for its accuracy or for reviewing it.<sup>134</sup>

## Continuity of representations

- 126 Representations are treated for many purposes as continuing in their effect until the contract between the parties is actually concluded.<sup>135</sup> This is one reason why a statement which is true when made, but which ceases to be true to the knowledge of the representor before the contract is concluded, is treated as a misrepresentation unless the representor informs the representee of the change in circumstances.<sup>136</sup> This principle may have other effects as well. First, as we have just seen, if a representation is made innocently but falsely, and facts later come to the knowledge

of the representor which show that the statement was false, a failure to inform the representee of the truth may convert what was originally an innocent misrepresentation into a fraudulent one.<sup>137</sup> Again, if a man truthfully states that he intends to do something but changes his mind at a later stage he may come under a duty to disclose that change.

<sup>138</sup>

**U** The principle is also recognised by s.2(1) of the Misrepresentation Act which extends the right to damages for negligent misrepresentation,<sup>139</sup> for a misrepresentation falls within this subsection unless the representor had reasonable grounds to believe and did believe *up to the time the contract was made* that the facts represented were true.<sup>140</sup>

## “Commercially binding” agreements

- 127 There are some circumstances in which a contract may be treated as commercially binding before it becomes legally binding, and in such a case it seems that the principle of continuity of representations does not operate beyond the time when the contract becomes commercially binding. So, for instance, an insured was held not to be obliged (despite the general duty of disclosure in insurance contracts)<sup>141</sup> to disclose facts coming to his notice after the insurer had initialled a slip indicating that he was at risk, although there was no binding legal contract until a policy was issued later.<sup>142</sup>

## Representations made originally by or to a third person

- 128 Another consequence of the principle that representations are continuous in their effect is that if a representation is made by an agent who is acting without authority, and he subsequently obtains the authority of his principal to continue the negotiations, the principal will become responsible for the representations previously made by the agent.<sup>143</sup> Conversely, if the contract is ultimately concluded not between the representor and the original representee but between the representor and a third person (on the facts of the case, a company formed for the purpose only after the original representation had been made), the representation may be treated as being made to the third party.<sup>144</sup> On the facts of the case the original representee continued to act as agent of the third person, so the representation could be regarded as continuing to be made to him, though in a different capacity. It is submitted that this is not a necessary condition, at least if the representor knows that the statement made earlier is likely to be passed on to the third person and does nothing to withdraw it or to indicate that there should be a fresh start to the negotiations, so that “the earlier misrepresentation is to be regarded as water under the bridge”.<sup>145</sup>

## Withdrawals and corrections

- 129 A misrepresentation will cease to have effect if it is withdrawn or corrected before the contract is made, as then it will not have induced the contract.<sup>146</sup> The burden of establishing a correction or withdrawal rests on the person making the correction and the correction must be sufficiently clear in all the circumstances of the case.<sup>147</sup>

## Footnotes

- 1 See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- 20 The general requirements for misrepresentation (in the context of an action for damages for fraud) were set out by Jacobs J in *Vald Nielsen Holding A/S v Baldorino [2019] EWHC 1926 (Comm)* at [130]–[159]; and see further *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* at [112]–[122].
- 21 *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm)*, [2007] 1 Lloyd's Rep. 264 at [50]; affirmed without comment on this point [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449. See also *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221*, [2010] 2 C.L.C. 705 at [120]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm)*, [2011] 1 C.L.C. 701 (“In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee”: Hamblen J at [215]); *Dhaliwal v Hussain [2017] EWHC 2655 (Ch)* at [46]. Compare the process of contractual interpretation, described in Ch.15 below. As Christopher Clarke J pointed out in *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)*, [2011] 1 Lloyd's Rep. 123 at [87], the claimant must show that he understood the statement in the sense (so far as material) which the court ascribes to it and that, having that understanding, he relied on it.
- 22 [2000] 1 All E.R. (Comm) 573.
- 23 This section of the Act was repealed in 2016 by Insurance Act 2015 Pt 7 s.21(2).
- 24 See para.9-049.
- 25 *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)*, [2011] 1 Lloyd's Rep. 123 at [149]; *Bonham-Carter v SITU Ventures Ltd [2012] EWHC 3589 (Ch)* at [120].

•26

*Smith v Chadwick* (1884) 9 App. Cas. 187; *Bonham-Carter v SITU Ventures Ltd* [2012] EWHC 3589 (Ch) at [119], and *Leeds City Council v Barclays Bank Plc and Newham LBC v Barclays Bank Plc* [2021] EWHC 363 (Comm), [2021] Q.B. 1027 at [69] both citing Cartwright, Misrepresentation, Mistake and Non-Disclosure, 6th edn (2022), para.3-06: “It will ... be for the representee to establish the meaning of the words which he actually understood; it is not enough for him simply to claim that one of the meanings was actionable, or to leave it to the court to decide the “ordinary” meaning.” Compare the situation when damages are claimed for fraud below, para.9-060.

27 On what amounts to a false statement see above, para.9-006. Traditionally relief was only given for misrepresentations of fact, not of law. But see now below, para.9-020.

28 See below, para.9-011.

29 See below, para.9-017.

30 See below, para.9-012.

31 On the question of intention, see below, para.9-039.

32 *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [86]; see also *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) (“A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true ...”: Hamblen J at [215]; *Standard Chartered Bank v Ceylon Petroleum Corp* [2011] EWHC 1785 (Comm) at [552]–[556]). It has been said that whether the representee was entitled to rely on the representation is partly a question of reasonableness: *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2016] 2 Lloyd's Rep. 229 at [219]. A party is not entitled to rely on a statement that the party was reasonably expected to have checked by its lawyers: *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [119]–[122].

33 *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264, per Toulson J at [50] (affirmed without comment on this point [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449). Toulson J’s statement was adopted by the Court of Appeal in *Webster v Liddington* [2014] EWCA Civ 560 at [40]. See also the dictum of Mance J in *Bankers Trust International v PT Dharmala Sakti Sejahtera* [1996] C.L.C. 518 at 531, referring to “the potential relevance of the parties’ relationship and the surrounding circumstances to a decision whether any and if so what representation was made in the particular case. The meaning and effect of words never falls to be viewed in a vacuum. It is shaped by the context of their communication, including the parties’ respective positions, knowledge and experience. A description or commendation which may obviously be irrelevant or may even serve as a warning to one recipient, because of its generality, superficiality or laudatory nature, or because of the recipient’s own knowledge and experience, may constitute a material representation if made to another less informed or sophisticated receiver”. See also (in the context of materiality: below, para.9-049) *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957 (“judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the

actual representee”: per Mance LJ, at [30]); *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) at [90]; *Mabanga v Ophir Energy Plc* [2012] EWHC 1589 (QB) at [26]–[27]. As Christopher Clarke J pointed out in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) at [87], the claimant must show that he understood the statement in the sense (so far as material) which the court ascribes to it and that, having that understanding, he relied on it. See further Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.3-06.

- 34     34     *Dimmock v Hallett* (1866) L.R. 7 Ch. App. 21, 27. See also, for an analogous criminal law case, *West Yorkshire Metropolitan CC v MFI Furniture Centre* [1983] 1 W.L.R. 1175; *Chartered Trust v Davies* [1997] 2 E.G.L.R. 83, 86 (“prestigious retail development”). The expression *puffery* does not include communications which the recipient is expected to take seriously: *Shaftsbury House (Developments) Ltd v Lee* [2010] EWHC 1484 (Ch) at [35].
- 35     35     This passage was cited with approval in *Hummingbird Motors Ltd v Hobbs* [1986] R.T.R. 276. Nor will a simple statement of intention which is not put into effect be treated as a misrepresentation: cf. below, para.9-016.
- 36     36     See *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd (No.2)* (1997) 87 B.L.R. 52.
- 37     37     See the authorities cited in para.9-006, above.
- 038     038     *Connolly Ltd v Bellway Homes Ltd* [2007] EWHC 895, [2007] All E.R. (D) 182 (Apr). The sentences in this paragraph were cited with approval in *Economides v Commercial Union Assurance Co Plc* [1998] Q.B. 587, by Simon Brown LJ at 598 (who considered that *Brown v Raphael* [1958] Ch. 636, below, para.9-011, fell into a different category) and Sir Iain Glidewell (who considered that the statement summarised that case accurately also), 608–609. Another way to put the same point is that if a person states that he holds an opinion that in fact he does not hold, or that he has an intention that in fact he does not have, he makes a false statement of fact. See Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.3-18.
- 39     39     *Smith v Land and House Property Corp* (1884) 28 Ch. D. 7.
- 40     40     [1958] Ch. 636; *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department* [1996] 1 Lloyd’s Rep. 200 (bank’s statement that a management was “respectable and trustworthy” a misrepresentation as it was contrary to the bank’s actual experience of the management). See also *Patterson v Landsberg & Son* (1905) 7 F. 675.
- 41     41     It is possible that *Smith v Land House Property Corp* (1889) 28 Ch. D. 7 was also decided on the basis that the vendor was impliedly representing that he had reasonable grounds for his belief, or at least that he knew of nothing which might be inconsistent with it: *Bennett* (1998) 61 M.L.R. 886, 888. See also *Highland Insurance Co v Continental Insurance Co* [1987] 1 Lloyd’s Rep. 109; *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department* [1996] 1 Lloyd’s Rep. 200; *Barings Plc (In Liquidation) v Coopers & Lybrand* [2002] EWHC 461 (Ch), [2002] 2 B.C.L.C. 410 at [50]–[51].
- 42     42     *Bisset v Wilkinson* [1927] A.C. 177; *Hummingbird Motors Ltd v Hobbs* [1986] R.T.R. 276. Further, there is no implication that the party giving the opinion has reasonable grounds for it if the facts justifying the opinion were stated: *Wilson and Sharp Investments Ltd v Falmouth*

- 43 *Property Investments Ltd Unreported 21 January 2019*, Master Davison at [23]. Permission to appeal on this point was refused, see [2019] EWHC 2108 (QB) at [34] (Sooke J). *[1998] Q.B. 587*. Simon Brown and Peter Gibson LJJ expressed the view that under the Marine Insurance Act 1906 s.20(5), which stated that a representation as to a matter of expectation or belief is true if it be made in good faith, there is no room for such an implication, doubting a dictum to the contrary by Steyn J in *Highlands Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep. 109, 112–113*. Sir Iain Glidewell preferred to leave the matter open. But see *Bennett (1998) 61 M.L.R. 886*; Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.3-17. See further below, paras 9-016 and 44-038. Section 20 was repealed when the Insurance Act 2015 came into force (see below, para.9-171): s.21(2).
- 44 *Kyle Bay Ltd (trading as Astons Nightclub) v Underwriters subscribing under policy 019057/08/01 [2006] EWHC 607 (Comm), [2006] All E.R. (D) 433 (Mar)*, Jonathan Hirst QC at [45]–[47], [52]–[54]. On appeal, this was accepted as the correct approach in principle: *[2007] EWCA Civ 57, [2007] 1 C.L.C. 164* at [31]; see below, para.9-012. Likewise, when a party had expressly stated that it was giving no representation as to the accuracy of the information provided, there was no implication that it had no further information suggesting that what was stated might not be correct. The question is what would the reasonable person in the context have inferred was being implicitly represented: *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [50]; affirmed [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*. There might be an implied representation that the information was supplied in good faith, but not one that the party knew of nothing that might possibly cast doubt on it: *[2006] EWHC 2887 (Comm)* at [60].
- 45 *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705* at [121].
- 46 *[1958] Ch. 636.*
- 47 *New Brunswick and Canada Ry and Land Co v Conybeare (1862) 9 H.L. Cas. 711; Anderson v Pacific Insurance Co (1872) L.R. 7 C.P. 65; Bisset v Wilkinson [1927] A.C. 177; Sanders v Gall [1952] Current Property Law 343.*
- 48 See *Reese River Silver Mining Co Ltd v Smith (1869) L.R. 4 H.L. 64*.
- 49 *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [50]; affirmed [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*. See also *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705*, at [120]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* (“In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee”: Hamblen J at [215]).
- 50 *Kyle Bay Ltd (t/a Astons Nightclub) v Underwriters Subscribing under Policy No.019057/08/01 [2007] EWCA Civ 57, [2007] 1 C.L.C. 164* at [33]–[35]; distinguishing *Wauton v Coppard [1899] 1 Ch. 92*. In that case the statement was by a vendor’s agent as to

the effect of a restrictive covenant to a lay person who, as a prospective purchaser, did not (to the knowledge of the vendor's agent) have a copy of the covenant. In *Hayward v Zurich Insurance Co Plc [2015] EWCA Civ 327* at [24] Underhill LJ drew a parallel with *Kyle Bay* in a case in which it was decided that a party to a settlement cannot claim to rescind the settlement even if it can now show that the claims put forward by the other side were in fact false, if at the time of the settlement it did not believe the claims put forward by the other side but was influenced by a fear that they might be believed by the court. The suggestion seems to be that claims made in negotiating a settlement should not necessarily be treated as statements of fact rather than contentions. However, the Supreme Court *[2016] UKSC 48, [2017] A.C. 142* allowed an appeal by the insurer (see below, para.9-042) and did not find the *Kyle Bay* case, which “involved unusual facts”, to be of assistance: at [41].

51 See below, paras 9-154 and 9-156.

52 *Highlands Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep. 109, 111–112; Sirius International Insurance Corp v Oriental Insurance Corp [1999] 1 All E.R. (Comm) 699, 709* (statements by reinsureds or brokers to reinsurers).

53 See *Sycamore Bidco Ltd v Breslin [2012] EWHC 3443 (Ch)* at [203]–[209] and *Idemitsu Kosan Co Ltd v Sumitomo Corp [2016] EWHC 1909 (Comm), [2016] 2 C.L.C. 297* at [14]–[20], declining to follow the decision in *Invertec Ltd v De Mol Holding BV [2009] EWHC 2471 (Ch)*. A warranty may carry an implicit statement of fact that the warrantor has done, or knows, nothing inconsistent with the warranty: *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd [2002] EWCA Civ 1235* at [23] (promise of an exclusive licence contained an implicit representation that no licence had been granted to anyone else at the date of the contract). See also *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* at [119] and [151]; *[2022] EWCA Civ 231* at [35]–[38] (appeal dismissed). It is also possible, though in practice unlikely, for a person to warrant the truth of a fact without making any representation at all, where they expressly agree to take the risk, however the facts may turn out.

54 *Kingscroft Insurance Co Ltd v Nissan Fire & Marine Ins Co Ltd [1999] 1 Lloyd's Rep. I.R. 603, 628* per Moore-Bick J, adding: “He is unlikely to be saying that he intends to perform the contract in accordance with its true construction whatever that may in due course be held to be ... In practice, therefore, the representation is likely in most cases to come down to no more than one of honesty in entering into the bargain”. See also *SK Shipping Europe Ltd v Capital VLCC 3 Corp, Capital Maritime and Trading Corp, “The C Challenger” [2022] EWCA Civ 231* at [48] (Males LJ: “I would hesitate to endorse the suggestion that there is a general rule that, merely by offering to contract, a party represents that it is able and willing to perform the contract, even with the qualification that the representation is limited to performance of the obligations which the party understands itself to be offering to undertake”).

55 *Idemitsu Kosan Co Ltd v Sumitomo Corp [2016] EWHC 1909 (Comm)* at [28]–[30]. In *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* it was held that the mere offer of a speed and consumption warranty did not amount to an implicit representation

as to the vessel's current or recent performance (at [129]); upheld, *[2022] EWCA Civ 231* at [57].

•56 *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm), [2016] 2 C.L.C. 297 at [17]. This assumes that the representee would have relied on the representation rather than just on the warranty: *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [150].

•57 *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch) at [133].

58 cf. para.9-008 above.

59 See below, paras 9-153 et seq.

60 As Jacob J put it in *Thomas Witter Ltd v TPB Industries Ltd* [1996] 2 All E.R. 573, 597, "where a man has been sold a pup, even if it is a warranted pup, there is nothing, unless the contract expressly says so, from the man also treating it as a misrepresented pup, if that was indeed the case. What he relied upon is a question of fact".

61 In *Thomas Witter Ltd v TPB Industries Ltd* [1996] 2 All E.R. 573, 596 Jacob J pointed out that in business acquisitions it is common practice to exclude liability for all but breach of warranty (see Knight, *The Acquisition of Private Companies and Business Assets*, 7th edn (1997)); and the warranty liability is frequently limited in amount. In *Leofelis SA v Lonsdale Sports Ltd* [2008] EWCA Civ 640, [2008] E.T.M.R. 63 the contract provided that the only remedy for breach of any warranty or representation which was expressly set out in the agreement was for breach of contract under the terms of the agreement: see at [134]. This provision was subject to s.3 of the Misrepresentation Act 1967 (see below, para.9-157) but the court said that had it been necessary to decide, it would have held that the clause was reasonable (at [137]–[139]).

62 In *Thomas Witter Ltd v TPB Industries Ltd* the contract stated that the seller "warrants and represents" the truth of certain statements: see [1996] 2 All E.R. 573, 584.

63 *Leofelis SA v Lonsdale Sports Ltd* [2008] EWCA Civ 640, [2008] E.T.M.R. 63 at [141].

64 *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [218].

65 *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887, [2007] 1 Lloyd's Rep. 264, per Toulson J at [54] (affirmed without comment on this point [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449). See also *Webster v Liddington* [2014] EWCA Civ 560 (party may warrant the accuracy of the information; may adopt it as his own; may represent that he believes on reasonable grounds that it is accurate; or may merely pass it on as material about which he has no knowledge or belief (at [46], Jackson LJ)). cf. *Rehman v Santander UK Plc* [2018] EWHC 748 (QB) ("unreasonable to conclude that, simply by passing on to an intended borrower or guarantor the result of the valuation exercise and then making facilities available, the bank somehow makes a representation about the accuracy or reliability of the valuation or the competence of the valuer": at [37]).

66 *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [153]–[157].

- 67 See *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459; *Angus v Clifford* [1891] 2 Ch. 449, 470; *Goff v Gauthier* (1991) P. & C.R. 388; *C21 London Estates Ltd v Maurice Macneill Iona Ltd* [2017] EWHC 998 (Ch) at [44] and *Inter Export LLC v Townley* [2018] EWCA Civ 2068, applying this paragraph in the 32nd edition (but in the *London Estates* case it was not shown that the representation was false). cf. *Lewin v Barratt Homes Ltd* [2000] Crim. L.R. 323 (a case under Property Misdescriptions Act 1991 s.1). As David Richards J said in *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch) at [197], it is difficult to see how a party could negligently, as opposed to fraudulently, misrepresent his own intentions. Nonetheless, the judge could see the possibility that a party might state its current intention yet negligently omit to reveal that his intention was qualified in that he had considered reviewing it at a later date: at [207].
- 68 *Re Shackleton Ex p. Whittaker* (1875) L.R. 10 Ch. App. 446; *Ray v Sempers* [1974] A.C. 370; *Re Gerald Cooper Chemicals Ltd* [1978] Ch. 262.
- 69 cf. *Brown v Raphael* [1958] Ch. 636 above, para.9-011.
- 70 *Smelter Corp of Ireland Ltd v O'Driscoll* [1977] I.R. 305.
- 71 See *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15, [2002] E.M.L.R. 27, 29; *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 1552 (TCC) at [160]; *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [198]; *Inter Export LLC v Townley* [2018] EWCA Civ 2068, applying this paragraph in the 32nd edition. A warranty as to certain facts may carry an implicit statement of fact that the warrantor has done, or knows, nothing inconsistent with the warranty: *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235 at [23] (promise of an exclusive licence contained an implicit representation that no licence had been granted to anyone else at the date of the contract). See also *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [119] and [151]; [2022] EWCA Civ 231 at [35]–[38] (appeal dismissed).
- 72 *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101 at [59].
- 73 [1958] Ch. 636; above, para.9-011.
- 74 See below, para.9-022.
- 75 [2002] EWCA Civ 15, [2002] E.M.L.R. 27 at [54].
- 76 *Laurence v Lexcourt Holdings Ltd* [1978] 1 W.L.R. 1128. In the criminal law the concept of an implied representation is widely relied upon in prosecutions under the *Theft Act 1968*; for instance, it has been held that a minicab driver who solicited a customer at a London airport, saying, “yes, I am an airport taxi”, and subsequently assured the customer that £27.50 was the “correct fare” was guilty of representing that he was an officially licensed taxi driver and that the fare was somehow at an officially approved rate: *R. v Banaster* [1979] R.T.R 113. See also below, para.9-022.
- 77 *IFE Fund SA v Goldman Sachs International* [2007] 1 Lloyd's Rep. 264, per Toulson J at [50] (affirmed without comment on this point [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449); *Merrill Lynch International v Amorim Partners Ltd* [2014] EWHC 74 (QB) at [43], referring to a dictum of Mance J in *Bankers Trust International v PT Dharmala Sakti Sejahtera* [1996] C.L.C. 518 at 531, cited above, para.9-008.

- 78 *Geest Plc v Fyffes Plc* [1999] 1 All E.R. (Comm) 672, 683. In *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, *The Times*, 5 April 2018 this test was described as helpful, but “there must be clear words or clear conduct of the representor from which the relevant representation can be implied” (at [132]). See further *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) at [84]–[85]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [215]; *Cavendish Corporate Finance LLP v KIMS Property Co Ltd* [2014] EWHC 1282 (Ch) at [113]; *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 471 (Comm) at [27] (that bank that is a member of the LIBOR panel enters into a financial transaction linked to LIBOR does not imply representation that nothing has been done in the past, or is now being done, by the bank, to manipulate the rate). Even when a reasonable representee would naturally assume that the true state of facts did not exist, the representee must have given conscious thought to the implied representation in order to satisfy the requirement of inducement; see below, para.9-041. In *Leeds City Council v Barclays Bank Plc and Newham LBC v Barclays Bank Plc* [2021] EWHC 363 (Comm), [2021] Q.B. 1027 Cockerill J remarked that the requirement that the representee be aware of the representation, as opposed to acting on their own assumption, is “of particular importance when considering implied representations.... if the representation was not understood to have been made... then inducement logically cannot be made out” (at [67]).
- 79 *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, [2018] 1 W.L.R. 3529 at [126]. “A Court will not (or is very unlikely to) imply a representation from conduct in terms which are vague, uncertain, imprecise or elastic”: *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [120] and [123]. Passive conduct may sometimes give rise to an implied representation but “the broader and more complex the alleged representations, the more active and specific the conduct must be to give rise to the implication”: [2019] EWHC 366 (Comm) at [157].
- 80 Below, paras 9-095—9-105.
- 81 [1964] A.C. 465; below, para.9-098.
- 82 [1976] Q.B. 801, below, para.9-102.
- 83 [1978] I.R.L.R. 497.
- 84 [1979] 2 Lloyd's Rep. 391; in the Court of Appeal (on costs only) [1981] 1 Lloyd's Rep. 434.
- 85 See also *Hagen v ICI Chemicals & Polymers Ltd* [2002] I.R.L.R. 31 at [98]–[103].
- 86 See Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.6-12.
- 87 *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [207].
- 88 *Beattie v Ebury* (1872) L.R. 7 Ch. App. 777, 802; *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, 560.
- 89 *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360, 362–363; *Oudaille v Lawson* [1922] N.Z.L.R. 259.

- 90 See *Solle v Butcher* [1950] 1 K.B. 671.
- 91 *Brikom Investments Ltd v Seaford* [1981] 1 W.L.R. 863.
- 92 *Reynell v Sprye* (1852) 1 De G.M. & G. 660; *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360; *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 K.B. 482.
- 93 *Hirshfeld v L.B. & S.C. Ry* (1876) 2 Q.B.D. 1; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch. 330; *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 K.B. 805.
- 94 (1867) L.R. 2 H.L. 149.
- 95 (1867) L.R. 2 H.L. 149 at 170.
- 96 *Laurence v Lexcourt Holdings Ltd* [1977] 1 W.L.R. 1128.
- 97 *Brikom Investments Ltd v Seaford* [1981] 1 W.L.R. 863. But cf. *China Pacific SA v Food Corp of India* [1981] Q.B. 403, 429 (reversed on different grounds [1982] A.C. 939) where an admission of liability was said to be a representation of law.
- 98 *Rashdall v Ford* (1866) L.R. 2 Eq. 750; *Harse v Pearl Life Assurance Co* [1904] 1 K.B. 558.
- 99 See also, below, paras 32-049—32-055.
- 100 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349. See below, para.32-052.
- 101 [2002] EWHC 2441(Ch). See also above, para.8-052.
- 102 cf. above, para.9-012. It has rightly been remarked that the reasons often given for refusing relief on the grounds of a mistake of law—for example, that it would be easy to claim a mistaken belief in the law and hard to disprove it—have much less weight when the mistake was the result of a misrepresentation by the other party: Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.3-31.
- 103 See Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.3-43.
- 104 *André & Cie SA v Ets Michel Blanc & Fils* [1977] 2 Lloyd's Rep. 166.
- 105 *Ward v Hobbs* (1878) 4 App. Cas. 13. In *Hurley v Dyke* [1979] R.T.R. 265, 303 Lord Hailsham suggested *Ward v Hobbs* might need reconsideration in the light of recent developments in negligence but expressed no concluded opinion. Certain statutes may impose duties of disclosure in particular circumstances: e.g. **Housing Act 1985** (as amended) s.125(4A): see

*Payne v Barnet LBC* (1998) 30 H.L.R. 295 (no duty at common law should be superimposed on statutory scheme).

- 106 [1902] 2 Ch. 421; cf. *Coleman v Myers* [1977] 2 N.Z.L.R. 225, and see also *Gething v Kilner* [1972] 1 W.L.R. 237; *Prudential Insurance Co Ltd v Newman Industries Ltd* [1981] Ch. 257, 295. Such conduct could constitute an offence under the Criminal Justice Act 1993 s.52, but s.63(2) provides that no contract shall be void or unenforceable by reason only of s.52.
- 107 *Moorgate Mercantile Co Ltd v Twitchings* [1977] A.C. 890.
- 108 See *Keates v Cadogan* (1851) 10 C.B. 591; *New Brunswick and Canada Ry and Land Co v Conybeare* (1862) 9 H.L. Cas. 711; *Smith v Hughes* (1871) L.R. 6 Q.B. 597; *Turner v Green* [1895] 2 Ch. 205; see also *Jewson & Son Ltd v Arcos Ltd* (1933) 39 Com. Cas. 59; *Wales v Wadham* [1977] 1 W.L.R. 199. This sentence of the text was cited with approval in *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397 at [465] and in *ING Bank NV v Ros Roca* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 at [92].
- 109 See e.g. below, para.9-181.
- 110 See below, paras 9-167 et seq. Whether the label uberrimae fidei is useful is discussed below, para.9-167.
- 111 See below, paras 9-096—9-097.
- 112 See below, para.9-193.
- 113 In certain circumstances failing to disclose information may be a criminal offence, e.g. Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) reg.12, replacing Timeshare Act 1992 s.1A (inserted by Timeshare Regulations 1997 (SI 1997/1081)).
- 114 See below, paras 9-097 and 9-193.
- 115 See above, para.9-018. The representation in *Spice Girls Ltd v Aprilia World Service BV, The Times, 5 April 2000, Ch D* (reversed in part on other grounds [2002] EWCA Civ 15), referred to in that paragraph, may equally well be interpreted as one of representation by conduct. There may also be a misrepresentation by conduct when a master agreement between the parties provides that each time one party enters a transaction under the agreement, it makes a representation that particular facts exist or have not occurred: see *TMT Asia Ltd v Marine Trade SA* [2011] EWHC 1327 (Comm). As with an implied representation, a representation by conduct must have been “actively present” to the representee’s mind in order to satisfy the requirement of inducement (see below, para.9-041). There is no separate rule for representations by conduct: *Leeds City Council v Barclays Bank Plc* and *Newham LBC v Barclays Bank Plc* [2021] EWHC 363 (Comm), [2021] Q.B. 1027 at [102] and [131]; indeed it must be possible to articulate in words what is being represented by conduct: at [132].
- 116 But it was necessary where the question was whether there is a representation in writing sufficient to satisfy the Statute of Frauds (Amendment) Act 1828 (Lord Tenterden’s Act) (see below, para.9-054): *Contex Drouzhba v Wiseman* [2007] EWCA Civ 1201, [2007] All E.R. (D) 293 (Nov) (representation implied by a written statement would suffice but representation by conduct would not).
- 117 *R. v Barnard* (1837) 7 Car. & P. 784.

- 118 *Ray v Sempers* [1974] A.C. 370.
- 119 *Walters v Morgan* (1861) 3 De G.F. & J. 718, 723. See also *Gill v M'Dowal* [1903] 2 Ir.R. 463.
- 120 *Re Shackleton Ex p. Whittaker* (1875) L.R. 10 Ch. App. 446; *Re Gerald Cooper Chemicals Ltd* [1978] Ch. 262; *Ray v Sempers* [1974] A.C. 370.
- 121 *Avon CC v Howlett* [1981] I.R.L.R. 447.
- 122 *R. v Williams* [1980] Crim. L.R. 589.
- 123 [1977] A.C. 177.
- 124 [1982] A.C. 449.
- 125 *Baglehole v Walters* (1811) 3 Camp. 154; *Schneider v Heath* (1813) 3 Camp. 506. For a case under the Trade Descriptions Act 1968, see *Cottee v Douglas Seaton (Used Cars) Ltd* [1972] 1 W.L.R. 1408. In *Taittinger v Allbev* (1993) 12 Tr.L.R. 165, a passing-off case, it was held that the labelling and “get-up” of a bottle constituted a false representation.
- 126 *Horsfall v Thomas* (1862) 1 Hurl. & C. 90, but it was held in this case that as the buyer had not examined the gun he had not been influenced by the misrepresentation. See below, para.9-041.
- 127 *Gordon v Selico Ltd* [1985] 2 E.G.L.R. 79, 83 (affirmed on other grounds [1986] 1 E.G.L.R. 71).
- 128 See *Hudson* (1969) 85 L.Q.R. 524.
- 129 [1962] 2 Lloyd's Rep. 249.
- 130 *Oakes v Turquand* (1867) L.R. 2 H.L. 325; *Barwick v English Joint Stock Bank* (1867) L.R. 2 Ex. 259; *Peek v Gurney* (1873) L.R. 6 H.L. 377, 403; *Arkwright v Newbold* (1881) 17 Ch. D. 301, 318; *R. v Kylsant* [1932] 1 K.B. 442; *Jewson & Sons Ltd v Arcos Ltd* (1933) 39 Com. Cas. 59; *R. v Bishirgian* [1936] 1 All E.R. 586.
- 131 *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 K.B. 805. Denning LJ said (at 809–810) that the company could not rely on the clause, but it seems that the majority took the view that because of the misrepresentation, the clause was never incorporated into the contract: see the judgment of Rix LJ in *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1 at [100]–[105]; see below, para.17-063.
- 132 *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, 787–789, affirmed on other grounds [1991] 2 A.C. 249; cf. *Hudson* (1969) 85 L.Q.R. 524.
- 133 *Traill v Baring* (1864) 33 L.J. Ch. 521; *With v O'Flanagan* [1936] Ch. 575; *Ray v Sempers* [1974] A.C. 370; *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [208]–[212]; cf. *Wales v Wadham* [1977] 1 W.L.R. 199 (see below, para.9-183). It has been said that if a person who has made a representation of fact which, before the contract is made, he discovers to be untrue, he is not fraudulent in failing to correct the representation, as he will not be dishonest: *Thomas Witter Ltd v TBP Industries Ltd* [1994] Tr.L.R. 145. It is submitted that there may still be fraud if the person knows that he should tell the other party but fails to do so; see (1995) 111 L.Q.R. 385; *Abu Dhabi Investment Co v H Clarkson and Co Ltd* [2007] EWHC 1267 (Comm) at [232] (reversed on other grounds [2008] EWCA Civ 699). A failure to reveal that a fact stated was no longer true was held to be fraudulent in *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 1552 (TCC), 125 Con. L.R. 171; and see *FoodCo UK LLP (t/a Muffin Break) v Henry Boot*

*Developments Ltd [2010] EWHC 358 (Ch)* at [213]–[214] (fraud if knows of change and of its significance). If a senior executive of a company knows that a forecast has been falsified by events to which he is privy but remains silent intending that the forecast should be relied on by persons to whom the forecast is directly communicated, dishonesty on the part of that individual will have been proved without it being necessary distinctly and separately to show a conscious awareness of a duty to correct the statement: *GG 132 Ltd v Hampson Industries Plc [2011] EWHC 1137 (Comm)* at [43]. Where statements in listing particulars or in a prospectus become incorrect, supplementary particulars or a supplementary prospectus may have to be issued: *Financial Services and Markets Act 2000 ss.81, 87G* (as amended by the Financial Services and Markets Act 2000 (Prospectus) Regulations 2019 (SI 2019/1043)). See further below, para.9-107.

- 134 *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 26* at [60]; *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*, see at [35], [38] and [74]. See above, para.9-012.
- 135 See *Cramaso LLP v Viscount Reidhaven's Trustees [2014] UKSC 9, [2014] A.C. 1093* at [16]–[23]; *Inter Export LLC v Townley [2018] EWCA Civ 2068* at [30]–[31].
- 136 Above, para.9-025.
- 137 *Davies v London Provincial Marine Insurance Co (1878) 8 Ch. D. 469.*
- 138 *Ray v Sempers [1974] A.C. 370*. But contrast *Wales v Wadham [1977] 1 W.L.R. 199, 211* (wife not obliged to reveal change of intention not to marry; overruled on another ground but apparent approval given to the decision on this point, *Livesey v Jenkins [1985] A.C. 424, 439*); see Cartwright, *Unequal Bargaining*, pp.84–88. The fact that the representor has come under a duty to disclose the change does not mean that the representor will have a remedy even though they were not aware of the representation: “an allegation of continuing breach is not some sort of philosophers' stone which can take a misrepresentation claim and turn it into a non-disclosure claim”: *Leeds City Council v Barclays Bank Plc* and *Newham LBC v Barclays Bank Plc [2021] EWHC 363 (Comm), [2021] Q.B. 1027* at [139], per Cockerill J.
- 139 This is dealt with fully below, paras 9-084 et seq.
- 140 *Corner v Munday [1987] C.L.Y. 479.*
- 141 Below, paras 9-169 et seq.
- 142 *Cory v Patton (1872) L.R. 7 Q.B. 304*; cf. *Berger and Light Diffusers Pty Ltd v Pollock [1973] 2 Lloyd's Rep. 442, 460–461.*
- 143 *Briess v Woolley [1954] A.C. 333.*
- 144 *Cramaso LLP v Viscount Reidhaven's Trustees [2014] UKSC 9, [2014] A.C. 1093.*
- 145 *[2014] UKSC 9* at [56].
- 146 *Cramaso LLP v Viscount Reidhaven's Trustees [2014] UKSC 9, [2014] A.C. 1093* at [20]. On inducement see paras 9-041 et seq.
- 147 *Mortgage Express v Countrywide Surveyors Ltd [2016] EWHC 224 (Ch)* at [194], referring to *Arnison v Smith (1889) 41 Ch. D. 348, 370, 373* and *Abu Dhabi Investment Co v H Clarkson and Co Ltd [2007] EWHC 1267 (Comm)*.

## **(b) - Statement By or Known to Other Party**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 2. - What Constitutes Effective Misrepresentation<sup>20</sup>**

**(b) - Statement By or Known to Other Party**

### **The representor**

<sup>130</sup> In order to ground relief to a person who has entered into a contract as a result of a misrepresentation, it is normally necessary that the misrepresentation should have been made either by the other party to the contract,

<sup>148</sup>

 or by his agent acting within the scope of his authority,

<sup>149</sup>

 or by someone with whom the other party shared a joint design to defraud and who thus was a joint tortfeasor

<sup>150</sup>

 ; or that the other party indicated that he approved or adopted a representation made by a third person

<sup>151</sup>

 ; or that the other party had notice of the misrepresentation. Notice may be actual or constructive.

<sup>152</sup>

**U** A person who has been induced to enter into a contract with A as a result of a misrepresentation made to him by B and of which A had no notice has no ground of relief against A unless B was A's agent.

<sup>153</sup>

**U** It is, however, not necessary to show that the misrepresentor was the agent of the other contracting party for the purpose of concluding the contract, or even for the purpose of conducting negotiations; it is sufficient if the misrepresentor was the agent of the other contracting party simply for the purpose of passing on the misrepresentation to the representee.

<sup>154</sup>

**U**

## Third party representor may be liable in damages

131 Although, apart from cases of notice or of agency, a misrepresentation made by one person will not find relief against another, nevertheless where the representee has been induced to enter into a contract with a third party, the representor may himself be liable in damages to the representee, either in tort, if the misrepresentation was fraudulent or, in some cases, negligent <sup>155</sup> or on the grounds of a collateral contract between the representor and the representee. <sup>156</sup>

## Sureties and misrepresentation by debtor

132 In a number of cases a recurring situation has arisen. A husband has wanted to borrow money from a creditor who has refused to proceed without having a guarantee secured by a charge over the matrimonial home, or similarly a charge without a guarantee, from the wife. The wife's consent has been secured by misrepresentation <sup>157</sup> or undue influence <sup>158</sup> by the husband. Can the creditor enforce the guarantee? In a number of cases it was held that if the creditor had "left it to the husband" to get the wife's signature, the husband was acting as agent for the creditor <sup>159</sup> and it was therefore responsible for his misconduct. In *Barclays Bank Plc v O'Brien*, <sup>160</sup> a case where the husband had by misrepresentation secured his wife's signature to a charge over the matrimonial home to secure the debts of his business, this approach was rejected as artificial. However, the bank was prevented from enforcing the charge on the ground that it had constructive notice of the husband's misrepresentation even though it had no actual knowledge of it. Lord Browne-Wilkinson, delivering the only full speech in the House of Lords, pointed out that there is a substantial risk that the wife may act as surety when the transaction is not to her advantage because of some legal or equitable wrong by the husband. Where the creditor is aware that the debtor and the surety are husband and wife, and the transaction is on its face not to the financial advantage of

the surety as well as of the debtor, the creditor will be fixed with constructive notice of any undue influence, misrepresentation or other legal wrong by the debtor unless it has taken reasonable steps to satisfy itself that the surety has entered into the obligation freely and with knowledge of the true facts.<sup>161</sup> The decision in *Barclays Bank v O'Brien*, and many other decisions that followed it, must be read in the light of the subsequent decision of the House of Lords in *Royal Bank of Scotland v Etridge (No.2)*.<sup>162</sup> That case applied a similar approach wherever “the relationship between the surety and the debtor is non-commercial”, and considered in detail the steps that the lender should take if, instead of itself ensuring that the wife was not the victim of misrepresentation or undue influence, it chooses to rely on a confirmation from a solicitor that the wife has received advice.<sup>163</sup> Since *Etridge* and most of the decisions following *O'Brien* were cases of alleged undue influence rather than of misrepresentation, the topic is treated in detail in Ch.10.<sup>164</sup>

## Application to cases of misrepresentation

- 133 As far as cases of misrepresentation by the debtor are concerned, the bank cannot rely on a solicitor to give advice if it has material information which is not made available to the solicitor. Lord Nicholls said:

“... the solicitor should obtain from the bank any information he needs. If the bank fails for any reason to provide information requested by the solicitor, the solicitor should decline to provide the confirmation sought by the bank ...<sup>165</sup> It should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. What is required must depend on the facts of the case. Ordinarily this will include information on the purpose for which the proposed new facility has been requested, the amount of the husband's indebtedness, the amount of his current overdraft facility, and the amount and terms of any new facility. If the banks' request for security arose from a written application by the husband for a facility, a copy of the application should be sent to the solicitor ... Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband ... If such a case occurs the bank must inform the wife's solicitor of the facts giving rise to its belief or suspicion.”<sup>166</sup>

Where there has been a misrepresentation by the husband of the kind which occurred in *O'Brien*'s case (as to the extent and duration of the guarantee), there should be no problem, as the solicitor will always be informed of the terms of the guarantee or charge. What might be more problematic is if there has been some misrepresentation by the husband as to some other matter, such as the state of his business affairs,<sup>167</sup> but it is submitted that the information required of the bank should reveal many such misrepresentations. Lord Nicholls said that the protection of surety wives did not require a review of the rule that a creditor does not normally have any duty to disclose to a

surety any unusual risks relating to the debtor,<sup>168</sup> let alone normal risks. The possibility that the husband has lied to both the bank and his wife will remain. Moreover, if there is a relationship of trust and confidence between the husband and the wife, the husband may be required to disclose relevant information to the wife.<sup>169</sup>

## Effect of constructive notice

- <sup>134</sup> After *O'Brien*'s case there was some uncertainty as to the position when, as in that case, the husband had misrepresented the extent of the charge and the bank had constructive notice of the misrepresentation. Is the charge completely unenforceable against the wife or enforceable to the extent she was given to believe? (In *O'Brien*'s case it seems that £60,000, the sum which the wife had been led to believe was the limit of her liability, had been paid before the final decision, which did not discuss its fate.) In *TSB Bank Plc v Camfield*<sup>170</sup> the Court of Appeal held on similar facts that the charge was completely unenforceable. As against the husband the wife would have the right to set aside the whole charge.<sup>171</sup> The bank took subject to the equity in favour of the wife and could not be in a better position. However, in that case the wife had not received any benefit under the agreement. If she had done so, her right to rescind would have been conditional on her making counter-restitution of the benefit received.<sup>172</sup> Where a later security is unenforceable by reason of undue influence, that may still leave an earlier, untainted one in force.<sup>173</sup>

## Need the party who made the misrepresentation be a party to the transaction?

- <sup>135</sup> In *TSB Bank Plc v Camfield*<sup>174</sup> the bank was treated as having constructive notice of the wife's right to set aside the charge as against the husband. What would be the position if the husband were not a party to the charge? As a matter of principle, it seems that a party to a contract who has actual notice that the other party has entered the contract as the result of a misrepresentation by a third party should be unable to enforce it, and it is submitted that the same should apply in cases of constructive notice. In *Banco Exterior Internacional SA v Thomas*<sup>175</sup> (a case of alleged undue influence) Sir Richard Scott VC expressed the view that it could not have made a difference if in O'Brien's case the wife had been sole owner of the home, but the case was decided on other grounds, Roch LJ reserving this question. More recent authority treats the two situations in the same way.<sup>176</sup>

## Procedure

- 136 It will be for the wife or other surety to show that the bank had notice of the non-commercial relationship between her and the debtor, and that the transaction was, on its face, not to her advantage. The burden will then be on the bank or other lender to show that it has taken sufficient steps to prevent it being fixed with constructive notice.<sup>177</sup>

## Footnotes

- 1 See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- 20 The general requirements for misrepresentation (in the context of an action for damages for fraud) were set out by Jacobs J in *Vald Nielsen Holding A/S v Baldorino [2019] EWHC 1926 (Comm)* at [130]–[159]; and see further *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* at [112]–[122].
- 148 *Hasan v Willson [1977] 1 Lloyd's Rep. 431.*
- 149 But an agent who seeks to enforce in his own name a contract made by him as such is affected by a misrepresentation made by his principal: *Garnac Grain Co Inc v H.M. Faure & Fairclough Ltd [1966] 1 Q.B. 650*, reversed on the facts *[1966] 1 Q.B. 658* and *[1968] A.C. 1130n*. See also *U.B.A.F. Ltd v European American Banking Corp [1984] Q.B. 713.*
- 150 *Avonwick Holdings Ltd v Azitio Holdings Ltd [2020] EWHC 1844 (Comm)* at [386], citing Clerk & Lindsell on Torts, 23rd edn (2020), para.17-10.
- 151 See *Ivy Technology Ltd v Martin [2022] EWHC 1218 (Comm)* at [351]–[354].
- 152 *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180*; *Bank of Credit and Commerce International SA v Aboody [1990] 1 Q.B. 923, 973*; *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* (undue influence: see below, para.10-139). On constructive notice see further below, para.9-032.
- 153 For an extreme example, see *Foote v Hayne (1824) 1 Car. & P. 545* (defendant liable for breach of promise of marriage despite fraud of plaintiff's father with respect to plaintiff's illegitimate child).
- 154

*Pilmore v Hood (1838) 5 Bing. N.C. 97.* An agent may have authority to make representations in relation to a particular transaction even though he has no authority to conclude the transaction: *First Energy v HIB [1993] 2 Lloyd's Rep. 194, 204; MCI Worldcom International Inc v Primus Telecommunications Plc [2004] EWCA Civ 957, [2004] 2 All E.R. (Comm) 833* at [25]. See also *Avonwick Holdings Ltd v Azitio Holdings Ltd [2020] EWHC 1844 (Comm)* at [390]–[395]. For examples see para.21-015.

- 155 That is, if the case falls within the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465*, below, para.9-098.
- 156 See, e.g. *Wells (Merstham) Ltd v Buckland Sand & Silica Co Ltd [1965] 2 Q.B. 170*, below, para.15-021.
- 157 e.g. *Kings North Trust Ltd v Bell [1961] 1 W.L.R. 119*.
- 158 e.g. *CIBC Mortgages Plc v Pitt [1994] 1 A.C. 200*.
- 159 See *Coldunell Ltd v Gallon [1986] Q.B. 1184*.
- 160 [1994] 1 A.C. 180.
- 161 [1994] 1 A.C. 180, at 196.
- 162 [2001] UKHL 44, [2002] 2 A.C. 773. This case and seven other appeals were heard together.
- 163 [2001] UKHL 44 at [87].
- 164 See below, paras 10-139 et seq. The principles laid down in the *Etridge* cases apply equally when there has been misrepresentation by the debtor: *Royal Bank of Scotland Plc v Chandra [2011] EWCA Civ 192* at [30]; *Annulment Funding Co Ltd v Cowey [2010] EWCA Civ 711* at [64].
- 165 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773*, at [67], per Lord Nicholls, with whose speech the rest of the House concurred: see below, para.10-144.
- 166 [2001] UKHL 44 at [79]. Lord Nicholls pointed out that the bank may need to get the customer's consent to the circulation of this confidential information and, if consent is not forthcoming, the transaction will not be able to proceed. The steps described were said to be applicable to future transactions: at [80].
- 167 cf. *Massey v Midland Bank Plc [1995] 1 All E.R. 929*.
- 168 *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department [1996] 1 Lloyd's Rep. 200; Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [81]; below, para.9-186.
- 169 See below, paras 9-193 and 10-095.
- 170 [1995] 1 W.L.R. 430. See further below, para.9-135.
- 171 This was said to be implicit in *Misrepresentation Act 1967 s.2(2)*, which also implies that the court had no discretion save under that subsection. (On partial rescission see below, para.9-135.) The subsection does not apply as between a misrepresentee and a third party.
- 172 *Dunbar Bank Plc v Nadeem [1998] 3 All E.R. 876; Midland Bank Plc v Greene (1995) 27 H.L.R. 350*. See further below, paras 9-135 and 10-133.
- 173 *Barclays Bank Plc v Caplan [1998] 1 F.L.R. 532*.
- 174 [1995] 1 W.L.R. 430.
- 175 [1997] 1 W.L.R. 221.

- 176 *Royal Bank of Scotland v Etridge (No.2) [1998] 4 All E.R. 705, CA, 717–718; [2001] UKHL 44* at [39]. See also *Proksch* [1997] R.L.R. 71 and below, para.10-155.
- 177 *Barclays Bank Plc v Boulter [1999] 1 W.L.R. 1919*. Lord Hoffmann, delivering the only full judgment, said that enough facts must be pleaded to give rise to the presumption of constructive notice; but it would not be adequate to rely on inferences derived from statements tucked away in documents that were pleaded. However, the Court of Appeal should be slow to intervene in the decision that an arguable defence had been raised: *National Westminster Bank Plc v Kostopoulos, The Times, 2 March 2000*.

## (c) - Who May Rely on a Misrepresentation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 2. - What Constitutes Effective Misrepresentation<sup>20</sup>

(c) - Who May Rely on a Misrepresentation

### The representee or person intended to act on the representation

<sup>137</sup> In order to be entitled to relief in respect of misrepresentation, the person seeking relief must be able to demonstrate that he is a representee; for, subject to the transmission by operation of law of claims on death, bankruptcy and assignment, the person or persons who in law come within the category of representees are alone entitled to a remedy. To put the matter another way, the claimant must show that it was intended that he should act on the representation, rather than it being aimed solely at someone else.<sup>178</sup> There may be said to be three types of representees<sup>179</sup>: first, persons to whom the representation is directly made and their principals; secondly, persons to whom the representor intended or expected the representation to be passed on<sup>180</sup>; and thirdly, members of a class at which the representation was directed.<sup>181</sup> If the representation is directed at a particular class of persons, the alleged representee must be able to bring himself within that class. *Peek v Gurney*<sup>182</sup> illustrates this point. The plaintiffs bought shares in the market in reliance on the terms of a fraudulent prospectus issued by the promoters. The House of Lords held that the plaintiffs could not recover from the promoters: the purpose of issuing a prospectus was said to be to induce people to apply for shares, and not to induce them to buy in the market shares already issued; therefore the function of the prospectus was exhausted with the allotment, and the plaintiffs could not show that they came within the class of persons at which it was directed.

<sup>183</sup>

**U** Similarly, in *Gross v Lewis Hillman Ltd*<sup>184</sup> it was held that the right of a purchaser of certain land to rescind the contract for misrepresentation did not “run with the land” so as to be available to a subsequent purchaser; the subsequent purchaser was not himself a representee of the original vendor. On the other hand, where a person makes a false statement in a document (such as a bill of lading) which he knows is going to be passed on to other people and relied on by them, any person who does in fact rely on the document will be a representee.<sup>185</sup> Nor is it always necessary that the actual representation should reach the representee. If a person asks an agent to find some property for him, and the agent, relying on the fraudulent inducements of the vendor, recommends the vendor’s property, the buyer will be entitled to relief for misrepresentation even though the agent did not pass on the actual fraudulent statements.<sup>186</sup>

## Tort actions for misrepresentation

- 138 In tort actions based on negligent misrepresentation, there seems to be a tendency to apply rules which may be somewhat more favourable to a party claiming to be a representee. This is because in such actions the defendant’s liability turns on whether he owed a duty of care to the claimant, and that in turn may depend largely upon whether he ought to have foreseen that the statement would be acted upon by the claimant. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>187</sup> a case of negligent misrepresentation in tort, the plaintiffs asked their bankers to obtain a reference from the defendants, who were also bankers, about a client with whom the plaintiffs were proposing to do business. Although the action failed on other grounds, it was held that it was no defence that the defendants did not know anything about the plaintiffs personally, for it was enough that they must have realised that the reference was wanted by some customer of the bank who would most probably act upon it. The Australian High Court has held that a bank giving a reference to another bank must have known that the reference would be passed on to the second bank’s client even though it was prefaced with the words “[t]his opinion is confidential and for your private use”.<sup>188</sup> In *Smith v Eric S. Bush*<sup>189</sup> a surveyor instructed by a building society to value a house for mortgage purposes knew that the prospective purchaser, who had in effect paid for the valuation, would probably rely on it in deciding whether or not to purchase. The surveyor was liable in tort to the purchaser even though the purchaser’s application form for the mortgage contained a disclaimer of responsibility on the part of the surveyor towards the purchaser; the clause was held not to be fair and reasonable under the *Unfair Contract Terms Act 1977*.<sup>190</sup> It would seem, therefore, that it is sufficient if the representor either intended the representee to act on the statement or at least should have realised that he would probably do so.<sup>191</sup> On the other hand, in *Caparo Industries Plc v Dickman*<sup>192</sup> it was held that there will be no liability in tort for negligent misrepresentation unless the maker of the statement knew that the statement would be communicated to the person relying on it, either as an individual or as a member of a specified class, specifically in connection with a particular transaction or a transaction of a particular kind.<sup>193</sup> In relation to misrepresentation as between contracting parties, the second requirement appears to mean that the misrepresentation

must have been made in connection with the contract in respect of which relief is sought, or at least that reliance on the representation in connection with the contract was likely.

## Intention

<sup>139</sup> It is also sometimes said that a misrepresentation will not be effective to create liability for deceit unless it was intended to be acted on by the representee.

<sup>194</sup>

**U** If this means no more than that the representee cannot complain unless the misrepresentation was addressed to him, or to a class of persons to whom he was one, the statement is doubtless correct. This point has been dealt with earlier.

<sup>195</sup>

**U** But if the statement that the representor must have intended the representee to act on the representation means that the representor will not be liable if he did not intend that the person to whom he was deliberately giving the false information should act on it at all, or not in the way he did, the proposition must be treated with some caution. First, it seems that any requirement of intention applies only to cases of fraud

<sup>196</sup>

**U** and perhaps (because of the “fiction of fraud”) to cases in which it is claimed that the misrepresentor is liable in damages under [Misrepresentation Act 1967 s.2\(1\)](#).

<sup>197</sup>

**U** In cases of liability in tort for negligence, the test is one of reasonable foreseeability.

<sup>198</sup>

**U** It is submitted in cases in which the claimant seeks to rescind on the grounds of a non-fraudulent misrepresentation it will suffice that the misrepresentor should have realised that the misrepresentee might, not unreasonably, act on the representation, as then the statement will be one on which the misrepresentee was entitled to rely.

<sup>199</sup>

**U** Secondly, even in fraud cases the authorities are not clear on whether it suffices that it must have been obvious that the claimant or someone in his position might rely on the statement. In *Cullen v Thomson*

<sup>200</sup>

**U** three company directors were responsible for reading a report to a shareholders’ meeting which contained a completely fraudulent account of the company’s financial condition. It seems probable that the report was merely intended to conceal the company’s financial condition from

the shareholders, but the plaintiff, himself a shareholder, purchased additional shares in reliance on this report. It was held that the directors were liable for their fraudulent misrepresentations if they were made:

“... with the real intent to cause the [representee] to act on that representation, or under such circumstances as they must have supposed would probably induce a person in the situation of the [representee] to act upon it.”

<sup>201</sup>



In *Tackey v McBain*

<sup>202</sup>

**U** it was held that a manager of a company who said that he had no information to a broker about an important find of oil when in fact he did was not liable to a party who as a result sold his shares at a low price, whether or not the plaintiff was within the class to whom the statement was addressed, because the manager did not intend anyone to act as the plaintiff did and therefore had no fraudulent intent.

<sup>203</sup>

**U** The likelihood of reliance was not discussed.

**40** Thus it is possible that a representor may escape liability for damages by proving that he genuinely had no intention that the representee should act on the statement, for example if a vendor says something untrue about a property honestly believing that the purchaser will not rely on it at all but will get his own survey and inevitably discover the truth. But we will see that the law seems to take a harsh approach to fraud, not even requiring that the fraud be a “but for” cause of the representee entering the contract.<sup>204</sup> In the light of that, it is doubtful whether a court would allow a party who had knowingly made a false statement to another to rely on a defence that the representee was not meant to act on the statement unless the representee’s action was quite unforeseeable. Further, it is unclear whether “intention” in the sense discussed needs to be shown when the claimant is seeking to rescind on the basis of fraudulent misrepresentation.<sup>205</sup>

## Footnotes

**1** See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).

**20** The general requirements for misrepresentation (in the context of an action for damages for fraud) were set out by Jacobs J in *Vald Nielsen Holding A/S v Baldorino [2019] EWHC 1926*

(*Comm*) at [130]–[159]; and see further *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* at [112]–[122].

178 Compare below, para.9-039.

179 See *Swift v Winterbotham (1873) L.R. 8 Q.B. 244, 253*; the rule there stated was applied in *Richardson v Sylvester (1873) L.R. 9 Q.B. 34, 36*; see also *Commercial Banking Co of Sydney Ltd v R.H. Brown & Co (1972) 126 C.L.R. 13*, below, para.9-038.

180 This category includes third persons to whom the original representee passes on the representation to the knowledge of the representor (see *Pilmore v Hood (1838) 5 Bing.N.C. 97* which was applied in *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd [2001] Q.B. 488, CA; Yianni v Edwin Evans & Sons [1982] Q.B. 438*), but excludes persons to whom the representor does not intend any communication to be made (see *Peek v Gurney (1873) L.R. 6 H.L. 377*), unless (semble) he ought to foresee such communication, see below.

181 The class may amount to the public at large (cf. *R. v Silverlock [1984] 2 Q.B. 766*), for if a representation is made to the public generally with the intention that it should be acted upon, any member of the public may be a representee, though it does not follow that a legal remedy exists in respect of it. This is particularly so in cases of liability in tort for negligence, where (even if any member of the public is a representee) the absence of a duty of care may be fatal to a claim for damages, below, paras 9-098—9-100.

182 (*1873 L.R. 6 H.L. 377*.

•183 In *Al Nakib Investments Ltd v Longcroft [1990] 1 W.L.R. 1390* the approach in *Peek v Gurney* was applied in a case of alleged negligent misstatement. It might be thought that the actual decision in *Peek v Gurney* would no longer be the common law because a prospectus today is intended to be addressed to would-be purchasers in the market just as much as to purchasers from the company, but in *Taberna Europe CDO II Plc v Selskabet [2016] EWCA Civ 1262, [2017] Q.B. 633* Moore-Bick LJ said (at [11]) that “In an age when most commercial documents exist primarily in electronic form and can be made available to a wide audience at the touch of a button it is important not to allow inroads to be made too easily into the principles enunciated in cases such as *Peek v Gurney* … In order for a representation in a document to be actionable at the suit of the recipient there has to be a connection between the maker and the recipient of a kind that enables the court to be satisfied that the maker was intending the recipient to rely on the document in a particular way”. On the facts, the defendant had encouraged the party selling the investments to direct the investor to the information on the defendant’s website. Now, however, under *Financial Services and Markets Act 2000 s.90*, compensation is payable to any person who has acquired securities relying on incorrect or incomplete statements in the prospectus or listing particulars. See Davies, Worthington and Hare (eds), *Gower: Principles of Modern Company Law*, 11th edn (2021), paras 25-033—25-034 and below, para.9-107.

184 [*1970 Ch. 445, 460*.

185 See, e.g. *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 Q.B. 621*.

186 *Gross v Hillman Ltd [1970] Ch. 445, 461*. This paragraph was quoted in *Brown v InnovatorOne Plc [2012] EWHC 1321 (Comm)* at [883].

187 [*1964 A.C. 465*.

- 188 *Commercial Banking Co of Sydney Ltd v R.H. Brown & Co* (1972) 126 C.L.R. 13.
- 189 [1990] 1 A.C. 831.
- 190 s.2(2); see above, para.3-073.
- 191 cf. *McCullagh v Lane Fox and Partners Ltd* [1996] 1 E.G.L.R. 35, where at the time the information was given the surveyor did not know that the purchaser would act without getting his own survey, and by the time the surveyor did know he had issued a disclaimer.
- 192 [1990] 2 A.C. 605, below, para.9-099.
- 193 cf. *Morgan Crucible Co Plc v Hill Samuel Bank Ltd* [1991] Ch. 295; *Galoo Ltd (In Liquidation) v Bright Grahame Murray* [1994] 1 W.L.R. 1360.
- 194 Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.5-19; Compare Clerk & Lindsell on Torts, 23rd edn (2020), para.17-31.
- 195 See above, para.9-037.
- 196 Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.3-52. In a case of fraud it is necessary only that the representor intended the representation to be acted on: *Goose v Wilson Sandford (No.2)* [2000] All E.R. (D) 324 at [48]; *Mead v Babington (formerly t/a Babington Estate Agents)* [2007] EWCA Civ 518 at [16].
- 197 See below, para.9-087; *Banque Keyser Ullman SA v Skandia (UK) Insurance Ltd* [1990] 1 Q.B. 665, 790 (affirmed on other grounds [1991] 2 A.C. 249).
- 198 See above, para.9-038.
- 199 See above, para.9-008.
- 200 (1862) 6 L.T. 870.
- 201 (1862) 6 L.T. 870, 874.
- 202 [1912] A.C. 186, PC.
- 203 See also *Banque Keyser Ullman SA v Skandia (UK) Insurance Ltd* [1990] 1 Q.B. 665, 790 (affirmed on other grounds [1991] 2 A.C. 249). In *Gabriel v Little* [2013] EWCA Civ 1513 it was held that “whilst the motive of the representor is irrelevant, an intention to influence the mind of the representee must be shown if the requisite dishonest intention is to be established” (at [33]).
- 204 Below, para.9-047.
- 205 It may matter whether the misrepresentation was fraudulent or innocent for the purposes of Misrepresentation Act 1967 s.2(2): below, para.9-112.

## **(d) - Inducement**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 2. - What Constitutes Effective Misrepresentation<sup>20</sup>**

**(d) - Inducement**

**Inducement: representee unaware of representation or given correct information**

**D** It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee.

<sup>206</sup>

**U** It follows that if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made,

<sup>207</sup>

**U** or because he was not influenced by it,

<sup>208</sup>

**U** he has no remedy.

<sup>209</sup>

**U** Thus in *Horsfall v Thomas*

<sup>210</sup>

**U** a seller delivered to a buyer a gun which was defective, for after being fired it exploded, and the buyer was injured; the buyer had not examined the gun, but he alleged that the sale had been procured by fraudulent misrepresentation and that the defect had been concealed. The court

rejected his claim because, if any attempt to conceal the defect had been made, it had had no effect on the buyer's mind because he had never examined the gun.

211

**U** Where an estate agent's particulars misrepresented the size of a garage, and the buyer had examined the whole property thoroughly on two separate occasions, it was held that the misrepresentation had had no effect.

212

**U** A defence may be made out if the truth was known to the agent of the claimant, at least where the facts had deliberately been communicated to the agent.

213



## Belief in truth of statement not necessary

142 In some cases the requirement of inducement may not be satisfied because the misrepresentee knew that the statement was false,<sup>214</sup> but it is not necessary that the misrepresentee believed that the claim made was true. In *Hayward v Zurich Insurance Co Plc*<sup>215</sup> the Supreme Court held that a settlement of an insurance claim could be avoided by the insurer when it discovered that the amount of loss had been exaggerated fraudulently, even though at the time of the settlement the insurer had doubts over the extent of the claim. It was sufficient that the false claim, which might influence the court that would fix the amount of recovery,<sup>216</sup> influenced the insurer in the sum offered in settlement.<sup>217</sup> The question is one of fact.<sup>218</sup>

## Representee would have entered contract if no representation

143 The test is whether the misrepresentee would have entered the contract had the representation not been made, rather than what he would have done had he known the truth.<sup>219</sup> If the representee would have entered the contract without making further enquiries that would have revealed the true situation, the "but for" test is not satisfied.

220



## Burden of proof

- ¶44 The burden of proving that the claimant's decision to enter the contract was not induced by a misrepresentation normally lies on the defendant. In previous editions of this work it was stated that:

“The burden of proving that the claimant had actual knowledge of the truth, and therefore was not deceived by the misrepresentation, lies on the defendant; if established, knowledge on the part of the representee is a complete defence, because he is then unable to show that he was misled by the misrepresentation.”<sup>221</sup>

This statement was cited in *Hayward v Zurich Insurance Co Plc*.<sup>222</sup> The Supreme Court did not accept that knowledge of the falsity was always a defence: its decision shows that the question is whether the claimant's decision was induced by the misrepresentation, not necessarily whether the claimant suspected or possibly even knew the statement to be untrue.<sup>223</sup> The Court did not comment explicitly on the burden of proof but it referred to “rebutting” the presumption of inducement that arises (as a matter of fact) once it has been shown that the false statement was material.<sup>224</sup> On the other hand Lord Clarke said that even in a case in which the claimant knows that the representation was a lie, it “may be able to establish inducement on the facts”.<sup>225</sup> This suggests that the question of the burden of proof is an evidential one, not a rule of law; and this has been confirmed by the Court of Appeal.<sup>226</sup>

## Need not be sole inducement

- ¶45 It is not necessary that the misrepresentation should be the sole cause which induced the representee to make the contract. It is sufficient if it can be shown to have been one of the inducing causes.<sup>227</sup> Thus in *Edgington v Fitzmaurice*<sup>228</sup> the plaintiff was induced to take debentures in a company partly because of a misrepresentation in the prospectus, but also because of a mistaken belief of his own that the debentures conferred a charge on the company's property. He was held to be entitled to have the contract rescinded, and Cotton LJ said, “[i]t is not necessary to show that the misstatement was the sole cause of his acting as he did”.<sup>229</sup> The plaintiff appears to have agreed to take the debentures because of a combination of the misrepresentation and his own mistake.<sup>230</sup> What is required is that the misrepresentee would not have entered the contract but for the misrepresentation.<sup>231</sup>

## “But for” causation normally required

- 146 It seems to be the normal rule<sup>232</sup> that, where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered the contract (or at least not on the same terms) but for the misrepresentation.<sup>233</sup> Certainly this is the case when the misrepresentee claims damages in tort for negligent misstatement; and it seems also to be required if damages are claimed for fraud.<sup>234</sup> It seems likely that the same rule applies if he seeks to rescind on the ground of an innocent or negligent misrepresentation.<sup>235</sup>

## “But for” causation not required for rescission for fraud

- 147 In cases of fraud, in contrast, if the representee seeks to rescind, it is no defence for the representor to show that if the misrepresentation had not been made, the misrepresentee might still have made the contract.<sup>236</sup> It is sufficient if there is evidence to show that he was materially influenced by the misrepresentation merely in the sense that it had some impact on his thinking, “was actively present to his mind”.<sup>237</sup> As Lord Cross put it in a case of duress to the person<sup>238</sup>:

“... [i]n this field the court does not allow an examination into the relative importance of contributory causes.

‘Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand’:

per Lord Cranworth LJ in *Reynell v Sprye*.<sup>239</sup>

The Privy Council applied this “fraud rule” when B had entered a contract with A after A had made threats against B’s life. It held that B was entitled to relief even though he might well have entered into the contract if A had uttered no threats. It was only if it were shown that B did not allow the threat to affect his judgment at all that relief would be denied.<sup>240</sup> The Court of Appeal has held that this is not a reversal of the usual burden of proof,<sup>241</sup> but it seems still to suffice that the false statement was “actively present to [the representee’s mind]”, even if he might still have entered the contract anyway—in other words, a special rule that in fraud cases that, provided the misrepresentation had some influence, it is no defence that the misrepresentee would have entered the contract even if the statement had not been made.<sup>242</sup> The rule is intended to deter fraud.<sup>243</sup> The

same approach has been applied by the Court of Appeal in a case of “actual” undue influence,<sup>244</sup> which is seen as a “species of fraud”.<sup>245</sup> The rule applies only to fraud,<sup>246</sup> and only when the remedy sought is rescission. The victim of fraud cannot recover damages unless the loss for which damages are claimed would not have been suffered but for the fraud.<sup>247</sup>

## **Material misrepresentation and a presumption of inducement**

- ¶48 Once it is proved that a false statement was made which is “material” in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement,<sup>248</sup> and the inference is particularly strong where the misrepresentation was fraudulent.<sup>249</sup> There is no set list of matters that might rebut the presumption which arises from a fraudulent statement. One is to show that the misrepresentee had already firmly made up his mind, but even then the misrepresentation might have induced him not to change his mind.<sup>250</sup>

## **Materiality**

- ¶49 It is sometimes said that a misrepresentation will not be effective to ground relief in law unless it was material, in the sense that a reasonable man would have been influenced by it in deciding whether to enter into the contract.<sup>251</sup> It is true that courts have sometimes used language which would support this contention<sup>252</sup> and it is also true that if the representation is not material in this sense, the representee may have considerable difficulty in satisfying the court that he was in fact influenced by it. There is no clear authority denying relief to a representee who has in fact been influenced by a misrepresentation which would not have influenced a reasonable person,<sup>253</sup> but this may be one reason why a mere “puff” or sales talk does not ground relief.<sup>254</sup> It is submitted that a remedy will be given where the representor knows that the representee is likely to act on the misrepresentation,<sup>255</sup> or ought to know that the misrepresentee, not unreasonably, is likely to do so—in other words, when the representee was entitled to rely on it.<sup>256</sup> In contrast, save in cases of fraud, if the representor has no reason to know that the representee regards as relevant some fact which the reasonable person would think was immaterial, there will be no remedy for misrepresentation:

“... whether there is a representation and what its nature is must be judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee

... The position in the case of a fraudulent misrepresentation may of course be different.”<sup>257</sup>

In cases of fraud, the representor is not permitted to argue that it was unforeseeable that the representee would be influenced by the lie.<sup>258</sup>

## Unforeseeable reliance

- 150 The question may arise whether relief may be given when in the circumstances the representee was unlikely to act on the representation, even though it was a statement that was material in the sense that objectively speaking it was relevant: in other words, a question of whether reliance has to be reasonable or at least foreseeable. This, it is respectfully submitted, is a different question from whether the statement is material.<sup>259</sup> A person who has entered a contract as a result of a fraudulent misrepresentation may be entitled to rescind even though one would not have expected a reasonable person to enter the contract at that stage because, for example, he has not yet secured finance for the transaction<sup>260</sup> or because he was expected to take the opportunity to check the facts for himself. It is not clear whether the same would apply if the party unforeseeably entered into a transaction as the result of an innocent or negligent misrepresentation, rather than a fraudulent one which was intended to induce the other to act quickly. It depends to some extent on the cases to be discussed in the next paragraph. We will see that the misrepresentee may be permitted to rescind even though he passed up an opportunity to discover the truth for himself, but it is not quite clear whether that applies if it was unforeseeable (as opposed to being merely unreasonable) that he would do so.

## Representee could have discovered truth: rescission

- 151 If the representee did not know that the representation was false, it is no defence to an action for rescission that the representee might have discovered its falsity by the exercise of reasonable care.<sup>261</sup> Thus it is irrelevant that the true position is stated in the contract signed by the misrepresentee unless he was actually aware of the “correction” in the contract document<sup>262</sup>; “it is not enough to show that the claimant could have discovered the truth, but that he did discover it”.<sup>263</sup> It has been argued that the rule that a misrepresentee’s failure to take advantage of an opportunity to discover the truth is no bar to rescission may require reconsideration in the light of indications in cases of claims for damages for negligent misstatement to the effect that buyers of expensive or commercial properties would be expected to have their own survey done, and thus would fail in a claim for negligent misrepresentation against a surveyor employed by the

lender<sup>264</sup>; it has been suggested that the rule should be limited to cases in which it was reasonable not to take the opportunity.<sup>265</sup> It is not clear, however, that the same approach should apply as between contracting parties when the misrepresentee is seeking to rescind, as is taken when a party claims damages for a negligent misstatement by a person with whom he is not in a contractual relationship. When the misstatement leads to a contract with the misrepresentor, there is at least the possibility that the misrepresentor will have benefited from his misstatement, for example by obtaining a better price for the property he is selling. The fact that he was innocent, and the other party careless of his own interests, does not necessarily justify allowing the misrepresentor to retain the advantage gained.<sup>266</sup> It is possible, however, that relief might be denied if it was unforeseeable that the victim of a non-fraudulent misrepresentation would not check the accuracy of the statement for himself before entering the contract. It was submitted earlier that when a misrepresentee seeks to rescind on the ground of a non-fraudulent misrepresentation, there may be a requirement that his reliance on it was at least foreseeable.<sup>267</sup> If there is such a requirement, it would not be fulfilled if it was unforeseeable that the misrepresentee would act without checking first.

## Representee could have discovered truth: damages

<sup>152</sup> As will be seen later, the victim of a fraudulent or negligent misrepresentation may have a claim for damages. We saw in the previous paragraph that the fact that the misrepresentee could have discovered the truth is no defence to a claim for rescission if he did not do so.<sup>268</sup> Can the damages be reduced on the ground that the representee was contributorily negligent in not discovering the truth? Contributory negligence is not a defence to an action of deceit and the [Law Reform \(Contributory Negligence\) Act 1945](#)<sup>269</sup> does not apply.<sup>270</sup> There are also dicta in cases in which the misrepresentee was claiming damages for negligence to the effect that it is irrelevant that the representee could have discovered the truth for himself.<sup>271</sup> It has been held that damages for negligent misrepresentation under the [Misrepresentation Act 1967 s.2\(1\)](#)<sup>272</sup> may be reduced if the loss was partly the fault of the representee, at least when there is concurrent liability under that section and in tort for negligent misrepresentation under the principle of *Hedley Byrne v Heller*<sup>273</sup>; but it would not be just and equitable to reduce the damages when the representor had intended, or should be taken as having intended, that the representee should act in reliance on the answers which had been given to his questions.<sup>274</sup>

## Footnotes

<sup>1</sup> See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).

- 20 The general requirements for misrepresentation (in the context of an action for damages for fraud) were set out by Jacobs J in *Vald Nielsen Holding A/S v Baldorino [2019] EWHC 1926 (Comm)* at [130]–[159]; and see further *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* at [112]–[122].
- 206 See generally *Handley*, “*Causation in misrepresentation*” (2015) 131 L.Q.R. 274.
- 207 *Horsfall v Thomas (1862) 1 Hurl. & C. 90*. The requirement of awareness “marks a critical boundary between a claim for misrepresentation (generally actionable) and non-disclosure (actionable only in situations of utmost good faith or where specifically contracted for)” (*Leeds City Council v Barclays Bank Plc* and *Newham LBC v Barclays Bank Plc [2021] EWHC 363 (Comm)*, [2021] Q.B. 1027 at [65]); in the latter cases the question is not whether the claimant had considered the matter but whether the claimant would have acted differently had the truth been disclosed.
- 208 *Attwood v Small (1838) 6 Cl. & F. 232*; *Jennings v Broughton (1853) 5 De G.M. & G. 126*; *Smith v Chadwick (1884) 9 App. Cas. 187*; *Holmes v Jones (1907) 4 C.L.R. 1692*. In *Ahuja Investments Ltd v Victorygame Ltd [2021] EWHC 2382 (Ch)* there was no inducement because the claimant had already signed the contract and returned it before the misrepresentation had been communicated to him and he never even considered it (at [86]).
- 209 Cited with approval, *Brown v InnovatorOne Plc [2012] EWHC 1321 (Comm)* at [883]. Where the representation is implied, the claimant must prove that it understood the representation to have been made: *[2012] EWHC 1321 (Comm)* at [906]. It has been said that the claimant must have given conscious thought to the representation, even if not to the precise formulation that the court later decides the representation comprised: *Marme Inversiones 2007 SL v Natwest Markets Plc [2019] EWHC 366 (Comm)* at [286]. If it would have been unreasonable of the representee to rely upon the representation, that may go to show that the representee did not in fact rely on it: *Monde Petroleum SA v WesternZagros Ltd [2016] EWHC 1472 (Comm)*, [2016] 2 Lloyd's Rep. 229 at [219].
- 210 *(1862) 1 Hurl. & C. 90*. The judgment of Bramwell B. was criticised in *Smith v Hughes (1871) L.R. 6 Q.B. 597, 605* by Cockburn CJ.
- 211 An action for breach of the implied terms as to quality and fitness would probably lie in such circumstances today. See Vol.II, paras 46-094—46-112.
- 212 *Hartlelid v Sawyer & McClockin Real Estate Ltd [1977] 5 W.W.R. 481*.
- 213 *Strover v Harrington [1988] Ch. 390*; compare *Markappa Inc v N.W. Spratt & Son Ltd [1985] 1 Lloyd's Rep. 534*. However, the information must be received by a person authorised and able to appreciate its significance: *Malhi v Abbey Life Assurance Co Ltd [1996] L.R.L.R. 237*.
- 214 *Cooper v Tamms [1988] 1 E.G.L.R. 257*.

- 215 [2016] UKSC 48, [2017] A.C. 142.
- 216 See [2016] UKSC 48 at [19]. In *Holyoake v Candy* [2017] EWHC 3397 (Ch) the *Zurich* case was said to rest on two particular features (a) that the insurers did not know that the claim was false and (b) that the insured's lies might influence the court that would fix the value of the claim (at [391]–[392]).
- 217 The question whether the insurer might still be sufficiently influenced even if it knew that the claim was false was left open: [2016] UKSC 48 at [44]. So was the question whether the insurer must prove the fraud by evidence that it could not have obtained at the time of the settlement: at [73]. The logic of the decision in *Hayward* suggests the critical question is whether at the time of the settlement the insurer was confident that it would be able to prove the claim was false.
- 218 [2016] UKSC 48 at [25] and [71].
- 219 *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [174]–[191]; *Leni Gas and Oil Investments Ltd v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm) at [17]; *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [298].
- 220 SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm) at [185]–[188]; [2022] EWCA Civ 231 at [61]. In that case the charterers would have entered the contract relying on a warranty by the owners ([2022] EWHC 3448 (Comm) at [191]). See also below, para.9-046.
- 221 32nd edn (2015), para.7-036, citing *Dyer v Hargrave* (1805) 10 Ves. 505; *Attwood v Small* (1838) 6 Cl. & F. 232; *Vigers v Pike* (1842) 8 Cl. & F. 562, 650.
- 222 [2016] UKSC 48, [2017] A.C. 142.
- 223 See above, para.9-042.
- 224 [2016] UKSC 48 at [34], [36]. On the presumption of inducement see below, para.9-048. The representee has no duty to be careful, suspicious or diligent in research: *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 W.L.R. 4041 at [39].
- 225 At [45].
- 226 *BV Nederlandse Industrie Van Eiproducten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2020] Q.B. 551, see at [32] and [44].
- 227 *Western Bank of Scotland v Addie* (1867) L.R. 1 Sc. & Div. 145, 158; *Geest Plc v Fyffes Plc* [1999] 1 All E.R. (Comm) 672; *Brown v InnovatorOne Plc* [2012] EWHC 1321 (Comm) at [883]; *Taberna Europe CDO II Plc v Selskabet* [2015] EWHC 871 (Comm) at [153], citing this paragraph (reversed on other grounds [2016] EWCA Civ 1262, [2017] Q.B. 633); *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48, [2017] A.C. 142 at [33], also citing this paragraph.
- 228 (1885) 29 Ch. D. 459.
- 229 (1885) 29 Ch. D. 459, 481. See also *BV Nederlandse Industrie Van Eiproducten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596.
- 230 See the judgment of Fry LJ at 483. Bowen LJ seems to have applied a slightly different test, whether the representation was “actively present to his mind” so that it might have influenced

his decision, though in *Marme Inversiones 2007 SL v Natwest Markets Plc [2019] EWHC 366 (Comm)* at [307] Picken J said he read Bowen LJ as also addressing only the question whether it is sufficient if the fraudulent statement was one of several causes. See further para.9-047 below.

- 231 See next paragraph.
- 232 Except where the misrepresentee seeks to rescind on the basis of a fraudulent misrepresentation: see next paragraph.
- 233 *Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 All E.R. (Comm) 140; Taberna Europe CDO II Plc v Selskabet [2015] EWHC 871 (Comm)* at [153], citing this paragraph in the 31st edition (reversed on other grounds [2016] EWCA Civ 1262); *BV Nederlandse Industrie Van Eiproducten v Rembrandt Enterprises Inc [2019] EWCA Civ 596, [2020] Q.B. 551*, also citing this paragraph. This is consistent with the decision of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 A.C. 501* (see below) and *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)*, [2011] 1 Lloyd's Rep. 123 at [163]–[173]. See also *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm)* at [232]; *Leni Gas and Oil Investments Ltd v Malta Oil Pty Ltd [2014] EWHC 893 (Comm)* at [17]; *Marme Inversiones 2007 SL v Natwest Markets Plc [2019] EWHC 366 (Comm)* at [304] and [317]. It has been argued convincingly that where the misrepresentation tends to confirm the misrepresentee in a decision that it has already made, the “but for” test is satisfied only if, had the representation not been made, the misrepresentee would have made further enquiries that would have revealed the truth or have changed its mind for other reasons: Venkatesan (2021) 137 L.Q.R. 503.
- 234 *Barings Plc (In Liquidation) v Coopers & Lybrand [2002] EWHC 461 (Ch), [2002] 2 B.C.L.C. 410* at [127]–[130], relying on statements from the speech of Lord Steyn in *Smith New Court v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254, 284*. (For the *Smith New Court* case see below, paras 9-068—9-072.) Thus there would be no inducement if the representee would have gone ahead even if he had been told the truth: *Dadourian Group International v Simms [2006] EWHC 2973 (Ch), [2006] All E.R. (D) 351 (Nov) at [548]; affirmed [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601*, including the trial judge’s statement that “the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee’s decision to enter into the transaction; the representor does not have to go so far as to show that the misrepresentation played no part at all”: see at [99]–[101]. On the last point, compare the test when the representee seeks to rescind on the ground of fraud: below, para.9-047.
- 235 In *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 A.C. 501*, a case of non-disclosure in insurance (see below, para.9-169), Lord Mustill spoke of inducement both “in the sense in which that expression is used in the general law of misrepresentation” and (549) “in the sense in which it is used in the general law of contract” without apparently seeing any difference between the two. As the “but for” test is applied generally to breach of contract, his statements and an overall reading of his speech suggest that he thought that the insurer’s decision as to whether to enter the contract or at what premium must have been

influenced by the non-disclosure in the sense that “but for” causation is required. cf. *Bennett (1996) 112 L.Q.R. 405*, 408.

- 236 See *Re London & Leeds Bank (1887) 56 L.J. Ch. 321*.
- 237 Bowen LJ in *Edgington v Fitzmaurice (1885) 29 Ch. D. 459*, 483; *Brown v InnovatorOne Plc [2012] EWHC 1321 (Comm)* at [883]. Bowen LJ seems to have applied this test to a claim for damages for fraud, but he seems to have been in the minority; see above, para.9-045. In *Marme Inversiones 2007 SL v Natwest Markets Plc [2019] EWHC 366 (Comm)* at [296] Picken J emphasised “the... distinction between the question of whether a misrepresentation has induced a claimant to act in a certain way and the separate question of whether loss has been caused to the claimant as a result of the representation”, referring to MacDonald Eggers, *Vitiation of Contractual Consent*, 1st edn (2016) at pp.646–647; and (at [317]) considered that the but for test should apply to claims for damages for fraud. However, in *BV Nederlandse Industrie Van Eiproducten v Rembrandt Enterprises Inc [2019] EWCA Civ 596*, [2020] Q.B. 551 Longmore LJ (with whom the other members of the Court agreed) stated the “actively present to his mind” test as being applicable also to the tort of deceit, see at [32]. This approach to causation in deceit is criticised by Venkatesan (2021) 137 L.Q.R. 503, arguing that the question should be what the claimant would have done, not what he might have done.
- 238 *Barton v Armstrong [1976] A.C. 104*, PC at 118–119. In *Hayward v Zurich Insurance Co Plc [2016] UKSC 48*, [2017] A.C. 142 at [33] Lord Clarke quoted the first sentence of Lord Cross’s statement but did not address the question of whether but for causation is required. On the facts of the *Hayward* case, any “but-for” requirement was satisfied.
- 239 (1852) 1 De G.M. & G. 660, 708. See also *Arnison v Smith (1889) 41 Ch. D. 348*, 369, where Lord Halsbury L.C. said, “[y]ou cannot weight the elements by ounces”.
- 240 [1976] A.C. 104, PC at 118–119.
- 241 In *BV Nederlandse Industrie Van Eiproducten v Rembrandt Enterprises Inc [2019] EWCA Civ 596* Longmore LJ (with whom the other members of the Court of Appeal agreed) emphasised that the representee must still prove inducement, albeit with the assistance of a presumption that “will be very difficult to rebut”, so that a court that “cannot make up its mind on inducement” should not give the representee the benefit of the doubt as a matter of law: at [45].
- 242 The rule is usefully discussed in Burrows, *Law of Restitution*, 3rd edn (2011), pp.94–95.
- 243 cf. below, para.9-073.
- 244 *UCB Corporate Services Ltd v Williams [2002] EWCA Civ 555* at [86].
- 245 See below, para.10-099.
- 246 *Ross River Ltd v Cambridge City Football Club Ltd [2007] EWHC 2115 (Ch)*, [2008] 1 All E.R. 1004 at [202], referring to this paragraph in an earlier edition; *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)* at [198]. The but for test is said to apply to non-disclosure where there is a duty to disclose: *Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 All E.R. (Comm) 140* at [59], [187], but note the doubts of Ward LJ at [218].
- 247 See above, para.9-046.

- 248 *Smith v Chadwick* (1884) 9 App. Cas. 187, 196; also (1882) 20 Ch. D. 27, 44–45; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1992] 1 Lloyd's Rep. 101, 112–113 (affirmed without reference to this point, [1993] 1 Lloyd's Rep. 496, and by the House of Lords, where Lord Mustill refers to the “presumption of inducement” in the case of fraud, but he does not deny that there may be a similar presumption in other cases of positive misrepresentation: [1995] 1 A.C. 501, 542); *Dadourian Group International Inc v Simms* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601 at [99]–[101]; *Edwards v Ashik* [2014] EWHC 2454 (Ch) at [19]. There is not unanimity as to the weight of any presumption. The following passage from Halsbury's Laws of England, 4th edn, Vol.3, para.1067: “Inducement cannot be inferred in law from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of fact that the representee was actually induced, but, even in such exceptional cases, the inference is only a *prima facie* one and may be rebutted by counter-evidence”, was approved in *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All E.R. 96, 112; but the same case refers simply to a “presumption”. See *Bennett* (1996) 112 L.Q.R. 405. A material representation was said to create a presumption in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd* (1997) 13 Const. L.J. 418.
- 249 *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [2008] 1 All E.R. 1004 at [241] (Briggs J); *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48 at [34], quoting this paragraph, and [37] (in a case of fraud, “it is very difficult to rebut the presumption”).
- 250 *County Natwest Bank Ltd v Barton*, *The Times*, 29 July 1999; *Edwards v Ashik* [2014] EWHC 2454 (Ch) at [20]–[25]. “[I]t is sufficient inducement if, in consequence of the misrepresentation, the claimant abstains from doing something bearing on his material interests”: *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm) at [107] (affirmed without reference to this point, [2010] EWCA Civ 486, [2011] Q.B. 477).
- 251 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), paras 9-023–9-024 (but noting that exceptions mean the requirement will seldom not be met).
- 252 *Jennings v Broughton* (1854) 5 De G.M. & G. 126, 130; *Smith v Chadwick* (1884) 9 App. Cas. 187. The Marine Insurance Act 1906 s.20(2) incorporated the requirement of materiality, and it was frequently said that the Act represented the common law, at least in part (e.g. *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501, 518, 553). It is possible that the requirements of the Act were influenced by the fact that it also applied to non-disclosure. A requirement of materiality is a necessary part of a rule requiring disclosure; it is not a necessary part of a rule affording relief for active misrepresentation. However, it seems clear that in insurance cases, the requirement of materiality applies to misrepresentation as well as non-disclosure. Note the definition of materiality in relation to non-disclosure in insurance: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501 (material if it “would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk”), below, para.9-172. This definition is also used in the Insurance Act 2015, s.7(3); see below, para.9-173. The Consumer Insurance (Disclosure and Representations) Act 2012 does not refer to materiality. The consumer has a duty not to make careless representations; and it is doubtful whether a

consumer who without fraud says something that is incorrect but seemingly irrelevant to the insurer will be careless. On the other hand, the Act provides that a misrepresentation that is made dishonestly is always to be taken to show lack of reasonable care ([s.3\(5\)](#)), so it seems that the insurer may have a remedy if the consumer makes a deliberate misstatement, even if the statement did not seem material in the sense discussed, provided the insurer can show that without the misstatement it would not have entered the contract at all, or would have done so only on different terms ([s.4\(1\)\(b\)](#)).

- 253 In *Avon Insurance v Swire [2000] 1 All E.R. (Comm) 573* Rix J held that a statement will be treated as true if it is substantially correct and the difference would not have induced a reasonable person to enter the contract (above, para.[9-006](#)). This might seem to support the requirement of materiality.
- 254 Above, para.[9-009](#).
- 255 It has been so held in Australia: *Nicholas v Thompson [1924] V.L.R. 554*. In *Cuthbertson v Friends' Provident Life Office (2006) S.L.T. 567, (2006) S.C.L.R. 697* Lord Eassie pointed out that the materiality test in insurance (set out in [s.20\(2\)](#) of the Marine Insurance Act) would be satisfied if the proposer actually appreciated that the fact stated would be relevant to the insurer. In *Museprime Properties Ltd v Adhill Properties Ltd [1990] 2 E.G.L.R. 196* it was said that materiality was really a question of the burden of proof: if the statement would not have influenced a reasonable person, the burden of proving that it did induce the contract will be on the representee, but relief may still be obtained if the burden is discharged. However, the case did not involve materiality in the sense discussed here; see next paragraph.
- 256 See above, para.[9-008](#).
- 257 Mance LJ in *MCI Worldcom International Inc v Primus Telecommunications Plc [2004] EWCA Civ 957, [2004] All E.R. (Comm) 833* at [30]. He said that the version of this paragraph in the 29th edition “appears ... to put the position too cautiously”.
- 258 *Smith v Kay (1859) 7 H.L.C. 750*. It is no defence that the maker of a fraudulent statement thought that it was irrelevant or unimportant: *Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2000] 1 Lloyd's Rep. 218, 225* (reversed in part on other grounds, [2002] UKHL 43, [2002] 3 W.L.R. 1547: see below, para.[9-080](#)). See also *Dadourian Group International Inc v Simms [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601* at [101]. In *Bonham-Carter v SITU Ventures Ltd [2012] EWHC 3589 (Ch)* it seems that both parties agreed that materiality was an essential ingredient of a claim for deceit, relying on a dictum of Hobhouse LJ in *Downs v Chappell [1997] 1 W.L.R. 426, 433*: see at [121]. In *Downs v Chappell* the false statement was clearly material: see [1997] 1 W.L.R. 426, 433. In *Edwards v Ashik [2014] EWHC 2454 (Ch)* Hamblen J (at [25]) pointed out that Hobhouse LJ was concerned with what the representee needs to prove in order to establish a cause of action in deceit, not what the representor needs to prove in order to show that the representee was not induced to enter into a contract by the representation. On the latter, Hamblen J said the correct approach was that in *County Natwest Bank Ltd v Barton, The Times, 29 July 1999*, see above, para.[9-048](#).
- 259 It is submitted that this was the question in *Goff v Gauthier (1991) 62 P. & C.R. 388*, although the court referred to an earlier version of the previous paragraph of this work. It was also the question in *Museprime Properties Ltd v Adhill Properties Ltd [1990] 2 E.G.L.R. 196*

(representee did not take opportunity to check accuracy.) cf. Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.9-023.

- 260 *Goff v Gauthier (1991) 62 P. & C.R. 388.*
- 261 *Dyer v Hargrave (1805) 10 Ves. 505; Dobell v Stevens (1825) 3 B. & C. 623; Reynell v Sprye (1852) 1 De G.M. & G. 660; Central Ry of Venezuela v Kisch (1867) L.R. 2 H.L. 99, 120; Redgrave v Hurd (1881) 20 Ch. D. 1; Nocton v Ashburton [1914] A.C. 932, 962; Laurence v Lexcourt Holdings Ltd [1977] 1 W.L.R. 1128.*
- 262 *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511.* However, the misrepresentee must still prove inducement. If the misrepresentation was in very “rough and ready terms”, while the contract was a detailed financial instrument which the investor would be expected to read in order to discover the details which he claimed were of importance to him, but the investor signed the contract without reading it, he may be held not to have relied on the misrepresentation. See similarly *Reinhard v Ondra LLP [2015] EWHC 1869 (Ch)* at [112]–[118]; *Banks and Clients Plc v King [2017] EWHC 3099 (Comm)* at [50].
- 263 *[2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511* at [40]. The case involved a claim for damages under Misrepresentation Act 1967 s.2(1).
- 264 *Smith v Eric S. Bush [1990] 1 A.C. 831, 854, 872.*
- 265 Peel (ed.), Treitel on The Law of Contract, 14th edn (2015), para.9-028; the suggestion is not repeated in the 15th edn (2020), para.9-033, which instead suggests that the principle stated in the first sentence of this paragraph applies only once it is clear that a misrepresentation has been made.
- 266 See Jessel, MR in *Redgrave v Hurd (1881) 20 Ch. D. 1, 13.*
- 267 Above, para.9-039.
- 268 *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd [2006] EWCA Civ 386* at [40] (damages under Misrepresentation Act 1967 s.2(1)).
- 269 See below, para.9-080.
- 270 *Alliance and Leicester Building Society v Edgestop Ltd [1994] 2 All E.R. 38; Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2002] UKHL 43, [2003] 1 A.C. 959.*
- 271 *Nocton v Ashburton [1914] A.C. 932, 962; The Arta [1985] 1 Lloyd's Rep. 534; and Strover v Harrington [1988] Ch. 390, 410: see Taberna Europe CDO II Plc v Selskabet [2015] EWHC 871 (Comm) at [181]; [2016] EWCA Civ 1262, [2017] Q.B. 633 at [51].*
- 272 See below, para.9-091.
- 273 See below, para.9-098.
- 274 *Gran Gelato Ltd v Richcliff (Group) Ltd [1992] Ch. 560*, especially at 574. See further below, para.9-091. In *Smith v Eric S. Bush [1990] 1 A.C. 831* (where there was no contract between plaintiff and defendant) the plaintiff recovered although she might have had her own survey of the house she bought; but it was not reasonable to expect her to have her own survey of a modest property. Had the property been more expensive it might have been different and a disclaimer of liability might have been reasonable: *Smith [1990] 1 A.C. 831, 854, 872.* See above, para.9-038 and below, para.17-108.

---

End of Document

© 2022 SWEET & MAXWELL

## Section 3. - Damages for Misrepresentation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 3. - Damages for Misrepresentation

### Preliminary

- <sup>153</sup> Damages are always recoverable for a fraudulent misrepresentation,<sup>275</sup> subject to the exception noted in the next paragraph. Under [s.2\(1\) of the Misrepresentation Act 1967](#) damages are recoverable for (in effect)<sup>276</sup> a negligent misrepresentation if they would have been so recoverable in fraud, where the representee enters into a contract with the representor as a result of the misrepresentation.<sup>277</sup> Damages for negligent misrepresentation are also recoverable in some circumstances at common law, quite apart from the [Act of 1967](#).<sup>278</sup> Damages are not generally recoverable for innocent misrepresentation unless the representation is, or becomes, a contractual term, but there are a number of important exceptions to this principle.<sup>279</sup>

### Lord Tenterden's Act

- <sup>154</sup> Exceptionally, no action may be brought on a fraudulent misrepresentation as to a person's "relating to the character, conduct, credit, ability, trade, or dealings of any other person" unless the representation is in writing and signed by the representor: [Statute of Frauds Amendment Act 1828 \(Lord Tenterden's Act\) s.6](#). This applies only to claims of fraud<sup>280</sup> and possibly to claims under [Misrepresentation Act 1967 s.2\(1\)](#).<sup>281</sup>

## Footnotes

- 1 See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).
- 275 Below, paras 9-055—9-082.
- 276 See below, para.9-085.
- 277 Below, paras 9-084—9-094.
- 278 Below, paras 9-095—9-106.
- 279 Below, paras 9-110—9-117.
- 280 *Banbury v Bank of Montreal [1918] A.C. 626, HL*. The Act may be satisfied by a representation implied by a signed writing but a representation by conduct would not suffice: *Contex Drouzhba v Wiseman [2007] EWCA Civ 1201, [2007] All E.R. (D) 293 (Nov)*. The representation may be made in an email, provided that the email includes a written indication of who is sending the email and some form of “signature”: *J Pereira Fernandes SA v Mehta [2006] EWHC 813 (Ch), [2006] 1 W.L.R. 1543*; *Lindsay v O’Loughnane [2010] EWHC 529 (QB), [2012] B.C.C. 153* at [95].
- 281 *UBAF Ltd v European American Banking Corp [1984] Q.B. 713, CA*: see further below, para.9-087.

## **(a) - Fraudulent Misrepresentation**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 3. - Damages for Misrepresentation**

**(a) - Fraudulent Misrepresentation**

### **Claims for damages for fraud**

- 155 Where a person has been induced to enter into a contract as a result of a fraudulent misrepresentation by the other contracting party, he may rescind the contract, or claim damages, or both.<sup>282</sup> Rescission is dealt with in the next section.<sup>283</sup> In cases in which the parties have entered a contract as the result of the misrepresentation, damages for fraud are perhaps less important than they used to be, as a result of the *Misrepresentation Act 1967*: claims for damages by a person who has been induced to enter into a contract by the misrepresentation of another party thereto may now be based either on fraud or on (in effect)<sup>284</sup> negligence. As will be seen in detail below,<sup>285</sup> s.2(1) of this Act allows a person who has been induced to enter into a contract by a misrepresentation to make a claim for damages as of right, as though the representation had been fraudulent, unless the representor “proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true”. In an action under this subsection, it is for the representor to disprove negligence, whereas in an action in fraud it is for the representee affirmatively to prove the fraud—and the burden is no light one.<sup>286</sup> However, claims for damages against a representor who does not subsequently enter into a contract with the representee may have to be brought in fraud, for although even here negligence may sometimes suffice, it will not always do so.<sup>287</sup> Further, as will be seen below, the Misrepresentation Act has created a new distinction of some importance between fraudulent and other misrepresentations in connection with rescission.<sup>288</sup>

## Definition of fraud

- 156 The common law relating to fraud was established by the House of Lords in *Derry v Peek*.<sup>289</sup> It was there decided that in order for fraud to be established, it is necessary to prove the absence of an honest belief in the truth of that which has been stated.<sup>290</sup> In the words of Lord Herschell:

“... fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false.”<sup>291</sup>

The converse of this is that however negligent a person may be, he cannot be liable for fraud, provided that his belief is honest; mere carelessness is not sufficient, although gross carelessness may justify an inference that he was not honest.<sup>292</sup>

## Absence of honest belief

- 157 That the claimant who alleges fraud must prove the absence of an honest belief is demonstrated by *Derry v Peek* itself. A company issued a prospectus stating that it was entitled to use steam power to run trams; the respondents obtained shares on the strength of this representation, which was in fact false, although at the time the company had reason to believe that permission would be granted by the Board of Trade as a matter of course. Permission to use steam power was, however, not granted and the company was wound up. In an action for deceit the House of Lords held that the directors were not liable in damages for fraudulent misrepresentation. The decisive factor, in Lord Herschell’s words, was that “they honestly believed that what they asserted was true”.<sup>293</sup>

## Defendant’s knowledge of falsity of statement

- 158 The requirement of proof of the absence of honest belief does not, however, mean that the claimant must prove the defendant’s knowledge of the falsity of the statement. It is enough to establish that the latter suspected that his statement might be inaccurate, or that he neglected to inquire into its accuracy, without proving that he actually knew that it was false. Thus where directors issued a prospectus setting out the advantages of working a particular mine, without having ascertained the truth of these representations, they were held to have committed a fraud.<sup>294</sup> Lord Cairns expressed the principle as follows:

“... if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they know to be untrue.”<sup>295</sup>

## Motive irrelevant

- 159 Further, it is not necessary to establish that the defendant's motive was dishonest.<sup>296</sup> However, it must be shown that the representor intended the representee to act on the representation.<sup>297</sup> In the case of an implied representation, if the representor intended what he said to be relied on by the representee in deciding whether to contract, he must be taken to have intended that the representee should rely on the objective meaning of what he said.<sup>298</sup>

## Ambiguity in fraud cases

- 160 If the statement is ambiguous, the representee must first prove that he understood the statement in a sense in which it is in fact false.

<sup>299</sup>

**U** If the representor intended the statement to be understood in that sense, he will be guilty of fraud. But a person who makes a statement honestly believing it to be true in the sense which he understands it to bear is not guilty of fraud merely because the representee understands it in a different sense which is false to the knowledge of the representor.

<sup>300</sup>

**U** And this is still the case even though the court may agree that the sense in which the representee understands the statement is the meaning which, on its true construction, it ought to bear.

<sup>301</sup>

**U** To hold a person guilty of fraud it must be shown that he intended, or at least was willing, that the representation should be understood in a sense which is false

<sup>302</sup>

**U**; or, it has been suggested, if he was recklessly indifferent to whether it might be understood in that sense.

303



## Principal and agent

- )61 Much difficulty has arisen in dealing with cases where responsibility for a statement is divided between principal and agent, or between several agents of one principal. It has been held that the law does not recognise any conception of “composite fraud”, i.e. an action in fraud will not lie where a statement is made by an agent who honestly believes it to be true, merely because the principal, or another agent, knew the statement to be false.<sup>304</sup> But a principal is vicariously liable for the fraud of an agent, so that if an agent makes a statement in the scope of his authority, and the agent is himself fraudulent, the principal will be liable.<sup>305</sup> And if one agent makes a fraudulent statement to another agent, intending the latter to pass the statement on to a third party, and this is done, the principal will again be liable; for in these circumstances, the first agent is guilty of the complete tort of fraudulent misrepresentation, the second agent being his innocent agent.<sup>306</sup> Again, if one agent makes a statement honestly believing it to be true, but another agent or the principal himself knows that it is not true, knows that the statement will be or has been made, and deliberately abstains from intervening, the principal will be liable.<sup>307</sup> In these circumstances the party with the guilty knowledge can himself be treated as being guilty of fraud.

## Causation in damages for fraud

- )62 As stated earlier,<sup>308</sup> when the claimant seeks damages for fraud as opposed to rescission, the normal “but for” rule of causation seems to apply. Thus if the claimant would have entered the contract on the same terms even if the misrepresentation had not been made, his claim for damages will fail.<sup>309</sup> The court is not required to speculate as to what the misrepresentee would have done had he known the truth,<sup>310</sup> and the defendant will not be permitted to argue that the misrepresentee might have entered the contract on the same terms anyway.<sup>311</sup> But if the misrepresentor can definitively show that this is what the misrepresentee would have done, it will be very difficult for the misrepresentee to argue that it was induced by the fraudulent misrepresentation.<sup>312</sup>

## Measure of damages for fraudulent misrepresentation

)63

The proper measure of damages for fraudulent misrepresentation was discussed by the Court of Appeal in *Doyle v Olby (Ironmongers) Ltd*.<sup>313</sup> It was here held that damages for fraud were not the same as damages for breach of contract, in that they were not designed to place the innocent party in the position he would have been in if the representation had been true but to put him in the position he would have been in if the representation had not been made. The presumption seems to be that if the misrepresentation had not been made, the claimant would not have entered into the contract.<sup>314</sup> So the plaintiff ought to be awarded such damages as will put him back in the financial position he was in before the contract was made. This means that where a person is induced by fraud to buy some property, the proper measure of damages is *prima facie* the difference between the price paid and the fair value of the property.<sup>315</sup>

## Unforeseeable losses

- 164 In *Doyle v Olby (Ironmongers) Ltd*<sup>316</sup> it was held that in cases of fraud the plaintiff was entitled to damages for any such loss which flowed from the defendants' fraud, even if the loss could not have been foreseen by the latter. Thus the claimant may recover not only the difference between the price paid and the value of what he received but also expenditure wasted in reliance on the contract and compensation for other opportunities passed over in reliance on it.

## Lost opportunity

- 165 The points that damages for fraud will not compensate the claimant for loss of bargain but may cover loss caused by passing up other profitable opportunities are well illustrated by *East v Maurer*.<sup>317</sup> The plaintiffs bought a hairdressing business in reliance on a false representation that the defendant had no intention of working regularly at a second hairdressing business he owned in the same town. In fact he continued to work at the second business and the plaintiffs were forced to resell the business they had bought at a substantial loss. They were awarded damages for the difference between the price they had paid and the price they received on resale, plus expenditure wasted in attempting to improve the business and in other ways. They were also awarded the sum they could have expected to make as profit had they bought another similar business in the same area.<sup>318</sup> However, they were not entitled to the higher amount they might have earned from the actual business bought had the defendant kept to his stated intention; he had not warranted that they would keep all his old customers or that he would not compete.<sup>319</sup> Damages for lost opportunity may be recovered even though they may have to be discounted on the ground that it was not certain that the claimant would have been able to take up the opportunity, e.g. if the owner of the alternative business might not have agreed to sell.<sup>320</sup> It is not necessary to show that the

alternative deal would necessarily have been profitable; if necessary the amount can be discounted to reflect the element of risk.<sup>321</sup>

## Not loss of bargain

- ¶66 It follows that in many cases the measure of damages for breach of contract will be higher than that for fraud, as it will include the profit that would have been made on the contract in question had the representation been true. If as a result of a fraudulent misrepresentation the claimant has bought a property, but the property appears to be worth the price paid for it and there is no wasted expenditure or loss of a more valuable opportunity, the claimant damages according to the tort measure would appear to be nil.<sup>322</sup>

## Property worth less than paid for it

- ¶67 While the claimant in an action for fraud cannot claim to be put into the position he would have been in if the fact represented were true, a claimant who has made a bad bargain, in the sense that even if what he had been told were true, at the time the contract is made the property he is induced to buy would have been worth less than he has agreed to pay for it, will be better off under the tortious measure than the contractual one.<sup>323</sup>

## Assessing damages for fraud

- ¶68 In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*<sup>324</sup> Lord Browne-Wilkinson described *Doyle v Olby (Ironmongers) Ltd* as restating the law correctly. He stated the principles applicable in assessing damages where a party has been induced by a fraudulent misrepresentation to buy property as follows:

“(1)The defendant is bound to make reparation for all the damage directly flowing from the transaction;  
(2)although such damage need not have been foreseeable, it must have been directly caused by the transaction

<sup>325</sup>

;

(3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction

<sup>326</sup>

**U** ;

(4) as a general rule, the benefits received by him include the market value of the property acquired at the date of the transaction; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;

(5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property

<sup>327</sup>

**U** ;

(6) in addition, the plaintiff is entitled to recover consequential losses caused by the transaction;

(7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud.”<sup>328</sup>

## Difference in value at time of acquisition

<sup>169</sup> As Lord Browne-Wilkinson states in his propositions (3) and (4),

<sup>329</sup>

**U** the general rule is that the claimant is entitled to the difference between what he paid and the value of the property he received at the date he acquired it. The court will not reduce the damages to reflect that fact that, as it turned out, various risks that, at that date, reduced the value of the property, did not in fact materialise.

<sup>330</sup>

**U** The claimant will normally recover the difference between the price paid and the value of the property bought, and also any consequential loss

<sup>331</sup>

**U** ; or, if the claimant would have bought the property even if the misrepresentation had not been made, but at a lower price, the difference between the actual price and the price it would have paid,

332

U plus again any consequential loss.

## Subsequent falls in value of property

- 170 As Lord Browne-Wilkinson's fourth proposition indicates, the damages are normally to be calculated according to the difference between the contract price and the value of the property at the time of the contract.<sup>333</sup> This seems to follow from the rule that the loss must flow directly from the transaction.<sup>334</sup> But this is only a *prima facie* rule; as Lord Steyn put it,<sup>335</sup> the date of transaction rule is simply a second-order rule applicable only if the valuation method is followed, and the court is entitled to assess the loss flowing directly from the fraud without any reference to the date of the transaction or indeed any particular date. In some situations, the claimant may recover the difference between the contract price and the value of the property at a later date. This is so when the fall in value is due to the discovery of the defendant's fraud, which has also deceived others in the market.<sup>336</sup> However, it may also apply even if the reduction of value is not the result of the fraud.

## “Already flawed assets”

- 171 One such case is where, as the result of the fraud, the claimant has bought an “already flawed asset”, the value of which falls when the flaw is discovered, but the fraud did not relate to the flaw. In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*,<sup>337</sup> SNC had bought shares in Ferranti as the result of fraudulent misrepresentations by the defendants. SNC intended to keep the shares for a period of time. Their value fell drastically when it was discovered that Ferranti had been the victim of another fraud by a third party. The House of Lords, reversing the Court of Appeal,<sup>338</sup> held that SNC were not limited to recovering the difference between the contract price and the market value of the shares at the date of the transaction; they could recover the difference between the contract price and the prices obtained for the shares when they were sold after the discovery of the fraud.

## Claimant “locked into” property

- 172 As stated in the fourth and fifth propositions of Lord Browne-Wilkinson quoted above (see para.9-068), the date of transaction rule will not be applied if it would prevent the claimant obtaining full compensation because the claimant is locked into the transaction. In *Smith New*

*Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*,<sup>339</sup> as SNC had intended to keep the shares and it was not commercially feasible to resell them immediately, it was locked into the property.

It is not wholly clear whether the purchaser who has bought a “flawed asset”, which falls in value after the date of the transaction because the flaw is discovered, can recover for this further loss if it was not clearly the purchaser’s purpose to retain the property. In *Twycross v Grant*,<sup>340</sup> Cockburn CJ gave the example of a person who is induced by fraud to buy a racehorse. If the horse has already contracted some disease from which it dies when he gets it home, the buyer may recover the entire price paid. In the *Smith New Court Securities* case Lord Steyn refers to this example with apparent approval.<sup>341</sup> It may suffice that it was to be expected that the claimant would keep the property for at least the time that it took for the flaw to emerge.

## Loss caused by fall in market

173 Secondly, as the result of the fraud, the claimant may have acquired a property which, had it known the truth, it would not have acquired, and that property may have fallen because of a subsequent fall in the general value of property of the kind in question. It is possible that in an appropriate case, damages for fraud may include such losses. In *South Australia Asset Management Corp v York Montague Ltd*<sup>342</sup> the House of Lords held that in a case of negligent valuation, recovery of such losses are limited to the difference between the valuation given and a correct one, but it left open the question in cases of fraud.<sup>343</sup> In *Downs v Chappell*<sup>344</sup> the plaintiffs had bought a business as the result of the defendant’s fraudulent statements; they recovered the difference between the price paid and the value of the business when the fraud was discovered, even though the difference may have been increased by a general fall in property prices. In that case, Hobhouse LJ said that only losses flowing from the tort would be recoverable, and as a means of testing whether the loss was caused by the tort and of preventing over-compensation, proposed comparing:

“The loss consequent upon entering the transaction with that which what would have been the position had the represented, or supposed, state of affairs actually existed.”

This last aspect of the case was disapproved by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*.<sup>345</sup> Thus it appears that in a fraud case the claimant can recover the full fall in value of the property, at least up to the date of discovery of the fraud, where the claimant was “locked into the transaction”. Lord Steyn justified a special rule for cases of deceit by considerations of morality and deterrence.<sup>346</sup>

## Other cases

- 174 Where the asset bought is not “already flawed” and the claimant is not locked into the transaction, nor is the fraud continuing to operate to induce him to retain the property (so that Lord Browne-Wilkinson’s fifth proposition does not apply <sup>347</sup>), it appears that the damages will still be assessed by the value of the property at the date of the transaction. In *Twycross v Grant*, <sup>348</sup> Cockburn CJ also gave the example of a person who is induced by fraud to buy a racehorse which subsequently catches a disease and dies; the buyer may only recover the difference between the price paid and the real value at the time of the transaction. In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* Lord Steyn gave this as an example of a case in which there would not be a sufficient causal link between the fraud and the loss. <sup>349</sup> But it seems that the claimant will be treated as locked into the transaction where the other party knew that the claimant was purchasing the property for a purpose that would require him to retain it.

## Claimant would have entered another losing transaction

- 175 As mentioned earlier, in fraud cases it is presumed that had it not been for the fraud, the claimant would not have entered the contract. <sup>350</sup> In *Downs v Chappell* <sup>351</sup> it was said that a party who has been induced to enter a contract by fraud and who seeks damages need not show that, had he known the truth, he would not have entered the transaction. He need only show that he was induced to enter the contract by a material misrepresentation and the loss that flowed from entering it. Where the misrepresentee claims to rescind the contract, it is irrelevant that he might have entered a contract with the misrepresentor even if the fraudulent misrepresentation had not been made: it need only have been one of the factors which influenced him. <sup>352</sup> But what the misrepresentee would have done will normally be relevant to a claim for damages, since he must show a causal connection between the misrepresentation and the loss claimed; and if it is shown that he would have entered another losing transaction, this should be taken into account. This is certainly the case when the claim is one for negligence. In *South Australia Asset Management Corp v York Montague Ltd* Lord Hoffmann pointed out that it might be shown that, had the valuer not been negligent, the lender would have lent a lesser amount to the same borrower on the same security, or “would have used his money in some altogether different, but equally disastrous venture”. <sup>353</sup> The same rule should apply in cases of fraud, even though, according to Lord Steyn’s speech in the *Smith New Court Securities* case, the rules of causation are applied differently <sup>354</sup> and:

“... it is not necessary for the judge to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred.” <sup>355</sup>

In *Yam Seng Pte Ltd v International Trade Corp Ltd*<sup>356</sup> Leggatt J held that although there is some authority<sup>357</sup> for ignoring the fact that, but for the fraudulent misrepresentation, the claimant might have entered another losing transaction, such a rule would be logically indefensible when profits that the claimant might have made are to be taken into account in assessing damages for fraud.<sup>358</sup> Lord Steyn's statement quoted above was referring to a different issue, whether the court should consider what the claimant might have done had the statement been true. It is therefore open to a defendant to show that, had the representation not been made, the claimant would have entered another losing transaction.<sup>359</sup> The evidential burden will be on the defendant, and in seeking to discharge this burden, the defendant (unlike the claimant) does not have the benefit of the principle that if the financial outcome of the alternative transaction is uncertain the court will make reasonable assumptions in its favour (for example by allowing damages to be calculated on a loss of a chance basis) to assist in the proof of loss.<sup>360</sup>

## Mitigation

- 176 Finally it should be noted that Lord Browne-Wilkinson's final proposition is that once the fraud is discovered, the plaintiff must take reasonable steps to mitigate his loss.<sup>361</sup>

## Damages for non-pecuniary losses

- 177 Damages for worry and inconvenience<sup>362</sup> and for mental and physical suffering<sup>363</sup> have been awarded in actions based on fraud.

## No account of profits

- 178 The victim of fraud may not obtain an account of profits made by the fraudulent party, at least where the victim has affirmed the contract and has suffered no loss.<sup>364</sup> The House of Lords in *A.G. v Blake*<sup>365</sup> held that, in certain circumstances, the victim of a breach of contract may obtain an account of the profit made by the other party through his breach. This is undoubtedly a relaxation of the rule in cases of breach of contract and it may be asked whether the rule that an account of profits is not available in case of fraud will continue to be applied. However, the conditions which the House of Lords laid down for an account of profits in breach of contract cases—broadly, that the claimant has a legitimate interest in the promised performance which an award of damages

will not satisfy because the breach will not necessarily cause a loss—are less likely to occur in cases of fraud, since damages for fraud by definition do not include the gain the claimant would have made (the “expectation”) had the statement made been true. Thus the claimant is entitled only to be put into the position he would have been in had the misrepresentation not been made,<sup>366</sup> and it is suggested that damages will normally be adequate for this purpose. To award the victim of a fraud an account of profit would be to allow him a fully restitutionary claim, and in *Halifax Building Society v Thomas* that was held by the Court of Appeal not to be available.<sup>367</sup>

## Exemplary damages

<sup>179</sup> It is not yet wholly clear if exemplary damages can be awarded for fraud.<sup>368</sup> Until recently it seemed very unlikely. Even if fraud could be brought within the first or second of Lord Devlin’s three categories in *Rookes v Barnard*,<sup>369</sup> namely, first, oppressive, arbitrary or unconstitutional action by the servants of government or, secondly, cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff,<sup>370</sup> the interpretation of those categories by the House of Lords in *Cassell & Co Ltd v Broome*<sup>371</sup> and by the Court of Appeal in *AB v South West Water Services Ltd*<sup>372</sup> required that for exemplary damages to be awarded the tort must be one in respect of which such an award had been made prior to 1964, and deceit is not such a tort.<sup>373</sup> However in *Kuddus v Chief Constable of Leicestershire Constabulary*<sup>374</sup> the House of Lords held that the power to award exemplary damages is not limited to those cases in which such awards had been made before 1964. *AB v South West Water Services Ltd* was overruled. This seems to open the way for awards of exemplary damages in cases of deceit which fall into Lord Devlin’s first two categories. Although both Lord Nicholls<sup>375</sup> and Lord Scott<sup>376</sup> remarked that the growth of remedies for unjust enrichment may make Lord Devlin’s second category of less importance as the defendant’s profit may be removed without an award of exemplary damages,<sup>377</sup> exemplary damages were awarded in a case involving fraudulent insurance claims where the anticipated profit would have exceeded the loss.<sup>378</sup> The argument (made in previous editions of this work) that it would be wrong to award exemplary where the defendant has already been convicted and imprisoned for the same fraud, because would infringe the basic principle that a person should not be punished twice for the same offence,<sup>379</sup> has been rejected.<sup>380</sup>

## Contributory negligence

<sup>180</sup> Contributory negligence is not a defence to an action of deceit and the Law Reform (Contributory Negligence) Act 1945<sup>381</sup> does not apply. Section 1(1) of the Law Reform (Contributory

Negligence) Act 1945 applies “[w]hen any person suffers damage as the result partly of his own fault and partly of the fault of any other person”. Section 4 defines “fault” as:

“... negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.”

Thus for the Act to apply, the claimant’s conduct must either be an act giving rise to liability to the defendant in tort or be one which at common law would have given rise to the defence of contributory negligence.<sup>382</sup> It has been held that at common law contributory negligence is not a defence to fraud and that therefore the Law Reform (Contributory Negligence) Act does not apply to fraud.<sup>383</sup>

## Compound interest

- 181 In *Black v Davies*<sup>384</sup> the Court of Appeal held that compound interest cannot be awarded on damages for fraud. Waller LJ, giving the judgment of the court, said that compound interest will be awarded in equity in the two cases:

“[1] ... where money had been obtained and retained by fraud, or [2] where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position.”<sup>385</sup>

However, subsequently the House of Lords said that the rule that lost interest may not be recovered by way of damages should be confined to those cases in which the loss is not pleaded or proved.<sup>386</sup> Loss of interest at compound rates can be recovered if that is the loss pleaded and proven.<sup>387</sup> This applies to damages for fraud as much as to damages for any other common law claim. It has been held in a case of fraud that damages may be recovered for loss of use of money on an alternative investment.<sup>388</sup>

## Illegality

- 182 It has been held that payments made under a contract which was illegal (though not to the knowledge of the plaintiff) could be recovered in an action of fraud,<sup>389</sup> though the contract itself could not be sued upon because of the illegality. Further, damages for fraud may be recovered even where the contract was known by the plaintiffs to be illegal, if the fraud and the illegality were quite unconnected.<sup>390</sup> In *Hughes v Clewley, The Siben (No.2)*<sup>391</sup> the misrepresentee was

permitted to claim damages for fraud although part of the business transferred to him was used for immoral purposes, as it was said that he did not have to rely on the illegal contract. Moreover, in calculating the value of what he had received for the purposes of damages, the value of this part of the business was disregarded. Whether a claim is unenforceable by reason of illegality is now to be determined by a “factors-based” approach<sup>392</sup>; it seems unlikely that this would change the outcome in the situations discussed in this paragraph.

## Footnotes

- <sup>1</sup> See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- <sup>282</sup> *Archer v Brown [1985] Q.B. 401*. The rules relating to liability for damages for fraud are set out in some detail in *Vald Nielsen Holding A/S v Baldorino [2019] EWHC 1926 (Comm)* at [130]–[159].
- <sup>283</sup> Below, paras 9-120—9-152.
- <sup>284</sup> See below, para.9-085.
- <sup>285</sup> Below, paras 9-084 et seq.
- <sup>286</sup> Strictly, the burden is the same as that in other civil proceedings, namely, proof on the balance of probabilities (*Hornal v Neuberger Properties Ltd [1957] 1 Q.B. 247*), but it is well known that the burden of proof of fraud is not easily discharged in practice. See the explanation in *Dadourian Group International Inc v Simms [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601* at [31]–[32], referring to the speech of Lord Nicholls in *Re H (Minors) [1996] A.C. 563, 586* and that of Baroness Hale in *Re B (Children) (Care proceedings: standard of proof) [2008] UKHL 35, [2009] 1 A.C. 11* at [62]. In *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* at [229] Hamblen J summarised the point thus: “Where a serious allegation (such as deceit) is in issue, this does not mean the standard of proof is higher. However, the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established”.
- <sup>287</sup> Below, para.9-104.
- <sup>288</sup> Below, para.9-112.
- <sup>289</sup> *(1889) 14 App. Cas. 337*.
- <sup>290</sup> Or knowledge that a fact stated previously is no longer true, and of its significance: *Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 1552 (TCC); FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [213]–[214]: see above, para.9-025.
- <sup>291</sup> *(1889) 14 App. Cas. 337, 374*.

- 292 “I can conceive of many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one”: *Lord Herschell* (1889) 14 App. Cas. 337, 375, cited in *Mortgage Express v Countrywide Surveyors Ltd* [2016] EWHC 224 (Ch) at [164].
- 293 (1889) 14 App. Cas. 337, 379. The decisions in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 W.L.R. 1476 and *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, [2018] A.C. 391 have not rendered the test of dishonesty an objective one, and only if the representor has been shown to not to have believed the truth of the statement can the question arise whether his conduct was honest or dishonest by the (objective) standards of ordinary people: *Glossop Cartons and Print Ltd v Contact (Print and Packaging) Ltd* [2019] EWHC 2314 (Ch) at [49].
- 294 *Reese River Silver Mining Co Ltd v Smith* (1869) L.R. 4 H.L. 64. See also *Taylor v Ashton* (1843) 11 M. & W. 401, 415; *Evans v Edmonds* (1853) 13 C.B. 777, 786.
- 295 (1869) L.R. 4 H.L. 64, 79–80.
- 296 See *Polhill v Walter* (1832) 3 B. & Ad. 114; *Denton v G.N. Ry* (1856) 5 El. & Bl. 860; *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Q.B. 621; *Standard Chartered Bank v Pakistan National Shipping Corp* [1995] 2 Lloyd's Rep. 365; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)* [2000] 1 Lloyd's Rep. 218, 224 (reversed in part on other grounds, [2002] UKHL 43, [2003] 1 A.C. 959); *Gabriel v Little* [2013] EWCA Civ 1513 at [32]. See also *Morrell v Stewart* [2015] EWHC 962 (Ch) (fraud if vendors said no work done on property knowing work had been done but believing it had cured any problem). The definition of criminal fraud under the *Fraud Act 2006* is different. Section 2 requires both dishonesty and an intention, by making the representation, either to make a gain for oneself or to cause loss to another or to expose another to the risk of loss. “It is not necessary that the maker of the statement was ‘dishonest’ as that word is used in the criminal law ... What is required is dishonest knowledge, in the sense of an absence of belief in truth”: *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) at [147]; *Glossop Cartons and Print Ltd v Contact (Print and Packaging) Ltd* [2019] EWHC 2314 (Ch) at [49].
- 297 *Gabriel v Little* [2013] EWCA Civ 1513 at [33]. That paragraph refers to “a dishonest intention”, but it has been held that there is no separate requirement of an intention to deceive: *Eco3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413 at [78]; *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [254].
- 298 *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) at [222]; *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [261]. Similarly, the representor may be taken to know that the statement would be acted on: see *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [263]–[264].
- ②99 *Smith v Chadwick* (1884) 9 App. Cas. 187; *Bonham-Carter v SITU Ventures Ltd* [2012] EWHC 3589 (Ch) at [119].

③00

*Akerhielm v De Mare* [1959] A.C. 789; *John McGrath Motors (Canberra) Pty Ltd v Applebee* (1964) 110 C.L.R. 656.

•301 *Akerhielm v De Mare* [1959] A.C. 789.

•302 *Gross v Lewis Hillman Ltd* [1970] Ch. 445; *Goose v Wilson Sandford (No.2)* [2000] All E.R. (D) 324 at [41]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [221]; *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) at [140]–[141].

•303 *Pisante v Logothetis* [2022] EWHC 161 (Comm) at [35] (“much to be said for the proposition”).

304 *Cornfoot v Fowke* (1840) 6 M. & W. 358; *Armstrong v Strain* [1952] 1 K.B. 232. This sentence was quoted with approval in *Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch) at [77].

305 *Lloyd v Grace, Smith & Co* [1912] A.C. 716; *Briess v Woolley* [1954] A.C. 333. The position of a junior employee, for instance one who passes on information given to him by a more senior officer and, though he has doubts about its accuracy, puts his name to it because he does not like to question it, is discussed by Tugendhat J in *GE Commercial Finance Ltd v Gee* [2006] 1 Lloyd's Rep. 337 at [96]–[112].

306 *London County Freehold & Leasehold Properties Ltd v Berkeley Property & Investment Co Ltd* [1936] 2 All E.R. 1039, as explained in *Armstrong v Strain* [1952] 1 K.B. 232.

307 *Ludgater v Love* (1881) 44 L.T. 694; *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, 320–321 and *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm) at [755] (in both cases this sentence in the text was cited with approval). See also *GG 132 Ltd v Hampson Industries Plc* [2011] EWHC 1137 (Comm) at [42].

308 Above, para.9-046.

309 See above, para.9-046; Clerk & Lindsell on Torts, 23rd edn (2020), para.17-35; see *Templeton Insurance Ltd v Motorcare Warranties Ltd* [2010] EWHC 3113 (Comm) at [168] (need not be sole cause; sufficient that substantially contributed to deceiving the claimant). The action will fail if the claimant would have done the same thing even if no representation had been made but the defendant will not normally be permitted to argue that the claimant might have done the same thing had he known the truth.

310 See *Leni Gas and Oil Investments Ltd v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm) at [17]; *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [298].

311 *Downs v Chappell* [1997] 1 W.L.R. 426 at 433; see also *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254, 283. This principle cannot prevent the claimant from giving evidence that it would not have acted as it did if it had known the true position, as demonstrating inducement by the fraudulent misrepresentation: *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm), [2009] 2 All E.R. (Comm) 589 at [105], per Flaux J (affirmed without reference to this point, [2010] EWCA Civ 486, [2011] Q.B. 477).

- 312 *Dadourian Group International Inc v Simms* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601 at [107]. See also above, para.9-046. The dictum in *Dadourian* is criticised by *Handley* (2015) 131 L.Q.R. 275, 283. However, it is consistent with what appears to be the case if it can be shown that, if the misrepresentation had not occurred and the misrepresentee would not have entered the contract, nonetheless he would have entered another losing contract. See below, para.9-075.
- 313 [1969] 2 Q.B. 158, noted (1969) in 32 M.L.R. 556; see also *New Zealand Refrigerating Co v Scott* [1969] N.Z.L.R. 30; *Parma v G. & S. Properties* (1969) 5 D.L.R. (3d) 315. *Doyle v Olby* is of general application, so it applies whether the claimant is the buyer or the seller: *Inter Export LLC v Townley* [2017] EWHC 530 (Ch) at [8].
- 314 See *Esso Petroleum Ltd v Mardon* [1976] Q.B. 801, 820, 828, 833; *Wemyss v Karim* [2016] EWCA Civ 27 at [23].
- 315 *Newark Engineering (N.Z.) Ltd v Jenkin* [1980] N.Z.L.R. 504; *Smith Kline & French Laboratories Ltd v Long* [1989] 1 W.L.R. 1. When there is no evidence as to values, the cost of making good the representation may be taken to represent the difference in value: *Jacovides v Constantinou, The Times*, 27 October 1986.
- 316 [1969] 2 Q.B. 158, noted in (1969) 32 M.L.R. 556.
- 317 [1991] 1 W.L.R. 461. See also *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] Q.B. 488 (claimants had agreed to buy goods from defendants at prices which defendants had fraudulently stated to be those charged to the defendants' UK customers. Although claimants had been able to resell the goods profitably, they were still entitled to the difference between the prices they had paid and those they would probably have been able to negotiate had the misrepresentation not been made). Similar damages for wasted expenditure and loss of other opportunities were awarded in *Esso Petroleum Ltd v Mardon* [1976] Q.B. 801. But cf. *Davis v Churchward* Unreported 6 May 1993 noted in (1994) 110 L.Q.R. 35. See also *Smith Kline & French Laboratories Ltd v Long* [1989] 1 W.L.R. 1, in which sellers, who had been tricked into supplying goods to a buyer who was unable to pay, recovered the normal wholesale price of the goods, not just the cost of producing them. It has been argued persuasively that the decision in *Smith Kline* on this point was wrong, as it had not been shown that the plaintiff had lost an opportunity to sell the goods to someone else: Burrows, Remedies for Torts, Breach of Contract and Equitable Wrongs, 4th edn (2019), pp.224–225. The point was left open by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254, 283 and the *Smith Kline* case remains binding on the Court of Appeal: *Inter Export LLC v Townley* [2018] EWCA Civ 2068, though it was said that “[t]here may ... be special rules which apply to matters surrounding the measurement of loss in the case of deceit which do not apply in the case of a negligent misstatement” (at [66]). There is no suggestion in the *Smith New Court* case, however, that damages for fraud should put the claimant into the position it would have been in had the statement been true. In the *Inter Export* case itself, *Smith Kline* was not applicable. A seller of goods who had been tricked into supplying them to a company by a false representation by a director that the company was able to pay for them, which it was not able to do, was entitled to recover the market value of the goods at the moment when it

relied on the representation by allowing the goods to be delivered, rather than a measure of its loss at the earlier date when the representation was first made (at [67]).

- 318 The award in *East v Maurer* [1991] 1 W.L.R. 461 based on a hypothetical profitable business in which the plaintiff would have engaged but for the deceit has been described by Lord Steyn as “classic consequential loss”: *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254, 282.
- 319 Even if the claimant would have paid the market price for the alternative business, he may have lost the opportunity to make profits, both by way of income and capital appreciation, and this loss is compensable: *4Eng Ltd v Harper* [2008] EWHC 915 (Ch) at [51]. (On the last point, see further below, para.29-032.)
- 320 *4Eng Ltd v Harper* [2008] EWHC 915 (Ch), [2009] Ch. 91.
- 321 *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm) at [147]. (The Court of Appeal held that the issue of loss of chance did not arise on the facts: [2010] EWCA Civ 486, [2011] Q.B. 477 at [23].) See also *Welven Ltd v Soar Group Ltd* [2011] EWHC 3240 (Comm); *County Leasing Asset Management Ltd v Michael Green Plant Ltd* [2012] EWCA Civ 53. On damages for loss of chance see further below, para.29-020.
- 322 In the United States, some jurisdictions allow recovery of damages for loss of bargain in actions for fraud, e.g. *Beardmore v T.D. Burgess Co* (1967) 226 A. 2d 329; cf. *Uncle Ben's Tartan Holdings Ltd v North West Sport Enterprises Ltd* (1974) 46 D.L.R. (3d) 280. Loss of bargain damages did appear to be recoverable in English law where there had been fraud by a vendor of land who knew that he had no good title and would be unable to make one, with the result that the rule in *Bain v Fothergill* (1874) L.R. 7 H.L. 158, below, para.29-004, did not apply; but this was not a true exception: the fraud simply lifted a restriction on recovery of damages for breach of contract that would otherwise apply. Mere negligence was not enough: see the disapproval of *Watts v Spence* [1976] Ch. 165 in *Sharneyford Supplies Ltd v Edge* at first instance [1986] Ch. 128, 149 and by Balcombe LJ in the Court of Appeal [1987] Ch. 305, 323. In any event the rule has been abolished as regards all contracts made after 27 September 1989: Law of Property (Miscellaneous Provisions) Act 1989 s.3.
- 323 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254, 281–282, per Lord Steyn, approving the statement by Treitel (1969) 32 M.L.R. 558–559. See also *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [201]; *Wemyss v Karim* [2016] EWCA Civ 27 at [24]–[25].
- 324 [1997] A.C. 254, 263.
- 325 The representee should be awarded the difference between the value of the assets received and retained and the contract price; there should not be a deduction for potential losses which it had fully appreciated and factored into the purchase price. “[C]laimants seeking damages for fraudulent misrepresentation can be compensated for making a bad bargain, even if they knew or ought to have known about defects in what they were buying before they entered into the transaction”: *Glossop Cartons and Print Ltd v Contact (Print and Packaging) Ltd* [2021] EWCA Civ 639, [2021] 1 W.L.R. 4297 at [36]–[37].

•326

A defendant who wishes to assert that post-breach events have reduced a recoverable loss must plead as well as prove it: *Tuke v Hood* [2022] EWCA Civ 23, [2022] 2 W.L.R. 983 at [35].

•327 In *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, Toulson LJ said that he took these instances “to be illustrative rather than exclusive” (at [34]).

328 [1997] A.C. 254, 267. Lord Mustill said that the judgment of Lord Denning in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158 was in some respects too broadbrush; the case had not been fully argued (apparently a reference to the fact mentioned by Lord Browne-Wilkinson that certain nineteenth-century cases on the date of valuation had not been cited). He considered that, in future, courts would do well to be guided by Lord Browne-Wilkinson’s seven propositions: 269. On the duty to mitigate, see *Standard Chartered Bank v Pakistan National Shipping Corp* [1999] 1 All E.R. (Comm) 417, affirmed [2001] EWCA Civ 55, [2001] 1 All E.R. (Comm) 822.

•329 See above, para.9-068.

•330 *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778, [2016] 2 Lloyd’s Rep. 432 (“The purpose of the flexibility of approach about the valuation date to which Lord Browne-Wilkinson referred was to ensure that the person duped should not suffer an injustice by failing to recover full compensation in the type of circumstances to which he referred. There is no need to adopt such an approach in order to relieve the fraudster from the general rule as to damages, especially if to do so means that the person defrauded ends up paying more than the cargo was worth at the time that he bought it” (at [39])). See *MDW Holdings Ltd v Norvill* [2022] EWCA Civ 883 at [49(iii)]. The *OMV* case is criticised by *Summers and Kramer* (2017) 133 L.Q.R. 41 for failing to take into account what the claimants would have done had the fraud not occurred, and that the goods about which the fraudulent representations had been made had been sold on before the fraud had come to light, apparently at the same price as if the claimants had known the truth, so on the compensatory principle they suffered no loss.

•331 [2016] EWCA Civ 778 at [66].

•332 *MDW Holdings Ltd v Norvill* [2022] EWCA Civ 883 at [79]. The victim is not required to give credit for any subsequent increase in the value of the property; nor is a party who has been induced by fraud to pay less than the property was worth required to give credit for the “time value” of the amount received: *Tuke v Hood* [2022] EWCA Civ 23, [2022] 2 W.L.R. 983 at [36]–[40] and [57]–[58].

333 See the speech of Lord Steyn in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254, 284; *Great Future International Ltd v Sealand Housing Corp* [2002] All E.R. (D) 28; McGregor on Damages, 21st edn (2020), para.49-011.

334 See the speech of Lord Steyn at 281–284.

335 [1997] A.C. 254, 284.

- 336 [1997] A.C. 254, 262 and 265; McGregor on Damages, 21st edn (2020), para.49-013. A rather similar explanation may underlie *Naughton v O'Callaghan* [1990] 3 All E.R. 191, a case under Misrepresentation Act s.2(1), in which the purchaser did not realise that the pedigree of the horse had been misrepresented until it had been very unsuccessful, by which time its value had fallen. Alternatively, the case may be one of a “flawed asset”: see paras 9-071—9-072 and McGregor, 21st edn (2020), para.49-063.
- 337 [1997] A.C. 254. See also *Glossop Cartons and Print Ltd v Contact (Print and Packaging) Ltd* [2019] EWHC 2314 (Ch) at [46] and [61].
- 338 [1994] 1 W.L.R. 1271.
- 339 [1997] A.C. 254.
- 340 (1877) 2 C.P.D. 469, 544–545.
- 341 [1997] A.C. 254, 279.
- 342 [1997] A.C. 191, [1997] A.C. 191. See below, para.29-192.
- 343 [1997] A.C. 191, 215.
- 344 [1997] 1 W.L.R. 426.
- 345 [1997] A.C. 254.
- 346 [1997] A.C. 254, 280.
- 347 In *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, Toulson LJ said that he took these instances “to be illustrative rather than exclusive” (at [34]).
- 348 (1877) 2 C.P.D. 469.
- 349 [1997] A.C. 254, 285. McGregor on Damages, 21st edn (2020), para.49-016 appears to take the view that the plaintiff may only be compensated for a subsequent fall in value when the asset was already flawed.
- 350 See above, para.9-063.
- 351 [1997] 1 W.L.R. 426.
- 352 See para.9-047, above.
- 353 [1997] A.C. 191, 218.
- 354 [1997] A.C. 254, 284–285.
- 355 [1997] A.C. 254, 283. The decision in *Downs v Chappell* [1997] 1 W.L.R. 426, as far as the vendor’s accountants were concerned, may have been interpreted in *Bristol and West Building Society v Mothew* [1998] Ch. 1 as applying the same measure in cases of negligence, but Hobhouse LJ, who delivered the only full judgment in *Downs*, has said that this is not an accurate account of the decision: *Swindle v Harrison* [1997] 4 All E.R. 705, 728.
- 356 [2013] EWHC 111 (QB), [2013] 1 Lloyd’s Rep. 526 at [209]–[217].
- 357 *Slough Estates Plc v Welwyn Hatfield DC* [1996] N.P.C. 118, 124; *Naughton v O'Callaghan* [1990] 3 All E.R. 191.
- 358 See e.g. *East v Maurer* [1991] 1 W.L.R. 461, discussed in para.9-065.
- 359 This might be because even if the false representation (an alleged implied representation that interest rates were not being manipulated) had not been made, the claimant would not have discovered the truth (*Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [360]) or, as in that case, the claimants would have entered a similar transaction

even without the representation and could not show that, had the truth been known, the transaction would have been on better terms (at [510]).

360 *[2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526* at [217].

361 For an application of the mitigation rule in a fraud case see *Downs v Chappell [1997] 1 W.L.R. 426*.

362 *McNally v Welltrade International Ltd [1978] I.R.L.R. 497; Jones v Emerton-Court [1983] C.L.Y. 982.*

363 *Shelley v Paddock [1980] Q.B. 348; Archer v Brown [1985] Q.B. 401.*

364 *Halifax B.S. v Thomas [1996] Ch. 217*; see also *Murad v Al-Saraj [2005] EWCA Civ 959, [2005] W.T.L.R. 1573; Renault UK Ltd v Fleetpro Technical Services Ltd [2007] EWHC 2541 (QB), [2007] All E.R. (D) 208 (Nov)* at [153]–[158]; and below, para.32-162.

365 *[2001] A.C. 268*; see below, paras 32-169 et seq.

366 See above, para.9-063.

367 *[1996] Ch. 217*. The Law Commission had recommended that restitutionary damages should be available if the defendant has committed a tort and his conduct shows a deliberate and outrageous disregard for the claimant's rights, but that was thought to require legislation: Report on Aggravated, Exemplary and Restitutionary Damages (No.247, 1997), para.3.51.

368 See *Mafo v Adams [1970] 1 Q.B. 548; Cassell & Co Ltd v Broome [1972] A.C. 1027* and *Archer v Brown [1985] 1 Q.B. 401, 418–421.*

369 *[1964] A.C. 1129.*

370 *Rookes v Barnard [1964] A.C. 1129, 1225–1226.*

371 *Cassell Co Ltd v Broome [1972] A.C. 1027, Mafo v Adams [1970] 1 Q.B. 548* was criticised.

372 *[1993] Q.B. 507.*

373 *Cassell & Co Ltd v Broome [1972] A.C. 1027, 1076*, per Lord Hailsham L.C. See also Law Commission, Aggravated, Exemplary and Restitutionary Damages (Report No.247, 1997), para.4.25. In *Parabola Investments Ltd v Browallia Cal Ltd [2009] EWHC 901 (Comm)* Flaux J said that his own research had shown that “exemplary damages have been awarded in cases of deceit, primarily in the case of fraudulent insurance claims by insureds dealt with in the county courts. This is no doubt because such cases do fall into that category, as the insurer's remedy is rejection of the claim coupled with avoidance and retention of the premium and it would not expect any compensation as such” (at [205]). However, he declined to make an award when the defendant's responsibility was only vicarious (see at [206]–[208]). The Court of Appeal (*[2010] EWCA Civ 486, [2011] Q.B. 477*) did not refer to this question.

374 *[2001] UKHL 29, [2002] 2 A.C. 122.*

375 *[2001] UKHL 29* at [67]. Lord Nicholls considered that Lord Devlin's second category should be expanded to include cases in which the defendant had acted with a malicious motive.

376 *[2001] UKHL 29* at [109]. Lord Scott thought that if exemplary damages were to be retained (which he personally regretted), deceit practised by a government or local authority official, or by a police officer, would be a suitable case for their award (at [122]).

377 See above, para.9-078 and below, para.29-069. The Law Commission, in its Report on Aggravated, Exemplary and Restitutionary Damages (No.247, 1997) had recommended that

punitive damages be available when, in committing a wrong or in subsequent conduct, the defendant deliberately disregarded the claimant's rights: see above, para.9-078.

- 378 *AXA Insurance UK Plc v Financial Claims Solutions Ltd* [2018] EWCA Civ 1330, [2019] R.T.R. 1.
- 379 Suggested in *Archer v Brown* [1985] Q.B. 401, 426.
- 380 *AXA Insurance UK Plc v Financial Claims Solutions Ltd* [2018] EWCA Civ 1330 at [33], applying *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197.
- 381 See below, para.29-094.
- 382 *Forsikringaktieselskapet Vesta v Butcher (No.1)* [1989] A.C. 852, 862, et seq.
- 383 *Alliance and Leicester Building Society v Edgestop Ltd* [1993] 1 W.L.R. 1462; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)* [2002] UKHL 43, [2003] 1 A.C. 959; see also *Corp Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 2 All E.R. 917, 921–923.
- 384 [2005] EWCA Civ 531, [2005] All E.R. (D) 78 (May). The question had been left open in *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] Q.B. 488.
- 385 The categories given by Lord Brandon in *President of India v LaPintada Compania Navigacion SA* [1985] A.C. 104 at 116A. This was the view of the majority in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669. For a case in which a party that had obtained money from a trust by deceit was held to be a constructive trustee and liable to pay compound interest, see *Glenn v Watson* [2018] EWHC 2483 (Ch).
- 386 *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 A.C. 561 at [96]. See below, para.29-289.
- 387 [2007] UKHL 34 at [16]–[17], [94], [100], [132] and [154].
- 388 *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, [2011] Q.B. 477.
- 389 *Saunders v Edwards* [1987] 1 W.L.R. 1116.
- 390 [1987] 1 W.L.R. 1116.
- 391 [1996] 1 Lloyd's Rep. 35.
- 392 *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467: see above, paras 18-004 et seq.

## **(b) - Negligent Misrepresentation**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 3. - Damages for Misrepresentation**

**(b) - Negligent Misrepresentation**

### **Preliminary**

- <sup>183</sup> A negligent misrepresentation is one which is made carelessly, or without reasonable grounds for believing it to be true. Apart from statute, a misrepresentation could not be regarded as negligent unless the representor owed a duty to be careful to the representee, and the law relating to the existence of such a duty of care has undergone some quite remarkable fluctuations since the case of *Derry v Peek*.<sup>393</sup> That case was at one time thought to lay down that there could never be a duty to take care in the making of statements unless the duty arose out of a contract itself, but the House of Lords rejected this view in two leading cases in this country. In *Nocton v Ashburton*<sup>394</sup> it was decided that such a duty to take care could arise out of a fiduciary relationship, and in *Hedley Byrne & Co Ltd v Heller and Partners Ltd*<sup>395</sup> the law was greatly widened by the decision that a duty to take care in making statements could arise out of many other “special relationships”. But the enactment of the *Misrepresentation Act 1967* has reduced the importance of these cases so far as the law of contract is concerned.

### **Misrepresentation Act s.2(1)<sup>396</sup>**

- <sup>184</sup> This subsection reads as follows:



“Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.”

Thus, where a person is induced to enter into a contract as a result of a misrepresentation, this subsection does away with the need to establish any duty of care as between the representor and the representee. In any circumstances in which this section applies,<sup>397</sup> the representee will have an action for damages under the Act.

<sup>398</sup>

**U** In *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd*<sup>399</sup> the plaintiffs misrepresented to the defendants the carrying capacity of two barges which the defendants wished to hire for carrying large quantities of clay out to sea and dumping them. The defendants entered into the contract in reliance on this misrepresentation and used the barges for some time, after which they discovered the true facts and returned the barges. It was said by a majority of the Court of Appeal that the plaintiffs were probably not under a duty of care at common law, but a differently-constituted majority held that the defendants were entitled to damages for a breach of s.2(1) of the 1967 Act.

## Not strictly speaking liability for negligence

<sup>405</sup>

In *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd*<sup>400</sup> it was also stressed that under s.2(1) the question was, strictly speaking, not one of negligence, but that the Act imposed an absolute obligation not to state facts which the representor cannot prove he had reasonable grounds to believe. No doubt it is correct to say that it is not a question of negligence, as at common law, where a duty of care is in issue<sup>401</sup>; and it is possible that circumstances may exist in which a person may make a statement without having reasonable ground to believe it, yet in which it would be held that he was not (having regard to all the circumstances) negligent. Nevertheless, for explanatory purposes it is sufficient to equate liability under s.2(1) of the Act with liability for negligence, and the statutory liability is referred to in this chapter, for the sake of convenience, as a liability for negligence.

## Effect of s.2(1)

<sup>186</sup> It will be noted that the gist of the subsection is to confer a right to damages for negligent misrepresentation in circumstances in which such a right would exist if the misrepresentation has been fraudulent.<sup>402</sup> A number of consequences seem to follow from this. First, the rules relating to what constitutes a misrepresentation,<sup>403</sup> and the principle that the representation must have been one of the inducements influencing the mind of the representee,<sup>404</sup> will apply to an action under the subsection as they apply to an action in fraud. Secondly, it is now settled that the basic measure of damages under the subsection is the same as the measure of damages for fraud.<sup>405</sup> This follows from the wording of the subsection.<sup>406</sup> In any event it would be highly anomalous if the basic measure of damages for negligent misrepresentation under the Act were different from the normal measure of damages for common law negligent misrepresentation. This means that generally damages will be awarded to put the representee in the position in which he would have been if he had never entered into the contract, and not to put him in the position in which he would have been if the misrepresentation had been true.<sup>407</sup>

## Application of rules on damages for fraud

<sup>187</sup> It has been shown that damages for fraud are governed by somewhat different rules to damages for negligent misrepresentation at common law: losses may be recoverable even though they were not of a foreseeable kind<sup>408</sup> and, in some circumstances, consequential losses may include compensation for falls in the value of the property acquired which were unrelated to the fraudulent statement.<sup>409</sup> It is not clear whether these rules, which appear to be justified by considerations of morality and deterrence,<sup>410</sup> are applicable to damages claimed under s.2(1). In the 26th edn of this work it was suggested<sup>411</sup> that the first rule did not apply, but this was rejected by the Court of Appeal in *Royscot Trust Ltd v Rogerson*<sup>412</sup> on the ground that this interpretation “is to ignore the plain words of the subsection”.<sup>413</sup> In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*<sup>414</sup> both Lords Browne-Wilkinson and Steyn declined to comment on the correctness of the *Royscot* case. If the interpretation of s.2(1) taken in *Royscot* is correct, however, it would presumably follow that damages under s.2(1) can also include compensation for loss of value caused by a fall in the market, at least where the claimant has acquired an “already flawed asset”,<sup>415</sup> and that contributory negligence will not necessarily be a defence or lead to a reduction in the claimant’s damages.<sup>416</sup> Whether it is necessary to interpret s.2(1) in this way may, with respect, be doubted.

417

- U** It does not seem appropriate to apply the special rules governing damages for fraud, which are justified by considerations of morality and deterrence,<sup>418</sup> to cases in which there was, by definition, no fraud.<sup>419</sup>

## Fraud rules on knowledge

- 188 Further, a possible consequence of the decision in *Roscot Trust Ltd v Rogerson*<sup>420</sup> is that the difficulties which arise in cases of fraud where the misrepresentation is made by one person, but the guilty knowledge is that of another, seem to apply equally to an action for negligence under the subsection.<sup>421</sup> If, for example, the representee contracts with a company as a result of a misrepresentation made to him by one of the company's employees or agents, and that employee or agent did have reasonable grounds for believing the statement to be true, the representee will have no action under the subsection merely because another employee or agent of the company knew that the representation was untrue, or knew that there were no reasonable grounds for believing it to be true.<sup>422</sup> However, in practice this type of case may not prove so troublesome in cases of negligence as it has been in cases of fraud. Although a court will not impute fraud to an employee or agent merely because his principal (or another employee or agent) knows that the statement he has made is untrue, a court might be much more ready to hold that the person making the statement in these circumstances did not have reasonable grounds for believing that the facts stated were true<sup>423</sup>; and it would also be possible to find negligence at common law as a result of a failure of one employee to inform another of the true facts.<sup>424</sup> Damages have been awarded under this subsection against a vendor of land because of the misrepresentations of his estate agent.<sup>425</sup>

## Rescission and damages

- 189 There is nothing in the subsection to prevent the representee from both rescinding the contract and claiming damages,<sup>426</sup> though (as will be seen below)<sup>427</sup> the court now has a discretion to refuse to allow rescission, except in cases of fraud, under s.2(2) of the Act. If the representee does rescind he was, even before the passing of the Act, entitled to an "indemnity"<sup>428</sup> against liabilities incurred as a result of the contract, and it seems clear that he cannot claim both an indemnity and damages under s.2(1) in respect of the same loss.

## No damages for non-disclosure

- 190 The section does not give rise to liability in damages for failure to disclose, even when there is a duty to disclose material facts.<sup>429</sup> Silence as to material facts which should be disclosed is not an implicit representation that there is nothing to be disclosed, nor does it constitute a “misrepresentation made” within s.2(1).<sup>430</sup>

## Contributory negligence

- 191 It was held in *Gran Gelato Ltd v Richcliff (Group) Ltd*<sup>431</sup> that damages for negligent misrepresentation under s.2(1) of the Misrepresentation Act 1967 may be reduced under [s.1 of the Law Reform \(Contributory Negligence\) Act 1945](#)<sup>432</sup> if the loss was partly the fault of the representee. Liability under s.2(1) applies unless the representor “had reasonable grounds to believe and did believe ... that the facts represented were true” and thus is “essentially founded on negligence”. However, it would not be just and equitable to reduce the damages when the representor had intended, or should be taken as having intended, that the representee should act in reliance on the answers which had been given to his questions.

<sup>433</sup>

**U** The decision was based on the fact that there was concurrent liability under s.2(1) and in tort for negligent misrepresentation under the principle of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.<sup>434</sup> It may happen that a defendant is liable under s.2(1) without being concurrently liable in tort for negligent misrepresentation, for instance because the court considers that there was on the facts no undertaking of responsibility towards the claimant.<sup>435</sup> In such a case it seems that the claimant’s damages could not be reduced on account of any contributory negligence. This is because s.2(1) makes the misrepresentor who cannot prove reasonable grounds liable as if the statement had been fraudulent. It has been held that at common law contributory negligence is not a defence to fraud and that therefore the [Law Reform \(Contributory Negligence\) Act](#) does not apply to fraud.<sup>436</sup> Because the misrepresentor is to be liable under the [Misrepresentation Act 1967](#) s.2(1), “as if the representation had been fraudulent”,<sup>437</sup> the [Law Reform \(Contributory Negligence\) Act](#) seems not to apply to claims under s.2(1) where there is no concurrent liability in tort for negligent misrepresentation.

## Burden of proof

- 192 Once the representee proves that the statement was in fact false, the burden under the subsection shifts to the representor to prove that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. Where the negotiations for a contract have continued over a substantial time, and the misrepresentation was made some while before the contract was finally entered into, this burden may indeed prove a heavy one. It will not be sufficient for the representor to prove that he had reasonable grounds to believe the statement was true when made; he will have to go on to prove that he had reasonable grounds to believe and did believe the statement was true when the contract was made.<sup>438</sup>

## Parties liable under the subsection

- 193 The subsection only applies where the representee has entered into a contract after a misrepresentation was made to him by another party to the contract.<sup>439</sup> Presumably, ordinary principles of agency will still apply, so that an action will lie under the subsection where the misrepresentation has been made by an agent of the other contracting party, acting within the scope of his authority.<sup>440</sup> But an agent who makes a misrepresentation which is within his actual or ostensible authority is not personally liable under the subsection, despite the fact that the subsection, having referred to a misrepresentation having been made by a *party* to the contract (i.e. the principal via the agent) then goes on to refer to the liability of the *person* making the representation.<sup>441</sup> The agent may, of course, be liable for negligence at common law but only if he has assumed personal responsibility towards the claimant.<sup>442</sup> If the agent seeks to enforce the contract in his own name, the misrepresentation may be set up as a defence against him whether or not it is attributable to him rather than his principal.<sup>443</sup>

## Misrepresentation by third person

- 194 The subsection has no application where the representor is neither himself the other contracting party nor the agent of the other contracting party. Thus where B is induced to enter into a contract with C as a result of a misrepresentation made by A, and A is not C's agent,<sup>444</sup> B will have no right of action against A under the subsection.<sup>445</sup> He may, however, have a remedy in damages against A on some other ground. There is, of course, no doubt that A would be liable to B in tort for fraud if fraud were proved, and in these circumstances, he might also be liable on the ground of a collateral

contract or warranty (which requires neither fraud nor negligence to support it).<sup>446</sup> Further, an action may lie for negligent misrepresentation quite apart from s.2(1) of the Misrepresentation Act.

## Liability for negligence at common law

195 It would be beyond the scope of this work to examine this kind of liability in detail

<sup>447</sup>

① since it is not strictly contractual in its nature, and in any event, its importance has been greatly diminished by s.2(1) of the Misrepresentation Act which has been discussed in the preceding paragraphs.<sup>448</sup> But some account of this kind of liability is not out of place even in a work on the law of contract, since cases may arise in which a person is induced to enter into a contract as a result of a misrepresentation by a third party, and in these circumstances it is obviously desirable to consider the remedies available to the representee as a whole. This kind of liability may sometimes also arise where parties are negotiating for a contract but no contract is ever concluded, and loss is caused to one party as a result of a negligent statement by the other.<sup>449</sup> Since the decisions in *Nocton v Ashburton*<sup>450</sup> and *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>451</sup> it is clear that an action will lie in tort for negligent misrepresentation causing loss to the representee where the relationship of the parties is such as to give rise to a duty of care. The former case establishes that such a duty may arise (even apart from contract) out of a fiduciary relationship, such as that of solicitor and client, principal and agent, or trustee and beneficiary; the latter case establishes that such a duty may also arise in other circumstances.<sup>452</sup>

## Nocton v Ashburton

196 In this case a mortgagee sued his solicitor, alleging that by improper advice the latter had induced him to release part of his security, whereby the security had become insufficient; it was further alleged that the solicitor knew that the security would be rendered insufficient, and that his advice was given in order that he himself might benefit. The House of Lords held that fraud in the sense of *Derry v Peek*<sup>453</sup> had not been proved, but that the mortgagee was entitled to relief for the breach of a duty imposed on the solicitor by the relationship in which he stood to his client.

## What is a fiduciary relationship

197

The fiduciary or confidential relationship necessary to bring this doctrine into operation extends to certain obvious ties, such as those between trustee and cestui que trust, solicitor and client, and parent and child. But the courts have not fettered their jurisdiction by defining its limits, and are ready to interfere in order to protect the person who is under the influence of another. The principle was stated in *Tate v Williamson*<sup>454</sup>:

“Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.”<sup>455</sup>

Cases relating to fiduciary relationships are generally dealt with as part of the doctrine of “undue influence”,<sup>456</sup> but it is not wholly clear whether every relationship which would justify rescission of a contract for undue influence would also give rise to a duty of care which would support an action for damages for negligence.<sup>457</sup>

## Hedley Byrne & Co Ltd v Heller & Partners Ltd

- 198 Until the decision of the House of Lords in the *Hedley Byrne*<sup>458</sup> case in 1964, it was thought that a duty to take care in the making of statements could only arise in the case of fiduciary (or, of course, contractual) relationships, but that decision showed that the law is very much wider than this. Although the House made it clear that misrepresentations made in the course of a mere social relationship would not ground liability in tort, they also made it clear that many “special relationships” would suffice. In particular, it is clear that professional relationships, even where there is no contract between the parties, will often give rise to a duty of care if it can be said that the representor knew or ought reasonably to have known that the representee was likely to act on the representation.<sup>459</sup> So, for example, if a company’s auditor gives negligent advice to a person who invests money in the company on the strength of the advice, and it can be shown that the auditor ought to have realised that the representee would act on the advice, an action for negligent misrepresentation will lie against the auditor.<sup>460</sup> Again advice given “in a business connection” about the creditworthiness of a third party may give rise to a duty of care even where the adviser is not acting in a professional capacity,<sup>461</sup> provided he has some financial interest in the transaction.<sup>462</sup> On the other hand, the question whether a banker owes a duty to take care in giving references about his customers was left open by the House of Lords in the *Hedley Byrne* case, since it was thought that such a liability might be too onerous. It was, however, said that a “duty to be honest” is at least owed in such circumstances, though it is far from clear whether this is

the same thing as the duty merely to abstain from fraud.<sup>463</sup> If the “duty to be honest” goes beyond liability in fraud, it would seem necessary to recognise a new form of liability midway between fraud and negligence, but it is submitted that this is a confusing and unnecessary conception. Since the duty of care means a duty to take such care as is reasonable in all circumstances of the case, the law of negligence is already sufficiently flexible to cater for different degrees of care. There is, for instance, no reason why a court should not hold that a banker giving references about a customer does owe a duty of care to the representee, while at the same time recognising that this duty does not require the banker to compile an exhaustive dossier on the customer’s activities over a period of many years.<sup>464</sup>

## Statement in connection with particular transaction

- <sup>199</sup> In *Caparo Industries Plc v Dickman*<sup>465</sup> it was held that there will be no liability in tort for negligent misrepresentation unless the maker of the statement knew that the statement would be communicated to the person relying on it specifically in connection with a particular transaction or a transaction of a particular kind. In relation to misrepresentation as between contracting parties,<sup>466</sup> this appears to mean that the misrepresentation must have been made in connection with the contract in respect of which relief is sought, or at least that reliance on the representation in connection with the contract was likely.<sup>467</sup>

## Voluntary assumption of responsibility

- <sup>100</sup> In *Hedley Byrne*, considerable emphasis was placed on whether the defendants had voluntarily assumed responsibility towards the plaintiffs<sup>468</sup>; and the defendants’ disclaimer of responsibility prevented them from being liable in that case. The meaning of assumption of responsibility is not wholly clear. In *Smith v Eric S. Bush*,<sup>469</sup> in which the plaintiff had purchased a house on the strength of a valuation made by surveyors employed by the building society from whom the plaintiff borrowed to finance the purchase, the application form signed by the plaintiff stated that the defendant valuer’s report would be “supplied without acceptance of responsibility on their part to me”. Similarly, in the joined case of *Harris v Wyre Forest DC*, in which the survey was carried out by an employee of the lender, the application form stated that the lender took “no responsibility ... for the value or condition of the property”. It was held by the House of Lords that the defendants were responsible nonetheless; the clauses were subject to **Unfair Contract Terms Act 1977 s.2(2)** and had not been shown to be reasonable. Lord Griffiths stated that he did not find that “voluntary assumption of responsibility is a helpful or realistic test for liability”.<sup>470</sup> However, subsequent authority in the House of Lords again stressed that liability for economic loss, including in cases

of negligent misstatement, is based on an “assumption of responsibility”.<sup>471</sup> Lord Goff explained that:

“... especially in a context concerned with a liability which may arise under a contract or in a situation ‘equivalent to contract’, it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff.”<sup>472</sup>

Thus the existence of a disclaimer will not necessarily negate an assumption of liability if the defendant knows that there is a strong probability that the plaintiff will nonetheless rely on the information given.<sup>473</sup> The defendant will be protected only if he shows that the disclaimer satisfies the requirement of reasonableness under the [Unfair Contract Terms Act 1977](#)<sup>474</sup> or the requirement of fairness under the [Consumer Rights Act 2015](#),<sup>475</sup> as appropriate.

## Statements not made in course of business

- 101 The principle of the [Hedley Byrne](#) case was somewhat limited by the majority decision of the Privy Council in [Mutual Life and Citizen's Assurance Co Ltd v Evatt](#)<sup>476</sup> where it was held that in general there is no duty to take care in the making of statements unless the maker has held himself out as having some special skill or competence in the matter in question. In general, it was held, the duty will only arise where the statement is made in the course of a business though in some cases other factors may be sufficient to impose a duty, for example that the person making the statement has a financial interest in the transaction on which he has given advice.<sup>477</sup> It seems unlikely that this decision will now be followed. It was decided by a bare majority and several judges have felt free to indicate their preference for the minority judgments of Lord Reid and Lord Morris.<sup>478</sup> However, it has been pointed out that although the inflexible view of [Mutual Life](#) has been rejected, it remains the case that a claimant is much more likely to be able to show that he is entitled to depend on a service or statement where the work is undertaken by a person who is exercising a special skill in a business context.<sup>479</sup>

## Special relationship between parties negotiating contract

- 102 It is clear that a special relationship, giving rise to a duty of care, may subsist between parties negotiating a contract if information is given in connection with the contract.<sup>480</sup> In [Esso Petroleum Co Ltd v Mardon](#)<sup>481</sup> it was held that a petroleum company, negotiating a lease of a filling station, was liable to the tenant for negligently giving him over-optimistic estimates of the sales potential

of the filling station. It should be noted that this was not a casual observation made between parties each of whom was in the same position to judge the accuracy of the estimate. The information was based on a detailed evaluation of the position by the petroleum company and the tenant was clearly not in as good a position as they were to make such an estimate.<sup>482</sup> Similarly, it has been held that a special relationship existed between a landlord and a tenant as a result of pre-contractual discussion during which the landlord assured the tenant that he would keep the premises insured<sup>483</sup>; but it was also held in this case that the duty was only a duty not to give misleading information, and did not extend to requiring the landlord to exercise care not to allow the insurance to expire unrenewed without informing the tenant.<sup>484</sup> On the other hand, it has been held that a special relationship existed between an astute and experienced business woman and an insurance company with whom she was contemplating investing over £90,000 in a property bond; and in this case it was held that the consequential duty of care required the defendants' agent to give the plaintiff an adequate explanation of the nature of property bonds, and was not merely a duty to avoid misrepresentation.<sup>485</sup> A Canadian case has held that a builder who provided an estimate as to the cost of building a house was under a duty to take care to see that the client realised that his estimate did not include his 15 per cent mark up.<sup>486</sup> Sometimes even a failure to disclose may give rise to liability, but this will only be so if there has been a voluntary assumption of responsibility to disclose and the claimant has relied on it. There is no liability under the *Hedley Byrne* principle simply because the contract was uberrimae fidei and thus could be avoided for non-disclosure of a material fact.<sup>487</sup>

## Relationship between manufacturer and purchaser of goods

- <sup>103</sup> In *Lambert v Lewis*<sup>488</sup> it was held by the Court of Appeal that a person who purchases goods in reliance on statements in a manufacturer's promotional literature is not, for that reason alone, entitled to claim that a special relationship exists as a result of which the manufacturer may be held liable for negligent statements in the literature. The mere making of a serious statement with the intent that it should be relied upon was not enough, said the court, to create a special relationship. It may seem regrettable that a manufacturer is under no duty of care with respect to statements made in his brochures and advertising leaflets which are plainly designed to influence buyers. However, the decision itself seems consistent with the later decision in *Caparo Industries Plc v Dickman*<sup>489</sup> that there will be no liability in tort for negligent misrepresentation unless the maker of the statement knew that the statement would be communicated to the person relying on it either as an individual or as a member of a specified class, specifically in connection with a particular transaction or a transaction of a particular kind. In most cases a manufacturer will not know the purchaser's identity other than as a member of a very broad class and will know the purchaser's purposes only in general terms. If the manufacturer knows both the purchaser's identity and his purposes it is submitted that there may be a special relationship.<sup>490</sup> There is authority for saying that in such circumstances information given by the manufacturer may constitute a contractual

warranty.<sup>491</sup> There is some ground for suggesting that even in the absence of direct contact between manufacturer and purchaser, statements in the manufacturer's literature should be treated as warranties, rendering the manufacturer strictly liable, and not merely liable for negligence: this is certainly the position in American law,<sup>492</sup> but in English law such statements are said not to be warranties unless there is an intent to warrant.<sup>493</sup> However, where goods are sold to a person dealing as a consumer, public statements made by the producer are relevant to whether the goods are of satisfactory quality<sup>494</sup>; and where goods are sold or supplied to a consumer with a "guarantee", the guarantee:

"... takes effect ... as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and in any associated advertising."<sup>495</sup>

## Where negotiations do not lead to contract<sup>496</sup>

- <sup>104</sup> In principle there seems no reason why a special relationship should not be held to exist between parties negotiating a contract even where the negotiations break down so that no contract is ultimately made. Indeed, this seems to have been the basis of the decision in *Box v Midland Bank Ltd*<sup>497</sup> where the plaintiff sought a large loan from his bankers. His bank manager told him that the loan would need approval from head office but gave the plaintiff to think that this was a formality; in the meantime, the plaintiff was permitted overdraft facilities. The loan application was refused by head office and the plaintiff claimed that he had suffered loss through being led to believe that the loan would be forthcoming. This claim was, in part, upheld by Lloyd J on the basis that the bank manager owed a duty not to mislead the plaintiff by careless advice as to the probable outcome of his loan application.

## Special relationship between parties already in contractual relationship

- <sup>105</sup> It is now clear that one party to a contractual relationship may owe duties in tort to the other; these duties may overlap with contractual duties, and where this is the case the claimant may have alternative causes of action in contract and in tort.<sup>498</sup> It has also been held that damages may be obtainable for misrepresentations made in the course of renegotiating a contract already in existence, under the Misrepresentation Act,<sup>499</sup> and there seems no reason to doubt that in an appropriate case liability could also arise under the *Hedley Byrne* principle in such a situation.

## Damages at common law

- <sup>106</sup> Damages for negligent misrepresentation at common law will naturally be on the tortious measure <sup>500</sup>; but the usual rules on remoteness <sup>501</sup> and contributory negligence <sup>502</sup> will apply. So will the restrictions on a negligent valuer's liability for subsequent falls in the value of the property set down in *South Australia Asset Management Corp v York Montague Ltd.* <sup>503</sup>

## Other legislative provisions creating liability for negligent misrepresentations: financial services

- <sup>107</sup> There are a number of legislative provisions that in effect create liability for negligent misrepresentation in particular circumstances.

<sup>504</sup>

 For example, **Financial Services and Markets Act 2000 Pt VI** imposes stringent duties on persons responsible for listing particulars of securities for admission to the Official List, and prospectuses.

<sup>505</sup>

 The legislation makes the person responsible liable to pay compensation to a person who has acquired securities to which the legislation applies,

<sup>506</sup>

 and who has suffered loss as the result of any untrue or misleading statement in the prospectus or, in the case of listing particulars, the particulars.

<sup>507</sup>

 It then provides a number of exceptions, one of which is that liability for the loss will not be incurred if the person responsible satisfies the court that, at the time when the particulars were submitted to the relevant authority or delivered for registration, he reasonably believed that the statement was true and not misleading.

<sup>508</sup>

 There is also liability for failure to publish a supplementary prospectus when necessary.

<sup>509</sup>



## Former Property Misdescriptions Act

- <sup>108</sup> Under [s.1 of the Property Misdescriptions Act 1991](#), the making of a false or misleading statement about a prescribed matter<sup>510</sup> in the course of an estate agency business or a property development business might constitute a criminal offence, unless all reasonable steps and due diligence had been used to avoid committing the offence.<sup>511</sup> However no contract was void or unenforceable and no right of action in civil proceedings would arise by reason only of the commission of an offence under the section.<sup>512</sup> The [Property Misdescriptions Act 1991](#) was repealed with effect from 1 October 2013.<sup>513</sup> Consumers are now protected by the [Consumer Protection from Unfair Trading Regulations 2008](#).<sup>514</sup>

## Package travel, etc.

- <sup>109</sup> Under the [Package Travel, Package Holidays and Package Tours Regulations 1992](#),<sup>515</sup> organisers or retailers of such packages were not to supply any descriptive matter concerning a package, the price of a package or any other conditions applying to the contract which contained misleading information. If a consumer suffered loss as a result of a breach of this requirement the organiser or retailer was liable to pay compensation.<sup>516</sup> As liability appeared to be strict it might be regarded as contractual than for misrepresentation; but it was pointed out that the relevant regulation differs from others which imply terms into the contract.

<sup>517</sup>

-  The measure of damages was not stated, but it seems likely that a tort measure would be applied.<sup>518</sup> The [1992 Regulations](#) have now been replaced by [Package Travel and Linked Travel Arrangements Regulations 2018](#).<sup>519</sup> These require the organiser or the retailer to provide the traveller with listed types of information before the contract is concluded<sup>520</sup> and provide that the information provided will form “an integral part of the package travel contract”.<sup>521</sup> Thus it appears that if the information given is incorrect, the traveller will have remedies for breach of contract.<sup>522</sup> Indeed, the Regulations provide that compliance is a condition of the contract.<sup>523</sup>

## Footnotes

- 1 See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).
- 393 [1889] *14 App. Cas.* 337; above, paras 9-056—9-058.
- 394 [1914] *A.C.* 932; see below, para.9-096.
- 395 [1964] *A.C.* 465; see below, para.9-098.
- 396 Note that under s.2(4) of the Misrepresentation Act 1967 (added by *Consumer Protection (Amendment) Regulations 2014* (SI 2014/870) reg.5), a consumer who has a right to redress under Pt 4A of the Consumer Protection from Unfair Trading Regulations 2008 (on which see para.9-002 and Vol.II, paras 40-166 et seq.) in respect of the conduct constituting misrepresentation no longer has a right to damages under s.2 of the Act: see below, Vol.II, para.40-220.
- 397 There seems no reason why s.2(1) should not apply in cases of insurance when the policyholder has made a misrepresentation, and on occasion it has been assumed that it does: see *HIH Casualty & General Insurance v Chase Manhattan Bank* [2001] *1 Lloyd's Rep.* 30 at [90] (for further proceedings not related to this point, see [2001] *EWCA Civ* 1250, [2001] *2 Lloyd's Rep.* 483 and [2003] *UKHL* 6, [2003] *2 Lloyd's Rep.* 61). However, it has been questioned whether it is correct to permit an insurer who has lost the right to avoid the policy nonetheless to recover damages equivalent to the benefit it would have received from avoidance under s.2(1): *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] *EWHC* 301 (*Comm*) at [45]; reversed on other grounds [2011] *EWCA Civ* 1572, [2012] *Lloyd's Rep. I.R.* 67, compare below, para.9-117.
- 398 Where it is difficult for the claimant to prove the amount of loss, it seems that the cases on proving loss caused by breach of contract (see below, para.29-019) can be applied: see *Hodgson v Creation Consumer Finance Ltd* [2021] *EWHC* 2167 (*Comm*) at [103]–[109].
- 399 [1978] *Q.B.* 574, noted (1978) 94 *L.Q.R.* 334.
- 400 [1978] *Q.B.* 574, noted (1978) 94 *L.Q.R.* 334.
- 401 An action under s.2(1) is not an action for negligence within the meaning of the *Limitation Act 1980* s.14A, since it is not necessary for the claimant to aver any negligent act or omission: *Laws v Society of Lloyd's* [2003] *EWCA Civ* 1887, *The Times*, 23 January 2004 at [91] (whether it is an action in tort was left open, see at [92]); *Thomas v Taylor Wimpey Developments Ltd* [2019] *EWHC* 1134 (*TCC*), [2019] *B.L.R.* 382 at [41].
- 402 s.2(1) only gives rise to a right to damages and cannot be relied on as a defence to a claim for injunctive relief by a misrepresentee who does not wish to avoid the contract as a whole but to repudiate just one of its terms: *Inntrepreneur Pub Co (CPC) v Sweeney*, *The Times*, 26 June 2002.
- 403 Above, paras 9-008 et seq.
- 404 Above, paras 9-041 et seq. See the *Howard Marine case* [1978] *Q.B.* 574.
- 405 *Royal Trust Ltd v Rogerson* [1991] *2 Q.B.* 297. See also *F. & H. Entertainments Ltd v Leisure Enterprises Ltd* (1976) *120 S.J.* 331; *André & Cie SA v Ets Michel Blanc & Fils* [1977] *2 Lloyd's Rep.* 166; *McNally v Welltrade International Ltd* [1978] *I.R.L.R.* 497;

*Chesnau v Interhomes* (1983) 134 New. L.J. 341; *Heineman v Cooper* (1987) 19 H.L.R. 262 (apparently an action under s.2(1)); *Cooper v Tamms* [1988] 1 E.G.L.R. 257.

- 406 *Royscot Trust Ltd v Rogerson* [1991] 2 Q.B. 297. Note that actual fraud still has to be proved if it becomes relevant for other purposes: *Garden Neptune Shipping Ltd v Occidental World Wide Investment Ltd* [1990] 1 Lloyd's Rep. 330.
- 407 Though see the contrary suggestion in *Jarvis v Swan Tours Ltd* [1973] Q.B. 233, 237. See also *Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd* [1974] 2 Lloyd's Rep. 27; *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801. *Watts v Spence* [1976] Ch. 165, which suggested that damages under s.2(1) might be on a loss of bargain basis, has been disapproved: see above, para.9-066.
- 408 Above, para.9-064.
- 409 Above, paras 9-070—9-075. In *Young v Hamilton* [2012] NICH 4 damages for distress were awarded (cf. above, para.9-077) under s.2(1) without referring to the fiction of fraud.
- 410 See the words of Lord Steyn in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254, 280, referred to earlier, para.9-073.
- 411 Chitty, 26th edn, Ch.6, para.439, referring to Treitel, The Law of Contract, 7th edn (1987), p.278.
- 412 [1991] 2 Q.B. 297. See the criticisms of that case in (1991) 107 L.Q.R. 547.
- 413 [1991] 2 Q.B. 297 at 307 and 309.
- 414 [1997] A.C. 254 at 267 and 283. In *Avon Insurance v Swire* [2000] 1 All E.R. (Comm) 573 the defendants reserved the right to argue the correctness of the *Royscot* case in a higher court. See also *Cheltenham BC v Laird* [2009] I.R.L.R. 621 at [524]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [223]. But see *Forest International Gaskets Ltd v Fosters Marketing Ltd* [2005] EWCA Civ 700 at [15]–[16]. The Singapore Court of Appeal doubted the correctness of the *Royscot* case in *RBC Properties v Defu Furniture Pte Ltd* [2014] SGCA 62, [2015] 1 S.L.R. 997; see *Liau* [2015] L.M.C.L.Q. 464.
- 415 Above, paras 9-070—9-075. See *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526 at [207].
- 416 See above, para.9-080 and below, para.9-091. *Lord Tenterden's Act* may also apply: see above, para.9-054.
- 417 In *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526 Leggatt J said (at [206]) that “It is possible to construe the words ‘and as a result thereof has suffered loss’ as requiring the claimant to show that he has suffered loss as a reasonably foreseeable result of a misrepresentation having been made to him, and to treat the following words as imposing an additional requirement (that the defendant would be liable to damages had the misrepresentation been made fraudulently) which must also be satisfied”, but held that unless and until *Royscot Trust* is over-ruled he was bound to apply it. In *Hodgson v Creation Consumer Finance Ltd* [2021] EWHC 2167 (Comm) HH Judge Pearce, sitting as a judge of the High Court, noted that because the loss on the *Royscot Trust* case was held not to be unforeseeable ([1991] 2 Q.B. 297 at 307F), what Balcombe LJ said might be obiter, but left the point open (at [118]–[119]).

- 418 See above, para.9-073.
- 419 cf. McGregor on Damages, 21st edn (2020), para.49-060; Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.9-082.
- 420 *[1991] 2 Q.B. 297*.
- 421 Above, para.9-061.
- 422 cf. *Armstrong v Strain* [1952] 1 K.B. 232.
- 423 See *Taberna Europe CDO II Plc v Selskabet* [2015] EWHC 871 (Comm) at [128] (sufficient that the meaning that misrepresentee attributed to those expressions was one that he was reasonably entitled to adopt as an addressee of the representation) (reversed on other grounds *[2016] EWCA Civ 1262*, [2017] Q.B. 633).
- 424 See, e.g. *W.B. Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All E.R. 850.
- 425 *Gosling v Anderson* [1972] C.L.Y. 492.
- 426 See *F. & H. Entertainments Ltd v Leisure Enterprises Ltd* (1976) 120 S.J. 331.
- 427 Below, paras 9-112 and 9-124.
- 428 Below, paras 9-138—9-139.
- 429 See below, paras 9-167 et seq.
- 430 *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, 787–789, approved by the House of Lords *[1991] 2 A.C. 249*, 268, 280, 281.
- 431 *[1992] Ch. 560*.
- 432 See below, para.29-094.
- 433 *[1992] Ch. 560*, 574. See also *Taberna Europe CDO II Plc v Selskabet* [2015] EWHC 871 (Comm) at [181], citing this paragraph in the 31st edn with apparent approval; no deduction was made in that case. The *Taberna* case was reversed on appeal on other grounds but Moore-Bick LJ appears (*[2016] EWCA Civ 1262*, [2017] Q.B. 633 at [51]) to agree with the first instance judge's analysis. In *Hodgson v Creation Consumer Finance Ltd* [2021] EWHC 2167 (Comm) it was held that contributory negligence can be pleaded in response to a claim for damages under the 1967 Act where the facts would found a claim in negligent misstatement at common law, even if the common law claim is not expressly pleaded (at [75]).
- 434 *[1964] A.C. 465*.
- 435 See the views of the majority in the *Howard Marine case* [1978] Q.B. 574, below, para.9-102.
- 436 *Alliance and Leicester Building Society v Edgestop Ltd* [1993] 1 W.L.R. 1462; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)* [2002] UKHL 43, [2002] 3 W.L.R. 1547, above, para.9-080.
- 437 *Royscot Trust Ltd v Rogerson* [1991] 2 Q.B. 297, above, para.9-087.
- 438 *Cooper v Tamms* [1988] 1 E.G.L.R. 257. Perhaps the burden would also have been discharged in *Oscar Chess Ltd v Williams* [1957] 1 W.L.R. 370.
- 439 *Foxtons Ltd v O'Reardon* [2011] EWHC 2946 (QB) at [44].
- 440 See *Gosling v Anderson* [1972] C.L.Y. 492.
- 441 *Resolute Maritime Inc v Nippon Kaiji Kyokai (The Skopas)* [1983] 1 W.L.R. 857, disapproving a suggestion in earlier editions of this work.
- 442 *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830; see further below, para.9-100.

- 443 *Garnac Grain Co v H.M. Faure & Fairclough Ltd* [1966] 1 Q.B. 650, reversed on facts, 658 and [1968] A.C. 1130n.
- 444 As happened, e.g. in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] A.C. 465. For rescission in such circumstances see above, paras 9-030 et seq.
- 445 It has been held that s.2(1) does not apply if B is induced by a representation by C to enter a contract with A that also results in B coming into a contractual relationship with C.
- 446 See *Wells (Merstham) Ltd v Buckland Sand & Silica Co Ltd* [1965] 2 Q.B. 170; below, para.15-021.
- 447 For a full account see Clerk & Lindsell on Torts, 23rd edn (2020), paras 7-103—7-143 and especially 7-128—7-134; Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), Ch.6.
- 448 But the existence of concurrent liability under s.2(1) and at common law may be important if a question of contributory negligence arises; see above, para.9-091.
- 449 As in *Box v Midland Bank Ltd* [1979] 2 Lloyd's Rep. 391, on appeal (as to costs only) [1981] 1 Lloyd's Rep. 434; see above, para.4-272, and below, para.9-104.
- 450 [1914] A.C. 932.
- 451 [1964] A.C. 465.
- 452 The plaintiff may be required to specify the nature of the duty in his pleadings: *Selangor United Rubber Estates Co Ltd v Cradock* [1965] Ch. 896.
- 453 (1889) 14 App. Cas. 337; above, para.9-056.
- 454 (1866) L.R. 2 Ch. App. 55.
- 455 (1866) L.R. 2 Ch. App. 55, 61.
- 456 Below, paras 10-072 et seq.
- 457 It is perhaps not strictly accurate to refer to an action for “damages” for negligence in breach of a fiduciary relationship, for this was an equitable remedy and equity did not award damages. In *Nocton v Ashburton* [1914] A.C. 932 the House of Lords spoke of an action for “compensation” and it may be that the measure of damages which they had in mind as appropriate in that case would have been lower than the usual tort measure. But today it is at least clear that a fiduciary relationship arising out of a professional relationship will ordinarily support a duty of care in tort for which ordinary tort damages will be recoverable, see, e.g. *Arenson v Arenson* [1977] A.C. 405; *Midland Bank v Hett, Stubbs and Kemp* [1979] Ch. 384.
- 458 [1964] A.C. 465. On the facts the defendants could not be liable because they had coupled their statement with a disclaimer of responsibility. Such a disclaimer is subject to the Unfair Contract Terms Act 1977 s.2(2) or the Consumer Rights Act 2015 s.62(2): *Smith v Eric S. Bush* and *Harris v Wyre Forest DC* [1990] 1 A.C. 831.
- 459 It seems that an explicit voluntary assumption of responsibility by the defendant may not always be needed, at least when the defendant should know that the plaintiff will reasonably rely on the defendant’s statement: see further below, para.9-100.
- 460 See, e.g. *Candler v Crane, Christmas & Co* [1951] 2 K.B. 164, the majority decision in which was overruled in the *Hedley Byrne case* [1964] A.C. 465; *J.E.B. Fasteners Ltd v Marks*,

*Bloom & Co* [1981] 3 All E.R. 289, [1983] 1 All E.R. 583. But note the restriction described in para.9-099, below.

- 461 *W.B. Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All E.R. 850.
- 462 See below, para.9-101.
- 463 Honoré, “*Hedley Byrne & Co Ltd v Heller and Partners Ltd*” (1965) 8 *Journal of the Society of Public Teachers of Law* (N.S.) 284.
- 464 For UK and Commonwealth cases on the *Hedley Byrne* principle, see Clerk & Lindsell on Torts, 23rd edn (2020), paras 7-103—7-143.
- 465 [1990] 2 A.C. 605. cf. *Morgan Crucible Co Plc v Hill Samuel Bank Ltd* [1991] Ch. 295. In *Galoo Ltd (In Liquidation) v Bright Grahame Murray* [1994] 1 W.L.R. 1360, it was held that an auditor of a company’s accounts may owe a duty of care to a takeover bidder if he has expressly been informed that the bidder will rely on the accounts for the purpose of deciding whether to make an increased bid and intends that the bidder should so rely. See also *Possfund Custodian Trustee Ltd v Diamond* [1996] 1 W.L.R. 1351. See also *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 W.L.R. 4041, in which it was held that the bank was not liable to the club, which had asked for a credit reference on a customer in the name of a third party, when the bank did not know of the club or have reason to know the third party was to pass on the information to the club. It made no difference to the claim in tort that the club might be an undisclosed principal of the third party, nor that the bank seemed to be indifferent as to the identity of the third party and the purpose for which the information was required (at [11] and [16]).
- 466 See below, para.9-102.
- 467 An estate agent may be liable to a customer who purchases a house in reliance on a negligent misrepresentation: *Computastaff Ltd v Ingledew Brown Bennison & Garrett* (1983) 268 E.G. 598.
- 468 e.g. by Lord Reid and Lord Devlin in *Hedley Byrne* [1964] A.C. 465 at 487 and 529, respectively. There was no assumption of responsibility or duty of care in *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811, [2007] 2 Lloyd’s Rep. 449. See also *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 W.L.R. 4041 at [6]–[7] (“The ratio of [*Hedley Byrne*] was that the reasonable reliance of Hedley Byrne on the reference, combined with Heller & Partners’ appreciation of the fact that they would reasonably rely on it, gave rise to a direct relationship between them involving a duty of care … The defendant’s voluntary assumption of responsibility remains the foundation of this area of law”). See above, para.3-080.
- 469 [1990] 1 A.C. 831.
- 470 [1990] 1 A.C. 831, 862.
- 471 See *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; *White v Jones* [1995] 2 A.C. 207; *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830. All three cases are discussed in more detail above, paras 3-075—3-078.
- 472 *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 181. See also the speech of Lord Steyn in *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830.
- 473 See, e.g. the judgments of Lords Templeman and Griffiths in *Smith v Eric S. Bush* [1990] 1 A.C. 831, at 852 and 865, respectively.

- 474 ss.2(2), 11 and 13; see below, paras 17-099 et seq.
- 475 s.62. See below, Vol.II, paras 40-418 et seq.
- 476 [1971] A.C. 793, noted (1971) 87 L.Q.R. 147.
- 477 See *W.B. Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All E.R. 850.
- 478 In *Esso Petroleum Co Ltd v Mardon* [1975] Q.B. 819 and [1976] Q.B. 801, below, para.9-102, and also in the *Howard Marine case* [1978] Q.B. 574, above, para.9-084. The Australian High Court has also refused to follow the majority judgments in the *Evatt* case: see *L. Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 55 A.L.J.R. 713.
- 479 Clerk & Lindsell on Torts, 23rd edn (2020), para.7-135.
- 480 See above, para.9-099.
- 481 [1976] Q.B. 801; also *McInerny v Lloyds Bank Ltd* [1974] 2 Lloyd's Rep. 246, 253–254; *Cornish v Midland Bank Plc* [1985] 3 All E.R. 513; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch. 560.
- 482 Contrast the *Howard Marine case* [1978] Q.B. 574, where the majority seems to have considered that the casual nature of the answer precluded a duty of care; and also *Djurberg (t/a Hampton Riviera) v Small Unreported 1 September 2017, Ch D*, in which it was held that no duty of care arose at common law but that the misrepresentation gave rise to liability under the Misrepresentation Act 1967 s.2(1).
- 483 *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 1 W.L.R. 444.
- 484 [1977] 1 W.L.R. 444. Similarly, in *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, [2018] 1 W.L.R. 3529 it was common ground that a bank selling a swap to a customer had a duty not to mis-state (at [68]); but it was held that the bank had no duty to disclose information about possible “break costs” (at [78]).
- 485 *Rust v Abbey Life Insurance Co Ltd* [1978] 2 Lloyd's Rep. 386.
- 486 *A.L. Gullison & Sons Ltd v Corey* (1980) 29 N.B.R. (2d) 86.
- 487 *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, 791, 794–795, 799, 802–803, affirmed on other grounds [1991] 2 A.C. 249. On contracts uberrimae fidei see below, paras 9-167 et seq. It is possible that there might be an implicit assumption of responsibility if the defendant should have known that the plaintiff was reasonably relying on the defendant to disclose certain facts: cf. *Smith v Eric S. Bush* [1990] 1 A.C. 831, above, para.9-100.
- 488 [1982] A.C. 225; this issue was not discussed on appeal to the House of Lords.
- 489 [1990] 2 A.C. 605, above, para.9-099.
- 490 By analogy to the special relationship between employer and nominated sub-contractor in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520. cf. *Independent Broadcasting Authority v EMI Electronics and BICC Construction Ltd* (1980) 14 B.L.R. 1, a case of a post-contractual representation.
- 491 *Shanklin Pier v Detel Products Ltd* [1951] 2 K.B. 854; *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 Q.B. 170.
- 492 See, e.g. *Greenman v Yuba Power Products* (1963) 377 P. 2d 897, and many other cases cited in White & Summers, Uniform Commercial Code, 5th edn (2000), para.11-2.
- 493 See *Lambert v Lewis* [1982] A.C. 225 itself, and see also below, paras 15-002—15-004.

- 494 Consumer Rights Act 2015 s.9(5)–(7). For contracts made before 1 October 2015, see *Sale of Goods Act 1979* s.14(2D)–(2F); see below, Vol.II, paras 40-460—40-462.
- 495 Consumer Rights Act 2015 s.30(3).
- 496 See further above, paras 4-272 et seq.
- 497 [1979] 2 *Lloyd's Rep.* 391, on appeal (as to costs only) [1981] 1 *Lloyd's Rep.* 434.
- 498 *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; above, paras 3-010 et seq.
- 499 *André & Cie SA v Ets Michel Blanc & Fils* [1977] 2 *Lloyd's Rep.* 166.
- 500 See above, para.9-063.
- 501 Compare above, para.9-064.
- 502 Above, para.9-091.
- 503 [1997] A.C. 191; above, para.9-073 and below, para.29-192.
- 504 *Financial Services Act 2012* ss.89–92 impose criminal liability for knowingly or recklessly making false or misleading statements in relation to financial services, impressions as to the market in or the price or value of any relevant investments or false or misleading statements in relation to benchmarks; but it does not appear that there will be civil liability. These sections replace *Financial Services and Markets Act 2000* s.397, that section replacing *Financial Services Act 1986* s.47, which was held not to confer any right to damages or other civil remedy: *Norwich Union Life Insurance Society v Qureshi* [1999] 2 All E.R. (Comm) 707, CA. See further Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), paras 7-78—7-80. For the possibility of a restitution order on the basis that the conduct may constitute market abuse within the Market Abuse Regulation (Regulation (EU) 596/2014, retained) see Davies, Worthington and Hare (eds), Gower: Principles of Modern Company Law, 11th edn (2021), paras 30-046 and 30-049, and cf. *Securities and Investments Board Ltd v Pantell SA (No.2)* [1993] Ch. 256, decided under the *Financial Services Act 1986*.
- 505 See generally, Davies, Worthington and Hare (eds), Gower: Principles of Modern Company Law, 11th edn (2021), paras 25–10 et seq.; Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), paras 7-49 et seq. For the duties of disclosure imposed by these provisions see below, para.9-181.
- 506 Thus investors who have bought on the market after dealing has commenced are now protected.
- 507 *Financial Services and Markets Act 2000* ss.85, 90(1). Note that s.90 is without prejudice to any liability which may be incurred apart from the section or regulation: s.90(6). These provisions stem ultimately from the *Directors Liability Act 1890*, which was passed to reverse the effect of *Derry v Peek* (1889) 14 App. Cas. 337, so far as it applied to prospectuses.
- 508 *Financial Services and Markets Act 2000* Sch.10 para.1(2). For the possible application of the *Hedley Byrne* principle (above, para.9-098) and of *Misrepresentation Act 1967* to

misstatements in prospectuses and particulars, see Davies, Worthington and Hare (eds), Gower: Principles of Modern Company Law, 11th edn (2021), paras 25-038—25-040.

•509 See further below, para.[9-181](#).

510 See Property Misdescriptions (Specified Matters) Order (SI 1992/2834).

511 Property Misdescriptions Act 1991 s.2. See *Enfield LBC v Castles Estate Agents Ltd* (1997) 73 P. & C.R. 343.

512 s.1(4).

513 Property Misdescriptions Act 1991 (Repeal) Order 2013 (SI 2013/1575).

514 See above, para.[9-002](#) and below, Vol.II, paras [40-166](#) et seq.

515 SI 1992/3288 implementing Directive 90/314. See below, para.[16-053](#).

516 1992 Regulations reg.4.

•517 Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2017), para.7-68; the 1992 Regulations are not discussed in the 6th edn (2022), see para.7-78.

518 Cartwright, 4th edn (2017), para.7-69.

519 SI 2018/634. The 2018 Regulations came into force on 1 July 2018. See below, Vol.II, paras 40-150 et seq.

520 reg.5.

521 reg.6(1)(a).

522 But note that the organiser or retailer may have a defence to a claim for damages under reg.16 if the non-conformity was attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable.

523 reg.6(4).

## (c) - Innocent Misrepresentation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 3. - Damages for Misrepresentation

(c) - Innocent Misrepresentation

### No damages for innocent misrepresentation

- [10] The term “innocent misrepresentation” is here used to mean a representation which is neither fraudulent nor negligent, and the general rule remains what it has always been, namely, that no action for damages lies for a mere innocent misrepresentation in this sense.<sup>524</sup> Damages in respect of the misrepresentation will be recoverable, however, if the court exercises its discretion under the [Misrepresentation Act 1967 s.2\(2\)](#), to declare the contract subsisting, and awards damages in lieu of rescission.<sup>525</sup> Also it must be stressed that a misrepresentation will found a claim for damages if it can be construed as a contractual promise, and is either part of a wider contract, or is itself supported by consideration. This may happen in two principal types of case. First, where the representor and representee themselves enter into a contract after the misrepresentation was made. Here, if the misrepresentation becomes a term of the contract, an action for damages will lie, and whether the party who made the statement was fraudulent, negligent or innocent is normally immaterial.<sup>526</sup> Secondly, the representee may enter into a contract with a third party as a result of the misrepresentation. Even in this situation, it is often possible to construe the misrepresentation as a collateral contract, the consideration for which is supplied by the fact that the representee enters into the contract with the third party.<sup>527</sup> A familiar illustration of the principle of the collateral contract can be seen in an agent’s liability for breach of warranty of authority.<sup>528</sup>

## Estoppe

- |11 Circumstances may arise in which damages are recoverable for a completely innocent misrepresentation, through the assistance of the doctrine of estoppel. For example, if a person agrees to buy shares in a company on the strength of a share certificate issued to the seller stating that he is the registered owner of the shares, the company may be estopped from denying that the seller was in truth the owner of the shares. The purchaser is, in these circumstances, entitled to demand that the company register him as the owner of the shares, or to claim damages in lieu.<sup>529</sup> The purchaser does not claim damages directly for the misrepresentation, but the net effect is much the same. For the doctrine of estoppel to apply the usual requirements of an estoppel must be satisfied; in particular the statement relied on must be precise, unambiguous and unqualified.<sup>530</sup> An estoppel may in exceptional circumstances arise out of non-disclosure, but a duty to disclose must then be shown.<sup>531</sup> It is also necessary that some independent cause of action be shown, apart from the misrepresentation itself.<sup>532</sup> This cause of action will normally be a claim to some form of property to which the representee would be entitled if the representation were true, and the truth of which the representor is not entitled to deny, e.g. money which would be due to the representee as assignee,<sup>533</sup> or goods which the representor has acknowledged that he holds on behalf of the representee.<sup>534</sup>

## Misrepresentation Act s.2(2)<sup>535</sup>

- |12 This subsection reads as follows:

“Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.”

It will be seen that this subsection does not give a representee any *right* to claim damages, but it enables the court, in its discretion, to grant damages to the representee in lieu of rescinding the contract.<sup>536</sup> It seems probable that the subsection was intended principally for the benefit of the representor, so that a contract need not be rescinded where the court feels that the representee can

be adequately compensated in damages.<sup>537</sup> But cases may well occur in which damages would be the preferable remedy for the representee. In this event there seems nothing to prevent the representee from claiming the right to rescind but then inviting the court to award damages in lieu. Nor does there seem to be anything which would prevent the court from taking this course over the protests of the representor, who may prefer rescission to an award of damages.

## Damages only in lieu of rescission

- |13 It is important to note two limitations on the power to award damages under this subsection. First, damages can only be awarded *in lieu* of rescission. In the case of a fraudulent misrepresentation, to which the subsection does not apply, the representee can both rescind and claim damages as of right.<sup>538</sup> Rescission for fraud is rescission ab initio, and damages for breach of contract cannot be recovered after such rescission, but damages for fraud are recovered in tort and this remedy will survive rescission of the contract. In the case of a negligent misrepresentation, the representee can claim both rescission and damages, but whereas his claim to damages under s.2(1) is as of right, his claim to rescission is now subject to the discretion of the court under s.2(2).<sup>539</sup> But in the case of an innocent misrepresentation, the representee cannot get both rescission and damages,<sup>540</sup> nor can he claim either remedy as of right.

## Rescission barred

- |14 A second limitation on the subsection is that the power to grant damages is, on the balance of authority, available only where the remedy of rescission would still be available at the time of the court's order. The court may award damages in lieu of rescission wherever the representee "would be entitled ... to rescind the contract". The question is whether this means: "would be entitled at the time of the court's order", or "would have been entitled after the representation was made". Purely linguistic considerations suggest that the former meaning is the correct one and in *Atlantic Lines & Navigation Co Inc v Hallam Ltd (The Lucy)*<sup>541</sup> Mustill J accepted it. Nonetheless earlier editions of this Work suggested that the wording was ambiguous. In *Thomas Witter Ltd v TBP Industries Ltd*<sup>542</sup> Jacob J also considered the section to be ambiguous<sup>543</sup> and referred to a statement of the Solicitor-General during a debate on the Misrepresentation Bill.<sup>544</sup> Jacob J expressed the view that damages could have been awarded under s.2(2) even though the misrepresentee had lost the right to rescind. But the suggestion that the words were unclear was disapproved in *Zanzibar v British Aerospace (Lancaster House) Ltd*,<sup>545</sup> in which Judge Jack QC held that the power to award damages is an alternative to damages and no longer existed when the right to rescission had been lost. The same conclusion had been reached earlier by Judge Humphrey Lloyd QC in *Floods of Queensferry Ltd v Shand Construction Ltd*,<sup>546</sup> who refused to follow the decision in the *Thomas*

*Witter* case. The Court of Appeal has now confirmed that there is no power to award damages under s.2(2) if the claimant has lost the right to rescind.<sup>547</sup>

## Measure of damages under s.2(2)

- |15 Section 2(2) does not state the measure of damages to be awarded. It is possible that the measure of damages which may be awarded under subs.(2) is intended to be lower than the measure of damages for fraudulent misrepresentation which, as seen above, is now also applicable to negligent misrepresentation under s.2(1).<sup>548</sup> This possibility is suggested by subs.(3) of the same section which provides that damages may be awarded under subs.(2) whether or not the representor is liable to damages under subs.(1) (i.e. whether or not he has been negligent), but goes on to provide that any damages awarded under subs.(2) shall be taken into account in assessing liability under subs.(1). This seems to indicate that the damages awarded under subs.(2) may be lower than the damages awarded under subs.(1), and there might be something to be said for this since the representor may be wholly innocent in a case under subs.(2). But the Act gives little clue as to how damages are to be assessed under this subsection if they are not to be assessed in the same way as under subs.(1). It has already been seen that damages under subs.(1) are tortious rather than contractual.<sup>549</sup> It would seem a fortiori that damages under subs.(2) would not be at the contractual level. The alternatives then would seem to be to award either the tort measure or a special measure designed to compensate the representee for the loss resulting from his inability to obtain rescission. Whereas the result of the misrepresentation the misrepresentee has given up some other right, the damages should be the value of that other right.<sup>550</sup> There seem to be two reasons to interpret s.2(2) as applying a special measure. The first relates to consequential loss, the second to bad bargains.

## Section 2(2) and consequential loss

- |16 Suppose the vendor of a house has made an innocent misrepresentation about the state of the drains and as a result the purchaser has suffered personal injury and property damage. Rescission, even with an indemnity, would not compensate the purchaser for these losses<sup>551</sup> and it is arguable that they should not be compensated under s.2(2), which refers to damages “in lieu of rescission”.<sup>552</sup> It has been held that consequential damages may be recovered under this subsection,  
553
- U but without averting to these questions.

## Section 2(2) and bad bargains

<sup>117</sup> The second relates to cases where the misrepresentee has made a bad bargain in the sense that, quite apart from the misrepresentation, the property is worth less than he has paid for it. In such a case the court might well exercise its discretion to declare the contract subsisting if it thinks the misrepresentee is less concerned about the effect of the misrepresentation than to escape from the contract. Were the damages in lieu of rescission to be on the tortious measure as applied in actions for fraud,

<sup>554</sup>

 or were the damages to be calculated so as to indemnify the misrepresentee fully against the consequences of rescission being refused, the damages might include loss suffered by the misrepresentor through the general fall in value of the property. The Court of Appeal in *William Sindall Plc v Cambridgeshire CC*

<sup>555</sup>

 said that this would not be appropriate in a case like the one outlined since the result would be to defeat the object of declaring the contract subsisting; the loss caused by the general fall in value would once again be put onto the misrepresentor.

<sup>556</sup>

 Evans LJ

<sup>557</sup>

 said that in such a case the contract measure—the difference in value between the property with and without the “defect” to which the misrepresentation related, or the cost of correcting the defect—would be appropriate. Hoffmann LJ agreed to the extent that the damages should never exceed the contract measure, but left open the question whether they should be less.

<sup>558</sup>

 With respect, it seems to be contrary to principle to award the contractual measure when the claim was to rescind because of a misrepresentation. Moreover, the solution will not always be attractive. Even without the defect, the property might be worth as much as the misrepresentee had paid for it. In such circumstances and provided that there is no consequential loss, damages for misrepresentation will normally be nil.

<sup>559</sup>

 It would not be logical for an award under s.2(2) to include the additional value the property would have had if the representation had been true, which would be included were the contractual measure to apply.

<sup>560</sup>

**U** Nor should the amount recoverable under the contractual measure be used to “cap” recovery for misrepresentation.

561

**U** However, since the *Sindall* case was decided it has become clear that in a claim at common law against a negligent valuer, the valuer will not necessarily be liable for the losses caused by the fall in property prices generally, even though the lender would not have taken the property as security had a correct valuation been given. The damages are limited to the difference between the valuation negligently provided and the correct property value at the time.

562

**U** By analogy, it is submitted that in a case where property has been bought as the result of a misrepresentation, damages under **Misrepresentation Act 1967 s.2(2)** should be limited to any difference between the contract price and the actual value of the property taking account of the misrepresentation but not taking into account the general fall in the value of the property. This was canvassed as an alternative approach by Evans LJ in *Sindall*’s case

563

**U** and it does not seem inconsistent with the words of the statute. It would, in effect, reverse any unjust enrichment of the defendant.

564

**U**

## Exercise of court’s discretion

**D** 18 The court’s discretion under **s.2(2)** is a wide one. In particular, it is to be noted that the court is not confined to a consideration of whether damages would be an adequate remedy to the representee. The court is also required to consider the loss that would be caused to the representor by rescission. Thus even where damages would not be an adequate remedy for the representee, the court may feel that it would be more equitable to award damages where it is shown that great loss would be caused to the representor by rescinding the whole contract, for instance because the market value of the performance to be rendered has fallen dramatically.

565

**U** The court may also exercise its discretion where to permit rescission would expose the misrepresentor to a large liability, even if that might in practice not be enforceable, whereas to maintain it would result in little additional loss to the misrepresentee.

566

**U** A court is unlikely to exercise its power to declare the contract subsisting under s.2(2) when an award of damages against the misrepresentor will be an empty remedy.

567

**U** The Court of Appeal has indicated that rescission is “the normal remedy” and “should be awarded if possible, particularly perhaps in a case in which a defendant makes no attempt to prove that he had reasonable grounds to believe its representation was true.”

568

**U** It has also been said that it would not be appropriate to refuse rescission of a reinsurance contract for misrepresentation by the reinsured, as avoidance of the contract performs an important policing function.

569

**U** The burden of persuading the court to exercise its discretion is on the party seeking its exercise.

570

**U** Further, as will be argued below, uncertainty over the effect of a declaration that the contract is subsisting suggests that s.2(2) should be applied only in very limited circumstances.

## Effect of court exercising discretion to declare contract subsisting

**D** **119** When a misrepresentee purports to rescind a contract for non-fraudulent misrepresentation, but the court exercises its discretion to declare the contract subsisting, the effect is not wholly clear.

571

**U** In *SK Shipping Europe Plc v Capital VLCC 3 Corp*,

572

**U** in which, the charterer of a vessel had purported to rescind on the grounds of misrepresentation and had returned the vessel, Foxton J said

573

**U** that the result of declaring the contract subsisting would be that the misrepresentee was in repudiatory breach of contract. The judge seemed to base this conclusion principally on his view that rescission for non-fraudulent misrepresentation requires a court order,

574

**U** and so by proceeding without obtaining one the charterer took the risk, though the judge said that the outcome would be the same even if he was incorrect about the need for a court order. With respect, when a misrepresentee has given a proper notice of rescission but the court has in its

discretion declared the contract subsisting, it seems incorrect to treat the misrepresentee as having repudiated the contract, unless the misrepresentee were to refuse to perform despite the court order.

[575](#)

**U** As we will see below, the judge's argument that rescission for non-fraudulent misrepresentation requires a court order seems contrary to the bulk of authority and inconsistent with [s.2\(2\)](#) itself.

[576](#)

**U** And if the misrepresentee can indeed effect rescission by giving notice, it seems unlikely that Parliament intended that by doing so the misrepresentee might become liable for breach of contract unless its notice contained words indicating a reservation such as that it would comply with any subsequent court order declaring the contract subsisting.

[577](#)



## Section 2(2) should be used in limited circumstances

**D** [19A](#) In *SK Shipping Europe Plc v Capital VLCC 3 Corp* Males LJ pointed to some difficulties raised by [s.2\(2\)](#). It is hard to see how the section is supposed to operate if by the time of the hearing the contract would have expired in any event, and it may create considerable uncertainty for the parties. If the effect of the court declaring the contract subsisting is that the misrepresentee who has purported to rescind is liable for wrongful repudiation, the misrepresentee

“... is at risk of being liable for repudiation damages. But if it continues to perform a contract into which it was induced to enter by a negligent misrepresentation, it may end up paying large sums by way of hire which it may never get back even if it is ultimately able to establish its right to rescind.”

It may be possible to resolve matters by a without prejudice agreement but that will not always be agreed; and it may not be possible to get a hearing in short order. These are telling points. Though it has just been argued

[578](#)

**U** that the effect of the court declaring the contract to be subsisting should not be that the misrepresentee who purported to rescind has committed a wrongful repudiation, it is also hard to see how the declaration is supposed to operate in cases where the contract requires each party to continue to perform over a period of time. It may be that [s.2\(2\)](#) should be used only in the type of case envisaged by the Law Reform Committee, viz where the question is whether a buyer should

be permitted to return property that it has bought relying on a misrepresentation about a relatively minor matter.

579



## Footnotes

- 1 See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).
- 524 *Heilbut, Symonds & Co v Buckleton [1913] A.C. 30; Gilchester Properties Ltd v Gomm [1948] 1 All E.R. 493.*
- 525 See below, para.9-112.
- 526 See, e.g. *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 W.L.R. 623*, below, para.15-004. If the statement amounts to a contractual term, the promisee need not show reliance: *Wemyss v Karim [2016] EWCA Civ 27* at [26], citing Slade LJ in *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1991] 1 Q.B. 564, 584*. The measure of damages will also differ: see above, para.9-063. Note however that the warranty may only be that the party has used reasonable care, as in *Esso Petroleum Ltd v Mardon [1976] Q.B. 801*.
- 527 Below, para.15-021.
- 528 See below, paras 21-109—21-116.
- 529 *Re Bahia and San Francisco Ry (1868) L.R. 3 Q.B. 584; Balkis Consolidated Co v Tomkinson [1893] A.C. 396.*
- 530 *Low v Bouverie [1891] 3 Ch. 82; Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd [1972] A.C. 741; China-Pacific SA v Food Corp of India [1981] Q.B. 403, reversed on different grounds [1982] A.C. 939.*
- 531 *Greenwood v Martin's Bank [1933] A.C. 51; Moorgate Mercantile Co Ltd v Twitchings [1977] A.C. 890; Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, affirmed on other grounds [1991] 2 A.C. 249.*
- 532 [1990] 1 Q.B. 665. But cf. *Brikom Investments Ltd v Seaford [1981] 1 W.L.R. 863; Re Wyvern Developments Ltd [1974] 1 W.L.R. 1097*. In cases based on “proprietary estoppel” it seems that no independent cause of action need be shown, but the authorities in this area of the law are still developing. See above, paras 6-106—6-114 and 6-155—6-193.
- 533 *Burrows v Lock (1805) 10 Ves. Jr. 470.*
- 534 *Seton, Laing & Co v Lafone (1887) 19 Q.B.D. 68.*
- 535 Note that under s.2(4) of the Misrepresentation Act 1967 (added by *Consumer Protection (Amendment) Regulations 2014* (SI 2014/870) reg.5), a consumer who has a right to redress under Pt 4A of the Consumer Protection from Unfair Trading Regulations 2008 (on which see above, para.9-002 and below, Vol.II, paras 40-166 et seq.) in respect of the conduct

constituting misrepresentation no longer has a right to damages under s.2 of the Act: see below, Vol.II, para.40-220.

536 It is apparent from subs.(3) that this subsection also applies where the misrepresentation was negligent, but clearly the victim of such a misrepresentation who wants damages rather than rescission will claim under subs.(1).

537 See paras 11 and 12 of the Tenth Report of the Law Reform Committee, Cmnd.1782 (1962) on which s.2 was based.

538 *Attwood v Small (1838) 6 Cl. & F. 232, 444*; *Newbigging v Adam (1886) 34 Ch. D. 582, 592*. There is nothing inconsistent with this in *Johnson v Agnew [1980] A.C. 367*. See below, paras 9-123 and 27-078.

539 For a case in which damages and rescission were permitted under the Act, see *F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 120 S.J. 331*.

540 Except in those exceptional cases in which damages are recoverable for innocent misrepresentation, above, para.9-110. Note also that, on rescission, the representee is entitled to an indemnity for burdens assumed under the contract, but this is much narrower than the right to damages, below, paras 9-138—9-139.

541 *[1983] 1 Lloyd's Rep. 188*.

542 *[1996] 2 All E.R. 573*. See (1995) 111 L.Q.R. 385.

543 *[1996] 2 All E.R. 573, 590*.

544 The statement itself lends some support to this view but further investigation of the legislative history throws some doubt on it: see (1995) 111 L.Q.R. 385.

545 *[2000] 1 W.L.R. 2333*.

546 *[2000] B.L.R. 81*.

547 *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* at [17]. The case is noted by Davies (2016) 75 C.L.J. 15, Turner (2016) 132 L.Q.R. 388.

548 Damages under s.2(2) may be nominal: *Ceviz v Frawley [2021] EWHC 8 (Ch)* at [126].

549 Above, para.9-086.

550 In *UCB Corporate Services Ltd v Thomason [2005] EWCA Civ 225, [2005] 1 All E.R. (Comm) 601* the respondents were liable for large sums under two guarantees. As the result of misrepresentation, the appellants entered an agreement to waive their rights under the guarantees in exchange for payment of a much smaller sum. The damages that might be awarded to the appellants under s.2(2) were not the full sums due under the guarantees but only compensation for any loss of the chance to recover more than the appellants gave up when they entered the waiver agreement (at [38] and [51]).

551 *Whittington v Seale-Hayne (1900) 82 L.T. 49*, below, para.9-139.

552 In favour of this alternative is the literal interpretation given to s.2(1) by the Court of Appeal in *Royscot Trust Ltd v Rogerson [1991] 2 Q.B. 297*. Against it is the analogy of damages under Lord Cairns' Act 1858 *in lieu* of an award of specific performance where (it was said) the damages are to be assessed as at common law, and not in accordance with some special measure: *Johnson v Agnew [1980] A.C. 367, 400*. But subsequently this has been interpreted as referring primarily to the date of assessment; it should not be taken to imply that the measure of damages must be the same as for damages at common law for breach

of contract: *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] A.C. 649 at [47]; see below, para.29-006.

•553 *Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd* [1974] 2 Lloyd's Rep. 27. In *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1044 Evans LJ said that in his view a plaintiff under s.2(2) should recover the same additional compensation as was permitted in *Cemp Properties (UK) Ltd v Dentsply Research and Development Corp* [1991] 2 E.G.L.R. 197, a case under s.2(1) in which the plaintiffs recovered for wasted expenditure. Recovery of consequential loss would have been permitted in *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm); see at [256] (not discussed on appeal [2022] EWCA Civ 231). See generally, McGregor on Damages, 21st edn (2020), paras 49-065—49-069.

•554 See above, paras 9-063 et seq. It would have to be shown that the misrepresentee would not have entered the contract but for the fraud.

•555 [1994] 1 W.L.R. 1016: held that there were no grounds for rescission.

•556 In McGregor on Damages, 21st edn (2020), paras 49-076–49-084, it is argued that the damages should put the claimant in the same position as if a decree of rescission had been granted, but that on the facts of the *William Sindall* case this would not have resulted in the plaintiffs recovering the whole of the amount they had paid: the deterioration in the value of the property might mean that rescission was now barred (see below, para.9-134), or alternatively the plaintiff would have to make an allowance for the deterioration (see below, para.9-133), so that it would not have recovered the full purchase price. It is submitted that neither argument is correct. If rescission had been barred, then, as McGregor admits, s.2(2) would not have applied at all (see above, para.9-114); and it is not the case that a simple fall in the value of the property, not attributable to anything done by the defendant, has been seen as either barring rescission (see *Armstrong v Jackson* [1917] 2 K.B. 822, 829) or as grounds for requiring the claimant to make an allowance (see below, paras 9-133—9-134 and Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), paras 9-116 and 9-119).

•557 [1994] 1 W.L.R. 1016, 1045. At 1037 Hoffmann LJ remarked that while s.2(1) is concerned with damage flowing from the plaintiff having entered the contract, s.2(2) is concerned with damage caused by the property not being what it was supposed to be.

•558 [1994] 1 W.L.R. 1016, 1038. Russell LJ agreed with both judgments. The refusal to award damages that would be the monetary equivalent of rescission, so as to include the loss caused by the fall in value of the property, was also supported (obiter) by Foxton J in *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [237]. This point was not discussed on appeal [2022] EWCA Civ 231.

•559 See above, para.9-066.

•560

cf. above, para.9-063.

- 561 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254*, disapproving on this point *Downs v Chappell [1997] 1 W.L.R. 426*; see above, para.9-075. (Both cases were ones of fraud but it is not clear that disapproval of this form of “cap” is limited to cases of fraud.) The cap approach receives support from *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* at [249] (not discussed on appeal [2022] EWCA Civ 231).
- 562 *South Australia Asset Management Corp v York Montague Ltd [1997] A.C. 191*; see below, para.29-192.
- 563 *[1994] 1 W.L.R. 1016, 1046*.
- 564 See *Birks [1997] R.L.R. 72*, who argues that this is what Parliament intended despite use of the word “damages”.
- 565 *Atlantic Lines & Navigation Co Inc v Hallam Ltd [1983] 1 Lloyd's Rep. 188*; and see *William Sindall Plc v Cambridgeshire CC [1994] 1 W.L.R. 1016*, discussed in para.9-117; *SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)* (if it had been necessary to decide, the judge would have refused rescission as, inter alia, the misrepresentation “did not strike at the heart of the bargain”; the charter market had fallen and rescission would throw the risk of a fall back on the owners; and the damages claimed recognised that, but for the misrepresentation, the charterer would have entered another charter at about the same rate and have been exposed to the same market fall: at [234]; not discussed on appeal [2022] EWCA Civ 231).
- 566 *UCB Corporate Services Ltd v Thomason [2005] EWCA Civ 225, [2005] 1 All E.R. (Comm) 601*. It was said that “loss” in s.2(2) includes financial loss and “what may loosely be described as detriment” (Latham LJ at [37]).
- 567 *TSB Bank Plc v Camfield [1995] 1 W.L.R. 430, 439*.
- 568 *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* at [24]; *SK Shipping Europe Plc v Capital VLCC 3 Corp [2022] EWCA Civ 231* at [86].
- 569 *Highland Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep. 109*.
- 570 *British & Commonwealth Holdings Plc v Quadrex Holdings Inc Unreported 10 April 1985, CA.*
- 571 In *Atlantic Lines & Navigation Co Inc v Hallam Ltd [1983] 1 Lloyd's Rep. 188, 202*, Mustill J remarked: “There are some formidable difficulties in the practical application of this

discretion to a case where the Court is not asked to order rescission as a direct and immediate remedy, but is invited to validate a rescission which has already been effected as a measure of self-help.” They did not arise in the case before him, as performance of the contract continued until a without-prejudice agreement was made.

•572 [2020] EWHC 3448 (Comm); appeal dismissed [2022] EWCA Civ 231.

•573 [2020] EWHC 3448 (Comm) at [235].

•574 [2020] EWHC 3448 (Comm) at [240]–[242]. In the Court of Appeal Males LJ, with whom the other LJJ agreed, noted that s.2(2) “appears to be drafted on the basis that, at least in some circumstances, rescission does not depend on obtaining a court order” (at [89], but after observing that the section raised a number of difficulties (see below, para.9-119A) left the issue for another case [at 91].

•575 [2020] EWHC 3448 (Comm) at [243].

•576 See below, para.9-128.

•577 There is no discussion of this issue in the Tenth Report of the Law Reform Committee, Cmnd.1782 (1962), on which s.2 was based, nor in Hansard. At least at the Third Reading, the examples given relate to property that has been sold after there has been a misrepresentation as to a relatively minor matter. It seems to have been assumed that the contract would simply be reinstated, with the misrepresentor having to pay damages under the section. One concern was to preserve the transaction so that the “chain of contracts” of which property sales often form part would not be disrupted (Hansard, 20 February 1967, cols 1387–1389). To give the misrepresentor the right to terminate on the ground that the misrepresentee’s notice amounted to a repudiation might defeat that aim. It is true that the Law Reform Committee Report refers to the court having “power to order rescission” (para.12); and also that para.25 refers to removing “the anomaly of the difference between remedies available for breach of a term in a contract and those in respect of an independent misrepresentation which has induced the contract”, but the latter does not necessarily imply that the consequence of a court deciding as a matter of discretion that rescission should not be allowed should be the same as when a party has purported to terminate a contract because of a breach of contract that was not sufficiently serious to justify termination. The right to terminate is not a matter of the court’s discretion, even though it may require a detailed evaluation of the facts. In any event, it will be submitted that the Act as passed clearly assumes that the misrepresentee may rescind without a court order: see below, para.9-128.

•578 See above, para.9-119.

•579 See above, para.9-119.

---

End of Document

© 2022 SWEET & MAXWELL

## **(a) - General**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 4. - Rescission for Misrepresentation**

**(a) - General**

### **Preliminary**

- [20] Before the passing of the [Misrepresentation Act 1967](#), the position with regard to rescission was, broadly speaking, as follows: where a person was induced to enter into a contract as a result of a misrepresentation by the other party to the contract, and the misrepresentation never became incorporated as a contractual term, the representee was entitled to rescind the contract, whether the misrepresentation was fraudulent, negligent or wholly innocent. At common law, the right to rescind was confined to cases in which the misrepresentation was fraudulent or in which there was a total failure of consideration,<sup>580</sup> but in equity there was a right to rescind even for innocent misrepresentation.<sup>581</sup> Since the [Act of 1967](#) this right of rescission is qualified (except in cases of fraud) by the court's power to refuse rescission and award damages in lieu,<sup>582</sup> and there remain certain bars to rescission in all cases, which are discussed below.<sup>583</sup> But it still remains a general proposition that the remedy for misrepresentation is rescission of the contract.<sup>584</sup>

### **Misrepresentation incorporated as contractual term**

- [21] Where the misrepresentation was later incorporated into the contract as a contractual term, the position was in some respects uncertain before the [Act of 1967](#). In cases of fraud, the subsequent incorporation of the misrepresentation into the contract made no difference to the representee's common law right to rescind, but in cases of innocent misrepresentation (including, for this

purpose, negligent misrepresentation) the position was different. For in this case there was some authority for saying that the equitable right to rescind did not arise, and the representee's right to rescind (if any) depended entirely on the effect of the misrepresentation as a contractual term.<sup>585</sup> That is to say, if the term was a condition or an innominate term, breach might justify rescission (or, as it would now be more appropriately put,<sup>586</sup> termination of the representee's outstanding obligations) whereas if the term was a warranty, breach would not justify termination at all.<sup>587</sup> Thus the somewhat strange result followed that a misrepresentation which would have justified rescission as of right by the representee if it had remained a representation pure and simple, might cease to have this effect if it later became incorporated into the contract as a warranty.<sup>588</sup>

## Misrepresentation Act s.1(a)

- <sup>122</sup> Section 1(a) of the Act of 1967 provides that a person is not to be deprived of the right to rescind for misrepresentation merely because the representation has become a term of the contract. Thus a misrepresentation which is subsequently incorporated into the contract as a warranty will now remain a ground for rescission, whereas breach of a warranty which has never been a representation will never ground rescission.<sup>589</sup>

## Rescission and termination

- <sup>123</sup> Since the decision of the House of Lords in *Johnson v Agnew*<sup>590</sup> a much clearer and sharper distinction has been drawn between rescission of a contract ab initio and termination of the contract for subsequent breach. The former generally has retrospective effect, while the latter does not; indeed, termination usually affects only some of the obligations under the contract and it is strictly incorrect to speak of the contract ceasing to exist through termination. It is clear from *Johnson v Agnew* itself that rescission for fraud is rescission ab initio, and will therefore prima facie have retrospective effect, though it has already been submitted<sup>591</sup> that such rescission will not deprive the representee of a right to damages for fraud, because that right arises in tort, and not out of the contract. Where s.1(a) of the Act of 1967 applies, it seems that the representee retains his right to rescind ab initio, but may in addition have a right to terminate for breach of what has now become a term of the contract. Problems may well arise in deciding whether a refusal to continue with the contract in such circumstances amounts to a rescission or only a termination. It has been held that where a variation of a contract has been induced by fraud, the innocent party may rescind the variation ab initio, with the effect that the original contract is retrospectively revived.<sup>592</sup>

## Present position

- 124 The right to rescind for fraudulent misrepresentation is unimpaired by the Misrepresentation Act, but there is no longer an absolute right to rescind for negligent or innocent misrepresentation. Section 2(2) of the Act (which has been set out above)<sup>593</sup> provides that in these cases the court has a discretion to award damages in lieu of rescission wherever it is of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause the other party. It has already been observed that this is a wide discretion, and the court is not confined to a consideration of whether damages would be an adequate remedy to the representee.<sup>594</sup>

## Effect on right to terminate for breach

- 125 It is clear from s.1(a) of the Act that (subject to the court's discretion under s.2(2)) there is now a right to rescind for any misrepresentation made before the contract was entered into, notwithstanding that the misrepresentation has become a term of the contract. It might be argued that, when this happens, any right to terminate for breach of contract also becomes subject to the discretion of the court under s.2(2). There are many circumstances in which a person has a right to terminate a contract for breach of condition, in which no loss has in fact been incurred by him, and a case could be made for saying that, where the term is a representation of fact, the court should have a discretion to refuse to permit termination, but to award damages in lieu—indeed, the damages might well be nominal.<sup>595</sup> However, it is unlikely that the subsection was intended to have this effect, and it is submitted that the words: “[w]here a person ... would be entitled by reason of the misrepresentation, to rescind the contract” would exclude the case under discussion since the right to rescind (or terminate<sup>596</sup>) then arises from breach of the contractual term. In any event, it is clear that subs.(2) would not affect a right to treat the contract as terminated for breach of a contractual term which was a promise of future conduct; nor for a breach of a contractual term which was an undertaking as to fact but which was never made before the contract was entered into.

## Misrepresentation as defence to proceedings

- 126 There is no doubt that a misrepresentation which would justify rescission of a contract may also be used as a defence to an action brought by the representor against the representee. The use of misrepresentation as a defence has sometimes been distinguished from its use as a ground for rescission,<sup>597</sup> and it is possible that the principles governing the two situations are not in all

respects identical<sup>598</sup> but generally speaking they appear to be the same. Indeed, the courts have sometimes treated the setting up of a misrepresentation as a defence as though this were in itself one way of rescinding the contract.<sup>599</sup> Accordingly, it is thought that although s.2(2) of the 1967 Act speaks of rescission, its provisions would apply equally to a case in which the misrepresentation is set up by way of defence. However, fraud may be used as a defence to a claim for specific performance (which is a discretionary remedy<sup>600</sup>) even where the right to rescind has been lost (save by affirmation, when the inconsistency of affirming and then resisting specific performance would be unconscionable).<sup>601</sup> It was said that impossibility of restoring the parties to their original position will not necessarily prevent the use of fraud as a defence; it will depend on the impact that enforcement would have on the representee, and especially on whether it would cause hardship, whether on the facts any estoppel had arisen and the importance of the term to be enforced and the breach of it. The fact that there would be a claim for damages for deceit should be taken into account.<sup>602</sup>

## Rescission normally requires notice

- <sup>127</sup> The general rule is that, in order to rescind the contract, the representee must communicate his intention to do so to the representor.<sup>603</sup> But in *Car & Universal Finance Co Ltd v Caldwell*<sup>604</sup> it was held by the Court of Appeal that this was not an inflexible rule. In this case a person was induced to sell his car by fraud to a purchaser who paid with a bad cheque, and promptly disappeared. When the seller discovered the fraud he informed the police and the Automobile Association, but was, of course, unable to notify the fraudulent purchaser. It was held that the seller had done sufficient to rescind the contract, and that accordingly a subsequent purchaser from the fraudulent party had acquired no title to the car, as the title had revested in the seller on rescission. The actual ratio of the decision seems confined to circumstances in which communication of the representee's desire to rescind is not possible because the representor is deliberately keeping out of the way, and the court left open the question whether the decision would apply to a case where the impossibility of communication did not arise from the representor's deliberate fraud.

## Court order not required

- <sup>128</sup> Although it is common to speak of a court "setting aside" or rescinding a contract for misrepresentation, a court order is not necessary when a contract is rescinded for fraud.<sup>605</sup> In cases of non-fraudulent misrepresentation the balance of authority suggests that the remedy is not necessarily a judicial one,<sup>606</sup> though there are dicta to the contrary.

607

**U** Parliament<sup>608</sup> seems to have taken the view that rescission for non-fraudulent misrepresentation is effected by notice to the other party, as the wording of s.2(2) of the Misrepresentation Act 1967,<sup>609</sup> “if it is claimed ... that the contract ought to be *or has been* rescinded” would seem inappropriate were a court order required.<sup>610</sup> Moreover, it is hard to see the point of requiring a court order if the court has no discretion but to grant rescission, but if the court did have a discretion s.2(2) would be unnecessary. In other words, a representee is entitled to rescind for misrepresentation without invoking the assistance of the court at all, although when s.2(2) applies the court may, in effect, annul a rescission previously effected by self-help.<sup>611</sup> It may well be, as a purely practical matter, that the representee will require the assistance of the court in some cases, e.g. where rescission of an executed conveyance is sought<sup>612</sup>; but “the process of rescission is essentially the act of the party rescinding, and not of the court”.<sup>613</sup>

## Rescission not available except against contracting party

- |29 It seems clear that rescission is *prima facie* a remedy which is only available against the other party to the contract. In *Northern Bank Finance Corp Ltd v Charlton*<sup>614</sup> this principle was affirmed by a bare majority of the Supreme Court of Eire in a case in which the plaintiff had been induced by the fraud of a bank to pay various sums to the bank in order that these sums should be used by the bank to purchase various properties on behalf of the plaintiff. The properties were in fact so purchased from third parties. The plaintiff claimed rescission of the contracts of purchase but the majority of the court held that rescission was not available as against the bank since the properties were not bought from the bank itself. Rescission would in fact have amounted to a sort of compulsory subrogation under which the bank would have taken over the properties and refunded the purchase price to the plaintiff.

## Misrepresentation inducing consent order

- |30 Where proceedings are compromised by agreement, and the compromise is made the subject of a consent order, the court may set aside the consent order if it is shown to have been based on an agreement induced by misrepresentation.<sup>615</sup>

## Effect of rescission

|31

When a contract is rescinded it has the effect of revesting any property transferred in the transferor, so far as no formal steps are required for the retransfer.<sup>616</sup> Thus property in goods will vest in the victim of fraud without more.<sup>617</sup> If land has been conveyed, rescission will have the effect that the representor holds the title on constructive trust for the representee.<sup>618</sup> Although the contract is avoided retrospectively, some clauses that are regarded as “separable” may continue to have effect. Thus unless otherwise agreed an arbitration agreement is unaffected by the invalidity of the substantive contract of which it forms part<sup>619</sup>; and an exclusive jurisdiction clause will survive rescission.<sup>620</sup> In contrast, a “no set-off” clause, even if it is reasonable under Misrepresentation Act 1967 s.3,<sup>621</sup> may not survive rescission for fraud.<sup>622</sup>

## Footnotes

- 1 See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- 580 580 *Kennedy v Panama, etc. Royal Mail Co Ltd (1867) L.R. 2 Q.B. 580.*
- 581 581 *Lamare v Dixon (1873) L.R. 6 H.L. 414.* The generalisation of this remedy was largely a post-Judicature Act development, stemming principally from *Redgrave v Hurd (1881) 20 Ch. D. 1* and *Adam v Newbigging (1888) 13 App. Cas. 308.*
- 582 582 Above, paras 9-112 et seq.
- 583 583 Below, paras 9-132—9-152.
- 584 584 This sentence was cited with approval by Longmore LJ in *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* at [24]: see above, para.9-114.
- 585 585 *Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All E.R. 1167, 1171; Leaf v International Galleries [1950] 2 K.B. 86;* cf. *Compagnie Française de Chemins de Fer Paris-Orléans v Leeston Shipping Co Ltd (1919) 1 Ll.L. Rep. 235, 237–238.*
- 586 586 See *Johnson v Agnew [1980] A.C. 367.*
- 587 587 See below, para.27-020.
- 588 588 However, this “somewhat strange result” was held not to be law in *Academy of Health and Fitness Pty Ltd v Power [1973] V.R. 254*, a case arising in a jurisdiction not governed by the Misrepresentation Act 1967.
- 589 589 If the representee did not know of the representation before the contract was made (as, e.g. where they simply signed a written agreement) it would not in any event be an effective misrepresentation; above, para.9-041. There may be no representation when one party simply gives a warranty that certain facts are true; it may be merely an implied representation that the giver is not aware of facts inconsistent with the warranty; see above, para.9-013. Even if there was a representation as well as a warranty, it is possible the other party will be relying on the warranty and not on the representation; see above, para.9-043.
- 590 590 *[1980] A.C. 367.*
- 591 591 See above, para.9-089.

- 592 *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293.
- 593 Above, para.9-112.
- 594 Above, para.9-118.
- 595 See, e.g. *Re Moore & Co Ltd and Landauer Co* [1921] 2 K.B. 519 (although the term here may well have been a promise rather than a statement of fact). This argument is also applicable to insurance contracts in which the insured may warrant some fact which is untrue, but the fact in question may have no bearing on the risk which occurs. Hitherto, it has always been clear that the insurer may repudiate liability in these circumstances, below, para.9-178.
- 596 See above, para.9-123.
- 597 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.9-098.
- 598 Treitel (15th edn (2020), para.9-106) points to the rule that an insurer who uses fraud as a defence could repudiate liability and keep the premiums: see below, Vol.II, para.44-076. Further, Treitel suggests that in cases of criminal fraud a representee who sets the fraud up by way of defence need not return money received under the contract (*Berg v Sadler & Moore* [1937] 2 K.B. 158), whereas if he sues for rescission he must do so (*Spence v Crawford* [1939] 3 All E.R. 271). *Berg v Sadler Moore* is contrary to dicta of the Exchequer Chamber in *Clough v L. & N.W. Ry* (1871) L.R. 7 Ex. 26, 37 which do not seem to have been cited, and the refusal of the claim for return of the money may be better explained on the basis of illegality.
- 599 *Clough v L. & N.W. Ry* (1871) L.R. 7 Ex. 26; *Academy of Health and Fitness Pty Ltd v Power* [1973] V.R. 254.
- 600 See below, para.30-046.
- 601 *Geest Plc v Fyffes Plc* [1999] 1 All E.R. (Comm) 627, 694 et seq.
- 602 *Geest Plc v Fyffes Plc* [1999] 1 All E.R. (Comm) 627. On the facts of the case, restitutio was impossible. To refuse specific performance altogether of the undertaking to provide security for an indemnity that the defendant had given the plaintiff would expose the plaintiff to very different risks. Specific performance would be granted but limited to the excess of the claim over any counterclaim for damages.
- 603 *Car & Universal Finance Co Ltd v Caldwell* [1961] 1 Q.B. 525. It was accepted that the misrepresentee could also rescind by retaking the goods, even without the misrepresentor's knowledge: 555, 558. There is no principle that rescission (in the case concerned, for repayment on the ground of mistake) is unavailable unless sought by a notice given before an action is brought: *West Sussex Properties Ltd v Chichester DC* [2000] N.P.C. 74, CA, at [12].
- 604 [1961] 1 Q.B. 525; see also *Newtons of Wembley Ltd v Williams* [1965] 1 Q.B. 560.
- 605 *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525. Rescission was available for fraud at common law, but subject to precise restitution being available. It seems likely that a court order is not necessary even when the party rescinding is relying on the wider equitable notion of rescission that would, for example, allow the defrauded party to rescind even though they are not able to restore the property in its original condition and would have to make an allowance for depreciation, see above, para.9-133; it is thought that a notice of rescission coupled with an offer of an appropriate amount, or even stating a willingness to make an allowance, would effect rescission, though the misrepresentor could then make a claim for the depreciation. In Australia, the High Court has taken a different approach, holding that even in a case of fraud equity does more than recognise rescission effected by the

action of the innocent party. It may impose terms to achieve observance of the requirements of good conscience and practical justice and this enables it to grant partial rescission. Thus it could set aside the part of a contract of guarantee to which the fraud related (previous supplies) but leave the rest (as to future supplies) intact: *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 C.L.R. 102, noted (1997) 113 L.Q.R. 16; *Proksch* [1996] R.L.R. 71. On the *Vadasz* case see further below, para.9-135.

- 606 *Abram S.S. Co Ltd v Westville Shipping Co Ltd* [1923] A.C. 773, 781–782; see also *Reese River Silver Mining Co Ltd v Smith* (1869) L.R. 4 H.L. 64, 73–75 (a case in which there seems to have been fraud, but no distinction is drawn between fraud and other cases of rescission for misrepresentation); *Horsler v Zorro* [1975] 1 Ch. 302 at 310; *Drake Insurance Plc v Provident Insurance Plc* [2003] EWHC 109 (Comm), [2003] Lloyd's Rep. I.R. 78 at [31]–[32], [2003] EWCA Civ 1834, [2004] Q.B. 601 at [53] and [102]; *Brotherton Aseguradora Colseguros SA* [2003] EWCA Civ 705, [2003] 2 All E.R. (Comm) 298 CA at [27], [45]–[48]. See, however, *O'Sullivan* [2000] C.L.J. 509 and also *Turner* (2016) 132 L.Q.R. 388.
- 607 See *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [240]–[242], where Foxton J suggests that, on the balance of a large number of conflicting authorities, a court order is not required for rescission at common law for fraud, but is required for rescission in equity, though if ordered the rescission will be retrospective to when the misrepresentee gave notice; and notes that this is the view of Snell's Equity, 34th edn (2019), paras 15-010 to 15-012, but that Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019), para.4-19 takes the same view as is stated in the text above (see now 6th edn (2022), para.4-19). (In the Court of Appeal the point was left for another case to decide: [2022] EWCA Civ 231 at [91], see above, para.9-119.) In *IGE USA Investments Ltd v Revenue and Customs Commissioners* [2021] EWCA Civ 534, [2021] Ch. 423 (appeal outstanding), Henderson LJ remarked (at [91]) that “whether, or to what extent, or in what sense, rescission in equity for fraud is properly to be characterised as a self-help remedy which does not require the intervention of the court … is a notoriously difficult subject, on which the authorities are in such a state of disarray that, in my judgment, only the Supreme Court can reconcile them”. E. Peel (ed.) Treitel's Law of Contract, 25th edn (2020), para.9-104 also considers that a contract may be rescinded by giving notice to the other party. It may be noted that Snell does not explain why s.2(2) was passed if relief is discretionary. In *Islington London BC v UCKAC* [2006] EWCA Civ 340, [2006] 1 W.L.R. 1303 it was held that a tenancy to which the Housing Act 1985 applies can be brought to an end only on the grounds stated in the Act on which the landlord may obtain possession, which include a false statement made knowingly or recklessly by the tenant (s.84 and Sch.2, ground 5). In reaching this conclusion, Dyson LJ adopted the opposing theory that a contract is only rescinded for misrepresentation by a court order (at [26]). But the court's conclusion that, as Mummery LJ put it: “[T]he relevant provisions of the 1985 Act provide a complete code for the termination of a secure tenancy, the private law remedy of rescission of the tenancy for fraudulent representation is not available to the council” (at [46]), can be supported as a matter of statutory construction without resorting to the notion that a court order is needed for rescission.

- 608 Though the Tenth Report of the Law Reform Committee, Cmnd.1782 (1962), on which s.2 was based, is less clear: see above, para.9-119.
- 609 See above, para.9-112.
- 610 *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430, 439 (conferral of a discretion on the court by s.2(2) said to imply that, apart from that section, “the court does not have the power to declare the contract to be subsisting when, as in this case, the representee has exercised her right to set aside the transaction”: per Roch LJ). *Turner* (2016) 132 L.Q.R. 388 argues that the phrase from s.2(2) quoted in the text merely refers to cases in which the misrepresentee “claims” to have rescinded by giving notice although, in Turner’s view, that was not possible because rescission for non-fraudulent misrepresentation is possible only by court order.
- 611 See *Atlantic Lines & Navigation Co Inc v Hallam Ltd* [1983] 1 Lloyd’s Rep. 188, 202.
- 612 In *Hughes v Clewley, The Siben (No.2)* [1996] 1 Lloyd’s Rep. 35 it was held that rescission will not be ordered [sic] if the effect would be to transfer a business being used for unlawful purposes from one party to the other. The case was one of fraud, so there was no power to declare the contract subsisting under s.2(2).
- 613 *Horsler v Zorro* [1975] Ch. 302, 310.
- 614 [1979] I.R. 149.
- 615 *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170. The consent order had not been drawn up in this case, but that seems immaterial. Except in matrimonial cases, a consent order derives its force and effect from the contract underlying it, and if the contract can be set aside, so can the order: *Purcell v F.C. Trigell Ltd* [1971] 1 Q.B. 358. See further above, para.8-060.
- 616 Until the contract is rescinded, the accepted view is that the misrepresentee has no proprietary right in the property transferred but only a “mere equity”: below, para.9-149.
- 617 *Car & Universal Finance Co Ltd v Caldwell* [1961] 1 Q.B. 525. But note that the fact that the contract has been rescinded does not prevent Sale of Goods Act s.25 (sale by buyer in possession) from applying. See below, Vol.II, para.46-221.
- 618 cf. *Nasrullah v Rashid* [2018] EWCA Civ 2685, [2020] Ch. 37; Megarry & Wade, The Law of Real Property, 9th edn (2019), para.10-023. Note that completion of the contract is no longer a bar to rescission: Misrepresentation Act 1967 s.1(b), below, para.9-152.
- 619 Arbitration Act 1996 s.7; Vol.II, para.34-028.
- 620 *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* [1998] L.R.L.R. 24, 28; Vol.II, para.34-028.
- 621 See below, para.9-164.
- 622 See *Ahuja Investments Ltd v Victorygame Ltd* [2020] EWHC 1153 (Ch) at [89].

## **(b) - Restitutio in Integrum**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 4. - Rescission for Misrepresentation

**(b) - Restitutio in Integrum**

### **Restitutio in integrum**

- <sup>132</sup> The purpose of rescission is to restore the status quo ante, and it was said by Bowen LJ in *Newbigging v Adam*<sup>623</sup> that “there ought ... to be a giving back and a taking back on both sides”. Thus the traditional view is that the remedy will not lie if the parties are not in a position to make restitutio in integrum. In *Clarke v Dickson*<sup>624</sup> Crompton J said that when a party:

“... exercises his option to rescind the contract, he must be in a state to rescind; that is he must be in such a situation as to be able to put the parties into their original state before the contract.”

### **Common law and equity**

- <sup>133</sup> Common law put a strict interpretation on the requirement of restitution, and consequently restricted the field within which rescission could operate. Further, there was no machinery for taking accounts, or for balancing set-offs against each other, or for making allowances. As a result the injured party was often relegated to his remedy in damages, if any. In contrast equity offered two advantages to the litigant.<sup>625</sup> As at common law the parties to an action for rescission were required to make restitution, but equity did not insist that this should be precise. It was content

to do practical justice between the parties. Secondly, the greater flexibility of the machinery at its disposal enabled equity to direct accounts to be taken and balances to be struck and adjustments to be made which were impossible at common law. Both of these points were emphasised by Lord Blackburn in *Erlanger v New Sombrero Phosphate Co*<sup>626</sup>:

“It [a court of equity] can take account of profits and make allowance for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.”

The present position seems to be that in contracts where the benefits received are in their nature returnable, such as contracts of sale, while an ability to make restitution is an essential to an action for rescission, the courts require that this should be substantial rather than precise.<sup>627</sup> In other words, the equitable approach to this requirement has prevailed over that of the common law. Further, it has been suggested that a contract for services, which in their nature cannot be restored, may be rescinded despite part performance of the services by the misrepresentor<sup>628</sup>; and it may be that, where third party rights are not in question, the courts will be prepared to allow rescission even when property cannot be returned, allowing restitution to be made in the form of money.<sup>629</sup>

## Alteration of subject matter

- <sup>134</sup> Clearly, it is impossible to make substantial restitution of property transferred under the contract if it has altered its character. Thus in *Clarke v Dickson*<sup>630</sup> rescission was refused where a partnership, in which the representee had been induced to take shares, had been converted into a limited liability company, for the existing shares were wholly different from those which he originally received. Other examples of alteration in the subject-matter of the contract sufficient to disentitle the representee to rescission are the working out of mines<sup>631</sup>; the conversion of an unincorporated banking company into an incorporated joint stock company<sup>632</sup>; a material change in the position of both parties in relation to the patents and business in question<sup>633</sup>; the commencement of winding-up proceedings<sup>634</sup> and, when completion was a bar to rescission of a contract for the sale of land,<sup>635</sup> part performance of a single contract.<sup>636</sup> On the other hand, if property has retained its substantial identity, rescission is possible even if its value has fallen for reasons outside the control of the parties,<sup>637</sup> and restitution may be ordered even though it has deteriorated or depreciated or cannot be restored in its original state. Thus in *Adam v Newbigging*<sup>638</sup> the respondent was induced by an innocent misrepresentation to become a partner in a business which was insolvent and which subsequently failed. He was held to be entitled to rescind and to have his capital repaid although the business to be restored was worthless. Two further comments may be useful. First, in appropriate cases the court may order the plaintiff to pay compensation on account of any deterioration that

has occurred, in accordance with the principle that this is preferable to allowing the defendant to retain all the advantages of property transferred under the contract.<sup>639</sup> The point was put by Roche J as follows:

“The principle of *restitutio in integrum* did not require that a person should be put back into the same position as before; it meant that he should be put into as good a position as before.”<sup>640</sup>

Secondly, it seems that the courts are more willing to exercise their discretionary powers and to order restitution in a case of fraud than in a case of innocent misrepresentation.<sup>641</sup> Thus in *Hulton v Hulton*<sup>642</sup> the court rescinded a separation deed obtained by the husband by fraudulent misrepresentation, and refused to order the wife to repay the sums that she had received under the deed because the husband had received corresponding benefits, such as freedom from molestation and from proceedings by the wife for restitution of conjugal rights.

## Partial rescission not allowed

<sup>135</sup> The more flexible approach advocated in the previous paragraph would not necessarily be inconsistent with what appears to be the current rule that the misrepresentee may only rescind the whole contract and not part of it. In *Vadasz v Pioneer Concrete (SA) Pty*<sup>643</sup> the High Court of Australia had held that in a case of fraud the court has power to set aside the contract on terms and thus could set aside the part of the contract of guarantee to which the fraud related (previous supplies) but leave the rest (as to future supplies) intact. This should be contrasted with the decision of the English Court of Appeal in *TSB Bank Plc v Camfield*,<sup>644</sup> in which a wife was held to have the right to set aside a charge in its entirety when she had entered it as the result of the husband's misrepresentation that it was limited to £15,000. In *Scales Trading Ltd v Far Eastern Shipping Plc*<sup>645</sup> the Privy Council had left open the question of whether the approach in *Vadasz* should be preferred to that in *TSB Bank Plc v Camfield*. However, in *De Molestina v Ponton*<sup>646</sup> Colman J held that it was not even arguable that partial rescission may be awarded.<sup>647</sup> That there cannot be partial rescission is part of a wider principle that there cannot be rescission unless there can be *restitutio in integrum*.<sup>648</sup> Thus:

“... if a representee is induced to enter separate contracts A and B by the same misrepresentation, it may be that performance of contract B depends on the prior performance of contract A. In that case one cannot rescind contract A without also rescinding contract B ... But there may be cases where, although both contracts were induced by the same misrepresentation, either can be performed without performance

of the other. In that case the misrepresentee may rescind unless the contract not sought to be rescinded would never have been entered without also entering the other.”<sup>649</sup>

## Services

<sup>136</sup> The suggestion<sup>650</sup> that a partly performed contract for services may be rescinded is attractive but raises difficulties. One view might be that the contract is rescinded for the future, leaving the services already rendered unaffected, but this would be inconsistent with the normal view that rescission for misrepresentation is rescission ab initio.<sup>651</sup> It might also result in the party who had rendered the services going without payment for them if the contract were entire and the payment due on completion.<sup>652</sup> Rather the suggestion seems to be that the contract is rescinded ab initio but the misrepresentee must make an allowance for the services received.<sup>653</sup> That seems a workable proposition but it would leave an anomaly when the services had been performed by the misrepresentee: it would be rather hard if he were permitted to rescind only at the price of forgoing payment for what he had done, but unless the contract was severable it is not clear what remedy he would have to claim payment. The adjustments and allowances which a court may make in a claim for rescission may not include the allowance of a quantum meruit. This is suggested by *Boyd and Forrest v Glasgow Ry.*<sup>654</sup> During the negotiations for a contract for constructing a railway, an innocent misrepresentation was made about the nature of the subsoil; the contractors claimed to rescind the contract, and sued on a quantum meruit for the difference between the contract price, which they had received, and the increased cost of the work which was due to the misrepresentation. The House of Lords, reversing the Scottish courts, rejected the claim on the ground that, if allowed, it would be equivalent to an award of damages to the contractors.

## A more flexible approach?

<sup>137</sup> In the *Boyd and Forrest* case<sup>655</sup> the work had actually been completed, so it was clearly too late for the contractor to “rescind”, and it is to be hoped that a modern court might see its way to granting a quantum meruit to the misrepresentee in a case in which he only discovers that an innocent misrepresentation has been made after he has performed some of the services required of him.<sup>656</sup> It has been argued that the courts should adopt a still more flexible approach to the requirement of restitutio in integrum where third party rights are not in question,<sup>657</sup> allowing restitution to be made in the form of money.<sup>658</sup> This, despite recent endorsement by the Court of Appeal of the difficulties alluded to earlier,<sup>659</sup> seems a sensible development and one which is in line with the decision in a case of undue influence to award “equitable compensation” when the property

transferred could no longer be returned.<sup>660</sup> A recent decision of the Court of Appeal in a duress case suggests that the courts are now adopting this approach.<sup>661</sup>

## Indemnity distinguished from damages

- <sup>138</sup> Assuming that a claimant who wishes to rescind is in a position to make restitutio in integrum, the present position seems to be that he may expect the restoration of benefits and the resumption of burdens which have passed under the contract. Thus, if property has been delivered, it must be restored, and the claimant likewise must make restitution of any property delivered to him; and if obligations have passed to the claimant, these must be resumed by the defendant so that the restoration of the status quo ante may be achieved. In practical terms this means that the defendant must indemnify the claimant against obligations which he has discharged or will become liable to discharge. One problem arises: how is the rule requiring the defendant to indemnify the claimant for obligations assumed by him reconciled with the rule that damages cannot be recovered for an innocent misrepresentation which has not become a term of the contract? The traditional answer has been that the defendant must indemnify the claimant against obligations necessarily created by the contract, i.e. against liabilities to third parties which the contract required the claimant to incur or payments to third parties which it required him to make, but against these only. Thus the court is enabled to stop short of making an award which could be classified as damages.<sup>662</sup>
- <sup>139</sup> The practical operation of the distinction between indemnity and damages is illustrated by *Whittington v Seale-Hayne*.<sup>663</sup> The plaintiffs took a lease of certain premises on the strength of the defendant's innocent misrepresentation that they were in a sanitary condition and they erected certain poultry sheds thereon. As a result of the unsanitary state of the premises the manager of the plaintiffs' poultry farm became ill, and the poultry died; the local council ordered the plaintiffs to renew the drains, and the plaintiffs were obliged to remove their sheds. In an action for rescission and for an indemnity against the consequences of having entered into the contract, it was held that the plaintiffs were entitled to an indemnity against the obligations to pay rates and to effect repairs, for these were necessarily assumed under the contract. But they were not entitled to recover anything in respect of medical expenses or loss of poultry, or the removal of the sheds, for these were in effect claims for damages, and therefore not admissible in an action based on innocent misrepresentation.

## Footnotes

- 1 See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- 623 *(1886) 34 Ch. D.* 582, 595.
- 624 *(1858) El. Bl. & El.* 148, 154.
- 625 But note that fraud may be used as a defence to specific performance even when restitutio in integrum is impossible: *Geest Plc v Fyffes Plc* [1999] 1 All E.R. (Comm) 672. See above, para.9-126.
- 626 *(1878) 3 App. Cas.* 1218, 1278–1279. See also *O'Sullivan v Management Agency Ltd* [1985] Q.B. 428, below, para.10-135.
- 627 *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 (buyer of car could rescind despite depreciation and intermittent enjoyment). In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* in the Court of Appeal it had been accepted that rescission was no longer possible because the plaintiffs had disposed of the shares they had brought. Nourse LJ referred to this rule as harsh in relation to fungible assets: [1994] 1 W.L.R. 1271, 1280. In the House of Lords, Lord Browne-Wilkinson remarked that, if a sale of shares cannot be rescinded once the specific shares purchased have been sold, “the law will need to be looked at closely hereafter”: [1997] A.C. 254, 262. See *Halson* [1997] R.L.R. 89. A claimant is not entitled to recover the price paid to the defendant for shares if the claimant is able to return the shares to the defendant but is merely unwilling to do so: *Gamatronic (UK) Ltd v Hamilton* [2016] EWHC 2225 (QB) at [218]; to pay the value of the shares to the defendant instead of returning them would not put the parties back into their original position or anywhere near it (at [219]).
- 628 *Atlantic Lines & Navigation Co Inc v Hallam Ltd* [1983] 1 Lloyd's Rep. 188, 202. See further below, para.9-136.
- 629 See below, para.9-137.
- 630 *(1858) El. Bl. & El.* 148. Some dicta in this case were disapproved in *Armstrong v Jackson* [1917] 2 K.B. 822, 829. A Name at Lloyd's cannot rescind membership because the benefits received are not in their nature returnable: *Lloyd's of London v Leigh* [1997] CA Transcript 1416; *Society of Lloyd's v Khan* [1998] 3 F.C.R. 93.
- 631 *Vigers v Pike* (1842) 8 Cl. & F. 562.
- 632 *Western Bank of Scotland v Addie* (1867) L.R. 1 Sc. & Div. 145, 159–160.
- 633 *Sheffield Nickel Co v Unwin* (1877) 2 Q.B.D. 214; see also *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392.
- 634 *Oakes v Turquand* (1867) L.R. 2 H.L. 325.
- 635 See now below, para.9-152.
- 636 *Thorpe v Fasey* [1949] Ch. 649; cf. *Kupchak v Dayson Holdings Co Ltd* (1965) 53 D.L.R. (2d) 482.
- 637 *Armstrong v Jackson* [1917] 2 K.B. 822. The contrary suggestion in McGregor on Damages, 21st edn (2020), para.47-083 is, with respect, doubtful.
- 638 *(1888) 13 App. Cas.* 308.
- 639 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392, 456, 457. See also *O'Sullivan v Management Agency Ltd* [1985] Q.B. 428, below, para.10-135.

- 640 *Compagnie Chemin de Fer Paris-Orleans v Leeston Shipping Co* (1919) 36 T.L.R. 68, 69; cf. *Wiebe v Butchart's Motors* [1949] 4 D.L.R. 838 (contract for sale of car rescinded subject to allowance for depreciation during use); *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 (noted by Davies (2016) 75 C.L.J. 15) (buyer of car could rescind despite depreciation and intermittent enjoyment; court could order an account and/or an inquiry to determine the terms on which restitution should be made: at [22], referring to these paragraphs in the 31st edition of Chitty on Contracts. The burden of showing that justice requires compensation for depreciation should be on the misrepresentor: at [30]).
- 641 *Spence v Crawford* [1939] 3 All E.R. 271, 288. The effect of negligent misrepresentation in this respect is an open question.
- 642 [1917] 1 K.B. 813.
- 643 (1995) 184 C.L.R. 102, noted in (1997) 113 L.Q.R. 16.
- 644 [1995] 1 W.L.R. 430. The case, and *De Molestina v Ponton* [2002] EWHC 2413, are criticised by Poole and Keyser (2005) 121 L.Q.R. 273, who argue that in cases of non-fraudulent misrepresentation, where rescission is allowed under equity's auxiliary jurisdiction, if the misrepresentation is as to the terms, partial rescission can be ordered to bring the contract into line with the misrepresentee's expectation. This seems doubtful on the authorities, which seem to recognise that even rescission for non-fraudulent misrepresentation is the act of the party not of the court. See above, para.9-128.
- 645 [2001] 1 All E.R. (Comm) 319.
- 646 [2002] 1 Lloyd's Rep. 271.
- 647 See also *Potter v Dyer* [2011] EWCA Civ 1417. Note that in cases in which a voluntary settlement is being set aside for mistake (see above, para.8-005) or misrepresentation, partial rescission may be allowed: *Kennedy v Kennedy* [2014] EWHC 4129 at [46]; *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch) at [22].
- 648 [2002] 1 Lloyd's Rep. 271 at [6.2].
- 649 [2002] 1 Lloyd's Rep. 271 at [6.9]. See also *Marine Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [332]–[349]. This paragraph in the 31st edition was cited with approval in *NGM Sustainable Developments Ltd v Wallis* [2015] EWHC 2089 (Ch) at [226].
- 650 Above, para.9-133.
- 651 Above, para.9-132. These two sentences were endorsed by the Court of Appeal in *Society of Lloyd's v Lyon* Unreported 11 August 1997.
- 652 See below, para.27-085.
- 653 [1983] 1 Lloyd's Rep. 188, 202.
- 654 (1915) S.C.(H.L.) 20.
- 655 *Boyd and Forest v Glasgow Ry* (1915) S.C.(H.L.) 20; above, para.9-136.
- 656 If the misrepresentation had been fraudulent or negligent the problem could be avoided since the victim could claim the cost of performing as part of the damages. In the loosely analogous situation where a contract is terminated for breach after the victim has performed part of the services required, the victim may opt to abandon his remedies on the contract and claim a quantum meruit: *Planché v Colburn* (1831) 8 Bing. 14; see below, para.32-080.
- 657 cf. below, paras 10-134 et seq.

- 658 Burrows, *Law of Restitution*, 3rd edn (2011), pp.249–252, arguing that the requirement of restitution is best rationalised as a form of the “change of position” defence; *Birks [1997] R.L.R. 72.*
- 659 See above, para.9-136.
- 660 *Mahoney v Purnell [1996] 3 All E.R. 61*, discussed below, para.10-134. Neither this case nor *Cheese v Thomas [1994] 1 W.L.R. 129* (see below, para.10-137) is authority for allowing a claimant to recover the price paid to the defendant for shares if he is unwilling to return the shares to the defendant: *Gamatronic (UK) Ltd v Hamilton [2016] EWHC 2225 (QB)* at [218].
- 661 See *Halpern v Halpern (No.2) [2007] EWCA Civ 291, [2008] Q.B. 195* at [70]–[73]; below, para.10-070.
- 662 *Newbigging v Adam (1886) 34 Ch. D. 582, 594*, per Bowen LJ Cotton and Fry LJJ interpreted “indemnity” more widely, but their view was not followed in *Whittington v Seale-Hayne (1900) 82 L.T. 49*, below, para.9-139. cf. *Horsler v Zorro [1975] Ch. 302* where it was held that, on termination for *breach of contract* the innocent party was entitled to recover expenses thrown away.
- 663 *(1900) 82 L.T. 49.*

## **(c) - Other Bars to Remedy of Rescission**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 4. - Rescission for Misrepresentation**

**(c) - Other Bars to Remedy of Rescission**

### **Restrictions on the right to rescind**

- <sup>140</sup> The ability to make restitution is an essential to the rescission of a contract, but it does not follow that because restitution is possible, rescission must result. For (apart altogether from the court's discretionary power to refuse rescission in cases of innocent or negligent misrepresentation)<sup>664</sup> the plaintiff may find his claim barred by one of three restrictions on the right to rescind, namely, affirmation of the contract, lapse of time or the acquisition by a third party of rights in the subject-matter of the contract. Until the passing of the *Misrepresentation Act* there was also a fourth bar to rescission in cases of innocent misrepresentation, namely, the execution of the contract; this has now been abrogated.

### **Affirmation of the contract**

- <sup>141</sup> If the representee, having discovered the misrepresentation, either expressly declares his intention to proceed with the contract, or does some act inconsistent with an intention to rescind the contract, he is bound by his affirmation.<sup>665</sup>

 Thus a shareholder's right to claim rescission of a contract to take shares, made on the strength of a misrepresentation in the prospectus, may be lost if, after discovering the facts, he carries on

the business of which the shares give him control,<sup>666</sup> or if he attends a shareholders' meeting<sup>667</sup> or tries to sell the shares<sup>668</sup>; for by such acts he is taken to have affirmed the contract. But, where rescission cannot in fact be effected without the co-operation of the representor, affirmation is not to be inferred merely because the representee continues to enjoy the fruits of the contract. So where purchasers of shares in a motel company continued to occupy the motel and manage the company after discovering that they had been induced to buy by fraud, this was held insufficient evidence of affirmation<sup>669</sup>; the purchasers in fact took prompt proceedings for rescission, and they could not have rescinded out of court without the co-operation of the vendors.<sup>670</sup> And a representee who became suspicious of the truth of representations which induced her to buy a share in a partnership was held not to have affirmed merely because she continued to act as a partner while she took steps to verify her suspicions.<sup>671</sup> Each case is decided on its own facts, and the courts pay particular attention to the nature of the contract, to any lapse of time which may have occurred, and to the question whether the representor has changed his position in reliance on the absence of a protest by the representee, or whether third parties have been affected by this.<sup>672</sup>

## Affirmation requires knowledge

<sup>142</sup> In general, a party entitled to rescind or avoid a contract will not be held to have affirmed it unless he knows the facts,

<sup>673</sup>

 and also is aware that he has a right to rescind or avoid.

<sup>674</sup>

 This was the conclusion of the Court of Appeal in *Peyman v Lanjani*,

<sup>675</sup>

 after a full review of the authorities.

<sup>676</sup>

 Such an affirmation, where there is such knowledge, is conclusive evidence of the party's election, whether or not it is acted upon, and whether or not there is any change of position by the other party.

## Sale of goods cases

<sup>143</sup>

In contracts for the sale of goods, it has been said that the right to rescind for innocent misrepresentation will be lost when, had the statement been a condition, the right to reject for breach of condition would have been lost.<sup>677</sup> In most circumstances an act which constitutes an acceptance of the goods within s.35 of the Sale of Goods Act, and so bars the right to reject the goods for breach of condition, would doubtless also constitute an affirmation of the contract and would also bar the right to rescind.<sup>678</sup> But there may be some cases in which this is not so, because a person can “accept” goods within s.35<sup>679</sup> without knowing of his right to reject them,<sup>680</sup> whereas there can be no affirmation without knowledge of the facts. To this extent, sale of goods cases may be an exception to the general rule; but in the Court of Appeal it has recently been doubted whether after the enactment of s.1 of the Misrepresentation Act 1967 it is still the law that the right to rescind is lost just because the goods have been accepted.<sup>681</sup>

## Estoppel

- <sup>144</sup> A party may, however, be held estopped from rescinding or avoiding the contract even where he does not know the facts or his rights,<sup>682</sup> but in this event, he must have led the other to believe, by unequivocal statements or actions, that he does intend to affirm the contract; and it is unlikely that a party will give a sufficiently clear indication of his intention not to rely on a misrepresentation unless his statements or conduct indicate apparent awareness that he has some rights.<sup>683</sup> In addition, the other party must show that he has acted on the statement or conduct to his prejudice.<sup>684</sup>

## Lapse of time

- <sup>145</sup> Lapse of time after discovery that there has been a misrepresentation may be evidence of affirmation.<sup>685</sup> In *Clough v L. & N.W. Ry*<sup>686</sup> it was said that “when the lapse of time is great it probably would be treated in practice as conclusive evidence” of a decision to proceed with the contract. This is especially true of contracts for the sale or allotment of shares in companies, where the utmost promptness is required.<sup>687</sup> In such a case a delay of even a few weeks after discovery of the misrepresentation is usually fatal, and there cannot, in any event, be rescission of an allotment after the company has gone into liquidation.<sup>688</sup> But there can normally be no affirmation where the representee is ignorant of the truth and therefore of his right to rescind,<sup>689</sup> and the inference of affirmation from lapse of time should therefore be rebuttable by proof of lack of knowledge of the untruth. In *Leaf v International Galleries*<sup>690</sup> the right to rescind a contract for the sale of goods was held barred by five years’ delay despite the fact that the representee only discovered the truth shortly before the proceedings but that was a case in which the delay would have amounted

to acceptance of the goods and appears to be an exception to the general rule<sup>691</sup>; and, as we have seen, in the Court of Appeal it has been questioned whether *Leaf v International Galleries* is good law after the enactment of s.1 of the Misrepresentation Act 1967.<sup>692</sup> It seems doubtful whether mere lapse of time will bar rescission in other cases of completely innocent misrepresentation, and this will not be so in cases of fraud, nor where there has been breach of a fiduciary duty, at least until the fraud or breach has been discovered.<sup>693</sup>

## **Effect on representee; laches and acquiescence**

- <sup>146</sup> Older cases indicate that in considering whether the representee has lost his right to rescind by lapse of time, it may be important to inquire if the representee has been adversely affected by the delay.<sup>694</sup> Thus in *Morrison v Universal Marine Insurance Co*<sup>695</sup> it was said that rescission of a contract of marine insurance, the policy of which was voidable for non-disclosure of a material fact, would have been refused if there had been any evidence that the failure of the underwriters to avoid the contract after they had become aware of the defect had led the insured party to refrain from insuring elsewhere. In *Transview Properties Ltd v City Site Properties Ltd*,<sup>696</sup> a rectification case, Briggs J referred to loss of the remedy by laches, meaning “delay coupled with some form of relevant prejudice to the defendant”. Further, it is submitted that if the misrepresentee has delayed in exercising his right for so long that he reasonably appears to be indicating that he will not do so, and the other party acts on that assumption, the misrepresentee will be barred by acquiescence, though again only if the apparent indication was given after the misrepresentee knew of the facts giving him the right to avoid.<sup>697</sup> But the fact that the representor has changed his position is not by itself a bar to rescission, so, e.g. a contract of guarantee can be rescinded by the guarantor notwithstanding that money has been lent by the representor in reliance on the guarantee.<sup>698</sup> Prompt action would doubtless be required once the representee knows the truth in a case of this nature.

## **Third-party rights**

- <sup>147</sup> The intervention of third-party rights may prevent the misrepresentee from rescinding the contract and reclaiming property transferred under it.<sup>699</sup> This is one of the risks run by the injured party if he delays in taking action, for if a third party acquires an interest in the subject matter of the contract before the contract has been avoided a claim for rescission will not lie,<sup>700</sup> provided that the third party acted in good faith and gave consideration.<sup>701</sup> Thus, although there may be no duty to act within a prescribed time, it is in the representee’s interest to act promptly, for the longer the delay, the greater the possibility of a third party acquiring rights in the subject-matter of the contract. This rule does not apply to void contracts, for in such cases the transferee has no title to

pass to the third party<sup>702</sup>; it does apply to voidable contracts, for here the transferee has a good title until the contract is avoided.<sup>703</sup> Thus the rule may operate in all cases of misrepresentation (whether innocent, negligent or fraudulent) unless the effect of the misrepresentation is to make the contract void for mistake.<sup>704</sup> The effect on third parties, in this case insured persons, may also prevent a name at Lloyd's from rescinding her agreement to become a name.<sup>705</sup>

## Tracing proceeds of disposition

- ¶48 Even though the fact that, before rescission, an innocent third party has acquired rights over the property transferred under the contract that was induced by misrepresentation will prevent the misrepresentee from recovering the property as such, the misrepresentee obtains an equity on which it may rely to trace into other property that represents the proceeds of disposition of the original property,<sup>706</sup> thus giving it a proprietary claim rather than merely a personal claim against the misrepresentor.<sup>707</sup>

## A “mere equity”

- ¶49 Until the contract is rescinded, the accepted view is that the misrepresentee has no proprietary right in the property transferred but only a “mere equity”.<sup>708</sup>



## Assignments “subject to equities”

- ¶50 The principle that the intervention of third party rights will prevent rescission only applies to a transfer of goods and not to an assignment of contractual rights. If A is induced to sell goods to B by the fraud of B, and B resells the goods to C who takes in good faith and for value, C acquires a good title to the goods. But if A is induced to buy goods from B by the fraud of B, and B assigns the right to receive the purchase price to C, the rule that assignments are “subject to equities”<sup>709</sup> means that C gets no better right than B.

## Rescission by sub-buyer

- 151 If a contract is induced by an innocent misrepresentation and that same innocent misrepresentation is passed on to a sub-buyer and in turn induces a subcontract, the sub-buyer may rescind the subcontract; if he does so, there is nothing to prevent the first representee from rescinding the original contract.<sup>710</sup>

## Executed contracts

- 152 Until the passing of the [Misrepresentation Act 1967](#) there was a further bar to rescission in certain cases of innocent misrepresentation, namely, the execution of the contract. This rule, often known as the rule in *Seddon v North Eastern Salt Co Ltd*,<sup>711</sup> did not apply to cases of fraud, nor to cases of breach of fiduciary relationships,<sup>712</sup> and its application to particular types of contract was much disputed. The rule was, however, completely abrogated by [s.1\(b\) of the Misrepresentation Act](#) which provides that the performance of the contract shall be no bar to rescission for any misrepresentation where it would not have barred rescission for fraud. Although the Law Reform Committee (on whose Report the Act was based) had recommended that this rule should be retained for contracts for the sale of an interest in land, except for leases not exceeding three years,<sup>713</sup> the Act contains no special provision for such contracts. And despite the fact that the word “performed” is perhaps not wholly appropriate to contracts for the sale of an interest in land, it is thought that there can be no doubt that rescission of such contracts is now possible after execution of a conveyance or other grant in all cases of misrepresentation. Of course, the execution of the contract may still be a bar to rescission on other grounds, for example, because it is evidence of affirmation,<sup>714</sup> or because *restitutio in integrum* is no longer possible.<sup>715</sup> Moreover, it is to be anticipated that a court might be more ready to exercise its discretion under [s.2\(2\) of the Act of 1967](#) to award damages in lieu of rescission in cases where the contract has been executed.<sup>716</sup> But execution of the contract is no longer in itself an absolute bar to rescission.

## Footnotes

1 See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

664 Above, paras 9-112 et seq.

665

*Ormes v Beadel* (1860) 2 De G.F. & J. 333; *Clough v L. & N.W. Ry* (1871) L.R. 7 Ex. 26, 34; *Sharpley v Louth and East Coast Ry* (1876) 2 Ch. D. 663. Passive conduct, such as not claiming to avoid an insurance policy or not offering to return the premium, may amount to affirmation: *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep. 61 at [40]; but the Court of Appeal held that the representation must be unequivocal and on the facts it was not: [2011] EWCA Civ 1572, [2012] Lloyd's Rep. I.R. 67 at [41], [50]. The test of whether the misrepresentee has affirmed is objective: *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [203], where Foxton J gives a detailed analysis of what amounts to communication of affirmation; see also the judge's comparison with affirmation when the right is to terminate for breach (at [205]; his summary of the principles was not challenged on appeal, [2022] EWCA Civ 231 at [73]). Some actions may amount to affirmation even though the misrepresentee purports to reserve their rights (at [211]; approved [2022] EWCA Civ 231 at [74]–[75]).

- 666 *Seddon v North Eastern Salt Co* [1905] 1 Ch. 326. As to the wider grounds for this decision, see below, para.9-152.
- 667 *Sharpley v Louth and East Coast Ry* (1876) 2 Ch. D. 663.
- 668 *Re Hop and Malt Exchange and Warehouse Co Ex p. Briggs* (1866) L.R. 1 Eq. 483.
- 669 *Kupchak v Dayson Holdings Co Ltd* (1965) 53 D.L.R. (2d) 482; *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [203(vii)].
- 670 See also *Edwards v Ashik* [2014] EWHC 2454 (Ch) at [60]–[61] (no affirmation when clear claimant was intending to claim remedies for fraud and was merely waiting to see what the defendant had to say about the allegations).
- 671 *Senenayake v Cheng* [1966] A.C. 63.
- 672 See *Clough v L. & N.W. Ry* (1871) L.R. 7 Ex. 26, 34, 35 (though the reference on p.35 to third parties may have been intended to refer to third party rights that make it impossible for the property to be restored, see above, para.9-134); *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [204]); *Bank of Credit and Commerce International SA (In Liquidation) v Ali* [1999] 2 All E.R. 1005, 1023.
- 673 Suspicion is not sufficient, and the suggestion that if the party "has the facts from which a reasonable person would deduce the truth, he may be taken to know it" (E. Peel (ed.) Treitel's Law of Contract, 25th edn) (2020), para.9-125), has been doubted: that "might well provide the basis for drawing an inference of knowledge, however, it is clear in the present context that the means of discovering knowledge is not the same as knowledge": *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [202], where Foxton J gives a detailed account of the question of "knowledge" in the context of affirmation. The question whether the communication must show that the misrepresentee has knowledge was left open: see at [224]–[226]. The judge's summary of the principles of affirmation was not challenged on appeal, [2022] EWCA Civ 231 at [73].
- 674 It has been said that the need for knowledge of the legal right, "although established by authority, is difficult to justify in principle", and such knowledge is hard to prove, but "the unfairness of the rule is mitigated ... by a presumption that a party which had a legal adviser

at the relevant time received appropriate advice: *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm) at [160] (Leggatt J). In *Leeds City Council v Barclays Bank Plc and Newham LBC v Barclays Bank Plc* [2021] EWHC 363 (Comm), [2021] Q.B. 1027 at [208]–[209] Cockerill J described the issue of when a party will be taken to have known of its legal right as “fact sensitive” and unsuitable for determination on summary judgment.

•675 [1985] Ch. 457.

•676 See also *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep. 476, 498, 518, 529; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391, 397–399; *Habib Bank Ltd v Tufail* [2006] EWCA Civ 374, [2006] All E.R. (D) 92 (Apr) (Comm) at [20]. For a case where any right to rescind would have been lost, see *Donegal International Ltd v Zambia* [2007] EWHC 197 (Apr), [2007] 1 Lloyd's Rep. 397 at [467].

677 *Leaf v International Galleries* [1950] 2 K.B. 86 (lapse of time). See also *Long v Lloyd* [1958] 1 W.L.R. 753. Sale and delivery to a sub-purchaser also amounts to acceptance (though only after he has had a reasonable opportunity to examine the goods: *Sale of Goods Act 1979* (as amended) s.35), but if the sub-purchaser rejects the goods the right to rescind for misrepresentation can probably still be exercised, cf. below, para.9-151. It should make no difference to the right to rescind for misrepresentation that the representation has become a term of the contract: *Misrepresentation Act 1967* s.1(a). On loss of the right to reject, see Vol.II, paras 46-276 et seq.

678 In *Leaf v International Galleries* [1950] 2 K.B. 86 Denning LJ and Lord Evershed MR said that the right to rescind for innocent misrepresentation must be barred if a right to reject for breach of condition would be barred by acceptance. It is not clear that a strictly analogous rule applies to rescission for innocent misrepresentation. It seemed doubtful when the courts held that the right to reject for breach of condition might be lost by acceptance after a matter of weeks: *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All E.R. 220. Subsequent decisions such as that of the Court of Appeal in *Clegg v Andersson* [2003] EWCA Civ 320, [2003] 2 Lloyd's Rep. 32, seem more generous (below, para.46-285) and, if *Leaf v International Galleries* remains good law (see following text) an analogous approach might still be applied to loss of the right to rescind for misrepresentation.

679 See below, Vol.II, para.46-279.

680 The buyer in *Leaf v International Galleries* [1950] 2 K.B. 86 therefore had lost the right to rescind although he was unaware of the misrepresentation.

681 *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 at [34] (noted by *Davies* (2016) 75 C.L.J. 15, *Turner* (2016) 132 L.Q.R. 388), at [34] (Longmore L.J, with whom Patten LJ agreed). (The third member of the court, Roth J, doubted whether in *Leaf* a majority had in fact adopted a strict rule that if the right to reject goods would have been lost, so would the right to rescind, and held that in the circumstances there had been no undue delay on the part of the buyer: at [47]–[48].) On s.1 of the *Misrepresentation Act 1967* see above, para.9-122.

682 See *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391, 399. In *Habib Bank Ltd v Tufail* [2006] EWCA Civ 374, [2006]

*All E.R. (D) 92 (Apr) (Comm)* the Court of Appeal distinguished between promissory estoppel and acquiescence. The right to avoid a contract for misrepresentation may be lost by acquiescence if the misrepresentee indicates that he will not avoid it and the other party acts on this to its detriment, but only if the representation was made after the misrepresentee knew of the facts giving him the right to avoid (at [20]–[23]). The difference (if any) between estoppel (in the sense used in this paragraph) and acquiescence (see below, para.9-146) seems to be that estoppel envisages a statement or action indicating the party's intention to affirm, whereas acquiescence implies passive acceptance of the status quo.

- 683 *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions* [2002] EWCA Civ 1253, [2003] *Lloyd's Rep. I.R.* 1 at [21]; *IHC (A Firm) v Amtrust Europe Ltd* [2015] EWHC 257 (QB) at [12].
- 684 *Habib Bank Ltd v Tufail* [2006] EWCA Civ 374 at [20].
- 685 *Lindsay Petroleum Co v Hurd* (1874) L.R. 5 P.C. 221; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218; *Clough v L. & N.W. Ry* (1871) L.R. 7 Ex. 26, 35; *Oelkers v Ellis* [1914] 2 K.B. 139; *Armstrong v Jackson* [1917] 2 K.B. 822; *Leaf v International Galleries* [1950] 2 K.B. 86; *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWHC 301 (Comm), [2011] 2 *Lloyd's Rep.* 61 at [40]. The Court of Appeal held that the representation must be unequivocal and on the facts it was not: [2011] EWCA Civ 1572, [2012] *Lloyd's Rep. I.R.* 67 at [41], [50].
- 686 (1871) L.R. 7 Ex. 26, 34, 35.
- 687 *Taite's Case* (1867) L.R. 3 Eq. 795; *Sharpley v Louth and East Coast Ry* (1876) 2 Ch. D. 663; *Re Scottish Petroleum Co* (1883) 23 Ch. D. 413; *Aaron's Reefs Ltd v Twiss* [1896] A.C. 273, 294; *Taylor v Oil and Ozokerite Co* (1913) 29 T.L.R. 515; *First National Reinsurance Co Ltd v Greenfield* [1921] 2 K.B. 260.
- 688 *Oakes v Turquand* (1867) L.R. 2 H.L. 325.
- 689 *Aaron's Reefs Ltd v Twiss* [1896] A.C. 273, 287; *Armstrong v Jackson* [1917] 2 K.B. 822; and see above, para.9-142.
- 690 [1950] 2 K.B. 86.
- 691 See above, para.9-143.
- 692 *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745; see above, para.9-143.
- 693 *Armstrong v Jackson* [1917] 2 K.B. 822, 828–829, 830.
- 694 See *Clough v L. & N.W. Ry* (1871) L.R. 7 Ex. 26, 34, 35; *Morrison v Universal Marine Insurance Co* (1873) L.R. 8 Ex. 197, 205; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218, 1278. See also *Re Cape Breton Co* (1885) 29 Ch. D. 795 and *Ladywell Mining Co v Brookes* (1887) 35 Ch. D. 400.
- 695 (1873) L.R. 8 Ex. 197.
- 696 [2008] EWHC 1221 (Ch) at [149] (affd without reference to the point [2009] EWCA Civ 1255).
- 697 In *Transview Properties Ltd v City Site Properties Ltd* [2008] EWHC 1221 (Ch) at [149] Briggs J drew a distinction between loss of the remedy by laches and loss by acquiescence, “the non-exercise of a right in circumstances where the obligor may reasonably assume that it will never be exercised”. Burrows, Remedies for Torts, Breach of Contract and Equitable Wrongs, 4th edn (2019), p.489 explains that acquiescence requires a representation by the

claimant, usually implied from its conduct, that it is giving up (i.e. waiving) its rights which the defendant relies on, and is a form of estoppel, whereas laches can be established by a delay without any representation: but stresses that in either case the claimant must have had sufficient knowledge of the relevant facts before the right will be lost. Terminology in this area seems not to be wholly consistent: see *Goldsworthy v Brickell* [1987] Ch. 378, 409.

- 698 *Mackenzie v Royal Bank of Canada* [1934] A.C. 468.
- 699 But see next paragraph. The effect of insolvency of the misrepresentor is unclear. Older cases such as *Tilley v Bowman Ltd* [1910] 1 K.B. 745 assume that the misrepresentee may still rescind and recover any property from the misrepresentor's trustee in bankruptcy but more recent cases involving companies have suggested that the rights of unsecured creditors have intervened to prevent recovery of the property: *Re Crown Holdings (London) Ltd* [2015] EWHC 1876 (Ch) at [37]–[45]; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch. 281 at [126]. See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.40-027.
- 700 *White v Garden* (1851) 10 C.B. 919; *Babcock v Lawson* (1880) 5 Q.B.D. 284; *Re L.G. Clarke* [1967] Ch. 1121.
- 701 *Scholefield v Templer* (1859) 4 De G. & J. 429, 433–434.
- 702 *Hardman v Booth* (1863) 1 H. & C. 803; *Cundy v Lindsay* (1878) 3 App. Cas. 459; *Ingram v Little* [1961] 1 Q.B. 31; *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919.
- 703 Sale of Goods Act 1979 s.23.
- 704 As, e.g. in *Cundy v Lindsay* (1877) L.R. 3 App. Cas. 459 and *Ingram v Little* (1892) L.R. 11 Q.B.D. 251. The rule that intervention of third party rights prevents rescission is normally invoked where a third party has acquired rights over the property transferred; but it can also apply where liability to third parties has been incurred before rescission is claimed and rescission would cause detriment to them: *Society of Lloyd's v Lyon* Unreported 11 August 1997.
- 705 *Society of Lloyd's v Khan* [1998] 3 F.C.R. 93.
- 706 See *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch. 281 at [122]–[127]; *National Crime Agency v Robb* [2015] Ch. 520 at [40]–[46] (cases of fraud); *Pearce v Beverley* [2013] EWHC 2627 (Ch) (undue influence); and *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch) at [24]–[32] (voluntary settlement sought to be set aside for mistake (see above, footnotes to para.8-005)).
- 707 *Shalson v Russo* [2003] EWHC 1637 (Ch) at [122].
- 708 *Clough v L. & N.W. Ry* (1871) L.R. 7 Ex. 26, 32, 34; *Bristol and West Building Society v Mothew* [1998] Ch. 1, 22; *Barclays Bank Plc v Boulter* [1999] 1 W.L.R. 1919, HL, at 1925; *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep. Bank. 438, CA at [461]–[462]; *Shalson v Russo* [2003] EWHC 1637 (Ch), *The Times*, 3 September 2003, Ch D (defendant did not hold property on constructive trust before rescission). For a full discussion see Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022), para.4-10, and *Worthington* [2002] R.L.R. 28.
- 709 Below, para.22-072.
- 710 *Abram S.S. Co v Westville Shipping Co* [1923] A.C. 773.

- 711 [1905] 1 Ch. 326. See also *Senenayake v Cheng* [1966] A.C. 63, decided shortly before the 1967 Act was passed.
- 712 *Armstrong v Jackson* [1917] 2 K.B. 822.
- 713 Tenth Report, Cmnd.1782 (1962), paras 6 and 7.
- 714 Above, para.9-141.
- 715 Above, paras 9-132—9-139.
- 716 Above, para.9-118.

## Section 5. - Exclusion of Liability for Misrepresentation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 5. - Exclusion of Liability for Misrepresentation

D After title, add new footnote 708a: See Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), Ch.9, paras 9-01—9-07 give examples of different types of clauses purporting to exclude or limit liability for misrepresentation.

### Position at common law

153 At common law a person could not contract out of liability for fraud inducing the making of a contract with him, at least where the fraud was his own.<sup>717</sup> It is, however, possible that he could do so where the fraud was that of his employees<sup>718</sup> or agents<sup>719</sup> and there seems no doubt that it was possible, by a provision of the contract itself, to exclude or modify the normal consequences of innocent or negligent misrepresentation.

720

U Such clauses are, however, subject to the normal principles of construction common to all exemption clauses.<sup>721</sup> Any exclusion of liability for misrepresentation must be clearly stated.<sup>722</sup> Thus a clause containing a statement by one party that “we are acting for our own account and have made our own independent decisions” would not exclude liability for misrepresentations in investment advice or recommendations<sup>723</sup>; and a clause stating that “this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement” was not only held not to exclude or supersede misrepresentations as to matters that were not the

subject of the terms of the Agreement<sup>724</sup> but also to be dealing only with whether representations had become terms of the contract and not with liability for misrepresentation.<sup>725</sup>

## “No reliance” clauses

- <sup>154</sup> A clause that acknowledges that a party has not relied on a non-contractual representation  
<sup>726</sup>

 may prevent that party showing that he was induced to enter the contract by a representation, as it may raise, or at least have the effect of,<sup>727</sup> an estoppel. It was said that an “evidential estoppel” will have that effect only if the party who made the representation entered the contract in the belief that the other had not relied on the representation:

“... it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations was true.”<sup>728</sup>

However it was subsequently said that the clause may also be effective, even if it is known that the other party did rely on a representation, if the parties have in fact agreed to conduct their affairs on the basis<sup>729</sup> that there has been no reliance, so that an estoppel arises by convention<sup>730</sup> or “by contract”. This analysis has now been accepted by the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank*.<sup>731</sup> The estoppel should be regarded as one that arises “by contract” rather than by convention, the difference being that with an estoppel by contract, the party which wishes to rely on that estoppel has no need to demonstrate that it would be unconscionable for the other party to resile from the conventional state of affairs that the parties have assumed.<sup>732</sup> However, unless the party to whom the statement was made did not in fact rely on it, or it was made clear at the time the statement was made (or possibly subsequently but before the agreement was concluded<sup>733</sup>) that the statement was not one on which the party was entitled to rely,<sup>734</sup> the clause is likely to be interpreted as an attempt to exclude or restrict liability for misrepresentation and thus subject to statutory control.<sup>735</sup>

## Basis of the “contractual estoppel”

- <sup>155</sup>

The notion that a non-reliance clause may raise a conventional or contractual estoppel has not escaped criticism.<sup>736</sup> The decisions appear to be sound but may be better explained in a different way. The basic idea behind estoppel by convention may well have started with recitals in deeds, setting out assumptions that the parties were not permitted to contradict.<sup>737</sup> It soon spread to similar “contractual” statements, for example in *M'Cance v London and North Western Railway Co*<sup>738</sup> to a declaration that the horses to be transported were worth no more than £10 each. It is true that in that case, Williams J said:

“Here it appears in evidence that the contract declared on was to be regulated and governed by a state of facts understood by the parties, viz., that the horses were under the value of 10*l.* each.”

That might seem to imply an actual belief that the horses were worth less than £10, but he continued in words that suggest strongly that neither party had to believe that this was the case:

“It is laid down in my brother Blackburn’s Treatise on the Contract of Sale, p. 163, that ‘when parties have agreed to act upon an assumed state of facts their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth.’ Applying that rule to the present case, we think that both parties are bound by the conventional state of facts agreed upon between them.”

As Dixon J said in *Grundt v Great Boulder Proprietary Gold Mines Ltd*:

“It is important to notice that belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs. ... Parties to a deed sometimes deliberately set out an hypothetical state of affairs as the basis of their covenants in order to create a mutual estoppel.”<sup>739</sup>

It seems that neither the *M'Cance* case nor *Peekay*<sup>740</sup> and *Springwell*<sup>741</sup> is really based on estoppel reasoning but rather on contractual undertakings not to raise issues of pre-contractual representations or promises.<sup>742</sup> It is simply the effect that is to “estop” one party from raising certain arguments. As argued earlier, “nothing of substance is gained by classifying [the] conclusion under the rubric of ‘contractual estoppel’”.

<sup>743</sup>

**U** In the analogous case of estoppel by deed, Lord Toulson, delivering a decision of the Privy Council, certainly discussed the doctrine in terms of estoppel but the decision that a statement that a sum had been paid could not be challenged seems ultimately to have been based on agreement alone:

“On the basis that the deed contained a valid contract of sale, the company is entitled on ordinary contractual principles to rely on the terms of the deed by which the purchase price was treated as between the parties as having been paid.”<sup>744</sup>

## Acknowledgement that statement of opinion only

- <sup>156</sup> The parties’ agreement may create a “contractual estoppel” to the effect that statements will be treated as no more than expressions of opinion.<sup>745</sup>

## Misrepresentation Act s.3

- <sup>157</sup> Section 3 of the Act of 1967 limits the freedom of the parties<sup>746</sup> to contract out<sup>747</sup> of the effect of the Act in certain respects. The original s.3 was replaced by s.8 of the Unfair Contract Terms Act 1977, and s.3 is now as follows:

“If a contract contains a term which would exclude or restrict—

- (a)any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- (b)any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.”

The main change of substance between the current and the original s.3 is that under the original section it was *reliance* on the exempting provision which had to be shown to be reasonable; under the current s.3, it is the exempting term itself which has to be shown to be reasonable. The requirement of reasonableness is now stated in s.11(1) of the Unfair Contract Terms Act 1977 as a requirement that the term in question:

“... shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.”

Thus a very wide exempting term may be held unreasonable under the current s.3 while reliance on it might have been reasonable under the old s.3<sup>748</sup>; equally, a term may now be held reasonable where reliance on it in particular circumstances might formerly have been held unreasonable. A further change is that the current s.3 makes it clear that the onus is on a person claiming to rely upon an exempting term to show that it is reasonable under the relevant section of the **Unfair Contract Terms Act**. Reasonableness under the Act is discussed below.<sup>749</sup>

## Consumer cases

- 158 With the coming into force of the **Consumer Rights Act 2015** (for contracts made on or after 1 October 2015), s.3 of the **Misrepresentation Act 1967** was amended so as to no longer apply to “a term in a consumer contract within the meaning of Pt 2 of the **Consumer Rights Act 2015**”.<sup>750</sup> These terms are controlled under the **2015 Act** by the general test of unfairness provided by s.62.<sup>751</sup> This has the effect of making the application of the legislation (the **Misrepresentation Act 1967** s.3 on the one hand, the **Consumer Rights Act** on the other) turn on the distinction between a person who contracts as a “consumer” with a “trader” within the meanings of the Act and otherwise. As will be seen, the definition of “consumer” provided by the Act is fact-sensitive and, therefore, in some cases the relevant legislation applicable will be difficult to determine.<sup>752</sup> It is not thought that the distinction will make much, if any, difference to the outcome of cases in which it has to be determined whether a term that purports to exclude or restrict liability for misrepresentation is “fair” or “reasonable”. This is because in relation to any particular type of term, application of the test of fairness employed in s.62 of the **2015 Act** is unlikely to differ from the test of “reasonableness” under the **Unfair Contract Terms Act 1977**.<sup>753</sup> However, it may be easier to show that a term in a consumer contract falls within the scope of the control, as it will not be necessary to show that the term is one that “would exclude or restrict liability” (as opposed to preventing any liability for misrepresentation arising in the first place, e.g. by negating reliance), as is necessary to bring the term within s.3 of the **1967 Act**.<sup>754</sup>

## International supply contracts and s.3

- 159 Section 3 does not apply if the contract is an “international supply contract” within the meaning of the **Unfair Contract Terms Act 1977** s.26.<sup>755</sup> This is because s.3 subjects the relevant clauses to the requirement of reasonableness under s.11 of the **1977 Act**, and s.26 of the **1977 Act** provides that the requirement of reasonableness does not apply to exclusions or restrictions of liability arising under contracts within s.26.<sup>756</sup>

## Scope of s.3

- [60] The terms “any liability” and “any remedy” are presumably wide enough to cover provisions which would exclude or restrict a claim to damages, or the right to rescind, or the right to set up the misrepresentation by way of defence to an action.<sup>757</sup> The section applies not merely to provisions totally excluding the normal consequences of misrepresentation, but also to provisions which restrict any liability or remedy arising from a misrepresentation.<sup>758</sup> This means, for instance, that a provision barring rescission but allowing claims for damages would fall within the section, as also would a provision limiting the amount of damages or the time within which a claim may be made. What is more problematic is whether the section applies to a clause that is worded so as to exclude any liability for misrepresentation<sup>759</sup> from arising at all, by stating that one of the essential elements is missing.<sup>760</sup> Thus it has been held that the section does not prevent a principal from limiting the authority of his agent even though the effect is to exclude or restrict a liability to which the principal would otherwise be subject,<sup>761</sup> and it may not apply to a “no reliance” clause.<sup>762</sup>

## Section 3 and no reliance clauses

- [61] Whether s.3 applies to clauses under which one party acknowledges that it has not relied on any statement made to it<sup>763</sup> has been the subject of apparently conflicting views.<sup>764</sup> In *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* Christopher Clarke J said:

“... the essential question is whether the clause in question goes to whether the alleged representation was made (or, I would add, was intended to be understood and acted on as a representation), or whether it excludes or restricts liability in respect of representations made, intended to be acted on and in fact acted on; and that question is one of substance not form.<sup>765</sup>

In this respect the key question, as it seems to me, is whether the clause attempts to rewrite history or parts company with reality. If sophisticated commercial parties agree, in terms of which they are both aware, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they are or are not making, a suitably drafted clause may properly be regarded as establishing that no representations (or none other than honest belief) are being made or are intended to be relied on. Such parties are capable of distinguishing between statements which are to be treated as representations on which the recipient is entitled to rely, and statements which do not have that character, and should be allowed to agree among themselves into which category any given statement may fall.

Per contra, to tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before, and in substance an attempt to exclude or restrict liability.”<sup>766</sup>

In *Springwell Navigation Corp v JP Morgan Chase Bank*<sup>767</sup> the Court of Appeal held that statements by one party that it had made its decision to contract independently, without relying on the other party, and that it was fully familiar with the risks, created a contractual estoppel to the effect that any statement by other would amount to merely one of opinion<sup>768</sup> and were not within s.3.<sup>769</sup> In contrast, a sentence in the same paragraph of the document which stated that the other party would not be liable for any loss suffered by the first party unless the loss was caused by gross negligence or wilful misconduct was within s.3, though in the circumstances it was reasonable and therefore effective.<sup>770</sup> Aikens LJ, delivering the only full judgment, said that a statement that “... no representation or warranty, express or implied, is or will be made” by the relevant party “is more difficult to classify”; but he was inclined to treat it as falling within s.3 following because it “may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before”.<sup>771</sup> Aikens LJ held that the same was true of a non-reliance clause in the agreement.<sup>772</sup> In *First Tower Trustees Ltd v CDS (Superstores International) Ltd*<sup>773</sup> the Court of Appeal rejected suggestions that the question is not one of whether the clause attempts to re-write history but to determine whether, as a matter of construction, the terms define the basis on which the parties were transacting business.<sup>774</sup> The Court agreed expressly with Christopher Clarke J’s statement in the *Raiffeisen* case that the question is one of fact: if in fact there has been reliance on what the person to whom it was made would reasonably understand to be a representation, the clause will be an attempt to exclude liability and thus will fall within s.3.

“The situation might be different in the unlikely scenario that before he contracts the buyer sees the clause and, eyes wide open, agrees that he is not relying on what he may have been told.”<sup>775</sup>

## Timing of notice of the clause

<sup>162</sup> A no-reliance clause that was brought to the attention of the party, or of which he knew, before the statement of which he is complaining was made might thus show that he was not relying on it, or that he was not reasonable in relying on it. It is possible that a clause only brought to his attention later might have the same effect. In an analogous case, the question was whether a bank selling a “swap” was under a duty of care to a customer in giving advice on its suitability, or if the documentation provided had prevented any such duty arising so that the clause did not fall within s.2(2) of the Unfair Contract Terms Act 1977. The court held that even though an employee of the

bank had given advice, the terms of business provided to the customer at a later stage prevented any duty arising and were not “re-writing history”.<sup>776</sup>

“They were clearly drawn to [the customer’s] attention before the swap contract was concluded. He rightly understood … that they were not empty words but were intended to have legal effect as part of any contract.”<sup>777</sup>

In the light of the decision of the Court of Appeal in *First Tower Trustees Ltd v CDS (Superstores International) Ltd*,<sup>778</sup> which emphasised that where there has been reliance on a representation that was incorrect, any clause is likely to be seen as an attempt to exclude liability and thus fall within the scope of s.3 of the Misrepresentation Act 1967, it is submitted that a court should be very slow to hold that a non-reliance or similar clause contained in a document that was supplied only later shows that the parties were agreeing that one would not rely on what it was being told by the other, or that the statements would be treated as expressions of opinion only. If a party who has not yet been given documents or other indications that it should not place any reliance on what it is being told, or that it is only opinion, and, not being aware of the clauses from previous experience, reasonably thinks that it is entitled to rely on what is being said, documents provided later that contain “no-reliance” or “opinion only” clauses should be regarded as attempts to re-write the history, and therefore subject to s.3 of the Misrepresentation Act 1967, unless the documents are presented in such a way that the party must realise that it should re-consider the import of the information it was given earlier. Thus the evidence as a whole, including the clause, might show that the representee did not rely on the misrepresentation<sup>779</sup> or, even if it had relied on a statement made by the other party, it was not “entitled to do so” as the statement was not put forward as one of fact.<sup>780</sup> But if the contract was induced by misrepresentation, s.3 applies, and its effect cannot be excluded.<sup>781</sup>

## Unfair Contract Terms Act 1977 s.3(2)(b)(i)

[63] It has been said that a clause stating that the document constitutes the “entire agreement [which] shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us” may also fall within s.3(2)(b)(i) of the Unfair Contract Terms Act 1977. This section prevents a party relying on one of its written standard terms of business to entitle it to render a contractual performance which is substantially different from that which was reasonably expected of him, unless the clause satisfies the requirement of reasonableness.<sup>782</sup> In *AXA Sun Life Services Plc v Campbell Martin Ltd* Stanley Burnton LJ said that a pre-contractual representation might affect what was reasonably expected; and therefore the clause “may be subject to the reasonableness test in UCTA in relation to both collateral warranties and representations”.<sup>783</sup>

## Reasonableness

- <sup>164</sup> Reasonableness under the Act is discussed below (paras 17-105—17-115) and only selected points will be considered here.<sup>784</sup> It seems that the court must consider the reasonableness of the provision as a whole.<sup>785</sup> A clause may be invalid because, taken as a whole, it is too wide, even though it would not necessarily be unreasonable to exclude or restrict liability on the facts which have occurred. Thus it has been held that a clause which purports to exclude liability for misrepresentation of any kind will be unreasonable, since it is not reasonable to exclude liability for fraud, and the clause as a whole will be invalid.<sup>786</sup> However, this decision must be considered in the light of other cases that have held that an exclusion or restriction of one form of liability will not necessarily be unreasonable under the **Unfair Contract Terms Act 1977** merely because the clause purports also to exclude another liability which under the Act cannot be excluded: the necessarily invalid part of the clause may be excised.<sup>787</sup> In any event, the court should not hold a clause unreasonable because it might extend to some situation which is unlikely to occur.<sup>788</sup> But if the clause is too wide, the court cannot rewrite the clause in a reasonable fashion and, as the test under s.11(1) of the **Unfair Contract Terms Act 1977** is whether the term was “a fair and reasonable one to be included”, the court cannot allow the misrepresentor to rely on it so far as seems reasonable.<sup>789</sup> Thus it cannot uphold a provision in so far as it would bar rescission, but reject it in so far as it would bar a claim for damages. However, it is possible that a clause which is in distinct parts might be severed and the reasonable parts upheld. It has been said in the Court of Appeal that there are at least two good reasons why the courts should not refuse to give effect to an exclusion of remedies for misrepresentation in a commercial contract between experienced parties of equal bargaining power—a fortiori, where those parties have the benefit of professional advice. First, it is reasonable to assume that the parties desire commercial certainty; and secondly, it is reasonable to assume that the price to be paid reflects the commercial risk which each party—or, more usually, the purchaser—is willing to accept.<sup>790</sup>

## Clauses covering breach

- <sup>165</sup> The section does not seem to apply to a provision which excludes or restricts liability arising solely from breach of a contractual term, whether the term is a promise or a representation of fact. Read literally, the section might appear to apply to a provision which excludes or restricts liabilities or remedies arising both from misrepresentations as such and from misrepresentations as contractual terms,<sup>791</sup> but it seems more likely that it will be interpreted as affecting only any remedies arising from the misrepresentation.<sup>792</sup> What is less clear is the position if a single term of the contract purports to exclude or limit liability for both misrepresentation and breach, and the clause is held to not to be reasonable. Again read literally, s.3 appears to invalidate the term as a whole.<sup>793</sup> Again it

is suggested that the section should be interpreted as invalidating the term only so far as remedies for misrepresentation are concerned.

## Other statutory provisions affecting disclaimers

- [66] A clause aimed at preventing liability arising in tort under *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>794</sup> on the part of a business will be valid under the *Unfair Contract Terms Act 1977 s.2(2)* only if it satisfies the requirement of reasonableness under that Act.<sup>795</sup> In consumer contracts, clauses that unfairly exclude or restrict the consumer's remedies for misrepresentation in consumer contracts made on or after 1 October 2015 fall within the *Consumer Rights Act 2015 s.62*, which applies whether or not the term was negotiated.<sup>796</sup> These provisions appear to apply also to clauses limiting the authority of agents and "no-reliance" clauses which are not caught by s.3 of the *Misrepresentation Act 1967*.<sup>797</sup>

## Footnotes

- 1 See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).
- 717 *S. Pearson & Son Ltd v Dublin Corp [1907] A.C. 351*; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61* at [16], [76], [121]. This will include, in a case where there is a duty of disclosure (see below, paras 9-167 et seq.), fraudulent non-disclosure: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6* at [21], [72].
- 718 See *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q.B. 495*.
- 719 This question was left open by the House of Lords in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61*, see at [16], [76]-[82]. In that case the clause was not in sufficiently clear and unmistakable terms to exclude remedies for alleged fraud on the part of the agent.
- 720 *Boyd and Forrest v Glasgow Ry (1915) S.C.(H.L.) 20, 36*. On older cases involving misdescriptions in the sale of land see below, paras 30-072—30-073 and Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022), para.9-17; *SPS Groundworks & Building Ltd v Mahil [2022] EWHC 371 (QB)* at [67(d)] (duty of disclosure cannot be circumvented by contractual conditions). A properly worded clause which excludes a right of avoidance will be effective (assuming it is not affected by *Misrepresentation Act 1967 s.3*; see para.9-157) notwithstanding a purported rescission of

the contract as a whole by the misrepresentee: *Toomey v Eagle Star Insurance Co Ltd (No.2) [1995] 2 Lloyd's Rep. 88*.

- 721 Below, paras 17-007—17-022. Thus a clause stating that a contract of reinsurance was “neither cancellable nor voidable by either party” was held to apply only to cases of innocent misrepresentation or non-disclosure, and not to alleged negligence, nor to exclude the right to damages under Misrepresentation Act 1967 s.2(1): *Toomey v Eagle Star Insurance Co Ltd (No.2) [1995] 2 Lloyd's Rep. 88*. A disclaimer “without responsibility” does not prevent rescission on the ground of misrepresentation: *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department [1996] 1 Lloyd's Rep. 1*. However, a clause applying to “rights, obligations and liabilities arising … in connection with this contract” may apply to a claim for misrepresentation: *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd (No.2) (1997) 87 B.L.R. 52*; but in *First Tower Trustees Ltd, Intertrust Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637* a clause protecting trustees from personal contractual liability was held not to apply to their liability under s.2(1) of the Misrepresentation Act 1967 (at [80]–[87]).
- 722 *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1* at [94]; see also *NF Football Investments Ltd v NFFC Group Holdings Ltd [2018] EWHC 1346 (Ch)* at [25]. No particular form is required, *[2018] EWHC 1346 (Ch)* at [27].
- 723 *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* at [513]. However, the next sentence of the same clause, stating that “We are not relying on any communication (written or oral) from you as investment advice or as a recommendation” was effective under the principle to be discussed in the next paragraph.
- 724 *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1* at [36]; *Al-Hasawi v Nottingham Forest Football Club Ltd [2018] EWHC 2884 (Ch)*. The *AXA* decision is criticised by *A. Trukhtanov (2011) 127 L.Q.R. 345*. In *Mears Ltd v Shoreline Housing Partnership Ltd [2013] EWCA Civ 639* the entire agreement clause did not exclude liability for misrepresentation: see at [16]. However, in *Bikam OOD v Adria Cable Sarl [2012] EWHC 621 (Comm)*, where in one clause of the contract the seller acknowledged the buyer’s reliance on specified warranties by the seller, it was held that the effect of an “entire agreement” clause was that, subject to the exception of fraud, the parties’ rights were confined to those arising under the agreement, and rights in respect of warranties and representations not expressly set out in the agreement were waived (at [45]).
- 725 *[2011] EWCA Civ 133* at [81], applying the approach of Ramsay J in *BSkyB Ltd v HP Enterprise Services UK Ltd [2010] EWHC 86 (TCC), (2010) 129 Con. L.R. 147*. Rix LJ pointed out that the word “representations” was “completely sandwiched between words of contractual import” (at [80]) and that “supersede” is “a word of agreement rather than exclusion” (at [81]). A simple “entire agreement clause” is not apt to exclude liability for misrepresentation: *Thomas Witter Ltd v T.B.P. Industries Ltd [1996] 2 All E.R. 573; Deepak Fertilisers and Petrochemicals Corp v ICI [1999] 1 Lloyd's Rep. 387, 395; Mears Ltd v Shoreline Housing Partnership Ltd [2013] EWCA Civ 639* at [16]. However, there may be a separate clause waiving rights in respect of warranties and representations not expressly set out in the agreement, as in *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd*

[2009] EWCA Civ 290, [2010] Q.B. 86 at [37]; see also *Bikam OOD v Adria Cable Sarl* [2012] EWHC 621 (Comm) (at [45]).

- 726 Which statements are covered by the non-reliance clause is a question of construction: *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [166]; *Shill Properties Ltd v Bunch* [2021] EWHC 2142 (Ch).

727 See below, para.9-155.

728 Chadwick LJ in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 143 at [40], referring to the requirements for evidential estoppel identified by the Court of Appeal in *Lowe v Lombank Ltd* [1960] 1 W.L.R. 196 and citing his own unreported decision in *E A Grimstead & Son Ltd v McGarrigan* Unreported 27 October 1999. This dictum was applied in *Quest 4 Finance Ltd v Maxfield* [2007] EWHC 2313 (QB), [2007] 2 C.L.C. 706. Whether a non-reliance clause is caught by Misrepresentation Act s.3 is discussed below at para.9-161.

729 In *First Tower Trustees Ltd, Intertrust Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637 Leggatt LJ said that in this context, “basis” merely means only that the parties have agreed to assume that the relevant state of affairs is true, and suggested it would be better to avoid use of the phrase “basis clause” (at [95]).

730 *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [54]–[60], referring to *Colchester BC v Smith* [1991] Ch. 448, affirmed on appeal [1992] Ch. 421; Moore-Bick L.J.'s analysis was followed in several first instance decisions, e.g. *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397, see at [465]; *JP Morgan Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm), see at [536]–[567] (holding that the principle stated in the *Peekay* case formed part of the ratio, see [556]–[559]); for the Court of Appeal decision in this case, see next footnote; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2009] 1 All E.R. (Comm) 16, at [33]–[36] (affirmed [2009] EWCA Civ 290, see para.9-159); the trial judge's decision on this point was not appealed, see at [8]); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), see at [87]–[89]; *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [168]–[171]; and *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123. See generally *A. Trukhtanov* (2009) 125 L.Q.R. 648. On estoppel by convention and by contract see above, paras 6-116 et seq.

731 [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 at [169]. See also *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [514]; *Aquila Wsa Aviation Opportunities II Ltd v Onur Air Tasimacilik AS* [2018] EWHC 519 (Comm). In the *Springwell* case the Court of Appeal held that dicta by Diplock J in *Lowe v Lombank Ltd* [1960] 1 W.L.R. 196 at 204, to the effect that a statement as to past facts known to be untrue cannot be converted into a contractual obligation and is not a contractual promise, “are not binding authority for the far-reaching proposition that there can never be an agreement in a contract that the parties are conducting their dealings on the basis that a past event had not occurred or that a particular fact was the case, even if it

was not the case and both the parties knew it was not” (at [155]; the Court did not however agree with the trial judge that Diplock J was considering whether the agreement was a sham, nor with the analysis of *Lowe v Lombank* in *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) at [253]–[254]).

732 [2010] EWCA Civ 1221 at [177].

733 See below, para.9-162.

734 See above, para.9-008.

735 See below, para.9-161.

736 See *McMeel*, [2011] L.M.C.L.Q. 185, 206–207, who argues that the doctrine is unsound. Compare *Braithwaite* (2016) 132 L.Q.R. 120.

737 See Elizabeth Cooke, *The Modern Law of Estoppel* (2000), p.29.

738 (1864) 159 E.R. 563.

739 *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 C.L.R. 641 (HCA) 676.

740 *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd’s Rep. 511.

741 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705.

742 See *Loi* [2015] LMCLQ 346. A somewhat different explanation is given by *Braithwaite* (2016) 132 L.Q.R. 120 at 133–134, who seems to regard the doctrine, though rooted in “the principle of freedom of contract”, as a species of estoppel even though it does not require reliance or unconscionability.

743 See above, para.6-126. For a fuller discussion see McMeel in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Contract* (2017) 239, 267–269; and see Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 6th edn (2022), para.9-03, esp n.9.

744 *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] A.C. 436 at [54].

745 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 at [118]–[173]. cf. above, para.9-012. See also *Brown v InnovatorOne Plc* [2012] EWHC 1321 (Comm) at [903].

746 With the coming into force of the *Consumer Rights Act 2015* (for contracts made on or after 1 October 2015), s.3 of the *Misrepresentation Act 1967* is amended so as to no longer apply to “a term in a consumer contract within the meaning of Pt 2 of the *Consumer Rights Act 2015*”: see next paragraph.

747 Although s.3 applies only to terms and not to notices, a mere declaration of non-liability by the representor cannot have the effect of preventing a representor from incurring liability for misrepresentation: see *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd’s Rep. 264 in particular at [65]; but the notice may go to the question of whether the alleged misrepresentation was made at all (at [67]); in other words, whether he has made has made a misrepresentation on which the other was entitled to rely. See also *Taberna Europe CDO II Plc v Selskabet* [2016] EWCA Civ 1262, [2017] Q.B. 633 at [20].

748 In the *Howard Marine case* [1978] Q.B. 574 (above, paras 9-084—9-085) Lord Denning MR was prepared to uphold reliance on an exempting clause under the old s.3 as reasonable; the majority of the court disagreed without giving reasons.

- 749 See below, para.9-164.
- 750 Consumer Rights Act 2015 s.75; Sch.4 para.1. On the effect of the Act on the law on unfair terms, see below, Vol.II, paras 40-229 et seq. It should be noted that (with exceptions that are not relevant here) s.62 applies to any term of a consumer contract, not just terms that were not individually negotiated, as was the case under the *Unfair Terms in Consumer Contracts Regulations 1999* (on which see below, Vol.II, paras 40-226—40-227 and 40-274).
- 751 On which see below, Vol.II, paras 40-274 et seq.
- 752 See Vol.II, paras 40-031 et seq.
- 753 See Vol.II, paras 40-274 and 40-313.
- 754 See below, paras 9-160—9-161. In *Carney v NM Rothschild and Sons Ltd [2018] EWHC 958 (Comm)* it was suggested that a “no reliance” clause might bring a case within Consumer Credit Act 1974 s.140A. see at [94]—[100].
- 755 *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2009] EWCA Civ 290, [2010] Q.B. 86.*
- 756 For a discussion of s.26, see below, para.17-127. In contrast, s.27 of the Unfair Contract Terms Act 1977, which prevents the principal provisions of the Act applying to contracts that are subject to the law of any part of the UK only by choice of the parties, does not affect s.3 of the Misrepresentation Act 1967.
- 757 A right of set-off is a remedy for this purpose: *Skipskreditforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66*, not following *Society of Lloyd's v Wilkinson (No.2) [1997] 6 Re L.R. 214* on this point. See also *WRM Group Ltd v Wood [1998] C.L.C. 189*. But a term that purchasers of a lease would be permitted to enter into possession before completion “at their own risk” was held not to be within the section (though unreasonable if it was): *F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 120 S.J. 331*.
- 758 It may not apply to clauses excluding liability for non-disclosure: *National Westminster Bank Plc v Utrecht-America Finance Co [2001] EWCA Civ 658, [2001] 3 All E.R. 733* at [62] (point left open). In *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] EWHC 1686 (Comm), [2009] 1 All E.R. (Comm) 16s.3* was applied to a clause under which party was said to “give up any rights ... regarding any ... misrepresentation” (affirmed *[2009] EWCA Civ 290*; the trial judge’s decision on this point was not appealed, see at [8]). See *A. Trukhtanov (2009) 125 L.Q.R. 648, 666–670*.
- 759 Misrepresentation Act s.3 does not apply to clauses stating that the written document constitutes the entire contract and that particulars given do not constitute an offer or contract, but that is because such a clause does not purport to exclude liability for misrepresentation, but only to define what are the terms of the contract: *McGrath v Shah (1989) 57 P. & C.R. 452*.
- 760 It has been pointed out that the problem is caused by the fact that s.3 has no equivalent to Unfair Contract Terms Act 1977 s.13, which defines *excluding or restricting liability* to include “excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty”: *Peel (2001) 117 L.Q.R. 545, 548*.
- 761 *Overbrooke Estates Ltd v Glencombe Properties Ltd [1974] 1 W.L.R. 1335*, approved by the Court of Appeal in *Museprime Properties Ltd v Adhill Properties Ltd [1990] 2 E.G.L.R. 196, 200*.

- 762 See next paragraph.
- 763 See above, para.9-154.
- 764 Compare *Cremdean v Nash* (1977) 241 E.G. 837, CA, *Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 W.L.R. 2333, 2347 and *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) on the one hand to, on the other, *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1034 and *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 142 at [40]. In *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637 Leggatt LJ suggested that in any event a mere acknowledgement of non-reliance should not suffice: “If what the parties wish to agree is that A will not assert in any future dispute that it relied on a representation made by B even if A did in fact rely on such a representation, then it seems to me that this is what the clause ought to say”; but he accepted that in *Springwell Navigation Corp v JP Morgan Chase Bank* (see below; at [170]) the Court of Appeal had taken a different view.
- 765 *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [310]. See also *Morgan v Pooley* [2010] EWHC 2447 (QB) at [114]; *Welven Ltd v Soar Group* [2011] EWHC 3240 (Comm) at [111].
- 766 [2010] EWHC 1392 (Comm) at [314]–[315]. Christopher Clarke J referred to a passage in *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 (affirmed without comment on this point [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449), where Toulson J said (at [68]–[69]): “If a seller of a car said to a buyer ‘I have serviced the car since it was new, it has had only one owner and the clock reading is accurate’, those statements would be representations, and they would still have that character even if the seller added the words ‘but those statements are not representations on which you can rely’ ... If, however, the seller of the car said ‘The clock reading is 20,000 miles, but I have no knowledge whether the reading is true or false’, the position would be different, because the qualifying words could not fairly be regarded as an attempt to exclude liability for a false representation arising from the first half of the sentence.” (Toulson J held that on the facts no representation had been made, see above, para.9-009). Christopher Clarke J’s words were seemingly accepted as correct by the Court of Appeal in *First Tower Trustees Ltd v CDS (Superstores International) Ltd* save that Leggatt LJ said (at [101]–[103]) that what matters is not the status of the parties (commercially sophisticated or “man in the street”) but whether the clause was to govern their future relationship or was looking back towards what had already happened.
- 767 [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705. See *McMeel* [2011] L.M.C.L.Q. 185.
- 768 [2010] EWCA Civ 1221 at [173]; see above, para.9-156.
- 769 [2010] EWCA Civ 1221 at [181]. See also *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [514]. *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 1 C.L.C. 627 at [186]; *Standard Chartered Bank v Ceylon Petroleum Corp* [2011] EWHC 1785 (Comm) at [568].
- 770 [2010] EWCA Civ 1221 at [181]. On reasonableness see below, para.9-164.

- 771 [2010] EWCA Civ 1221 at [181], referring to [2010] EWHC 1392 (Comm) at [315], quoted above; applied in *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch) at [144]–[145].
- 772 [2010] EWCA Civ 1221 at [182].
- 773 [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637 at [50]–[66], [99] (“No rational legislator could have intended that the need for a contract term to satisfy a test of reasonableness could be avoided simply by felicity in drafting the contract term”: Leggatt LJ) and [113].
- 774 See *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [97]–[121], in particular at [105]; *Sears v Minco Plc* [2016] EWHC 433 (Ch) at [80]. This approach had been rejected by the judge at first instance in the *First Tower* case, Michael Brindle QC [2017] EWHC 891 (Ch), [2017] 4 W.L.R. 73 at [32]. See also *Carney v NM Rothschild and Sons Ltd* [2018] EWHC 958 (Comm).
- 775 [2018] EWCA Civ 1396 at [58]–[59] approving Christopher Clarke J’s statements in [2010] EWHC 1392 (Comm) at [286] and [308]–[310]. However, Leggatt LJ said ([2018] EWCA Civ 1396 at [101]–[103]) that what matters is not the status of the parties (commercially sophisticated or “man in the street”) but whether the clause was to govern their future relationship or was looking back towards what had already happened.
- 776 *Crestsign Ltd v National Westminster Bank Plc* [2014] EWHC 3043 (Ch) at [114]–[115]. See also *London Executive Aviation Ltd v Royal Bank of Scotland Plc* [2018] EWHC 74 (Ch). The *Crestsign* case seems a particularly strong one as the judge held that if, contrary to his view, there was a duty, it had been broken (at [134]), and that the clause, if it was subject to s.2(2) of the Act, was unreasonable (at [119]). The case does not seem to have been cited to the Court of Appeal in the *First Tower* case.
- 777 [2014] EWHC 3043 (Ch) at [114].
- 778 [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637.
- 779 See e.g. the effect of the clauses in *Bikam OOD v Adria Cable Sarl* [2012] EWHC 621 (Comm), above, footnotes to para.9-153.
- 780 cf. above, para.9-008. Both Lewison LJ ([2018] EWCA Civ 1396 at [43]–[44]) and Leggatt LJ (at [96]) distinguished no reliance clauses from clauses that define a party’s contractual obligations in a way that prevents liability arising in the first place; see also *Fine Care Homes Ltd v National Westminster Bank Plc* [2020] EWHC 3233 (Ch) at [119]–[121]. Leggatt LJ said that this is different from where a contracting party relies on a term of the contract to argue that, because the term precludes the assertion of facts inconsistent with those that have been agreed, it has no liability to the other party in tort ([2018] EWCA Civ 1396 at [97]).
- 781 *Cremdean v Nash* (1977) 241 E.G. 837, CA. See also *Thomas Witter Ltd v TBP Industries Ltd* [1992] All E.R. 573, 597–598; *Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 W.L.R. 2333, 2347. A “no reliance” clause was also held to be ineffective under s.3 in *Leofelis SA v Lonsdale Sports Ltd* [2007] EWHC 451 (Ch).
- 782 See above, paras 17-088—17-091.
- 783 [2011] EWCA Civ 133, [2011] 2 Lloyd’s Rep. 1 at [50]. The clause was held to be reasonable: at [66]. Note that s.3 of the Unfair Contract Terms Act does not apply to consumer contracts made on or after 1 October 2015; it is replaced by Consumer Rights Act 2015 s.62. See below, Vol.II, paras 40-229 et seq.

- 784 It has been held that condition 17 of the National Conditions of Sale (19th edn) was invalid as unreasonable under s.3 of the Misrepresentation Act: *Walker v Boyle [1982] 1 W.L.R. 495*. Condition 17 stated that replies to questions by the vendor or his agents do not obviate the need for the buyer to make his own inquiries and inspections, and are not to be treated as representations. See also *Southwestern General Property Co Ltd v Marton (1982) 263 E.G. 1090; White Cross Equipment Ltd v Farrell (1982) 2 Tr.L.R. 21; Cooper v Tamms [1988] 1 E.G.L.R. 257; Goff v Gauthier [1991] 62 P. & C.R. 388; Cleaver v Schyde Investments Ltd [2011] EWCA Civ 929, [2011] 2 P. & C.R. 21*. In *Lloyd v Browning [2013] EWCA Civ 1637, [2014] 1 P. & C.R. 11* it was held that a special condition, commonly used within the area, stating that the buyer entered into the contract solely as a result of his inspection of the property and that no statement by the seller, other than written statements made in reply to enquiries, had induced him to enter into the contract, was a reasonable one to be included in the particular contract. Thus where a “no-reliance” clause is subject to the Act (see above, para.9-161) it is likely to be reasonable if it expressly permits reliance on any reply given by the landlord’s or vendor’s solicitors to the tenant’s or purchaser’s solicitors, whereas one that seeks to prevent the landlord or vendor from incurring any liability for misrepresentation other than for fraud is unlikely to be reasonable: see *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [177]; *Lloyd v Browning [2013] EWCA Civ 1637* at [34]; *First Tower Trustees Ltd v CDS (Superstores International) Ltd [2017] EWHC 891 (Ch), [2017] 4 W.L.R. 73* at [36]–[38] (“not a reasonable clause to put into the lease, even if the parties are of equal bargaining power and act on legal advice, because its effect would render the whole exercise of making inquiries and relying on answers thereto all but nugatory” (at [39]–[40])); upheld on appeal, *[2018] EWCA Civ 1396, [2019] 1 W.L.R. 637* at [75]). In *Djurberg (t/a Hampton Riviera) v Small Unreported 1 September 2017, Ch D* it was said that if the clause in that case (seemingly an entire agreement clause) applied to misrepresentations, it would be unreasonable as the buyers (a couple who were buying a houseboat from a trader) were in a weak bargaining position and there had been no negotiation about the terms. See further below, para.17-108.
- 785 See below, para.17-116.
- 786 *Thomas Witter Ltd v TBP Industries Ltd [1992] All E.R. 573*. cf. *Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] Q.B. 600*; below, para.17-116. In *Skipskreditforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66* it was held not to be unreasonable to include in a loan agreement a no-set off clause which might apply even in cases of fraud; but see *Ahuja Investments Ltd v Victorygame Ltd [2020] EWHC 1153 (Ch)* at [72]–[84].
- 787 See *Goodlife Foods Ltd v Hall Fire Protection Ltd [2017] EWHC 767 (TCC), [2017] B.L.R. 389* at [66]–[70], discussed below, para.17-118 (notes).
- 788 *Skipskreditforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66, 75–76*.
- 789 Compare the formulation used by the original version of s.3 before amendment by the 1977 Act: “[T]hat provision shall be of no effect except to the extent that ... the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case”. But see the doubts expressed by Mance J in *Skipskreditforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66, 75*; and also *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379* at [26].

- 790 See *National Westminster Bank Plc v Utrecht-America Finance Co* [2001] EWCA Civ 658, [2001] 3 All E.R. 733 at [60]–[61], citing an unreported judgment of Chadwick LJ in *E A Grimstead & Son Ltd v McGarrigan* Unreported 27 October 1999; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 143 at [39]. See also *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), at [177]; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [319]–[327]. In *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705, at [183]–[184] the Court of Appeal agreed with the trial judge (see [2008] EWHC 1186 (Comm)) that clauses restricting liability towards a sophisticated investor who was aware of the risks were reasonable. See also *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm) at [187]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1 at [48]–[75]; *Standard Chartered Bank v Ceylon Petroleum Corp* [2011] EWHC 1785 (Comm) at [569]–[572]; *Welven Ltd v Soar Group* [2011] EWHC 3240 (Comm) at [115].
- 791 As already seen (above, para.9-122) s.1(a) of the 1967 Act provides that a misrepresentation continues to be effective as such even if it becomes a term of the contract. See also below, para.17-133.
- 792 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.9-145; cf. above, para.9-121, discussing a parallel question arising under s.2(2) of the Misrepresentation Act.
- 793 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.9-146.
- 794 [1964] A.C. 465; above, para.9-098.
- 795 *Smith v Eric S. Bush* [1990] 1 A.C. 831; see above, para.9-100 and below, para.17-108.
- 796 s.62 replaces the Unfair Terms in Consumer Contracts Regulations 1999, which applied to terms that were “not … individually negotiated”, reg.5(1).
- 797 See above, para.9-161. On the question of fairness under the Regulations and the Act, see Vol.II, paras 40-274 and 40-313.

## Section 6. - Contracts Where a Duty of Disclosure

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 6. - Contracts Where a Duty of Disclosure

### Non-disclosure

<sup>167</sup> Mere non-disclosure of fact, material or not, does not ordinarily amount to misrepresentation, and <sup>D</sup> the general rule is that in order to be actionable a representation must take an active form. <sup>798</sup> But in certain cases a stricter rule is enforced. The most important of these are the contracts uberrimae fidei <sup>799</sup> in which knowledge of the material facts generally lies with one party alone; that party is under a duty to make a full disclosure of these facts, and failure to do so makes the contract voidable. However, it is doubtful whether any contract other than one for insurance is correctly described uberrimae fidei, as the extent of the duty to disclose and the remedies available seem to vary from type of contract to type of contract; and since the *Insurance Act 2015* came into force <sup>800</sup> it seems that it is no longer accurate to describe even contracts of insurance as uberrimae fidei, as any duty to disclose is statutory <sup>801</sup> and any rule of law permitting a party to a contract to avoid it on the ground that utmost good faith has not been observed by the other party has been abolished. <sup>802</sup> Therefore it is more helpful to consider the extent of the duty and the remedies available in each type of case in which it has been held that there is some duty of disclosure. <sup>803</sup>

<sup>804</sup> <sup>805</sup> <sup>U</sup> These include contracts to subscribe for shares in a company, family settlements, contracts for the sale of land, <sup>806</sup> contracts for suretyship <sup>807</sup> and partnerships. <sup>808</sup> To this list may be added general releases <sup>809</sup> and contracts where the parties are in a relationship of trust and confidence. <sup>810</sup> Contracts of service, <sup>811</sup> contracts of sale of goods <sup>812</sup> and interest rate swap agreements <sup>813</sup> have been held not to be uberrimae fidei, so that there is no duty of disclosure.

## Rescission but not damages

<sup>168</sup> A breach of the duty to disclose will give rise to the right to rescind the contract but, it is submitted, not to a right to damages even if the other party kept quiet “fraudulently” in the sense of intended deliberately to mislead the claimant. <sup>814</sup> In *Conlon v Simms* it was said that:

“... where the breach of the duty of disclosure is fraudulent, a party to whom the duty is owed who suffers loss by reason of the breach may recover damages for that loss in the tort of deceit ... Non-disclosure where there is a duty to disclose is tantamount to an implied representation that there is nothing relevant to disclose.”<sup>815</sup>

This, with respect, is very doubtful, and cannot be supported on the ground given. It is well established that breach of the duty of disclosure in insurance does not of itself give rise to an action for damages.<sup>816</sup> A negligent failure to speak may give rise to liability in damages but only if there is a “voluntary assumption of responsibility”.<sup>817</sup> If silence when there is a duty to disclose amounted to an implied representation that there was nothing to disclose, that would make even a non-fraudulent non-disclosure into a positive misrepresentation for which damages could be recovered under *Misrepresentation Act 1967 s.2(1)*, unless the non-disclosing party could show that he had reasonable grounds for believing that there was nothing to disclose, whereas it has been held that if the non-disclosure is negligent, it does not give rise to liability in damages under *Misrepresentation Act 1967 s.2(1)* or, without more, at common law.<sup>818</sup> It is almost certain that without a voluntary assumption of responsibility there is no liability in damages for merely keeping silent, and it is submitted that this is so even if there was an intention to deceive.

<sup>819</sup>



## Footnotes

<sup>1</sup> See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

<sup>798</sup> See above, para.9-021.

<sup>799</sup> For the others, see above, paras 9-021—9-025.

<sup>800</sup> The relevant parts of the Act came into force in August 2016.

<sup>801</sup> *Insurance Act 2015 s.3* imposes a duty of fair presentation: see below, para.9-171.

- 802 Insurance Act 2015 s.14(1). Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of the Act and the **Consumer Insurance (Disclosure and Representations) Act 2012: 2015 Act** s.14(2).
- 803 See also Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.17-03.
- 804 Below, para.9-181.
- 805 Below, para.9-183.
- 806 Below, para.9-184.
- 807 Below, para.9-186.
- 808 Below, para.9-190.
- 809 Below, para.9-192.
- 810 Below, para.9-193.
- 811 *Bell v Lever Bros Ltd [1932] A.C. 161, 227; Nottingham University v Fishel [2000] I.C.R. 1462.*
- 812 *Jewson & Sons Ltd v Arcos Ltd (1932) 39 Com. Cas. 59.*
- 813 *Nextia Properties Ltd v Royal Bank of Scotland [2013] EWHC 3167 (QB).*
- 814 See also Cartwright in Burrows and Peel (eds), “Liability in Tort for Pre-Contractual Non-disclosure”, Contract Formation and Parties (2010), pp.137, 146–149.
- 815 [2006] EWCA Civ 1749, [2008] 1 W.L.R. 484 at [130]; see also at first instance [2006] EWHC 401 (Ch), [2006] 2 All E.R. 1024; *JD Wetherspoon Plc v Ven de Berg & Co Ltd [2007] EWHC 1044 (Ch), [2007] P.N.L.R. 28* at [17] (“may be” liability); *Cavell USA Inc v Seaton Insurance Co [2008] EWHC 3043 (Comm), [2008] 2 C.L.C. 898* at [84].
- 816 *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 787–789, 790–805, affirmed on other grounds [1991] 2 A.C. 249.* See above, para.3-018.
- 817 *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665* at 794. [1990] 1 Q.B. 665, 787–789, 790–805.
- 819 Liability in damages for fraudulent non-disclosure had been mooted as a possibility by Rix LJ in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483* at [48], [164] and [168] but the point was neither argued nor decided. In the House of Lords, Lord Bingham did say that the deliberate withholding of information which the person knows or believes to be material, if done dishonestly or recklessly, may amount to a fraudulent misrepresentation: [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [21]. However this appears to refer to cases where in the circumstances a failure to disclose amounts to a positive misrepresentation, and it is not clear that Lord Bingham thought this included every case of a duty to disclose. Lord Hoffmann said that “nondisclosure (whether dishonest or otherwise) does not as such give rise to a claim in damages” (at [75]); he referred to the judgments in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 777–781 and 788* (“without a misrepresentation there can be no fraud in the sense of giving rise to a claim for damages in tort”) and [1991] 2 A.C. 249 at 280 (per Lord Templeman) and at 281 (per Lord Jauncey of Tullichettle).

Moreover, in *Manifest Shipping Co v Uni-Polaris Insurance Co, The Star Sea [2001] UKHL 1, [2003] 1 A.C. 469* at [46], Lord Hobhouse regarded the *Banque Keyser Ullman* case as deciding authoritatively that a breach of duty to disclose does not give rise to damages. Damages may be recovered in tort for deceit but the dicta in *Conlon v Simms [2006] EWCA Civ 1749* at [130] and other cases noted earlier apart, deliberate non-disclosure does not seem to give rise to an action for deceit. See, however, Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.17-43, tentatively accepting that fraudulent failure to fulfil a duty to speak may amount to deceit; Clerk & Lindsell on Torts, 23rd edn (2020), para.17-09 (established only where fiduciary relationship).

## **(a) - Insurance**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 6. - Contracts Where a Duty of Disclosure**

**(a) - Insurance**

### **Contracts of insurance<sup>820</sup>**

- <sup>169</sup> The traditional position was that, as a matter of law, all of these are uberrimae fidei, whatever their subject matter, that is whether they relate to marine, fire, life or burglary insurance, or to any other risk. Marine insurance was governed by the [Marine Insurance Act 1906](#), which codified the existing law. Non-marine insurance was subject to the common law. It was thought to be contrary to good faith to withhold material facts from the insurer.<sup>821</sup> Such facts are generally known only to the assured, and he was therefore under a duty to disclose them.<sup>822</sup> However, the traditional rules no longer apply either to consumer insurance, as the result of the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#), nor to contracts for other classes of insurance made after the [Insurance Act 2015](#) came into force in August 2016.<sup>823</sup>

### **Consumer insurance**

- <sup>170</sup> In practice the duty of disclosure had for some time had a very limited application to “retail” or “consumer” insurance because of the requirements of the Financial Services Authority and, even more pertinently, the decisions of the Financial Ombudsman Service as to when insurers are complying with a general requirement to treat customers fairly and reasonably.<sup>824</sup> Under the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#),<sup>825</sup> the duty of disclosure on a consumer insured is removed altogether, as is the insurer’s right to avoid for

innocent misrepresentation. The consumer has a duty to take reasonable care not to make a misrepresentation to the insurer.<sup>826</sup>

## Insurance Act 2015<sup>827</sup>

- [71] In contracts made after the relevant part of the Act came into force, the non-consumer insured's duty of disclosure is replaced by a duty to make a fair presentation of the risk to the insurer.<sup>828</sup> The insured must disclose every material circumstance which the insured knows or ought to know, or, failing that, give the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.<sup>829</sup>

## Materiality in insurance contracts

- [72] At common law, a circumstance is material if it "would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk". This is the definition that was given in the *Marine Insurance Act 1906 s.18(2)*,<sup>830</sup> and it was held in *Locker and Woolf Ltd v Western Australian Insurance Co Ltd*<sup>831</sup> that the definition applies to all forms of insurance. In *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*<sup>832</sup> the House of Lords held that, for both marine insurance under *Marine Insurance Act 1906 s.18(2)* and non-marine insurance, the test of materiality is not whether the matter would have had a decisive effect on the prudent insurer's decision whether to accept the risk or at what premium, but whether it would have an effect on the mind of the prudent insurer in weighing up the risk.<sup>833</sup> In *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd*<sup>834</sup> it was held that a matter did not necessarily have to lead to an increase in the risk in order to be material; it was sufficient that the risk was different.<sup>835</sup> But in the *Pan Atlantic* case the House of Lords held that, in addition to being material, a misrepresentation or non-disclosure must have induced the making of the policy.<sup>836</sup> In this respect, the law on insurance contracts is parallel to the general law on positive misrepresentation.<sup>837</sup> Lord Mustill<sup>838</sup> refers to "a presumption in favour of causative effect", as there is in the case of a positive misrepresentation.<sup>839</sup>

## Materiality under Insurance Act 2015

- [73] The *2015 Act* adopts the same approach. A circumstance or representation is material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on

what terms.<sup>840</sup> The insurer will have a remedy for breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer either (a) would not have entered into the contract of insurance at all, or (b) would have done so only on different terms.

## Material facts

- [74] The following have been held to be material facts and their non-disclosure made the contract in question voidable: that goods were insured upon a voyage for an amount in excess of their value<sup>841</sup>; that the vessel itself was over-insured<sup>842</sup>; that (in the particular circumstances of the case) the insured under a policy of burglary insurance was an alien<sup>843</sup>; that the insured had been convicted of robbery 12 years previously<sup>844</sup>; that in relation to an insurance comparable to that sought previous claims had been made.<sup>845</sup> On the other hand, certain details may on construction be held to be irrelevant,<sup>846</sup> such as the place where a lorry was to be garaged.<sup>847</sup> A circumstance that is material for one type of insurance is not necessarily material for another; for example, the fact that the risk has been refused by another company is material in life, fire, accident and burglary insurance, but not in marine insurance.<sup>848</sup> Whether a particular circumstance is material is a question of fact, and the opinion of the assured on its materiality is irrelevant.<sup>849</sup>

## Insured's knowledge

- [75] In marine insurance the duty to disclose was defined as follows:

“Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.”<sup>850</sup>

In non-marine insurance the duty may have extended only to facts actually known to the assured.<sup>851</sup> If so, he was under no duty to disclose facts of which he was ignorant. A statement which is expressed to depend on the assured's state of mind will not be untrue simply because he was unaware of the true facts, provided that his statement of belief was genuine. For instance, a statement by the assured that he is in good health in relation to a proposed life policy will generally be construed to mean in good health to his own knowledge, and the contract cannot be rescinded on proof that at the time of the contract the assured's state of health was not what he believed it to be.<sup>852</sup> If, however, he is aware of a fact which a reasonable or prudent insurer might treat as material, he must disclose it; the test is not whether a reasonable man would think it material.<sup>853</sup>

## Duty on insurer abolished

- [76] Traditionally, the obligation to disclose material facts was mutual and a duty also rested on the insurer to disclose all facts known to them which were material either to the nature of the risk sought to be covered or to the recoverability of a claim under the policy.<sup>854</sup> In this case the test of materiality is whether the fact not disclosed would be taken into account by a prudent insured in deciding whether to place the risk with that insurer.<sup>855</sup> However, the **Insurance Act 2015** provides only for fair presentation by the insured<sup>856</sup> and any rule of law permitting a party to a contract to avoid it on the ground that utmost good faith has not been observed by the other party has been abolished,<sup>857</sup> so that in contracts made since the Act came into force the duty on the insured has disappeared.<sup>858</sup>

## Remedies for non-disclosure

- [77] Traditionally, the insurer's remedy for breach of the duty of disclosure by the insured was to rescind (or "avoid") the contract.<sup>859</sup> Under both the **Consumer Insurance (Disclosure and Representations) Act 2012** and the **Insurance Act 2015**, if the breach of the relevant duty by the insured was deliberate or reckless, the insurer may avoid the policy and refuse all claims, and may not have to return the premium<sup>860</sup>; but in other cases the insurer may avoid the contract only if, in the absence of the breach the insurer would not have entered the contract on any terms.<sup>861</sup> If the insurer would have entered the contract but on different terms, then the contract is to be treated as if it contained those terms<sup>862</sup>; if at a different premium, then the insurer may reduce the amount paid on the claim proportionately.<sup>863</sup>

## "Basis of the contract"

- [78] Traditionally, the insurer's remedies could be enlarged by the terms of the contract, and insurers commonly provided that the declarations of the assured shall form the basis of the contract. In effect this means that the assured "warrants" that the information which he supplies is correct, the penalty for inaccuracy being the avoidance of the contract by the insurer. Thus the insurer may be discharged from liability<sup>864</sup> if the assured failed to disclose even a non-material fact,<sup>865</sup> or a fact never within his knowledge, or if he gave what has proved to be an inaccurate statement on a matter of opinion.<sup>866</sup> Where an attempt was made to enlarge the duty by the terms of the contract,

the courts put a strict burden of proof upon the insurer.<sup>867</sup> But this did not prevent the courts from holding that even disclosure to a representative of the insurer was insufficient, if (as has in the past commonly been the case with some forms of insurance) the proposal form declared that any person filling in the form was deemed to be the agent of the insured, and not of the insurer.<sup>868</sup> More recently, however, it was held that if the representative is authorised by the insurer to fill in the forms and then secure the proposer's signature thereto, he may be held to be the agent of the insurer.<sup>869</sup> Under both the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#)<sup>870</sup> and the [Insurance Act 2015](#),<sup>871</sup> a representation by the insured may not be converted into a warranty by means of a "basis of the contract" clause or any other provision of the insurance contract or any other contract.

## Burden of proof

- <sup>179</sup> With regard to the burden of proof generally, the insurer must produce evidence to show non-disclosure, unless there is *prima facie* evidence of concealment. In that case the burden is on the assured to prove disclosure.<sup>872</sup> Similarly, under the legislation now in force it appears to be for the insurer to show that the consumer insured has made a careless misrepresentation<sup>873</sup> or that the non-consumer insured is in breach of the duty to make a fair presentation of the risk.<sup>874</sup> In each case it is provided expressly that it for the insurer to show that a breach by the insured was deliberate or reckless.<sup>875</sup>

## Continuing duty

- <sup>180</sup> The duty to disclose continues until the contract is concluded. Thus if before the acceptance of the proposal a new material fact arises, or a fact thought to be non-material becomes material, this must be disclosed.<sup>876</sup> Neither of the new Acts addresses this point; presumably what matters is whether any statement made by a consumer insured was inaccurate, or that the presentation made by a non-consumer insured was fair, at the time that the contract as concluded.

## Footnotes

- 1 See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).
- <sup>820</sup> See *Hasson* (1969) 32 *M.L.R.* 615 and Vol.II, paras 44-033 et seq.

- 821 See *Carter v Boehm* (1766) 3 Burr. 1905, 1909; *London Assurance Co v Mansel* (1879) 11 Ch. D. 363, 367.
- 822 A contract of marine insurance appears to be based on an implied condition that there is no misrepresentation or concealment: *Blackburn v Vigors* (1886) 17 Q.B.D. 553, 561, 562; *Pickersgill v London and Provincial Marine and General Insurance Co* [1912] 3 K.B. 614, 621. The duty of disclosure in non-marine insurance, on the other hand, is said to rest on a common law, and not on a contractual duty: *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B. 863, 886; *Merchants and Manufacturers Insurance Co v Hunt and Thorne* [1941] 1 K.B. 295, 313. But see *Moens v Hayworth* (1842) 10 M. & W. 147, 157. It is otherwise of course if the common law obligation is superseded by a term in the contract itself.
- 823 Insurance Act 2015 ss.22 and 23. Pt 2 (which includes the duty to make a fair presentation) will apply also to subsequent variations of contracts made at any time: s.22(1)(b).
- 824 An account of the FSA Regulations and the FOS practice will be found in Law Commission, Joint Consultation Paper, Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of Warranty by the Insured (LCCP 182, SLCDP 134, 2007) paras 3.5–3.54. The FOS applies the same approach in favour of some small business: para.5.165.
- 825 The Act came into force on 6 April 2013: SI 2013/450.
- 826 s.2. See further Vol.II, para.44-047.
- 827 For a detailed explanation, see below, Vol.II, paras 44-051 et seq.
- 828 Insurance Act 2015 s.3(1).
- 829 s.3(4). Section 3(5) creates a number of exceptions for example for information that the insurer knows, ought to know or is presumed to know. Sections 4, 5 and 6 set out what the insured and the insurer know or ought to know.
- 830 s.20 was repealed by the Insurance Act 2015 s.21(2).
- 831 [1936] 1 K.B. 408, 415. This was also the test applied in *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep. 485.
- 832 [1995] 1 A.C. 501.
- 833 See further below, Vol.II, para.44-034.
- 834 [1996] 1 All E.R. 96.
- 835 [1996] 1 All E.R. 96, 107.
- 836 [1995] 1 A.C. 501, 549–550.
- 837 See above, paras 9-041 et seq.
- 838 [1995] 1 A.C. 501, 542.
- 839 See above, para.9-046; and also *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All E.R. 96, 112.
- 840 Insurance Act 2015 s.7(3). See further Vol.II, para.44-053.
- 841 *Ionides v Pender* (1874) L.R. 9 Q.B. 531; *Gooding v White* (1913) 29 T.L.R. 312.
- 842 *Thames and Mersey Marine Insurance Co v Gunford Ship Co Ltd* [1911] A.C. 529.
- 843 *Horne v Poland* [1922] 2 K.B. 364. But cf. *Associated Oil Carriers Ltd v Union Insurance Society* [1917] 2 K.B. 184.

- 844 *Woolcott v Sun Alliance & London Insurance Ltd* [1978] 1 W.L.R. 493; contrast *Reynolds and Anderson v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep. 440 (mere allegation of fraud need not be disclosed). Note the effect of the Rehabilitation of Offenders Act 1974 on cases of this kind, see s.4(2) and (3).
- 845 *Farra v Hetherington* (1931) 47 T.L.R. 465.
- 846 *Perrins v Marine Insurance Society* (1859) 2 El. & El. 317.
- 847 *Dawsons Ltd v Bonnin* [1922] 2 A.C. 413.
- 848 *London Assurance Co v Mansel* (1879) 11 Ch. D. 363; *Yager v Guardian Assurance Co* (1912) 29 T.L.R. 53; *Glicksman v Lancashire and General Assurance Co* [1927] A.C. 139; *Holts' Motors v South East Lancashire Insurance Co* (1930) 35 Com. Cas. 281; *Locker and Woolf Ltd v Western Australian Insurance Co* [1936] 1 K.B. 408.
- 849 *Lindenau v Desborough* (1828) 8 B. & C. 586, 592; *London Assurance Co v Mansel* (1879) 11 Ch. D. 363; *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B. 863, 884; *Godfrey v Britannic Assurance Co Ltd* [1963] 2 Lloyd's Rep. 515; *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep. 485.
- 850 Marine Insurance Act 1906 s.18(1), now repealed. On the interpretation of this section see *PCW Syndicates v PCW Reinsurers* [1996] 1 W.L.R. 1136.
- 851 *Blackburn, Low & Co v Vigors* (1887) 12 App. Cas. 531 (a marine insurance case before the Marine Insurance Act 1906); *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B. 863, 884–885. In the *Economides v Commercial Union Assurance Co Plc* [1998] Q.B. 587 it was held that an insured who is not acting in the course of business has only to disclose material facts actually known to him; provided that he did not wilfully shut his eyes to the truth (so-called “Nelsonian blindness”), he is not under a duty to inquire further, for example by checking that his honest belief in the value of the property is in fact accurate. But see Vol.II, para.44-038.
- 852 *Wheelton v Hardisty* (1857) 8 El. & Bl. 232. But see *Macdonald v Law Union Insurance Co* (1874) L.R. 9 Q.B. 328.
- 853 *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep. 485.
- 854 *Carter v Boehm* (1766) 3 Burr. 1905; *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, 770–772, affirmed on other grounds but without disapproval of this statement of principle, [1991] 2 A.C. 249.
- 855 [1990] 1 Q.B. 665, 772.
- 856 Insurance Act 2015 s.3; see above, para.9-171.
- 857 Insurance Act 2015 s.14(1); see above, para.9-167.
- 858 The Law Commissions considered that the only instances in which the duty on the insurer has or might have been invoked—the selling of worthless policies—would be better dealt with by the Financial Services Authority or its successors) or the Financial Ombudsman Service: Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Law Com Report No.353, Scot Law Com Report No.238, 2014), para.30.34.
- 859 See below, Vol.II, para.44-042.

- 860 Consumer Insurance (Disclosure and Representations) Act 2012 Sch.1 para.2 (the premium must be returned to the extent that it would be unfair to the insured to retain it: para.2(b)); Insurance Act 2015 Sch.1 para.2 (no return of premium: para.2(b)).
- 861 Consumer Insurance (Disclosure and Representations) Act 2012 Sch.1 para.5; Insurance Act 2015 Sch.1 para.4. In each case the premium must be returned.
- 862 Consumer Insurance (Disclosure and Representations) Act 2012 Sch.1 para.5; Insurance Act 2015 Sch.1 para.6.
- 863 Consumer Insurance (Disclosure and Representations) Act 2012 Sch.1 paras 7–8; Insurance Act 2015 Sch.1 paras 5–6.
- 864 See *Bank of Nova Scotia v Hellenic Mutual War Risks (The Good Luck)* [1992] 1 A.C. 233, 263–234. Under former Marine Insurance Act 1906 s.34(3) the insurer could waive the breach and affirm the contract.
- 865 *Anderson v Fitzgerald* (1853) 4 H.L.C. 484; *Condolianis v Guardian Assurance Co* [1921] 2 A.C. 125; *Dawsons Ltd v Bonnin* [1922] 2 A.C. 413. See Vol.II, para.44-044.
- 866 It was seen earlier (above, para.9-125) that it is not clear whether s.2(2) of the Misrepresentation Act enables a court to refuse to allow rescission for misrepresentation where the statement in question was later incorporated as a term of the contract. If it did have this effect, the totally unexpected result might follow, that an insurer might no longer be able to repudiate liability for an immaterial misrepresentation, or for a material misrepresentation which had no bearing on the risk which has occurred, even where the insured's statement formed part of the basis of the contract. But this is not generally thought to be the result of the 1967 Act (see *Hudson* (1969) 85 L.Q.R. 524); and in any event it is very unlikely that the court would exercise its jurisdiction to prevent an insurer rescinding on the ground of misrepresentation by the insured (see above, para.9-118).
- 867 *Anderson v Fitzgerald* (1853) 4 H.L.C. 484; *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B. 863; *Anstey v British National Premium Life Association Ltd* (1908) 99 L.T. 765.
- 868 *Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 K.B. 356; *Facer v Vehicle & General Insurance Co Ltd* [1965] 1 Lloyd's Rep. 113. Contra, *Bawden v London, Edinburgh and Glasgow Assurance Co Ltd* [1892] 2 Q.B. 534; this case was treated as virtually overruled by the *Newsholme Bros* case in the *Facer* case but now seems to have been rehabilitated by *Stone v Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep. 469. Such a clause might well have been caught by Unfair Terms in Consumer Contracts Regulations 1999.
- 869 *Stone v Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep. 469; see also *Maye v Colonial Mutual Life Assurance Society Ltd* (1924) 35 C.L.R. 14.
- 870 Consumer Insurance (Disclosure and Representations) Act 2012 s.6. Again, the practical effect of such warranties had been severely restricted in cases of consumer insurance by the FSA Regulations and the requirements of the Financial Ombudsman Service: see above, para.9-170.
- 871 Insurance Act 2015 s.9(2). Section 10 alters the remedies for breach of warranty for all types of insurance (see below, Vol.II, para.44-082).
- 872 *Glicksman v Lancashire and General Assurance Co* [1925] 2 K.B. 593, [1927] A.C. 139.

- 873 Consumer Insurance (Disclosure and Representations) Act 2012 s.2(2).
- 874 Insurance Act 2015 s.2.
- 875 Consumer Insurance (Disclosure and Representations) Act 2012 s.5(4); Insurance Act 2015 s.8(4). If the breach was careless or reckless, the insurer may have remedies that are not otherwise available: see above, para.[9-177](#).
- 876 *Allis Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 L.T. 433; *Looker v Law Union and Rock Insurance Co* [1928] 1 K.B. 554; cf. *Blackley v National Mutual Life Association of Australasia Ltd* [1972] N.Z.L.R. 1038. See Vol.II, para.[44-037](#).

## **(b) - Contracts to Take Shares in Companies**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 6. - Contracts Where a Duty of Disclosure**

**(b) - Contracts to Take Shares in Companies**

**Companies**

<sup>181</sup> **D** Contracts to take shares in companies might be classified as uberrimae fidei because again the knowledge of the material facts lies with one party alone, namely, the promoters, directors and others responsible for the issue of the prospectus. It was long ago recognised that invitations to invest, made through a prospectus, could lead to much enrichment of individuals at the public expense, and at least from promoters the utmost good faith was required.

877

**U** In time the legislature intervened to protect the public and to supplement the common law. The present position is governed by [Financial Services and Markets Act 2000 ss.80 and 81](#).

878

**U** The legislation requires the disclosure of specified matters, and render those responsible liable in damages to anyone who has acquired securities to which the legislation applies,

879

**U** and who has suffered loss as the result of the omission from the prospectus or, in the case listing particulars, the particulars, of any matter that should have been included.

880

**U** However, mere disclosure does not of itself give a right to rescission.

881

**U** It is this fact which provokes the doubt as to whether contracts to take shares in companies are properly classified as contracts uberrimae fidei. However, if failure to disclose makes the prospectus misleading by falsifying that which is stated, there is a remedy as for positive misrepresentation.

882

**U** With regard to misrepresentations as distinct from non-disclosures, an untrue statement in the prospectus which has induced a person to subscribe for shares does of course give that person the right to rescind the contract, provided that he acts promptly and before winding-up proceedings have begun.

883

**U**

<sup>182</sup> The position of the promoters is also regulated by the common law. They have a fiduciary relationship with the company, and the rule is that they must not make a secret profit at its expense. <sup>884</sup> They are under a duty to disclose either to an independent board of directors, or to the intended shareholders, for instance by making a disclosure in the prospectus, any profit made by them on a sale of property to the company. A breach of this duty entitles the company to sue the promoters for damages, or to recover the profit <sup>885</sup> or to rescind the contract.

886

**U**

## Footnotes

<sup>1</sup> See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).

<sup>877</sup> *Erlanger v New Sombrero Phosphate Co (1878) 3 App. Cas. 1218.*

<sup>878</sup> See generally, Davies, Worthington and Hare (eds), Gower: Principles of Modern Company Law, 11th edn (2021), paras 25-008—25-041; Cartwright, Misrepresentation, Mistake and Non-disclosure, 6th edn (2022), para.17-53 et seq.

<sup>879</sup> Thus investors who have bought on the market after dealing has commenced are now protected.

<sup>880</sup>

Financial Services and Markets Act 2000 s.90(1). Note that s.90(1) is without prejudice to any liability which may be incurred apart from the section or regulation: s.90(6). These provisions stem ultimately from the Directors Liability Act 1890, which was passed to reverse the effect of *Derry v Peek (1889) 14 App. Cas. 337*, so far as it applied to prospectuses.

•881 Gower: Principles of Modern Company Law, 11th edn (2021), para.25-038.

•882 See *Central Ry of Venezuela v Kisch (1867) L.R. 2 H.L. 99*.

•883 Further, a shareholder may rescind if misrepresentations are made in a document issued by the promoters before the company is formed: *Karberg's Case [1892] 3 Ch. 1*.

884 *Erlanger v New Phosphate Co (1878) 3 App. Cas. 1218; Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch. 392; Re Leeds and Hanley Theatre of Varieties [1902] 2 Ch. 809*; see also below, para.12-054.

885 *Gluckstein v Barnes [1900] A.C. 240*.

•886 *Erlanger v New Sombrero Phosphate Co (1878) 3 App. Cas. 1218* (provided of course that restitutio in integrum is still possible). On the duties of promoters and the remedies for breach of those duties see Davies, Worthington and Hare (eds), Gower: Principles of Modern Company Law, 11th edn (2021), paras 10-137—10-142.

## (c) - Family Settlements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 6. - Contracts Where a Duty of Disclosure

(c) - Family Settlements

### Family settlements

- [83] In these and in negotiations for these there must not only be an absence of misrepresentation but a full communication of all material facts known to the parties. Any failure to disclose may be a ground for setting aside the settlement, and it is immaterial that information was withheld because of a mistaken opinion as to its accuracy or importance. In *Gordon v Gordon*<sup>887</sup> a division of property, based on the assumption that the eldest son was illegitimate, was set aside after 19 years on proof that the younger son had withheld knowledge of a marriage ceremony that had taken place between his parents before the birth of his brother. Lord Eldon said that “whether the omission of disclosure originated in design, or in honest opinion of the invalidity of the ceremony”,<sup>888</sup> the agreement could not stand. On the other hand, in *Wales v Wadham*<sup>889</sup> it was held that a wife was under no duty to disclose to her husband, when they were negotiating for a financial settlement to be embodied in a consent order after divorce, that she intended to remarry. In the particular circumstances of the case, the parties had been negotiating a compromise on the basis that neither party was required to make a full disclosure. However, *Wales v Wadham* was overruled so far as it related to disclosure in proceedings for financial relief by the House of Lords in *Livesey v Jenkins*.<sup>890</sup> This held that the relevant statutory provisions required a court exercising jurisdiction to make financial provision or property adjustment between spouses to be placed in full possession of the facts, so that each side must make full disclosure.<sup>891</sup> These decisions leave it uncertain whether the common law today recognises family settlements as contracts uberrimae fidei.

## Footnotes

- 1 See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- 887 (1816-19) 3 *Swans.* 400; see also *Fane v Fane* (1875) *L.R.* 20 *Eq.* 698.
- 888 (1816-19) 3 *Swans.* 400, 477.
- 889 [1977] 1 *W.L.R.* 199.
- 890 [1985] *A.C.* 424, 429; see Cartwright, Unequal Bargaining, pp.84–88.
- 891 Matrimonial Causes Act 1973 s.25, now replaced by Matrimonial and Family Proceedings Act 1984 s.3.

## **(d) - Contracts for the Sale of Land**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 6. - Contracts Where a Duty of Disclosure**

**(d) - Contracts for the Sale of Land**

### **Sales of land**

<sup>184</sup> Contracts for the sale of land are not uberrimae fidei in the sense that the vendor has to make to the purchaser a full disclosure of all material facts.<sup>892</sup> In the absence of actual misrepresentation<sup>893</sup> the general rule is caveat emptor. But certain qualifications must be made because the vendor is under a duty to disclose defects relating to title. Every material defect in the vendor's title must be disclosed, because if the title is in fact defective the vendor will be unable to perform his contract in the absence of a condition that the purchaser should accept a defective title. In consequence, if any such defect is not disclosed the purchaser may rescind the contract or resist a suit for specific performance. It has been persuasively argued that there is in addition a duty on the vendor to disclose all latent defects in his title, since if an undisclosed latent defect appears the purchaser may apparently terminate the contract without waiting to see whether the vendor will be able to remove the defect before the date for completion.

<sup>894</sup>

**U** However, as it appears that all defects must be revealed whether known to the vendor or not, and that if a latent defect is not revealed the purchaser may recover damages for breach of contract, it seems that the duty must be based on an implied term of the contract.<sup>895</sup>

<sup>185</sup> It seems that any fact which will prevent the purchaser from obtaining such a title as he was led to expect may constitute a defect in title.<sup>896</sup> So where the subject of the sale was a leasehold interest,

and the lease contained onerous and unusual covenants which were not disclosed by the vendor, the purchaser was held to be entitled to rescind the contract.<sup>897</sup> It has also been suggested that a tenant who is selling his leasehold interest is bound to disclose receipt of notice from his landlord of an intention to proceed under a rent review clause.<sup>898</sup> A purchaser may, of course, contract to accept a defective title, but even an express agreement to this effect will not (it seems) save the vendor where he fails to disclose defects known to him.<sup>899</sup> A purchaser is not obliged to disclose any information he may have which may affect the value of the property; but it has been held that a purchaser who applies for planning permission in the name of the vendor prior to the exchange of contracts is acting as a self-appointed agent, and may thereby come under fiduciary duties to the vendor.<sup>900</sup>

## Footnotes

<sup>1</sup> See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).

<sup>892</sup> It had been intended that vendors (or their estate agents) of larger types of residential property would be required to provide on request a “Home Information Pack” including a “home condition report” prepared by a home inspector, but the relevant legislation has now been repealed.

<sup>893</sup> See *Dyster v Randall [1926] Ch. 932*.

<sup>894</sup> *Harpum* (1992) 108 L.Q.R. 208, relying on, inter alia, *Carlish v Salt [1906] 1 Ch. 355* and *Reeve v Berridge (1888) 20 Q.B.D. 423*. The existence of such a duty was accepted by at least the majority of the Court of Appeal in *Peyman v Lanjani [1985] Ch. 457, 482, 496–497*; and in *SPS Groundworks & Building Ltd v Mahil [2022] EWHC 371 (QB)* at [67], reviewing and summarising the effect of the authorities.

<sup>895</sup> *Harpum* (1992) 108 L.Q.R. 208, 332–333.

<sup>896</sup> But see *Re Flynn and Newman's Contract [1948] Ir.R. 104*.

<sup>897</sup> *Molyneux v Hawtrey [1903] 2 K.B. 487*.

<sup>898</sup> *F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 120 S.J. 331*.

<sup>899</sup> *Becker v Partridge [1966] 2 Q.B. 155*.

<sup>900</sup> *English v Dedham Vale Properties Ltd [1978] 1 W.L.R. 93; Rignall Developments Ltd v Halil [1988] Ch. 190*.

## (e) - Contracts of Suretyship

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 6. - Contracts Where a Duty of Disclosure

(e) - Contracts of Suretyship

### Suretyship or insurance <sup>901</sup>

- [86] It seems that contracts of suretyship are not contracts uberrimae fidei properly so-called, although they are sometimes said to bear certain characteristics of that class. One difficulty is that it may be a matter for doubt whether a given contract is one of suretyship or of insurance. In *Seaton v Heath*<sup>902</sup> Romer LJ said that many contracts may with equal propriety be called contracts of insurance or contracts of suretyship, and that whether a contract requires uberrima fides or not depends not upon what it is called, but upon its substantial character and how it came to be effected. Commercial sureties, at least, are generally persons who know the risk they undertake without it being explained to them, and who if they do not know it, would make inquiry on the subject; in contracts of insurance, on the other hand, the person desiring to be insured has means of knowledge of the risk which the insurer does not possess, and he puts the risk before the insurer as a business proposition.
- [87] The position seems to be that while a contract of insurance traditionally required a full disclosure of all material facts, a contract of suretyship does not.<sup>903</sup> Thus it has been held that a bank was under no duty to disclose to the guarantor of a customer's overdrawn account suspicions that the customer was defrauding him.<sup>904</sup> On the other hand, it seems that there is a limited duty of disclosure even in contracts of suretyship, though the nature and scope of this limited duty are hard to define. In *Levett v Barclays Bank Plc*<sup>905</sup> it was held that there is a duty to disclose to the surety any unusual feature of the contract between the principal debtor and the creditor which makes it

materially different in a potentially disadvantageous respect from what the surety might naturally expect. In *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department*<sup>906</sup> it was held that any duty to disclose unusual features only applied to unusual features of the transaction itself, not to unusual features of the risk; and it did not extend to matters of which the bank had no knowledge, even if what it knew might have led it to make further enquiries. However, where a person guaranteed the honesty of a servant to an employer, who knew but did not disclose the fact that the servant had previously been dishonest while in his employment, the bond was held to be unenforceable when the servant subsequently committed a further act of dishonesty.<sup>907</sup> In *North Shore Ventures Ltd v Anstead Holdings Inc*<sup>908</sup> the Chancellor (Sir Andrew Morritt) said that the cases establish the following propositions:

- “(1)the creditor is obliged to disclose to the surety any contract or other dealing between creditor and debtor so as to change the position of the debtor from what the surety might naturally expect, but
- “(2)the creditor is not obliged to disclose to the surety other matters relating to the debtor which might be material for the surety to know.”<sup>909</sup>

But if the duty of disclosure has arisen because the feature of the transaction to be guaranteed is “unusual”, the creditor is not absolved from his duty of disclosure because he reasonably believes that the surety knows of it already.<sup>910</sup>

## Sureties given to banks on a non-commercial basis

- <sup>188</sup> It should be noted that the law which was developed to protect “surety wives” (principally wives who guarantee the debts of their husband’s business), and which now apply to any guarantee to a bank given on a non-commercial basis<sup>911</sup> may have the practical effect of requiring the bank to disclose information to the surety. These rules are discussed in Ch.10.<sup>912</sup>

## Binding authority to issue insurance

- <sup>189</sup> It has been suggested that an obligation to point out unusual facts, similar to that which appears to apply to suretyship,<sup>913</sup> may apply to a binding authority to issue insurance, so that unusual features of the coverholder to whom the authority is to be given should be pointed out.<sup>914</sup>

## Footnotes

- 1 See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- 901 See Vol.II, Ch.47.
- 902 [1899] 1 Q.B. 782, 792–793.
- 903 *North British Insurance Co v Lloyd* (1854) 10 Ex. 523; *Lee v Jones* (1864) 17 C.B.(N.S.) 482; *Geest Plc v Fyffes Plc* [1999] 1 All E.R. (Comm) 672; below, paras 47-036 et seq.
- 904 *National Provincial Bank v Glanusk* [1913] 3 K.B. 335; see also *Royal Bank of Scotland v Greenshields* (1914) S.C. 259; *Cooper v National Provincial Bank* [1946] K.B. 1.
- 905 [1995] 1 W.L.R. 1260.
- 906 [1996] 1 Lloyd's Rep. 200; affirmed on other grounds [2000] 1 A.C. 486.
- 907 *London General Omnibus Co v Holloway* [1912] 2 K.B. 72; see also *Phillips v Foxall* (1872) L.R. 7 Q.B. 666. For further discussion of these points see Vol.II, para.47-036.
- 908 *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230, [2012] Ch. 31. At first instance it had been held that the duty extends to facts that the surety would expect not to exist, so the creditor should disclose the fact that the debtor has been fraudulent ([2010] EWHC 1485 (Ch) at [119]–[123], referring to statements by Vaughan Williams LJ in *London General Omnibus Co v Holloway* [1912] 2 K.B. 72, 79 which had been cited with approval by the Privy Council in *Estate of Imorette Palmer (deceased) v Cornerstone Investments & Finance Co Ltd* [2007] UKPC 49 at [40]). The decision was reversed by the Court of Appeal, which held that Vaughan Williams LJ had not widened the existing law (at [27] and [57]).
- 909 [2011] EWCA Civ 230 at [14].
- 910 [2011] EWCA Civ 230 at [37]. For further discussion of this case see Vol.II, para.47-038.
- 911 See below, para.10-147.
- 912 See below, paras 10-139—10-153.
- 913 See para.9-187.
- 914 *Pryke v Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep. 602, 616.

## **(f) - Partnership Agreements**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 6. - Contracts Where a Duty of Disclosure**

**(f) - Partnership Agreements**

## **Partnership**

- [90] The fundamental duty of every partner is to show the utmost good faith in his dealings with the other partners. In *Conlon v Simms*, the Court of Appeal held that in negotiating a partnership agreement:

“... a party owes a duty to the other negotiating parties to disclose all material facts of which he has knowledge and of which the other negotiating parties may not be aware.”<sup>915</sup>

The duty of good faith applies during the continuance of the partnership, and during the winding up after dissolution. The duties of partners are regulated for the most part, in the absence of agreement to the contrary, by the **Partnership Act 1890**; and although the principle requiring the utmost good faith is not expressly enunciated by the Act, it is embodied in ss.28, 29 and 30. Thus a partner must account for any private profit made by him; so for instance, if a partner is buying from or selling to the firm, he cannot do either at a profit to himself.<sup>916</sup>

## **Analogous agreements**

[91]

A duty of disclosure may arise as an implied term of an agreement which is not a partnership but which has “elements of joint enterprise or joint venture”, but:

“... wider duties will not lightly be implied, in particular in commercial contracts negotiated at arms’ length between parties with comparable bargaining power, and all the more so where the contract in question sets out in detail the extent, for example, of a party’s disclosure obligations.”<sup>917</sup>

## Footnotes

- 1 See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- 915 [2006] EWCA Civ 1749, [2008] 1 W.L.R. 484 at [127], relying on a dictum of Lord Atkin in *Bell v Lever Bros* [1932] A.C. 161 at 227, HL.
- 916 *Bentley v Craven* (1853) 18 Beav. 75; *Dunne v English* (1874) L.R. 18 Eq. 524.
- 917 *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [2008] 1 All E.R. 1004 at [197] (Briggs J). A duty of disclosure was found to exist in *Banwaitt v Dewji* [2013] EWHC 879 (QB), see at [72].

## (g) - General Releases

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 9 - Misrepresentation<sup>1</sup>

Section 6. - Contracts Where a Duty of Disclosure

(g) - General Releases

### General releases

- <sup>192</sup> In *Bank of Credit and Commerce International SA (In Liquidation) v Ali (No.1)*<sup>918</sup> Lord Nicholls said that where the party to whom a general release was given knew that the other party has or might have a claim and knew that the other party was ignorant of this, to take the release without disclosing the existence of the claim or possible claim could be unacceptable sharp practice. The law would be defective if it did not provide a remedy, and while the case did not raise the issue, he had no doubt that the law would provide a remedy.<sup>919</sup> Lord Hoffmann agreed:

“There are different ways in which it can be put. One may say, for example, that inviting a person to enter into a release in general terms implies a representation that one is not aware of any specific claims which the other party may not know about. That would preserve the purity of the principle that there is no positive duty of disclosure. Or one could say, as the old Chancery judges did, that reliance upon such a release is against conscience when the beneficiary has been guilty of a *suppressio veri* or *suggestio falsi*.

... a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim. I do not propose any wider principle: there is obviously room in the dealings of the market for legitimately taking advantage of the known ignorance of the other party. But, both on principle and authority, I think that a release of rights is a situation in which the court should not allow a party to do so. On the other hand, if the context shows that

the parties intended a general release for good consideration of rights unknown to both of them, I can see nothing unfair in such a transaction.”<sup>920</sup>

Whatever the basis on which this is to be explained, it would amount to creating a duty on a party negotiating for a general release to disclose a claim that he knows the other has or may have and which he knows the other is not aware of.

## Footnotes

- 1 See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).
- 918 [2001] UKHL 8, [2002] 1 A.C. 251, in which the House of Lords held that a general release was not effective to release a claim for “stigma” damages (see below, para.29-166) that neither party could have known about.
- 919 [2001] UKHL 8 at [32]–[33]. Lord Bingham preferred not to address this question (at [20]), and so it seems did Lord Clyde (at [87]).
- 920 [2001] UKHL 8 at [69]–[70].

## **(h) - Fiduciary Relationships and Relationships of Trust and Confidence**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 9 - Misrepresentation<sup>1</sup>**

**Section 6. - Contracts Where a Duty of Disclosure**

**(h) - Fiduciary Relationships and Relationships of Trust and Confidence**

- <sup>193</sup> The existence of a fiduciary relationship<sup>921</sup> or a relationship of trust and confidence<sup>922</sup> between the parties may also have the effect of requiring the trusted party to disclose information to the other. Disclosure when there is a relationship of trust and confidence is dealt with in Ch.10.<sup>923</sup>

### **Footnotes**

<sup>1</sup> See Allen, Misrepresentation (1988); Cartwright, Unequal Bargaining (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 5th edn (2019); Spencer Bower and Handley, Actionable Misrepresentation, 5th edn (2014).

<sup>921</sup> See above, para.9-097.

<sup>922</sup> See below, paras 10-101—10-119.

<sup>923</sup> See below, para.10-095.

## Section 1. - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 1. - Introduction

*Mindy Chen-Wishart*

### Scope of chapter

- 001 This chapter deals with three further grounds on which a contract may be avoided: duress, undue influence and unconscionable dealing. In outline, a complainant may be able to avoid a contract for duress where he or she entered it because of a wrongful or illegitimate threat or other form of pressure<sup>2</sup> exerted by the other party, normally because the threat or pressure left the complainant with no practical alternative.<sup>3</sup> A contract may be voidable for undue influence if it has resulted from one party's abuse of the complainant's trust and confidence, or emotional or physical dependence.<sup>4</sup> Unconscionable dealing occurs where one party exploits the other's ignorance or weak position to obtain the other's agreement to a contract which is substantively unfair.<sup>5</sup> We will see that there may be some overlap between the three grounds. In particular, some cases that were decided on the basis of undue influence are now better regarded as examples of the more recently-developed "economic" duress,<sup>6</sup> while other cases may involve both undue influence and unconscionable dealing.<sup>7</sup>

### Unfair commercial practices

- 002 A consumer who has been the victim of an aggressive sales practice might have a remedy under the general law of duress, undue influence or unconscionable dealing, or may have (for off-premises sales) a right to cancel,<sup>8</sup> or may derive protection from the [Protection from Harassment Act 1997](#).<sup>9</sup>

However, there was no effective remedy for many kinds of aggressive practice, in particular for many kinds of high-pressure selling.<sup>10</sup> In 2008, the [Consumer Protection from Unfair Trading Regulations](#)<sup>11</sup> was made to implement the Unfair Commercial Practices Directive.<sup>12</sup> This requires Member States to prohibit, and to provide “adequate and effective” means to combat, unfair commercial practices, including “aggressive” commercial practices, defined thus:

“A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.”<sup>13</sup>

However, the Directive is “without prejudice to contract law and, in particular, to the rules of validity, formation or effect of a contract”,<sup>14</sup> and so did not necessarily yield civil remedies to consumers.<sup>15</sup> The [2008 Regulations](#) prohibit unfair commercial practices, but originally provided that an agreement shall not be void or unenforceable by reason only of a breach of the Regulations.<sup>16</sup> Subsequently, the Law Commissions concluded that consumers who are the victims of misleading<sup>17</sup> or aggressive practice by a trader should have a civil law remedy.<sup>18</sup> This was implemented by the [Consumer Protection \(Amendment\) Regulations 2014](#),<sup>19</sup> which amend the [Consumer Protection from Unfair Trading Regulations 2008](#). The amendments apply to any contract made on or after 1 October 2014. The remedies available include the right to “unwind the contract” and to receive a full refund if the consumer acts quickly or, if the consumer waits more than three months or the goods or services supplied have been fully consumed, the right to a “discount” of 25, 50, 75, or 100 per cent depending on the seriousness of the incident; and damages for further loss, including for alarm, distress, or physical inconvenience or discomfort, unless the trader can show that it used due diligence. Other common law and statutory remedies should not be affected. The new remedies introduced in 2014, which form part of the retained EU law,<sup>20</sup> are explained in Vol.II, [Ch.40](#).<sup>21</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 2 See below, paras 10-013—10-015.
- 3 See below, paras 10-003—10-071.
- 4 See below, paras 10-071—10-138.
- 5 See below, paras 10-161—10-181.
- 6 See below, paras 10-062—10-063.

- 7 See below, para.10-163.
- 8 See below, Vol.II paras 40-115 et seq. The Law Commissions considered that the withdrawal period is often too short for vulnerable consumers to take action: Report, para.3.50.
- 9 The Law Commission pointed out that this “does not usually apply to one-off incidents”: Report, para.3.51.
- 10 Report, para.3.72.
- 11 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) and Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276).
- 12 Directive 2005/29 on unfair commercial practices [2005] O.J. L149/22. A useful summary of the Directive and its impact can be found in *Twigg-Flesner (2005) 121 L.Q.R. 386*.
- 13 Directive 2005/29 art.8.
- 14 Directive 2005/29 art.3(2).
- 15 Directive 2005/29 art.3(1). EU Member States are now required to provide civil redress for consumers harmed by unfair commercial practices; see Directive (EU) 2019/2161 for the better enforcement and modernisation of Union consumer protection rules; but the Directive does not have to be implemented until November 2021 and thus does not affect the UK. See below, Vol.II, para.40-185.
- 16 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.29; Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276) reg.29.
- 17 On misleading practices see above, para.9-002 and Vol.II, paras 40-187 et seq.
- 18 Law Commission and Scottish Law Commission Report: Consumer Redress for Misleading and Aggressive Practices (Law Com. No.332, Scot Law Com. No.226 (2012)).
- 19 SI 2014/870.
- 20 See above, paras 1-016 et seq.
- 21 See below, Vol.II, paras 40-187 et seq.

## **(a) - Introduction**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 2. - Duress<sup>22</sup>**

**(a) - Introduction**

### **Introductory remarks**

- 003 A contract which has been entered as the result of duress may be avoided by the party who was threatened. It has long been recognised that a threat to the victim's person may amount to duress<sup>23</sup>; it is now established that the same is true of wrongful threats to the victim's property, including threats to seize their goods,<sup>24</sup> and of wrongful or illegitimate threats to their economic interests,<sup>25</sup> at least where the victim has no practical alternative but to submit.<sup>26</sup> In each case, the wrongful or illegitimate threat must have had some causal effect on their decision to enter the contract, but the causal requirements may differ between the various kinds of duress.<sup>27</sup> In cases of economic duress, it is submitted that the victim must also show that they had no practical (or reasonable) alternative to submission to the challenged contract.

### **Footnotes**

<sup>1</sup> See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).

<sup>22</sup> Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.

<sup>23</sup> Below, para.10-017.

- 24 Below, paras 10-018—10-019.
- 25 Below, paras 10-020 et seq.
- 26 Below, paras 10-042—10-044.
- 27 Below, paras 10-030—10-046.

---

End of Document

© 2022 SWEET & MAXWELL

## **(b) - Nature of Duress**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 2. - Duress<sup>22</sup>**

**(b) - Nature of Duress**

### **Absence of consent**

- 004 It was at one time common to treat the legal rules relating to duress (and frequently also the equitable rules relating to undue influence) as resting on the absence of consent. A party who was subject to duress, or even undue influence, was often said to have had his will “overborne” so that he was incapable of making a free choice, or even of acting voluntarily. Most of the older cases cited in this chapter rest on this assumption; and even many modern decisions use the same kind of language.<sup>28</sup> But the basis of the law relating to these topics has been reconsidered in light of the speeches in the House of Lords in *Lynch v D.P.P. of Northern Ireland*.<sup>29</sup> This case was concerned with the defence of duress in the criminal law, and there are no doubt important differences between the civil and the criminal law on what can constitute duress; but the case contains by far the most extensive analysis of the juridical nature of duress in the law reports, and on this question, there appears to be no difference between the criminal and the civil law. Indeed, two of their Lordships in this case specifically relied upon the analogy of the law of contract.<sup>30</sup>
- 005 All five members of the House of Lords in *Lynch*'s case rejected the notion that duress deprives a person of his free choice, or makes his acts non-voluntary.<sup>31</sup> Duress does not “overbear” the will, nor destroy it; it “deflects” it.<sup>32</sup> Duress does not literally deprive the person affected of all choice; it leaves him with a choice between evils.<sup>33</sup> A person acting under duress intends to do what he does; but does so unwillingly.<sup>34</sup> Lord Wilberforce specifically stated that:

“... duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law.”<sup>35</sup>

Similarly, Lord Simon of Glaisdale said that in the law of contract:

“Duress again deflects without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is coactus volui on his side. The contrast is with non est factum. The contract procured by duress is therefore not void: it is voidable—at the discretion of the party subject to duress.”<sup>36</sup>

- 006 Notwithstanding these clear declarations of principle, in several important decisions relating to economic duress which post-date the *Lynch* decision the judges spoke of duress as negativing true consent and rendering the coerced party’s actions non-voluntary.<sup>37</sup> For example, in *Pao On v Lau Yiu Long*<sup>38</sup> it was accepted by the Privy Council that economic duress might be recognised in principle by the law, but it was insisted that:

“... the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.”<sup>39</sup>

## Illegitimate pressure

- 007 In *Universe Tankships of Monrovia v I.T.W.F.*, Lord Diplock said that the rationale was that the party’s consent was induced by pressure which the law does not regard as legitimate with the consequence that the consent is treated in law as revocable.<sup>40</sup> Similarly Lord Scarman, though dissenting in the result, agreed that the real issue is whether there has been illegitimate pressure, the practical effect of which is compulsion or absence of choice:

“The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no practical choice open to him.”<sup>41</sup>

Subsequent decisions have for the most part applied the test of whether the threat was illegitimate, coerced the victim and the victim had no practical choice.<sup>42</sup>

## Importance of basis of duress

- 008 No doubt in many circumstances the precise basis of duress will be immaterial; but in other circumstances it will be a matter of the greatest importance. For, so long as the doctrine of duress is treated as resting on the complainant's absence of consent or of a voluntary act, the precise cause of the absence of consent, or the involuntariness of the act (i.e. whether due to the counterparty's conduct), would seem to be immaterial. Duress would be a question of fact, and not of law. Further, absence of consent would logically render a contract void and not voidable. It is clear from *Lynch*'s case that all these propositions are inconsistent with the analysis of the nature of duress in the speeches in the House of Lords. Because duress does not destroy the will or the consent of the putative contracting parties, it is not possible to treat the issue as one of pure fact, nor is it immaterial what caused the will to be deflected, or the consent to be distorted. Whether the threat or pressure was illegitimate is a question of law. So, also, because duress does not truly deprive a party of all choice, but only presents him with a choice between evils, it is not possible to inquire simply whether the party relying on duress had "no choice"; the inquiry must necessarily be as to the nature of the choices he was presented with, and in what respect the choices differed from those ordinarily available in the market—where a person also has to choose, between paying the market price and going without. The question whether the doctrine rests on the absence of consent or on the use of illegitimate pressure may also affect questions of causation: on the latter approach, it may not be necessary to show that the threat was an overwhelming cause of the victim entering the contract.<sup>43</sup>

## Analogy with fraud and mistake

- 009 Both in *Lynch*'s case and in *Barton v Armstrong*<sup>44</sup> the analogy with fraud and mistake has been relied upon by the courts. Thus (as shown by the quotation from Lord Simon's speech in *Lynch*'s case, above, paras 10-004—10-005) duress renders a contract voidable rather than void; and in this respect it operates like fraud, and not like non est factum.<sup>45</sup> No doubt there will be extreme cases of duress, as there are extreme cases of fraud or mistake, in which non est factum is available as a plea and in which there is a total absence of consent: for example, if one party seizes another's hand, puts a pen in it and physically forces the other's hand to produce a signature. Equally, the gunman who actually helps himself to his victim's wallet is stealing it against his victim's consent, and in no sense obtaining it by means of a coerced contract. But (artificial though the distinction may seem in such a case) the gunman who *demands and is given* the wallet by the victim, is obtaining it by duress. As we will see, the analogy with fraud was also used in *Barton v Armstrong* to justify

the view that, at least in a case of duress to the person, a contract entered into under duress may be avoided provided that the duress had some effect on the mind of the party threatened, even if he might have entered the contract anyway for other reasons. However, the contract will stand if it can be shown that the threat had no effect on his mind at all.<sup>46</sup>

## Legitimacy of the pressure or threat

- 010 Once it is accepted that the basis of duress does not depend upon the absence of consent, but on the combination of pressure and absence of practical choice,<sup>47</sup> it follows that two questions become all important.<sup>48</sup> The first is whether the pressure or the threat is legitimate; the second, its effect on the victim.<sup>49</sup>

“The legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support ... Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, that fact that the threat is lawful does not necessarily make the pressure legitimate.”<sup>50</sup>

Clearly not all pressure is illegitimate;<sup>51</sup> nor even are all threats illegitimate. In ordinary commercial activity, pressure and even threats are both commonplace and often perfectly proper.<sup>52</sup> Indeed, in one sense, all contracts are made under pressure: every offeror “threatens” that unless the offeree accepts the terms offered, he will not get the benefit of whatever goods or services are on offer. We shall see that the causal link between the pressure or threat and the victim’s action is also important,<sup>53</sup> but it cannot be said that the force or weight of the pressure or the threats is the decisive factor:

“... for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act.”<sup>54</sup>

It therefore becomes essential to distinguish between legitimate and illegitimate forms of pressure. We shall see that whereas threats to the person and threats to commit a crime or tort are always treated as illegitimate,<sup>55</sup> it is possible that in some circumstances a threat to break a contract if a demand is not met may not be regarded as illegitimate, depending on the nature of the demand.<sup>56</sup> Conversely, a threat to carry out an action which in itself is lawful but which is coupled with an illegitimate demand may constitute duress.<sup>57</sup>

## The coercive effect of the threat

- 011 For a contract made after there has been a wrongful or illegitimate threat to be avoidable for duress, the threat must have had some causal effect on the victim's decision to enter the contract. However, the causal requirements differ between the various kinds of duress.<sup>58</sup>

## No reasonable alternative

- 012 In cases of "economic duress", references to the requirement that the victim had no reasonable alternative to agreeing to the contract, may be interpreted as merely evidence that the threat had the necessary causal effect. An alternative and, it is submitted, preferable interpretation is that it constitutes a separate independent requirement.<sup>59</sup>

## Footnotes

1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).

22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.

28 Even in *Barton v Armstrong* [1976] A.C. 104, 121, the dissenting speech of Lord Wilberforce and Lord Simon refers to the defence of duress as resting on the absence of true consent; and in several other modern cases courts have continued to use the same kind of language, see *Atiyah* (1982) 98 L.Q.R. 197.

29 [1975] A.C. 653.

30 The same analysis of the nature of duress is almost universally adhered to in America. For an early example, see Holmes J in *Union Pacific Ry Co v Public Service Commission of Missouri* 248 U.S. 67, 70 (1918).

31 *Lynch v D.P.P. of Northern Ireland* [1975] A.C. 653: Lord Morris of Borth-y-Gest at 670, 675; Lord Wilberforce at 680; Lord Simon of Glaisdale at 690–691, 695; Lord Kilbrandon at 703; and Lord Edmund-Davies at 709–711.

32 Lord Simon, [1975] A.C. 653, 695.

33 [1975] A.C. 653, 690–691.

34 [1975] A.C. 653, 670, Lord Morris.

35 [1975] A.C. 653, 680.

36 [1975] A.C. 653, 695.

- 37 See *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; *Pao On v Lau Yiu Long* [1980] A.C. 614; *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366; see also *Syros Shipping Co v Elaghill Trading Co* [1981] 3 All E.R. 189.
- 38 Above, and see below, para.10-022.
- 39 *Pao On v Lau Yiu Long* [1980] A.C. 614, 636.
- 40 [1983] 1 A.C. 366, 384.
- 41 [1983] 1 A.C. 366, 400.
- 42 e.g. *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419; *Vantage Navigation Corp v Suhail and Saud Bahwan Building Materials, The Alev* [1989] 1 Lloyd's Rep. 138. See Beatson, The Use and Abuse of Unjust Enrichment (1991), pp.109–117; and the remarks of Lord Goff in *Dimskal Shipping Co SA v ITWF* [1992] 2 A.C. 152, 166, agreeing with McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 N.S.W.L.R. 40, 45–46, that the “overbearing of the will” test is unhelpful.
- 43 See below, paras 10-030—10-046.
- 44 [1976] A.C. 104.
- 45 As to the defence non est factum, see above, paras 5-049—5-056. In *Barton v Armstrong* [1976] A.C. 104 Lord Cross, speaking for the majority, referred to the deeds as void (at 120), but he had previously referred to “setting aside a disposition for duress” (at 118). The dissenting minority seemed to consider that duress renders a contract voidable.
- 46 Below, para.10-031. There may, of course, be some issues on which the analogy with fraud would be inappropriate and inapplicable, e.g. duress is not necessarily tortious: below, para.10-071.
- 47 *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 400; *R. v Attorney-General for England and Wales* [2003] UKPC 22 at [15]. On the absence of practical choice see further below, paras 10-042—10-044.
- 48 See *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366, 384, 391, 400.
- 49 See the next paragraph.
- 50 Lord Hoffmann in *R. v Her Majesty's Attorney-General for England and Wales* [2003] UKPC 22 at [16] referring to *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 401.
- 51 For an example, see *Meghjee v BW Foundation* [2020] EWHC 2970 at [22]: “Nor does the fact that the claimant felt compelled to agree and signed the policy mean that there was duress”.
- 52 *Rotamead Ltd v Durston Scaffolding Ltd* [2020] EWHC 2738 (TCC) at [17], [20] and [30]; *Oliver Dean Morley T/A Morley Estates v The Royal Bank of Scotland Plc* [2021] EWCA Civ 338 at [54].
- 53 See below, paras 10-030—10-046.
- 54 *Barton v Armstrong* [1976] A.C. 104, 121, per Lord Wilberforce and Lord Simon dissenting, but not on this point.
- 55 Certain acts of one state against another, such as trade restrictive measures, threatened use of force, military aggression by invasion and supporting military action, are capable of

constituting duress under English law such as to raise a defence against a contractual action;  
*Ukraine v Law Debenture Trust Corp Plc [2018] EWCA Civ 2026*.

**56** See below, paras 10-047—10-055.

**57** See below, paras 10-056—10-065.

**58** Below, paras 10-030—10-046.

**59** See below, para.10-046.

## (c) - Types of Illegitimate Pressure

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 2. - Duress<sup>22</sup>

(c) - Types of Illegitimate Pressure

### Violence or threats

- 013 Violence to the person, and threats of such violence, have long been recognised as illegitimate forms of pressure. The law therefore allows a party to avoid any promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made or that of his agent.<sup>60</sup> Contracts made under such circumstances are said to be made under duress,<sup>61</sup> a term derived from the common law, which took a narrow view as to the facts which would establish (as was then thought) the absence of free consent. At common law, duress consisted of actual or threatened violence or imprisonment.<sup>62</sup> Courts of equity, however, administered the wider doctrine of undue influence<sup>63</sup> which was applied chiefly to cases where some fiduciary relation existed between the parties, but was not in any way limited to them. Equity might therefore grant relief where the compulsion complained of was something less than that required by the common law. Since the *Judicature Act 1873* it has been the duty of all courts to administer both doctrines concurrently and cases of coercion must be dealt with in the light of their combined effect. In recent years the courts have recognised that other forms of duress may be grounds for avoiding a contract: firstly, where there was a wrongful threat to seize the claimant's goods and secondly, where there was "economic duress". These developments to some extent blur the traditional distinction between duress and undue influence. In particular, there are cases in which equity will give relief against an agreement entered as the result of an improper threat to bring a prosecution against a member of the claimant's family. Traditionally, relief was given on the ground of actual undue influence, but it is strongly arguable that they are now to be regarded as falling within the doctrine of duress and they are so treated in this chapter.<sup>64</sup>

## Unconscionable conduct as illegitimate pressure

- 014 Duress is a form of constraint on the victim's choice, and it is normally assumed that the constraint involves a threat by the other party to harm the victim in some way.<sup>65</sup> Certainly nearly all the cases, particularly of economic duress, have involved threats. However, in *Borrelli v Ting*<sup>66</sup> liquidators urgently needed to conclude a settlement agreement, and agreed to the defendant's terms when as the result of delays caused by the defendant "opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the Liquidators from investigating his conduct ... or making claims against him arising out of that conduct", they could wait no longer. The Privy Council held that the agreement could be avoided on the ground of economic duress. Duress was defined as "the obtaining of agreement or consent by illegitimate means".<sup>67</sup> Lord Saville described the defendant's conduct as unconscionable.<sup>68</sup> This decision suggests not only that a constraint caused by actual illegitimate conduct, as opposed to threatened conduct, may amount to duress,<sup>69</sup>
- but also that the doctrines of duress and of unconscionable conduct<sup>70</sup> may not be clearly separable.

## Undue influence as illegitimate pressure

- 015 Cases of undue influence<sup>71</sup> based on the relationship between the contract parties may also overlap with that of economic duress or duress by threatening a lawful act.<sup>72</sup> Indeed, David Richards LJ has observed that<sup>73</sup>:
- "The equitable doctrines of unconscionable transactions (or undue pressure, as it is called in some jurisdictions such as Australia) and undue influence are particularly relevant in the context of economic duress. Both involve the possibility of the court setting aside a contract made in circumstances which may involve pressure being put on a party to enter into the contract."

However, traditionally, relief on the ground of unconscionability or undue influence does not depend on the defendant having done anything that is otherwise unlawful or illegitimate.

## Illegitimate pressure against a state

- 016 Certain acts of one state against another, such as trade restrictive measures, threatened use of force, military aggression by invasion and supporting military action, are capable of constituting duress under English law such as to raise a defence against a contractual action.<sup>74</sup> The Court of Appeal in *Ukraine v Law Debenture Trust Corp Plc* state that<sup>75</sup>:

“Although moral and social standards are more attenuated in the relations between states on the international plane than is the case in a purely domestic commercial context, international law sets out reasonably determinate standards of conduct applicable between states on the international plane. In our view, there is no reason why the law of duress should not treat these as providing an appropriate test of illegitimate pressure.”

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.
- 60 See *Al Nehayan v Kent [2018] EWHC 333 (Comm)* at [216] (threat by agents within the course of their employment). For the parallel doctrine in cases concerning marriage, see *Scott v Sebright (1886) 12 P.D. 21*; *Griffith v Griffith [1944] I.R. 35*; *H. v H. [1954] P. 258*; *Szechter v Szechter [1971] P. 286*; *Singh v Singh [1971] P. 226*; Davies (1972) 88 L.Q.R. 549; *Matrimonial Causes Act 1973* s.12. See also *Re Roberts (deceased) [1978] 1 W.L.R. 653*; *Hirani v Hirani (1983) 4 F.L.R. 232*.
- 61 See generally, *Beatson [1974] C.L.J. 97*.
- 62 1 Roll.Abr. 687; Coke 2 Inst. 482. A threat to ruin a person financially cannot be equated with a physical threat: *Holyoake v Candy [2017] EWHC 3397 (Ch)* at [233] (Nugee J).
- 63 See below, paras 10-072 et seq.
- 64 See below, paras 10-062—10-063.
- 65 e.g. Burrows, *Law of Restitution*, 3rd edn (2011), p.255 (“pressurised ... by illegitimate threats”); see also Goff and Jones, *Law of Restitution*, 7th edn (2007), paras 10-004 et seq., in which the examples seemed to involve threats in one form or another; compare Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), para.10-02. It is usually said that duress to the person may result from actual physical violence (see below, para.10-017) but it is presumably the threat of repetition which constitutes the constraint.
- 66 *[2010] UKPC 21, noted [2011] L.M.C.L.Q. 333*.

- 67 [2010] UKPC 21 at [34].
- 68 [2010] UKPC 21 at [32].
- 69 See also *Carter v Carter* (1829) 5 Bing. 406, 130 E.R. 1118, cited by Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), para.10-02. And see *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [30].
- 70 See below, paras 10-161 et seq.
- 71 See below paras 10-070 et seq.
- 72 See below paras 10-056—10-057.
- 73 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828, [2019] 2 Lloyd's Rep. 89 at [40]. For the decision of the Supreme Court in this case see below, paras 10-057 et seq.
- 74 *Ukraine v Law Debenture Trust Corp Plc* [2018] EWCA Civ 2026, [2019] 2 W.L.R. 655, allowing an appeal against summary judgment in respect of a claim for \$3 billion, and applying the public policy exception to the act of foreign state doctrine which would otherwise make such acts non-justiciable.
- 75 [2018] EWCA Civ 2026 at [160] (Gloster, Sales and David Richards LJJ).

## **(i) - Duress of the Person**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 2. - Duress<sup>22</sup>

(c) - Types of Illegitimate Pressure

(i) - Duress of the Person

### **Forms of duress to the person**

- 017 Duress of the person may consist in violence to the person, or threats of violence, or in imprisonment whether actual or threatened.<sup>76</sup> The threat of violence need not be directed at the claimant<sup>77</sup>: a threat of violence against the claimant's spouse or near relation suffices<sup>78</sup> and a threat against the claimant's employees has been held to constitute duress.<sup>79</sup> It is suggested that a threat against even a stranger should be enough if the claimant genuinely believed that submission was the only way to prevent the stranger from being injured or worse.<sup>80</sup> As the previous paragraph shows, threats of force by one state against another can also constitute duress.<sup>81</sup>

### **Footnotes**

<sup>1</sup> See Cartwright, Unequal Bargaining (1991), Pt III; N. Enonchong, Duress, Undue Influence and Unconscionable Dealing, 2nd edn (2012).

<sup>22</sup> Burrows, Law of Restitution, 3rd edn (2011), Ch.5; Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), Ch.10; Virgo, Principles of the Law of Restitution, 3rd edn (2015), Ch.10, Sect.2.

- 76 For modern examples, see *Friedeberg-Seeley v Klass* (1957) 101 S.J. 275; *Barton v Armstrong* [1976] A.C. 104; *Singh v Redford* [2018] EWHC 2390 (Ch). But compare *R. v HM Att-Gen for England and Wales* [2003] UKPC 22 (threat to return member of armed forces to his unit lawful).
- 77 See further below, para.10-066.
- 78 *Kaufman v Gerson* [1904] 1 K.B. 591; *Singh v Redford* [2018] EWHC 2390 (Ch) (threats of violence to the claimant and his family); cf. *Williams v Bayley* (1866) L.R. 1 H.L. 200 (threat to prosecute relation); and see below, para.10-066. See Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), para.10-15.
- 79 *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674 (threat to use employees as human shield); *Gulf Azov Shipping Co Ltd v Chief Idisi (No.2)* [2001] EWCA Civ 505, [2001] 1 Lloyd's Rep. 727 (detention of ship and crew).
- 80 See further below, para.10-066.
- 81 *Ukraine v Law Debenture Trust Corp Plc* [2018] EWCA Civ 2026; see above para.10-015.

## **(ii) - Duress of Goods**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 2. - Duress<sup>22</sup>**

**(c) - Types of Illegitimate Pressure**

**(ii) - Duress of Goods**

### **Recognition of duress of goods**

- 018 A threat to destroy or damage property may amount to duress,<sup>82</sup> and it is now accepted that the same is true of a threat to seize or detain goods wrongfully.<sup>83</sup> For many years it was thought that such a threat could not amount to duress at common law,<sup>84</sup> but this was difficult to reconcile with the well-established rule that money paid in order to get possession of goods wrongfully detained, or to avoid their wrongful detention, may be recovered in an action for money had and received.<sup>85</sup> A possible solution may be that money paid in this way can only be recovered if it has been paid under protest, without any binding agreement<sup>86</sup>; otherwise the absurd result must ensue that, although an agreement to pay money under duress of goods can be enforced, any money so paid will be recoverable as money had and received to his use. There are cases inconsistent with the notion that duress can only be relied upon by someone who acted under protest<sup>87</sup>; and an alternative view received increasing support. This is that the older cases denying relief are best explained as cases in which the claim was voluntarily compromised by the claimant,<sup>88</sup> for example, pursuant to pressure applied in execution of legal process, such as distress or execution, brought in good faith.<sup>89</sup> In such cases, an agreement made to secure the release of the goods is a form of submission to legal process, and seizure of goods under legal process brought in good faith can scarcely be regarded as an illegitimate form of pressure.

-019

This argument thus opened the door to a broad concept of duress of goods as a ground of relief in contract law, and the courts have now endorsed duress of goods.<sup>90</sup> As we shall see, they have also embraced a broader concept of “economic duress”. At least one case that involved duress of goods was decided on this broader ground.<sup>91</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.
- 82 *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, 335.
- 83 *Dimskal Shipping Co Ltd v I.T.W.F.* [1992] 2 A.C. 152, 165.
- 84 *Skeate v Beale* (1840) 11 A. & E. 983, 990; *The Unitas* [1948] P. 205, affirmed sub nom. *Lever Bros & Unilever NV v H.M. Procurator General* [1950] A.C. 536.
- 85 *Astley v Reynolds* (1731) 2 Str. 915; *Atlee v Backhouse* (1838) 3 M. & W. 633; *Wakefield v Newbon* (1844) 6 Q.B. 276; *Oates v Hudson* (1851) 6 Exch. 346.; *Maskell v Horner* [1915] 3 K.B. 106. Money paid to recover goods in the custody of the law is not paid under duress and cannot be recovered: *Liverpool Marine Credit Co v Hunter* (1868) L.R. 3 Ch. App. 479. See generally below, paras 32-107 et seq.
- 86 *Atlee v Backhouse* (1838) 3 M. & W. 633, 650; *Parker v Bristol & Exeter Ry* (1851) 6 Ex. 702, 705.
- 87 See, e.g. *Spanish Government v North of England S.S. Ltd* (1938) 54 T.L.R. 852; *T.A. Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 S.R. (N.S.W.) 323; *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366, 400.
- 88 See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp.105–106; *North Ocean Shipping* [1979] Q.B. 705, 719. On voluntary settlements see further below, para.10-035.
- 89 See below, para.10-065; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 10-20—10-21.
- 90 *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; *Dimskal Shipping Co Ltd v I.T.W.F.* [1992] 2 A.C. 152, 165 (limitation to duress of the person now discarded). See further Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 10-30 et seq.
- 91 *The Alev* [1989] 1 Lloyd's Rep. 138; see Burrows, *Law of Restitution*, 3rd edn (2011), p.265.

### **(iii) - Economic Duress**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 2. - Duress<sup>22</sup>**

**(c) - Types of Illegitimate Pressure**

**(iii) - Economic Duress**

#### **Recognition of economic duress**

- 020 Three English cases, and one important Privy Council appeal, first recognised the possibility of the concept of economic duress; namely, that certain threats or forms of pressure, not amounting to threats to the person, nor to the seizure or withholding of goods, may give grounds for relief to a party who enters into a contract as a result of the threats or the pressure. In *Occidental Worldwide Investment Corp v Skibs A/S Avanti*,<sup>92</sup> the charterers of two ships secured a renegotiation of the rate of hire, after a slump in market rates, by threatening the owners that they (the charterers) had no substantial assets, and therefore would go bankrupt if the rates were not lowered. This threat was strongly coercive because, given the slump in the market, the owners would have had to lay up the tankers if the charterers had returned them, and would then have been unable to pay mortgage charges on the ships—all these facts being well known to the charterers. In fact, the charterers' allegations and threats were false and fraudulent, and Kerr J held that the owners were therefore entitled to avoid the renegotiated terms, and withdraw the ships, on the ground of fraud; but he also recognised that the economic pressure of the threats might also have given rise to relief on the ground of duress, at least in principle. In the event, however, he denied relief on this ground because the owners' consent or will was not vitiated by the pressures, which were only normal commercial pressures. In light of the discussion of *Lynch*'s case, above, paras 10-004—10-005, this ground of decision seems dubious; the question which the learned judge ought to have asked himself was not whether the owners' consent was negatived by the pressure, but whether the pressure was permissible pressure to exert.<sup>93</sup> Given his finding that the pressure was based

on fraud, it would seem that duress should have been a further ground for relief, although in the circumstances it would have been immaterial, given that relief was available for fraud.

- 021 In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*<sup>94</sup> shipbuilders who were building a ship under a contract for the plaintiffs, threatened, without legal justification, to terminate the contract unless the plaintiffs agreed (within a few days) to increase the price by 10 per cent. The owners had chartered the vessel to Shell at very favourable rates and feared that they would lose the charter if the vessel were delivered late, so they reluctantly acquiesced in this demand, but under protest, and without prejudice to their rights. Mocatta J held<sup>95</sup> that this amounted to a case of economic duress, and that the plaintiffs would have been entitled, on that ground, to have refused payment of the additional 10 per cent. But he went on to hold that the owners had, by implication, affirmed the contract, or waived their right to avoid it for duress, even though they had not intended to do so, because the owners had failed to raise the matter at any further stage, paying the extra instalments, and taking delivery of the ship in due course, and so giving the builders grounds for belief that the owners had affirmed the variation in price.
- 022 In *Pao On v Lau Yiu Long*<sup>96</sup> the allegation was again made that a party had secured an amendment to a prior commercial transaction of some complexity, as a result of a threat to break his contract. Here also the Privy Council conceded that economic duress could be recognised in principle, but held that it was not made out on the facts. Lord Scarman emphasised that the defendant had carefully considered his position when faced with the threatened breach of contract, and had concluded that it was in his interests to grant the concession demanded rather than to sue on the original contract. In determining the validity of the plea of duress in such circumstances, Lord Scarman said that:

“... it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it.”<sup>97</sup>

Lord Scarman did, however, draw attention to American case law which stressed the effectiveness of alternative remedies available to the party allegedly coerced; and it seems clear that it would not necessarily be regarded as an adequate answer to a plea of duress that the party coerced had a legal remedy which he could in due course have pursued in the courts. The all-important question in practice is whether, having regard to all the circumstances, that remedy is a practical and effective one. If it would have been, the complainant may have difficulty in persuading the court to grant relief.<sup>98</sup> If it would not, a case of duress may be made out.

-023

The fourth case is *Universe Tankships of Monrovia v International Transport Workers Federation*<sup>99</sup> in which the defendant trade union had “blacked” the plaintiffs’ ship in port, and refused to release her except on payment of a large sum of money; most of the money was claimed as back pay on behalf of seamen on the ship, but a part of it was a payment for the union’s welfare fund. The Court of Appeal, affirming Parker J, held that the union’s actions constituted duress which would *prima facie* have justified the shipowners in recovering the money, because the coercive nature of the threat was so powerful, and at common law involved unlawful pressure on various third parties to break their contracts. But the Court of Appeal went on to hold that the union’s conduct was protected by the statutory immunities in the *Trade Union and Labour Relations Act 1974*, because it was in the course of, or in furtherance of, a trade dispute under that Act. The “trade dispute” defence was disallowed in the House of Lords where the finding of economic duress was not challenged. The decision involves rejection of the defendants’ argument that a plea of duress requires the party guilty of the duress to appreciate that the other party is acting under duress. In effect, this was an attempt to revive, in a slightly different form, the argument that payments made under duress are only recoverable if they are paid under protest; as already seen (above, para.10-018) this view has been rejected in a number of previous cases.

- 024 The doctrine of economic duress is therefore now clearly established, and its existence was accepted by the House of Lords in *Dimskal Shipping Co Ltd v I.T.W.F.*<sup>100</sup> It has been applied in a number of other cases.<sup>101</sup> For example, in *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd*<sup>102</sup> the plaintiffs had contracted to erect an exhibition stand for the defendants at Olympia, but their workmen went on strike. To get the work done the defendants agreed to contribute £4,500 to pay off the workmen’s claims. It was held by the Court of Appeal that this promise was made under duress as the defendants had no realistic alternative<sup>103</sup> but to promise to pay, given the serious threat to their economic interests.

## Relationship between doctrine of consideration and economic duress

- 025 In the first three cases cited in paras 10-020—10-022, the parties were already in a contractual relationship; in some of these circumstances, a one-sided variation of the contract secured by one party as a result of threats to break the contract might until recently have been viewed as invalid on the ground of lack of consideration, irrespective of any issue of economic duress. Thus, in *D&C Builders Ltd v Rees*<sup>104</sup> the defendants, who owed the plaintiffs some £482, refused to pay anything unless the plaintiffs would accept £300 in full satisfaction of the claim; the plaintiffs (as the defendants knew) were in desperate financial straits, so that recourse to law was not a practicable remedy, and they accepted the £300, giving a receipt in full satisfaction. It was held that this was not a valid surrender of their claim to the balance because of the absence of consideration.<sup>105</sup> The case could, it is submitted, now be supported on the ground of economic duress. In contrast, in cases in which a promise is made to pay an additional sum to the promisee if the latter will

perform its existing contractual duty, but where there is no duress, the law has undergone a marked change. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>106</sup> a carpentry subcontractor which had under-priced work on a number of flats was having difficulty in completing it on time. The contractor promised an additional payment for each flat finished. It was held that this promise was enforceable although the subcontractor was only performing its existing obligation; in the absence of duress the “practical benefit” to the contractor, that if the work was finished on time it would avoid liability for liquidated damages under the main contract, constituted consideration. Although in this case the subcontractor made no threat,<sup>107</sup> the decision suggests that not every case in which a party agrees to make an extra payment in order to obtain the performance originally promised is one of duress, nor perhaps will every agreement secured by a threat to break a contract be voidable. As will be seen later, a “threat” to break a contract which is in fact no more than a statement of the inevitable that will happen unless an extra payment is made may not amount to duress<sup>108</sup>; and even when a breach is not inevitable in that sense, a threat coupled with a demand for extra payment may sometimes be seen as legitimate.<sup>109</sup> Equally, the fact that there was some consideration does not rule out the question of duress. Where the consideration is only trifling, it is suggested that its inadequacy may be relevant in establishing that the variation of the contract has been secured by improper pressure.

## Non-contractual payments

- 026 So far as the law of duress is concerned, there appears to be no difference between a payment made in pursuance of a contract or a variation of a contract procured under duress, and one made on a non-contractual basis in response to an illegitimate threat. Although in the first situation it is technically the case that the contract or contractual variation must first be set aside, it seems that the definition of duress that applies in the two situations is the same.<sup>110</sup>

## Different approaches to economic duress

- 027 Although the doctrine of economic duress is now firmly established, there remains considerable doubt and some disagreement over the circumstances in which relief will be granted, and how the decisions are best explained. It is evident from the dicta in *Occidental Worldwide Investment Corp v Skibs A/S Avanti*<sup>111</sup> and the decision in the *Pao On* case<sup>112</sup> that a party who has agreed to a contractual variation cannot always avoid the variation simply because the other party had threatened to break the contract if it was not varied and this threat had some influence on the party seeking relief. Something more must be shown. Those cases referred to the party’s consent being vitiated. Now that the vitiation of consent approach has been discarded,<sup>113</sup> what additional elements have to be shown?

## Special causal or other requirements?

- 028 Earlier it was suggested that the critical questions are, first, the nature of the pressure or the threats and, secondly, their effect on the victim. In contrast to physical duress, it is not sufficient that the economic duress was merely a reason for the victim entering the contract even though they might have concluded the contract for other reasons: the “but for” test must be satisfied. The question relates to the role played by the frequent judicial reference to the need to show that the claimant had no reasonable or practicable alternative but to submit to the defendant’s demand that the claimant contracts on particular terms.<sup>114</sup> One possible interpretation is that the necessary causation is established if the claimant shows that, but for the threat, they would not have entered the contract, and that lack of a reasonable alternative is simply evidence of this requirement.<sup>115</sup> This interpretation will be rejected. Instead, it will be submitted that the claimant must show, as a separate and independent requirement, that in an objective sense they had no reasonable alternative —in other words, that any reasonable person in the same predicament would have acted in the same way. This must be proved in cases of economic duress, and it is arguably presumed in cases of duress to person or to property, these forms of duress being something that no reasonable person should be expected to put up with.<sup>116</sup>

## Legitimacy of the demand

- 029 Another possible interpretation looks to the nature of the pressure or threat. It is arguable that for a contract to be voidable for economic duress, the threat must not only have been wrongful but illegitimate in the sense of being without any commercial or similar justification.<sup>117</sup> It will be suggested that not every threat to break a contract is illegitimate in this sense, and that where the threat is one to breach a contract it will suffice only if it is made in support of a demand that is illegitimate. In the sections that follow we will consider first causation and lack of a reasonable alternative, and then the legitimacy of the demand.

## Footnotes

<sup>1</sup> See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).

<sup>22</sup> Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.

- 92 [1976] *I Lloyd's Rep.* 293, noted (1976) 92 *L.Q.R.* 496.
- 93 It might, however, be said that his finding that consent was not negative was tantamount to finding that the pressure was not of sufficient *weight* to constitute duress, see below, para.10-033.
- 94 [1979] *Q.B.* 705.
- 95 Relying, inter alia, on *Parker v G.W.R.* (1844) 7 *Man. & G.* 253; *G.W.R. v Sutton* (1869) *L.R. 4 H.L.* 226; *Close v Phipps* (1844) 7 *M. & G.* 586; *Fernley v Branson* (1851) 20 *L.J. Q.B.* 178; *Nixon v Furphy* (1925) 25 *S.R. (N.S.W.)* 151; *Smith v William Charlck* (1924) 34 *C.L.R.* 38, 56; and *D & C Builders Ltd v Rees* [1966] 2 *Q.B.* 617, as to which see below, para.10-025.
- 96 [1980] *A.C.* 614.
- 97 [1980] *A.C.* 614, 635.
- 98 See below, paras 10-042—10-044, where the question whether absence of a reasonable alternative is a separate requirement is discussed.
- 99 [1981] *I.C.R.* 129, reversed [1983] *A.C.* 366.
- 100 [1992] 2 *A.C.* 152, 159, 160, 162, 165, 170.
- 101 *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd* [1984] *I.C.R.* 419; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] *Q.B.* 833 (carrier refused to perform without extra payment after miscalculating number of cartons it could carry per load); *The Alev* [1989] *I Lloyd's Rep.* 138 (owner demanded “financial assistance” from consignee before it would deliver goods under freight pre-paid bills when charterer had failed to pay hire); *Carillion Construction Ltd v Felix (UK) Ltd* [2001] *B.L.R. 1* (sub-contractor threatened to withhold performance if main contractor did not settle contested account); *Cantor Index Ltd v Shortall* [2002] *All E.R. (D)* (Nov) (payment made under threat to close customer’s bets); *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] *EWHC 113 (Comm)*; *Borrelli v Ting* [2010] *UKPC* 21 (a case of illegitimate pressure which did not take the form of a threat: above, paras 10-014—10-015); *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] *EWHC 273 (Comm)*, [2012] *I Lloyd's Rep.* 501. See also *Alec Lobb Ltd v Total Oil GB Ltd* [1983] *1 W.L.R.* 87 (varied on other points, [1985] 1 *W.L.R.* 173); *Dimskal Shipping Co Ltd v I.T.W.F.* [1992] 2 *A.C.* 152; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 *All E.R.* 714 (below, paras 10-058—10-059); *Sapporo Breweries Ltd v Lupofresh Ltd* [2012] *EWHC 2013 (QB)* (at [55]); *Finance Ltd v Bank of New Zealand* (1993) 32 *N.S.W.L.R.* 50 (NSWCA); *Morley (t/a Morley Estates) v Royal Bank of Scotland Plc* [2020] *EWHC 88 (Ch)*; *KSH Farm Ltd v KSH Plant Ltd* [2021] *EWHC 1986 (Ch)* at [601]—[604], where economic duress was rejected partly because the “embryonic terms” of the agreement was proposed by supporting the view that the claimant had not entered into the agreement against her will.
- 102 [1984] *I.C.R.* 419.
- 103 On the question of absence of choice see below, paras 10-042—10-044.
- 104 [1966] 2 *Q.B.* 617; see also *T.A. Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Ltd* (1956) 56 *S.R. (N.S.W.)* 323.
- 105 See above, para.6-128.
- 106 [1991] 1 *Q.B.* 1. Some doubt has been thrown on the correctness of the decision on the consideration point by dicta in the Supreme Court in *MWB Business Exchange Centres Ltd*

- v Rock Advertising Ltd [2018] UKSC 24, [2018] 2 W.L.R. 1603.* See above, paras 6-069—6-072. Nonetheless the point made in the text here remains valid.
- 107 See further below, para.10-050. Compare *South Caribbean Trading Ltd v Trafigura Beheever BV [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128* at [107]–[109] (*Williams* doubted but not applicable because economic duress).
- 108 See below, para.10-050.
- 109 See below, paras 10-047—10-055.
- 110 *CTN Cash and Carry Ltd v Gallaher Ltd [1994] 4 All E.R. 714, 717.* And see Beatson, *The Use and Abuse of Unjust Enrichment* (1991), 106–108. Although see Burrows, *The Law of Restitution*, 3rd edn (2011), at pp.277–280, where he suggests that a wider scope for economic duress may be warranted in a non-contractual context such as in the *CTN* case: “as there was no contractual obligation to wipe away, economic duress should have been given a wider scope so that the bona fides of the defendant was irrelevant”; and see 218–219, where the analogy is drawn with mistake, when there a wider scope for the recovery of money paid in a non-contractual (rather than a contractual) context.
- 111 *[1979] Q.B. 705*; above, para.10-020.
- 112 *[1980] A.C. 614*; above, para.10-022.
- 113 See above, paras 10-004—10-011.
- 114 See below, para.10-041.
- 115 See below, paras 10-042—10-044.
- 116 *Astley v Reynolds (1731) 2 Str. 915, 916*, a case of duress to goods. The court was prepared to assume that the plaintiff “might have such an immediate want of his property that [and alternative course of action] would not do”. The plaintiff need not prove this. See below, paras 10-044—10-046.
- 117 In *Rotamead Ltd v Durston Scaffolding Ltd [2020] EWHC 2738 (TCC)* at [17] and [45], the fair and reasonable nature of the transaction was one reason for the court’s conclusion that there had been no economic duress.

## (d) - Causation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 2. - Duress<sup>22</sup>

(d) - Causation

### Causation in general

- 030 In all cases of duress it is necessary that the victim's agreement was caused by the duress.<sup>118</sup> However, it appears that the nature of the causation required differs according to the nature of the duress.

### Footnotes

<sup>1</sup> See Cartwright, Unequal Bargaining (1991), Pt III; N. Enonchong, Duress, Undue Influence and Unconscionable Dealing, 2nd edn (2012).

<sup>22</sup> Burrows, Law of Restitution, 3rd edn (2011), Ch.5; Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), Ch.10; Virgo, Principles of the Law of Restitution, 3rd edn (2015), Ch.10, Sect.2.

<sup>118</sup> See the speech of Lord Goff in *Dimskal Shipping Co SA v I.T.W.F. [1992] 2 A.C. 152, 165.*

## **(i) - Causation in Duress to the Person**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 2. - Duress<sup>22</sup>

(d) - Causation

(i) - Causation in Duress to the Person

- 031 In *Barton v Armstrong*<sup>119</sup> the Privy Council, relying on the analogy of fraud,<sup>120</sup> held that it was sufficient that the threat was a reason for the victim entering the contract: not only did it not have to be the predominant reason, but the victim was entitled to relief even if he had not shown that he would not have entered the contract without the threat (i.e. even if he would have entered the contract without the threat). The burden of proof is reversed such that it would be up to the party who made the threat to show that it had not influenced the victim in any way.<sup>121</sup>

### **Footnotes**

<sup>1</sup> See Cartwright, Unequal Bargaining (1991), Pt III; N. Enonchong, Duress, Undue Influence and Unconscionable Dealing, 2nd edn (2012).

<sup>22</sup> Burrows, Law of Restitution, 3rd edn (2011), Ch.5; Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), Ch.10; Virgo, Principles of the Law of Restitution, 3rd edn (2015), Ch.10, Sect.2.

<sup>119</sup> [1976] A.C. 104. And see *Singh v Redford* [2018] EWHC 2390 (Ch) at [87]: “It is enough that duress be a contributory cause of the transfer of a benefit by a claimant to a defendant, without it being the sole or operative cause”.

<sup>120</sup> cf. above, para.9-047.

<sup>121</sup> [1976] A.C. 104, 120, 121.

---

End of Document

© 2022 SWEET & MAXWELL

## **(ii) - Causation in Duress to Goods**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 2. - Duress<sup>22</sup>**

**(d) - Causation**

**(ii) - Causation in Duress to Goods**

- 032 In cases of duress to goods, it seems that the threatened seizure must have been a significant cause<sup>122</sup> of the victim's agreeing to the contract or payment. Thus, the victim will not be entitled to avoid the contract if he had an effective alternative remedy, for example to obtain an injunction to prevent the seizure, though it is recognised that a legal remedy may be of no avail if the victim has an urgent need for the goods.<sup>123</sup> The victim will also be unable to avoid the contract if it was a "voluntary settlement" of the other party's claim. The meaning of this is not wholly clear<sup>124</sup> but it appears that relief will be denied if the threat was not the reason for the victim agreeing to the other party's demand. Nor is it clear exactly what is meant by "significant cause". Relief will be denied if the threat did not influence the victim at all, so that it was not even "one of the reasons" for the victim agreeing to the other party's demand.<sup>125</sup> On the other hand, it seems unlikely that the courts will apply the analogy of fraud as they do in cases of duress to the person.<sup>126</sup> Thus the victim will not have the benefit of the reversed burden of proof in the same way as the victim of duress to the person<sup>127</sup> nor that it will suffice that the threat was merely "one reason" for his actions or "present to his mind".<sup>128</sup> It seems likely that the victim must show that, "but for" the threat, he would not have entered the contract. We will see that it has been said that this is the appropriate test of causation in economic duress<sup>129</sup> and, given the similarity of duress of goods and economic duress, the same test of causation seems appropriate.

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.
- 122 See the speech of Lord Goff in *Dimskal Shipping Co SA v I.T.W.F. [1992] 2 A.C. 152, 165*.
- 123 *Astley v Reynolds (1731) 2 Stra. 915, 916*.
- 124 See Burrows, *Law of Restitution*, 3rd edn (2011), pp.255–256.
- 125 cf. *Barton v Armstrong [1976] A.C. 104*, above, para.10-031.
- 126 See para.10-031.
- 127 cf. *Barton v Armstrong [1976] A.C. 104*.
- 128 cf. above, paras 9-046—9-047.
- 129 See next paragraph.

## **(iii) - Causation in Economic Duress**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 2. - Duress<sup>22</sup>

(d) - Causation

(iii) - Causation in Economic Duress

**“Predominant cause” not required**

- 033 As mentioned earlier,<sup>130</sup> some cases of economic duress applied the test of whether the victim’s will was overborne so that they did not consent to the contract. This suggested that relief was only possible if the threat was the overwhelming reason for the victim’s decision. However, the “overborne will” test has now been abandoned.<sup>131</sup> This, together with Lord Goff’s dictum quoted in the next paragraph,<sup>132</sup> suggests that the combination of threat and other pressures need not be overwhelming, or “the only reason” the victim entered the contract.

**“but for”**

- 034 In *Dimsdal Shipping Co SA v I.T.W.F.*<sup>133</sup> Lord Goff said that there may be duress where “the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter the relevant contract”. This dictum indicates that, as cases of duress of goods,<sup>134</sup> the victim will not have the benefit of the reversed burden of proof in the same way as the victim of duress to the person,<sup>135</sup> nor will it suffice that the threat was merely “one reason” for his actions or “present to his mind”. As Mance J said in *Huyton v Cremer*,<sup>136</sup> by “significant

cause” Lord Goff meant that what the judge termed the “relaxed view” of causation in the special context of duress to the person does not apply to economic duress.<sup>137</sup> Mance J said:

“... the minimum basic test of subjective causation in economic duress ought ... to be a ‘but for’ test. The illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching. There may of course be causes where a common sense relaxation ... is necessary, for example in the event of an agreement induced by two concurrent causes, each otherwise sufficient to ground a claim of relief, in circumstances where each alone would have induced the agreement.”<sup>138</sup>

Adopting a “but for” test would place cases of economic duress on a par with cases of negligent or non-negligent misrepresentation.<sup>139</sup> This seems appropriate. Only in the special circumstances of duress to the person, as with cases of fraudulent misrepresentation, should relief be given merely because the threat or fraud had some influence on the mind of the victim.

## Voluntary submission

- 035 Confirmation of the need for “but for” causation comes from indications that relief will be denied if the reason for the victim’s agreement was that he was prepared to pay it anyway. This may have been relevant in the *Pao On* case,<sup>140</sup> where the actual decision seems to have rested on the fact that the defendants believed that they stood to lose very little by granting the amendment sought.<sup>141</sup> In *Morley v The Royal Bank of Scotland Plc*<sup>142</sup> no duress was found because, inter alia, the agreement concluded was one that the claimant wanted and originally proposed, against the defendant’s wishes. It “was the result of robust (and even aggressive) negotiations between commercial parties”, each of which was legally advised and able to look after its own interests.

## Protest

- 036 In the *Pao On* case<sup>143</sup> it was said that it was relevant whether or not the victim protested. This seems to be a question of evidence as to whether or not the threat had a coercive effect. It has been accepted for many years that when a payment is made in order to avoid the wrongful seizure of goods, protest “affords some evidence ... that the payment was not voluntarily made”,<sup>144</sup> but that the fact that the payment was made without protest does not necessarily mean that the payment was voluntary.<sup>145</sup> The victim may not protest because they see no point in it or they may not wish to antagonise the coercing party whose performance they need.

## Independent advice

- 037 Likewise in the *Pao On* case<sup>146</sup> it was said that it is relevant whether or not the victim had independent advice. The relevance of this is perhaps less obvious: access to legal advice, for example, will not increase the range of options available to the victim, and lack of advice therefore cannot be an absolute requirement. However, whether or not the victim appreciated that they had an alternative remedy, and the practical implications of following it, would be relevant to the question of causation.

<sup>147</sup>



## Gravity of threat

- 038 It is likely that the threat must normally be one of some gravity. This is to some extent implicit in the factors to which attention must be had, as specified by Lord Scarman in the *Pao On* case,<sup>148</sup> including the alternative remedies available to the threatened party (and their effectiveness). It is evident that minor threats, even if unlawful or improper, can normally give no redress in contract law: the party threatened ought to pursue their other remedies. How serious the threats must be in order to constitute duress may depend on the physical and mental condition of the person threatened. Weakness of intellect or fear, whether reasonably entertained or not, may be relevant factors which should be taken into account.<sup>149</sup> The seriousness of the threat is therefore additional evidence as to whether the victim was coerced by it.

## Steps taken to avoid contract

- 039 The *Pao On* case also referred to the relevance of “whether after entering the contract he took steps to avoid it” in determining whether the claimant had been coerced.<sup>150</sup> In *Morley v The Royal Bank of Scotland Plc*,<sup>151</sup> the Court of Appeal found no coercion because, *inter alia*, the fact that the claimant:

“... did not take any step to set the agreement aside until five years later is significant, not only because it demonstrates his affirmation of the agreement, but also because it negates any finding of coercion.”

## Conclusion on causation

- 040 It is submitted that for a contract to be voidable on the grounds of economic duress, the usual rule of causation should apply: the victim must show that “but for” the threat they would not have entered the contract.<sup>152</sup> It is not necessary that the victim shows that the threat was the predominant reason for them entering the contract or that it was particularly coercive. On the other hand, it is insufficient that the economic pressure was merely “a reason” for the victim entering the contract.

## Footnotes

- 1 See Cartwright, Unequal Bargaining (1991), Pt III; N. Enonchong, Duress, Undue Influence and Unconscionable Dealing, 2nd edn (2012).
- 22 Burrows, Law of Restitution, 3rd edn (2011), Ch.5; Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), Ch.10; Virgo, Principles of the Law of Restitution, 3rd edn (2015), Ch.10, Sect.2.
- 130 Above, paras 10-006—10-007.
- 131 Above, paras 10-006—10-007.
- 132 Below, para.10-034.
- 133 [1992] 2 A.C. 152, 165.
- 134 See previous paragraph.
- 135 But note the contrary authority of *Crescendo Management Pty Ltd v Westpac Banking Corp (1988)* 19 N.S.W.L.R. 40.
- 136 *Huyton SA v Peter Cremer GmbH [1999]* 1 Lloyd's Rep. 620, 636; *Kolmar Group AG v Traxpo Enterprises Pvt Ltd [2010]* EWHC 113 (Comm) at [92].
- 137 See also Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), paras 10-73—10-74.
- 138 [1999] 1 Lloyd's Rep. 620, 636. But see further below, para.10-041.
- 139 See above, para.9-046.
- 140 *Pao On v Lau Liu Long [1980]* A.C. 614, above, para.10-022. Birks, Introduction to the Law of Restitution (1985), p.183; compare Burrows, Law of Restitution, 3rd edn (2011), p.269.
- 141 [1980] A.C. 614, 635.
- 142 *Oliver Dean Morley T/A Morley Estates v The Royal Bank of Scotland Plc [2021]* EWCA Civ 338 at [54]—[56].

- 143 *Pao On v Lau Yiu Long* [1980] A.C. 614.
- 144 *Maskell v Horner* [1915] 3 K.B. 106, 120.
- 145 See below, para.32-127.
- 146 *Pao On v Lau Yiu Long* [1980] A.C. 614; above, para.10-022.
- 147 *Hennessy v Craigmyle & Co Ltd* [1986] I.C.R. 461; *Instagroup Ltd v Carroll* [2022] EWHC 464 (QB) at [85]; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), para.4-025.
- 148 *Pao On v Lau Yiu Long* [1980] A.C. 614; above, para.10-022.
- 149 *Scott v Sebright* (1866) 12 P.D. 21.
- 150 *Pao On v Lau Yiu Long* [1980] A.C. 614, 635.
- 151 *Oliver Dean Morley (t/a Morley Estates) v The Royal Bank of Scotland Plc* [2021] EWCA Civ 338 at [55].
- 152 Contrast N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), paras 4-011—4-014, who favours applying the *Barton* test (see above, para.10-031).

## **(e) - Additional Requirement of No Reasonable Alternative?**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 2. - Duress<sup>22</sup>

### **(e) - Additional Requirement of No Reasonable Alternative?**

-041 After the passage quoted in para.10-034 above, Mance J continued in relation to economic duress:

“On the other hand it also seems clear that the application of a simple ‘but for’ test of subjective causation in conjunction with an actual or threatened breach of duty could lead too readily to relief being granted. It would not, for example, cater for the obvious possibility that, although the innocent party would never have acted as he did, but for the illegitimate pressure, he nevertheless had a real choice and could, if he had wished, equally well have resisted the pressure and, for example, pursued alternative legal redress.”

Thus, it is seems that Mance J considered that there may be other elements to economic duress.<sup>153</sup> It is certainly relevant whether or not the victim had a reasonable alternative. The victim’s lack of choice was emphasised by Lord Scarman in the *Pao On*<sup>154</sup> and *Universe Sentinel*<sup>155</sup> cases and has clearly been an important factor in those cases in which relief has been given.<sup>156</sup> This may be seen as a prerequisite or merely evidential<sup>157</sup>; but it seems that if the victim had a reasonable alternative to submitting to the other party’s demand, he will seldom obtain relief.<sup>158</sup>

### **Reasonable alternative as evidence of causation**

-042



References to the existence of reasonable alternatives may sometimes be explicable on causal grounds. Thus, a refusal, in breach of contract, to supply goods unless some extra consideration is supplied by the buyer, may lack genuine coercive force where alternative supplies are available in the market.

<sup>159</sup>

**U** Similarly, where the party claiming relief had adequate time to claim redress at law, and there is no reason to think that this would not protect or compensate him, submission to the threat may simply reflect that party's belief that his best interests would be served by such submission rather than by resort to the courts. The existence of a reasonable alternative may have been relevant in the *Pao On*<sup>160</sup> decision itself: Lord Scarman referred in general terms to American case law stressing the importance of examining the alternatives available to the party claiming relief.<sup>161</sup>

- 043 After the passage quoted in para.10-041 above,<sup>162</sup> Mance J remarked that absence of a reasonable alternative was not "an inflexible third ingredient" (in addition to illegitimate pressure and causation).<sup>163</sup> David Richards LJ has expressed the same view<sup>164</sup>: that whether the victim had any realistic alternative goes to the question of causation. On this view, absence of a reasonable alternative is not an absolute requirement but rather very strong evidence of whether the victim was in fact influenced by the threat.<sup>165</sup>

## Reasonable alternative as additional requirement

- 044 In *Chaggar v Chaggar*<sup>166</sup> it was pointed out that it may make little difference where in the analysis the absence of a reasonable alternative falls. Nevertheless, it is submitted that the existence of no reasonable alternative for the victim but to submit to the threat and demand should be regarded as an *independent and additional requirement* of duress since it goes to the very essence of the jurisdiction.<sup>167</sup> The House of Lords in the *Universe Tankships* case describes the classic case of duress as "the victim's intentional submission arising from the realisation that there is no other practicable choice open to him".<sup>168</sup> The US Second Restatement of Contracts describes duress as "an improper threat ... that leaves the victim no reasonable alternative".<sup>169</sup> It may be objected that if no reasonable alternative is of the essence of duress, it should not be invisible in cases of duress to the person and to property. The answer may be that seriousness of these forms of duress not only lowers level of causation to be proved, but also absolves the claimant of proving that they had no reasonable alternative to submission. Thus in *Astley v Reynolds*<sup>170</sup> the defendant informed the claimant that he could not redeem his plate (pawned to the defendant) unless he paid more than twice the legal interest rate. The claimant paid but then successfully recovered the excess payment for duress. The court was prepared to *assume* that he "might have such an immediate want of his property that [an alternative course of action, e.g. a tort action for wrongful interference with

goods] would not do".<sup>171</sup> A did not need to actually prove it. Cases can be imagined in which the illegitimate demand was the factor which "tipped the balance" and led to the victim agreeing to the demand even though he had an alternative. As Mance J suggested, in such a case, relief would be available even though "but for" causation was satisfied.<sup>172</sup> It has been said that "economic duress can only provide a basis for avoiding a contract if there was no real alternative".<sup>173</sup> This suggests that a plea of duress would fail if a reasonable person would have thought that an alternative was practical, even if the actual victim did not and it is shown that he would not have entered the contract but for the threat.

- 045 In *DSND Subsea v Petroleum Geo-Services*,<sup>174</sup> Dyson J recognised "no practicable alternative" as a separate requirement of duress but held, on the facts, that the claimant *did* have the practicable alternative of terminating the contract with the defendant making the threat and seeking alternative suppliers. In contrast, duress was found in *Adam Opel v Mitras Automotive*,<sup>175</sup> where the court rejected the defendant's argument that the claimant *had* a practical alternative. The claimant's new supplier was not ready to begin production and the claimant could not have obtained supplies elsewhere. While it had a strong case for an injunction, the court recognised that the claimant:

"... had to take a rapid decision in circumstances where the threat had already become reality. Capitulation would ensure with certainty the restoration of supplies and at a price which, though seen ... as extortionate, would be a fraction of the loss which would otherwise be suffered. By contrast, there were serious imponderables about the injunction route ... [The claimant was] entitled to consider that the outcome would not inevitably be in their favour ... [T]he court's attitude to the grant of a mandatory interim injunction to supply an indeterminate number of units on an indeterminate timetable could not ... have been assumed."<sup>176</sup>

## Conclusion on reasonable alternative in economic duress

- 046 There is some difference of opinion on whether the existence of a reasonable alternative is evidentiary or an independent requirement. The combination of a wrongful threat without which the innocent party would not have agreed to the contract and the absence of any reasonable alternative are clearly very important factors. On the one hand, it is argued that while the victim will seldom obtain relief if they had a reasonable alternative, this is because they will fail to convince the court that they would not have entered the contract but for the threat.

<sup>177</sup>

**U** On the other hand, the House of Lords and lower courts, and some writers, have argued that it is a necessary ingredients of economic duress.

178

**U** It is submitted that the latter are correct. This has been confirmed, at least in relation to economic duress, by the Supreme Court in *Times Travel (UK) Ltd v Pakistan International Airlines Corp*,

179

**U** referring to “a third element. This is that the claimant must have had no reasonable alternative to giving into the threat (or pressure)”.

180

**U**

## Footnotes

1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).

22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.

153 *Huyton SA v Peter Cremer GmbH & Co [1999] 1 Lloyd's Rep. 620, 637*. See also *Occidental Worldwide Investment Corp v Skibs A/S Avanti [1976] 1 Lloyd's Rep. 293*; above, para.10-020 where the plea of duress was rejected on the basis that the owners were subjected only to “normal commercial pressures”.

154 *Pao On v Lau Liu Long [1980] A.C. 614, 635*. See also *Halson (1991) 107 L.Q.R. 649*.

155 “The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no practical choice open to him”: *[1983] 1 A.C. 366, 400*.

156 e.g. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd [1979] Q.B. 705*; *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd [1984] I.C.R. 419*; *The Alev [1989] 1 Lloyd's Rep. 138*. cf. *Adam Opel GmbH v Mitras Automotive UK Ltd [2007] EWHC 3252 (QB)*, *[2007] All E.R. (D) 272 (Dec)* (in the circumstances, an injunction was not an adequate alternative to nullify pressure caused by threat to refuse to deliver supplies: at [33]); *Kolmar Group AG v Traxpo Enterprises Pvt Ltd [2010] EWHC 113 (Comm)*, *[2010] 2 Lloyd's Rep. 653* (if did not perform, the victim would face having very large claims which were unsecured: see at [94]).

157 See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp.122–126.

158 *Huyton SA v Peter Cremer GmbH [1999] 1 Lloyd's Rep. 620, 638*; *Morley (t/a Morley Estates) v Royal Bank of Scotland Plc [2020] EWHC 88 (Ch)* at [270]–[271] (no economic

duress because the claimant “retained the choice to resist the threat” initially by not signing the agreement and later by choosing not to litigate).

•159 *Instagroup Ltd v Carroll [2022] EWHC 464 (QB)* at [83]–[84].

160 *[1980] A.C. 614.*

161 For examples, see *Tristate Roofing Co of Uniontown v Simon (1958) A.2d. 333, 335; Gallagher Switchboard Corp v Heckler Electric Co (1962) 229 N.Y.S. 2d. 623, 630.*

162 *Huyton SA v Peter Cremer GmbH & Co [1999] 1 Lloyd's Rep. 620, 638.* The objective approach to whether there was a reasonable alternative is criticised in Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), para.10-55; and the authors point out that in fact the courts seem quite ready to accept that the victim had no real alternative: paras 10-75 and 10-77.

163 *Huyton SA v Peter Cremer GmbH & Co [1999] 1 Lloyd's Rep. 620, 638.* In *DSND Subsea Ltd v Petroleum Geo-services ASA [2000] B.L.R. 530*, [638], Dyson J said “compulsion on, or lack of practical choice for, the victim” was one of “the ingredients of actionable duress”; but it is suggested that he did not mean lack of practical alternative to be an absolute requirement, since (also at [31]) he listed “whether the victim had any realistic practical alternative but to submit to the pressure” as one a range of factors to be taken into account: see below, para.10-055.

164 *Times Travel (UK) Ltd v Pakistan International Airlines Corp [2019] EWCA Civ 828, [2019] 2 Lloyd's Rep. 89* at [65], in reference to the range of factors set out by Dyson J in *DSND Subsea Ltd v Petroleum Geo Services ASA [2000] B.L.R. 530* at [131]; see also *Kolmar Group AG v Traxpo Enterprises Pvt Ltd [2010] EWHC 113 (Comm)* at [92].

165 For example in *Oliver Dean Morley T/A Morley Estates v The Royal Bank of Scotland Plc [2021] EWCA Civ 338* at [53], the finding that the claimant did have a practical alternative to submission to the defendant’s demand contributed to the finding of an absence of coercion.

166 *[2018] EWHC 1203 (QB)* at [233].

167 *J. Beatson, “Duress, Restitution and Contract Modification” in the Use and Abuse of Unjust Enrichment (1990), 95;* Virgo, Principles of the Law of Restitution, 3rd edn (2015), p.225; *P.S. Atiyah in “Duress and the Overborne Will Again” (1983) 99 L.Q.R. 353* at 356 describes duress as concerned with “the permissible limits of coercion in our society” and “the extent to which society can legitimately require people to stand up to threats when they are made, rather than to submit and litigate afterwards”.

168 *Universe Tankships of Monrovia Inc v I.T.W.F. [1983] 1 A.C. 366* at 400.

169 American Restatement of Contract (Second), § 175(1).

170 *(1731) 2 Str. 915.*

171 *(1731) 2 Str. 915, 916.*

172 See above, para.10-041.

173 Sir John Donaldson MR in *Hennessy v Craigmyle & Co Ltd [1986] I.C.R. 461, 468.*

174 *DSND Subsea Ltd v Petroleum Geo-services ASA [2000] B.L.R. 530.*

175 *Adam Opel v Mitras Automotive [2007] EWHC 3205 (QB), [2008] Bus L.R. D55.*

176 *Adam Opel v Mitras Automotive [2007] EWHC 3205 (QB)* at [32].

- 177 See also N. Enonchong, Duress, Undue Influence and Unconscionable Dealing, 2nd edn (2012), paras 4-020 and 4-024—4-030.
- 178 See above, para.10-044.
- 179 *Times Travel (UK) Ltd v Pakistan International Airlines Corp [2021] UKSC 40*, per Lord Burrows JSC, and at [1] per Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Kitchin JJSC agreed). And see *Heritage Travel and Tourism Ltd v Windhorst [2021] EWHC 2380 (Comm)* at [34.2].
- 180 Citing Dyson J in *DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo-Services ASA [2000] B.L.R. 530* at [131]; *Borrelli v Ting [2010] UKPC 21, [2010] Bus. L.R. 1718* at [35].

## (f) - Legitimacy of the Threat

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 2. - Duress<sup>22</sup>

(f) - Legitimacy of the Threat<sup>181</sup>

### Threat to commit an unlawful act

- 047 As already indicated, it is clear that not all threats can be regarded as improper or illegitimate, and it is necessary in the law of duress to distinguish between legitimate and other forms of pressure or threats. *Prima facie* it is thought to be clear that a threat to commit an unlawful act will constitute an improper threat for the purposes of the law of duress.<sup>182</sup> Certainly a threat to commit a crime or a tort as a means of inducing the coerced party to enter into some contract must *prima facie* be improper.<sup>183</sup> However, this may not be true of every threatened wrong, particularly a threat to break a contract.

### Threat to break a contract as economic duress

- 048 When the threatened wrong is a breach of contract it seems that the victim will not necessarily be entitled to relief even if they would not have agreed “but for” the threat and even if they had no reasonable alternative. The decisions in *Occidental Worldwide Investment Corp v Skibs A/S Avanti*<sup>184</sup> and *Pao On v Lau Liu Long*<sup>185</sup> suggest that something more than this is required. As we saw earlier, one possible “additional factor” is that the combination of the threat and commercial pressures were overwhelming, but that “causal” approach was rejected.<sup>186</sup> An alternative possibility is that the additional factor that may be required is that the threatened breach

of contract must be regarded as “illegitimate pressure”, and that in some circumstances a threat of a breach of contract may not be regarded as illegitimate.

## Can a threatened breach be “legitimate”?

- 049 This possibility is suggested by American cases. Where unexpected difficulties arise in the performance of a contract (even if they do not amount to frustrating circumstances) it is often commercially reasonable for one party to claim extra remuneration, or some other extra-contractual concession, as the price of his continuing with performance. In these circumstances, a threat to break the contract unless the extra consideration is forthcoming may well be regarded as a legitimate form of commercial pressure<sup>187</sup> where the unanticipated difficulty means that he is genuinely unable to perform without an extra payment, and possibly also if the threatening party acts in the bona fide belief that he is entitled to some extra payment or if the demand is in some sense “fair”. We will consider these three possibilities in turn.

## Statement of the inevitable is not a threat

- 050 A genuine inability to perform without the promised payment might have been significant in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>188</sup> had the subcontractor demanded extra payment. On the facts there was no duress because no threat was made: the initiative for the extra payment came from the contractors.<sup>189</sup> If, however, the subcontractors had said that without extra payment, they would be unable to perform, and the main contractors had then promised the extra payment, it seems unlikely that the main contractors could have avoided the promise to pay extra on the ground of duress. There are a number of ways in which this result could be explained. One is that a party who truthfully states that, without the extra payment or concession demanded, he will be unable to perform is not making a threat; he is simply stating a fact.<sup>190</sup> This is not a matter of the words used; the courts have recognised that a threat may be implicit.<sup>191</sup> Thus where an agreement is entered into not because of a threatened breach of contract but through fear of prosecution, it was said that:

“... not only is no direct threat necessary, but no promise need be given to abstain from a prosecution. It is enough if the undertaking were given to prevent a prosecution and that desire were known to those to whom the undertaking was given.”<sup>192</sup>

A “veiled threat” has been held to constitute duress.<sup>193</sup> But if it is genuinely the case that the party will be forced to default if he is not paid extra, for instance because he will inevitably become bankrupt, he cannot be regarded as making a threat because he is powerless to prevent his

default.<sup>194</sup> It would seem appropriate to uphold any variation that the other party agrees or extra payment that he makes in such circumstances.<sup>195</sup> However, this is quite a narrow exception. It may be the case that it is not impossible for the party to perform without the extra payment but doing so will cause him very severe hardship.

## Bad faith

- 051 Another approach is to say that a demand made in bad faith is illegitimate and may amount to duress.<sup>196</sup> There is some judicial support for the relevance of the good or bad faith of the party exerting the pressure.<sup>197</sup> One difficulty, however, is to know what is meant by good faith or bad faith. It seems correct to say that a party who exploits the other's position to demand a payment that is unrelated to the contract, and to which he knows he has no legal or moral right, is guilty of economic duress.<sup>198</sup> However, a demand may constitute economic duress even though the demand is related to the contract, and it is not necessary that the threatening party was deliberately exploiting the victim's position.<sup>199</sup> Thus, duress has been found although the threatening party was trying to solve its own financial or other problems,<sup>200</sup> or respond to change of circumstances,<sup>201</sup> or correct what was always clearly a bad bargain.<sup>202</sup>
- 052 One interpretation is that a party is in bad faith unless he honestly believes that his demand is legally justified, but it is not evident that every claim which is known not to have a legal basis should be treated as made in bad faith; nor conversely that any claim that is honestly made should be acceptable however little legal justification for it there may be. If the claim is genuinely made, the other party may of course agree to it because it seems fair rather than because of the threat, but that will not necessarily be the case: the threat may still be a "but-for" cause of the victim's agreement.<sup>203</sup> If a party makes a claim that it knows to be bad, any compromise that results may lack consideration,<sup>204</sup> so that the compromise is unenforceable on that ground. Provided however that there is other consideration, in some situations—for example, when a claim is made by a party who has been confronted with unexpected difficulty or expense not amounting to frustration<sup>205</sup>—it might be argued that the claim should not be regarded as illegitimate for the purposes of duress even though the party knows that there is no legal basis for it but honestly believes that the demand is justifiable in commercial terms. On existing authorities, however, it seems that good faith in this sense does not preclude a finding of economic duress.<sup>206</sup> Similar circumstances may have obtained in the *North Ocean Shipping* case,<sup>207</sup> yet it was held that there was economic duress. Thus, the role of good faith or bad faith in economic duress is uncertain. While one judge has expressed the view that good or bad faith is irrelevant,<sup>208</sup> other judges have said that the good or bad faith of the party making the threat may be a relevant factor.<sup>209</sup>

## Fairness of the demand

- 053 In the cases, some of the demands appear to have been made in order to rectify an apparent imbalance in the existing contract; others appear to have been unrelated to any such factor. Where the demand is recognised by the “victim” as fair, that may lead to the conclusion that he was not really influenced by the threat so much as by a desire to help out the other party, and thus the necessary causal link will be missing.<sup>210</sup> For example, in *Rotamead Ltd v Durston Scaffolding Ltd*<sup>211</sup> the fair and reasonable nature of the transaction was one reason for the court’s conclusion that there had been no economic duress. But if it is clear that the threat did have a significant influence, it does not seem that the fact that the demand might rectify an imbalance in the contract will make the demand legitimate. In *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd*<sup>212</sup> the plaintiffs miscalculated the number of cartons of the defendants’ goods that they could carry on a trailer load for delivery to a retail chain and, when they discovered the truth, stated that they would not carry any more cartons without an extra payment. The defendants were heavily reliant on the contract with the retail chain and were unable to find an alternative carrier, so they agreed; but later they refused to pay the extra charges. Tucker J held that their consent had been vitiated by duress.<sup>213</sup> Although the mistake was the plaintiffs’ and unknown to the defendant, it seems likely that the latter did get the benefit of cheaper rates than normal for the goods to be carried. Nor would an evaluation of the “fairness” of the changed contract be consistent with the courts’ normal approach.<sup>214</sup>

## Conclusion on legitimacy of threat to break contract

- 054 It is thus difficult to state with confidence whether a threat of a breach of contract will ever be regarded as legitimate and, if so, in what circumstances. It is submitted that deliberate exploitation of the victim’s position with a view to gaining some advantage, particularly one unrelated to the contract and to which the threatening party knows he is not entitled, is clearly illegitimate.<sup>215</sup> At the other end of the scale, an apparent threat should not be treated as illegitimate if it was really no more than a true statement that, unless the demand is met, the party making it will be unable to perform. The difficult case is that of the party who has a genuine belief that he is entitled to the amount demanded. It is submitted that, by analogy to the cases in which it has been held that there is consideration for a compromise of a claim which is in fact bound to fail if the party making the claim honestly and reasonably believed in its validity,<sup>216</sup> a party who honestly and not unreasonably believes that he has a legal claim is not acting in bad faith by demanding what he thinks is due. A court should hesitate to find that the demand was illegitimate. It is also suggested that a demand made in good faith in the sense that the party demanding has a genuine belief in the moral strength of his claim—for example, because he has encountered serious and unexpected

difficulties in performing and will suffer considerable hardship if his demand is not met; or to correct an acknowledged imbalance in the existing contract—may in some circumstances also be treated as legitimate. Here the behaviour of the victim, for example whether he protests, will be relevant. First, as argued earlier,<sup>217</sup> it will go to causation: if the victim pays without protest, that may be evidence that he was not influenced by the threat. But secondly, payment without protest may leave the demanding party believing that the justice of his demand is admitted, whereas it will be harder for him to prove that he was acting in good faith if he ignores the victim's protests.

## A range of factors

-055 However, it is doubtful whether either the good faith of the party making the threat or the apparent fairness of his demand provides a touchstone by which to determine whether a threatened breach of contract which influenced the victim and which left him no reasonable alternative amounts to economic duress. In analogous doctrines, such as undue influence, the courts have refused to lay down precise limits to the doctrine.<sup>218</sup> This is with good reason: the facts with which they are presented can vary widely. We can expect the courts to maintain the same fluid approach to economic duress. It is clear that the threat must be made, as opposed to a warning being given.<sup>219</sup> The threat must influence the victim, at least to the extent that he would not have entered the contract from which he seeks relief “but for” the threat.<sup>220</sup> He will seldom have a remedy if he had a reasonable alternative.<sup>221</sup> The threat must be “illegitimate”, and this normally<sup>222</sup> requires that the threat is of a breach of contract or other civil wrong.<sup>223</sup> But threat of a breach of contract which caused him to enter the contract or variation agreement may not suffice: he may have to show more than these facts, and what the additional facts will be is not rigidly defined. The degree of commercial pressure that combined with the threat to influence him, the good faith or bad faith of the party making the threat and possibly even the fairness of the latter's demand may all be taken into account.<sup>224</sup> In other words, the courts take into account a range of factors. As Dyson J has said:

“In determining whether there has been illegitimate pressure, the courts take into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressure of normal commercial bargaining.”<sup>225</sup>

In the context of lawful act duress, Lord Burrows has rejected the “range of factors” approach, distinguishing it from the context of illegality where it is applied

<sup>226</sup>



“in the realm of lawful act economic duress, the law is in its infancy and the best approach is for the common law to be clarified or developed in a traditional incremental way.”

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.
- 181 See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp.117–129; Burrows, *Law of Restitution*, 3rd edn (2011), especially pp.267–268.
- 182 In *Dimska Shipping Co SA v ITWF, The Evia Luck [1992] 2 A.C. 152* the House of Lords held that the question of whether economic pressure amounted to duress was *prima facie* a matter for the proper law of the contract, so that whether the conduct was lawful or not fell to be determined by the proper law of the contract rather than by that of the place where the threat was made. In *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674, 689, 730* it was said that, nonetheless, counsel had been correct to concede, in the light of *Kaufman v Gerson [1904] 1 K.B. 591*, that some forms of duress are so shocking that English law would not enforce a contract made under such duress irrespective of whether the threat would be acceptable, and the contract valid, under the governing law. See below, para.33-299.
- 183 See the American Restatement of Contract, para.176(1).
- 184 *[1976] 1 Lloyd's Rep. 293*; above, para.10-020.
- 185 *[1980] A.C. 614*; above, para.10-022.
- 186 See above, para.10-033.
- 187 See, e.g. *Goebel v Linn* (1882) 11 N.W. 284; *Linz v Schuck* (1907) 67 A. 286. There is a sense in which the *Pao On case [1980] A.C. 614* also resembles these cases inasmuch as the variation obtained by the alleged duress was needed to put right what was an obvious commercial omission or mistake in the original contract.
- 188 *[1991] 1 Q.B. 1*; above, para.10-025.
- 189 But see further below, para.10-053.
- 190 Birks, *An Introduction to the Law of Restitution* (1985), p.183. cf. *Biffin v Bignell (1862) 7 H. & N. 877*, where it was held to be no duress to warn the promisor that the probable consequence of her failure to agree would be her continued detention in a lunatic asylum.

- 191 See *Birks* [1990] *L.M.C.L.Q.* 342, 346.
- 192 *Mutual Finance Co Ltd v John Wetton & Sons Ltd* [1937] 2 *K.B.* 389, 395. Thus, in *Williams v Bayley* (1866) *L.R. 1 H.L.* 200 a father executed a mortgage to a banker, who insisted on this course as he had it in his power to prosecute the father's son for forgery. There was no direct threat of a prosecution, but the mortgage was executed in return for the delivery up of the documents forged. It was held that the mortgage was unenforceable in equity as the father was not a free and voluntary agent since he knew that unless he undertook the liability his son would be prosecuted.
- 193 *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd* [1984] *I.C.R.* 419.
- 194 *Posner* (1977) 6 *J.L.S.* 411 makes the telling point that if a party will become bankrupt unless he is promised extra, it is very much in the promisor's interest to be able to make a binding promise to pay the extra amount in order to get the work finished, even though the promisor has no practical choice.
- 195 *Halson* (1991) 110 *L.Q.R.* 649.
- 196 Birks at p.183; also [1990] *L.M.C.L.Q.* 342, 347.
- 197 e.g. *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] *B.L.R.* 530 at [131]; *Adam Opel GmbH v Mitras Automotive UK Ltd* [2007] *EWHC 3252 (QB)*, [2007] *All E.R. (D)* 272 (*Dec*) (no good faith belief that entitled to compensation demanded). And see A Burrows, *The Law of Restitution* (3rd edn, OUP, 2010) 233.
- 198 Compare *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] *I.C.R.* 419, where the difficulty faced by the threatening party (a strike by its workers) was not related to the contract and may have been one it should have dealt with. See also *Adam Opel GmbH v Mitras Automotive UK Ltd* [2007] *EWHC 3252 (QB)*, [2007] *All E.R. (D)* 272 (*Dec*) (claim so unreasonable that genuine belief would count for little: at [34]).
- 199 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] *Q.B.* 705.
- 200 *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] *Q.B.* 833, where the threatening party had badly miscalculated and so underpriced the contract by a half.
- 201 *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] *I.C.R.* 41, where the threatening party's cost of performance increased substantially due to industrial action by its workforce.
- 202 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 *Q.B. 1.*
- 203 But compare Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 10-62—10-63.
- 204 Mance J in *Huyten v Cremer* [1999] 1 *Lloyd's Rep.* 620, 637. This follows from cases such as *Wade v Simeon* (1846) 2 *C.B.* 528; 135 *E.R.* 1061: above, para.6-050.
- 205 cf. below, Ch.26.
- 206 See Birks and Chin in Beatson & Friedmann (eds), *Good Faith and Fault in Contract Law* (1995), pp.57–97, 62. See also *Huyten SA v Peter Cremer GmbH & Co* [1999] 1 *Lloyd's Rep.* 620, 637.
- 207 [1979] *Q.B.* 705; above, para.10-021.
- 208 Kerr J in *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 *Lloyd's Rep.* 293, 335.

- 209 *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep. 620, 637, though Mance J described the argument that a threatened breach of contract may not represent illegitimate pressure if there was a reasonable commercial basis for the threat as "by no means uncontentious"; *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] B.L.R. 530 at [131], where Dyson J said: "In determining whether there has been illegitimate pressure, the courts take into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith ...". The relevant passage is quoted in full below, para.10-055.
- 210 The attitude of the main contractors in *Williams v Roffey* [1991] 1 Q.B. 1 may be explained by the fact that the subcontractors appear to have under-priced the job. cf. Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), para.10-64.
- 211 [2020] EWHC 2738 (TCC) at [17] and [45]; the fair and reasonable nature of the transaction was one reason for the court's conclusion that there had been no economic duress. And see *Morley v The Royal Bank of Scotland Plc* 2021] EWCA Civ 338 at [54]–[58] (no duress where the Court of Appeal found that the challenged agreement was one that the claimant "wanted and had originally proposed", against the defendant's original wishes).
- 212 [1989] Q.B. 833.
- 213 He also held that there was no consideration for the payment; but after the decision in *Williams v Roffey & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, the presence or absence of consideration may depend on whether or not there was duress: see above, para.10-025.
- 214 For a helpful discussion of "fairness" in this context, see Burrows, Law of Restitution, 3rd edn (2011), pp.274–275.
- 215 "[A] threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented": *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep. 653 at [92], Christopher Clarke J.
- 216 e.g. *Cook v Wright* (1861) 1 B. & S. 559, 569; above, para.6-052.
- 217 See above, para.10-036.
- 218 See below, para.10-072.
- 219 See above, para.10-050.
- 220 See above, para.10-034.
- 221 See above, para.10-043.
- 222 For possible exceptions see below, paras 10-056—10-057.
- 223 See above, paras 10-014—10-015; but see the next paragraph.
- 224 cf. Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), paras 10-62—10-63.
- 225 *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] B.L.R. 530 at [131]. Dyson J's statement was accepted as correct by both sides in the later case of *Carillion Construction Ltd v Felix (UK) Ltd* [2001] B.L.R. 1, also before Dyson J.
- 226 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [94], referred to with agreement by Lord Hodge, with whom the other JSCs agreed.

## **(g) - Threats of Actions not in Themselves Wrongful**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 2. - Duress<sup>22</sup>**

**(g) - Threats of Actions not in Themselves Wrongful**

### **Lawful act duress accepted**

- 056 Threatening to carry out something perfectly within one's rights will not normally amount to duress; for instance, a party who relies on his existing contractual rights to drive a hard bargain is not, on that ground alone, guilty of economic duress.<sup>227</sup> It was at one time suggested that it could not be unlawful to threaten to exercise one's legal rights, no matter what the motive.<sup>228</sup> But such a principle is too widely stated. There are, for example, many cases where a party who has a "right", in the sense of a liberty or capacity to do an act which is not unlawful, but which is calculated seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining, e.g. from disclosing discreditable incidents in the victim's life.<sup>229</sup> Although it is, in general, true to say that a contract is not rendered voidable by reason of the fact that pressure has been lawfully applied so as to compel the promisor to accept its terms,<sup>230</sup> there can be no doubt now that English law accepts the existence of lawful act duress,<sup>231</sup> such that even a threat to commit what would otherwise be a perfectly lawful act may amount to duress in qualifying circumstances.

### **Narrowness of the doctrine of lawful act duress**

-057

The Supreme Court in *Pakistan International Airline Corp v Times Travel (UK) Ltd* while recognising lawful act duress, stressed its narrowness. Lord Hodge, writing the judgment for the majority, agreed with Lord Burrows in the minority on the following points:

“... (iii) the importance of clarity and certainty in our commercial law, which means that the concept of lawful act duress must not be stated too widely (para 93), (iv) the rejection of a range of factors approach (para 94), (v) the similar rejection of the use of a wide principle of good faith dealing (para 95), (vi) the appropriateness of focusing on the nature and justification of the demand rather than the legality of the threat (paras 88 and 96), and (vii) the law’s general acceptance of the pursuit of commercial self-interest as justified in commercial bargaining and the rarity of cases where lawful act duress will be found to exist in such bargaining (paras 97–99).”<sup>232</sup>

The narrow scope for lawful act duress in commercial life is also justified by the absence of a doctrine of inequality of bargaining power,<sup>233</sup> and is consistent with jurisdictions, such as Australia, New Zealand and Singapore, have adopted a circumspect approach to economic duress and lawful act duress.<sup>234</sup>

## Exploitation of knowledge of criminal activity

- 058 In the *Times Travel* case the Supreme Court extrapolated from the case-law two circumstances in which the English courts have recognised and provided a remedy for lawful act duress:

“The first circumstance is where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant’s close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution.”<sup>235</sup>

In such cases duress is founded on the unconscionability of the defendant seeking to enforce or uphold the contract.<sup>236</sup>

- 059 A threat to prosecute may itself be an unlawful threat if the charge is known to be false and the threat is made out of malice or other improper motive. Such a threat would amount to a threat to commit the tort of malicious prosecution.<sup>237</sup> Consequently, a contract made as a result of such a threat would, it seems, be a clear case of a contract entered into as a result of duress, and if the other conditions are satisfied, would be voidable for that reason. Even at common law such action could constitute duress as to the person (where the party makes the threat maliciously, knowing that there

is no reasonable basis to the threat), because the result of the prosecution could be the imprisonment of the threatened party, and this was sufficient to constitute duress as to the person.<sup>238</sup>

- 060 In equity, a broader view was taken, covering threats to prosecute the victim's loved ones,  
239

U though most of the equitable cases were dealt with as instances of undue influence. They should now be seen as examples of lawful act duress.

240

U Thus, in *Williams v Bayley*,

241

U a father executed a mortgage to a banker, who insisted on this course as he had it in his power to prosecute the father's son for forgery. There was no direct threat of a prosecution, but the mortgage was executed in return for the delivery up of the documents forged. It was held that the mortgage was unenforceable in equity as the father had no personal liability, and was forced into the agreement since he knew that, unless he undertook the liability, his son would be prosecuted.

- 061 A threat to prosecute, even when perfectly proper in itself, in the sense that a prosecution would be justified, may amount to an improper threat for the purposes of the law, if it is coupled with a demand for restitution or for a promise of restitution or other contractual undertaking if it is addressed to a person who was not herself liable to pay the sums in question. In *Kaufman v Gerson*<sup>242</sup> the Court of Appeal invalidated for coercion a contract entered into by which the wife of A, who had misappropriated money belonging to B, undertook to pay to B the misappropriated amount in consideration of his not prosecuting her husband. The judges reasoned that it was "impossible to say that it was not coercion to threaten a wife with the dishonour of her husband and children"<sup>243</sup>; that the plaintiff had "extorted" the contract from the wife by threats of criminal proceedings against her husband if she did not comply,<sup>244</sup> and that the means used to obtain the contract was "unjust and immoral".<sup>245</sup>

- 062 In *Mutual Finance Co Ltd v John Wetton & Sons Ltd*<sup>246</sup> a guarantee was obtained from a family company under an implied threat to prosecute a member of the family for his alleged forgery of a previous guarantee. The persons seeking to enforce the guarantee knew that at the time it was given the father of the alleged forger was so ill that the shock of the prosecution of his son was likely to endanger his life. The guarantee was held to be invalid on the basis of actual undue influence, which Porter J held was made out "where a promise was extracted by a threat to prosecute certain

third persons unless the promise were given".<sup>247</sup> It is submitted that today the wider equitable rule will prevail, so that a contract will be voidable if obtained by a threat of criminal prosecution or other lawful imprisonment, if the threat amounts to the use of illegitimate pressure.

-062A The implication of these cases, now explicitly stated, is that it is

<sup>248</sup>

 :

"doubtful whether lawful act duress could ever be established from a threat of prosecution by due process ... to obtain agreement from the person liable to prosecution (rather than a family member or other party fearing that prospect), and in respect of sums already due in law from that person."

The door is left ajar since

<sup>249</sup>

 :

"this may well be a matter of degree. If the threat of prosecution were to be made in circumstances which made it particularly terrifying or oppressive, it might upon extreme facts constitute lawful act duress even though the person acting under that duress was truly guilty or, at least, properly liable to prosecution."

## Inducing waiver by illegitimate means

-063 The second category of lawful act duress recognised by the Supreme Court entails: (i) B having a legal claim against A and (ii) the A manoeuvring B by reprehensible means into a vulnerable position where B had no alternative but to waive its pre-existing rights.<sup>250</sup> Two cases are relied upon for this category. In *Borrelli v Ting*,<sup>251</sup> Ting, the former chairman of Akai Holdings, failed to assist the liquidators in their investigation of Akai's affairs through a long process of evasion and prevarication. Ting also used forgery, the provision of false evidence and his shareholdings to defeat the liquidator's proposed scheme to raise money to investigate Ting's possible misappropriation and false accounting. Ting only withdrew his opposition to the liquidators' scheme when the liquidators agreed not to pursue any claims against him in connection with the company. The Privy Council held that Ting's failure to co-operate with the liquidators as he was obliged to do, his failure to explain the absence of papers and books relating to the

three years before Akai's collapse, and his opposition "was not made in good faith, but for an improper motive" and was "unconscionable".<sup>252</sup> Ting had the liquidators over a barrel,<sup>253</sup> leaving them with "no reasonable or practical alternative but to enter into the settlement agreement".<sup>254</sup> The Supreme Court in *Times Travel* described the crux of the Privy Council's decision as "Ting's illegitimate or unconscionable acts which placed the liquidators in the position of vulnerability with the result that they had no reasonable alternative but to agree to his demands".<sup>255</sup>

-063A In *The Cenk K*,<sup>256</sup> the claimant chartered the Cenk K to carry scrap metal to sell to purchasers in China at a fixed date. The owners, in repudiatory breach, chartered the Cenk K to another party but assured the claimant that they would provide a substitute vessel and compensate for all damages resulting from their breach. Ultimately, the owners only offered a discount (far less than the loss the charterers sustained) and on condition that the charterers waive all claims for loss from the initial breach. To avoid further loss, the charterer agreed under protest. Cooke J upheld the arbitrators' reasons for avoiding the waiver agreement for economic duress: the owners had been in repudiatory breach of contract, had lulled the charterers into a false sense of security by their assurances, and had manoeuvred them into a position where, because of the passage of time, they had no choice but to accept the owners' "take it or leave it" and hard bargain.<sup>257</sup> Cooke J found illegitimate pressure in the owner's creation and exploitation of the charterer's vulnerability<sup>258</sup>; in particular, "a past unlawful act, as well as the threat of a future unlawful act can, in appropriate circumstances, amount to "illegitimate pressure".<sup>259</sup>

## Bad faith demand insufficient

-063B In the *Times Travel* case, Lord Burrow's minority view was that lawful act duress turns on the presence of a "bad faith demand" in the sense:

"that the threatening party does not genuinely believe that it is owed what it is claiming to be owed or does not genuinely believe that it has a defence to the claim being waived by the threatened party."<sup>260</sup>

In support of this position, Lord Burrows<sup>261</sup> referred to the same cases as the majority, *Borrelli v Ting*<sup>262</sup> and *The Cenk K*.<sup>263</sup> Conversely, the absence of a bad faith demand explains the Court of Appeal's refusal to find duress in *CTN Cash and Carry Ltd v Gallaher Ltd*.<sup>264</sup> In this case the plaintiffs had ordered goods from the defendants, who delivered them by mistake to the wrong warehouse, from which they were stolen. The defendants, honestly but wrongly believing that the goods were at the plaintiffs' risk, invoiced them. The plaintiffs initially refused to pay but did so after the defendants threatened to withdraw the plaintiffs' credit facilities, which, it was said,

would seriously jeopardise the plaintiffs' business. The defendants had the right to withdraw credit facilities at any time. The plaintiffs later sought repayment. The Court of Appeal upheld the trial judge's decision that no case of economic duress had been made out. Steyn LJ, with whom the other members of the Court agreed, said that the combination of the facts that: (i) the defendants were entitled to refuse to enter into any future contracts with the plaintiffs for any reason; and (ii), critically, that the defendants' bona fide belief that the plaintiffs owed the sum in question, was sufficient to distinguish cases in which a plea of economic duress had succeeded. The fact that the defendants were in a sense in a monopoly position was irrelevant, the control of monopolies being a matter for Parliament.

-063C In the *Times Travel* case, Lord Hodge for the majority concluded that mere bad faith demand, without more, is insufficient to establish lawful act duress on the authorities,<sup>265</sup> and in the current state of English law which does not recognise a general principle of good faith or a doctrine of imbalance of bargaining power.<sup>266</sup> The duress found in both *Borrelli v Ting*<sup>267</sup> and *The Cenk K*<sup>268</sup> rested on more than mere bad faith demands, but required also, reprehensible conduct that amounted to illegitimate pressure. Moreover, the test of bad faith demand: "is in principle no different from the demand for a sum of money as a pre-condition for entering into contractual relations in the context of a commercial negotiation"<sup>269</sup>; is uncertain<sup>270</sup>; and bad faith relates not only to the threatening party's belief but also to that party's conduct and to the likely validity of the threatened party's claim. It would seem, therefore, that while all their Lordships in *Times Travel* agreed that the focus of lawful act duress cases should be on the nature and justification of the demand rather than the legality of the threat, the inquiry should take in the all the circumstances. Lord Hodge explained that:

"... the court in focusing on the nature and justification of the demand ... has regard to, among other things, the behaviour of the threatening party including the nature of the pressure which it applies, and the circumstances of the threatened party ... [M]orally reprehensible behaviour which in equity was judged to render the enforcement of a contract unconscionable in the context of undue influence has been treated by English common law as illegitimate pressure in the context of duress."<sup>271</sup>

-063D Lord Hodge in *Times Travel* said that it would be incorrect to find duress in *CTN Cash and Carry*<sup>272</sup> merely on the basis of a bad faith demand:

"absent circumstances which involved the manoeuvring by Gallaher of CTN into a position of vulnerability by means which involved bad faith or were similarly reprehensible and went beyond the use of its position as a monopoly supplier, or which brought the transaction within the ambit of the equitable doctrine of unconscionable transactions."<sup>273</sup>

His Lordship said that *CTN Cash and Carry*:

“although an important steppingstone in the development of the doctrine of lawful act duress and cited in later cases, is authority for what is not such duress and not for what is.”<sup>274</sup>

-063E In *Times Travel* itself, Times Travel (TT), a travel agent, made claims for unpaid commission against Pakistan International Airlines Corp (PIAC), the sole operator of direct flights between the UK and Pakistan. PIAC terminated its existing agency agreement with TT, and then offered a new agreement on the condition that TT waive its claim for unpaid commission (which PIAC rejected) and henceforth accept a lower commission. TT accepted, but later sought to set aside the agreement for duress and claim the unpaid commission. In the Supreme Court, all their Lordships upheld the Court of Appeal’s conclusion that there was no lawful act duress. In doing so, Lord Burrows agreed with the Court of Appeal’s reasoning, namely that TT failed to establish that PIAC’s demand was made in bad faith.<sup>275</sup> In contrast, Lord Hodge for the majority did so because:

there are no findings that PIAC had used any reprehensible means such as were evident in Borrelli and The Cenk K, to manoeuvre Times Travel into a position of increased vulnerability in order to exploit that vulnerability<sup>276</sup> .... [T]he pressure which it applied to obtain the waiver was the assertion of its power as a monopoly supplier.<sup>277</sup>

## Threat to exercise a right

-063F In *R. v Attorney-General for England and Wales*

 278

**U** the Privy Council held that a confidentiality agreement signed by a member of the SAS under threat of being returned to his original unit if he did not sign was not voidable for duress: the threat was not unlawful, as the Crown had the right to transfer any member of the SAS to another unit, and the demand could be justified on the ground that the Ministry of Defence was reasonably entitled to regard anyone unwilling to accept the obligation of confidentiality as unsuitable for the SAS.<sup>279</sup>

## Threat not to contract

-063G In general, a threat not to enter into a contract unless the threatener's terms are met does not amount to improper pressure, for example where the threatener's terms are extortionate. Admittedly, there are a number of salvage cases in which extortionate demands have been made to rescue a vessel (or those on board) and the contracts so entered into have been set aside, or refused enforcement.<sup>280</sup> But these cases may rest upon the principle of maritime law that a duty to rescue human life is imposed on putative rescuers, so that the threat not to rescue may be unlawful. Otherwise, a party that is under no duty to enter into a contract with another is entitled to set its own terms, even though these may seem extortionate and the other party may have little choice but to comply.<sup>281</sup> In *Pakistan International Airline Corp v Times Travel (UK) Ltd*<sup>282</sup> an existing agreement between the parties had been terminated by notice and a new agreement entered under which the claimant travel agents would receive reduced commissions and give up their claim to commissions payable under the old agreement. It was held that the new agreement could not be avoided on the ground of duress although the defendant was effectively in a monopoly position, because PIAC had not deployed any reprehensible means to induce TT's agreement.<sup>283</sup> Lord Hodge said:

“Where B is induced to meet A’s demand because of the stark inequality of bargaining power which gives B no effective choice but to meet the demand which B knows is not justified, it is not obvious to me that, without more, B could have a claim for economic duress in the absence of a general principle of good faith in contracting or a doctrine of imbalance of bargaining power, neither of which currently exists. It is difficult in principle to distinguish such a circumstance from a circumstance in which A makes an exorbitant demand in the course of negotiations as a condition for entering into contractual relations with B.”<sup>284</sup>

## Stifling a prosecution

-064 An agreement obtained by threats to prosecute for a criminal offence may also be invalid on the ground that it involves the stifling of a prosecution for the offence.<sup>285</sup> In such a case, it is not sufficient for the party seeking to avoid the contract to show that his promise induced the other party to abstain from criminal proceedings.<sup>286</sup> He must go further and show that it was an express or implied term of the contract that there should be no prosecution.

<sup>287</sup>

**U** An agreement of this nature is not only voidable on the ground of duress, but may be void as being contrary to public policy.<sup>288</sup> Money paid in pursuance of an illegal agreement, whether or not induced by duress, is now ordinarily recoverable, subject to some exceptions.<sup>289</sup> The law will permit the compromise of a claim for damages, though made the subject of a criminal prosecution, in certain limited circumstances.<sup>290</sup> It is, however, submitted that a plea of duress might still be admitted to an action on a compromise of this nature if it were shown that it was arrived at by an illegitimate threat of a criminal prosecution. The modern trend seems to be to discourage the making of such contracts whenever serious crime is involved. If a contract is made without the matter being reported to the police, there is a strong probability that the transaction will be held to amount to the stifling of a prosecution. And if the contract is made after the matter is reported to the police then there is a danger that it will amount to a conspiracy to pervert the course of justice.<sup>291</sup> To make a valid contract in such circumstances, it should be made absolutely clear that the innocent party is only compromising his *civil* claim for damages, and is neither threatening to report the matter to the police, nor to prosecute, nor offering not to do so.

## Threat to institute civil proceedings

-065 Since recourse to law is the remedy for redress provided by the law itself, it is obvious that *prima facie* a threat to enforce one's legal rights by instituting civil proceedings cannot be an unlawful or wrongful threat. Consequently, a contract which is obtained by means of such a threat must *prima facie* be valid, and cannot be impeached on grounds of duress.<sup>292</sup> So an ordinary bona fide compromise is clearly a valid contract even though exacted under threats to bring (or defend) legal proceedings, or to appeal from a judgment already given. Even a threat to bring proceedings where there is no ground of action in law is *prima facie* not an unlawful threat, at least where the threat is made bona fide, and is not manifestly frivolous or vexatious.<sup>293</sup> On the other hand, the malicious institution of some forms of legal process or other civil proceedings is, at least in some circumstances, a tort,<sup>294</sup> and a threat to institute proceedings which would constitute a tort will therefore *prima facie* constitute a threat to do something unlawful; consequently a contract entered into as a result of such a threat may be voidable on grounds of duress. It is likely that a threat to institute civil proceedings which is not unlawful in itself can also constitute duress for present purposes, if it is coupled (for instance) with a wholly unjustified demand,<sup>295</sup>

**U** or if it is made in special circumstances (for instance) in which the defendant has a particular fear of the publicity which may follow from a claim.<sup>296</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.
- 227 *Alec Lobb Ltd v Total Oil GB Ltd* [1983] 1 W.L.R. 87 (varied on other points, [1985] 1 W.L.R. 173).
- 228 *Allen v Flood* [1898] A.C. 1; *Ware and De Freville v Motor Trade Association* [1921] 3 K.B. 40; *Hardie and Lane Ltd v Chilton* [1928] 2 K.B. 306; *Chapman v Honig* [1963] 2 Q.B. 502; cf. *Quinn v Leathem* [1901] A.C. 495.
- 229 *Thorne v Motor Trade Association* [1937] A.C. 797, 822; *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366, 401.
- 230 *Hardie and Lane Ltd v Chilton* [1928] 2 K.B. 306; *Eric Gnapp Ltd v Petroleum Board* [1949] 1 All E.R. 980.
- 231 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [1], [82]–[92].
- 232 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [1], the paragraph numbers in the quote refer to the minority judgment of Lord Burrows.
- 233 [2021] UKSC 40 at [28] and [30].
- 234 [2021] UKSC 40 at [39].
- 235 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [4].
- 236 [2021] UKSC 40 at [17].
- 237 *Duke Cadaval v Collins* (1836) 4 Ad. & El. 858; *Flower v Sadler* (1882) 10 Q.B.D. 572.
- 238 *Smith v Monteith* (1844) 13 M. & W. 427. And see *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 K.B. 389, 395, citing Salmond on Contracts (1927), at 259.
- 239 This was emphasised in *Al Saif Group v Robert Thomas Cable* [2022] EWHC 271 (QB) at [200]–[207].
- 240 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [9].
- 241 (1866) L.R. 1 H.L. 200.
- 242 [1904] 1 K.B. 591.
- 243 *Kaufman v Gerson* [1904] 1 K.B. 591 at 597.
- 244 *Kaufman v Gerson* [1904] 1 K.B. 591 at 599.
- 245 *Kaufman v Gerson* [1904] 1 K.B. 591 at 600.
- 246 [1937] 2 K.B. 389.
- 247 [1937] 2 K.B. 389, 395.

- 248 *Al Saif Group v Robert Thomas Cable* [2022] EWHC 271 (QB) at [208], citing Cotton LJ in *Flower v Sadler* (1882) 10 Q.B.D. 572 at 576. Hence, there was no duress when the threat was directed against the debtor himself.
- 249 *Al Saif Group v Robert Thomas Cable* [2022] EWHC 271 (QB) at [209].
- 250 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [14] and [17].
- 251 *Borreli v Ting* [2010] UKPC 21, [2010] Bus.L.R. 1718.
- 252 [2010] UKPC 21 at [28] and [32].
- 253 [2010] UKPC 21 at [31].
- 254 [2010] UKPC 21 at [35].
- 255 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [13].
- 256 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 2 All E.R. (Comm) 855, 864 (“The Cenk K”).
- 257 [2012] EWHC 273 (Comm) at [40].
- 258 [2012] EWHC 273 (Comm) at [44].
- 259 [2012] EWHC 273 (Comm) at [36].
- 260 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [102] and [136].
- 261 [2021] UKSC 40 at [105]–[109].
- 262 [2010] UKPC 21, [2010] Bus.L.R. 1718.
- 263 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 2 All E.R. (Comm) 855.
- 264 [1994] 4 All E.R. 715; *Marsden v Barclays Bank Plc* [2016] EWHC 1601 (QB), [2016] 2 Lloyd’s Rep. 420; *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [100]–[103].
- 265 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [46].
- 266 [2021] UKSC 40 at [49].
- 267 [2010] UKPC 21, [2010] Bus.L.R. 1718.
- 268 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 2 All E.R. (Comm) 855.
- 269 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [54].
- 270 [2021] UKSC 40 at [50], although see Lord Burrow’s criticism of Lord Hodge’s focus on “reprehensible” or “unconscionable” or using “illegitimate means” as creating “considerable uncertainty”, [2021] UKSC 40 at [133].
- 271 [2021] UKSC 40 at [1]–[2].
- 272 [1994] 4 All E.R. 714; see above, para.10-063B.
- 273 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [59]. Contra Lord Burrows at [134] and [137].
- 274 [2021] UKSC 40 at [43].

- 275 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828; [2021] UKSC 40 at [138].
- 276 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [58].
- 277 [2021] UKSC 40 at [60].
- 278 [2003] UKPC 22. See also *Heritage Travel and Tourism Ltd v Windhorst* [2021] EWHC 2380 (Comm) at [39]–[46] (threats to enforce contractual rights or perform acts that were not contractually prohibited).
- 279 [2003] UKPC 22 at [17]–[18].
- 280 See *Akerblom v Price* (1881) 7 Q.B.D. 129; *The Rialto* [1891] P. 175; *The Port Caledonia and the Anna* [1903] P. 184; *The Crusader* [1907] P. 196. See now Merchant Shipping Act 1995 s.224, which provides for the Salvage Convention 1989 (contained in Sch.11 to the Act) to have the force of law. Art.13 of the Convention sets out criteria for fixing the proper reward.
- 281 See, e.g. *Smith v William Charlick Ltd* (1924) 34 C.L.R. 38; *Morton Construction v City of Hamilton* (1961) 31 D.L.R. (2d) 323; *Dold v Murphy* [2020] NZCA 313, [75], [76], [79]. See Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), paras 10-71—10-72.
- 282 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40.
- 283 See below, para.10-068.
- 284 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [49].
- 285 *Williams v Bayley* (1866) L.R. 1 H.L. 200; *Windhill Local Board v Vint* (1890) 45 Ch. D. 351; *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173; see also Criminal Law Act 1967 s.5(1), (5) and below, paras 18-079—18-081.
- 286 *Flower v Sadler* (1882) 10 Q.B.D. 572; *Barnes v Richards* (1902) 71 L.J. K.B. 341.
- 287 *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173 but the modern trend seems somewhat against this restricted view: see *R. v Panayiotou* [1973] 1 W.L.R. 1032, cf. *Al Saif Group v Robert Thomas Cable* [2022] EWHC 271 (QB), in particular at [199].
- 288 See below, para.18-081; *Keir v Leeman* (1846) 9 Q.B. 371.
- 289 *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467. See below, paras 18-043—18-046.
- 290 *Keir v Leeman* (1846) 9 Q.B. 371, 395; *Fisher & Co v Apollinaris Co* (1875) L.R. 10 Ch. App. 297; see also Criminal Law Act 1967 s.5(1), (5), and below, paras 18-084—18-086. See also *Hudson* (1980) 43 M.L.R. 532.
- 291 See *R. v Panayiotou* [1973] 1 W.L.R. 1032.
- 292 *Powell v Hoyland* (1851) 6 Exch. 67; *Ex p. Hall* (1882) 19 Ch. D. 580.
- 293 Decisions upholding the validity of compromises in such cases usually turn on the existence of consideration and have been dealt with above (paras 6-048 et seq.); although the presence of consideration is not conclusive that there is no duress (see above, para.10-025) it seems clear that a bona fide compromise could not be attacked on grounds of duress any more than on grounds of want of consideration.
- 294 See, e.g. *Roy v Prior* [1971] A.C. 470; *Willers v Joyce* [2016] UKSC 43, [2016] 3 W.L.R. 477.
- 295

In *Al Nehayan v Kent [2018] EWHC 333 (Comm)* Leggatt LJ accepted that a threat of legal action which had no legal basis and which was brought purely as a means of putting pressure on the claimant to sign a guarantee might amount to duress, but made no finding on the point as it had not been pleaded (at [213]). But see *Al-Subaihi v Al-Sanea [2021] EWHC 2609 (Comm)* at [188] (threats to cease acting as lawyers for the defendant, his father and his father's business; bringing civil proceedings to claim unpaid fees; enforcing promissory notes; and applying for travel bans for the family constituted lawful conduct and legitimate pressure).

- 296 An example of a threat to take legal proceedings which in the circumstances amounted to improper pressure, and thus actual undue influence, is *Drew v Daniel [2005] EWCA Civ 507, [2005] 2 F.C.R. 365*.

## **(h) - Parties to Duress**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 2. - Duress<sup>22</sup>**

**(h) - Parties to Duress**

### **Threats to harm third parties**

-066 Earlier, it was submitted there may be duress to the person when the threat is not to injure the party who makes the promise but a third person.<sup>297</sup> It was at one time said that the duress must be suffered by the party who enters into the contract, so that duress against a principal debtor would be no defence to an action on a bond against a surety.<sup>298</sup> However, it seems likely that a surety who gave an indemnity as the result of threats of violence to the principal debtor would not be liable, even if the threat was not directly addressed to the surety. Similarly, if an agent enters into a contract for his principal, from the same fear of the inconvenience which may arise to the principal from the latter being kept in confinement as would affect the mind of the principal himself, such a contract will be voidable on the ground of duress.<sup>299</sup> So, too, duress to a wife will avoid a contract given under its influence by her husband,<sup>300</sup> duress to a child will avoid a contract obtained by means thereof from a parent,<sup>301</sup> and even duress to a more remote relative will suffice if a contract is entered into under its influence.<sup>302</sup> Threats against the claimant's employees have been held to constitute duress.<sup>303</sup> Duress to a stranger was formerly thought to be ineffective,<sup>304</sup> and would no doubt be exceedingly rare. But if A takes B as a hostage and threatens to shoot him unless C signs a written agreement placed in front of him by A, it does not seem likely that the agreement would be held binding merely because B is a stranger to C. There are old cases holding that a contract made by a person in consideration of the discharge of a third party from illegal arrest is unenforceable as a mere nudum pactum.<sup>305</sup> In modern times it is possible that a court would find consideration in such circumstances (often the promisor would not have made the promise unless he regarded the release of the third party as a benefit to him) but would hold the promise voidable for duress.

## Duress exercised by third party

- 067 Where it is sought to avoid a contract on the ground of duress exercised, not by the party seeking to enforce the agreement, but by some third person, the party seeking to avoid the contract must prove that the other party knew of the duress,<sup>306</sup> or had constructive notice of it or had procured the making of the contract through the agency of the party who exercised the duress.<sup>307</sup> This is another reason why the basis for duress cannot be absence of consent<sup>308</sup> since, otherwise, the victim's consent would be tainted whether by the duress of the other contract party or of a third party. Rather, the basis of duress is the counter party's improper conduct.

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.
- 297 Above, paras 10-017, 10-062—10-063.
- 298 Roll.Abr. 687, pl. 7; Bacon Abr. Duress (B); *Huscombe v Standing (1607) Cro. Jac. 187*. And see Vol.II, para.47-032.
- 299 *Cumming v Ince (1847) 11 Q.B. 112*.
- 300 *Kaufman v Gerson [1904] 1 K.B. 591*.
- 301 *Williams v Bayley (1866) L.R. 1 H.L. 200*.
- 302 *Seear v Cohen (1881) 45 L.T. 589*; *Jones v Merionethshire Permanent Benefit Building Society [1892] 1 Ch. 173*.
- 303 *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674* (threat to use employees as human shield); *Gulf Azov Shipping Co Ltd v Chief Idisi (No.2) [2001] EWCA Civ 505, [2001] 1 Lloyd's Rep. 727* (detention of ship and crew).
- 304 1 Roll.Abr. 687, pl. 6.
- 305 *Smith v Monteith (1844) 13 M. & W. 427*; *Pole v Harrobin (1782) 9 East 416n*.
- 306 *Kesarmal s/o Letchman Das v Valliappa Chettiar (N.K.V.) s/o Nagappa Chettiar [1954] 1 W.L.R. 380*. In the case of a bill of exchange, the onus of proof is shifted by s.30(2) of the *Bills of Exchange Act 1882*, but this has been held not to apply where the holder seeking to enforce the instrument is the person to whom it was originally delivered and in whose possession it remains: *Talbot v Von Boris [1911] 1 K.B. 854*; *Hasan v Willson [1977] 1 Lloyd's Rep. 431* (fraud).

- 307 These propositions are based on the cases of misrepresentation and undue influence, see above, paras 9-030 et seq. and below, paras 10-139 et seq.
- 308 See above, paras 10-004—10-009.

## **(i) - General Effect of Duress**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 2. - Duress<sup>22</sup>**

**(i) - General Effect of Duress**

**Contract under duress is voidable<sup>309</sup>**

- 068 Despite earlier doubts,<sup>310</sup> it now seems clearly established that a contract entered into under duress is voidable and not void<sup>311</sup>; consequently a person who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased<sup>312</sup>; and if he has voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the ground of ratification,<sup>313</sup> or if, after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it.<sup>314</sup> The agreement must be avoided as a whole; the claimant cannot rescind a just promissory note that was an inseparable part of a large agreement that he has not sought to rescind.<sup>315</sup>

**Right to rescind cannot be excluded**

- 069 The right to rescind an agreement reached under duress cannot be excluded by the terms of the agreement.<sup>316</sup>

## Counter-restitution of benefits

- 070 In some circumstances a person may not be able to avoid a contract he has entered into under duress unless he is able to restore the benefits he has received under the contract, at least in substantially the same form, or make an adequate monetary allowance. The position is the same as in cases of misrepresentation or undue influence<sup>317</sup>; there are not separate rules for duress at common law and other grounds on which a contract may be avoided in equity.<sup>318</sup> The court will:

“... give ... relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state there were in before the contract.”<sup>319</sup>

However, the prime concern is to prevent unjust enrichment of the party who made the threat; that he should not be prejudiced is a secondary consideration and whether counter-restitution in any form will be required will depend on the circumstances of the case.<sup>320</sup> Thus, where the agreement was a compromise under which all documents relating to the agreement were to be and had been destroyed, which (if the agreement were avoided) would benefit the party seeking to avoid, and to the prejudice of the other parties, it would not necessarily be impossible to avoid the contract for alleged duress even though the documents have been destroyed, and pecuniary relief could not adequately restore the other parties' position.<sup>321</sup> It is submitted that counter-restitution or at least pecuniary compensation will normally be required where the transaction to be set aside involved an exchange from which the victim obtained some benefit.<sup>322</sup> In contrast, where the promise avoided for duress was merely one to pay an additional sum for a benefit already due under an existing contract,<sup>323</sup> there should logically be no requirement of counter-restitution since the benefit representing the enrichment was due under the original contract and therefore is not unjust.<sup>324</sup>

## Damages for duress

- 071 As previously stated,<sup>325</sup> modern authorities have relied upon the analogy of fraud in adumbrating the law relating to duress. In particular, it now seems clear that a person may affirm a contract which would have been voidable for duress. In these circumstances it may be a matter of some importance to consider whether duress may constitute a tort, like fraud, so that damages may be obtained, either in addition to, or in lieu of, rescission of a contract entered into as a result of the duress. The leading authority on the tort of intimidation (or duress) is *Rookes v Barnard*<sup>326</sup> where the defendants conspired together to threaten to break their contracts of employment with

the plaintiff's employer if he did not terminate the plaintiff's contract of employment. They were held liable to the plaintiff on the ground that a threat to break a contract was a sufficient unlawful act for the purpose of the tort of intimidation, at least where the intimidation is of a third party. In *Berezovsky v Abramovich*<sup>327</sup> Longmore LJ, with whom the other two members of the Court agreed, said:

“... the essential ingredients of the tort of intimidation are: (1) a threat by the defendant to do something unlawful or ‘illegitimate’; (2) the threat must be intended to coerce the claimant to take or refrain from taking some course of action; (3) the threat must in fact coerce the claimant to take such action; (4) loss or damage must be incurred by the claimant as a result.”

Since it now appears clear that a threat to break a contract may, in appropriate circumstances, constitute unlawful duress in the law of contract, so that a variation of the contract thereby obtained may be voidable as a matter of contract law, it would seem that the doctrines of duress and intimidation are based on similar principles.<sup>328</sup> (It is, of course, also clear that a threat to commit a crime or a tort may equally constitute both duress in contract law, and intimidation in tort law.) If this is correct, it may be that, even where a person has affirmed a contract which is voidable for duress, damages could still be recovered in tort. In *Universe Tankships of Monrovia v I.T.W.F.*<sup>329</sup> Lords Diplock and Scarman expressed differing views on the point. The question was not considered in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*,<sup>330</sup> even though this case is a firm authority for holding that duress renders a contract voidable and not void. It is arguable that this conclusion makes it all the more necessary to recognise that damages may be recovered for duress, for otherwise (as indeed was held in this case) the plaintiff who has lost his right to avoid will be left without any remedy for a wrongful act<sup>331</sup>; but two decisions at first instance have held that economic duress does not itself give rise to liability in damages, if it does not amount to intimidation or some other wrong.<sup>332</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 22 Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), Ch.10, Sect.2.
- 309 This paragraph in the 28th edn was accepted as stating the law correctly in *Capital Structures Plc v Time & Tide Construction Ltd [2006] EWHC 591, [2006] B.L.R. 226* at [18]. Acquiescence is presumably also a bar, as it is in cases of misrepresentation and undue influence: see below, para.10-132.

- 310 *Lanham* (1966) 29 M.L.R. 615. In *Barton v Armstrong* [1976] A.C. 104, 120, the majority of the Privy Council spoke of the contract as being void “so far as concerns” the plaintiff, but they were not adverting to this point. Indeed, the analogy with fraud which was relied upon by the majority supports the view stated in the text. See above, para.10-009.
- 311 See *Lynch v D.P.P. of Northern Ireland* [1975] A.C. 653, 695; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705.
- 312 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705. See also *Pao On v Lau Yiu Long* [1980] A.C. 614. In *Morley v The Royal Bank of Scotland Plc* [2021] EWCA Civ 338 the claimant’s failure to object to the agreement for five years was evidence of the claimant’s affirmation (at [55]).
- 313 *Ormes v Beadel* (1860) 2 De G.F. & J. 333.
- 314 As in *North Ocean Shipping Co Ltd v Hyundai Construction Ltd* [1979] Q.B. 705, in which this passage was cited. See further below, para.10-132. In *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674, 730, Phillips LJ expressed some difficulty in saying that a contract has been avoided on the grounds of duress if it is governed by a foreign law which would afford no right of avoidance, even where the duress was so unconscionable that English law would override the proper law of the contract (see above, para.10-047). However, he considered that English law would not recognise the effects of the contract (at 731). See also *Morley (t/a Morley Estates) v Royal Bank of Scotland Plc* [2020] EWHC 88 (Ch) at [218], where para.10-068 was cited with approval; the claimant had affirmed the agreements by failing to take any steps over five years to set them aside (at [272]).
- 315 *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [220].
- 316 *Borrelli v Ting* [2010] UKPC 21, [2010] Bus. L.R. 1718 at [40]. Compare the right to rescind for fraud, above, para.9-153.
- 317 See above, paras 9-132—9-137 and below, paras 10-133—10-138.
- 318 *Halpern v Halpern* (No.2) [2007] EWCA Civ 291, [2008] Q.B. 195 at [70]–[73].
- 319 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279.
- 320 *Halpern v Halpern* (No.2) [2007] EWCA Civ 291 at [75]–[76]. For a case of fraudulent misrepresentation in which the judge seems to have taken the view that rescission was no longer possible because it was not possible to return the parties to their original position, see *Crystal Palace FC (2000) Ltd v Dowie* [2007] All E.R. (D) 135 (Jun) at [210]–[218].
- 321 *Halpern v Halpern* (No.2) [2007] EWCA Civ 291, [2008] Q.B. 195; reversing [2006] EWHC 1728 (Comm), [2006] 3 All E.R. 1139.
- 322 Compare Carnwath LJ’s example of work being done that was not needed: [2007] EWCA Civ 291 at [74]. It may be that counter-restitution is not required if criminal fraud is used merely as a defence: see above, para.9-126. It is possible that the same approach, which seems to be based on the ex turpi causa rule (see below, paras 18-220 and 18-224), would be applied in cases of duress were the duress to amount to a crime.
- 323 As in, e.g. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; see above para.10-021.
- 324 See Burrows, Law of Restitution, 3rd edn (2011), pp.261–262, giving other examples also.
- 325 Above, para.10-009.
- 326 [1964] A.C. 1129.

- 327 [2011] EWCA Civ 153, [2011] 1 W.L.R. 2290 at [5]. See also *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [409]. In *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [233] it was held that the test of causation in intimidation is the same that applies to fraud (see above, para.9-047) and to physical duress (see above, para.10-031).
- 328 See *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366, 385, 400. But cf. Lord Reid in *J.T. Stratford & Son Ltd v Lindley* [1965] A.C. 269, 325, where some doubt is thrown on the possible assimilation of two-party duress cases (where A coerces B) with three-party cases (where A coerces B who acts so as to cause loss to C). The reason for Lord Reid's doubts is that in the two-party case, unlike the three-party case, the plaintiff has a choice not to submit to the coercion, but to pursue his legal remedies. But this doubt seems to be disposed of by Lord Scarman's judgment in *Pao On v Lau Yin Long* [1980] A.C. 614 (above, para.10-022), where it is stressed that the question turns on the effectiveness of the remedy which the coerced party has. Damages for intimidation were recovered in a case of duress by threatened breach of contract in *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep. 653; see at [119]–[121]. See also *Berezovsky v Abramovich* [2011] EWCA Civ 153, [2011] 1 W.L.R. 2290. On “two-party” intimidation see Clerk & Lindsell on Torts, 22nd edn (2017), paras 24-69—24-70.
- 329 [1983] A.C. 366, 385, 400. See *Carty and Evans* [1983] J.B.L. 218, 223–225. In *Dimsdal Shipping Co SA v I.T.W.F.* [1992] 2 A.C. 152, Lord Goff followed Lord Diplock's analysis that economic duress is not a tort per se. In *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [403] the point was left open.
- 330 [1979] Q.B. 705, above, para.10-021.
- 331 Where the duress does amount to intimidation, the sum payable under the contract would be recoverable as damages and “the principle of circuity of action applies to give [the threatened party] a defence to the claim”: *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [238].
- 332 *Investec Bank (Channel Islands) Ltd v Retail Group Plc* [2009] EWHC 476 (Ch) at [122]; *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [224] (in which the defendant was held liable in damages for breach of contractual duty of good faith and in tort).

## **(i) - Equitable Doctrine of Undue Influence**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 3. - Undue Influence<sup>333</sup>

(a) - Introduction

(i) - Equitable Doctrine of Undue Influence<sup>334</sup>

- 072 The equitable doctrine of undue influence is a comprehensive phrase covering cases in which a transaction between two parties who are in a particular type of relationship may be set aside if the transaction is the result of an abuse of the relationship. Normally, the relevant relationship is one of trust and confidence, but it may also include relationships of emotional or physical dependency. If the claimant shows that the other party obtained it by abusing the relationship, this, as we shall see, is often termed “actual undue influence”, but it is better to refer to such cases as ones in which undue influence is actually (or directly) proved.<sup>335</sup> A transaction may also be set aside in the absence of direct proof if claimant shows the existence of a relationship of trust and confidence with the other party, and that the resulting transaction sought to be avoided is one that “calls for explanation”.<sup>336</sup> Then there will be an evidential presumption<sup>337</sup> that the transaction was the result of undue influence and unless the presumption is rebutted, the transaction may be set aside.<sup>338</sup> The doctrine extends to cases of coercion, domination, or pressure outside those special relations, though abuse of the victim’s relationship with a third party will normally be present.<sup>339</sup> Such cases will often now come within the doctrine of duress. As was said by Lord Chelmsford L.C.: “[t]he courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise”.<sup>340</sup> Although most of the cases in which undue influence has been successfully pleaded relate to gifts and guarantees,<sup>341</sup> the same principles apply to purchases at an undervalue or sales at an excessive price.<sup>342</sup> The difference between a gift and a contract that “calls for explanation” is for this purpose only a matter of degree.<sup>343</sup> In principle, the rules may also apply to contracts which are not obviously disadvantageous to the complainant in terms of

under- or over-value, at least where undue influence actually is shown,<sup>344</sup> although in practice, the nature of the transaction will usually be a key factor in determining whether the conduct amounts to undue influence.

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006) 59 C.L.P. 231*.
- 334 The equivalent of this paragraph and para.10-073 of the 33rd edn were cited with approval in *Pakistan International Airline Corp v Times Travel (UK) Ltd [2021] UKSC 40* at [23].
- 335 See below, paras 10-082—10-083.
- 336 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [10]: see below, para.10-120.
- 337 See below, paras 10-082—10-083.
- 338 The right to rescind may be lost in various ways, see below, para.10-132.
- 339 e.g. *Williams v Bayley (1866) L.R. 1 H.L. 200*; see above, paras 10-062—10-063.
- 340 *Tate v Williamson (1866) L.R. 2 Ch. App. 55, 61*. See also *Winder (1940) 3 M.L.R. 97*; and see *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [6].
- 341 See below, para.10-140.
- 342 *Tufton v Sperni [1952] 2 T.L.R. 516, 526*.
- 343 *Wright v Carter [1903] 1 Ch. 27, 52*.
- 344 Below, para.10-084.

## **(ii) - Basis of Doctrine**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 3. - Undue Influence<sup>333</sup>**

**(a) - Introduction**

**(ii) - Basis of Doctrine**

- 073 At common law, the presence of duress was (as has been seen) traditionally justified on the ground that the duress prevented the party constrained from forming a full and independent resolution to contract, though duress is now accepted as based on one party's application of illegitimate pressure in inducing the other's consent.<sup>345</sup> Cases treated as falling within the doctrine of undue influence included cases of coercion that are now seen as ones of duress, and were treated in the previous section,<sup>346</sup> but the equitable doctrine was much wider than this.
- 074 In equity the application of the doctrine of undue influence was intended rather to ensure that no person should be allowed to retain the benefit of his own fraud or wrongful act. The equity view was well expressed in *Allcard v Skinner*<sup>347</sup>:

“This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play.”

Equity therefore acts on the conscience of the donee, not primarily on want of a true consent on the part of the donor. As a result, the equitable doctrine extends not only to cases of coercion, but to all cases “where influence is acquired and abused, where confidence is reposed and betrayed”.<sup>348</sup> It has been said that:

“... the question is not whether [the party influenced] knew what she was doing, had done or was proposing to do, but how the intention was produced.”<sup>349</sup>

Traditional explanations of undue influence frequently refer to the “conscience of the recipient”,<sup>350</sup> and modern cases often use similar phrases. Thus it has been said that “[t]he court of equity ... sets aside transactions obtained by the exercise of undue influence because such conduct is unconscionable”.<sup>351</sup> In a recent House of Lords case, actual undue influence was described as “a species of fraud” and from this was drawn the conclusion that the complainant need not show that she was “manifestly disadvantaged” by the transaction concerned.<sup>352</sup> And in the latest decision of the House of Lords, Lord Nicholls (whose opinion was supported by all their Lordships) referred variously to “the taking of unfair advantage”,<sup>353</sup> “misuse” of influence,<sup>354</sup> “abuse of trust and confidence”<sup>355</sup> and a “connotation of impropriety”.<sup>356</sup> Nevertheless, there is some disagreement or ambiguity over the circumstances in which the conscience of the stronger party (normally the defendant) will be engaged.

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006) 59 C.L.P. 231*.
- 345 See above paras 10-004—10-007.
- 346 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [8]; see above, paras 10-062—10-063.
- 347 (1887) 35 Ch. D. 145, 190.
- 348 *Smith v Kay (1859) 7 H.L.C. 750, 779*.
- 349 Lord Eldon L.C. in *Huguenin v Baseley (1807) 14 Ves. 273, 300*.
- 350 e.g. *Allcard v Skinner (1887) L.R. 36 Ch. D. 145, 190*.
- 351 *Dunbar Bank Plc v Nadeem [1998] 3 All E.R. 876, 883–884*, per Millett LJ. The other members of the court did not consider the question.
- 352 Lord Browne-Wilkinson in *CIBC Mortgages Ltd v Pitt [1994] 1 A.C. 200, 209*. See further below, para.10-084. The analogy with fraud may also be relevant to causal issues: see below, para.10-099.
- 353 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [8].
- 354 [2001] UKHL 44 at [9].
- 355 [2001] UKHL 44 at [10].

356 [2001] UKHL 44 at [32]. See also, e.g. *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 51 at [28]–[33] (Lord Millett); *R. v Att-Gen for England and Wales* [2003] UKPC 22 at [21] (Lord Hoffmann).

### **(iii) - When the Stronger Party's Conscience is Engaged**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 3. - Undue Influence<sup>333</sup>

(a) - Introduction

(iii) - When the Stronger Party's Conscience is Engaged

-075 There is some difference of opinion, both judicial and academic,<sup>357</sup> as to when the conscience of the stronger party (normally the defendant) will be engaged. It is certain that a transaction may be avoided if it is proved that the defendant obtained it by exploiting his relationship with the claimant to put emotional pressure on the claimant<sup>358</sup>; or if he used the fact that the claimant was willing to follow his suggestions without question to "prefer his own interests".<sup>359</sup>

-076 However transactions that were manifestly one-sided—the cases have involved gifts—have been set aside when the defendant seems merely to have done no more than acquiesce in receiving the gift without ensuring the claimant took independent advice or putting it to him that it might leave him with inadequate means of support.

<sup>360</sup>

**U** It has been pointed out<sup>361</sup> that in the leading case of *Allcard v Skinner*, Lindley LJ put the matter in terms of protecting the victim from fraud:

"The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or

want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction ... It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.”<sup>362</sup>

- 077 Cotton LJ, in contrast, put the matter in terms of a public policy to ensure that the claimant acted spontaneously<sup>363</sup>:

“These decisions may be divided into two classes—First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor’s will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.”

- 078 Bowen LJ’s view was less clear, as he referred to both public policy and “fair play”.<sup>364</sup> Certainly, some more recent cases have put emphasis, not on the claimant’s consent, nor the defendant’s conduct, but on the potential disadvantage of the transaction to the claimant in the light of the parties’ relationship. In *Pestuccio v Huet*, Mummery LJ said:

“Although undue influence is sometimes described as an “equitable wrong” or even as a species of equitable fraud, the basis of the court’s intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives<sup>365</sup>: ... The court scrutinises the circumstances in which

the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. A transaction may be set aside by the court, even though the actions and conduct of the person who benefits from it could not be criticised as wrongful.”<sup>366</sup>

- 079 The decision of the House of Lords in *Royal Bank of Scotland v Etridge (No.2)*<sup>367</sup> makes clear that there are not two classes of undue influence, actual and presumed (as previously accepted),<sup>368</sup> but merely two methods of proving undue influence; one by direct proof, and the other by use of a presumption that arises when there is a relationship of trust and confidence between the parties<sup>369</sup> and a transaction between them that “requires explanation”.<sup>370</sup> There is no need to insist on undue influence being limited to cases of wicked exploitation; to do so would involve at least a substantial reworking of the authorities.<sup>371</sup>

## Unconscionable conduct and the resulting transaction

- 080 It is submitted that the decisions may be reconciled by taking into account the nature of the transaction. If the transaction is obviously one-sided (like a substantial outright gift to the defendant, and particularly if it is one that will have serious effects for the claimant, for example, leaving him with very limited resources<sup>372</sup>), and if there was a relationship of trust and confidence between the parties, the presumption of undue influence will arise. The defendant will not rebut the presumption by showing that he did nothing wrong. It has long been accepted in cases where undue influence was presumed that the transaction may be set aside even though it is found that the defendant acted with propriety.<sup>373</sup> Unconscionability in such a case consists in failing to point out to the claimant that the transaction was not to her advantage and ensuring that she took proper independent advice.<sup>374</sup> Alternatively, the claimant may actually be able to show that the defendant used influence. In such cases, it is said that there is no need to prove a transaction calling for an explanation. However, it is the parties’ relationship and the extent of any disadvantage of the transaction to the claimant that makes the, otherwise low-level, coercion (harassment, emotional blackmail or bullying, which would not fall within the duress doctrine)<sup>375</sup> “undue” and so legally relevant.
- 081 In a case in which the defendant did not exert emotional pressure or resort to misrepresentation or non-disclosure to obtain the transaction, but merely “decided for” the claimant, who simply followed the advice, the exercise of influence is unlikely to be held to be undue unless the defendant “preferred his own interests”. If the defendant was seeking to make an arrangement that would

be to the claimant's advantage, the exercise is unlikely to be undue.<sup>376</sup> Thus in a case in which the wife simply signed whatever her husband put in front of her, it was said that the husband's influence was not "undue" because the transaction appeared at the time to be to her advantage: the husband was seeking to obtain for her an interest in a property which at the time was worth more than the amount charged, as he "was getting on".<sup>377</sup> In either type of case it is immaterial that the person to whom the gift or promise is made derives no personal benefit from it.<sup>378</sup>

## Footnotes

<sup>1</sup> See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).

<sup>333</sup> See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006)* 59 C.L.P. 231.

<sup>357</sup> For a useful summary of the debate see Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 11-08—11-11.

<sup>358</sup> See below, paras 10-089—10-094.

<sup>359</sup> See below, para. 10-093.

<sup>360</sup> This has led for a call for undue influence cases to be re-classified as "plaintiff-sided", the core of the doctrine being that the complainant's dependency led to the impairment of her decision, rather than that the defendant took advantage. See Birks and Chin in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (1995), pp.57–97, who at p.59 cite dicta by the Australian High Court in *Commercial Bank of Australia Ltd v Amadio (1983)* 151 C.L.R. 447, 461, 474 to similar effect. This approach appears to have received some support in *Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10* at [15]. Contrast N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), para.7-007. *Chen-Wishart (2006)* 59 C.L.P. 231 and in Burrows and Rodger (eds), *Mapping the Law* (2006) 210 prefers a "relational" analysis which looks to both the propriety of any disadvantage in the transaction to the claimant, and to the defendant's conduct in the context of the parties' relationship, which has a notably lower threshold than would be required for a finding of duress. See also *Bigwood (2005)* 25 O.J.L.S. 231.

<sup>361</sup> *Lewison [2011] R.L.R.I.*

<sup>362</sup> *(1887) L.R. 36 Ch. D. 145, 182–183.*

<sup>363</sup> *(1887) L.R. 36 Ch. D. 145, 170.*

<sup>364</sup> *(1887) L.R. 36 Ch. D. 145, 190.*

<sup>365</sup> At this point Mummery LJ referred to *Allcard v Skinner (1887) 36 Ch. D. 145* at 171.

<sup>366</sup> *[2004] EWCA Civ 372* at [20].

<sup>367</sup> *[2001] UKHL 44, [2002] 2 A.C. 773.*

<sup>368</sup> See below, paras 10-082—10-083.

<sup>369</sup> See below, paras 10-103 et seq.

- 370 See below, paras 10-087 and 10-120 et seq.
- 371 See Beale, “Undue Influence and Unconscionability” in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Contract* (2017), Ch.5, where it is argued that while the primary purpose of the doctrine may be to prevent “tyranny, trickery and fraud”, those are not requirements. First, exploitation may be passive. Secondly, the defendant’s behaviour need not be dishonest; it can consist of a failure to ensure that the claimant was properly informed, was thinking through the consequences and was acting free of the defendant’s influence. Thirdly, the transaction need not always be apparently to the claimant’s disadvantage at the time.
- 372 As in *Hammond v Osborn* [2002] EWCA Civ 885.
- 373 e.g. *Cheese v Thomas* [1994] 1 W.L.R. 173; *Chen-Wishart* (1994) 110 L.Q.R. 173, 175; *Hammond v Osborn* [2002] EWCA Civ 885; *The Times*, 18 July 2002; *Scott* [2003] L.M.C.L.Q. 145.
- 374 Compare *Hammond v Osborn* [2002] EWCA Civ 885, [2002] W.T.L.R. 1125, a case of gift in which it was held that the donor had not made an informed judgment. It was accepted that the recipient was not guilty of any reprehensible conduct. It appears that the exercise of undue influence consisted of failing to draw the donor’s attention to the size of the gift he was making and to ensure that he obtained independent advice. It has been argued that the approach of the court in this case was inconsistent with the Etridge case: *Scott* [2003] L.M.C.L.Q. 145; but the explanation given in the text above is preferred. See also *Macklin v Dowsett* [2004] EWCA Civ 904, [2004] All E.R. (D) 95 (Jun) at [10]; *Turkey v Awadh* [2005] EWCA Civ 382, [2005] 2 F.C.R. 7 at [11] (“no need to show ... either misconduct or that the deal was disadvantageous”). See also *Goodchild v Bradbury* [2006] EWCA Civ 1868; *Gorjat v Gorjat* [2010] EWHC 1537 (Ch) at [147] (“where one person has acquired a measure of ascendancy over the other or one of the parties is vulnerable and reliant and where the transaction is not readily explicable by ordinary motives ... it must be proved that the donor knew and understood what he was doing”).
- 375 See below, paras 10-088—10-100.
- 376 e.g. *Royal Bank of Scotland Plc v Chandra* [2011] EWCA Civ 192. See further below, para.10-098.
- 377 *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, 883–884, per Millett LJ. The other members of the court did not consider the question.
- 378 *Ellis v Barker* (1871) L.R. 7 Ch. App. 104; *Allcard v Skinner* (1887) L.R. 35 Ch. D. 145; *Bullock v Lloyds Bank Ltd* [1955] Ch. 317. The doctrine is not limited to transactions which are in favour of, or which have been instigated by, the individual on whom reliance has been placed: *Naidoo v Naidu*, *The Times*, 1 November 2000.

## **(iv) - Classes of Undue Influence**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 3. - Undue Influence<sup>333</sup>**

**(a) - Introduction**

**(iv) - Classes of Undue Influence**

### **Traditional classes of undue influence**

-082 In *Allcard v Skinner* Cotton LJ classified the cases into two:

“First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor’s will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.”<sup>379</sup>

In *Barclay’s Bank Plc v O’Brien*<sup>380</sup> Lord Browne-Wilkinson adopted a classification previously set out by the Court of Appeal,<sup>381</sup> labelling cases of actual undue influence as Class 1 and of

presumed undue influence as Class 2. Class 2 was subdivided into cases in which there is a relationship between the parties such that it is presumed as a matter of law that undue influence had been used (Class 2A) and those in which for the presumption to arise it must be proved on the facts the existence of a relationship under which the complainant generally reposed trust and confidence in the defendant (Class 2B).

## Only one class of undue influence

- 083 In the subsequent House of Lords case of *Royal Bank of Scotland v Etridge (No.2)*<sup>382</sup> the traditional classifications and the statements about when a presumption of undue influence will arise were criticised. In particular, it was pointed out that no presumption that the influence was undue will arise unless the transaction between the parties is one that is not readily explicable by ordinary motives.<sup>383</sup> Further, Lord Hobhouse and Lord Scott criticised the “so-called Class 2B presumption” in particular.<sup>384</sup> And Lord Nicholls, whose opinion was supported by all their Lordships, remarked that the custom of distinguishing between cases of actual undue influence and presumed undue influence “can be confusing”.<sup>385</sup> The question is more one of proof. The claimant may prove undue influence directly. Even if he does not do this, if nonetheless he shows that he placed trust and confidence in the other party in relation to the management of his affairs, and that the transaction in question is one that calls for explanation, that “will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof” and the transaction will be liable to be set aside.

<sup>386</sup>

- U The “presumption” “is descriptive of a shift in the evidential onus on a question of fact”.<sup>387</sup>

“The combination of a relationship in which a wife entrusts financial decisions to her husband and a transaction which is sufficiently disadvantageous to her to call for explanation may shift the evidential burden to the party relying on the transaction, but when the principal participants have given oral evidence, the issue for the Court is whether on the totality of the evidence, including any appropriate inference, it finds that the transaction was in fact brought about by undue influence.”<sup>388</sup>

It is presumably this which caused Lord Clyde in the *Etridge* case to doubt the utility of distinguishing between actual and presumed undue influence.<sup>389</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006) 59 C.L.P. 231.*
- 379 *(1887) L.R. 36 Ch. D. 145, 171.*
- 380 *[1994] 1 A.C. 180, 189–190.*
- 381 In *Bank of Credit and Commerce International SA v Aboody [1990] 1 Q.B. 923, 953.*
- 382 *[2001] UKHL 44, [2002] 2 A.C. 773.*
- 383 *[2001] UKHL 44* at [22]–[23]; below, para.10-120.
- 384 See below, paras 10-112—10-119.
- 385 *[2001] UKHL 44* at [17].
- 386 *[2001] UKHL 44* at [14]. The question is whether undue influence has been proved, either by direct evidence or by inference: *Annulment Funding Co Ltd v Cowey [2010] EWCA Civ 711* at [50] and *Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10* at [11].
- 387 *[2001] UKHL 44* at [16]. See also the speeches of Lord Clyde (at [92]) and Lord Hobhouse (at [98]).
- 388 *Royal Bank of Scotland Plc v Chandra [2010] EWHC 105 (Ch), [2010] 1 Lloyd's Rep. 677* at [121], David Richards J. (The decision was affirmed *[2011] EWCA Civ 192.*)
- 389 *[2001] UKHL 44* at [92].

## (v) - Manifest Disadvantage not Essential

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 3. - Undue Influence<sup>333</sup>

(a) - Introduction

(v) - Manifest Disadvantage not Essential

- 084 In *National Westminster Bank Plc v Morgan* Lord Scarman, giving the only full speech in the House of Lords, stated that relief for undue influence rests “not on some vague ‘public policy’ but specifically the victimisation of one party by the other”.<sup>390</sup> The House, reversing the Court of Appeal,<sup>391</sup> held that the presumption that undue influence was used only arises if the transaction is “manifestly disadvantageous” to the person influenced.<sup>392</sup> Although most of the transactions which have been set aside were obviously one-sided,<sup>393</sup> this decision seemed to represent a narrowing of the doctrine. For instance, in the Court of Appeal in *National Westminster Bank Ltd v Morgan* there had been some discussion of the position of the client who is induced by his solicitor to sell his house to the solicitor at a fair price but who regrets the sale for other reasons.<sup>394</sup> But as will be explained in the following three paragraphs, subsequent cases show that manifest disadvantage is not a necessary ingredient of any case of undue influence. In cases where undue influence has actually been shown, it has been rejected.<sup>395</sup> In cases in which there is not just a relationship of trust and confidence but a fiduciary relationship, it is not needed.<sup>396</sup> In cases in which the claimant cannot prove undue influence directly, and relies on the presumption of undue influence, the House of Lords have held that the test of manifest disadvantage should not be applied. Rather, the presumption will only arise if there is the necessary relationship of trust and confidence and “a transaction that cannot be explained by ordinary motives”.<sup>397</sup> In practice, “manifest disadvantage” to the claimant and “a transaction that cannot be explained by ordinary motives” will overlap, and one or other will almost invariably accompany a finding of undue influence.

## Undue influence actually proved

- 085 In cases where undue influence has actually been shown, the party influenced is entitled to a remedy without more, unless the right to rescind has been lost<sup>398</sup>; it is not necessary to show that the transaction was manifestly disadvantageous to him or her.<sup>399</sup> Nevertheless, the point remains that the extent of any disadvantage of the transaction to the claimant will serve to make the otherwise low-level influence exercised (harassment, emotional blackmail or bullying, which would not fall within the duress doctrine)<sup>400</sup> “undue”.

## Cases of abuse of confidence

- 086 In a case in the Court of Appeal after *Morgan* it was pointed out that even if undue influence would not be a ground for upsetting a transaction that was not manifestly disadvantageous to the claimant, if the parties were in a fiduciary relationship the client might be able to obtain relief on the more limited ground of abuse of confidence.<sup>401</sup> This applies only between solicitor and client, principal and agent, trustee and beneficiary and persons in similar positions.<sup>402</sup> In these cases it is not necessary for the party seeking relief to show that the transaction is manifestly disadvantageous to him.<sup>403</sup> The cases are:

“... founded on considerations of general public policy, *viz.* that in order to protect those to whom fiduciaries owe duties *as a class* from exploitation by fiduciaries *as a class*, the law imposes a heavy duty on fiduciaries to show the righteousness of the transactions.”<sup>404</sup>

Abuse of confidence is outside the scope of this chapter.<sup>405</sup>

## “Manifest disadvantage” replaced by “transaction requiring explanation”

- 087 The existence of the cases referred to in the last paragraph, and the fact that the House of Lords in *Morgan* was apparently not referred to them, seems to have led to that decision being the subject of some doubt in the later case of *CIBC Mortgages Plc v Pitt*.<sup>406</sup> (The actual decision in that case was that manifest disadvantage need not be shown in cases of actual undue influence.<sup>407</sup>) Lord

Browne-Wilkinson, in a judgment with which the other members of the House agreed, pointed out the difficulty of reconciling *Morgan* with the abuse of confidence cases. He stated that “the exact limits of *Morgan* may have to be examined in the future”.<sup>408</sup> But in the *Etridge* case the House of Lords held that the presumption of undue influence does not arise until it has been shown, first, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant; and secondly, that the transaction is not readily explicable by the relationship of the parties. The House held that the phrase “manifest disadvantage” should be abandoned because it had been misunderstood. Lord Nicholls said that in cases in which a wife had given a guarantee of the debts of her husband’s business, in particular, it had sometimes led to the conclusion that such a guarantee was always manifestly disadvantageous because the wife undertakes a serious financial obligation and in return she personally receives nothing. This view was too narrow, and the better test to apply is that stated by Lindley LJ in *Allcard v Skinner*.<sup>409</sup> Thus for a presumption to arise that undue influence has been exercised, it is not sufficient for the complaining party to show the existence of a confidential relationship. It must also be shown that the transaction cannot, in Lindley LJ’s words, “reasonably [be] accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act”.<sup>410</sup> Of course, disadvantage or unfairness is relevant to the issue of whether a transaction is readily explicable on ordinary motives. In *Nature Resorts Ltd v First Citizens Bank Ltd*

<sup>411</sup>

 the Privy Council opined that:

“The underlying idea behind the test is that the nature and/or contents of the transaction must make one conclude, in the context of the relationship of influence, that, absent evidence to the contrary, undue influence has been exercised. A contract between A and B which is substantively very unfair to A stands on one side of the line: a Christmas present by A to B stands on the other side of the line.”

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart* (2006) 59 *C.L.P.* 231.
- 390 [1985] *A.C.* 686, 705.
- 391 [1983] 3 *All E.R.* 85.
- 392 [1985] *A.C.* 686, 704, relying on a Privy Council decision on the Indian Contracts Act, *Poosathurai v Kannappa Chettiar* (1919) *L.R.* 47 *Ind. App.* 1. As Nourse LJ put it in *Goldsworthy v Brickell* [1987] *Ch.* 378, 401: “the presumption is not perfected and remains inoperative until the party who has ceded the trust and confidence makes a gift so large, or

enters a transaction so improvident, as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which men act. Although influence might have been presumed beforehand, it is only then that it is presumed to have been undue”.

- 393 As Lord Nicholls put it in *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 77* at [12]: “[I]n the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous”.
- 394 *[1983] 3 All E.R. 85, 90.*
- 395 See next paragraph.
- 396 See below, para.10-086.
- 397 See below, paras 10-103—10-127.
- 398 See below, paras 10-132 et seq.
- 399 *CIBC Mortgages Ltd v Pitt [1994] 1 A.C. 200*, overruling *Bank of Credit and Commerce International SA v Aboody [1990] 1 Q.B. 923* on this point; *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [12], [156].
- 400 See below, paras 10-090—10-093.
- 401 *Bank of Credit & Commerce International SA v Aboody [1990] 1 Q.B. 923, 943*. See Snell’s Principles of Equity, 32nd edn (2010), paras 8-022 and 9-007—9-012.
- 402 *[1990] 1 Q.B. 923, 943.*
- 403 In a leading case Lord Parmoor, delivering the judgment of the Privy Council, said that relief will be given “unless the person claiming to enforce the contract can prove, affirmatively, that the person standing in such a confidential position has disclosed, without reservation, all the information in his possession and can further show that the transaction was, in itself, a fair one”: *Demara Bauxite Co Ltd v Hubbard [1923] A.C. 673, 681–682*.
- 404 Lord Browne-Wilkinson in *CIBC Mortgages Plc v Pitt [1994] 1 A.C. 200, 209*.
- 405 See N. Enonchong, Duress, Undue Influence and Unconscionable Dealing, 2nd edn (2012), Ch.14.
- 406 *[1994] 1 A.C. 200.*
- 407 Above, para.10-084.
- 408 *[1994] 1 A.C. 200*. For criticism of the requirement see *Capper (1998) 114 L.Q.R. 479, 487* and numerous further comments cited at *(1998) 114 L.Q.R. 479, n.44*. In *Barclays Bank v Coleman [2000] 1 All E.R. 385, 400*, Nourse LJ, delivering the only full judgment, said that Slade LJ in the Court of Appeal in *National Westminster Bank Ltd v Morgan [2000] 1 All E.R. 385*, had stated the law as it stood at the time accurately; and that not every transaction in which an unfair advantage is obtained is necessarily manifestly disadvantageous. While in that case the House of Lords had held that manifest disadvantage is required in Classes 2A and 2B, this “may not remain essential indefinitely”. For the time being at least this prediction seems to have been inaccurate at least in substance, as the test is now more demanding.
- 409 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773*, per Lord Nicholls at [21]—[29]. See also the speech of Lord Scott at [156]—[158].
- 410 *Allcard v Skinner (1887) L.R. 36 Ch. D. 145, 185.*

•411 [2022] UKPC 10 at [12].

---

End of Document

© 2022 SWEET & MAXWELL

## **(i) - "Actual" Undue Influence**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 3. - Undue Influence<sup>333</sup>**

**(b) - Direct Proof of Undue Influence**

**(i) - "Actual" Undue Influence**

- 088 If there is no special relationship of the kind to be mentioned below, between the parties, or if there is such a relationship but the transaction that is challenged is not one that "requires explanation", the onus is upon the person seeking to avoid the transaction to establish that undue influence was used.<sup>412</sup> In *Bank of Credit and Commerce International SA v Aboody* Slade LJ, delivering the judgment of the Court of Appeal, said:

"... we think that a person relying on a plea of actual undue influence must show that  
(a) the other party to the transaction ... had the capacity to influence the complainant;  
(b) the influence was exercised; (c) its exercise was undue; (d) that its exercise brought about the transaction."<sup>413</sup>

It seems that undue influence may be proved by showing one of various forms of conduct.

**Coercion or actual pressure as duress**

- 089 Undue influence may be proved by showing that there was actual pressure exerted by the donee.  
 This does not necessarily require a pre-existing relationship between the parties.  
414

- U However, these cases are now better viewed as cases of illegitimate pressure  
415
- U and, accordingly, they were treated in the previous section.  
416
- U Thus, courts will be slow to treat differently a plea of duress “rebadged and relaunched” as a plea of actual undue influence and vice versa.  
417
- U The Supreme Court has confirmed that cases involving threats of prosecution of a third-party family member, decided under the rubric of actual undue influence “are now seen as examples of lawful act duress”.  
418

## Proved undue influence: bullying, confrontation and harassment

- 090 Undue influence may be proved by showing that the defendant used their relationship with the claimant to put pressure on the claimant.<sup>419</sup> For example, undue influence was proved in *Clarke v Prus*,<sup>420</sup> where the defendant befriended the elderly claimant after the latter’s wife died, and obtained gifts totalling £1.9 million over some 20 years. The court held that “what started out as Mr Clarke’s folly … finished up as Mrs Prus’ victimisation at the end of his life” when her requests turned into increasingly vehement demands made by verbal onslaughts and oppressive harassment.<sup>421</sup> Undue influence was also proved in *Drew v Daniel*,<sup>422</sup> where Daniel coerced his aged aunt to confer a significant benefit on him at the expense of her own son in a distressing and lengthy conversation, coupled by threats to sue her. Daniel concealed his dealings from her son and her solicitor. Ward LJ found Daniel’s conduct “unacceptable” in view of Drew’s vulnerability, naivety in business and fear of confrontation.<sup>423</sup> In *Re Craig*<sup>424</sup> an 84-year-old man, after his wife’s death, hired a companion to whom he transferred three-quarters of his wealth over six years. The court found undue influence to be proved from:

“… the amount of the gifts, the circumstances in which they were made, the vulnerability of Mr Craig to pressure by Mrs Middleton [the companion], the evidence of the direct exercise of that pressure on other occasions and for other purposes, the knowledge of Mr Craig and Mrs Middleton of his utter dependence on her, and the whole history of the relationship”.<sup>425</sup>

This case overlaps with cases in the next paragraph. However, “importunity and pressure ... [are] neither always necessary nor sufficient”.<sup>426</sup> Actual undue influence may be denied although pressure was applied by the defendant where a claimant:

“... was not a timid housewife, inexperienced in business ... she was an experienced businesswoman, used to dealing with professional advisers in relation both to the corporate business and to her personal affairs ... This was a case of a hard negotiation by experienced business people in a commercial transaction, and nothing more.”<sup>427</sup>

The nature of the parties’ relationship and the resultant transaction are clearly relevant.

## Proved undue influence: threat to abandon

- 091 Some cases of proved undue influence concern threats to abandon. In *Langton v Langton*,<sup>428</sup> the son and daughter-in-law of the complainant moved in with him after his release from prison for murdering his wife. They knew he feared further institutionalisation and threatened to stop caring for him as his health deteriorated if he did not transfer his property to them. Undue influence was proved. In *Bank of Scotland v Bennett*<sup>429</sup> the husband used wounding and insulting language to accuse his wife of disloyalty in contrast to the loyalty of his relatives. He said she would be a “waste of rations” if she refused to guarantee his business debt and would be splitting up the family. The judge found “moral blackmail amounting to coercion and victimisation”.<sup>430</sup>

## Proved undue influence: excessive control, secrecy and exclusivity

- 092 Undue influence may be shown without proof of pressure by showing that the stronger party exercised such a degree of domination or control over the mind of the weaker party that the latter’s independence of decision was substantially undermined.<sup>431</sup> The critical question is whether the complainant was allowed to exercise an independent and informed judgment.<sup>432</sup> Many of the old cases on this point have concerned spiritual “advisers”, who have used their expert knowledge of the next world to obtain advantages in this.<sup>433</sup> In *Morley v Loughnan*<sup>434</sup> executors recovered from the defendant large sums of money obtained by him from their testator during the last seven years of his life, on the ground that they had been obtained by undue influence in the guise of religion, it being held unnecessary to decide whether there was a fiduciary or confidential relationship between the defendant and the testator.<sup>435</sup> The testator, who was physically frail, lived with the defendant in practical seclusion as a member of the “Exclusive Brethren”, and the defendant controlled every aspect of the testator’s life including his diet and medicines. In *Killick*

*v Pountney*<sup>436</sup> undue influence was proved where a testator who had entered a nursing home after lodging with the defendants for 40 years, and the defendants banned him from contact with his relatives on threat of not allowing him to come home, which terrified him. There have also been cases where an employee obtained complete control over an employer of weak understanding,<sup>437</sup> and where an older man acquired a strong influence over a younger one, inducing him to execute securities for debts contracted by them in their career of mutual dissipation.<sup>438</sup> The transactions were set aside.

- 093 There are also husband and wife examples. In *Bank of Montreal v Stuart* the wife succeeded in establishing undue influence even though the husband had put no pressure on her because none was needed, as “she had no will of her own … she was ready to sign and do anything he told her to do”.<sup>439</sup> In *Bank of Credit and Commerce International SA v Aboody*,<sup>440</sup> the wife trusted her husband in business matters and signed documents he put before her without question. Although there was also evidence that he bullied her and that she signed because she wanted peace, the Court of Appeal did not rely on these facts; it considered that if the husband had intentionally exploited her trust to get the wife to sign manifestly disadvantageous documents without explaining them to her, that would constitute undue influence.<sup>441</sup> As now in cases where undue influence is actually proved it is not necessary to prove that the transaction was manifestly disadvantageous in order to obtain relief,<sup>442</sup> it seems that a party who is shown to have exploited another’s trust to get them to enter a transaction in the former’s interest without proper consideration or explanation will be held to be exercising undue influence; the influenced party’s mind is “a mere channel through which the will of [the influencing party] operates”.<sup>443</sup> As Lord Nicholls put it:

“In cases of this … nature the influence one person has over another provides scope for misuse without any specific acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree to a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests.”<sup>444</sup>

## Proved undue influence: husbands and wives

- 094 In *CIBC Mortgages Plc v Pitt* there was a finding of actual undue influence which seems to have rested largely on the pressure that the husband placed upon the wife.<sup>445</sup> But there may have been some change in what pressure wives are expected to have to withstand. In *Royal Bank of Scotland v Etridge (No.2)* Lord Nicholls said:

"Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence."<sup>446</sup>

## Proved undue influence: misrepresentation and non-disclosure

- 095 There may also be actual proof of undue influence in the form of misrepresentation or non-disclosure. Lord Nicholls in the *Etridge* case said that:

"[W]hen a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural. Courts should not too readily treat such exaggerations as misrepresentations."<sup>447</sup>

But Lord Nicholls continued:

"... inaccurate explanations of a proposed transaction are a different matter. So are cases where a husband, in whom a wife has reposed trust and confidence for the management of their financial affairs, prefers his interests to hers and makes a choice for them both on that footing. Such a husband abuses the confidence he has. He fails to discharge the obligation of candour and fairness he owes a wife who is looking to him to make the major financial decisions."<sup>448</sup>

This does not mean that an unintentional failure by the husband to disclose a relevant fact to the wife amounts to proof of undue influence<sup>449</sup>; but a deliberate suppression of information because the husband knows that, if disclosed, it will deter the wife from giving the guarantee will involve an abuse by him of her confidence.<sup>450</sup>

## Proved undue influence: bribery

- 096 It has been suggested that bribery, i.e. offering an inducement rather than making a threat,<sup>451</sup> may also be a form of "actual" undue influence.<sup>452</sup>

## Disregard of the victim's interests

- 097 The House of Lords has held that in order to show actual undue influence, or rather if undue influence is actually shown to have been exercised,<sup>453</sup> it is unnecessary to show that the transaction was "manifestly disadvantageous" or "one that called for an explanation".<sup>454</sup> In *CIBC Mortgages Plc v Pitt*<sup>455</sup> Lord Browne-Wilkinson said that actual undue influence was a species of fraud, and the victim is entitled to have the transaction set aside as of right. He continued:

"No case decided before [National Westminster Bank Plc v Morgan]<sup>456</sup> was cited (nor am I aware of any) in which a transaction proved to have been obtained by actual undue influence has been upheld nor is there any case in which a court has even considered whether the transaction was, or was not, advantageous."

However, the complainant may well have to show that the other party at least "preferred his own interests".<sup>457</sup> This phrase several times formed part of Lord Nicholls' description of "actual undue influence" in the *Etridge* case.<sup>458</sup> It certainly seems sufficient that the defendant took advantage of the claimant's willingness to trust him to prefer his own interests. Nor in such a case does it seem to matter that the transaction was not unfair to the claimant in purely financial terms: relief may be given even though, for example, the claimant obtained a reasonable price for property they were selling if the sale was disadvantageous to them, and advantageous to the defendant, in some other way.<sup>459</sup> It is also clear that the defendant need not have derived any personal advantage from the transaction.<sup>460</sup> In practice, the concepts of "manifest disadvantage", "a transaction calling for an explanation" and the defendant "preferring his own interest" are not hard edged and may overlap to a significant extent.

## The defendant has preferred their own interest

- 098 What is less clear is whether relief can be given even if the defendant thought they were acting in the victim's interests. In a case in which the wife simply signed whatever her husband put in front of her, it was said that the husband's influence was not "undue" because the transaction appeared at the time to be to her advantage: the husband was seeking to obtain for her an interest in a property which at the time was worth more than the amount charged, as he "was getting on". Millett LJ said:

"The court of equity is a court of conscience. It sets aside transactions obtained by the exercise of undue influence because such conduct is unconscionable."<sup>461</sup>

The law on this point is not wholly clear. Certainly undue influence has been found when the defendant had not behaved improperly, sought to trick or take advantage of the claimant; but the court found that the transaction was manifestly disadvantageous to the claimant.<sup>462</sup> In the context of parties who trust the other to the extent that they sign without question, it may be that the influence that has been proved to exist may be treated as undue if the transaction was clearly unwise for the claimant,<sup>463</sup> whether or not the defendant stood to benefit from it (this is indistinguishable from presumed undue influence)<sup>464</sup>; but that if there is clear evidence that the defendant preferred their own interests, the influence will have been exercised "unduly" even if the transaction is not so clearly disadvantageous to the claimant.<sup>465</sup> In practice, there may not be much difference between these situations.

## Causation

- 099 In cases of fraud, the fraud must have induced the contract; by analogy it would seem that actual undue influence must have contributed to the claimant's decision to enter the contract.<sup>466</sup> In *Bank of Credit and Commerce International SA v Aboody*<sup>467</sup> it was said that it would not be appropriate for the court to exercise its jurisdiction to set aside the contract "where the evidence establishes that on the balance of probabilities the complainant would have entered the contract in any event". But in *UCB Corporate Services Ltd v Williams*<sup>468</sup> the Court of Appeal held that, as undue influence is a species of fraud, it is no answer that the person influenced would have entered the transaction anyway: it is the fact that she has been deprived of the opportunity to make a free choice that founds her equity to set aside the transaction. The proposition in *Aboody's* case was said to be:

"... flatly inconsistent with Lord Browne-Wilkinson's statement of principle<sup>469</sup> ... that a victim of undue influence is entitled to have the transaction set aside 'as of right'. The words 'as of right' seem ... to admit of only one meaning; viz., regardless of other considerations."<sup>470</sup>

The matter was put even more strongly in *Syndicate Bank v Dansingani*<sup>471</sup> by HH Judge Dight, although reasoning from an absence of consent view of undue influence:

"I ... reject the ... argument that there has to be a causal link between the alleged undue influence and execution of the challenged document in the sense that ... [the claimant] has to show that had she been fully informed she would not have entered into the transaction. Causation in that sense is not part of the principles relating to undue influence which concerns the free will of the complainant at the point of entry into the transaction, to which an understanding is, of course, relevant, but is not the only or indeed main factor. If she did not enter into the transaction of her own free will she did not consent to it and she has a right in principle to set the transaction aside."

Presumably it would follow also that the same presumption applies as in fraud,<sup>472</sup> so that it will be for the stronger party to show that the undue influence had no impact at all on the complainant's decision.<sup>473</sup>

## Overlap between proved and presumed undue influence

- 100 There is a close parallel between these cases of "actual" undue influence and cases in which undue influence may be presumed. In each case the capacity to influence the complainant exists because of the trust and confidence that the claimant had in the other party, at least in relation to the transaction in question. The fact that the confidence has been abused may be *presumed* from the fact that the claimant has entered a transaction that is not readily explicable by the relationship of the parties<sup>474</sup>; but if it is shown that the particular transaction was the result of the claimant simply following the other party's suggestions, and the latter did not allow the claimant to exercise their own free and informed judgment but furthered their own interests,<sup>475</sup> that will amount<sup>476</sup> to actual undue influence.<sup>477</sup> Manifest disadvantage is powerful evidence that undue influence has been exercised.<sup>478</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006)* 59 *C.L.P.* 231.
- 412 *Allcard v Skinner (1887)* *L.R.* 36 *Ch. D.* 145, 181.
- 413 [1990] 1 *Q.B.* 923, 967.
- 414 See *Royal Bank of Scotland v Etridge (No.2)* [2001] *UKHL* 44, [2002] 2 *A.C.* 773 at [103] (Lord Hobhouse); *Libyan Investment Authority v Goldman Sachs* [2016] *EWHC* 2530 (*Ch*) at [136]–[137] (Rose J) (although the defendant was exploiting the complainant's relationship with a third party); cf. *Dwyer (UK Franchising) Ltd v Fredbar Ltd* [2021] *EWHC* 1218 (*Ch*) rejection of actual undue influence between commercial parties.
- 415 Birks and Chin in *Good Faith and Fault in Contract Law*, pp.63–65; *Capper (1998)* 114 *L.Q.R.* 479, 484, 493. An example of actual undue influence that seems to have amounted to illegitimate pressure is *Drew v Daniel* [2005] *EWCA Civ* 507, [2005] 2 *F.C.R.* 365.
- 416

In *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [8], Lord Nicholls said that overt acts of improper pressure or coercion, such as unlawful threats, might amount to undue influence but continued: “Today there is much overlap with the principle of duress as this principle has subsequently developed.” In *Holyoake v Candy* [2017] EWHC 3397 (Ch) Nugee J said that he could not see what a plea of actual undue influence of this kind adds to a plea of duress, or how it could succeed if a plea of duress fails on the facts: at [407]. Compare *De Sena v Notaro* [2020] EWHC 1031 (Ch) at [216], where HH Judge Paul Matthews (sitting as a Judge of the High Court) held that actual undue influence “involves pleading and proving ‘overt acts of improper pressure or coercion such as unlawful threats’, and that this overlaps with the principle of duress at common law”.

- 417 *KSH Farm Ltd v KSH Plant Ltd* [2021] EWHC 1986 (Ch) at [622] where the court rejected a plea of actual undue influence because it relied on “exactly the same factual averments” as the claimant’s plea of duress.

- 418 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [8]–[9] and [89]–[90]. See also *Al-Subaihi v Al-Sanea* [2021] EWHC 2609 (Comm) at [190] and *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] UKPC 10 at [10] (“illegitimate threats … are nowadays better viewed as falling within the doctrine of duress”).

- 419 An example seems to be *Coldunell Ltd v Gallon* [1986] Q.B. 1184; see at 1196. Compare *De Sena v Notaro* [2020] EWHC 1031 (Ch) at [217]–[218] (commercial pressure which cannot be regarded as improper or illegitimate is insufficient, “I do not say that the first defendant did not put any pressure on the first claimant. I accept that his business style could be self-centred, brusque and occasionally abrasive. He was every inch a businessman, who looked out for the interests of his company… [and of] himself. That is not wrong. To put pressure on another person to do a deal that you would like to do is not without more wrong.” Since the claimant “was an experienced businesswoman” the first defendant’s conduct cannot “properly be regarded as acts of improper or illegitimate pressure or coercion. This was a case of a hard negotiation by experienced business people in a commercial transaction, and nothing more”).

420 [1995] 3 WLUK 91, [1995] Lexis Citation 3253 (transcript).

421 [1995] 3 WLUK 91, [1995] Lexis Citation 3253 (transcript) at 34.

422 *Drew v Daniel* [2005] EWCA Civ 507.

423 *Drew v Daniel* [2005] EWCA Civ 507 at [28] and [46].

424 *Re Craig* [1971] Ch. 95.

425 *Re Craig* [1971] Ch. 95, 121.

426 *Royal Bank of Scotland v Etridge (No.2)* [1998] 4 All E.R. 705, 712. See also *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, 883.

427 *De Sena v Notaro* [2020] EWHC 1031 (Ch) at [218].

428 [1995] 2 F.L.R. 890.

429 *Bank of Scotland v Bennett* (1997) 1 F.L.R. 801.

430 *Bank of Scotland v Bennett* (1997) 1 F.L.R. 801 at 827. This case was reversed on other grounds: [1999] 1 F.L.R. 1115.

- 431 *Bank of Montreal v Stuart* [1911] A.C. 120.
- 432 "The donor may be led but she must not be driven; and her will must be the offspring of her own volition, not a record of someone else's": *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P. & C.R. 16 at [101].
- 433 *Norton v Relly* (1764) 2 Eden 286; *Nottidge v Prince* (1860) 2 Giff. 246; *Lyon v Home* (1868) L.R. 6 Eq. 655.
- 434 [1893] 1 Ch. 736.
- 435 It is such cases that Lord Nicholls may have had in mind when he said that undue influence includes "cases where a vulnerable person has been exploited": *Royal Bank of Scotland v Etridge* (No.2) [2001] UKHL 44, [2002] 2 A.C. 773 at [11].
- 436 [1999] 3 WLUK 568.
- 437 *Bridgeman v Green* (1755) 2 Ves. Sen. 627; *Re Craig* [1971] Ch. 95. Whether there was actual influence depends on the individual involved, not on whether a normal person would be influenced: *Re Brocklehurst's Estate* [1978] Ch. 14, 40.
- 438 *Smith v Kay* (1859) 7 H.L. Cas. 750. The position in relation to a will alleged to have been procured by undue influence is different: see *Edwards v Edwards* [2007] W.T.L.R. 1387; *Hubbard v Scott* [2011] EWHC 2750 (Ch); *Wharton v Bancroft* [2011] EWHC 3250 (Ch).
- 439 [1911] A.C. 120, 136–137. In *Royal Bank of Scotland v Etridge* (No.2) [1998] 4 All E.R. 705, 712, Stuart-Smith LJ said that this would today be more readily classed as a Class 2B case. If there is a sufficient relationship for Class 2B (below, para.10–112) and also a transaction calling for explanation, it will be in the weaker party's interest to plead the case as Class 2B as it then is up to the other party to rebut the presumption of undue influence; but actual undue influence remains an attractive alternative if there is doubt about the nature of the relationship or the need for an explanation of the transaction.
- 440 [1990] 1 Q.B. 923, 967.
- 441 The court held that manifest disadvantage was essential to a plea of actual undue influence. As on the facts it did not consider the transactions to be manifestly disadvantageous, it refused relief.
- 442 *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, overruling *Bank of Credit & Commerce International SA v Aboody* [1990] 1 Q.B. 923.
- 443 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923, 969, referring to the observations of Jenkins and Morris LJ in *Tufton v Sperni* [1952] 2 T.L.R. 516, 530, 532.
- 444 *Royal Bank of Scotland v Etridge* (No.2) [2001] UKHL 44, [2002] 2 A.C. 773 at [9]. See the discussion in *McGregor v Michael Taylor & Co* [2002] 2 Lloyd's Rep. 468, where at [24]–[27] these are described as "trust me" cases.
- 445 See the finding of the trial judge recounted in the Court of Appeal (*1993*) 66 P.&C.R. 179, 182 (affirmed [1994] 1 A.C. 200).
- 446 *Royal Bank of Scotland v Etridge* (No.2) [2001] UKHL 44, [2002] 2 A.C. 773 at [32]. cf. *Hurley v Darjan Estate Co Plc* [2012] EWHC 189 (Ch), [2012] 1 W.L.R. 1782 at [40] (fact that wife signed in the heat of the moment to keep the husband happy did not mean her consent was not free and informed; cf. the claim of undue influence made in Barclays *Bank v O'Brien*, which failed before the Court of Appeal and was not pursued: [1993] Q.B. 109, 113–117).

- 447 *Royal Bank of Scotland v Etridge* (No.2) [2001] UKHL 44, [2002] 2 A.C. 773 at [32].  
448 [2001] UKHL 44 at [33].  
449 *Royal Bank of Scotland Plc v Chandra* [2010] EWHC 105 (Ch), [2010] 1 Lloyd's Rep. 677 (affirmed [2011] EWCA Civ 192).  
450 [2010] EWHC 105 (Ch) at [131]; see also at [140]. In *Syndicate Bank v Dansingani* [2019] EWHC 3439 (Ch) at [217] the husband and brother of the wife misled her as to the basis of the mortgage and this amounted to undue influence. In *Hewett v First Plus Financial Plc* [2010] EWCA Civ 312 a husband's concealment from his wife of an affair with another woman amounted to undue influence. Compare *Davies v AIB Group (UK) Plc* [2012] EWHC 2178 (Ch) (held at [113]–[114] that no undue influence: husband made full disclosure of the entire transaction and all of the relevant documents so as to put wife's solicitor in the position to tender full and informed advice to her). A question is whether knowledge of the surety's solicitor should be imputed to her. The general rule is that, subject to any statutory variation, a solicitor's knowledge is treated as that of his client (see *AIB v Martin and Gold* Unreported 15 March 1999, Jacob J), but in *Davies v AIB Group (UK) Plc* [2012] EWHC 2178 (Ch) at [116], without deciding the issue, Norris J thought that some caution might be required in the context of undue influence arguments: "A principle of attributing the knowledge of an agent to the principal does not really assist in identifying how an intention to enter a transaction was produced—freely or under undue influence".  
451 cf. the cases on threatened prosecution and the like, above, paras 10-062—10-063.  
452 *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) at [165]–[168], Rose J. As bribery had not been established, the "difficult legal question" was left open.  
453 See above, paras 10-082—10-083.  
454 *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200; *Royal Bank of Scotland v Etridge* (No.2) [2001] UKHL 44, [2002] 2 A.C. 773 at [12], [156]. In *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P. & C.R. 16, Lewison J said that the *Etridge* case decided that "Disadvantage to the donor is not a necessary ingredient of undue influence ... However, it may have an evidential value, because it is relevant to the questions whether any allegation of abuse of confidence can properly be made, and whether any abuse actually occurred" (at [99]).  
455 [1994] 1 A.C. 200, 209.  
456 [1985] A.C. 686; above, para.10-084.  
457 See above, paras 10-080—10-081.  
458 See [2001] UKHL 44, [2002] 2 A.C. 773 at [9] (quoted above, para.10-093) and [33].  
459 For an example of a transaction which was unwise but not unfair in terms of value, see *Liddle v Cree* [2011] EWHC 3294 (Ch) at [86].  
460 *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145 (where the property went to the Order, not to the Mother Superior).  
461 *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, 883–884. The other members of the court did not consider the question.  
462 *Cheese v Thomas* [1994] 1 W.L.R. 129, decided before the decision of the House of Lords in *Etridge*: the case was one of presumed undue influence.

- 463 In practice, in such a case the transaction will require explanation (see below, para.10-120) and the claimant will rely on the presumption of undue influence, as in *Hammond v Osborn [2002] EWCA Civ 885, [2002] W.T.L.R. 1125* (see above, paras 10-080—10-081). Despite the obviously disadvantageous transaction (a very large gift which left the donor with limited means of support), the case has been criticised on the ground that the defendant did nothing wrong in (after considerable hesitation) accepting the gift: *Lewison (2011) 19 Rest L.R. 1*.
- 464 See situation where the transaction was one-sided, when it will require explanation and thus the claimant will rely on the presumption: see further below, para.10-103.
- 465 Compare N. Enonchong, Duress, Undue Influence and Unconscionable Dealing, 2nd edn (2012), paras 9-004—9-005 (wrong-doing required, though not proof of any specific act); *Chen-Wishart (2006) 59 C.L.P. 231, 265* (“an improvident outcome is practically indispensable even in class I coercion cases”; “substantive unfairness is of the essence of undue influence”).
- 466 See above, paras 9-041—9-042.
- 467 *[1990] 1 Q.B. 923, 971*.
- 468 *[2002] EWCA Civ 555* at [86].
- 469 *CIBC Mortgages Plc v Pitt [1994] 1 A.C. 200, 209*.
- 470 *[2002] EWCA Civ 555* at [91].
- 471 *Syndicate Bank v Dansingani [2019] EWHC 3439 (Ch)* at [96].
- 472 See above, paras 9-047 and 10-031.
- 473 This is the rule suggested by the statement in *Bank of Credit and Commerce International SA v Aboody [1990] 1 Q.B. 923, 971*, quoted in this paragraph. For the rule in fraud cases see above, para.9-047.
- 474 *McGregor v Michael Taylor & Co [2002] 2 Lloyd's Rep. 468* at [21]; see further below, para.10-120.
- 475 See above, paras 10-080—10-081 and 10-097.
- 476 Subject to the point to be discussed in paras 10-097—10-098.
- 477 *Royal Bank of Scotland v Coleman reported in Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [4], [90], [123], [130], [282]-[293] (in the Hasidic Jewish cultural context, the wife's: “upbringing and education ... prepared her principally for marriage within her own religious community and for a life of subservience to the wishes of her husband.... Hers may well have been a happy state, but it was one in which her husband's wishes and judgment in matters of finance and business were to be followed without question.” She was “not merely disinclined to second-guess her husband on matters of business but appears to have regarded herself as obliged not to do so”).
- 478 *Royal Bank of Scotland v Etridge (No.2) [1998] 4 All E.R. 705, 713*; cf. *[2001] UKHL 44, [2002] 2 A.C. 773* at [104].

## **(c) - Presumed Undue Influence**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 3. - Undue Influence<sup>333</sup>**

**(c) - Presumed Undue Influence**

**Presumed undue influence not a separate class**

-101 In *Barclays Bank Plc v O'Brien*<sup>479</sup> Lord Browne-Wilkinson had said that in this type of case:

“... if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a Class 2(B) case therefore, in the absence of evidence disproving due influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.”

In *Etridge* Lord Hobhouse said that it was difficult to apply this statement literally. First, in the context of husband and wife, it would seem to treat the husband as a “‘wrongdoer’ without saying why when it is expressly postulated that no wrongdoing may have occurred”.<sup>480</sup> Thus, a relationship of influence of itself does not prove that undue influence did actually occur.<sup>481</sup> Secondly, Lord Hobhouse remarked that Lord Browne-Wilkinson referred to the complainant reposing trust and confidence *generally*, whereas a wife:

“... may be happy to trust her husband to make the right decision in relation to some matters but not others; she may leave a particular decision to him but not other decisions.”<sup>482</sup>

- 102 Lord Hobhouse considered, and understood the other members of the court to agree, that there is only one class of undue influence. The claimant must prove her case by showing that she was the victim of an equitable wrong. This wrong may be an overt wrong, such as oppression; or it may be the failure to perform an equitable duty, such as a failure by one in whom trust and confidence is reposed not to abuse that trust by failing to deal fairly with her and have proper regard to her interests. She may discharge the burden of proof that rests on her (a) by direct proof,<sup>483</sup> or (b) by establishing a sufficient *prima facie* case to justify a decision in her favour on the balance of probabilities, the court drawing appropriate inferences of undue influence from the primary facts proved.<sup>484</sup> These primary facts comprise of a relationship of influence between the parties, and that they have entered a transaction that is “not otherwise readily explicable”.<sup>485</sup> Lord Scott spoke in rather similar terms<sup>486</sup>; and what Lord Hobhouse said was consistent with the remarks of Lord Clyde.<sup>487</sup> It does not seem inconsistent with what was said by Lord Nicholls.<sup>488</sup>

## Certain nominate relationships presumed to be ones of influence

- 103 If the parties were at the time of the transaction in one of certain types of relationship with each other, it is presumed that one party had influence over the other; and if it is shown that a transaction between them was one “not readily explicable by the relationship” between them, it will be presumed (or inferred)<sup>489</sup> that the transaction was the result of an abuse of the influence, unless the presumption is rebutted.<sup>490</sup> It is not necessary for the complainant to “prove that he actually reposed trust and confidence in the other party”,<sup>491</sup> or that the other party dominated the relationship. These are the cases that Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien*<sup>492</sup> referred to as “Class 2A cases”.<sup>493</sup> In such cases, if the transaction has been shown to be one requiring explanation, the onus is on the party taking the benefit to justify that it was free from undue influence.

## Relationship of influence shown on facts

- 104 Outside the recognised relationships, if the claimant proves that at the time of the transaction “requiring explanation”, a confidential relationship in fact existed between the parties, the

presumption of undue influence will arise.<sup>494</sup> That at least has been the traditional view. These are the cases labelled by Lord Browne-Wilkinson as “Class 2B”.<sup>495</sup> But the decision of the House of Lords in *Etridge*<sup>496</sup> has cast doubt on the existence of this class as a separate category. This is explored below.<sup>497</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006) 59 C.L.P. 231.*
- 479 *[1994] 1 A.C. 180* at 189–190.
- 480 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [105].
- 481 See above, paras 10-082—10-083.
- 482 *[2001] UKHL 44, [2002] 2 A.C. 773* at [105].
- 483 Above, paras 10-088—10-099.
- 484 *[2001] UKHL 44* at [107].
- 485 The cases at one time referred to as falling within Class 2(B): see above, paras 10-082—10-083.
- 486 *[2001] UKHL 44* at [158]–[162].
- 487 *[2001] UKHL 44* at [92].
- 488 In particular, *[2001] UKHL 44* at [19].
- 489 See below, para.10-105.
- 490 *Allcard v Skinner (1887) 36 Ch. D. 145, 181; Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [18].
- 491 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [18].
- 492 *[1994] 1 A.C. 180.*
- 493 See above, paras 10-082—10-083.
- 494 *Tufton v Sperni [1952] 2 T.L.R. 516, 522; Lloyds Bank Ltd v Bundy [1975] Q.B. 326.*
- 495 In *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180*: see above, paras 10-082—10-083.
- 496 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773.*
- 497 See above, para.10-101.

## **(i) - Relationships Presumed to be of Influence**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 3. - Undue Influence<sup>333</sup>**

**(c) - Presumed Undue Influence**

**(i) - Relationships Presumed to be of Influence**

### **Presumption of influence and of undue influence**

- 105 Certain types of nominate relationship give rise to a presumption that one party had influence over the other.<sup>498</sup> This does not by itself give rise to a presumption that undue influence has been used by the stronger party, but if there is a transaction between the parties that cannot, in the words of Lindley LJ in *Allcard v Skinner*,<sup>499</sup> “reasonably [be] accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act”,<sup>500</sup> then a presumption of undue influence does arise. Unless the stronger party raises sufficient doubt to rebut the presumption, the transaction will be set aside. Thus, in this class of case there are two separate presumptions. The first arises from the nature of the relationship. It is simply a presumption that one party had influence over the other; it is not a presumption that undue influence has been exercised and it is not sufficient for the transaction to be set aside, even if the stronger party offers no evidence. A presumption or inference that there was undue influence arises, as we have just seen, only when also there is a transaction that “calls for explanation”.<sup>501</sup> This second presumption is not only rebuttable but was said in *Etridge*’s case to be merely an “evidential presumption”.<sup>502</sup> This appears to mean that if the stronger party provides a reasonable explanation of the transaction or gives evidence that, on the balance of probabilities, casts doubt on whether the transaction did result from undue influence, the weaker party will succeed only if he or she can show, again on the balance of probabilities, that it was: the overall burden remains on the party seeking to set aside the transaction.<sup>503</sup>

## Value of the presumption of relationship of influence

- 106 In *Etridge*, Lord Nicholls stated that, in the nominate relationships, “the law presumes, irrebuttably, that one party had influence over the other”.<sup>504</sup> Of course it does not follow that any transaction between parties in such a relationship will be set aside, even if it is not “readily explicable by the relationship between the parties”.<sup>505</sup> The ascendant party may be able to rebut the presumption that any influence exercised was undue.<sup>506</sup> But it is not always possible to state with certainty when there will be a presumption of influence in the nominate relationships; indeed a test which states that there is a confidential relationship between, say, a parent and child<sup>507</sup> “if the parent’s influence continues” appears to be circular. Indeed, Lord Clyde disputed “the utility of the further sophistication of sub-dividing ‘presumed undue influence’ into further categories”.<sup>508</sup> Lord Nicholls further endorsed Treitel’s view that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular nominate type.<sup>509</sup> These statements indicate that in future the courts will abandon altogether the separate category of “presumed influence” and simply ask in each case whether the relationship was one of trust and confidence or of domination; or at least treat the fact that a case falls within Class 2A as raising no more than a rebuttable presumption that there was a relationship of trust and confidence between the parties.

510



## Dominating influence unnecessary

- 107 Despite the fact that in *Morgan* Lord Scarman had referred to a “dominating influence”,<sup>511</sup> in cases of presumed undue influence it is immaterial whether one party has acquired a dominating influence over the mind of the other party<sup>512</sup>:

“It is enough to show that the party in whom the trust and confidence is reposed is in a position to exert influence over him who reposes it.”<sup>513</sup>

These cases depend:

“... on the concept that once the special relationship has been shown to exist, no benefit can be retained from the transaction unless it has been positively established that the duty of fiduciary care has been entirely fulfilled.”<sup>514</sup>

## Solicitor and client

-108 Any gift or sale by a client to their solicitor will be regarded with considerable suspicion by the court.

<sup>515</sup>

U The relationship between solicitor and client can truly be said to raise an irrebuttable presumption that it is one of influence, such that, should the client enter transaction with the solicitor that calls for an explanation,

<sup>516</sup>

U the transaction is voidable for undue influence. Moreover, as mentioned earlier, the solicitor is subject to the stricter regime of abuse of confidence.

<sup>517</sup>

U The solicitor must show the utmost good faith in their dealings with their client,

<sup>518</sup>

U and must not make any benefit for themselves at their client's expense.

<sup>519</sup>

U Even if the benefit is an indirect one, as where a gift is made to the solicitor's wife

<sup>520</sup>

U or son,

<sup>521</sup>

U and even if the relationship of solicitor and client has technically ceased,

<sup>522</sup>

U the presumption will apply where the influence still continues between them.

<sup>523</sup>

U

## Parent and child

- 109 In the earliest cases in which benefits conferred by children upon their parents were set aside, the relief seems to have been extended on the ground of actual fraud.<sup>524</sup> Now, however, it is well established that the child reposes trust and confidence in the parent,<sup>525</sup> even though the child may have attained his majority not long before.<sup>526</sup> If a gift is made to a parent shortly after the child reaches the age of majority, the parent will be required to show that the child was acting independently of his influence.<sup>527</sup> This presumption can continue even after marriage,<sup>528</sup> although the duration of the presumption is a question of fact and degree in the circumstances of each particular case. This presumption of a relationship of influence is thus a rebuttable one. Family arrangements, however, are treated more leniently:

“Transactions between parent and child may proceed upon arrangements between them for the settlement of property, and of their rights in property in which they are interested.

In such cases the court regards the transactions with favour.”<sup>529</sup>

But even so, if the parent gets a disproportionate advantage, the arrangement is likely to be set aside.<sup>530</sup> As between an adult child and elderly or senile parents, no presumption of influence over the parents arises, but it may be possible to establish a case of undue influence on the facts.<sup>531</sup>

## Guardian and ward

- 110 The rebuttable presumption also applies to dealings between guardian and ward,<sup>532</sup> and the fact that the guardianship has legally terminated will not necessarily mean that the influence ceases, provided that there is still some control over the ward’s property or actions.<sup>533</sup> Persons in loco parentis are also subject to the same surveillance by the court, such as uncle and niece,<sup>534</sup> stepfather and stepdaughter,<sup>535</sup> stepmother and stepdaughter,<sup>536</sup> elder and younger brother,<sup>537</sup> and even an executor and beneficiary,<sup>538</sup> where the relationship confers a power analogous to that of parental control.

## Other possible instances

- 111

The rebuttable presumption applies to the relationship between fiancé and fiancée,<sup>539</sup> medical practitioner and patient,<sup>540</sup> trustee and cestui que trust,<sup>541</sup> religious adviser and a person to whom they give advice,<sup>542</sup> and between a person who has given a power of attorney and the person to whom it was given.<sup>543</sup> In contrast, it has been held that the relationship between husband and wife does not raise a presumption that it is one of influence.<sup>544</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006)* 59 C.L.P. 231.
- 498 See above, para.10-103.
- 499 *(1887) L.R. 36 Ch. D. 145, 185.*
- 500 This test is to be used instead of asking whether the transaction was “manifestly disadvantageous” to the weaker party: above, paras 10-084—10-087.
- 501 *[2001] UKHL 44, [2002] 2 A.C. 773* at [14]; above, para.10-087.
- 502 *[2001] UKHL 44, [2002] 2 A.C. 773* at [16], [93] (semble), [104] and [153].
- 503 Compare a legal presumption under which the burden of proof would shift to the stronger party to prove on the balance of probabilities that there was no undue influence. Before *Etridge [2001] UKHL 44* there seems to have been little discussion of the exact nature of the presumption in undue influence cases. See further below, para.10-120.
- 504 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [18].
- 505 *[2001] UKHL 44* at [21].
- 506 See above, paras 10-073—10-074 and below, para.10-128.
- 507 Above, para.10-109.
- 508 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [92].
- 509 *[2001] UKHL 44* at [10], referring to Treitel, *The Law of Contract*, 10th edn (1999), pp.380–381, but without apparently noting that Treitel was referring only to what used to be called “Class 2B” cases.
- 510 cf. *Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10* at [12] recognising the continued existence of an “irrebuttable legal presumption (... more appropriately referred to as a legal rule) that the relationship is one of influence” in respect of certain types of relationship. But see the doubts raised at [29].
- 511 *National Westminster Bank Ltd v Morgan [1985] A.C. 686, 707.*
- 512 *Lloyds Bank Ltd v Bundy [1975] Q.B. 326.*
- 513 *Goldsworthy v Brickell [1987] Ch. 378, 404.*
- 514 *Lloyds Bank Ltd v Bundy [1975] Q.B. 326*, per Sir Eric Sachs at 346.

- 515 For the analogous principles governing testamentary dispositions to solicitors, see *Wintle v Nye* [1959] 1 W.L.R. 284.
- 516 *Royal Bank of Scotland v Etridge* (No.2) [2001] UKHL 44, [2002] 2 A.C. 773 at [18]; *AKB v Willerton, OH v Craven* [2016] EWHC 3146 (QB), [2017] 4 W.L.R. 25 at [30]; *Al-Subaihi v Al-Sanea* [2021] EWHC 2609 (Comm) at [192] (“There was a lawyer-client relationship when the promissory notes were signed, but they are readily explained if explanation be needed”).
- 517 Above, para.10-086.
- 518 See above, paras 9-096—9-097; *Moody v Cox and Hatt* [1917] 2 Ch. 71.
- 519 *Turrell v Bank of London* (1862) 10 H.L. Cas. 26; *Wright v Carter* [1903] 1 Ch. 27.
- 520 *Liles v Terry* [1895] 2 Q.B. 679.
- 521 *Barron v Willis* [1902] A.C. 271.
- 522 *Demerara Bauxite Co Ltd v Hubbard* [1923] A.C. 673; *McMaster v Byrne* [1952] 1 All E.R. 1362.
- 523 In *Markham v Karsten* [2007] EWHC 1509 (Ch), [2007] All E.R. (D) 377 it was said that the relationship of solicitor and client between two parties to a transaction should not be irrelevant merely because they were also in another well-recognised relationship in which influence, or the reposing of trust and confidence, might arise. On the contrary, the influence which was presumed to exist between solicitor and client might be strengthened if they were also in a marriage or domestic partner relationship. Nor was it correct to confine the presumption of influence, as between solicitor and client, to transactions of a legal rather than domestic nature. See at [35]–[36].
- 524 *Glissen v Ogden* (1731) 2 Atk. 258; *Young v Peachy* (1741) 2 Atk. 254; *Cocking v Pratt* (1749) 1 Ves. Sen. 400.
- 525 *Wright v Vanderplank* (1855) 2 Kay. & J. 1.
- 526 *Archer v Hudson* (1844) 7 Beav. 551; *Berdeoe v Dawson* (1865) 34 Beav. 603; *Powell v Powell* [1900] 1 Ch. 243; *London and Westminster Loan & Discount Ltd v Bilton* (1911) 27 T.L.R. 184.
- 527 *Bainbrigge v Browne* (1881) 18 Ch. D. 188; *Bullock v Lloyds Bank Ltd* [1955] Ch. 317; *Re Pauling's Settlement Trusts* [1964] Ch. 303, 336.
- 528 *Lancashire Loans Ltd v Black* [1934] 1 K.B. 380.
- 529 *Baker v Bradley* (1855) 7 De G.M. & G. 597, 620; *Hartopp v Hartopp* (1855) 21 Beav. 259; *Jenner v Jenner* (1860) 2 De G.F. & J. 359; *Hoblyn v Hoblyn* (1889) 41 Ch. D. 200. cf. *Bullock v Lloyds Bank Ltd* [1955] Ch. 317.

- 530 *Hoghton v Hoghton* (1852) 15 Beav. 278; *Turner v Collins* (1871) L.R. 7 Ch. App. 329.
- 531 *Avon Finance Co Ltd v Bridger* [1985] 2 All E.R. 281. A very full survey of the doctrine of undue influence as applied to the elderly will be found in *Burns* (2003) 23 Legal Studies 251.
- 532 *Hylton v Hylton* (1754) 2 Ves. Sen. 547; *Taylor v Johnston* (1882) 19 Ch. D. 603.
- 533 *Hatch v Hatch* (1804) 9 Ves. Jr. 292.
- 534 *Archer v Hudson* (1844) 7 Beav. 551.
- 535 *Kempson v Ashbee* (1874) L.R. 10 Ch. App. 15.
- 536 *Powell v Powell* [1900] 1 Ch. 243.
- 537 *Sercombe v Sanders* (1865) 34 Beav. 382; cf. *Glover v Glover* [1951] 1 D.L.R. 657.
- 538 *Grosvenor v Sherratt* (1860) 28 Beav. 659.
- 539 *Cobbett v Brock* (1855) 20 Beav. 524; *Lovesy v Smith* (1880) 15 Ch. D. 655; *Re Lloyds Bank Ltd* [1931] 1 Ch. 289. Contrast *Zamet v Hyman* [1961] 1 W.L.R. 1442. Gifts between engaged couples may now also be set aside, if the marriage does not take place, under the Law Reform (Miscellaneous Provisions) Act 1970.
- 540 *Mitchell v Homfray* (1881) 8 Q.B.D. 587; *Radcliffe v Price* (1902) 18 T.L.R. 466.
- 541 *Ellis v Barker* (1871) L.R. 7 Ch. App. 104; *Beningfield v Baxter* (1866) 12 App. Cas. 167.
- 542 *Huguenin v Baseley* (1807) 14 Ves. Jr. 273; *Lyon v Home* (1868) L.R. 6 Eq. 655; *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145. It has been rightly pointed out that it is dangerous to assume that every relationship of this type, or of the other types just listed, will give rise to the presumption, as the relationship between the parties may not be confidential: *Cartwright, Unequal Bargaining* (1991), p.178. See further below, para.10-114.
- 543 *Hackett v Crown Prosecution Service* [2011] EWHC 1170 (Admin) at [54].
- 544 See below, para.10-119. Nor is the relationship between a social landlord's agent and a tenant under a contractual periodic tenancy: *Birmingham City Council v Beech* [2014] EWCA Civ 830, [2014] H.L.R. 38 at [65].

## **(ii) - Relationship of Influence Shown on Facts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume I - General Principles**

**Part 3 - Grounds for Avoidance**

**Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>**

**Section 3. - Undue Influence<sup>333</sup>**

**(c) - Presumed Undue Influence**

**(ii) - Relationship of Influence Shown on Facts**

### **Relationship shown on facts**

- 112 An inference of undue influence may also arise if it is shown on the facts, rather than presumed as a matter of law, that the parties were in a relationship of influence, and that the parties have entered a transaction that is “not otherwise readily explicable”. <sup>545</sup> While the cases in this section have been treated this as a separate category of presumed undue influence (formerly known as 2B), this is no longer correct in the light of the opinions expressed by the House of Lords in the *Etridge* case. <sup>546</sup> They must now be viewed simply as instances of the kind of evidence that, in the absence of direct proof of undue influence, <sup>547</sup> and in the absence of evidence of a presumption of a relationship of influence, <sup>548</sup> when combined with a transaction “not readily explicable by the relationship of the parties”, may be sufficient to raise an inference that the transaction was procured by undue influence and, unless the other party displaces this inference, should be set aside. <sup>549</sup>
- 113 Thus, for a wife to set aside a transaction between her and her husband, she will have to show, for example, that her husband took “unfair advantage of his influence … or her confidence in him”. <sup>550</sup> This is not quite the same as what is required for a case of “actual” undue influence: that would need direct proof that he exerted undue pressure or took advantage of her confidence. But the dividing line is thin. If, for example, a wife shows that in respect of a class of transactions including the particular transaction in question, she did not question her husband’s decision in any

way and simply signed what he put in front of her, she has established a case of actual undue influence, at least if she also shows that he preferred his own interests to hers.<sup>551</sup> She need not show that the transaction was not readily explicable by their relationship.<sup>552</sup> In such a case, what is the relevance of the transaction being disadvantageous to her? It seems that showing that the transaction was one that “calls for an explanation”<sup>553</sup> is no more than a piece of evidence that may be used to show that her husband did indeed abuse her trust when the evidence would otherwise fall short. The cases in what was formerly termed Class 2B must now be taken merely as examples of the kind of circumstances in which a combination of the nature of the relationship and the resulting transaction may provide sufficient evidence of undue influence for the complainant to succeed, unless the other party can somehow rebut the evidential inference.

## Relationships that may be of influence

- 114 The relevant type of relationship may arise in “all the variety of relations, in which dominion is exercised by one person over another”,<sup>554</sup> or where the claimant proves that they reposed trust and confidence in the other party. The potential breadth of the category is clear in the classic statement of Lord Chelmsford in *Tate v Williamson*<sup>555</sup>:

“Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relationship existed.”

Nevertheless, the “presumption” of undue influence does not arise merely because the relationship between the parties can be described as fiduciary (as, for instance, that of principal and agent). It arises only where the fiduciary relationship is of a particular kind which, in the opinion of equity judges,<sup>556</sup> is such as to raise concern when coupled with a transaction that calls for an explanation. For example, the relationship of bank manager and customer is not normally a confidential one in the relevant sense<sup>557</sup>; but when an elderly farmer, without consulting his solicitor, charged his property to his bank by way of guarantee of the debts of his son’s company, and it was obvious that he was relying upon the bank manager for advice, a confidential relationship arose. As the manager neither explained the company’s position fully nor suggested that the farmer get independent advice, the charge was set aside.<sup>558</sup>

## Examples

- 115 Where a young man in financial difficulties sought the advice of a more experienced relative, who himself purchased the young man's property at a third of its proper price,<sup>559</sup> where a young woman granted a mining lease to her uncle and to the son of her father's executor, being advised to do so by the executor in whom she placed "the greatest confidence",<sup>560</sup> and where a member of a committee set up to establish a Moslem cultural centre in London was induced by a fellow member to buy the latter's house from him for the purpose at a price which greatly exceeded its market value,<sup>561</sup> the transactions were set aside on the ground that the defendants had failed to rebut the presumption of undue influence.

## Relationship may arise from transaction

- 116 It has been held that a confidential relationship may arise from the circumstances of the very transaction in question, e.g. if the defendant has advised and assisted the claimant over it and the claimant has relied on the defendant for that.<sup>562</sup>

## Relationship may be inferred from disadvantageous transaction

- 117 The existence of a relationship of trust and confidence may be inferred from the fact that one party has entered an excessively onerous transaction at the request of the other (in the case in question, a junior employee with no stake in the business had at her employer's request given a second charge over her flat and an unlimited all monies guarantee of the employer's business debts).<sup>563</sup> In *Malik (Deceased) v Sheiek* Fancourt J stated that:

"... the true nature and effect of the transaction is a matter that is capable of affecting the assessment of whether or not a relationship of influence is shown to exist. A transaction that is seriously and inexplicably detrimental to a disporor is plainly likely to lead to a conclusion that it can only have been the result of a relationship of trust and confidence on the one side and influence on the other side. ... [T]here is a connection between the two separate factual assessments, which themselves are aspects of undue influence generally, such that the more disadvantageous and inexplicable the transaction the more easily a relationship of influence will be established to exist."<sup>564</sup>

Further, in *Paull v Paull*<sup>565</sup> it was held that:

“... where, or if, it is demonstrated that following a transfer, or transaction, there is evidence of a relationship of trust and confidence, it is, unless there is other conflicting evidence, a perfectly proper and permissible inference that that state of affairs also existed at the date of the transaction in question.”

In that case, the complainant, a vulnerable and eccentric 67-year-old man with limited means transferred his home where he lived with his disabled partner, to his son for no consideration. Following the transfer, the son's address became the registered address for the complainant's banking and pension documentation, which the son was authorised to open.

## Relationship may arise from vulnerability

- 118 In *Thompson v Foy*<sup>566</sup> Lewison J said that although in *Etridge*<sup>567</sup> Lord Nicholls of Birkenhead described the paradigm case of a relationship where influence is presumed as being one in which the complainant reposed trust and confidence in the other party in relation to the management of the complainant's *financial* affairs, he did not consider that this description was intended to be exhaustive. In *Malik (Deceased) v Sheikh* Fancourt J held:

“... the principle is not confined to cases where trust and confidence is reposed, either financially or generally, but extends to cases where there is evidence of dependence or vulnerability...”<sup>568</sup>

In that case, an elderly woman who was infirm, immobile, with impending mental degeneration and unable to understand English, transferred, for no consideration, her two properties to herself and the respondent as equal tenants in common, for the benefit of her sons and their company. Fancourt J concluded that the woman was in a relationship of influence with her sons (with whom she lived and on whom she depended for information) who procured her consent to the contract as the respondent's agents. It should be noted that in this case, the complainant evidently had a pre-existing relationship with her sons. If the scope of a confidential relationship were to be found simply on the basis of “vulnerability”, then it would be difficult to maintain a clear distinction between undue influence and the unconscionable bargains doctrine.

## Husband and wife

- 119

The presumption of influence does not apply between husband and wife.<sup>569</sup> In *Barclays Bank Plc v O'Brien*<sup>570</sup> the House of Lords recognised “a special tenderness of treatment afforded to wives” because in many cases:

“... the wife demonstrates that she placed trust and confidence in her husband in relation to her financial affairs<sup>571</sup> and therefore raises a presumption of undue influence”

and because “sexual and emotional ties ... provide a ready weapon for undue influence”.<sup>572</sup> In contrast, in *Etridge*’s case the Members of the House were at some pains to emphasise that the courts should not be too ready to find undue influence as between husband and wife. Lord Nicholls said that:

“... statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence.”<sup>573</sup>

Lord Scott said that in the surety wife cases, while there are cases in which the husband abused his wife’s confidence in him, for example by over-estimating his prospects, misrepresenting his intentions or subjecting her to excessive pressure, “it should ... be recognised that undue influence, though a possible explanation for the wife’s agreement to become a surety, is a relatively unlikely one”.<sup>574</sup>

## Footnotes

<sup>1</sup> See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).

<sup>333</sup> See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006) 59 C.L.P. 231.*

<sup>545</sup> The cases at one time referred to as falling within Class 2(B): see above, paras 10-082—10-083.

<sup>546</sup> See above, paras 10-082—10-083.

<sup>547</sup> Above, paras 10-088—10-099.

<sup>548</sup> Above, paras 10-105—10-111.

<sup>549</sup> “To speak of ‘trust and confidence’ in vacuo as it were, does not assist very much ... Whatever label is put upon the relationship, it must be one as a result of which it can be said, or inferred, that the donee has acquired influence over the donor ... in relation to some general aspect of the donor’s affairs”: *Morley v Elmaleh [2009] EWHC 1196 (Ch)* (at [598]). See also *Thompson v Foy [2009] EWHC 1076 (Ch), [2010] 1 P. & C.R. 16* at [100].

<sup>550</sup> *[2001] UKHL 44* at [19].

- 551 See above, para.10-098.
- 552 See above, para.10-084.
- 553 *Etridge's case* [2001] UKHL 44, Lord Nicholls at [17].
- 554 *Huguenin v Baseley* (1807) 14 Ves. Jr. 273, 286, per Sir S. Romilly arguendo; *Smith v Kay* (1859) 7 H.L.C. 750, 779; *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326.
- 555 (1866) L.R. 2 Ch. App. 55, 61.
- 556 *Smith v Kay* (1859) 7 H.L.C. 750, 771 and 774; *Re Coomber* [1911] Ch. 723 at 729.
- 557 *Smith v Kay* (1859) 7 H.L.C. 750, 771; *Re Coomber* [1911] 1 Ch. 723; *Investec Bank Plc* [2017] EWHC 1997 (Ch) at [25]. cf. *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) at [167]–[278] and [427]. If a bank takes it upon itself to explain the nature or effect of a guarantee to a customer, it will be liable for negligently misstating that nature or effect; and it was suggested that in some circumstances a bank might be under a duty to explain the nature of a guarantee to a guarantor before it is executed: *Cornish v Midland Bank Plc* [1985] 3 All E.R. 513.
- 558 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326. See also *Re Craig* [1971] Ch. 95; *Horry v Tate & Lyle* [1982] 2 Lloyd's Rep. 416.
- 559 *Tate v Williamson* (1866) L.R. 2 Ch. App. 55.
- 560 *Grosvenor v Sherratt* (1860) 28 Beav. 659.
- 561 *Tufton v Sperni* [1952] 2 T.L.R. 516.
- 562 *Turkey v Awadh* [2005] EWCA Civ 382, [2005] 2 F.C.R. 7, referring to *Macklin v Dowsett* [2004] EWCA Civ 904, [2004] All E.R. (D) 95 (Jun). In that case the defendant, who was impecunious, had made an arrangement to give up his rights to land for a small sum unless he completed building a bungalow on the land within three years, which he was very unlikely to be able to do. cf. *Perwaz v Perwaz* [2018] UKUT 325 (TCC) (Elizabeth Cooke J): to benefit from the evidential presumption, the relationship of trust and confidence must precede the transaction calling for an explanation.
- 563 *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144, especially at 154 and 158. See *Chen-Wishart* [1997] C.L.J. 60, 65–66. In such an extreme case the plaintiff may be able to set aside the transaction on the basis of unconscionability, see below, para.10-163.
- 564 *Malik (Deceased) v Sheikh* [2018] EWHC 973 (Ch), [2018] 4 W.L.R. 86 at [45].
- 565 *Paull v Paull* [2018] EWHC 2520 (Ch) at [16] and see [36].
- 566 [2009] EWHC 1076 (Ch) at [100].
- 567 [2001] UKHL 44 at [14].
- 568 *Malik (Deceased) v Sheikh* [2018] EWHC 973 (Ch), [2018] 4 W.L.R. 86 at [50], citing *Beech v Birmingham City Council* [2014] EWCA Civ 830 at [59], per Sir Terence Etherton C., referring to *Etridge* at [11]. This was applied in *Paull v Paull* [2018] EWHC 2520 (Ch) at [8] and [17].
- 569 *Hoes v Bishop* [1909] 2 K.B. 390. See also *Grigby v Cox* (1750) 1 Ves. Sen. 517; *Nedby v Nedby* (1852) 5 De G. & Sm. 377; *Barron v Willis* [1899] 2 Ch. 578, 585; *Mackenzie v Royal Bank of Canada* [1934] A.C. 468; *Midland Bank Plc v Shephard* [1988] 3 All E.R. 17. But cf. *Cresswell v Potter* [1978] 1 W.L.R. 255n and *Backhouse v Backhouse* [1978] 1 W.L.R. 243, below, para.10-163.

570 [1994] 1 A.C. 180.

571 See *Syndicate Bank v Dansingani* [2019] EWHC 3439 (Ch) at [60], where the court found the husband to be entirely in control of his wife's finances; the wife placed trust and confidence in him and played no independent role. Compare *Society of Lloyd's v Khan* [1998] 3 F.C.R. 93.

572 *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, 190. In *Barclays Bank Plc v Rivett* (1997) 29 H.L.R. 893 it was the wife who had influence over the husband.

573 [2001] UKHL 44 at [32].

574 [2001] UKHL 44 at [160]–[162].

### **(iii) - A Transaction Not Explicable by Ordinary Motives**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 3. - Undue Influence<sup>333</sup>

(c) - Presumed Undue Influence

(iii) - A Transaction Not Explicable by Ordinary Motives

#### **Transaction not explicable by ordinary motives**

- 120 As explained earlier, it is not sufficient in order to raise an inference that undue influence has been used that the parties were in the type of relationship in which influence of one over the other is presumed or proved. It must also be shown that the transaction in question was, in the words of Lindley LJ in *Allcard v Skinner*:

“...not reasonably to be accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act.”<sup>575</sup>

This need not be shown if undue influence may be proved in other ways,<sup>576</sup> but in all cases in which there is no direct proof, the combination of a relationship in which influence exists and a transaction that “that cannot be explained by ordinary motives”<sup>577</sup> seems now to be taken as evidence that undue influence was used,<sup>578</sup> and it will be sufficient to move the evidential burden of disproving undue influence to the other party.

- 121 In *Mortgage Agency Services Number Two Ltd v Chater*, the court said:

“In our judgment the correct legal test is that set out by Lord Nicholls at paragraph [14] in *Etridge* ... In so far as the passage cited from Lord Scarman’s speech in Morgan suggests a higher test, we prefer the reformulated test given by Lord Nicholls. We detect a possible distinction between a transaction explicable only on the basis that undue influence had been exercised to procure it (Lord Scarman) and one which called for an explanation, which if not given would enable the court to infer that it could only have been procured by undue influence (Lord Nicholls).”<sup>579</sup>

In *Turkey v Awadh*,<sup>580</sup> in which *Mortgage Agency Services Number Two Ltd v Chater* does not appear to have been cited, the Court of Appeal held that a presumption of undue influence does not arise merely because the transaction called for an explanation. It must be one that cannot be explained by ordinary motives (as had been said by Lord Scott in *Etridge’s* case<sup>581</sup>); or, as the trial judge (Judge Cooke QC) had put it:

“... whether, given the circumstances and the nature of the transaction, it says to the unbiased observer that absent explanation it must represent the beneficiary taking advantage of his position.”<sup>582</sup>

## Manifest disadvantage not the test

- 122 In *Etridge*<sup>583</sup> the House of Lords said that the “manifest disadvantage” test should be abandoned in favour of the test stated in the previous paragraph. The point seems to be that a transaction that is clearly disadvantageous to the complainant may not “call for an explanation”. Thus, even if the parties are in a confidential relationship, the fact that the weaker party has made a gift of moderate size to the other will not raise any presumption that undue influence was used.<sup>584</sup> More importantly, as between husband and wife, even a transaction that is, strictly speaking, disadvantageous to the wife, such as a guarantee of her husband’s business debts, will not necessarily raise the presumption: it may be explicable in terms of their relationship. In other words, the question is not simply, was the transaction disadvantageous to the complainant but was it one that, given their relationship, “calls for explanation”.<sup>585</sup> Moreover:

“... the weight of the presumption will vary from case to case and will depend both on the nature of the relationship and on the particular nature of the impugned transaction.”<sup>586</sup>

## **“A transaction calling for an explanation, which is not forthcoming”**

-123 As Buxton LJ put it:

“If on the evidence the transaction cannot so be explained — that is to say, the transaction calls for an explanation and that explanation is not forthcoming—the burden then shifts to the claimant to show that in fact, and despite the terms and nature of the agreement, he did not in truth abuse the position that he held.”<sup>587</sup>

The transaction must be looked at in its context and to see what its general nature was and what it was trying to achieve for the parties.<sup>588</sup> The judge’s decision that, although neither party had given thought to the value of the property, the transaction was otherwise explicable by the circumstances (the transaction had family elements) was upheld. Thus, if there is an explanation, no presumption arises in the first place. This would mean that the complainant, in order to show that there is a “transaction not explicable by ordinary motives” would have to show that it was not so explicable even in the circumstances of the case, for example, even though the complainant might be expected to want to provide for his family. This appears to be what Lord Nicholls intended, for in discussing the position as between husband and wife<sup>589</sup> he says that a guarantee of the husband’s business debts is not:

“... in the ordinary course ... to be regarded as a transaction which, failing proof to the contrary, is explicable only on the basis that it has been procured by the exercise of undue influence by the husband.”<sup>590</sup>

## **What may be expected as between husband and wife**

-124 As between husband and wife, it seems that the change from requiring “manifest disadvantage” to that treating a transaction that is “not readily explicable by their relationship” as evidence that, combined with a relationship of influence, may suffice to raise an evidentiary presumption, may have been accompanied by a change of attitude towards what will satisfy this criterion. Earlier cases had suggested that a charge executed by a wife to secure her husband’s business debts would be manifestly disadvantageous, even though she would benefit if the business were to thrive.<sup>591</sup> In *Etridge*’s case Lord Nicholls discussed at some length the “husband and wife” cases.<sup>592</sup> He said that it is not correct to take the narrow approach of saying that every guarantee of a husband’s bank overdraft by the wife is manifestly disadvantageous to her:

“Ordinarily, the fortunes of husband and wife are bound up together. If the husband’s business is the source of the family income, the wife has a lively interest in doing what she can to support the business.”<sup>593</sup>

In Lord Nicholl’s view, *in the ordinary course* [emphasis in the original], a guarantee of this kind is not to be regarded as explicable only on the basis of undue influence by the husband and thus *prima facie* evidence of undue influence. However, that applies only “in the ordinary course”:

“There will be cases where a wife’s signature of a guarantee or charge of her share in the matrimonial home does call for explanation.”<sup>594</sup>

- 125 On one view of the previous law, wives who have signed guarantees of their spouses’ business debts, and others in a similar position, will in future find it less easy to rely on the presumption of undue influence. However, it must be remembered that Lord Nicholls was discussing the facts necessary to give rise to an evidential presumption of undue influence. If the wife proves that the husband used undue influence (for example by showing that she left all such decisions to him and signed whatever he put in front of her),<sup>595</sup> she does not need to rely on the presumption. Even though in practice questions are unlikely to arise if the transaction is innocuous, she may avoid the transaction without having to show that it was disadvantageous “either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out”.<sup>596</sup>

## Surety cases that call for explanation

- 126 In *Bank of Credit and Commerce International SA v Aboody* the Court of Appeal held that the question whether there was what was then termed manifest disadvantage:

“... must depend on two factors, namely (a) the seriousness of the risk of enforcement to the giver, in practical terms, and (b) the benefits gained by the giver in accepting the risk.”<sup>597</sup>

The Court of Appeal refused to interfere with the trial judge’s findings that, as the wife would receive substantial benefits if the business survived, and at the relevant times it had “more than an equal chance” or “at least a reasonably good chance of surviving”, the transactions were not

manifestly disadvantageous to the wife. Conversely, if the chances of the business surviving are not good or if the marriage is already in difficulties and were it to founder the wife would be left without her only substantial asset, the transaction may be manifestly disadvantageous.<sup>598</sup> But the disadvantage must:

“... be obvious as such to any independent and reasonable persons who considered the transactions at the time with knowledge of all the relevant facts.”<sup>599</sup>

This approach seems compatible with that of the House of Lords in *Etridge*'s case. If a wife gives a guarantee for a business that seems to be thriving, the transaction will be explicable by ordinary motives.<sup>600</sup> But a presumption will arise if the complainant who was induced to guarantee or execute a charge to secure the other party's business debts is merely an employee with no stake in the business<sup>601</sup>; indeed some such transactions have been so one-sided that they “shock the conscience of the court” and may be set aside as unconscionable bargains.<sup>602</sup>

## Examples from other contracts

-127 In the context of contracts generally, as opposed to guarantees, it is not easy to say what will be treated as “not reasonably to be accounted for on ... ordinary motives” for the purposes of establishing an inference that undue influence has been used. Certainly, a sale at undervalue will suffice

<sup>603</sup>

**U** ; and so will a transaction which brings the weaker party significant benefits if the benefit is obviously outweighed by the risks involved.

<sup>604</sup>

**U** It has been held that vesting a large sum of money to which a successful personal injury claimant has recently become absolutely entitled in the settlor's solicitor upon a bare trust for the settlor (but subject to charging and other powers vested in the solicitor) cannot readily be accounted for by ordinary motives.

<sup>605</sup>

**U** On the other hand, the majority of the Privy Council in *Nature Resorts Ltd v First Citizens Bank*

<sup>606</sup>

**U** has said that where:

“[a] solicitor is acting for both a purchaser of land and a lender of the money for the purchase ... that relationship should not operate to give rise to a presumption of undue influence for either client to be used against the other. This is so where the solicitor does not obtain any personal benefit (beyond his normal fees) from the transaction.”

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006) 59 C.L.P. 231.*
- 575 *(1887) L.R. 36 Ch. D. 145, 185.*
- 576 *Etridge's case [2001] UKHL 44*, Lord Nicholls at [17]; above, paras 10-082—10-083.
- 577 See below, paras 10-121—10-123.
- 578 *Malik (Deceased) v Sheikh [2018] EWHC 973 (Ch)*, [2018] 4 W.L.R. 86, Fancourt J at [42]: “The nature of the transaction tends to suggest that there might have been abuse of trust and confidence or the exertion of some influence” to induce the complainant to enter the transaction; and see at [46].
- 579 *[2003] EWCA Civ 490* at [30].
- 580 *[2005] EWCA Civ 382*, *[2005] 2 F.C.R. 7.*
- 581 *[2001] UKHL 44* at [220].
- 582 *[2005] EWCA Civ 382* at [20]–[22].
- 583 *[2001] UKHL 44*, *[2002] 2 A.C. 773* at [29], [156].
- 584 See *Etridge's case [2001] UKHL 44*, *[2002] 2 A.C. 773* at [24], [104], [156]. In *R. v Att-Gen for England and Wales [2003] UKPC 22* the majority held that the confidentiality agreement signed by the service man did not require explanation because it was an agreement that anyone wishing to service in the special forces could reasonably be asked to sign (at [24]).
- 585 *[2001] UKHL 44* at [30], [158]. See further below, para. 10-124.
- 586 *[2001] UKHL 44*, per Lord Scott at [153]. On what is required to rebut the presumption see further below, para. 10-128. A confidentiality clause signed by a soldier does not call for explanation: *R. v Att-Gen for England and Wales [2003] UKPC 22*.
- 587 *[2005] EWCA Civ 382* at [15]; applied in *Hart v Burbidge [2014] EWCA Civ 992* (a gift case) at [35].
- 588 *[2005] EWCA Civ 382* at [32].
- 589 See next paragraph.
- 590 *Etridge's case [2001] UKHL 44* at [30].
- 591 *Turner v Barclays Bank Plc [1997] 2 F.C.R. 151, 165*. In *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180, 199* Lord Browne-Wilkinson said quite simply that the charge to secure the husband's business debts was on the face of it “not to her financial advantage” because

she had no direct pecuniary interest in the business, but there the question was whether the creditor was put on constructive notice of possible misrepresentation or undue influence and it seems that, as between the stronger and weaker party, more must be shown in order to raise the presumption of undue influence. See above, para.10-122 and compare below, para.10-148.

592 [2001] UKHL 44 at [28]–[31].

593 [2001] UKHL 44 at [28].

594 [2001] UKHL 44 at [30]–[31].

595 See above, para.10-093.

596 [2001] UKHL 44 at [12]. See above, para.10-084. It should also be noted that Lord Nicholls, at [44], pointed out that a much lower threshold is required in order to put a third party, such as a bank, to whom the wife has given a guarantee or charge, “on inquiry”: see below, para.10-146.

597 [1990] 1 Q.B. 923, 965. In *National Westminster Bank Plc v Morgan* [1985] A.C. 686 the charge was not manifestly disadvantageous as it was the only way to save the matrimonial home from repossession by another creditor.

598 See the Court of Appeal decision in *Etridge's case* [1998] 4 All E.R. 705 at 716.

599 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923, 965.

600 See above, para.10-124.

601 *Steeple v Lea* [1998] 1 F.L.R. 138.

602 *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144, 152. See further, below, para.10-163.

603 *Mahoney v Purnell* [1996] 3 All E.R. 61. In contrast, in *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) the profits made by Goldman Sachs were not excessive given the nature of the trades and the work that had gone in to winning them, and so no presumption was raised (at [427]).

604 *Cheese v Thomas* [1994] 1 W.L.R. 129. It has been argued that a transaction under which the complainant parted with property at full market value may still be manifestly disadvantageous if it was not one that a party in similar situation would ordinarily be expected to have made, such as to sell the family land: Birks and Chin in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (1995), pp.57–97, at 83; but cf. paras 10-075 —10-079 above.

605 *AKB v Willerton, OH v Craven* [2016] EWHC 3146 (QB), [2017] 4 W.L.R. 25 at [30]. On the steps that should be taken to show the settlor was not unduly influenced, see below, para.10-131; cf. *Al-Subaihi v Al-Sanea* [2021] EWHC 2609 (Comm) at [192]–[194] (agreement to settle unpaid legal fees was readily explicable).

606 [2022] UKPC 10 at [26].

## (d) - Rebutting the Presumption

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 3. - Undue Influence<sup>333</sup>

(d) - Rebutting the Presumption

### Rebutting the presumption

- 128 In order to rebut the presumption of undue influence, evidence must be adduced to satisfy the court “that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing”.

607

**U** The most usual, though not the only, way of rebutting the presumption is to prove that the claimant had competent and independent advice,

608

**U** and the position of the defendant is stronger if the claimant’s action was taken in accordance with, than if it was taken in spite of, such advice. Sometimes to show that the complainant had independent advice will be the only way of rebutting the inference of undue influence,

609

**U** but circumstances may establish the fact that the claimant’s will was freely exercised although no independent advice was given or although such advice was disregarded.

610

**U** Conversely, proof of outside advice does not necessarily show that there was no undue influence: it is a question of fact to be decided on the evidence.

611

 As Master Bowles explained in *Paull v Paull*:

“... whether the intervention of a solicitor, or the advice given by a solicitor, is sufficient to rebut the presumption is dependent not upon some formulaic, or mechanistic approach, whereby certain advice given in certain circumstances inevitably, or automatically, rebuts the presumption. The question, rather, is whether, in the particular circumstances of the case, the court can be affirmatively satisfied that the consequence of the advice given has been to procure the emancipation of the donor, or benefactor, from the influence exercised by the donee, or beneficiary.”

612



Moreover:

“[t]he greater the trust reposed ... the greater the clarity that will be required before the court can be satisfied that the influence emanating from that trust has been negated.”

613



In the context of *Paull v Paull*, the complainant:

“... would have had to be so informed in circumstances whereby [the defendant] ... was neither present when that information was imparted, nor sufficiently close by for his presence, nearby, to impact upon, or affect”

the complainant.

614



## Duty of confidence

- 129 In cases falling within the second of the two categories referred to in *Allcard v Skinner*<sup>615</sup> it is not to the point to attempt to “rebut the presumption” of undue influence by evidence that the donor’s will was exercised free of domination. In cases of this kind what needs to be established is that the duty of confidence has been fulfilled. What constitutes fulfilment of that duty depends on the facts of the particular case, but in general the duty requires that the person liable to be influenced should be enabled to form an independent and informed judgment.<sup>616</sup> Where the case involves the giving

of advice by a legal or other confidential adviser this no doubt means that the advice must be fairly and disinterestedly offered, and must also be reasonable and adequate advice in the circumstances. In other cases the question may not be so much as to any advice given by the defendant, but as to the availability of advice from other sources.<sup>617</sup> In some cases, such a duty may be held to require disclosure of material facts, and no real question arises of undue influence in the literal sense.<sup>618</sup>

## Independent advice

- 130 On the subject of independent advice there have been varying statements of judicial opinion. In *Re Coomber*,<sup>619</sup> it was said that it is sufficient if an independent adviser sees that the donor understands what he is doing and intends to do it; he need not advise him to do it or not to do it. On the other hand, in *Powell v Powell*,<sup>620</sup> it was said:

“The solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one which it is right and proper for the donor to make under all the circumstances, and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists.”

In *Royal Bank of Scotland v Etridge (No.2)* the Court of Appeal took a similar view,<sup>621</sup> but in the House of Lords, Lord Nicholls expressly disagreed.<sup>622</sup> It is not for the solicitor to veto the transaction.<sup>623</sup> The decision whether to proceed is the decision of the client, not the solicitor. Only in exceptional cases where it is glaringly obvious that the complainant is being grievously wronged is the solicitor to be expected to decline to act further.

## Adequacy of advice

- 131 It has been said that the independent adviser should ensure that the party entering the transaction understands it even where there has been no misrepresentation by the other party. It appears that if the solicitor does not have the relevant information or ask the relevant questions, the advice may be treated as inadequate and the presumption will not be rebutted.<sup>624</sup> The Judicial Committee of the Privy Council considered this question in *Inche Noriah v Shaik Allie Bin Omar*,<sup>625</sup> where there was a gift of almost the whole of her property by an aged Malay widow to her nephew. The Board was of the opinion that independent advice might be effective even though it was not shown that the advice was taken; but then it must be given:

“... with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.”<sup>626</sup>

In the instant case, the gift was set aside, for although the widow had received independent advice from a solicitor, he did not know at the time that the gift comprised almost all of her property, nor did he advise her that she could equally well have benefited her nephew by will.<sup>627</sup>

## Footnotes

- <sup>1</sup> See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- <sup>333</sup> See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006) 59 C.L.P. 231*.
- <sup>❶607</sup> *Inche Noriah v Shaik Allie Bin Omar [1929] A.C. 127, 135*. In order to rebut the presumption it is not sufficient to show that C understood what he or she was doing and intended to do it: *Curtis v Pulbrook [2009] EWHC 782 (Ch)* at [143], citing Snell's Equity, 31st edn (2005), para.8-30. See also *Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10* at [23]. At this stage, whether or not there was manifest disadvantage is irrelevant: *Smith v Cooper [2010] EWCA Civ 722, [2010] 2 F.C.R. 551* at [65].
- <sup>❶608</sup> *Morley v Loughnan [1893] 1 Ch. 736, 752; Re Coomber [1911] 1 Ch. 723; Inche Noriah v Shaik Allie Bin Omar [1929] A.C. 127; Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10* at [13] (“Although neither necessary nor conclusive, the main method of rebuttal is to show that A obtained the fully informed and competent independent advice of a qualified person, most obviously a lawyer”).
- <sup>❶609</sup> *Inche Noriah v Shaik Allie Bin Omar [1929] A.C. 127, PC.*
- <sup>❶610</sup> *[1929] A.C. 127, 135*; see, for example, *Re Estate of Brocklehurst [1978] Ch. 14; Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10*.
- <sup>❶611</sup> *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [20] and *Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10* at [13] (independent advice “neither necessary nor conclusive”). The Court of Appeal should interfere with the trial judge’s findings on this point only if the judge went wrong in principle: *Curtis v Curtis [2011] EWCA Civ 1602* at [14].
- <sup>❶612</sup> *Paull v Paull [2018] EWHC 2520 (Ch)* at [14].

❶613 *Paull v Paull* [2018] EWHC 2520 (Ch) at [112].

❶614 *Paull v Paull* [2018] EWHC 2520 (Ch) at [115].

615 See above, paras 10-075—10-079.

616 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 342.

617 cf. *Hammond v Osborn* [2002] EWCA Civ 885, *The Times*, 18 July 2002, a case of gift in which it was held that the donor had not made an informed judgment. It was accepted that the recipient was not guilty of any reprehensible conduct. It appears that the exercise of undue influence consisted of failing to draw the donor's attention to the size of the gift he was making and to ensure that he obtained independent advice.

618 *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93. See above, para.10-095.

619 [1911] 1 Ch. 723.

620 [1900] 1 Ch. 243, 247. See also *Barron v Willis* [1902] A.C. 271; *Wright v Carter* [1903] 1 Ch. 27.

621 *Royal Bank of Scotland v Etridge* (No.2) [1998] 4 All E.R. 705, 715.

622 [2001] UKHL 44, [2002] 2 A.C. 773 at [59]–[63]. Lord Nicholls said that *Powell v Powell* [1900] 1 Ch. 243 was an extreme case and Farwell J's statement “cannot be regarded as of general application”.

623 Or, in a case where the client is offering a guarantee to a third party bank (see below, para.10-140) by declining to confirm to the bank that he has explained the documents to the wife and the risks that she is taking upon herself. Lord Nicholls did not accept the view of the Court of Appeal that the availability of legal advice is insufficient to prevent the bank being fixed with constructive notice if the transaction is “one into which no competent solicitor could properly advise the wife to enter”. *Etridge* was of course a “three-party” case but in this context, Lord Nicholls did not draw a distinction between two and three-party cases.

624 See *Paull v Paull* [2018] EWHC 2520 (Ch) at [117] where the defendant's misrepresentation meant that the solicitor could not adequately advise the complainant on the implications and effect of the transaction. The transaction was set aside even though the complainant was also party to the misrepresentation; *Houssein v London Credit Ltd* [2021] EWHC 1417 (Ch) at [27]–[31] where the judge, in an application for an interim injunction, highlighted several “potentially questionable” aspects of the advice given to the claimant.

625 [1929] A.C. 127.

626 [1929] A.C. 127, 136.

627 In the context of a personal injury trust under which the claimant's solicitor is to be trustee (see above, para.10-127), it has been said that, with a settlement of £1 million or more where its in-house trust corporation is to be a trustee, to ensure that the claimant is not unduly influenced, a separate partner in the firm should instruct Chancery Counsel of not less than five years' standing to advise the claimant: *AKB v Willerton, OH v Craven* [2016] EWHC 3146 (QB), [2017] 4 W.L.R. 25 at [31]. cf. below, para.10-151.

## (e) - Remedies for Undue Influence

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 3. - Undue Influence<sup>333</sup>

(e) - Remedies for Undue Influence

Affirmation.<sup>628</sup>

- 132 A transaction entered into as the result of undue influence is voidable and not void. The right to rescind on the ground of undue influence may be lost either by express affirmation of the transaction by the victim,<sup>629</sup> by estoppel or by delay amounting to proof of acquiescence.<sup>630</sup> Although there can normally be no affirmation until the party knows he has the right to rescind, it has been doubted whether this is a hard and fast rule: “the whole of the circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed”.<sup>631</sup> Estoppel requires a clear and unequivocal representation that the claimant would not seek to set the agreement aside, intended to be acted on and in fact acted on by the other party to his detriment or in such a way that it would be inequitable to allow the claimant to go back on his representation.<sup>632</sup> In either case, to be of any value, the affirmation must take place after the influence has ceased:

“The right to property acquired by such means cannot be confirmed in this court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised.”<sup>633</sup>

Lapse of time in itself does not seem to constitute a bar to relief,<sup>634</sup> but it will provide evidence of acquiescence if the victim fails to take any steps to set aside the transaction within a reasonable time after he is freed from the undue influence.<sup>635</sup> And where he has himself failed to commence

proceedings in this way during his lifetime, his personal representatives cannot do so after his death.<sup>636</sup>

## Restitution

- 133 A complainant who has received no benefit under the contract may simply have it set aside.<sup>637</sup> If the complainant has received a benefit<sup>638</sup> and rescinds, she must make restitution<sup>639</sup> and it has been said that her right to rescission is “conditional on her making counter-restitution”.<sup>640</sup>

## Impossibility of restitution not necessarily a bar

- 134 It is thought that, as between the parties, the fact that property transferred can no longer be returned as such to the complainant (for example, because an innocent third party has acquired rights over it) is not necessarily a bar to rescission on the grounds of undue influence. Instead, the defendant may be required to make counter-restitution by a monetary equivalent.<sup>641</sup> This is suggested by the cases discussed in the next two paragraphs.

## Account of profits with allowance

- 135 Thus, a transaction entered into as a result of undue influence can be rescinded even though it has been fully executed, and even though restitutio in integrum is no longer fully possible, so long as the court can do substantial justice by ordering an account of profits with, if necessary, an allowance for work done by the defendant. Where a series of contracts between a young singer and his manager and agent was set aside after the singer had achieved worldwide success, it was held that the defendant could be made liable to account for all the profit made from the contracts, but subject to a reasonable allowance for his work under the transactions in question. This allowance could include a reasonable element of profit, but not so much as might have been obtained by the defendant if the plaintiff had been properly advised by independent advisers at the outset.<sup>642</sup>

## Equitable compensation

- 136 It has been held that if restitutio in integrum is no longer possible, and the defendant does not retain any profits for which he may be made to account, the claimant may still be given “compensation

in equity". In *Mahoney v Purnell*<sup>643</sup> May J held that equitable compensation under *Nocton v Lord Ashburton*<sup>644</sup> is also available in such circumstances and the plaintiff could recover the value of what he had transferred, giving credit for what he had received. The judge described this as the practical equivalent of awarding damages, though it should be noted that equitable compensation will not include compensation for consequential losses.<sup>645</sup> Doubt has been expressed whether equitable compensation is available in every case of undue influence, or only those in which there is a fiduciary relationship of a narrower sort, such as between solicitor and client or beneficiary and trustee.<sup>646</sup> In *Bank of Credit and Commerce International SA v Aboody*<sup>647</sup> Slade LJ treated such cases as different to normal cases of undue influence<sup>648</sup> and said that cases such as *Tate v Williamson*<sup>649</sup> did not draw a sufficiently clear distinction between the two types of case; but there is no sign that May J saw the case before him to be anything other than one of presumed undue influence. However, it has been argued persuasively that "equitable compensation" in this context should be understood as referring to pecuniary restitution of any unjust enrichment, which is appropriate in cases of undue influence. The case shows not that equitable compensation may be given when restitution is impossible, so much as that rescission need not be prevented by the fact that property cannot be returned in specie; as between the parties it may be effected in money.<sup>650</sup>

## Sharing of loss

- 137 Conversely, where as the result of undue influence the claimant has contributed to the purchase of property which as a result of the transaction being set aside has to be sold, and the property does not fetch the price paid for it, the claimant is not entitled to the return of the full contribution he made. The principle is to prevent unjust enrichment of the other party and the sum obtained on sale of the property should be shared in the same proportions as the parties' original contributions to the purchase.<sup>651</sup>

## Change of position

- 138 It has been noted that the decision described in the last paragraph might be viewed as a form of change of position defence to even monetary restitution; and that in *Allcard v Skinner*<sup>652</sup> the possibility of such a defence was recognised by all three Lords Justice, in that they considered that the complainant would have been able, had she taken steps in time, to recover from the religious order to which she had made her gifts only such sums as remained unspent in its hands.<sup>653</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006) 59 C.L.P. 231*.
- 628 This paragraph in the 28th edition was cited with approval in *DSND Subsea Ltd v Petroleum Geo-services ASA [2000] B.L.R. 530* at [146].
- 629 *Mitchell v Homfray (1881) 8 Q.B.D. 587*; *Morse v Royal (1806) 12 Ves. Jr. 355*.
- 630 *Allcard v Skinner (1887) 36 Ch. D. 145*; *Turner v Collins (1871) L.R. 7 Ch. App. 329*. See below, paras 31-137—31-143.
- 631 *Goldsworthy v Brickell [1987] Ch. 378, 412* (Nourse LJ) and 416 (Parker LJ). Nourse LJ considered that the defence might have succeeded on the basis that by the time of the alleged act of affirmation, the complainant had consulted solicitors. cf. *Lloyds Bank Plc v Lucken*, heard with the *Etridge case, [1998] 4 All E.R. 705, 738, 751*; *De Sena v Notaro [2020] EWHC 1031 (Ch)* at [231] (noted obiter dictum that the claimant had affirmed by selling part of the subject matter of the contract after having acquired knowledge of all facts necessary for its claim).
- 632 *Goldsworthy v Brickell [1987] Ch. 378, 410–411*. In *Habib Bank Ltd v Tufail [2006] EWCA Civ 374, [2006] All E.R. (D) 92 (Apr)* Lloyd LJ drew a distinction between affirmation, which requires knowledge of the right to rescind (at [19]) and acquiescence. Acquiescence can operate rather like promissory estoppel, though in *Goldsworthy v Brickell [1987] Ch. 378* at 409, Nourse LJ had pointed out that promissory estoppel is normally concerned with the giving up of rights under a contract whose validity is not in dispute, and its requirements are more formalised than those of acquiescence. Thus if before she seeks to avoid the contract the victim of undue influence or misrepresentation indicates that she will perform it, and the other party acts on that representation to its detriment, the victim will lose the right to avoid the contract, at least if the representation was made after she knew of the facts giving her the right to avoid (at [22]; Lloyd LJ doubted whether the supposed further requirement that her representation be intended to be acted on added anything). If, as on the facts of the case, the other party cannot show that the representation (on the facts, that solicitors had been instructed to sell the mortgaged property) led it to act differently, it cannot rely on acquiescence (at [25]) and the victim may still be entitled to avoid the contract. The case was one in which a mortgage to a bank had been entered into as the result of misrepresentation by a third party of which the bank had constructive notice (see below, paras 10-140 et seq.) but the same principle applies in a two-party case like *Goldsworthy v Brickell*.
- 633 *Moxon v Payne (1873) L.R. 8 Ch. App. 881, 885*.
- 634 *Hatch v Hatch (1804) 9 Ves. 292*; *Re Pauling's Settlement Trusts [1964] Ch. 303*.

- 635 *Allcard v Skinner* (1887) *L.R.* 36 *Ch. D.* 145; cf. *Bullock v Lloyds Bank Ltd* [1955] *Ch.* 317; *De Sena v Notaro* [2020] *EWHC 1031 (Ch)* at [233] (a delay of almost six years triggered the doctrine of laches).
- 636 *Wright v Vanderplank* (1855) 2 *Kay. & J.* 1; *Mitchell v Homfray* (1881) 8 *Q.B.D.* 587.
- 637 cf. *TSB Bank Plc v Camfield* [1995] 1 *W.L.R.* 430 (misrepresentation), above, para.9-135.
- 638 It seems likely that in this context “benefit” refers to something received directly under the contract to be set aside or one inextricably linked with it (as in the case cited in the next note) rather than to, e.g. a benefit received by a wife through the successful operation of her husband’s business for a period before the creditor sought to enforce the charge in question given by the wife.
- 639 *Dunbar Bank Plc v Nadeem* [1998] 3 *All E.R.* 876; see also *Midland Bank Plc v Greene* [1994] 2 *F.L.R.* 827.
- 640 *Dunbar Bank Plc v Nadeem* [1998] 3 *All E.R.* 876, 884.
- 641 Burrows, Law of Restitution, 3rd edn (2011), pp.287–288.
- 642 *O’Sullivan v Management Agency Ltd* [1985] *Q.B.* 428, following the authorities relating to setting aside contracts for misrepresentation, above, paras 9-132 et seq.
- 643 [1996] 3 *All E.R.* 61. Compare *De Sena v Notaro* [2020] *EWHC 1031 (Ch)* at [230], where the court held that restitutio in integrum would be impossible but left open the possibility that “some other remedy could be awarded, such as equitable compensation”.
- 644 [1914] *A.C.* 932 (a case of a mortgagee suing his solicitor, see para.9-096).
- 645 See para.9-097.
- 646 See *Heydon* (1997) 113 *L.Q.R.* 8, 9.
- 647 [1990] 1 *Q.B.* 923, 943.
- 648 See para.10-086.
- 649 (1866) *L.R.* 2 *Ch. App.* 55.
- 650 *Birks* [1997] *R.L.R.* 72. See also above, para.9-137.
- 651 *Cheese v Thomas* [1994] 1 *W.L.R.* 129. The focus should be on the property transactions, not the entire relationship between the parties: *Smith v Cooper* [2010] *EWCA Civ* 722, [2010] 2 *F.C.R.* 551 at [101].
- 652 (1887) 36 *Ch. D.* 145.
- 653 *Chen-Wishart* (1994) 110 *L.Q.R.* 173, 177–178; *Allcard v Skinner* (1887) 36 *Ch. D.* 145, 164, 171, 186.

## **(f) - Undue Influence by a Third Party**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 3. - Undue Influence<sup>333</sup>

**(f) - Undue Influence by a Third Party**

### **Undue influence by a third person**

- 139 Where one party seeks to avoid a contract on the ground of undue influence by a third person, it must appear either that the third person was acting as the other party's agent, or that the other party had actual or constructive notice of the undue influence.

[654](#)



### **Undue influence over a surety**

- 140 In a number of cases a recurring situation has arisen.<sup>655</sup> In the typical case, a husband has wanted to borrow money from a creditor that has refused to proceed without having a guarantee secured by a charge over the matrimonial home, or similarly a charge without a personal guarantee, from the wife. The wife's consent has been secured by undue influence<sup>656</sup> or misrepresentation<sup>657</sup> by the husband. Can the creditor enforce the guarantee? In some cases it was held that if the creditor had "left it to the husband" to get the wife's signature, the husband was acting as agent for the creditor<sup>658</sup> and it was therefore responsible for his misconduct.

## Constructive notice: Barclays Bank v O'Brien

- 141 In *Barclays Bank Plc v O'Brien*, a case where the husband had secured his wife's signature by misrepresentation, the Court of Appeal<sup>659</sup> expressed the view that the "agency" approach referred to in the previous paragraph was often artificial on the facts. It held that it was not just in cases in which the debtor was acting as the agent of the creditor in the true sense that the creditor would be unable to enforce the guarantee if the debtor had procured the surety's signature by misrepresentation. If the relationship between the debtor and a surety who charged property to secure the debt was one in which influence by the debtor over the surety and reliance on the debtor by the surety were natural and probable features, as in the case of husband and wife, and this was known to the creditor, a special rule applied. If the debtor procured the surety's consent by misrepresentation or undue influence, or the surety lacked an adequate understanding of the nature and effect of the transaction, and the creditor, whether by leaving it to the debtor to deal with the surety or otherwise, failed to take reasonable steps to try to ensure that the surety entered the transaction with adequate understanding and that the consent was a true and informed one, the creditor may not enforce the security given by the surety.<sup>660</sup>
- 142 In the House of Lords<sup>661</sup> this approach was rejected: there is no special theory in equity to protect wives.<sup>662</sup> The surety cannot set aside the transaction simply on the ground that she did not fully understand it.<sup>663</sup> However, the appeal of the Bank was dismissed on the ground that it had constructive notice of the husband's misrepresentation. Lord Browne-Wilkinson, delivering the only full speech in the House of Lords, pointed out that there is a substantial risk that the wife may act as surety when the transaction is not to her advantage because of some legal or equitable wrong by the husband. Where the creditor is aware that the debtor and the surety are husband and wife, and the transaction is on its face not to the financial advantage of the surety as well as of the debtor, the creditor will be fixed with constructive notice of any undue influence, misrepresentation or other legal wrong by the debtor unless it has taken reasonable steps to satisfy itself that the surety has entered into the obligation freely and with knowledge of the true facts.<sup>664</sup> It is the combination of the fact that the parties are husband and wife and that the transaction is on its face not to the wife's advantage that should put the creditor on notice.<sup>665</sup>
- 143 The creditor with the relevant knowledge<sup>666</sup> should explain to the surety the amount of her potential liability and of the risks involved, and advise her to seek independent legal advice before entering the guarantee<sup>667</sup>; and this should be done in a personal interview, as written warnings are often not read and are sometimes intercepted by the debtor.<sup>668</sup> The interview should not be attended by the husband. As in *O'Brien*'s case the bank's clerk, in disregard of her instructions, had not warned the wife of the risks involved nor recommended her to take legal advice before getting

her to sign the documents charging the matrimonial home, the bank could not enforce the charge. If the bank has notice of facts rendering misrepresentation or undue influence not just possible but probable, it must insist that the wife actually is separately advised.<sup>669</sup>

## Etridge's case

- 144 The decision in *Barclays Bank v O'Brien*, and the many other decisions that followed it,<sup>670</sup> must be read in the light of the subsequent decision of the House of Lords in *Royal Bank of Scotland v Etridge (No.2)*,<sup>671</sup> and in particular the speech of Lord Nicholls, which gained the support of all their Lordships.<sup>672</sup> Reference to this case has already been made in relation to what amounts to undue influence.<sup>673</sup> The decision on constructive notice, and what steps the lender should take to avoid being fixed with constructive notice, is of equal importance.<sup>674</sup>

## Basis of the constructive notice rule

- 145 Lord Nicholls said that the decision in *Barclays Bank Plc v O'Brien*:

“... is not a conventional use of the equitable doctrine of constructive notice ...<sup>675</sup> The law imposes no obligation on one party to check whether the other party’s concurrence was obtained by undue influence. Rather, *O'Brien* envisages that the steps taken by the bank will reduce, or even eliminate, the risk of the wife entering into the transaction under any misapprehension or as a result of undue influence by her husband. The steps are not concerned to discover whether the wife has been wronged by her husband in this way.<sup>676</sup> The steps are concerned to minimise the risk that such a wrong may be committed.”<sup>677</sup>

*O'Brien* concerned suretyship transactions, which (outside commercial suretyship) is a one-sided transaction, so that the decision is aimed “at a class of contracts which has special features of its own”.<sup>678</sup>

## When the bank is put on inquiry

- 146 The bank is put on inquiry (strictly speaking not an accurate description of what the bank is required to do but now the accepted terminology<sup>679</sup>) by a combination of two things: a non-commercial

relationship between the surety and the lender (see below, para.[10-147](#)) and a transaction which on its face is to the disadvantage of the surety (see below, para.[10-148](#)). The threshold that must be crossed before the bank is put “on inquiry” is deliberately set at a low level:

“... much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence.”<sup>[680](#)</sup>

The test stated by Lord Browne-Wilkinson<sup>[681](#)</sup> is to be taken to mean simply that a bank is put on inquiry whenever a wife offers to stand surety for her husband’s debts.<sup>[682](#)</sup>

## Relationships giving rise to notice

- 147 The same rule applies whether a husband stands surety for his wife’s debts or one of an unmarried couple for the other’s debts, provided the bank is aware of the relationship. Cohabitation is not essential.<sup>[683](#)</sup> It also applies where the bank knows that the parties are parent and child; knowledge of the relationship means that the bank must take reasonable steps to ensure that the child “knows what she is letting herself into”.<sup>[684](#)</sup> And, as the principle should apply to any other relationship where trust and confidence are likely to exist,<sup>[685](#)</sup> there is no rational cut-off point:

“... the only practical way forward is to regard banks as ‘put on inquiry’ in every case where the relationship between the surety and the debtor is non-commercial.”<sup>[686](#)</sup>

## Transaction not on its face to the advantage of the surety

- 148 The bank is put on inquiry whenever a wife offers to stand surety for her husband’s debts.<sup>[687](#)</sup> The bank is not put on inquiry if the money is advanced jointly to the couple, unless the bank is aware that the loan is being made for the husband’s purposes.<sup>[688](#)</sup> Thus in *CIBC Mortgages Plc v Pitt*,<sup>[689](#)</sup> which was heard with *O’Brien*’s case, the loan appeared on its face to be a normal one for the joint benefit of husband and wife and therefore the creditor was not fixed with constructive notice of the undue influence used by the husband to secure the wife’s agreement.<sup>[690](#)</sup> But if one party becomes surety for a company whose shares are held by both, the bank is put on inquiry, even if they have equal shareholdings or if the surety is also a director or secretary of the company.<sup>[691](#)</sup> This applies in the:

“... commonly found situation where a wife has an interest in a debtor company (whose debts are intended to be secured by the wife) but no involvement, understanding or control in respect of the company and that the business has been structured by the husband so as to give the appearance of joint ownership and control because it suited his purposes. The risk that the wife may be persuaded (in ignorance of the risks involved) to give security for a business which is really the husband’s vehicle is just as great as in the cases where she has no such interest ... [L]enders may know full well that the wife is an owner of a shareholding and an officer of the company in name only and it would be contrary to common sense to treat them as believing that the wife was fully involved and up to speed with the company business and financial situation.”<sup>692</sup>

## Reasonable steps

- 149 As to the steps that the lender should take to avoid being fixed with constructive notice of any undue influence that has occurred, Lord Nicholls stated in *Etridge* that for past transactions, the bank should have taken steps:

“... to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice.”<sup>693</sup>

For the future, however, Lord Nicholls said in *Etridge* that a bank will satisfy the requirements if it insists that the wife attend a private meeting with a representative of the bank at which she is told of the extent of her liability as surety, is warned of the risk she is running and is urged to take independent legal advice.<sup>694</sup> In exceptional cases the bank should insist that she be separately advised.<sup>695</sup>

## Advice from a solicitor

- 150 In several of the cases subsequent to *O'Brien* (the facts of many of which occurred before the House of Lords' decision in that case), the creditor had not itself advised the wife<sup>696</sup> but had relied on a certificate from a third party, typically a solicitor employed by the husband or by the creditor itself, that the wife had been given an explanation. If the wife has actually received such an explanation, this would go beyond what *O'Brien*'s case required in the normal case in that the wife actually receives advice.<sup>697</sup> In *Etridge*, Lord Nicholls said that if the bank (or other lender)

prefers that the task be undertaken by an independent legal advisor, it will normally be enough to rely on a confirmation from a solicitor,<sup>698</sup> acting for the wife,<sup>699</sup> that he has advised the wife appropriately.<sup>700</sup> However, if the bank knows that the solicitor has not duly advised the wife, or knows facts from which it ought to have realised the wife has not received appropriate advice, the position will be different.<sup>701</sup>

## Steps the solicitor should take

-151 Lord Nicholls then set out in some detail the steps the solicitor should take:

“[64]... As a first step the solicitor will need to explain to the wife the purpose for which he has become involved at all. He should explain that, should it ever become necessary, the bank will rely upon his involvement to counter any suggestion that the wife was overborne by her husband or that she did not properly understand the implications of the transaction. The solicitor will need to obtain confirmation from the wife that she wishes him to act for her in the matter and to advise her on the legal and practical implications of the proposed transaction.

[65]When an instruction to this effect is forthcoming, the content of the advice require a solicitor before giving the confirmation sought by the bank will, inevitably, depend upon the circumstances of the case. Typically, the advice a solicitor can be expected to give should cover the following matters as the core minimum. (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband’s business does not prosper. Her home may be her only substantial asset, as well as the family’s home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife’s financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband’s business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband’s present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she, would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to

her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority.

[66]The solicitor's discussion with the wife should take place at a face-to-face meeting, in the absence of the husband. It goes without saying that the solicitor's explanations should be couched in suitably non-technical language. It also goes without saying that the solicitor's task is an important one. It is not a formality.

[67]The solicitor should obtain from the bank any information he needs. If, the bank fails for any reason to provide information requested by the solicitor, the solicitor should decline to provide the confirmation sought by the bank."

## Conflicts of interest

- 152 The solicitor may also act for the husband or the bank but, in advising the wife, he is acting for her alone (and therefore his knowledge is not imputed to the bank <sup>702</sup>). He must consider whether there is any conflict of interest and whether it would be in the best interests of the wife for him to accept instructions from her. If at any stage there is a real risk that other interests or duties may inhibit his advice to the wife he must cease to act for her. <sup>703</sup>

## The bank and the solicitor

- 153 The bank should check directly with the wife the name of the solicitor she wishes to act for her, telling her that it will require written confirmation from the solicitor that he has explained to her fully the nature of the documents and their practical implications, so that she is not able later to dispute that he is bound by the documents she has signed. It must also send to the solicitor the necessary financial information. <sup>704</sup> If the solicitor is already acting for the husband and wife the wife should be asked if she would prefer a different solicitor to advise her. <sup>705</sup> If in exceptional circumstances the bank suspects that the wife is being misled by her husband or is not entering the transaction of her own free will, it must inform the solicitor of the facts giving rise to the suspicion.

## Procedure

- 154 It will be for the wife or other surety to show that the bank had notice of the non-commercial relationship between her and the debtor, and that the transaction was, on its face, not to her

advantage. The burden will then be on the bank or other lender to show that it has taken sufficient steps to prevent it being fixed with constructive notice.<sup>706</sup>

## Need the party guilty of undue influence be a party to the transaction?

- 155 In at least one case the bank was treated as having constructive notice of the wife's right to set aside the charge *as against the husband*.<sup>707</sup> It is clear, however, that it makes no difference that the husband is not a party to the charge:

"The transferor wife is seeking to resile from the very transaction she entered into with the bank, on the ground that her apparent consent was procured by the undue influence or other misconduct, such as misrepresentation, of a third party (her husband)."<sup>708</sup>

## Replacement mortgages

- 156 Where a mortgage granted by a wife to a bank was voidable against the bank because the bank had constructive notice of undue influence by the husband, a replacement of the mortgage may also be voidable against the bank even if at the time the replacement mortgage was given there was no undue influence, at least where the replacement mortgage is taken as a condition of discharging the original mortgage.<sup>709</sup> It does not matter that the new agreement is a fresh contract rather than a variation of the old one, provided that the replacement mortgage is between the same parties.<sup>710</sup> However, it seems that the replacement mortgage must be inseparable from the original mortgage, in the sense that the replacement mortgage was granted before the grantor became aware that she had a right to avoid the original one, and was granted in order to discharge it.<sup>711</sup>

## Loss of right to avoid by inconsistent action.<sup>712</sup>

- 157 Like the right to avoid a contract for undue influence by the other party, the surety's right against the lender may be lost. One way in which this may occur is by the surety acting inconsistently with her right to avoid the charge. In *First National Bank Plc v Walker*<sup>713</sup> the husband and wife had charged their jointly owned home to the bank as security for a loan to the husband's business. Subsequently they divorced and the wife applied for ancillary relief. A property adjustment order was made in her favour, ordering the husband to convey his interest in the property to the wife.

Clause 4 stated that nothing in the conveyance should prejudice the charge to the bank. Shortly afterwards the wife served a defence to possession proceedings by the bank, alleging that the charge was voidable by reason of the bank's actual or constructive notice of undue influence by the husband. The Court of Appeal held that the wife, by taking the transfer of her husband's interest, had lost her right to pursue the defence to the property proceedings, as this would be inconsistent with her having taken the conveyance. To pursue it would be an abuse of process or (per Morritt VC<sup>714</sup>) estoppel, approbation and reprobation, affirmation or release might apply. The reasoning employed in the Court of Appeal, that the wife's claim to set aside the charge because of the undue influence of the other joint and several debtor is secondary to and parasitic on the existence of such a claim against the other debtor, and that she lost her right by acting as against him in a way that was inconsistent with avoidance, may not have survived the decision in *Etridge*'s case that the wife's right to avoid the charge is because of the bank's constructive notice by a third party. But it seems that the right to avoid may be lost by acting in such a way as against the surety itself.<sup>715</sup>

## Jointly-owned homes

- 158 It is only the surety against whom the charge may not be enforceable. If the property charged is owned jointly by husband and wife, then even though the charge may not be enforceable against the wife, it may be against the husband; and the result may be that the court will still order the property to be sold<sup>716</sup> in order to realise the husband's share.<sup>717</sup>

## Other cases

- 159 This doctrine of constructive notice should avoid the need for the somewhat strained approach used in a number of earlier cases to the effect that the creditor, by "leaving it to the debtor" to get the surety's signature, was appointing the debtor as its agent and was therefore in no better position than the debtor would have been.<sup>718</sup> There may still be cases in which the creditor is responsible for the husband's actions because it can be said, "without artificiality", that the husband was acting as agent of the creditor, but "such cases will be of very rare occurrence".<sup>719</sup> The agency argument may still apply also in cases not involving sureties. In *O'Sullivan v Management Agency Ltd*<sup>720</sup>

**U** it was held that where a person in a fiduciary relationship procures by undue influence contracts to be entered into with companies under his control and direction, the companies will be affected by the doctrine of undue influence even though they themselves were not in fiduciary relationships. In such a case it is immaterial that the undue influence is exercised in order to obtain a benefit for third parties rather than for the person himself exercising the undue influence.

## Volunteers

- 160 Alternatively, it may suffice to set aside the contract if the person against whom relief is sought gave no consideration, i.e. he was merely a volunteer.<sup>721</sup> It is not possible to avoid the contract as against a bona fide purchaser for value without notice.<sup>722</sup> It is clear that a gift made to a person who has exercised no influence will not be set aside because there is in the same instrument a gift to a person within the suspect relationships, unless the instrument as a whole can be said to have been executed as a result of undue influence.<sup>723</sup>

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 333 See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; *Chen-Wishart (2006)* 59 C.L.P. 231.
- 654 See *Bank of Credit and Commerce International SA v Aboody [1990]* 1 Q.B. 923, 973; *Barclays Bank Plc v O'Brien [1994]* 1 A.C. 180, discussed in the paragraphs that follow; *Chancery Client Partners Ltd v MRC 957 Ltd [2016]* EWHC 2142 (Ch), [2016] *Lloyd's Rep. F.C.* 578; *Nature Resorts Ltd v First Citizens Bank Ltd [2022]* UKPC 10 at [14].
- 655 For a wide-ranging study of the problem, see Fehlberg, *Sexually Transmitted Debt* (1997).
- 656 e.g. *CIBC Mortgages Plc v Pitt [1994]* 1 A.C. 200; *Syndicate Bank v Dansingani [2019]* EWHC 3439 (Ch).
- 657 *Kings North Trust Ltd v Bell [1961]* 1 W.L.R. 119; *Barclays Bank Plc v O'Brien [1994]* 1 A.C. 180.
- 658 See *Coldunell Ltd v Gallon [1986]* Q.B. 1184.
- 659 [1993] Q.B. 109.
- 660 Considerable reliance was placed on *Turnbull & Co v Duval [1902]* A.C. 429, PC.
- 661 [1994] 1 A.C. 180. In Scotland a similar result has been reached but via the different route of recognising a duty of good faith by the creditor towards the cautioner: *Smith v Bank of Scotland 1997 S.L.T. 1061*. In Australia, the problem has been approached through the doctrine of unconscionability (below, para.10-161): see *Tjio (1997)* 113 L.Q.R. 13. The *O'Brien* case has not been followed: *Garcia v National Australia Bank Ltd [1998]* 155 A.L.R. 614, High Ct.
- 662 *Turnbull & Co v Duvall [1902]* A.C. 429, PC was doubted.
- 663 *Barclays Bank Plc v O'Brien [1994]* 1 A.C. 180, 195.
- 664 [1994] 1 A.C. 180, 196.

- 665 Compare *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, heard at the same time as *O'Brien* [1994] 1 A.C. 180: see below, para.10-146.
- 666 See above, para.10-142.
- 667 This much is required for “guarantees for personal and micro-enterprise lending” by the Lending Code, 2nd edn (2011, rev. October 2014 and September 2015), paras 67–75. (This replaces the Banking Code, which was first adopted by banks and building societies (as the Code of Banking Practice) in March 1992.) The code also provides that unlimited guarantees or security should not be taken from an individual (other than to support a customer’s liabilities under a merchant agreement): para.71. On 21 July 2016, the Lending Standards Board published a new Standards of Lending Practice, which come into force on 1 October 2016. The Standards of Lending Practice replaced the Lending Code. The Standards of Lending Practice apply to personal customers and cover loans, credit cards and current account overdrafts. The new Standards represent a move away from the Lending Code, which was focused more on compliance with provisions than customer outcomes. New Standards of Lending Practice for Business Customers were published on 28 March 2017 and became effective on 1 July 2017 (a revised version of the Standards of Lending Practice for Business Customers will come into operation on 1 November 2019 (“the 2019 Standards”)). They replace the micro-enterprise provisions of the Lending Code. See further below, para.36-220. Until July 2017, the existing protections of the Lending Code continued to apply to micro-enterprises (Standards of Lending Practice, p.3). The issue of guarantees provided by individuals is dealt with in a separate document issued by the Lending Standards Board, The Standards of Lending Practice for Personal Customers: Account Maintenance and Servicing (September 2016), Pt 8.
- 668 [1994] 1 A.C. 180, 198.
- 669 [1994] 1 A.C. 180, 197.
- 670 For a survey of many of the post-*O'Brien* cases see *Fehlberg* (1996) 59 M.L.R. 675.
- 671 [2001] UKHL 44, [2002] 2 A.C. 773. This case and seven other appeals were heard together.
- 672 See [2001] UKHL 44 at [3], [91], [100] and [192].
- 673 See above, paras 10-082 et seq.
- 674 It has been pointed out that *O'Brien* and *Etridge* are not concerned with establishing liability for damages or equitable compensation, but preventing the bank from relying upon a transaction that is tainted by wrongdoing: *Deane v Coutts & Co* [2018] EWHC 1657 (Ch) at [126].
- 675 [2001] UKHL 44 at [39].
- 676 Thus the solicitor is not expected to satisfy himself that the wife is free from undue influence: see the criticism of statements made in *Etridge* in the Court of Appeal and applied in the conjoined case of *Kenyon-Brown v Desmond Banks & Co* ([2001] UKHL 44 at [181]–[182], per Lord Scott) and the decision of the House in the latter case (see at [90] and [374]).
- 677 [2001] UKHL 44 at [41]. Compare the speech of Lord Scott, who though he said (at [192]) that he agreed fully with Lord Nicholls, said that the bank is to take steps to ensure that the wife understands the nature and effect of the transaction: see at [147], [164]–[165] and [191]. In contrast, Lord Hobhouse said that while comprehension was essential, the purpose was also to protect the wife’s vulnerability to undue influence. He disagreed with Lord Scott

- if he meant that a belief by the bank that the wife understood the nature and effect of the transaction was sufficient. That was not the effect of Lord Nicholls' scheme (see at [111]).
- 678 *Etridge's case* [2001] *UKHL* 44 at [43].
- 679 *Etridge's case* [2001] *UKHL* 44, per Lord Nicholls at [44].
- 680 [2001] *UKHL* 44 at [44]. For what will raise an inference that undue influence has been used, see above, paras 10-120—10-126.
- 681 See above, para.10-143.
- 682 [2001] *UKHL* 44 at [44].
- 683 *Etridge's case* [2001] *UKHL* 44 at [47]. Lord Browne-Wilkinson had said that the rule applied to cohabittees: [1994] *1 A.C.* 180, 198.
- 684 *Etridge's case* [2001] *UKHL* 44 at [84]. See also *Barclays Bank Plc v O'Brien* [1994] *1 A.C.* 180 at 198; *Avon Finance Co Ltd v Bridger* (1979) [1985] *2 All E.R.* 281 (vulnerable elderly parents providing security for the debts of their adult son); *Santander UK Plc v Fletcher* [2018] *EWHC* 2778 (*Ch*), [2019] *P. & C.R.* 4 (son took advantage of relationship with mother when she was emotionally vulnerable to induce her by undue influence and fraud to mortgage her home to secure a loan to him).
- 685 [2001] *UKHL* 44 at [82].
- 686 [2001] *UKHL* 44 at [87]. The creditor is all the more put on notice when the wife is not known to the creditor and is put forward as a surety by the husband: *Mahon v FBN Bank (UK) Ltd* [2011] *EWHC* 1432 (*Ch*) at [50].
- 687 [2001] *UKHL* 44 at [44].
- 688 [2001] *UKHL* 44 at [48]; cf. *Allied Irish Bank Plc v Byrne* [1995] *2 F.L.R.* 325. Similarly, the third party is unlikely to be put on constructive notice when the agreement will confer a joint tenancy on the wife: *Darjan Estate Co Plc v Hurley* [2012] *EWHC* 189 (*Ch*), [2012] *1 W.L.R.* 1782 at [34]; where the claimant gets the direct benefit in the form of an interest in land, the creditor will assume that she has an interest in the business (at [36]).
- 689 [1994] *1 A.C.* 200.
- 690 And see *Society of Lloyds v Khan* [1998] *3 F.C.R.* 93 (Lloyds not put on notice when wife agreed to be a Name, which enabled her to undertake a risk in return for reward); *Mortgage Agency Services Number Two Ltd v Chater* [2003] *EWCA Civ* 490, [2004] *1 P. & C.R.* 4 (joint loan to mother and son).
- 691 *Etridge's case* [2001] *UKHL* 44 at [49]. See also *Mahon v FBN Bank (UK) Ltd* [2011] *EWHC* 1432 (*Ch*) at [51] ("where the wife's interest and/or involvement is substantive rather than titular, if she is an active participant in managing the company's affairs and is rewarded by remuneration for her work and/or dividends or interest for her investment, the loan may well be equated with a joint loan; but ... where the financial arrangements with the bank are negotiated by the husband and the wife plays no part in those negotiations but is asked to become surety for the debts of her husband or the business, the bank should be aware of the vulnerability of the wife and of the risk that her agreement might be procured by undue influence or misrepresentation on the part of the husband, and is 'put on inquiry'"). Nor is a bank excused from making enquiry when the wife is the husband's partner in the business, especially if there is a change in the nature or scale of the lending: *O'Neill v Ulster Bank Ltd* [2015] *NICA* 64 at [17]. See also *Syndicate Bank v Dansingani* [2019] *EWHC* 3439 (*Ch*) at

[27] (the bank was fixed with the relevant knowledge even though the wife was a director of the company and a shareholder of equal shares).

- 692 *Syndicate Bank v Dansingani [2019] EWHC 3439 (Ch)* at [27], per HH Judge Dight.
- 693 [2001] UKHL 44 at [50], referring to the steps described by Lord Browne-Wilkinson in *O'Brien's case [1994] 1 A.C. 180, 196–197* and referred to above, para.10-143. In *Royal Bank of Scotland Plc v Chandra [2010] EWHC 105 (Ch), [2010] 1 Lloyd's Rep. 677 (affirmed [2011] EWCA Civ 192)* the “past transaction” rule was applied to a contract which was in train when the *Etridge* case was decided and was completed a few weeks later (see at [175]). And see *Syndicate Bank v Dansingani [2019] EWHC 3439 (Ch)* at [95]–[98] (faxed letter signed by the wife, stating that she fully understood the implications of the guarantee and that she did not require an independent solicitor, failed to discharge the claimant bank of its obligations to bring home to the wife the risk she was taking).
- 694 [2001] UKHL 44 at [50].
- 695 [2001] UKHL 44 at [50].
- 696 In *Royal Bank of Scotland v Etridge (No.2) [1998] 4 All E.R. 705, 720*, Stuart-Smith LJ doubted if banks would be willing to do this even after *O'Brien's* case, as it “is likely to expose the bank to greater risks than those from which it wishes to be protected”.
- 697 *Royal Bank of Scotland v Etridge (No.2) [1998] 4 All E.R. 705, 720*, Stuart-Smith LJ.
- 698 In *Barclays Bank Plc v Coleman*, one of the cases heard with *Etridge*, the Court of Appeal had held that the bank was justified in relying on a certificate given by a legal executive to the effect that the wife had received advice, provided that the advice was independent and was given with the authority of the legal executive's principal ([2001] Q.B. 20 at [78]). The House of Lords dismissed the appeal, Lord Scott saying that the bank were entitled to believe that the solicitors would not entrust such a task to a legal executive with insufficient experience to carry out the task properly ([2001] UKHL 44 at [292]).
- 699 Thus the bank cannot rely on a confirmation from a solicitor who was not acting for the wife: *National Westminster Bank Plc v Amin [2002] UKHL 9, [2002] 1 F.L.R. 735*.
- 700 As Lord Hobhouse put it at [120]: “[T]he central feature is that the wife will be put into a proper relationship with a solicitor who is acting for her and accepts appropriate duties towards her”. Lord Scott said that the bank could not assume that because a solicitor was acting for the wife, the solicitor's instructions extend to advising her on the transaction: see at [168] and the decision in the conjoined case of *UCB Home Loans Corp v Moore* at [90], [127] and [307]. If a solicitor is acting for the wife, the bank does not have to give express instructions on the steps to be taken or that legal advice must be provided to the wife independently, provided the solicitor confirms that she has received independent advice: *Bank of Scotland v Hill [2002] EWCA Civ 1081, [2002] E.G.C.S. 152*. In *Kapoor v National Westminster Bank Plc [2010] EWHC 2986 (Ch)* it was held that the wife had received independent legal advice, and the bank was entitled to rely on the solicitor's certificate that she had received that advice, despite fact that the wife had ignored the bank's suggestion to consult a different solicitor than the one advising her husband.
- 701 *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44* at [51]–[57].

- 702 *Etridge's case* [2001] UKHL 44 at [77]. See also *Midland Bank Plc v Serter* [1995] 3 F.C.R. 711; *Halifax Mortgage Services Ltd v Stepsky* [1995] 3 W.L.R. 701; *Barclays Bank Plc v Thomson* [1997] 4 All E.R. 816.
- 703 [2001] UKHL 44 at [74]. Lord Hobhouse, at [100], said that the guidance given by Lord Nicholls should be applied to past as well as future transactions, because it represented a reasonable response to being put on inquiry.
- 704 *Etridge's case* [2001] UKHL 44 at [79]. Lord Hobhouse (at [114]) pointed out that this may require the husband's consent, and if he will not give it, this would be a clear indication to the bank and the solicitor that something may be amiss and that it ought not to rely on the wife being bound.
- 705 [2001] UKHL 44 at [79].
- 706 *Barclays Bank Plc v Boulter* [1999] 1 W.L.R. 1919. Lord Hoffmann, delivering the only full judgment, said that enough facts must be pleaded to give rise to the presumption of constructive notice; but it would not be adequate to rely on inferences derived from statements tucked away in documents that were pleaded. However the Court of Appeal should be slow to intervene in the decision that an arguable defence had been raised: *National Westminster Bank Plc v Kostopoulos*, *The Times*, 2 March 2000.
- 707 *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430 (a case of misrepresentation).
- 708 *Royal Bank of Scotland v Etridge* (No.2) [2001] UKHL 44, [2001] 3 W.L.R. 1021, per Lord Nicholls at [39]. See also the speech of Lord Scott at [144]–[146]; *Banco Exterior Internacional SA v Thomas* [1997] 1 W.L.R. 221, 229, per Sir Richard Scott VC; *Proksch* [1997] 1 R.L.R. 71.
- 709 *Yorkshire Bank Plc v Tinsley* [2004] EWCA Civ 816, [2004] 1 W.L.R. 2380 at [19].
- 710 [2004] EWCA Civ 816 at [19]–[20].
- 711 [2004] EWCA Civ 816 at [24], [32] and [39]. Compare *Wadlow v Samuel* [2007] EWCA Civ 155, [2007] All E.R. (D) 370 (Feb), where the relationship of trust and confidence had ceased by the time of the second agreement and the claimant had been advised on it.
- 712 The right may also be lost by acquiescence, which is a form of inconsistent action: see above, para.10-132.
- 713 [2001] 1 F.C.R. 21.
- 714 [2001] 1 F.C.R. 21 at [55].
- 715 See *Walker* [2001] 1 F.C.R. 21 at [35], per Morritt VC. The Vice Chancellor said that the wife's right to claim ancillary relief on the footing that the mortgage was valid, which would have the effect that each party shares the liability equally and the equity of redemption is reduced by the amount of the liability, was inconsistent with her right to avoid the charge, since that would throw the entire liability to the bank onto the husband and increase the value of the equity of redemption by a sum equal to the wife's share of the liability.
- 716 Under *Trusts of Land and Appointment of Trustees Act 1996* s.14.
- 717 See *First National Bank Plc v Achampong* [2003] EWCA Civ 487, [2004] 1 F.C.R. 18, noted by *Thompson* [2003] Conv. 314. And see *Santander UK Plc v Fletcher* [2018] EWHC 2778 (Ch), [2019] 2 P. & C.R. 4 (son fraudulently induced his mother into mortgage after transferring her property into their joint names; the bank acquired an equitable charge over his beneficial interest, although the mortgage was avoided for undue influence).

- 718 See above, paras 10-140—10-141.
- 719 *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180, 195.*
- 720 [1985] Q.B. 428. See also *Malik (Deceased) v Sheikh [2018] EWHC 973 (Ch), [2018] 4 W.L.R. 86* where the complainant's sons, who were in confidential relationships with the complainant, acted as the respondent's agents, to procure transactions that were beneficial to the sons and the respondent.
- 721 *Bridgeman v Green (1755) Wilm. 58, 65; Huguenin v Baseley (1807) 14 Ves. 273.*
- 722 *Cobbett v Brock (1855) 20 Beav. 524, 528; O'Sullivan v Management Agency Ltd [1985] Q.B. 428.*
- 723 *Wright v Carter [1903] 1 Ch. 27.*

## Section 4. - Unconscionable Bargains and Inequality of Bargaining Power

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 3 - Grounds for Avoidance

Chapter 10 - Duress, Undue Influence and Unconscionable Dealing<sup>1</sup>

Section 4. - Unconscionable Bargains and Inequality of Bargaining Power<sup>724</sup>

### Equitable relief against unconscionable bargains

- 161 There are a number of well-established areas of the law where equitable relief is available against harsh or unconscionable bargains, such as in the law relating to penalties,<sup>725</sup> forfeitures<sup>726</sup> and mortgages; there are also many legislative interferences with freedom of contract designed to protect those who enter into harsh or unconscionable bargains.<sup>727</sup> But it remains doubtful in modern law to what extent there is any general equitable principle entitling the courts to interfere with freedom of contract on the ground that the contract (or a part of it) is, in all the circumstances of the case, a harsh and unconscionable bargain.<sup>728</sup> Until recent years, the legacy of nineteenth-century ideology in favour of freedom of contract has restricted the development of possible residuary principles of unconscionability, but there were for a time some signs of a possible resurgence of a broader equitable approach to unconscionable bargains.<sup>729</sup> Subsequently, the courts have shown a determination to adhere firmly to principles of freedom of contract, particularly in commercial contracts between businessmen.<sup>730</sup> However, it is clear that relief is possible in certain cases of unconscionable advantage taking and the real question is the scope of the principles involved, particularly that of relief against unconscionable bargains with persons suffering from some form of bargaining disadvantage.<sup>731</sup> The recent decision of the Privy Council in *Borrelli v Ting*<sup>732</sup> shows that unconscionable conduct which takes the form of illegitimate actions (such as forgery and fraud) that are not threats but that nonetheless constrain the victim's choice can amount to economic duress.<sup>733</sup> In contrast, the unconscionable conduct that is discussed in this section does not involve actions that are otherwise wrongful.

## Salvage cases

- 162 Reference has been made above (para.8-048) to the power of the court to set aside unconscionable contracts for salvage services rendered to a vessel in distress. When these cases were first decided they may have been based upon some broader principle permitting the overriding of unconscionable contracts, but now they are more usually treated as an exceptional category.

## Unconscionable bargains with poor and ignorant persons.<sup>734</sup>

- 163 Another principle of equity which can be traced back to the old equitable rules permitting intervention for the protection of expectant heirs<sup>735</sup> has been used in modern times to justify a substantial broadening of this jurisdiction. The old equitable principle was reviewed and restated in *Fry v Lane*<sup>736</sup> where it was held that the court could set aside a purchase at a considerable undervalue from “a poor and ignorant man” who had received no independent advice. Here the property being sold consisted of reversionary rights, so the case fell squarely within the old principles about expectant heirs, but little stress was laid upon the nature of the property in the judgment in this case; indeed, it was expressly said that the principle extended to a sale of property in possession. In two more modern decisions, on somewhat similar facts, it was held that the court could set aside a contract by a separated wife by which she gave up her rights in the matrimonial home in consideration of an indemnity against liability on the mortgage. In the first of these cases<sup>737</sup> Megarry J held that the requirements of “poverty” and “ignorance” referred to in *Fry v Lane* were satisfied because the wife was a “member of the lower income group” and “less highly educated” (than whom, does not appear). In the second,<sup>738</sup> Balcombe J was willing to follow Megarry J’s decision, though the question did not strictly arise, where the wife “was certainly not wealthy”, and was also not “ignorant”, but in fact “an intelligent woman”. These generous interpretations of the meaning of vague words like “poverty” and “ignorance” appear, on their face, to open the door to the possibility of relief in a substantial number of contracts where the terms are exorbitant or unconscionable, and the party aggrieved did not have independent advice, and since there have been a number of cases in which relief on the ground of unconscionability has been considered<sup>739</sup> and some in which it has been granted. Thus, the Privy Council has set aside the renewal of a lease, on very unfavourable terms, granted by a plaintiff who was “somewhat slow” and who was put under pressure by the lessee while the plaintiff’s usual advisor was away.<sup>740</sup> In *Crédit Lyonnais Bank Nederland NV v Burch*<sup>741</sup> the defendant had given a guarantee and charged her flat to secure the borrowings of her employer’s company, in circumstances in which the transaction was manifestly disadvantageous to her. The case was decided on the ground that the bank had constructive notice of undue influence by the employer, but both Nourse and Millett LJ suggested that it might have been argued that she had a direct right, as against the bank, to set

aside the transaction on the grounds of unconscionability. The bank had only explained the nature of the transaction without giving the defendant adequate information as to the risks and should have known she had not taken independent advice.<sup>742</sup>

## Scope of the doctrine

- 164 The doctrine of unconscionable bargains seems to be limited in three ways. The first is that the bargain must be oppressive to the complainant in overall terms; the second that it may only apply when the complainant was suffering from certain types of bargaining weakness; and the third that the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant.<sup>743</sup> These points will be discussed in turn.<sup>744</sup>

## An oppressive bargain

- 165 The modern cases in which relief has been granted or said to be available have all involved transactions which were substantively unfair in that the complainant was parting with property for much less than it was worth,<sup>745</sup> or getting nothing out of the transaction.<sup>746</sup> “The resulting transaction has been, not merely hard or improvident, but overreaching and oppressive” so that its terms, together with the conduct of the stronger party, “shock the conscience of the court”.<sup>747</sup> In *Boustany v Piggott*<sup>748</sup> the original lease had reserved a rent of \$833 per month and imposed an obligation of repair on the lessee; the new lease which was set aside at the instance of the lessor imposed no such obligation, while the rent was fixed at \$1,000 per month for a 10-year period and the lease was renewable for a further 10 years at the same rent. In *Portman Building Society v Dusaugh*<sup>749</sup> the Court of Appeal refused relief because the bargain was improvident but not so extravagantly so that it was difficult to explain in the absence of some impropriety.<sup>750</sup> Thus it is doubtful whether English courts would follow dicta in Australia<sup>751</sup> to the effect that inadequacy of consideration is not essential.<sup>752</sup> It is equally doubtful whether the doctrine would be applied as it has been in the United States<sup>753</sup> to a single harsh term such as a limitation of liability clause, unless the contract was oppressive overall.<sup>754</sup>

## The complainant's circumstances

- 166 As noted earlier,



755

 the traditional requirement that the complainant be “poor and ignorant”

756

 received a broad interpretation in some of the modern cases; and in one case

757

 the majority of the Court of Appeal were prepared to say that relief could have been given to a young employee who had charged her flat to secure her employer’s debts, without discussing the requirement.

758

 Commonwealth cases have allowed relief in a broad variety of “disabling” circumstances.

In *Blomley v Ryan*

759

 Fullagar J listed as examples:

“... poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.”

And in *Commercial Bank of Australia v Amadio*

760

 Deane J said that the jurisdiction is established:

“... as extending generally to circumstances in which ... a party to a transaction was under a special disability in dealing with the other party with the consequences that there was an absence of any reasonable degree of equality between them.”

It is submitted that English law can give relief in an equally wide range of circumstances, provided that:

“... one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken.”

761



However, apart from the salvage cases referred to earlier, there is little authority supporting the grant of relief where the claimant's "serious disadvantage" consists only of the difficult circumstances, including financial, in which he finds himself.

<sup>762</sup>

**U** This is particularly so where the claimant has "considerable commercial experience and sophisticated financial expertise ... and ... ready access to lawyers".

<sup>763</sup>

**U** Nevertheless, Lord Burrows has stated that while cases have hitherto involved claimants "with a mental weakness such as inexperience, confusion because of old age or emotional strain ... it is not inconceivable that the relevant weakness could be the very weak bargaining position of a company".

<sup>764</sup>

**U**

## Unconscionable conduct

-167 A contract will not be set aside merely because the aggrieved party did not have independent advice and the consideration was inadequate. It must also be shown that the other party engaged in unconscionable conduct or an unconscientious use of power.<sup>765</sup> He must have behaved:

"... in a morally reprehensible manner ... which affects his conscience ... The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible, well-advised ... person would have accepted."<sup>766</sup>

If there has been no equitable fraud, victimisation, taking advantage, overreaching or other unconscionable conduct, relief will not be granted.<sup>767</sup> Thus in *Hart v O'Connor*<sup>768</sup> the vendor was of unsound mind, but this was not apparent to the purchaser and the vendor appeared to be advised by a solicitor who had proposed the terms of the bargain. The Privy Council held that the contract could not be set aside on the grounds of insanity unless the vendor's incapacity was known to the purchaser,<sup>769</sup> nor as unconscionable because the purchaser had acted with complete innocence. In the words of Lord Brightman, there must be "procedural unfairness" as well as "contractual imbalance", though:

"... contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation."<sup>770</sup>

In *Boustany v Piggott*<sup>771</sup> Lord Templeman, delivering the judgment of the Privy Council, agreed in general terms with the submissions of counsel for the appellant:

- (1)there must be unconscionability in the sense that objectionable terms have been imposed on the weaker party in a reprehensible manner;
- (2)*unconscionability* refers not only to the unreasonable terms but to the behaviour of the stronger party, which must be morally culpable or reprehensible;
- (3)unequal bargaining power or objectively unreasonable terms are no basis for interference in equity in the absence of unconscionable or extortionate abuse where, exceptionally and as a matter of common fairness, “it is unfair that the strong should be allowed to push the weak to the wall”;
- (4)a contract will not be set aside as unconscionable in the absence of actual or constructive fraud or other unconscionable conduct; and
- (5)the weaker party must show unconscionable conduct, in that the stronger party took unconscious advantage of the weaker party’s disabling condition or circumstances.<sup>772</sup>

## Unconscionable conduct may be inferred

- 168 In *Crédit Lyonnais Bank Nederland NV v Burch*<sup>773</sup> Millett LJ pointed out that it would be necessary to show that the bank had imposed the objectionable terms in a morally objectionable manner, but said that impropriety might be inferred from the terms of the transaction itself in the absence of an innocent explanation.<sup>774</sup> The same point may be made another way. If the transaction is manifestly oppressive, it seems that the defendant may be found guilty of “unconscionable conduct” within the meaning of the doctrine if he did no more than consciously take advantage of the claimant’s willingness to enter it.<sup>775</sup>

## Absence of independent advice

- 169 The traditional statements of the rule on unconscionable bargains also state that the complainant must have acted without independent advice. However, it is submitted that the absence of such advice is not essential. In *Crédit Lyonnais Bank Nederland NV v Burch*<sup>776</sup> Millett LJ said that the fact that the complainant had been offered independent advice would not necessarily save a transaction which was so harsh that no competent advisor could have recommended it. In *Boustany v Piggott*<sup>777</sup> a lawyer called on to prepare the documents had pointed out that their terms were disadvantageous but did not refuse to proceed with execution of the document; the Privy Council refused to interfere with the trial judge’s finding that the transaction was unconscionable. It may be suggested that an oppressive transaction will only be saved by independent advice if the advisor

explains fully to the complainant why the transaction is so disadvantageous and that she is under no obligation to agree to it, or to agree to the terms offered; and (in an extreme case) refuses to act on her behalf if she persists in going ahead.<sup>778</sup>

## Burden of showing fair, just and reasonable

- 170 Once the conditions for relief are met, the burden shifts to the stronger party to show that the transactions are fair, just and reasonable.<sup>779</sup> In practice, this will mean showing either that, in the particular circumstances, the transaction was not in fact oppressive; or that the complainant was fully aware of what she was doing. This will normally come back to the question of whether she had received proper independent advice.

## Unconscionability in Canada

- 171 It has already been stated that Commonwealth courts appear to be more in favour of a possible general doctrine of unconscionability.<sup>780</sup> There is a good deal of authority in Canada,<sup>781</sup> where the doctrine of unconscionability is well established. The Supreme Court has asserted a general power to set aside contractual provisions on the broad ground of fairness. The cases often dealt with improvident contracts made by a claimant with very weak bargaining power with a stronger party who knows or must have known of the claimant's impairment. For example, an elderly widow with slender means was persuaded by two men to mortgage her home and lend the proceeds to them so that they could repay a loan to the first defendant lender and buy two cars from the second defendant;<sup>782</sup> and a man with little education sold a boat and license worth \$15,000 for \$570.<sup>783</sup>
- 172 The unconscionability doctrine has been applied by the Supreme Court to a dispute about the enforceability of an exemption clause. The Chief Justice said<sup>784</sup>:

“The availability of a plea of unconscionability in circumstances where the contractual term is per se unreasonable and the unreasonableness stems from inequality of bargaining power was confirmed in Canada over a century ago in *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch.) It has been used on many subsequent occasions ... I am of the opinion that the terms of a contract may be declared to be void as being unreasonable where it can be said that in all the circumstances it is unreasonable and unconscionable to bind the parties to their formal bargain.”

-173

More recently, in *Heller v Uber Technologies*<sup>785</sup> the Supreme Court of Canada set aside as unconscionable an arbitration clause that required a potential litigant to incur upfront costs of \$14,500 to commence arbitration proceedings in the Netherlands. An approach laying down four requirements<sup>786</sup> was rejected as it focused on the stronger party's state of mind, rather than the protection of the vulnerable party.<sup>787</sup> Abella and Rowe JJ supported an approach requiring two elements. First, the claimant must show inequality of bargaining power. But there are no strict limitations on what constitutes "inequality"; it can arise from the personal characteristics of the claimant and/or the circumstantial vulnerability. The inequality may either affect the claimant's ability to freely enter or negotiate a contract, or compromise their ability to understand the impact of the contract they have entered into. Secondly, the claimant must show that the transaction is improvident; this is satisfied when it unduly advantages the stronger party or unduly disadvantages the vulnerable individual. The issue can take many forms, and determining what makes it improvident "cannot be reduced to an exact science".<sup>788</sup> They rejected "a rigid requirement based on the stronger party's state of mind" (i.e. knowledge of the vulnerable party's vulnerability) as this would:

"... erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate."<sup>789</sup>

## Unconscionability in Australia

- 174 In Australia the courts seem prepared to give relief in equity for unconscionability in a wide range of circumstances provided that advantage has been taken.<sup>790</sup> In *Commonwealth Commercial Bank of Australia v Amadio* Mason J of the High Court of Australia held:

"Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will also be granted when such advantage is taken of an innocent party who though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interests."<sup>791</sup>

The Amadios' guarantee of their son's debt to the bank was held to be unconscionable given the Amadios' limited understanding of English and lack of independent advice, and the bank's awareness that the Amadios wrongly believed the guarantee to be limited and were ignorant of their son's precarious financial situation.

In two decisions, the courts seemed to apply the criteria very widely,<sup>792</sup> granting relief for unconscionability although the claimant's special disadvantage was unclear and it was difficult to say that the defendant had acted unconscionably, but in circumstances where the claimant transferred to the defendant substantial assets that would otherwise have been available to other family members who could be said to have a claim on the claimant.

- 176 More recently, the High Court of Australia has tightened up the criteria for finding unconscionability, so as to include the defendant's unconscionable conduct in inducing the transaction. The majority said that the:

“... conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage ‘which seriously affects the ability of the innocent party to make a judgement as to the [the innocent party’s] own best interests’. The other party must also unconsciously take advantage of the special disadvantage ... [and] it is also necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage.”<sup>793</sup>

The High Court set aside a pre-nuptial agreement as unconscionable where a woman with no substantial assets, who had moved to Australia to marry a developer, was presented shortly before their marriage with a pre-nuptial agreement that her independent advisor described as “entirely inappropriate”, and was told that the marriage would not ahead unless she agreed, when her family had been brought to Australia for the wedding.

- 177 In addition, the Australian Consumer Act<sup>794</sup> prohibits unconscionable conduct. Section 20 entrenches into statute the equitable doctrine of unconscionable conduct, thereby extending the range of remedies available to parties affected by unconscionable conduct.<sup>795</sup> Section 21 extends the concept of unconscionability beyond that recognised in equity and can be relied upon by all persons, other than listed corporations, who acquire or supply goods or services in trade or commerce. Relevant factors extend beyond “consideration of the circumstances relating to formation of the contract” to “the terms of the contract”. Section 22 sets out a range of factors a court may consider when determining whether conduct is unconscionable, including:

“...

(d)whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

- (e)the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and...
- (g)the requirements of any applicable industry code; and...
- (j)if there is a contract between the supplier and the customer for the supply of the goods or services:
  - (ii)the terms and conditions of the contract; and
  - (iii)the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
  - (iv)any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
- (k)without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
- (l)the extent to which the supplier and the customer acted in good faith."

## Unconscionability in the United States

- 178 In the United States, a broad doctrine of unconscionability is now a well-established principle of the law entitling courts to refuse to enforce contracts, or contractual clauses, which are harsh, exorbitant or unconscionable. The principle is partly statutory, deriving from § 2-302 of the Uniform Commercial Code, but is widely applied by American courts as a matter of common law where the Code is inapplicable.<sup>796</sup> § 2-302 states:

“(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

§ 2-302 has been criticised for failing to appreciate the importance of the distinction generally drawn in American law between “procedural unconscionability” and “substantive unconscionability”, resulting in the section’s “final amorphous unintelligibility”.<sup>797</sup> Procedural unconscionability can be invoked where some element of oppression or wrongdoing (in a broad sense) has occurred in the process of making the contract: this enables courts to use doctrines like duress and undue influence as merely illustrative of a broader principle requiring that undue advantage or surprise should not be taken of a party; so matters like illiteracy, lack of knowledge of

the English language, general inability to comprehend a complicated document, etc. may be treated as matters of procedural unconscionability. Substantive unconscionability, by contrast, goes to the actual substance of the contract and its terms. In practice substantive unconscionability covers excessively wide exclusion clauses on the one side, and grossly exorbitant or excessive prices, on the other. The leading commentary on the Uniform Commercial Code states that:

“Most parties who assert [§] 2-302 and most of those who have used it successfully in reported cases have been consumers. Most of these successful consumer litigants have been poor or otherwise disadvantaged. … The courts have not generally been receptive to pleas of unconscionability by one merchant against another.”<sup>798</sup>

The leading example is *Williams v Walker-Thomas Furniture*<sup>799</sup> where the defendant extended credit for a series of furniture sales to the consumer from 1957 to 1962. The contract stated that no item of furniture was paid off unless they were all paid off and when the consumer defaulted on payment in 1962, the defendant sought to repossess all items sold since 1957. The Court held that such a contract could be avoided for being unconscionable.<sup>800</sup> Some courts have held the doctrine applicable in cases involving petrol station operators<sup>801</sup> and franchisees; others have refused.<sup>802</sup>

## Unfair terms in consumer contracts

<sup>-179</sup> With the implementation of Council Directive 93/13 on Unfair Terms in Consumer Contracts,<sup>803</sup> English law has moved slightly closer to the concept of “substantive unconscionability”, since art.3 of the Directive defines a contractual term which has not been individually negotiated as unfair (and therefore not binding on the consumer):

“… if, contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

This is now expressed in English law by Pt 2 of the Consumer Rights Act 2015 which applies the same test to terms in consumer contracts whether or not the term was negotiated with the trader.<sup>804</sup> But it will not cover the cases of sales at undervalue which have formed the core of unconscionable bargain cases in England since under the Directive, and under the Consumer Rights Act 2015, the adequacy of the price cannot be reviewed.<sup>805</sup>

## Consumer Credit Act 1974

- 180 Under the [Consumer Credit Act 1974](#), a credit agreement which is the result of an unfair relationship may be reopened.<sup>806</sup> When the Act still provided for relief against extortionate credit bargains,<sup>807</sup> there was some disagreement as to whether the principles of unconscionability apply to this jurisdiction.<sup>808</sup> The new provisions were considered necessary because few cases met the high threshold set previously.<sup>809</sup>

## Inequality of bargaining power

- 181 A possible principle which is closely related to the broad idea of unconscionability, but slightly narrower in scope, is that of inequality of bargaining power. In [Lloyds Bank Ltd v Bundy](#),<sup>810</sup>

**U** Lord Denning MR stated the single general principle, which, in his view, underlay many of the cases discussed in this chapter. He considered that the thread running through the cases was the concept of “inequality of bargaining power”:

“By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”

<sup>811</sup>

**U**

In [National Westminster Bank Plc v Morgan](#) Lord Scarman questioned (the other Law Lords all concurring) whether there was any need in the modern law to erect a general principle of relief against equality of bargaining power.

<sup>812</sup>

**U** It is certainly unlikely that mere inequality of bargaining power, even when this leads to the exertion of considerable pressure, will be recognised as a ground for setting aside a contract. Even Lord Denning would not have given relief when the pressure was “the result of the ordinary interplay of forces”.

813

**U** And unless and until a general doctrine along the lines suggested by Lord Denning is recognised, a contract will only be set aside if it falls within one of the recognised categories of “victimisation” such as duress, undue influence or unconscionable advantage taking. In *Pakistan International Airline Corp v Times Travel (UK) Ltd*

814

**U** the Supreme Court has reinforced the absence of a doctrine of inequality of bargaining power and of a principle of good faith in contracting, the matter being one for the legislature since “judges should not, as a general rule, be the arbiters of what is socially acceptable and attach legal consequences to such conduct”.

815

**U**

## Footnotes

- 1 See Cartwright, *Unequal Bargaining* (1991), Pt III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012).
- 724 *Pakistan International Airline Corp v Times Travel (UK) Ltd [2021] UKSC 40* at [77] cited the equivalent paragraphs of this section in the 33rd edn with approval.
- 725 See below, paras 29-203 et seq.
- 726 See below, para.29-259.
- 727 See in particular the *Unfair Contract Terms Act 1977*, below, paras 17-069 et seq., *Unfair Terms in Consumer Contracts Regulations 1999* or *Consumer Rights Act 2015* Pt 2, Vol.II, Ch.40, and *Consumer Credit Act 1974* ss.140A-140C (inserted by ss.19–22 of the *Consumer Credit Act 2006*; the provisions on extortionate credit bargains, former ss.137–140, have been repealed by s.70 and Sch.4 of the 2006 Act): see Vol.II, para.41-213. The Unconscionable Conduct in Commerce Bill [HL] 2020 proposes a new criminal offence of unconscionable conduct in trade or commerce that is punishable by imprisonment or fine or both. Relevant factors detailed in s.2(1) include: “... (b) a system of conduct or pattern of behaviour ...; (c) consideration of the terms of a contract; (d) the manner in which and the extent to which a contract is carried out ...; (e) the relative strengths of the bargaining positions ...; (f) whether ... [the] customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; (g) whether any undue influence or pressure was exerted on or any unfair tactics were used against a customer ... including imposition of unrealistic timescales having regard to circumstances and the reasonable capacity of the customer; (h) whether a customer was able to understand any documents ...; (i) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; ... (k) the requirements of any applicable industry code; ...

(m) the extent to which a supplier unreasonably failed to disclose to the customer ... any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); ... (o) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; (p) the extent to which the supplier and the customer acted in good faith".

- 728 See *Waddams* (1976) 39 M.L.R. 369; *Reiter* (1981) 1 O.J.L.S. 347.
- 729 See, e.g. dicta of Lord Simon of Glaisdale in *Shiloh Spinners Ltd v Harding* [1973] A.C. 691, 726; Lord Diplock in *A. Schroeder Music Publishing Co v Macaulay* [1974] 1 W.L.R. 1308, 1315; *Burmah Oil Co v Bank of England*, *The Times*, 4 July 1981 (no relief for mere unfair bargain—there must be an unconscionable bargain—a bargain whose very terms reveal conduct which shocks the conscience of the court); and *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 W.L.R. 173, in which the Court of Appeal did not rule out a broad doctrine of unconscionability, though it held that no unconscientious conduct had occurred. See also cases cited below, para.10-163.
- 730 See, e.g. *Photo Productions Ltd v Securicor Transport Ltd* [1980] A.C. 827; *The Chikuma* [1981] 1 W.L.R. 314; *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84; for a slightly earlier dictum to the same effect, see Lord Radcliffe in *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600, 626; and, in the particular context of unconscionability, below, para.10-181.
- 731 See below, paras 10-164 et seq.
- 732 [2010] UKPC 21.
- 733 See above, paras 10-014—10-015.
- 734 *Bamforth* [1995] L.M.C.L.Q. 538.
- 735 e.g. *Aylesford v Morris* (1872-73) L.R. 8 Ch. App. 484. See Treitel in Peel (ed.), *The Law of Contract*, 15th edn (2020), para.10-047; Burrows, *Law of Restitution*, 3rd edn (2011), 302.
- 736 (1888) 40 Ch. D. 312. See also *Wood v Abrey* (1818) 3 Madd. 417; *Longmate v Ledger* (1860) 2 Giff. 157; *Clark v Malpas* (1862) 4 De G.F. & J. 401; *Baker v Monk* (1864) 4 De G.J. & S. 388; *Prees v Coke* (1870) L.R. 6 Ch. App. 645; *James v Kerr* (1888) 40 Ch. D. 449; *Rees v De Bernardy* (1896) 2 Ch. 437; cf. *Harrison v Guest* (1860) 8 H.L.C. 481.
- 737 *Cresswell v Potter* [1978] 1 W.L.R. 255n (decided in 1968).
- 738 *Backhouse v Backhouse* [1978] 1 W.L.R. 243.
- 739 See *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87; *Hart v O'Connor* [1985] A.C. 1000. Unconscionability was not found on the facts in *Pye v Ambrose* [1994] N.P.C. 53. The Multiservice and Alec Lobb cases draw on a line of authority relating to mortgages: see *Bamforth* [1995] L.M.C.L.Q. 538, 546. A plea of unconscionability was rejected on the facts in *Jones v Morgan* [2001] EWCA Civ 995, *The Times*, 24 July 2001.
- 740 *Boustany v Piggott* (1995) 69 P. & C.R. 298; see also *Watkin v Watson-Smith*, *The Times*, 3 July 1986.
- 741 [1997] 1 All E.R. 144, noted *Chen-Wishart* [1997] C.L.J. 60; *Hooley and O'Sullivan* [1997] L.M.C.L.Q. 17; *Tjio* (1997) 113 L.Q.R. 10.
- 742 [1997] 1 All E.R. 144, 151, 152–153.

- 743 *Strydom v Vendside Ltd [2009] EWHC 2130 (QB)*, per Blair J at [36] (“one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive”).
- 744 In *Irvani v Irvani [2000] 1 Lloyd's Rep. 412, 424*, Buxton LJ, delivering the only full judgment in the Court of Appeal, said that this paragraph (in the 28th edition of this work) accurately sets out the limitations on the doctrine of unconscionability. The doctrine is quite distinct from that of undue influence, which: “is concerned with the prior relationship between the contracting parties, and whether that was the motivation or reason for which the bargain was entered into”. (In Australia it seems that the courts may be abandoning this distinction: see *Bridgewater v Leahy [1998] HCA 66, [1998] 158 A.L.R. 66, High Ct.*) In *Bank of Credit and Commerce International SA v Ali (No.1) [2000] I.R.L.R. 398* the Court of Appeal (Buxton LJ dubitante) held that equity can give relief against a release of a claim on the ground of unconscionability where the release was procured by the other party’s deliberate concealment of facts, if that party knew or believed that the party giving the release could not discover the facts and the releasing party had not in fact known of them. In the House of Lords (*[2001] UKHL 8, [2002] 1 A.C. 251*), the case was decided upon other grounds, but there is a suggestion by Lord Nicholls (at [32]–[33]) that in extreme cases, unconscionability might have a part to play within a principle of “sharp practice”: see above, paras 8-007 and 9-192; and see *Yukos Hydrocarbons Investments (into which Fair Oaks Trade and Invest Ltd has merged) v Georgiades [2020] EWHC 173 (Comm)* [223]–[229], where Moulder J explored the implications of Lord Nicholls’ principle of “sharp practice” and held that it did not apply to a settlement negotiated by sophisticated commercial parties of equal bargaining strength.
- 745 *Cresswell v Potter [1978] 1 W.L.R. 255n; Backhouse v Backhouse [1978] 1 W.L.R. 243; Watkin v Watson-Smith, The Times, 3 July 1986; Boustany v Piggott (1995) 69 P. & C.R. 298.*
- 746 *Crédit Lyonnais Bank Nederland NV v Burch [1997] 1 All E.R. 144.*
- 747 *Alec Lobb Ltd v Total Oil (Great Britain) Ltd [1983] 1 W.L.R. 87, 94–95*, per Peter Millett QC sitting as a Deputy High Court Judge (reversed in part *[1985] 1 W.L.R. 173*); see also *Crédit Lyonnais Bank Nederland NV v Burch [1997] 1 All E.R. 144, 152–153; Strydom v Vendside Ltd [2009] EWHC 2130 (QB)* at [39], citing this paragraph.
- 748 *(1995) 69 P. & C.R. 298.*
- 749 *[2000] 2 All E.R. (Comm) 221.*
- 750 *[2000] 2 All E.R. (Comm) 221, 228.* See also in *Liddle v Cree [2011] EWHC 3294 (Ch)* at [91].
- 751 *Blomley v Ryan (1956) 99 C.L.R. 362, 405; Commonwealth Bank of Australia v Amadio (1983) 151 C.L.R. 447, 475.* But in the latter case (which was one of a guarantee, so that the complainant would not expect to receive anything) Deane J said that the transaction might be unfair, unreasonable and unjust although there was no inadequacy of consideration.
- 752 cf. the suggestion in *Langton v Langton [1995] 2 F.L.R. 890* that the jurisdiction to set aside contracts on the ground of unconscionability does not extend to gifts, as this would mean that in the case of all gifts by poor and ignorant persons without independent advice, an onus would be placed on the recipient to show that the gift was fair, just and reasonable. Note that

*Capper* (1998) 114 *L.Q.R.* 479 argues that “transactional imbalance” is not a precondition of relief but only evidential (at 491). He thus argues that unconscionability and undue influence can be assimilated.

- 753 See below, para.10-178. It is arguable that if the effect of a clause in the contract is that the bargain is worth a great deal less to the claimant than he thought, this may make the bargain oppressive: see Beale, “Undue Influence and Unconscionability” in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Contract* (2017), Ch.5.
- 754 cf. *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84.
- 755 Above, para.10-163.

- 756 e.g. *Fry v Lane* (1888) 40 Ch. D. 312.

- 757 *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144.

- 758 See *Hooley and O'Sullivan* [1997] L.M.C.L.Q. 17, 23.

- 759 (1956) 99 C.L.R. 362, 405.

- 760 (1983) 151 C.L.R. 447, 474. In that case the complainants were elderly immigrants with limited knowledge of written English.

- 761 *Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87, 94–95, per Peter Millett QC sitting as a Deputy High Court Judge (reversed in part [1985] 1 W.L.R. 173) (emphasis supplied). In *Barclays Bank Plc v Schwartz, The Times*, 2 August 1995 Millett LJ observed that a person whose illiteracy or inability to speak English is taken advantage of may, in an appropriate case, be able to have the contract set aside on the grounds of unconscionability. It is arguable that relief may be given when the claimant’s “bargaining weakness” took the form of not knowing of a clause in the contract he was signing, or not appreciating its possible effect: relief can then be given if the result is that the deal is worth a great deal less to the claimant than he thought, and if the other party deliberately took advantage of the claimant’s ignorance or lack of understanding. This form of bargaining weakness seems to fall within Fullagar J’s words in *Blomley v Ryan* (1956) 99 C.L.R. 362, 405, quoted in the text of the paragraph, which included “lack of assistance or explanation where assistance or explanation is necessary”: see Beale, “Undue Influence and Unconscionability” in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Contract* (2017), Ch.5. In *Nosworthy v Instinctif Partners Ltd* Unreported 28 February 2019 (EAT) at [49], relief was denied since there was no “poverty, or ignorance or lack of advice or otherwise leaving the individual vulnerable to unfair disadvantage”.

- 762 See Burrows, *Law of Restitution*, 3rd edn (2011), 306–307.

- 763

*Heritage Travel and Tourism Ltd v Windhorst [2021] EWHC 2380 (Comm)* at [47]. See also *Al-Subaihi v Al-Sanea [2021] EWHC 2609 (Comm)* at [195].

764 *Times Travel (UK) Ltd v Pakistan International Airlines Corp [2021] UKSC 40* at [77].

765 *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 W.L.R. 173, 182.*

766 *Multiservice Bookbinding Ltd v Marden [1979] Ch. 84, 110.*

767 *Hart v O'Connor [1985] A.C. 1000; Boustany v Pigott [1993] N.P.C. 75, PC; Westpac Banking Corp v Paterson [2001] FCA 1630, [2001] 187 A.L.R. 168* (Federal Ct of Australia); *Portman Building Society v Dusaugh [2000] 2 All E.R. (Comm) 221*. In *Al Nehayan v Kent [2018] EWHC 333 (Comm)* Leggatt LJ suggested (at [181]) that where the defendant has exploited a position of extreme vulnerability on the part of the claimant to induce the claimant to agree to a wholly unreasonable demand, there “is no reason why ... the availability of relief should depend on the defendant’s own perception of whether his conduct was justified ... [T]he law sets limits to freedom of contract by requiring the parties to observe certain minimum standards of behaviour [and] the appropriate arbiter of those standards is the independent judgment of the court”. This suggests that a party who is exploiting the other may not rely on some other factor, such as a previous injustice, to justify what he is doing, but it is submitted that on the existing authorities, the exploitation itself must still be deliberate.

768 *[1985] A.C. 1000.*

769 Overruling *Archer v Cutler [1980] 1 N.Z.L.R. 386*. But the New Zealand court has rejected this approach to unconscionability: *Nichols v Jessup (No.2) [1986] 1 N.Z.L.R. 237*; see *Bamforth [1995] L.M.C.L.Q. 538, 550.*

770 *Hart v O'Connor [1985] A.C. 1000, 1018*. Lord Brightman’s language seems to reflect American terminology, below, para.10-178. It is interesting to contrast the justification offered in *Redgrave v Hurd (1881) 20 Ch. D. 1, 13*, for rescission for innocent misrepresentation; it is moral fraud to insist on keeping the contract now you know the representation is false. cf. *Rooney v Conway [1982] 5 N.I.J.B.*

771 *(1995) 69 P. & C.R. 298, 303.*

772 Lord Templeman’s statement of the law was adopted by Buxton LJ in *Irvani v Irvani [2000] 1 Lloyd’s Rep. 412, 424*, delivering the only full judgment in the Court of Appeal.

773 *[1997] 1 All E.R. 144.*

774 *[1997] 1 All E.R. 144, 153*, referring to *Multiservice Bookbinding Ltd v Marden [1979] Ch. 84, 110* and *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1983] 1 W.L.R. 87, 95.*

775 This certainly seems to have been the case in some of the older authorities such as *Evans v Llewellyn (1787) 1 Cox Eq. Cas. 333*, see *Devenney and Chandler [2007] J.B.L. 541*. In *Liddle v Cree [2011] EWHC 3294 (Ch)* the court found that no unconscionable advantage had been taken (at [92]).

776 *[1997] 1 All E.R. 144.*

777 *(1995) 69 P. & C.R. 298.*

778 cf. above, para.10-130.

779 *Aylesford v Morris (1873) 8 Ch. App. 484, 490–491.*

780 See generally *Bamforth [1995] L.M.C.L.Q. 538*, passim. In *Irvani v Irvani [2000] 1 Lloyd’s Rep. 412, 425*, Buxton LJ, delivering the only full judgment in the Court of Appeal, said that

he agreed with this paragraph in saying that the Commonwealth cases “do or may go beyond the limits of present English authority”.

- 781** See, e.g. *Black v Wilcox* (1976) 30 D.L.R. (3d) 192; *Paris v Machnik* (1972) 30 D.L.R. (3d) 723; *Morrison v Coast Finance* (1965) 55 D.L.R. (2d) 710; and other cases cited in Waddams, *Law of Contracts*, 6th edn (2010), para.518 and *Enman* (1987) 16 Anglo-Am.L.R. 191.
- 782** *Morrison v Coast Finance Ltd* (1965) 55 D.L.R. (2d) 710 (BCCA).
- 783** *Harry v Kreutziger* (1978) 95 D.L.R. (3d) 231 (BCCA).
- 784** *Hunter Engineering Inc v Syncrude Canada Ltd* (1989) 57 D.L.R. 4th 321.
- 785** *Heller v Uber Technologies Inc* 2020 S.C.C. 16.
- 786** Set out in *Titus v William F Cooke Enterprises Inc* 2007 ONCA 573, 284 D.L.R. (4th) 734 at [38]; and confirmed more recently in *Phoenix Interactive Design Inc v Alterinvest II Fund LP* 2018 ONCA 98, 420 D.L.R. (4th) 335. The four requirements were said to be (i) inequality of bargaining power, (ii) improvident transaction, (iii) lack of independent advice, and (iv) knowing advantage-taking by the other party.
- 787** *Heller v Uber Technologies Inc* 2020 S.C.C. 16 at [85].
- 788** *Heller v Uber Technologies Inc* 2020 S.C.C. 16 at [78].
- 789** *Heller v Uber Technologies Inc* 2020 S.C.C. 16 at [85].
- 790** *Blomley v Ryan* (1956) 99 C.L.R. 362.
- 791** *Commonwealth Bank of Australia v Amadio* (1983) 57 A.L.J.R. 358, 462; *Hardingham* (1984) 4 O.J.L.S. 275.
- 792** *Louth v Diprose* [1992] 175 C.L.R. 621 (solicitor who had three children transferred property that was his only asset to depressed single mother with whom he was infatuated and who was about to be evicted and was contemplating suicide), and *Bridgewater v Leahy* [1998] HCA 66, [1998] 158 A.L.R. 66, High Ct (farmer sold farm at great undervalue to nephew, thereby disinheriting wife and daughters); but see *Westpac Banking Corp v Paterson* [2001] F.C.A. 1630, [2001] 187 A.L.R. 168, Federal Ct (complainant’s disadvantage must be sufficiently evident to other party to make it unconscionable for it to accept complainant’s apparent assent). The decision in *Barclays Bank Plc v O’Brien* [1994] 1 A.C. 180 has not been followed: *Garcia v National Australia Bank Ltd* [1998] 155 A.L.R. 614, High Ct.
- 793** *Thorne v Kennedy* [2017] HCA 49 at [38].
- 794** Set out in Sch.2 of the Competition and Consumer Act 2010.
- 795** The Australian Consumer Act added the remedies of compensation orders, and orders to redress loss or damage for consumers who were not part of an enforcement action in relation to the relevant contravening conduct. This is in addition to the remedies of pecuniary penalties, injunctions, actions for damages, non-punitive orders, adverse publicity orders and orders disqualifying a person from managing corporations, that existed under the Trade Practices Act 1974. See ss.224–250 inclusive of the Australian Consumer Act and ss.76–87CAA inclusive of the Trade Practice Act 1974.
- 796** See Farnsworth, *Contracts*, 4th edn (2004), §4.28.
- 797** *Leff* (1967) 115 Un. Pennsylvania L.R. 485, 488.
- 798** White & Summers, *Uniform Commercial Code*, 5th edn (2000), para.4-2, though see also para.4-9.

- 799 *Williams v Walker-Thomas Furniture Co* 350 F.2d 445.
- 800 The case was returned to the lower court to determine further facts.
- 801 cf. *Alec Lobb Ltd v Total Oil GB Ltd* [1983] 1 W.L.R. 87.
- 802 See Farnsworth, Contracts 4th edn (2004), 323–324.
- 803 See below, Vol.II, paras 40-223 et seq.
- 804 See below, Vol.II, para.40-274.
- 805 1999 Regulations regs 4(2) and 6(2); Consumer Rights Act 2015 s.64. See below, Vol.II, paras 40-351 et seq.
- 806 Consumer Credit Act 1974 ss.140A–140C, inserted by ss.19–22 of the Consumer Credit Act 2006; see below, Vol.II, paras 41-214 et seq.
- 807 The provisions on extortionate credit bargains, former ss.137–140 of the 1974 Act, have been repealed by s.70 and Sch.4 of the 2006 Act.
- 808 cf. *Davies v Directloans Ltd* [1986] 1 W.L.R. 823, 831 and *Shahabina v Gyachi* Unreported 1989, cited in *Bamforth* [1995] L.M.C.L.Q. 538, 559.
- 809 See below, Vol.II, para.41-214.
- 810 [1975] Q.B. 326; see too *Arrale v Costain Engineering Ltd* [1976] 1 Lloyd's Rep. 98; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69, 78–79; *Langdale v Danby*, *The Times*, 24 November 1981.
- 811 [1975] Q.B. 326, 339. See also *A. Schroeder Music Publishing Co v Macaulay* [1974] 1 W.L.R. 1308, 1315.
- 812 [1985] A.C. 686, 708. With respect, the question is not so much whether there is any need for a principle of this character as whether there may not be a need for a residuary principle to catch cases which may otherwise slip through the various statutory protections.
- 813 *Lloyd's Bank v Bundy* [1975] Q.B. 326, 336.
- 814 [2021] UKSC 40 at [26]–[30].
- 815 [2021] UKSC 40 at [28] quoting J. Beatson (later Beatson LJ), *The Use and Abuse of Unjust Enrichment* (Oxford 1991) at 129–130.