

Section 1. - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 1. - Introduction

Paul S. Davies

Three stages of development

- 43-001 The law relating to gaming, wagering and gambling contracts can be said to have developed in three stages. (1) The original common law position was that, in general, such contracts were valid, though this position was subject to significant qualifications.¹ (2) This common law position was reversed by a number of [Gaming Acts of 1710, 1835, 1845](#) and [1892](#), originally with the object of restricting credit for gaming² and later for the purpose of invalidating contracts by way of gaming and wagering³ as well as certain transactions related to such contracts.⁴ (3) [Part 17 of the Gambling Act 2005](#) came in to force on 1 September 2007⁵ and fundamentally changed the law with regard to gaming and wagering contracts as contained in the legislation which had governed it at the second stage of its development, described above. [Section 334\(1\) of the 2005 Act](#) repeals this legislation,⁶ though [s.334\(2\)](#) makes it clear that these repeals do not have retrospective effect.⁷ [Section 356](#) repeats those repeals, as well as repealing the remaining provisions of the [Gaming Acts of 1710](#) to [1892](#) which had not been repealed by earlier legislation.⁸ [Section 356](#) also repeals (again without retrospective effect) a number of other Acts, including the [Gaming Act 1968](#),⁹ [s.16](#) of which had imposed further restrictions (going beyond those imposed by earlier Gaming Acts) on credit for gaming; though the policy of restricting such credit for gambling continues to be reflected in the [2005 Act](#).¹⁰ As none of the above repeals are retrospective, the legal effects of gambling transactions concluded before 1 September 2007 continue to depend on the now repealed legislation (and on the associated case law) which governed such transactions during the second of the stages of development described above. The passage of time has so much reduced the practical importance of this body of rules that its continued discussion in the present edition of this book can no longer be justified. Any reader who may still need guidance on the law as it stood before the coming into force of the [2005 Act](#) is referred to paras 40-002—40-088 of the 30th edition of this book. Some of the old cases may, however, continue to provide useful illustrations of fact

situations that could still give rise to problems under the law as it now stands under the [2005 Act](#). To this extent, such cases may still merit discussion even though their reasoning is obsolete, and their outcome would be different, under the present law.

Change of course

- 43-002 For the purposes of this chapter, the most important of the changes made by the [Gambling Act 2005](#) are (apart from the repeals listed in para.[43-001](#) above) contained in its [Part 17](#). This Part deals with the “Legality and Enforceability of Gambling Contracts” and reverses the approach of the law as it had stood at the second of the stages of development described in para.[43-001](#) above. In particular, [s.335\(1\)](#) lays down the general rule that “[t]he fact that a contract relates to gambling shall not prevent its enforcement”. This new general rule is, under the [2005 Act](#), subject to two exceptions discussed in paras [43-016](#)—[43-023](#), below. By way of further introduction to the ensuing discussion of the [2005 Act](#), a brief account must be given of the main elements of the structure of the Act, and of its terminology, so far as these matters relate to the legal effects of gambling contracts under the Act.

General scheme of the Gambling Act 2005

- 43-003 The main purpose of this Act is to create a new scheme for the regulation of gambling in Great Britain, supervised by a body (the Gambling Commission) created by the Act.^{[11](#)} The scheme does not extend to transactions (such as contracts for differences) which are regulated under the [Financial Services and Markets Act 2000](#),^{[12](#)} or to the National Lottery.^{[13](#)} The general principle underlying the Act is that commercial gambling which does not fall within either of the above exceptions is unlawful (so that the provision of facilities, or the use of premises, for gambling is an offence) unless a licence has been obtained from the appropriate local authority^{[14](#)} and the conditions of the licence have been complied with.^{[15](#)} It is also an offence under the Act to invite, cause or permit a child or young person to take part in commercial gambling^{[16](#)} and for a young person to engage in such gambling^{[17](#)} or to provide facilities for such gambling.^{[18](#)} The licensing requirements described above, and the offences resulting from failure to comply with them do not extend to “private”^{[19](#)} gaming or betting or to certain other non-commercial gaming or betting.^{[20](#)}

“Gambling”, “gaming” and “betting”

- 43-004

Gambling in the [2005 Act](#) means gaming, betting and participating in a lottery.²¹ *Gaming* means playing (i.e. participating in) a game of chance (not including a sport) for a prize.²² “*Betting*” is defined in [s.9\(1\)](#) to mean:

“... making or accepting a bet on (a) the outcome of a race, competition or other event or process, (b) the likelihood of anything occurring or not occurring or (c) whether anything is or is not true.”

The “events” (on which the outcome of the bet can depend) in some important respects resemble those which could, before the coming into force of the [2005 Act](#), be the subject of a wager (an expression which forms no part of the definition of “gambling” “gaming” or “betting” in the [2005 Act](#)) within the definition which had been formulated and elaborated at common law for the purposes of the earlier Gaming Acts which are now repealed. Thus there can be a bet within [s.9\(1\)\(c\)](#) on the question “whether anything is true or not true”: for example, on which horse won the Derby last year²³; this point is explicitly made in [s.9\(2\)\(a\)](#) by which a “transaction that relates to the outcome of a race” (or certain other events) may be a “bet” within [s.9\(1\)](#) despite the fact that the race (etc.) “has already occurred”.²⁴ The words of [s.9\(1\)\(c\)](#) (quoted above) do not mean that a contract by which A promises B to pay a sum of money to B for proving a particular hypothesis or establishing a specified fact would necessarily be regarded as a “bet” within the Act. It seems unlikely, for example, that a promise to make a payment to a geologist for establishing that oil or some other mineral was present at a particular location would be so regarded; and the same is probably true of a promise to pay a sum of money to any mathematician who succeeded in proving a particular hypothesis. But under the old law it had been decided in *Hampden v Walsh*²⁵ that a promise by the claimant, who believed that the earth was flat, to pay £500 to any person who could satisfactorily prove the curvature of the earth was a wager, since the claimant’s object was not to establish a scientific fact, but “to establish his own view in a marked and triumphant manner”.²⁶ Presumably a transaction of this kind would now be a “bet” within [s.9\(1\)\(c\) of the 2005 Act](#). On the other hand, the concept of a “bet” within [s.9](#) is in some respects wider than the concept of a wager under the old law. It seems that there could be a “bet” within [s.9](#) on an occurrence which was not “uncertain” even in the restricted sense of the old law that the parties must “profess” to hold opposite views on it²⁷; under [s.9](#) it would suffice that both parties simply professed ignorance on the matter in question. There is also nothing in [s.9](#) to suggest that an event cannot be the subject of a “bet” within the section merely because the occurrence of the event was within the control of one of the parties; under the previous law it was doubtful whether such an event could be the subject of a wager.²⁸

“Bet”, “making a bet” and “betting”

The word “bet” and the phrase “making a bet” are not defined in the **2005 Act**, so that the opening words of the definition in s.9(1) (quoted in para.43-004 above) are self-referential and unhelpful. It can be inferred from other provisions of the Act that the person “making” the bet must normally pay (or undertake to pay or deposit) a stake or be required to make a payment in order to participate in the bet²⁹; and that a person “accepting” a bet undertakes that they will make a payment to the person “making” the bet if that person’s forecast or assertion on one of the events or states of affairs listed in s.9(1) turns out to be correct. In these respects, the concept of “making a bet” under the Act resembles that of a “wager” at common law: i.e. the essential nature of a “bet” is, like that of a “wager”,³⁰ a transaction by which one party promises to make a payment to (or to confer some other benefit on) another in the circumstances described in the words of s.9(1) quoted in para.43-004 above.

“Gambling” and “wagering”

- 43-006 There are, however, also differences between the concept of “gambling” under the **2005 Act** and that of the earlier concept of a “wager”. On the one hand, “gambling” under the Act is narrower than “wagering” under the previous law in that “betting” (and hence “gambling”³¹) under the Act does not include activities regulated under s.22 of the Financial Services and Markets Act 2000³²; contracts for differences (which could be wagers under the old law³³) fall into this category,³⁴ as do so called “spread bets”.³⁵ On the other hand, the concept of “gambling” under the **2005 Act** is in a number of respects wider than that of a wager under the judicially formulated definition of a wager under the old law. First, “betting” is defined³⁶ to mean “making *or* accepting a bet”: these are alternative possibilities, so that there appears to be no scope under the Act for the previous rule that a contract could not be a “wager” if one party could not win or if one party cannot lose.³⁷ Secondly, the concept of gambling under the **2005 Act** is wider than that of a wager under the old law in that it includes participating in a lottery³⁸ and in that the concept of betting includes pool betting.³⁹ A third, related, point is that under the old law there was some support for the view that there could be only two parties to a wager, or that, if there were more than two, they had to be divided into two sides.⁴⁰ There is nothing in the **2005 Act** to support the view that its concept of gambling is restricted by any such requirement.

Prizes

- 43-007 Section 339 of the **2005 Act** provides that “participating in a competition or other arrangement under which a person may win a prize is not gambling for the purpose of this Act”⁴¹ unless it is gaming, participating in a lottery or betting within specified other provisions of the Act.⁴² Where

such “prize competitions”⁴³ (e.g. between athletes) are governed by s.339, they are not subject to the regulatory regime of the Act and are legally enforceable quite apart from the provisions of its Part 17.⁴⁴ They must be distinguished from “prize gaming” which is regulated by Part 13 of the Act.⁴⁵ The essential features of prize gaming are that the size of the prize does not depend on the number of participants or on the stakes paid by them.⁴⁶

Disguised bets

- 43-008 Under the old law relating to gaming and wagering contracts, attempts were sometimes made to pass off as valid contracts transactions which were in substance wagers; and the courts then had regard to the substance of the transaction, rather than to the form in which it was cast. For example, in *Rourke v Short*⁴⁷ parties to an agreement for the sale of rags began, in the course of fixing the price, to argue about the price of a previous lot, the seller maintaining that it was lower than it was alleged to be by the buyer. It was agreed that if the seller was right, then the price of the present lot was to be twice as much as it would be if the buyer was right. This was held to be a wager (and could now be a bet) on the price of the previous lot. The court recognised that there could be a genuine bargain for the price of goods to be fixed by reference to that paid for a previous lot. But that was not the substance of the bargain here, “for the lower the former price was, the higher the present price was to be”.⁴⁸ The purpose of such attempts to disguise or conceal the fact that a transaction was a wager was to give it the legal enforceability which, as a wager, it formerly lacked. To this extent, the reasoning of the old cases, and the motive for such attempts to disguise the nature of a transaction which is in substance a gambling contract, are obsolete, now that the effect of s.335(1) of the 2005 Act is that contracts relating to gambling are, in general, legally enforceable. But the reasoning of those cases may still be of practical importance when parties to a bet seek to disguise its true nature in order to avoid the power of the Gambling Commission “to void bet”,⁴⁹ under s.336 of the 2005 Act⁵⁰; and also where it is alleged that the contract is, by virtue of s.335(2) unenforceable by reason of its unlawfulness and this unlawfulness consists of failure to comply with provisions of the 2005 Act which apply to “gambling” or “gambling contracts”.⁵¹ As under the old law, the question whether a transaction is a bet may also arise in a context that has nothing to do with its legal enforceability, in particular in the context of the rule that “winnings from betting” are not subject to capital gains tax.⁵² An attempt by parties for this purpose to disguise as a bet a contract which did not amount to “betting” within s.9 of the 2005 Act would no doubt be struck down by the courts.

Insurance

- 43-009

The concept of “gambling” under the [2005 Act](#) is not in terms restricted (as it was in the previous law) to cases in which the party to whom money is to be paid on the outcome of the bet has no other “interest” in the contract than the sum or stake that they will win or lose.⁵³ The existence of such an “interest” was formerly thought to be one reason why contracts of insurance were not wagers where the requirement of the insured’s having an “insurable interest” was satisfied. But under the law as it stood before the coming into force of the [2005 Act](#), a contract of insurance was not a wager merely because the requirement of insurable interest was not satisfied, since insurer and insured did not, for that reason alone, profess to hold “opposite views touching the issue of a future uncertain event”⁵⁴ and even where, for this reason, the contract of insurance was not, in spite of lack of insurable interest, a wager, it was (and is) nevertheless void under [s.4 of the Marine Insurance Act 1906](#) and might be illegal under the [Marine Insurance \(Gambling Policies\) Act 1909](#).⁵⁵ Neither of these enactments is repealed or amended by the [2005 Act](#), in spite of the fact that by [s.4 of the 1906 Act](#) a contract of marine insurance is “deemed to be a gaming or wagering contract”⁵⁶ where “the assured has not an insurable interest as defined by this Act ...”⁵⁷ and “every contract of marine insurance by way of gaming or wagering is void”.⁵⁸ The invalidity of such a contract, however (even though it is not actually a wagering contract), follows from its being “deemed to be a gaming or wagering contract”⁵⁹ (words which might be regarded as a reference to the now repealed legislation which invalidated contracts falling within this general category),⁶⁰ and from its being declared to be “void” by [s.4 of the 1906 Act](#). The absence of any reference to this provision⁶¹ in the [2005 Act](#) seems to indicate a legislative intention not (in that Act) to change the law with regard to insurance without interest, at any rate with regard to marine insurance, and probably with regard to insurance generally since the provisions of the [1906 Act](#) are, where appropriate, regarded as applicable to contracts of insurance generally.⁶² It follows that insurance, even without interest, is not subject to the regulatory provisions which form the bulk of the [2005 Act](#). It also follows that the new rules which are laid down by that Act as to the “legality and enforceability of gambling contracts”⁶³ (and which are discussed in paras [43-011—43-023](#), below) do not apply to contracts of insurance, even where such a contract is, for want of insurable interest, “deemed to be a gaming or wagering contract” by virtue of [s.4\(2\) of the 1906 Act](#). The same is, a fortiori, true where the requirement of insurable interest *is* satisfied: for example, where the owner of an orchard insures “next year’s apple crop”.⁶⁴ By parity of reasoning, it seems that the owner of a horse could insure the prize money which the horse might win; but if a person placed a bet on their own horse in a particular race, the contract would have been a wager under the old law⁶⁵ and would be a bet within the [2005 Act](#).

Footnotes

1 See below, para.[43-010](#).

2 [Gaming Acts 1710 and 1835](#).

3 [Gaming Act 1845 s.18](#).

- 4 [Gaming Act 1892 s.1](#).
- 5 By virtue of [Gambling Act 2005 \(Commencement No.6 and Transitional Provisions\) Order 2006 \(SI 2006/3272\)](#) art.2(4) (subject to certain transitional provisions not relevant to the ensuing discussion). Part 17 comprises [ss.334–338](#) (out of the 362 sections) of the [2005 Act](#).
6 [ss.334\(1\)\(e\)](#) and [356](#) and Sch.17 also delete the references to [s.18 of the Gaming Act 1845](#) and [s.1 of the Gaming Act 1892](#) from [s.412 of the Financial Services and Markets Act 2000](#) (below, para.[43-003](#)).
- 7 [s.334\(2\)](#) provides: “The repeals in subsection (1) do not permit the enforcement of a right which is created, or which emanates from an agreement made, before this section comes into force”. Strictly speaking, before the repeals effected by subsection (1) came into force, *no* “rights” would be created or emanate from agreements of the kind in question.
- 8 [s.356\(3\)\(a\), \(c\), \(d\) and \(e\); s.356\(4\)](#) and Sch.17.
- 9 [s.356\(3\)\(g\); s.356\(4\)](#) and Sch.17. Section 356 contains no express provision, comparable to that contained in [s.334\(2\)](#), denying it retrospective effect. With regard to the repeals made by [s.356](#), their prospective nature follows from the general presumption against giving legislation retrospective effect. In *Aspinall's Club Ltd v Al Zayat [2007] EWCA Civ 1001* the present point did not arise since, though the appeal was heard after [s.16 of the 1968 Act](#) had been repealed, this point could not affect the outcome (at [11]), presumably because the action had been begun before the repeal had come into force. The transaction which led to the litigation in the *Al Zayat* case had taken place on 10 March 2000.
- 10 [Gambling Act 2005 ss.81, 177](#); “credit” is defined in [s.81\(4\)](#).
- 11 [s.20](#).
- 12 [s.10](#); see [Financial Services and Markets Act 2000 s.412](#), as amended by [Gambling Act 2005 s.334\(1\)\(e\), 356\(4\)](#) and Sch.17.
- 13 [Gambling Act 2005 s.15](#), except for the purposes of [ss.42](#) and [335](#) (below, para.[43-011](#)): [s.15\(2\)](#).
- 14 [s.2](#) gives a list of licensing authorities.
- 15 [ss.33\(1\) and \(2\), 37\(1\) and \(2\)](#).
- 16 [s.46](#).
- 17 [s.48](#).
- 18 [s.50](#).
- 19 [s.296](#).
- 20 [ss.297–302](#).
- 21 [s.3](#).
- 22 [s.6](#). For the purposes of the old law relating to gaming and wagering contracts, “gaming” was judicially defined to mean “the playing of any game for money or money’s worth” (*Ellesmere v Wallace [1929] 2 Ch. 1, 55*, but see also p.29) and included horse-racing (*Applegarth v Colley (1842) 10 M. & W. 723*) and presumably other kinds of racing and other kinds of contests.
- 23 cf. *Pugh v Jenkins (1841) 1 Q.B. 631*; *Rourke v Short (1856) 5 E. & B. 904*.
- 24 [s.9\(2\)\(a\)](#) refers back to [s.9\(1\)\(a\)](#), which uses the same words as [s.9\(2\)\(a\)](#) to describe the kinds of occurrences which can be the subject of a bet.

- 25 (*1876*) *1 Q.B.D.* 189.
- 26 (*1876*) *1 Q.B.D.* 189 at 197.
- 27 This requirement is derived from the common law definition of a wager given in the judgment of Hawkins J in *Carlill v Carbolic Smoke Ball Co* [1892] *2 Q.B.* 484, 490, affirmed [1893] *1 Q.B.* 256.
- 28 For the suggestion that on such facts there was, under the old law, no wager, see *Ellesmere v Wallace* [1929] *2 Ch. 1*, 29; the suggestion was doubted in para.40-003 of the 30th edition of this book (bet between A and B that A will wear a red tie tomorrow).
- 29 See *Gambling Act 2005* s.11(1) (“despite the fact that he does not deposit a stake in the normal way of betting”), s.11(1)(b) (“required to pay”). See also *Green v Petfre (Gibraltar) Ltd (t/a Betfred)* [2021] *EWHC 842 (QB)* at [125].
- 30 For the common law definition of a wagering contract, see *Carlill v Carbolic Smoke Ball Co* [1892] *2 Q.B.* 484, 490, affirmed [1893] *1 Q.B.* 256.
- 31 See *Gambling Act 2005* s.3, defining “gambling” to mean (inter alia) “betting”.
- 32 *Gambling Act 2005* s.10. Regulation 6(1) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) likewise provides that “These Regulations do not apply to a contract, to the extent that it is (a) for (i) gambling within the meaning of the *Gambling Act 2005* ...”. For these Regulations, see Vol.I paras 16-049 and above, para.40-064 et seq.
- 33 e.g. *Re Gieve* [1899] *1 Q.B.* 794; cf. *Philip v Bennett* (1901) 18 *T.L.R.* 129; *Re The Futures Index* [1985] *F.L.R.* 147; *Chaikin and Moher*, [1986] *L.M.C.L.Q* 390.
- 34 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) art.85. See also the Contracts for Difference (Standard Terms) Regulations 2014 (SI 2014/2012) as amended by the Contracts for Difference (Standard Terms) (Amendment) Regulations 2017 (SI 2017/112).
- 35 Marginal note to *Gambling Act 2005* s.10. The expression “spread bets” does not occur in the body of s.10. cf. *WW Properties Investments Ltd v National Westminster Bank Plc* [2016] *EWCA Civ 1142*, [2017] *1 Lloyd's Rep.* 87, where an entity which had borrowed money from a bank entered into four “interest rate hedging contracts” with the bank; the first three of these were called “Collars” while the fourth “was a Swap Agreement” ([2016] *EWCA Civ 1142* at [2]). The purpose of these agreements was to hedge the borrower’s liabilities which, under the contract of loan, could rise in line with increases in the base rate (at [23]). Although these four agreements were “contracts for differences” (at [24]), it was held that they were not wagers: contracts for differences would not be wagers if they were entered into (as these contracts were) “for a commercial purpose such as hedging” (see at [28], citing Leggatt LJ in *City Index Ltd v Leslie* [1992] *Q.B.* 98, which had in turn been cited by Hobhouse J in *Morgan Grenfell and Co Ltd v Welwyn Hatfield DC* [1995] *1 All E.R.* 1 (a decision that was approved in the *WW Property case* [2016] *EWCA Civ 1142* at [42]); and relying on Financial Services Act 1986 s.63 and Sch.1 Pt 1 para.8 note 1). In *Banco Santander Totta SA v Compania de Carris de Ferro de Lisboa SA* [2016] *EWHC 465 (Comm)*, [2016] *4 W.L.R.* 49 interest rate swaps were likewise found not to be void under Portuguese law as “games of chance”, though that finding was not strictly necessary to the outcome in that case. The sentence of this paragraph ending with this footnote was quoted with apparent approval by

- Vos LJ in *Nextia Properties Ltd v Royal Bank of Scotland Plc* [2014] EWCA Civ 740 at [24] (refusing leave to appeal from the decision of HH Judge Behrens [2013] EWHC 3167 (QB)).
- 36 In s.9(1), above para.43-004.
- 37 This was the reason why the contract in *Carlill v Carbolic Smoke Ball Co* [1892] 1 Q.B. 256 had been held not to be a wager within the now repealed legislation referred to in para.43-001 above; cf. *Kloekner & Co AG v Gatoil Overseas Inc* [1990] 1 Lloyd's Rep. 177, 192.
- 38 **Gambling Act 2005** s.3(c); but participating in a lottery which forms part of the National Lottery is not gambling for the purposes of the Act except for the purposes of ss.42 (below, para.43-019) and 335 (below, paras 43-011 and 43-017).
- 39 **Gambling Act 2005** s.12(1); contrast the text above at this note and the following note for the view that pool betting was not “wagering” under the previous law.
- 40 *Ellesmere v Wallace* [1929] 2 Ch. 1, 50.
- 41 In this respect, s.339 carries forward the policy of the third limb of the now repealed s.18 of the **Gaming Act 1845**.
- 42 i.e. ss.6 (gaming), 14 (lottery) and 9–11 (betting).
- 43 Marginal note to s.339.
- 44 Such as, in particular, s.335(1), below, para.43-011.
- 45 ss.288–294.
- 46 s.288.
- 47 (1856) 5 E. & B. 904; cf. *Brogden v Marriott* (1836) 3 Bing. N.C. 88; contrast *Crofton v Colgan* (1859) 10 Ir. C.L.R. 133.
- 48 (1856) 5 E. & B. 904, 912.
- 49 These words occur in the marginal note to **Gambling Act 2005** s.336.
- 50 See paras 43-022, 43-023 below.
- 51 See paras 43-017—43-021.
- 52 **Taxation of Chargeable Gains Act 1992** s.51(1).
- 53 For the rule that a contract was a wager (under the law before the **2005 Act** came into force) only if neither party had “any other interest in that contract than the sum or stake that he will so win or lose”, see *Carlill v Carbolic Smoke Ball Co* [1892] 2 Q.B. 484, 490, affirmed [1893] 1 Q.B. 256. Hence if the requirement of insurable interest (text below, after this note) was satisfied, a contract of insurance was not a wager.
- 54 For this requirement of a wagering contract (under the law before the coming into force of the **2005 Act**), see *Carlill v Carbolic Smoke Ball Co* [1892] 2 Q.B. 484 at 490.
- 55 This Act imposes criminal penalties on contracts made in violation of the prohibitions imposed by it. It does not specify the civil consequences of such violations but such contracts made in breach of these prohibitions are illegal as contracts prohibited by statute with penal sanctions.
- 56 **Marine Insurance Act 1906** s.4(2). It followed from the use of the word “deemed” in s.4(2) that the contract was void where the insured had no insurable interest even though the contract was not actually a wagering contract since the insurer and insured did not profess to hold opposite views touching the issue of a future uncertain event.
- 57 **Marine Insurance Act 1906** s.4(2)(a); see also s.4(2)(b) (“interest or no interest policy”).

- 58 Marine Insurance Act 1906 s.4(1).
- 59 Marine Insurance Act 1906 s.4(2).
- 60 i.e. in particular, Gaming Act 1845 s.18, one of the repealed enactments referred to in para.[43-001](#) above.
- 61 And to those of the 1909 Act, referred to above.
- 62 cf. *Locker & Woolf Ltd v W. Australian Insurance Co Ltd [1936] 1 K.B. 408* at 414.
- 63 Heading to Gambling Act 2005 Pt 17.
- 64 *Thacker v Hardy (1878) 4 Q.B.D. 685, 695.*
- 65 *Carlill v Carbolic Smoke Ball Co [1892] 2 Q.B. 484, 492; affirmed [1893] 1 Q.B. 256.*

(a) - Enforceability at Common Law

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(a) - Enforceability at Common Law

Wagers prima facie valid

- 43-010 The common law position was that wagers were valid and could thus be enforced by the winner.⁶⁶ This rule was not much liked by the courts, who refused to enforce wagers on many grounds. Some wagers were illegal: these included wagers on unlawful games⁶⁷; wagers that one of the parties would commit a legal wrong or do an immoral act; wagers which affected the interests and feelings of a third person so as to make a breach of the peace likely; and wagers which were “against sound policy”.⁶⁸ On this last ground, the following wagers were held void: a wager that peace between England and France would be concluded by September 1797⁶⁹; a wager on the life of Napoleon in time of peace⁷⁰; a wager tending to cause public disorder⁷¹; a wager with voters in a constituency as to the outcome of an election in that constituency—an obvious cloak for bribery⁷²; and a wager on the sex of a living person suspected to be masquerading as a man.⁷³ The courts also sometimes simply refused to enforce a wager on the ground that it was an “idle wager” and that it was a waste of the court’s time to entertain an action on it.⁷⁴ Thus the courts refused to enforce a wager “on the number of ways of nicking 7 on the dice”⁷⁵; a wager made between persons who had no pecuniary interest in the matter that the next child of an unmarried woman would be a boy,⁷⁶ and a wager on an abstract question of law in which the parties had only an academic interest.⁷⁷

Footnotes

⁶⁶ *Micklefield v Hipgin* (1760) 1 Anst. 133; *Good v Elliott* (1790) 3 T.R. 693; *Hussey v Crickitt* (1811) 3 Camp. 168; *Khodari v Tamimi* [2010] EWCA Civ 1109 at [18].

- 67 At common law, cock-fighting, card games (other than those of mere skill) and (probably) all games of chance were unlawful: *Jenks v Turpin (1884) 13 Q.B.D. 505, 524*.
- 68 *Good v Elliott (1790) 3 T.R. 693, 695*.
- 69 *Lacaussade v White (1798) 2 Esp. 629* (as to recovery of money under illegal contracts, overruled in *Vandyck v Hewitt (1800) 1 East 96*).
- 70 *Gilbert v Sykes (1812) 16 East 150*; because this might lead to his assassination (which would be “against sound policy” in time of peace) or to his preservation (which would be “against sound policy” in time of war).
- 71 *Eltham v Kingsman (1818) 1 B. & Ald. 683*.
- 72 *Allen v Hearn (1785) 1 T.R. 56*.
- 73 *Da Costa v Jones (1778) 2 Cowp. 729*.
- 74 *Robinson v Mearns (1825) 6 D. & R.K.B. 26, 27*.
- 75 *Brown v Leeson (1792) 2 H. Bl. 43*.
- 76 *Ditchburn v Goldsmith (1815) 4 Camp. 152*.
- 77 *Henkin v Gerss (1810) 2 Camp. 406*.

(b) - Enforceability Under the Gambling Act 2005

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(b) - Enforceability Under the Gambling Act 2005

Contracts relating to gambling generally enforceable: s.335(1)

- 43-011 The restrictions on the enforceability of wagering contracts which had been imposed by the legislative provisions referred to in para.[43-001](#) above were removed by the repeal of those provisions by the [2005 Act](#),⁷⁸ but these repeals did not, of themselves, restore the common law rule by which wagering contracts were, in general, legally enforceable.⁷⁹ It was therefore necessary for the [2005 Act](#) to contain a specific provision to this effect; [s.335\(1\)](#) accordingly provides that “[t]he fact that a contract relates to gambling shall not prevent its enforcement”. Three points must here be made about this provision.

“Shall not prevent”

- 43-012 The first arises from what is in substance the double negative contained in the phrase “shall not prevent”. [Section 335\(1\)](#) does not in terms say that contracts relating to gambling shall be legally enforceable. Instead, it lays down the general rule to this effect by providing that the fact that a contract is so related shall not prevent its enforcement. The reason for formulating the general rule of enforceability in this way is to make allowance for the fact that the enforcement of such a contract may be refused on some ground *other* than the fact that the contract relates to gambling. The significance of this point is further considered in the discussion in paras [43-017](#) and [43-021](#) below of one of the exceptions to the general principle of enforceability laid down by the [2005 Act](#).

“Relates to gambling”

- 43-013 Secondly, s.335(1) refers to “the fact that a contract relates to gambling”.⁸⁰ This phrase is wide enough to cover, not only the gambling contract itself (also referred to in the Act as the, or a, “bet”⁸¹), but also associated transactions. Under the law as it stood before the 2005 Act, problems used to arise (and may continue to arise) out of associated transactions such as agency arrangements related to gambling, partnerships, stakeholders, securities and loans for gambling. Such transactions would all seem to be covered by the phrase “relates to gambling” and such related transactions will, in general, be enforceable by virtue of s.335(1).⁸²

Legal effects other than enforceability

- 43-014 Thirdly, the only direct legal effect of s.335(1) is to make the contracts covered by it enforceable; but the enforceability of such contracts also has repercussions on a number of further legal effects which had, in relation to such contracts, given rise to problems under the previous law. Thus if money is paid or property deposited under a gambling (or related⁸³) contract there is no longer any question of its being recoverable by the payor or depositor⁸⁴ merely because that contract is a gambling contract. The payment or deposit will simply have been made under a valid contract and any right to its return will depend on the terms of the contract, or on other rules of law governing the recoverability of payments or deposits made under a contract. The fact that a payment was made under a gambling contract which is now (by virtue of s.335(1)) enforceable also has repercussions on the law relating to gambling with stolen money.⁸⁵ On the other hand, the legal enforceability of contracts related to gambling has not affected the statutory rule that “winnings from betting” are not subject to capital gains tax.⁸⁶

Electronic Commerce

- 43-015 The EC Directive on Electronic Commerce⁸⁷ provides that it is not to apply to “gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions”.⁸⁸ The **Electronic Commerce (EC Directive) Regulations 2002**,⁸⁹ which implement most of the Directive, likewise do not apply in respect of “(d) the following activities of information society services—(iii) betting, gaming or lotteries which involve wagering a stake with monetary value”.⁹⁰ These exceptions appear to refer only to the gambling contract itself,

while the references in the [Gambling Act 2005](#) to contracts “related to gambling”⁹¹ and to similar concepts⁹² have a wider scope.⁹³

Footnotes

78 Above, para.43-001.

79 See [Interpretation Act 1978 ss.15, 16](#). For possible continued relevance of the common law rules stated in para.43-010 above to limits on the enforceability under the [2005 Act](#) of contracts relating to gambling, see below, para.43-020. In *WW Properties Investments Ltd v National Westminster Bank Plc [2016] EWCA Civ 1142, [2017] 1 Lloyd's Rep. 87* the Court of Appeal held that the “Collar” and “Swap” agreements were not wagers; the reasons for this conclusion are stated in para.43-006 above. But the Court went on to consider what the position would have been, if it had held that those agreements *had* been wagers, and in particular whether in that case they would then have been legally enforceable under the general rule of common law stated in para.43-010 above, having regard also to common law exceptions to that general rule. The Court gave a negative answer to this question on the ground that the Collar and Swap Agreements were contracts for differences and that, in the light of the “comprehensive regime established by the [Gambling Act \[2005\]](#) and the [FMSA](#) [i.e. the [Financial Services and Markets Act 2000](#)] there was in such a case no room for any common law rule” limiting the validity of gambling contracts by way of exception to the common law rule that such contracts were valid: see at [66]; and at [67] referring to the judgment of Vos LJ in *Nextia Properties Ltd v Royal Bank of Scotland Plc [2014] EWCA Civ 740*, especially at [22], refusing leave to appeal from the decision of HH Judge Behrens [\[2013\] EWHC 3167 \(QB\)](#); for earlier proceedings in which Christopher Clarke LJ had likewise refused leave to appeal from that decision, see the *Nextia* case [\[2014\] EWCA Civ 740](#) at [1] to [4] and the *WW Property* case [\[2016\] EWCA Civ 1142](#) at [20]. The judgment in the latter case also refers at [67] to “the Regulations made thereunder”, i.e. to the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001](#) (SI 2001/544), the relevant parts of which are cited in the *WW Property* case at [64] ([Sch.1 para.9 of the Act](#) and [art.85 of the Order](#), refer to “Contracts for differences”). It should be noted that this part of the judgment refers only to contracts subject to the “comprehensive regime” established by all this legislation. The same point is also reflected in the use of words such as “financial contracts”, “a contract of the kind in question” and “contracts such as the present” (at [66], where “section 35” is a misprint for “[section 335](#)”), all of which indicate that this part of the judgment has a restricted scope. It would not, for example, apply to a wager on the outcome of a sporting competition or of an election. In such cases there might still be room for common law rules recognising or limiting the validity of gambling contracts in ways considered in paras 43-011 and 43-020. It remains true that even in such cases the repeal of the [Gaming Act 1845](#) would not “revive the [common law] rule” (at [68]) which had existed before that repeal but it would not preclude the court from developing new rules which, as a matter of common law, restricted the legal validity of gambling contracts.

80 cf. [Gambling Act 2005 s.337\(1\)](#).

81 e.g. in [ss.9](#) (above, paras [43-004](#), [43-005](#)) and [336](#) (below, para.[43-022](#)).

82 See below, paras [43-025](#)—[43-027](#).

83 cf. above, para.[43-013](#).

84 The above assumption seems to underlie the claim for the return of money paid under the contracts in *WW Property Investments Ltd v National Westminster Bank Plc [2016] EWCA Civ 1142, [2017] 1 Lloyd's Rep. 87*, as described in [18] and [19] of the report. That claim was based on the argument that the claim was *invalid* at common law; but the argument that the outcome continued to be governed by the common law as it stood before the legislation that was repealed by the [Gambling Act 2005](#) (see above, paras [43-001](#), [43-010](#)) was rejected for the reasons given in para.[43-011](#) above.

85 See below, paras [43-045](#)—[43-050](#).

86 [Taxation of Chargeable Gains Act 1992 s.51\(1\)](#); above, para.[43-008](#).

87 2000/31/EC.

88 art.1(5)(d).

89 SI 2002/2013.

90 reg.3(1)(d)(iii).

91 s.335(1).

92 See [ss.336\(2\)\(b\)](#) (“contract or other arrangement in relation to the bet”); [337\(2\)](#) (“any part or aspect, of a betting transaction”). For such related transactions, see below, paras [43-026](#), [43-030](#)—[43-035](#).

93 See above, para.[43-013](#) and the discussion of “related transactions” in paras [43-026](#) et seq. below.

(c) - Exceptions to Enforceability Under the Gambling Act 2005

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(c) - Exceptions to Enforceability Under the Gambling Act 2005

- 43-016 The general principle of the legal enforceability of contracts relating to gambling⁹⁴ is, under the [2005 Act](#), subject to two significant exceptions. Enforcement may be refused on the ground of “unlawfulness”; and the Gambling Commission is given power to “void” certain bets. These exceptions are discussed in paras [43-017—43-023](#), below.

Footnotes

94 Above, para.[43-011](#).

(i) - “Unlawfulness”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(c) - Exceptions to Enforceability Under the Gambling Act 2005

(i) - “Unlawfulness”

Section 335(2)

43-017 Section 335(2) of the 2005 Act provides that:

“... subsection (1) is without prejudice to any rule of law preventing the enforcement of a contract on the ground of unlawfulness (*other than a rule of law relating specifically to gambling*).”⁹⁵

Failure to comply with other provisions of the Act

43-018 The first question that arises from s.335(2) is its effect on cases in which the unlawfulness is due to failure to comply with other provisions of the Act, outlined above, such as its licensing requirements.⁹⁶ In one sense, those requirements might be said to consist of rules of law “relating specifically to gambling”⁹⁷ and so not to fall within the restriction on the enforceability of contracts contained in s.335(2). But it is submitted that this reasoning would be contrary to the policy of the Act in that it would allow a party to a gambling contract who had failed to comply with the Act (or with secondary legislation made under it) nevertheless to enforce the contract. Such a conclusion can, and should, be avoided by arguing that, in cases of this kind, the “unlawfulness” arises, not “specifically” (within the phrase italicised in para.43-017 above) because the transaction

is a gambling contract, but because the making of the contract constitutes a form of activity which is prohibited, with penal sanctions, by law (in this case, by other provisions of, or made under, the Act itself). The purpose of the words italicised in para.[43-017](#) above appears to be to exclude the argument that gambling contracts are “unlawful” *as such* because their enforcement would be contrary to public policy; for if this argument were accepted, [s.335\(2\)](#) would (if it did not contain the italicised words) wholly negate the validating effect on gambling contracts of [s.335\(1\)](#). The purpose of subs.(2) is, in the terms of the Explanatory Notes^{[98](#)} to the Act, to ensure that subs.(1):

“... does not ... override any other rule that prevents enforcement on the ground of unlawfulness. Therefore gambling contracts may be void on the same basis as any other contract (for example, on the basis of lack of intention, mistake or illegality).”

The common law rule that a contract may be void for illegality because it is one to engage in a form of activity that is prohibited by legislation with penal consequences is of general application in that it applies to all contracts, of whatever nature (including gambling contracts). The common law rule is therefore not covered by the words italicised in para.[43-017](#) above, so that it will continue to restrict the enforceability of a contract by virtue of the preceding words of [s.335\(2\)](#), even though the contract in question is a gambling contract and is illegal by reason of its having been made in circumstances giving rise to an offence under the [2005 Act](#).

- 43-019 It follows from the reasoning in para.[43-018](#) above that, if a party to a gambling contract had, in making the contract, provided facilities for gambling without the requisite licence, or failed to comply with the terms of a licence which they held, and had so committed an offence under the Act,^{[99](#)} then the contract would be affected by illegality and it would normally, though not necessarily, follow that, under the law relating to illegal contracts,^{[100](#)} the person guilty of the illegality would not be able legally to enforce the gambling contract or a related transaction^{[101](#)}; while the other party’s rights to enforce such contracts would depend on the degree of their knowledge of, or complicity in, the failure. Conversely, if that other party committed the offence of cheating contrary to [s.42](#)^{[102](#)} of the Act, then that other party would not be entitled to enforce the contract, though the victim of the offence might be able to do so. Where the gambling amounts to an offence because it is between the holder of a licence and a child or young person,^{[103](#)} any money paid (e.g. by way of stake) by the child or young person must be returned to the child or young person,^{[104](#)} even (it seems) to a young person who is themselves guilty of an offence by gambling^{[105](#)}; and the provider of the facilities for gambling “may not give a prize to the child or young person”.^{[106](#)} It follows from this last provision that the contract under which the prize was to be given is not enforceable by the child or young person. A further possible ground of unlawfulness under the [2005 Act](#) lies in the provision of credit for gambling. In this respect, the Act maintains the policy of some of the earlier gaming legislation,^{[107](#)} which it repeals,^{[108](#)} of restricting the giving of such credit. Reference may here be made to three provisions of the [2005 Act](#) which give effect to this policy. The Act provides, first, that an operating licence may restrict the giving of credit

"in connection with the licensed activities" ¹⁰⁹; and secondly, that certain premises licences shall be subject to the condition that the licensee does not "give credit in connection with gambling authorised by the licence". ¹¹⁰ Failure to comply with such a condition would be an offence under the Act. ¹¹¹ Thirdly, it is an offence under the Act to supply, install or make available for use a gaming machine which is designed or adapted to permit money to be paid by means of a credit card. ¹¹² In the first and second of the above situations, it follows that the licensee could not enforce the terms of the credit against the person to whom it had been granted; and it is arguable that the illegality of the loan would also infect the gambling transaction itself, on the ground that the object of the illegal loan was to encourage credit betting in circumstances in which it was the policy of the Act to discourage this form of activity. The latter argument could also be available in the third case, though it would not affect the legal relations between the card-holder and the issuer of the card (assuming the issuer to be a person other than the licensee). A premises licence must also be subject to the condition that the premises shall not be used for gambling on Christmas Day. ¹¹³ Such gambling would therefore be unlawful and gambling contracts relating to it would be legally unenforceable.

"Unlawfulness" on other grounds

- 43-020 Unlawfulness of a contract relating to gambling can also result from rules of law other than those contained in the [2005 Act](#): e.g. where the gambling was prohibited by such other rules, or where the event on which the outcome of a bet depended involved the commission of an illegal act, whether by one or more of the parties to the bet or by one or more of the participants in the gaming on which the bet was placed. In such cases, the contract would be invalid, not because it related to gambling, but because it could be said to encourage breaches of the law. It is submitted that the same reasoning could apply where the unlawfulness arose because the conduct in question, though not contrary to law, was contrary to public policy on grounds other than the mere fact that it related to gambling. This was the position at common law before the [Gaming Acts of 1710, 1738, 1845](#) and [1892](#). As explained in para.43-010 above, at common law wagers were generally valid but a wager could not be enforced if enforcement was "against sound policy" ¹¹⁴: e.g. because it tended to cause public disorder. ¹¹⁵ While the repeal by the [Gambling Act 2005](#) of earlier legislation invalidating wagering contracts (and certain other contracts related to wagers) has not of itself restored the earlier common law rules, ¹¹⁶ it is submitted that the wording of [s.335\(2\)](#) leaves it open to the courts to develop grounds of public policy on which they could refuse to enforce contracts relating to gambling; and, again, the reason for any such refusal would be, not that the contract related to gambling, but that its enforcement would be contrary to public policy on some other ground. In relation to the example given above, of a wager tending to cause public disorder, it should be emphasised that the first of the "licensing objectives" stated in [s.1\(a\) of the 2005 Act](#) is "preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime". It is submitted that a contract which tended to subvert any part of

this objective should not be enforceable by virtue of s.335(1) but should be denied enforceability by virtue of s.335(2). In the case of most commercial gambling, a contract which had such a tendency would in all probability involve the breach of a condition of the relevant licence and so amount to an offence under the Act. But the scope of s.335 is quite general: it applies not only to commercial gambling, but also to gambling which is not subject to any licensing requirements, such as private and non-commercial gambling.¹¹⁷ The court may thus not only enforce contracts relating to such gambling,¹¹⁸ but also refuse to enforce them on the ground of "unlawfulness" (not relating specifically to gambling).¹¹⁹ In *Ivey v Genting Casinos (UK) Ltd*¹²⁰ it was, for example, held at first instance by Mitting J that a gambler could not recover from a casino winnings from gambling there which were the result of his having cheated (in breach of an implied term¹²¹ of the gambling contract that neither party to it would cheat) and that, in view of this conclusion it was "not necessary to decide whether or not the statutory offence of cheating under s.42 of the 2005 Act] had been committed". This reasoning was approved by the Supreme Court when it dismissed an appeal from a decision of the Court of Appeal which had affirmed the decision of Mitting J¹²² though it was also said in the Supreme Court that there was:

"… no reason to doubt that cheating carries the same meaning when considering an implied term not to cheat and when applying section 42 of the Act."¹²³

Scope of s.335(2)

- 43-021 The grounds on which the courts may refuse to enforce a contract relating to gambling are by no means exhaustively stated in s.335(2). That subsection states only *one* such ground, i.e. unlawfulness (other than a rule of law relating specifically to gambling). Enforcement may also be refused on other grounds, such as the failure of the parties to reach agreement, lack of contractual intention, invalidating causes such as mistake, misrepresentation or duress and any other ground on which a contract may be void, voidable or unenforceable irrespective of its being a contract relating to gambling.¹²⁴ It has, for example, been held that a gambler could not recover winnings which were the result of their having cheated¹²⁵ (in breach of an implied term¹²⁶ of the contract); and this was so whether or not their conduct amounted to the offence of "cheating" contrary to s.42 of the Act.¹²⁷ The Explanatory note to s.335 of the Act gives rise to some difficulty in that it includes among its illustrative list of rules that prevent "enforcement on the grounds of unlawfulness" not only "illegality" but also "lack of intention" and "mistake".¹²⁸ It is, however, respectfully submitted that to regard "lack of intention" or "mistake" as illustrations of "unlawfulness" is, to say the least, unusual; and that it may be misleading when the exact legal effects of such factors fall to be considered. The possibility that enforcement may be refused on account of these factors, and other factors such as those listed in this paragraph, follows, not from the exception

to enforceability (on the ground of “unlawfulness”) contained in s.335(2), but from the negative language of s.335(1).¹²⁹ Where the contract is affected by some invalidating cause such as those listed above in this paragraph, it simply does not fall within the scope of s.335(1). The same is true where the alleged contract is impugned for lack of contractual intention, e.g. because it contains an “honour” or similar clause, as appears to be common in the case of agreements between football pool promoters and participants in such betting.¹³⁰ In such cases there is simply no “contract” which could be made enforceable by virtue of s.335(1).

Footnotes

95 Italics supplied.

96 Above, para.43-003.

97 s.335(2), quoted above, para.43-017.

98 See para.829 of the Explanatory Notes; for further discussion of this paragraph of the Notes, see below, para.43-021.

99 *Gambling Act 2005 ss.33(2), 37(2)*.

100 See below, para.43-043.

101 In *Ritz Hotel Casino Ltd v Al Daher [2014] EWHC 2847 (QB)* the question whether a person who had failed to comply with the restrictions on giving credit contained in s.81 of the 2005 Act could enforce the contract was said (at [40]) to depend on whether such enforcement would “contravene the policy and purpose” of these restrictions i.e. “to protect a player from wagering beyond the extent of his immediate ability to pay” (at [40]); it was further there said that the court “would and should be willing to decline to enforce the gaming contract and the cheque there given” if such a refusal would “satisfy that policy and purpose”. But if, in that case, there had (contrary to the actual decision: see below) been an unlawful giving of credit by the claimant casino, then the “policy and purpose” of the prohibition in s.81(4)(b) would, because of the special circumstances of that case, *not* “have required the court to dismiss the casino’s action upon the cheques” (at [44]). These special circumstances were that the defendant had been a member of, and had gambled at, the casino for 13 years before the occasion in question; that she was a person of “great” (at [43]) or “almost unimaginable” (at [116]) wealth (so that even losses running into of £2 million sustained on that occasion would not be “beyond the extent of [her] immediate ability to pay”; at [40] (quoted above); that she had in fact had an “irreproachable history of paying over 15 years” (at [43(iii)]); that the cheques given by her to the casino in payment of her losses were “always presented promptly” (at [4]), so that, even if the acceptance of the cheques amounted (contrary to the court’s conclusion) to the giving of unlawful “credit”, the period of such credit would have been short; and that “there was … no deliberate setting out to break the law as to the giving of credit by the … casino” (at [43(iv)]). This combination of circumstances can fairly be described as exceptional, so that it is submitted that, in general, the giving of credit contrary to s.81 would prevent the enforcement of the contract by the person guilty of the illegality. See also *Ritz Hotel Casino v Al Geabury [2015] EWHC 2294 (QB)*, [2015] L.L.R. 860 where

- an action on a dishonoured cheque given by a gambler in exchange for chips (which he gambled away) succeeded as there had been *no* breach of the casino's licence condition or of the Gambling Commission's Code of Practice, and hence no illegality by reason of any violation of ss.33 or 82 of the Gambling Act 2005.
- 102 For the territorial scope of s.42, see *R. v Majeed [2012] EWCA Crim 1186, [2013] 1 W.L.R. 1041*.
- 103 See above, para.43-003.
- 104 Gambling Act 2005 ss.58, 83(1)(a).
- 105 Gambling Act 2005 s.48.
- 106 Gambling Act 2005 s.83(1)(b).
- 107 Especially Gaming Act 1710 s.1 and Gaming Act 1968 s.16.
- 108 Above, para.43-001.
- 109 Gambling Act 2005 s.81(2)(a); see also s.81(2)(b). "Credit" in s.81 is stated in subs.(4)(b) to include acceptance by way of payment of "anything other than ... (ii) a cheque which is not post-dated and for which full value is given ...". In *Ritz Hotel Casino Ltd v Al Daher [2014] EWHC 2847 (QB)* the defendant had given the claimants cheques totalling £2 million in payment for chips which she had lost in the course of an evening's gambling at the claimants' casino; these cheques were promptly presented by the claimants but were dishonoured. It was held that the claimants were entitled to recover the balance of £1m remaining unpaid on the cheques as there had been no giving of "credit" (at [39]). The main reason for this conclusion seems to have been that the giving of the cheques had suspended the defendant's liability to pay until the cheques were dishonoured and that at this stage "the debt [would become] immediately due and payable" (at [29]), where the reference in the Official Transcript to "section 16(2) of the 2005 Act" appears to be a misprint—either for s.16(2) of the Gaming Act 1968 or perhaps for s.81(4) of the Gambling Act 2005).
- 110 Gambling Act 2005 s.177(2)(a).
- 111 Gambling Act 2005 ss.33(1) and (2), 37(1) and (2).
- 112 Gambling Act 2005 s.245.
- 113 Gambling Act 2005 s.183.
- 114 *Good v Elliott (1790) 3 T.R. 693* at 695.
- 115 *Eltham v Kingsman (1818) 1 B. & Ald. 683*.
- 116 See Interpretation Act 1978 ss.15, 16.
- 117 See Gambling Act 2005 ss.33(1)(b)(v) and (vi), 37(7).
- 118 Gambling Act 2005 s.335(1).
- 119 Gambling Act 2005 s.335(2).
- 120 [2014] EWHC 3394 (QB); affirmed by a majority of the Court of Appeal [2016] EWCA Civ 1093, [2017] 1 W.L.R. 679, where Arden and Tomlinson LJ (Sharp LJ dissenting) also held that dishonesty was not a requirement of "cheating" for the purpose of s.42 of the Gambling Act 2005: see at [37], [40], [48] and [97]. There was no direct reference to this reasoning when a further appeal to the Supreme Court was dismissed: [2017] UKSC 67, [2017] 3 W.L.R. 1212 but Lord Hughes (with whom all the other members of that Court agreed) said at [75] that, "if contrary to the conclusions arrived at above" (the reference appears to be to

[74], and see also [45]) “there were in cheating at gambling an additional legal element of dishonesty, it would be satisfied by the application of the tests as set out above”. Those tests required the “fact-finding tribunal … first [to] ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts” (at [74]) and then to determine whether that individual’s conduct was honest; in determining this (second) question, the fact-finder must apply “the objective standard of ordinary decent people” (at [74]). On this test, the fact that the gambler in the Ivey case “did not regard what he did as cheating” did not amount “to a finding that his behaviour was honest. It was not” (at [75]). Hence “if the question arose” (i.e. if, contrary to the Court’s view (see at [45]) cheating involved an element of “dishonesty”) then “the better view would be … that his conduct was, contrary to his own opinion, also dishonest”, so that the “legal element of dishonesty” was satisfied (at [75]).

- 121 The existence of such an implied term was “common ground throughout this litigation”: [\[2017\] UKSC 67](#) at [35].
- 122 [\[2014\] EWHC 3394 AT](#) [52]. This reasoning was cited with apparent approval by the Supreme Court: [\[2017\] UKSC 67](#) at [36].
- 123 [\[2017\] UKSC 67](#) at [38].
- 124 One party’s right to enforce a contract may also be lost because the other party has rescinded the contract on account of the former party’s failure to perform their part. But the application of this principle to gambling contracts can give rise to difficulty because of the aleatory nature of such contracts in which one party’s duty to perform depends, generally, not on the other’s performance of their undertaking, but on the occurrence of a chance and uncertain event: see further para.[43-027](#) below.
- 125 [Ivey v Genting Casinos UK Ltd \[2014\] EWHC 3394 \(QB\)](#) at [50], [51].
- 126 The existence of such an implied term was admitted by the claimant: [\[2014\] EWHC 3394 \(QB\)](#) at [33].
- 127 See [\[2014\] EWHC 3394 \(QB\)](#) at [52].
- 128 Explanatory Note, para.829.
- 129 See above, para.[43-011](#).
- 130 See [Appleson v Littlewood \[1939\] 1 All E.R. 464](#); [Guest v Empire Pools \(1964\) 108 S.J. 956](#); contrast in Scotland, [Ferguson v Littlewood Pools Ltd, 1997 S.L.T. 309](#); and above, Vol.I, paras [4-214—4-215](#).

(ii) - Power “to Void Bet”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(c) - Exceptions to Enforceability Under the Gambling Act 2005

(ii) - Power “to Void Bet”¹³¹

Power to make orders where bet is “substantially unfair”

43-022 Section 336 of the 2005 Act empowers the Gambling Commission,¹³² in the situations described below, to make an order¹³³ in relation to a bet if (and only if) the Commission is “satisfied that the bet was substantially unfair”.¹³⁴ The power is exercisable in relation to a bet accepted by or through the holder of (a) a general operating licence, (b) a pool betting licence, or (c) a betting intermediary licence.¹³⁵ It is thus restricted to commercial gambling and so does not, for example, extend to private and non-commercial gaming or betting.¹³⁶ The effects of an order under s.336 are that (a) “any contract or other arrangement in relation to the bet is void”, and that (b) “any money paid in relation to the bet (whether by way of stake, winnings, commission or otherwise) shall be repaid to the person who paid it ...”.¹³⁷ In deciding whether a bet is “unfair” the Commission is required to take account of a list of factors set out in s.336(4). The list is not intended to be exhaustive¹³⁸; it includes “the fact that either party to the bet supplied insufficient, false or misleading information in connection with it;”¹³⁹ or was convicted of the offence (created by s.42 of the Act) of cheating.¹⁴⁰ An order under s.336 can, in general, be made only within six months of the beginning of the day on which the bet is determined¹⁴¹ but this time limit does not apply where the order is made:

“... taking into account the fact that a party to the bet was convicted of an offence under section 42 [i.e. the offence of cheating] in relation to it.”¹⁴²

Where the circumstance which makes the bet unfair would also amount to a factor vitiating the contract under general principles of law, a party to the contract could also rely on that circumstance even after the expiry of the six month period by way of defence to an action on the bet under s.335. This follows from the discussion in paras 43-017 and 43-021, above of “unlawfulness” and other grounds on which the court may refuse to enforce a contract relating to gambling. This reasoning would also apply where the contract was one in respect of which no order under s.336(1) could be made: e.g. because the contract related to private gaming or betting. The legal consequences of raising the defence of “unlawfulness” in ordinary legal proceedings would, however, differ from those of an order made by the Gambling Commission under s.336(1): for example, the legal consequences of the former course would not necessarily be either to make the contract “void”¹⁴³ (as opposed to voidable) or lead to the repayment to the payor of money paid in pursuance of the contract¹⁴⁴ nor would powers similar to those (described below¹⁴⁵) exercisable by the Commission apply, even by analogy, where “unlawfulness” was relied on simply as a defence to an action on the contract. The powers in question are conferred on the Commission by s.337, which provides that an order under s.336(1) may relate to the whole or any part or aspect of a betting transaction¹⁴⁶ and may make incidental provision about other parts of a transaction one part or aspect of which is made void by the order,¹⁴⁷ and about related bets.¹⁴⁸ Any order made by the Commission under s.336 is subject to appeal to the Gambling Appeals Tribunal¹⁴⁹ from which a further appeal lies on a point of law to the High Court with leave of the Tribunal or the Court.¹⁵⁰

Who may claim an order under s.336

- 43-023 An order under s.336 will no doubt normally be sought by the party to the contract who is prejudiced by the unfairness of the bet. But nothing in the section limits the power of the Commission to cases in which the order is sought by that person. On the contrary, s.338 suggests that the Commission may act on its own initiative in this respect. That section applies “where the Commission has reason to suspect that it may wish to make an order under section 336(1) in respect of a bet”¹⁵¹ and empowers the Commission in such a case to make an “interim moratorium” order by which an obligation to pay money in relation to the bet ceases to have effect for 14 days.¹⁵² It seems also to be possible for an order under s.336 to be made on the application of a third party who might be prejudiced by the enforcement of a bet under s.335 or by the retention of money paid under the bet on the ground of such enforceability. The view that at least some such third parties should have standing to seek an order under s.336 is supported by s.337(1) which provides that an appeal against an order under s.336(1) may be brought by “a party to a bet or to any contract or other arrangement in relation to the bet”. It would be strange if parties who were thus given a right of appeal against the order had no standing to seek the order in the first place. It is further arguable that an order under s.336 could be sought even by a third party who did not fall within the words quoted above from s.337(1).¹⁵³

Footnotes

- 131 Marginal note to s.336.
- 132 Created by [Gambling Act 2005 s.20](#); above, para.43-003.
- 133 [Gambling Act 2005 s.336\(1\)](#).
- 134 [Gambling Act 2005 s.336\(3\)](#).
- 135 [Gambling Act 2005 s.336\(1\)](#).
- 136 Within Pt 14 of the 2005 Act ([ss.295–302](#)).
- 137 [Gambling Act 2005 s.336\(2\)](#). “Stake” here seems to be intended to refer to the money paid (or “staked”) by the person making the bet to the person accepting it: see the definition of “stake” in [s.353\(1\)](#) and the marginal note to [s.83](#) (“return of stakes to children”); see also the use of the word “stake” in the Directive and in the Regulations relating to “Electronic Commerce” which are referred to in para.43-015 above. Quaere whether “stake” in [s.336\(2\)](#) can also refer to the situation described in para.43-031 below in which money is deposited pursuant to a bet with a third party “stakeholder”, i.e. with a person who is not a party to the bet.
- 138 See the words “in particular” in the opening phrase of [s.336\(4\)](#).
- 139 [s.336\(4\)\(a\)](#).
- 140 [s.336\(4\)\(d\)](#).
- 141 [s.336\(5\)](#).
- 142 [s.336\(6\)](#).
- 143 [s.336\(2\)\(a\)](#).
- 144 [s.336\(2\)\(b\)](#).
- 145 See also below, para.43-051.
- 146 [s.337\(2\)](#).
- 147 [s.337\(3\)\(a\)](#).
- 148 [s.337\(3\)\(b\)](#).
- 149 Established by [s.140](#).
- 150 [s.143](#).
- 151 [s.338\(1\)](#).
- 152 [s.338\(2\), \(3\)](#); the time can be extended: [s.338\(4\)](#).
- 153 e.g. by the victim of a theft of money used by the thief for gambling: see below, paras 43-050, 43-051.

(d) - Distance and Off-Premises Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(d) - Distance and Off-Premises Contracts

Distance and off-premises contracts

- 43-024 The Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013¹⁵⁴ provide that, where a contract for the supply of goods or services by a “trader” to a “consumer”¹⁵⁵ is a “distance”¹⁵⁶ or an “off-premises”¹⁵⁷ contract, then the consumer has the “right to cancel”¹⁵⁸ the contract within a “cancellation period”,¹⁵⁹ the length of which is specified in the Regulations. The Regulations, however, do not extend to certain types of contract, the first of which is a contract “for … gambling within the meaning of the [Gambling Act 2005](#)”.¹⁶⁰ One consequence of so excepting such contracts from the scope of the Regulations is that the “right to cancel” does not extend to such contracts. The assumption underlying the present exception is that the contract is *valid* apart from the Regulations. Under the [Gambling Act 2005](#), this would normally be the case by virtue of the general rule, laid down in [s.335\(1\)](#), that the fact that a contract relates to gambling shall not prevent its enforcement.¹⁶¹ But where that rule does not apply by reason of the “unlawfulness” of the contract¹⁶² or where, by reason of the bet’s being “substantially unfair” the contract made in relation to it becomes “void” in consequence of an order made by the Gambling Commission under [s.336\(1\)](#),¹⁶³ the consumer does not need to cancel to escape liability under it. Moreover, the restitutive consequences of their relying on such factors are then not those specified in the Regulations.¹⁶⁴ They are, in the first of the above situations, those laid down by the general rules of law specifying the consequences of the “unlawfulness”¹⁶⁵ and in the second, those specified in [ss.336](#) and [337](#) of the 2005 Act.¹⁶⁶

Footnotes

- 154 SI 2013/3134 (“the 2013 Regulations”) as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) and Consumer Contracts (Amendment) Regulations 2015 (SI 2015/1629), above paras 40-062 et seq.
- 155 “Trader” and “consumer” are defined in reg.4 of the 2013 Regulations.
- 156 “Distance contract” is defined in reg.5 of the 2013 Regulations. A contract made by, for example, exchange of posted letters, faxes or email messages, or in website trading could fall within this definition.
- 157 “Off-premises” contract is defined in reg.5 of the 2013 Regulations. A contract made in the simultaneous presence of the trader and the consumer in a place which is not the business premises of the trader could fall within this definition.
- 158 2013 Regulations reg.29.
- 159 2013 Regulations reg.30.
- 160 2013 Regulations reg.6(1)(a)(i).
- 161 Above, para.43-011.
- 162 Gambling Act 2005 s.335(2); above, para.43-017.
- 163 Above, para.43-022.
- 164 See reg.33(1)(b), cross-referring to regs 34 to 38.
- 165 See Vol.I, paras 18-015 et seq.
- 166 See para.43-022 above and paras 43-036—43-040 below.

(i) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(e) - Related Transactions

(i) - Introduction

Introduction

43-025 Before the coming into force ¹⁶⁷ of the rules now laid down in [Part 17 of the Gambling Act 2005](#) as to the “legality and enforceability of gambling contracts”, ¹⁶⁸ the law as to gaming and wagering was to a considerable extent concerned with the legal effects, not only of the wagering contract itself, but also of a number of related transactions. These included the effects of a promise to pay a lost bet in consideration of the winner’s promise not to post the loser as a defaulter, the effects of payments or deposits made under the wagering contract, agency partnership and stakeholder arrangements made in relation to such a contract, loans for gambling and securities given in relation to wagering transactions. The overriding policy which governed the solution of problems of this kind under the legislation and case law which invalidated wagering contracts ¹⁶⁹ and related arrangements before the repeal of that legislation on the coming into force of the [Gambling Act 2005](#), ¹⁷⁰ was that the rules against the enforcement of wagers or related arrangements should not be undermined by allowing the winner by means of such related transactions to achieve indirectly what they could not achieve directly, i.e. to recover the amount of the lost bet from the loser. That policy is abandoned by the [Gambling Act 2005](#), by [s.335\(1\)](#) of which the gambling contract itself is, as a general rule, legally enforceable. Two matters here call for further discussion. The first concerns the effect of that enforceability on related transactions of the kind described above: this topic will be discussed in paras [43-026](#), [43-027](#), [43-030—43-032](#) and [43-034—43-035](#), below. The second concerns the effect on such transactions of the power of the Gambling Commission to “void [a] bet”: this topic will be discussed in paras [43-036—43-040](#), below.

Footnotes

- 167 See above, para.43-001.
- 168 [Gambling Act 2005](#), heading to Pt 17.
- 169 See above, para.43-001.
- 170 See above, para.43-001.

End of Document

© 2022 SWEET & MAXWELL

(ii) - Enforceability

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(e) - Related Transactions

(ii) - Enforceability

Related transactions in general enforceable

43-026 It will be recalled¹⁷¹ that s.335(1) of the 2005 Act provides that “The fact that a contract relates to gambling shall not prevent its enforcement”. The phrase “that a contract relates to gambling” is capable of referring to a range of contracts wider than the gambling contract itself. It can, for example, refer to a contract such as that considered in *Hill v William Hill (Park Lane) Ltd*,¹⁷² where a fresh promise by the loser of a bet to pay the amount of his losses to the winner in consideration of the winner’s promise not to post them as a defaulter was not enforceable by the winner since such enforcement would have contravened s.18 of the Gaming Act 1845. The repeal of that section¹⁷³ by the Gambling Act 2005 has subverted the reasoning of *Hill’s* case; and the new contract that would now arise by an exchange of promises of the kind there made would be a contract relating to gambling and therefore, as a general rule, legally enforceable by virtue of s.335(1) of the 2005 Act. The same would be true of a fresh promise by the loser of a bet to pay their losses in consideration of the winner’s promise not to sue the loser. Formerly, such a promise did not amount to consideration as it was a promise to not enforce a debt which was void (and, it was assumed, known to be so)¹⁷⁴ but this reasoning, too, would be subverted by the 2005 Act, now that the original gambling contract is, as a general rule, legally enforceable. The same reasoning would, mutatis mutandis, apply where the winner made no *promise* to forbear, but simply forbore in fact, in response to the loser’s fresh promise. In all these cases, the winner would now *prima facie* be entitled to enforce either the original gambling contract or the new contract as one that “relate[d] to gambling”. Many other contracts that formerly were, or might have been, void or unenforceable under the legislation that governed wagering contracts, would now fall within the description of “contracts relate[d] to gambling” within s.335(1) of the 2005 Act. These would include agency

arrangements (such as the appointment of an agent to make or accept a bet),¹⁷⁵ partnerships for betting and loans to enable the borrower either to engage in gambling or to pay lost bets. The fact that such contracts “relate” to gambling no longer prevents their enforcement: this follows from the repeal (by s.334 of the 2005 Act) of the legislation which formerly governed them and from the express provision of s.335(1) (of that Act) that “the fact a contract relates to gambling shall not prevent its enforcement”. This provision can, of course, only apply if the transaction relied upon by the person seeking enforcement has contractual force; and this requirement was held not to have been satisfied in *Ritz Hotel Casino v Al Geabury*¹⁷⁶ where a persistent gambler had entered into a “voluntary self-exclusion agreement” (VSE) with the casino by which he had excluded himself for life from gambling at the casino. In an action by the casino against him on a cheque which he had given to the casino in payment for chips,¹⁷⁷ he counterclaimed for damages for breach of the contract alleged to have been contained in the VSE. The claim was rejected by Simler J on the ground that the VSE did not amount to a contract since the requirement of consideration was not satisfied. Her reason for this conclusion was that “nothing moved from the Defendant to the Claimant” and that it was “difficult to see what consideration flows from the defendant when he enters a self-exclusion agreement providing nothing in return”.¹⁷⁸ This reasoning, with respect, gives rise to some difficulty since it makes no reference to the generally accepted principle that, though consideration must move from the promisee, it need not move to the promisor.¹⁷⁹ Evidently the gambler was regarded as the promisee and the casino as the promisor, though it is not altogether clear what promise was made to the gambler by the casino; presumably it was one to deny him the gambling facilities from which he had asked to be excluded. The loss of those facilities, even if only for a limited time,¹⁸⁰ can without implausibility be regarded as a detriment to the gambler (just as is the case where a promisee has, in response to the promise, given up smoking or drinking). The doctrine of consideration does not impose any further requirement that anything should “move to the Claimant” (i.e. to the casino). It could perhaps be argued that the gambler’s self-exclusion did not amount to consideration because the gambler’s signature of the VSE form had not been requested by the casino; but that is not the ground given in the judgment in its short discussion of the consideration point.¹⁸¹

“Unlawfulness”

- 43-027 It does not, however, follow from the reasoning of para.43-026 above that such related transaction actually would be legally enforceable. Enforcement could, in particular be denied (by virtue of s.335(2) of the 2005 Act) on the ground of “unlawfulness”: e.g. where a loan gave the borrower credit in circumstances amounting to an offence under the 2005 Act¹⁸² or where it was illegal under other rules of law¹⁸³ or where the purpose of an agency arrangement or of a partnership for betting was to enable a child or young person to become a principal party to a gambling contract in contravention of the restrictions imposed by 2005 Act on their participation in commercial gambling.¹⁸⁴ All these examples serve merely to illustrate the wider principle that, in deciding

whether a contract which “relate[d] to gambling” was legally enforceable, the fact of its being so related must simply be ignored. Whether the result of ignoring this fact was to make the related contract legally enforceable would depend on rules of law applicable to contracts generally, that is, irrespective of the type or category to which they belonged. The related contracts might be unenforceable or void because of some defect in their formation or other vitiating factor or because of a failure in performance on the part of the party claiming to enforce the other party’s obligation. An objection to enforcement on the last of these grounds would indeed be inappropriate where enforcement was sought of the main wagering contract itself, in view of the aleatory, as opposed to synallagmatic,¹⁸⁵ nature of gambling contracts, under which one party’s liability does not depend on the performance by the other of their undertaking. But this reasoning would not apply to other contracts related to gambling, that is, to “related transactions” of the kind here under discussion. Nor would it apply where one party has failed to perform, not a positive duty, such as one to make a payment expressed to have fallen due under the contract, but a negative duty, such as the duty not to cheat arising by virtue of the implied term not to cheat. This possibility is illustrated by *Ivey v Genting Casinos (UK) Ltd.*¹⁸⁶

“Voiding [a] bet”

- 43-028 The enforceability of a contract which “relates” to gambling may also be affected by an order, made under s.336 of the 2005 Act,¹⁸⁷ to “void” a bet. This possibility is discussed, in the context of a number of the contractual relationships listed above,¹⁸⁸ in paras 43-036—43-039 below.

Footnotes

171 Above, para.43-011.

172 [1949] A.C. 530.

173 Above, para.43-001.

174 *Hyams v Coombes* (1912) 28 T.L.R. 413; *Burrell & Son v Leven* (1926) 42 T.L.R. 407; *Poteliakhoff v Teakle* [1938] 2 Q.B. 816; *Goodson v Baker* (1908) 98 L.T. 451 (contra) was hard to support. See also above, Vol.I, para.6-050.

175 For the terminology of “making” and “accepting” a bet, see *Gambling Act 2005* s.9 (above, para.43-005).

176 [2015] EWHC 2294 (QB), [2015] L.L.R. 860.

177 See above para.43-018.

178 [2015] EWHC 2294 (QB) at [137].

179 See Vol.I, paras 6-041—6-042.

- 180 The self-exclusion form signed by the gambler was expressed to be “for life” but the VSE agreement was in fact revoked by mutual consent (see at [125]) of the parties to it less than a year after it had been made: see at [2(iii)], [3(ii)], [137].
- 181 In the passage quoted above, Simler J relies on statements by Briggs J in *Calvert v William Hill Credit Ltd* [2008] EWHC 454 (Ch), [2008] L.L.R. 583 AT [175], [178], [180] to the effect that a voluntary self-exclusion agreement was “without consideration”; the decision was affirmed [2008] EWCA Civ 1427, [2009] Ch. 330 where the same view is stated at [26]. No reason is given for this view either by Briggs J or by the Court of Appeal but it should be pointed out that the judgments in the *Calvert* case dealt with a transaction concluded before the *Gaming Act 2005* had come into force; see [2008] EWCA Civ 1427, [2009] Ch. 330 at [2], [13] and when the earlier gambling (or gaming and wagering) legislation referred to in para.43-001 above was still in force. The gambler would therefore be excluding himself from making bets that were void in law while in the *Al Geabury* case he had excluded himself from transactions which, in general, were legally enforceable. This difference makes the argument that the gambler had provided consideration in the *Al Geabury* case more plausible (for the reason given in the *Calvert* case). This would not be the only situation in which the change in the law, making gambling contracts enforceable in law, could affect issues of consideration arising from gambling contracts or related transactions: see, for example, the discussions of *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 in paras 43-047 and 43-048 below and in Vol.I, paras 6-198—6-199 above.
- 182 *Gambling Act 2005* ss.81, 177.
- 183 e.g. where a loan was made to enable the borrower to play an illegal game, as in *M'Kinnell v Robinson* (1838) 3 M. & W. 434.
- 184 Above, para.43-003.
- 185 The expressions “aleatory” and “synallagmatic” are not often found in English law but they do occasionally occur: e.g. *Re Schebsman* [1944] Ch. 83 at 108; *Foskett v McKeown* [2001] 1 A.C. 102 at 135 (aleatory); *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 at 65; *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 928 (synallagmatic); *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [21] (“Given that a contract is a bilateral, or synallagmatic, arrangement ...”). For the latter expression, see also Vol.I, para.1-073. A contract may be bilateral without being synallagmatic: e.g. where A bargains for B’s *promise* rather than B’s performance. The point seems to be recognised (in relation, not to enforceability but to failure of consideration) in *Fibrosa Spolka Atacyjna v Fairbairn, Lawson, Combe Barbour Ltd* [1943] A.C. 32 at 48 (see the words “generally speaking”).
- 186 [2017] UKSC 67, discussed above, para.43-021.
- 187 Above, para.43-022.
- 188 e.g. agency and partnership (above, para.43-026).

(iii) - Recovering Back Money Paid

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(e) - Related Transactions

(iii) - Recovering Back Money Paid

No right to recover back losses

43-029 Section 335(1) of the 2005 Act in terms deals only with the enforcement of contracts related to gaming; but it also indirectly affects the situation in which the claim is one, not for enforcing, but one for undoing, the contract, e.g. where it is one for the return to the claimant of money paid by them under the contract. Before s.335 came into force, it was settled that the loser of a bet could not rely on the invalidity of the wagering contract (under the repealed legislation referred to in para.43-001 above) as a ground for recovering back losses which they had paid. This rule was explained on various (with respect, not entirely convincing) grounds, such as that the loser had waived the benefit of the relevant legislation,¹⁸⁹ or that they was regarded in law as having made a gift of the payment to the winner.¹⁹⁰ Money paid under a contract relating to gambling will now continue to be irrecoverable by the payor, but on the different ground that it was paid pursuant to a valid contract.¹⁹¹ Where the gambling contract is illegal or defective in some other way, the right to recover back money paid under it will be governed by the rules of law relating to the recovery of money paid under illegal or otherwise defective contracts in general. An overpayment by the loser was also formerly irrecoverable, but the reasoning of the authority which supported this view¹⁹² is undermined by the repeal of earlier legislation by, and the enforceability of contracts related to gambling under, the 2005 Act.¹⁹³ There is now no reason why the normal rules relating to the recovery of overpayments under valid contracts (e.g. as a result of a mistake) should not apply to overpayments made under gambling contracts. There is nothing in Pt 17 of the 2005 Act to affect the former rule that, where the winner knows when they receive the payment, that it is excessive and decides to keep it, they are guilty of theft.¹⁹⁴ There is also no reason to suppose that the 2005 Act has changed the former rule that, where the winner has cheated, money paid to them by the

loser can be recovered back by the loser on the ground of fraud.¹⁹⁵ If the winner were convicted in the first of the above two situations of theft, or in the second of the new offence of cheating (created by s.42 of the 2005 Act), the court by or before which they were convicted could presumably make a compensation order against them.¹⁹⁶

Footnotes

- 189 *Bridger v Savage* (1884) 15 Q.B.D. 363, 367; cf. *Richards v Starck* [1911] 1 K.B. 296 (losses paid in advance irrecoverable).
- 190 *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 562, 577 (but see 581, quoted in para.43-047: club under “an obligation which in business terms it had to comply with”).
- 191 The above reasoning would apply to losses paid in advance, no less than to payments made after the determination of the bet. Under the old law, such payments could likewise not be recovered back, but for the different reason given above.
- 192 *Morgan v Ashcroft* [1938] 1 K.B. 49.
- 193 Above, para.43-001.
- 194 *R. v Gilks* [1972] 1 W.L.R. 1341.
- 195 For the English common law rule to the above effect, see *Dufour v Ackland* (1830) 9 L.J. (O.S.) K.B. 33. For a review of conflicting American decisions, see *Berman v Riverside Casino Corp*, 323 F. 2d 977 (1963), where it was alleged that loaded dice had been used in a Nevada casino.
- 196 Powers of Criminal Courts (Sentencing) Act 2000 s.130.

(iv) - Deposits

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(e) - Related Transactions

(iv) - Deposits

Recovering back money or property deposited

- 43-030 The outcome of claims for the recovery of money deposited (as opposed to paid out and out) and of property deposited as security under a wager by one party to it with the other depended, before the [2005 Act](#), on a distinction between illegal and legal wagers. This distinction has survived the Act in the sense that an illegal gambling contract is not now, any more than it was before the Act, legally enforceable.¹⁹⁷ Hence claims for the recovery of such deposits will fall under the general rules on the recovery of money paid or property transferred under an illegal contract. The former general rule was that money paid or property transferred under an illegal contract could not be recovered back, but now enforcement of a claim in restitution will be determined by the “factors-based” approach adopted by the Supreme Court in *Patel v Mirza*.¹⁹⁸ The decision (which permitted recovery of money paid to enable an illegal bet that was in fact never placed) indicates that normally claims for the restitution of money paid or property transferred, if such a claim would otherwise be available, should be allowed.¹⁹⁹ Lord Toulson, speaking for the majority, said²⁰⁰:

“... a person who satisfied the ordinary requirements of a claim in unjust enrichment will not *prima facie* be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration.”

Under normal principles money paid or property transferred cannot be recovered unless there has been a total failure of consideration, or there is some other ground for restitution.²⁰¹ One such

ground is that the illegal purpose has not been put into effect.²⁰² Thus a deposit will normally be recoverable if the depositor repudiates the gambling contract in time.²⁰³ Where the gambling contract is not illegal (or affected by any other vitiating factor) the reasoning that the deposit was recoverable as it had been made to secure payment of a void debt²⁰⁴ no longer applies now that such a gambling contract is, as a general rule, legally enforceable by virtue of [s.335\(1\) of the 2005 Act](#). Any right to recover the deposit would now depend on the terms of the contract and the general law relating to the recoverability of deposits; the fact that the contract related to gambling would, again,²⁰⁵ simply be ignored.

Footnotes

197 Gambling Act 2005 s.335(2), above, para.[43-017](#).

198 [\[2016\] UKSC 42](#), [\[2017\] A.C. 467](#); see Vol.I, paras [18-023](#) et seq.

199 See above, Vol.I, paras [18-233](#) et seq.

200 [\[2016\] UKSC 42](#) at [201]. Note that the minority seemed to consider that an illegal contract could be set aside, and restitutionary remedies would be available, even if the contract had been performed: see [\[2016\] UKSC 42](#) at [198]–[199] (Lord Mance) and [253]–[254] (Lord Sumption); see further above, Vol.I, paras [18-044](#) et seq.

201 cf. Vol.I, paras [18-241](#) et seq., above.

202 Vol.I, paras [18-246](#) et seq. An alternative way to put it is that until the contract has been performed either party may withdraw, and there will then be a failure of consideration.

203 See also below, para.[43-032](#).

204 *Universal Stock Exchange v Strachan* [\[1896\] A.C. 166](#) (securities deposited by loser recoverable); contrast *Strachan v Universal Stock Exchange (No.2)* [\[1895\] 2 Q.B. 696](#) (money deposited by loser irrecoverable after it had been appropriated by winner in discharge of loser's "indebtedness"; but such a deposit could have been recovered back if claimed by loser before such appropriation: *Re The Futures Index* [\[1985\] F.L.R. 147](#)).

205 cf. above, para.[43-027](#).

(v) - Stakeholders

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(e) - Related Transactions

(v) - Stakeholders

Stakeholder contracts

- 43-031 In relation to gambling, a stakeholder is a person with whom the parties to a bet deposit their stakes under a “tripartite contract”²⁰⁶ to the effect that they will deliver the stakes of both of them to the winner on the determination of the bet. They are normally regarded as the agent of both parties to the bet. Each party authorises them to hold their own stake, to receive the other party’s and to dispose of the aggregate in accordance with the outcome of the bet. Under the [Gambling Act 2005](#), such a contract would be a “contract relate[d] to gambling” within [s.335\(1\)](#). As such it would, in general, be enforceable by virtue of that subsection and of the repeal by [s.334\(1\)\(c\)](#) of [s.18 of the Gaming Act 1845](#).²⁰⁷ The restriction on the enforceability of contracts related to gambling discussed in paras [43-016—43-021](#) above could affect the stakeholder contract, no less than the gambling contract itself, so that the stakeholder contract could not be enforced if (for example) it were illegal.²⁰⁸ It is also arguable that illegality of the principal gambling contract could infect the stakeholder contract and so make that contract illegal.²⁰⁹

Illegal bets

- 43-032 Where the stakeholder contract was illegal, either in itself or because the bet to which it related was illegal, further problems can arise as to the right of the parties to the bet to recover back their stakes from the stakeholder. The starting principle used to be that a stake deposited in pursuance of such

a contract was, in general, irrecoverable as money paid under an illegal contract.²¹⁰ But this rule was subject to many exceptions, of which the one most likely to be relevant in the present context was that enabling a person who had paid money under an illegal contract to recover it back if they had demanded its return before execution of the illegal purpose. If the bet was illegal because it was a bet on the outcome of an illegal game, or on some other illegal activity, it could thus be recovered back if it was reclaimed by the payor before the game or activity has taken place.²¹¹ Claims to recover stakes will now fall within the “factors-based” approach to the enforcement of claims that involve illegality adopted by the Supreme Court in *Patel v Mirza*.²¹² The Supreme Court held that normally claims for restitution should be allowed despite the illegality but, as pointed out earlier,²¹³ only where such a claim would otherwise be available.²¹⁴ Thus, under the new approach it may still be relevant to determine whether the illegal purpose or contract has been performed. According to one old case,²¹⁵ the stake could be recovered back so long as the *contract* has not been executed by payment of the stake to the winner of the bet. It is submitted that the decisive question ought to be whether the illegal *purpose* has been carried into effect,²¹⁶ that the illegal purpose is the playing of the illegal game (or the accomplishment of the stipulated illegal act) and that the stake should be irrecoverable once the illegal game or activity has taken place. If the bet is illegal because of its intrinsic nature (e.g. because it is made in violation of a prohibition in the 2005 Act²¹⁷), then it could be argued that the illegal purpose was not “executed” until the stake was paid over to the winner, so that, till then, the loser could recover it back from the stakeholder.²¹⁸

Unfair bets

- 43-033 If the bet is “unfair”, an order in relation to it may be made under s.336(1) of the Gambling Act 2005. One consequence of such an order is that “any contract or other arrangement in relation to the bet is void”.²¹⁹ The order can thus affect, not only the bet itself, but also the stakeholder contract. The effects of an order under s.336(1) on “other arrangement[s]” are considered in paras 43-036—43-040 below.

Footnotes

- 206 *Rockeagle Ltd v Alsop Wilkinson [1992] Ch. 47, 50* (where the stakeholder held a deposit under a contract for the sale of land). For stakeholder contracts, see also *Bristol Alliance Nominee No. 1 Ltd v Neil Andrew Bennett [2013] EWCA Civ 1626, [2014] P. & C.R. DG 15*, where an “escrow amount” paid under an agreement to surrender a lease was held by solicitors as stakeholders.
- 207 Above, para.43-001.

- 208 Gambling Act 2005 s.335(2) (“unlawfulness”).
- 209 *De Begnis v Armistead (1833) 10 Bing. 107*; *M'Kinnell v Robinson (1838) 3 M. & W. 434, 435.*
- 210 Vol.I, para.18-233.
- 211 *Martin v Hewson (1855) 10 Ex. 737.*
- 212 [2016] UKSC 42, [2017] A.C. 467; see above, Vol.I, paras 18-023 et seq.
- 213 See above, para.43-030.
- 214 See above, para.43-030 and Vol.I, paras 18-233 et seq.
- 215 *Hastelow v Jackson (1826) 8 B. & C. 221.*
- 216 Vol.I, para.18-247. The reason for the above submission is that the second of the two views stated above is more likely than the first to promote the policy of the *locus poenitentiae* principle discussed in Vol. I para.18-246. That second view is also favoured in Peel (ed.), Treitel on The Law of Contract, 14th edn (2015), paras 11-139, 11-140.
- 217 See above, para.43-003.
- 218 cf. *Barclay v Pearson [1893] 2 Ch. 154* (not a betting contract but a lottery; for the distinction between these concepts under the Gambling Act 2005, see ss.3, 9 and 14).
- 219 Gambling Act 2005 s.336(2)(a).

(vi) - Securities

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(e) - Related Transactions

(vi) - Securities

When enforceable

- 43-034 Before the repeal of the former legislative provisions preventing the enforcement of wagering contracts and certain related transactions,²²⁰ a security (such as a cheque) given in payment of a lost bet had, between the parties to the bet, no greater validity than the principal contract.²²¹ The position is different now that those provisions have been repealed²²² and gambling contracts are, in general, legally enforceable.²²³ Hence if the loser gives the winner a cheque in payment, the winner can bring an action against the loser not only on the gambling contract but also on the cheque as a contract which “relates to gambling”.²²⁴ But if the original debt were incurred in relation to gambling which had been carried on in violation of restrictions on the giving of credit imposed by 2005 Act²²⁵ or by the terms of a licence held by the creditor (the winner of the bet), then the contract by which credit had been given would be illegal and thus unenforceable “on the ground of unlawfulness”.²²⁶ The related contract contained in the cheque would on the same ground not be enforceable by the winner against the loser of the bet. Cheques are now usually deprived of the quality of negotiability by being marked “account payee”,²²⁷ so that problems to which the transfer of negotiable securities given in payment of lost bets formerly gave rise²²⁸ are now unlikely to occur. But where the payment was made by a negotiable bill of exchange, that bill, though not enforceable by reason of the illegality by the original payee, could be enforced by a “holder in due course”,²²⁹ i.e. by one who took the bill (provided that it was regular on its face and not overdue) for value, in good faith and without notice of the illegality²³⁰; it can also be enforced by a holder who derives their title from a holder in due course.²³¹ However, once it is

admitted that the bill is affected by illegality the holder cannot rely on the usual presumption that they are a holder in due course.²³² They must show that, subsequent to the illegality, value has in good faith been given either by them or by a previous holder through whom they derive title.²³³ “In good faith” here means “without notice of the illegality”.²³⁴

Footnotes

220 See above, para.43-001.

221 *Richardson v Moncrieffe* (1926) 43 T.L.R. 32.

222 Above, para.43-001. **Gambling Act 2005** s.334(1)(a) and (b); s.334(2) expressly provides that these repeals are not to have retrospective effect.

223 **Gambling Act 2005** s.335(1); above, para.43-011.

224 **Gambling Act 2005** s.335(1).

225 **Gambling Act 2005** ss.81, 177.

226 **Gambling Act 2005** ss.335(2); above, paras 43-017—43-021.

227 Bills of Exchange Act 1882 s.81A as inserted by Cheques Act 1992; *Esso Petroleum Ltd v Milton* [1997] 1 W.L.R. 938 at 946, 954.

228 Most of these problems arose, in the case of non-gaming wagers, by reason of s.18 of the **Gaming Act 1845**, and in the case of gaming wagers by reason of s.1 of the **Gaming Act 1710**, s.1 of the **Gaming Act 1835** and s.16 of the **Gaming Act 1968**. For the repeal of all this legislation by the **Gambling Act 2005**, see above, para.43-001.

229 Bills of Exchange Act 1882 s.38(2).

230 Bills of Exchange Act 1882 s.29(1).

231 Bills of Exchange Act 1882 s.29(3); this subsection does not apply where the holder who derived title through a holder in due course is themselves a party to any illegality affecting the bill.

232 Bills of Exchange Act 1882 s.30(2).

233 Bills of Exchange Act 1882 s.30(2).

234 Bills of Exchange Act 1882 s.90 (“in fact done honestly”) and cf. *Tatem v Haslar* (1889) 23 Q.B.D. 345, 348 (a case of fraud not of illegality). It is submitted that a person does not act “honestly” if they act with notice of the illegality.

(vii) - Loans

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(e) - Related Transactions

(vii) - Loans

Loans related to gambling

43-035 The law with regard to the effects of loans related to wagering contracts was, before Part 17 of the [Gambling Act 2005](#) came into force, largely concerned with the effects on such loans, and on the giving of securities in respect of them, of the [Gaming Acts 1710 and 1835](#), of [s.18 of the Gaming Act 1845](#), of the [Gaming Act 1892](#) and of [s.16 of the Gaming Act 1968](#). The repeal of all this legislation by the [Gambling Act 2005](#)²³⁵ has made most of the discussion of these effects obsolete. Under the [2005 Act](#), such loans²³⁶ will fall into the category of contracts related to gambling, so that, by virtue of [s.335\(1\) of that Act](#),²³⁷ the fact that they are so related no longer, as a general rule, prevents their enforcement. This is so whether the loan is made to enable the borrower to gamble or to enable them to pay losses incurred by gambling before the loan was made; it also no longer makes any difference²³⁸ to the issue of enforceability whether the money lent is paid to the loser or directly to the winner, or whether the loan is subject to a stipulation that it is to be used for gambling or paying losses incurred by the borrower in gambling. The general rule that contracts related to gambling are legally enforceable is, however, under [s.335\(2\) of the 2005 Act](#) subject to the exception that enforcement of such contracts may be refused on the ground of “unlawfulness”.²³⁹ Thus if the gambling itself is carried on in contravention of the Act and amounts to an offence under it, the common law principle that a loan made to enable a person to play an illegal game may be irrecoverable²⁴⁰ will continue to apply. The same would be true if the gambling were illegal on some other ground: e.g. because it amounted to a bet on the outcome of a contest that was unlawful (such as dog fighting). It is assumed that, in the above cases, the lender, though not a party to the bet, is complicit in the illegality, at least to the extent of being aware of it. Further possibilities are that *the loan itself* amounted to the giving of credit in contravention of

the [2005 Act](#)²⁴¹ so as to make the lender guilty of an offence under it, or that the loan amounted to an offence under some other rule of law. The unlawfulness of the loan would then be a ground for refusing to enforce it.

Footnotes

235 Above, para.[43-001](#).

236 In *Carlton Hall Club Ltd v Laurence [1929] 2 K.B. 153* the claimant Club advanced chips to the defendant to enable him to play at billiards and poker and the defendant at the time of the advance gave the Club a cheque for the amount of the chips. This transaction was treated as a loan of money; and this characterisation of it was accepted in *R. v Knightsbridge Crown Court, Ex p. Marcrest Properties Ltd [1983] 1 W.L.R. 300*, rejecting the view taken in *Cumming v Mackie, 1973 S.L.T. 242* that there was no “loan” if the cheque was given at the time of the loan. The *Carlton Hall Club* case is obsolete insofar as the outcome there depended on the now repealed [Gaming Acts of 1710 and 1835](#) (see above, para.[43-001](#)) but it remains authoritative for the characterisation of the transaction as a loan, which would now be “related to gambling” within s.[335\(1\) of the 2005 Act](#). See also the characterisation of a similar transaction as a loan to pay bets already lost in *CHT Ltd v Ward [1965] 2 Q.B. 63*, the actual decision in which is obsolete insofar as it depended on the now repealed [Gaming Act 1892](#) (see above, para.[43-001](#)).

237 Above, para.[43-011](#).

238 As it did before the coming into force of the [Gambling Act 2005](#) (see para.[43-001](#) above).

239 Above, paras [43-017—43-021](#).

240 Formerly the loan was irrecoverable, *M'Kinnell v Robinson (1838) 3 M. & W. 434*. Now its recoverability will depend on the application of the “factors-based” approach adopted by the Supreme Court in *Patel v Mirza [2016] UKSC 42, [2017] A.C. 467*; see above, paras [43-030](#) and [43-032](#).

241 See ss.[81, 177](#).

(viii) - “Voiding Bet” and Related Transactions

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(e) - Related Transactions

(viii) - “Voiding Bet” and Related Transactions

Effect of order to “void bet”²⁴²

- 43-036 Our concern here is with the effect on related transactions of the exercise by the Gambling Commission of its power under [s.336\(1\) of the 2005 Act](#) to make an order in relation to a bet on the ground that the bet was “substantially unfair”.²⁴³ [Section 336\(2\)](#) states that, where such an order is made

“(a) any contract or other arrangement in relation to the bet is void and (b) any money paid in relation to the bet (whether by way of stake, winnings, commission or otherwise) shall be repaid to the person who paid it …”

The words here quoted from paragraph (a) of this subsection appear to be wide enough to cover, not only the gambling transaction itself, but also a number of the related transactions discussed above. They would, for example cover (and so make void) fresh promises to pay the amount of a lost bet, agency arrangements related to gambling, partnerships for betting and stakeholder arrangements. All such arrangements could become void by virtue of an order under [s.336](#) even though they were not themselves unfair: the section requires only *the bet* (and not any other contract or arrangement related to it) to be unfair to enable the Commission to make an order under it. A security given in payment of losses could likewise fall within [s.336\(2\)\(a\)](#) and so become void in consequence an order made under [s.336\(1\)](#).

In some situations, the consequences described in para.43-036 above are no doubt necessary to give effect to the policy of s.336, to except “unfair” bets from the general principle, stated in s.335(1), of the enforceability of contracts relating to gambling. It would, for example, make no sense if that exception made the bet void but left it open to the winner to enforce a fresh promise (of the kind considered in para.43-026 above) by the loser to pay their losses; or to allow the winner who could not sue the loser on the bet which had become void to sue the loser on a cheque given in payment of their losses (though such a claim might fail, even if s.336 did not apply to the cheque, on the principle that, between the parties, the cheque has no greater validity than the bet itself²⁴⁴). The principle of making “unfair” bets void might also be undermined if the victim of the unfairness were not entitled to the repayment of sums paid by them under the unfair bet before the order under s.336 had been made; this possibility accounts for the express provision of s.336(2)(b) (quoted in para.43-036 above), though it can be argued that a claim for such repayment might succeed at common law as one for the return of money paid under a void contract, apart from s.336(2)(b).

- 43-038 Other possible consequences of the effects of an order under s.336 on related transactions give rise to more difficulty. Some of these result from the breadth, or perhaps the obscurity, of the words of s.336(2)(a) which are quoted in para.43-036 above and which provide for the repayment of “any money paid in relation to the bet (whether by way of stake, winnings, commission or otherwise)”. The first question that arises is what is here meant by the word “stake”. It seems that this word refers, not to a sum of money deposited with, or paid to, a third party as stakeholder,²⁴⁵ but to the sum paid by the person making, to the person accepting, the bet²⁴⁶; and it is normally consistent with the policy of s.336 that a person who makes a bet and pays a stake in pursuance of it should, if the bet is “unfair”, be entitled to the return of the payment. But if this is the correct interpretation of “stake” in s.336(2)(a), one has next to ask what is there meant by “winnings”. It seems that this word refers to payments made by the *other* party to the bet, i.e. by the party “accepting” it, who will generally be the holder of a licence of the kind specified in s.336(1)(a) to (c). Since that party is more likely than the person “making” the bet to be responsible for the unfairness, it might at first sight seem strange that the former party (i.e. the party accepting the bet) should, as a result of that unfairness, become entitled to the recovery of winnings which they had paid to the other party. But the factors to be taken into account by the Commission in determining whether the bet was unfair refer to the supply of information by, and the state of mind or conduct of, *either* party²⁴⁷ (e.g. to the fact that either has been convicted of cheating, contrary to s.42 of the 2005 Act²⁴⁸). Hence where it is the maker of the bet who is responsible for the factor making the bet unfair, it would be appropriate for the acceptor of the bet to be entitled to the return of winnings that they had paid. Conversely, in such a situation it would not be appropriate for the maker of the bet to recover their “stake”. We shall see in para.43-040 below that it is open to the Commission to reach the appropriate result in both of these two situations.
- 43-039 In a number of further situations, the effect of an order under s.336 could give rise to inappropriate consequences insofar as the order made not only the gambling contract, but also related transactions, void. Three examples may be given to illustrate the point. (1) A may make and B

accept a bet which was “unfair” by reason of factors for which B was responsible and A has, for the purpose of making the bet, used money borrowed from C in circumstances in which no “unfairness” affected the loan. At first sight, an order under s.336 could have the effect, not only of making the bet void, but also of extending this invalidity to the loan as an “arrangement in relation to the bet”.²⁴⁹ But if, as a result of the order so far as it related to the unfair bet, A obtained repayment of the amount that they had lost and paid to B under the bet,²⁵⁰ then there would be no good reason why A should not repay to C the money that A had borrowed from C to enable A to make the bet or to pay the amount lost under it. (2) Somewhat similar reasoning could apply where C had acted as stakeholder in relation to a bet between A and B which was unfair by reason of factors for which B was responsible; and where, on B’s having won the bet, C, who was not complicit in the unfairness, had paid A’s stake to B. Section 336(2)(b) provides that, if the bet becomes void as a result of an order under s.336, then “any money paid in relation to the bet ... shall be repaid to the person who paid it ...”.²⁵¹ If these words refer to the payment from A to C then C would have to repay the money to A even though, in previously paying it to B, they had acted in accordance with their instructions from A and was not involved in the unfairness. The better solution would be to interpret the words quoted above as referring to the payment from C to B and to order its repayment to C, who would then be liable to account for it to A. (3) A third situation which could give rise to difficulty under s.336 is that in which the loser of an unfair bet makes a payment under it by a negotiable security; this situation can still arise although it has become uncommon now that cheques are generally marked “account payee” and hence not negotiable.²⁵² But where payment was made by a negotiable instrument and an order was made under s.336 on the ground that the bet was unfair, the instrument might, by virtue of the order become “void”²⁵³ and such a result could cause prejudice to a third party to whom the instrument was transferred. It was this possibility which formerly gave rise to difficulty under the *Gaming Act 1710*²⁵⁴ and was in part resolved by the *Gaming Act 1835*.²⁵⁵ Both these Acts are repealed by the *Gambling Act 2005*²⁵⁶ but we shall see²⁵⁷ that it is open to the Gambling Commission to avoid the difficulty by other means when making an order under s.336 of the latter Act.

Flexibility of orders under s.336(1)

- 43-040 A number of the difficulties described in paras 43-038 and 43-039 above can be averted by the Commission’s availing itself of powers which are conferred on it by s.337(2) and (3) of the 2005 Act and introduce considerable flexibility into the making of orders under s.336(1). Section 337(2) enables the Commission to make such an order “in relation to the whole, or any part or any aspect of, a betting transaction”; and s.337(3) enables the Commission to:

“... make incidental provision, in particular ... about ... (b) the consequences of the order [under s.336(1)] for other aspects of a betting transaction one part or aspect of which becomes void under the order.”

The expression “betting transaction” in these provisions seems to embrace not only what s.336 calls the “contract”²⁵⁸ or the “bet”²⁵⁹ but also what it calls “any … other arrangement in relation to the bet”.²⁶⁰ (i.e. what in para.43-036 above is called a “related transaction”). The Commission’s powers under s.337(2) could, for example, be used in the case of an unfair bet between A and B made with money borrowed from C who was not complicit in the unfairness. The Commission would be enabled by s.337(2) to restrict its order under s.336(1) to the principal contract, and by s.337(3)(b) specifically to except the loan from the order. In this way it could avoid what in para.43-039 above was called the inappropriate result that could follow if the Commission simply made an order that the bet was unfair. Similarly, these powers could be used in the stakeholder example given in para.43-039 above: even if the interpretation of s.336(2)(b) there preferred were rejected, the Commission could restrict its order to the principal contract and except the stakeholder transaction from that order. The powers conferred by s.337(2) and (3)(b) could again be used to resolve the problem, described in para.43-039 above, which can arise where payment under an unfair bet was made by a negotiable security. The Commission could declare the principal contract void and the negotiable security unenforceable between the parties, but specify that the security was not to be “void” to the prejudice of third parties, whose rights could then be governed by the law applicable to negotiable securities which suffer from some defect that falls short of making them “void”.²⁶¹ The same powers could also be used to resolve the difficulty that could arise in the situation described at the end of para.43-038 above in relation to claims for the repayment of money paid under a bet which is “unfair” within s.336 of the 2005 Act. It was there submitted that if the maker of a bet had been convicted of cheating, then the acceptor of the bet should be entitled to repayment of their winnings but it would not be appropriate to allow the maker (the cheat) to recover back their stake. While there may be no warrant in the words of s.336(2)(b)²⁶² for such a distinction, it is submitted that an order in these terms could be made by the Commission under the powers conferred on it by s.337(2) and (3)(b), quoted above in this paragraph.

It is finally arguable that the results which can be reached under the provisions of s.337(2) and (3)(b) can also be reached, independently of them, by virtue of s.336(2) which provides that where “the Commission makes an order under subs.(1) in relation to a bet (a) any contract *or*²⁶³ other arrangement in relation to the bet is void …”. But there are difficulties in relation to this argument which, at the very least, leave the point in doubt. In the first place, it is by no means clear whether the words just quoted refer to the *content* of an order under subs.(1) or to its legal *consequences*. The structure of s.336(2) gives some support to the latter view; certainly the provisions in para. (b) of subs.(2), with regard to the repayment of money paid, appear to be of the latter nature. Secondly, the argument appears to place too much reliance on the word “or”, especially where it occurs in a sentence that contains what is in substance a negative proposition. An order that a contract “is void” is of this negative nature: it tells us that the contract can *not* be enforced; and if a proposition which is negative (whether in form or in substance) links two objects with the conjunction “or”, then the negative *prima facie* refers to both objects (as in the sentence “I do not like oranges or lemons”). Thus it is arguable that an order under s.336(1) would, by virtue of s.336(2)(a), if that provision stood alone, have the effect of invalidating both “the contract” and

“any other arrangement”. This seems to be the assumption underlying s.337(2) (quoted above) which gives the Commission the choice between making “an order under s.336(1) in relation to the whole, or any part or aspect of, a betting transaction”. If this choice were inherent in s.336(2) (a), then there would be no need for s.337(2).

Footnotes

- 242 Marginal note to [Gambling Act 2005](#) s.336.
- 243 Above, para.[43-022](#).
- 244 See *Richardson v Moncrieffe* (1926) 43 T.L.R. 32, applying this principle under the old law of gaming and wagering contracts (above, para.[43-001](#)).
- 245 Above, para.[43-031](#).
- 246 For the distinction between “making or accepting a bet”, see [Gambling Act 2005](#) s.9; for the use of the word “stake” to refer to a payment made by the person “making” the bet, see [Gambling Act 2005](#) s.83 (“return of stakes to children”) and the definition of “stake” in s.353(1); and cf. the use of the word “stake” in the Directive and Regulations cited in para.[43-015](#) above.
- 247 See [Gambling Act 2005](#) s.336(4).
- 248 [Gambling Act 2005](#) s.336(4)(c).
- 249 [Gambling Act 2005](#) s.336(2)(a).
- 250 [Gambling Act 2005](#) s.336(2)(b).
- 251 [Gambling Act 2005](#).
- 252 See above, para.[43-034](#).
- 253 [Gambling Act 2005](#) s.336(2)(a).
- 254 s.1 of this Act had made the relevant securities “utterly void, frustrate and of none effect”.
- 255 s.1 of this Act provided that securities of the kind referred to in the previous note should no longer be void, but that they should be “deemed and taken to have been given for an illegal consideration”. A bill of exchange so taken can be enforced by a holder in due course, i.e. by one who took the bill (provided that it was regular on its face and not overdue) for value, in good faith and without notice of the illegality: [Bills of Exchange Act 1882](#) ss.29(1) and (2), 38(2); it can also be enforced by a holder who derives their title from a holder in due course: [Bills of Exchange Act 1882](#) s.29(3).
- 256 Above, para.[43-001](#).
- 257 In para.[43-040](#) below.
- 258 In s.336(2)(a).
- 259 In s.336(1) and (3).
- 260 In s.336(2)(a).
- 261 See [Bills of Exchange Act 1882](#) s.29(2).
- 262 Quoted in para.[43-036](#) above.

263 Italicics supplied.

End of Document

© 2022 SWEET & MAXWELL

(f) - Gambling with Chips

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(f) - Gambling with Chips

Before the Gambling Act 2005

- 43-041 Before the coming into force of [Part 17 of the Gambling Act 2005](#), a number of legal problems arose from the common practice of using chips or tokens for the purpose of gambling in casinos and similar gambling establishments. These problems arose mainly under the Acts of Parliament which deprived wagering contracts and certain related transactions of legal validity; the reference to “money” in such legislation was generally extended by the courts so as to cover transactions in which payments under the contracts were made in chips or tokens²⁶⁴; and one of the relevant Acts expressly referred to “cash or tokens”.²⁶⁵ It was also held that the supply of chips in a casino to a person making bets there did not amount to “valuable consideration” for the purpose of the rule that a recipient of stolen money was bound to make restitution of it to the victim of the theft unless the recipient had received the money in good faith and for valuable consideration.²⁶⁶ One reason for this view was that the recipient’s promise to allow the acquirer of the chips to gamble in the club and to pay their winnings did not amount to consideration since these promises were void under [s.18 of the Gaming Act 1845](#).²⁶⁷

After the Gambling Act 2005

- 43-042 The reasoning in para.43-041 above has been made obsolete by the coming into force of [Part 17 of the Gambling Act 2005](#). [Section 334 of that Act](#) has repealed the legislation which had previously impaired the validity of wagering contracts and of certain related transactions, and [s.335\(1\)](#) has laid down the general rule that the fact that a contract relates to gambling shall not prevent its enforcement. Hence the purchase of chips to enable the buyer to gamble at (usually)

the seller's establishment now stands legally on the same footing as the purchase of tokens from a department store to enable the purchaser of the tokens to exchange them for goods there. There was authority before the coming into force of Part 17 of the 2005 Act that, in a case of the latter kind, "an independent contract is made for the chips when the customer obtains them at the cash desk".²⁶⁸ The consideration provided by the customer in such a case would be their payment (or promise to pay), while that provided by the store would be its promise to supply goods of the value of the tokens or the performance of that promise. The same reasoning would now apply to the purchase of chips from a casino by a person wishing to make bets there.²⁶⁹ Now that contracts related to gambling are, as a general rule, legally enforceable,²⁷⁰ there is (in general) no difficulty with respect to the consideration provided by the casino: it takes the form of its promise to allow its customer to gamble and to pay their winnings, or the performance of that promise. The "independent contract"²⁷¹ is, moreover, in general, legally enforceable as one that "relates to gambling".²⁷² Further problems with regard to such an "independent contract" may, however, arise in the two situations in which, under the 2005 Act, contracts related to gambling are not, or cease to be, legally enforceable. These situations are discussed in paras 43-043 and 43-044 below.

Unlawfulness

43-043 The circumstances in which a contract relating to gambling may be unenforceable, by virtue of s.335(2) of the Gambling Act 2005, on the ground of its "unlawfulness" are discussed in paras 43-017—43-021, above. The point to be made here is that the unlawfulness of the principal contract may infect the "independent"²⁷³ or collateral contract which arises when the person who wishes to bet with chips purchases them. If, for example, the bet were illegal by reason of its contravention of the Act or of some other rule of law,²⁷⁴ then the collateral contract might itself be illegal on the ground that its object was to facilitate the performance of an illegal act.²⁷⁵ The exact effects of the illegality on the collateral contract would then depend on the "factors-based" approach now applicable to claims arising from illegality.²⁷⁶ This would, for example, determine whether the contract could, in spite of the illegality, be enforced by a party who was innocent of it,²⁷⁷ or even by a guilty party where the object of the rule of law giving rise to the illegality was to prohibit conduct rather than to invalidate contracts.²⁷⁸ They would also determine in what circumstances money paid or property transferred in pursuance of the contract could be recovered back by the party who had made the payment or transfer.²⁷⁹

Effect of order "to void bet" ²⁸⁰ on gambling with chips

43-044

The power of the Gambling Commission to make an order under [s.336\(1\) of the Gambling Act 2005](#) in relation to a bet which is “substantially unfair” has been described in general terms in para.[43-022](#) above, and the effects of such an order on transactions related to the bet is discussed in paras [43-036—43-040](#) above. Where chips are bought and used for the purpose of gambling, the contract under which they are so bought is such a related transaction. Under [s.336\(2\)\(a\) of the Act](#), the effect of an order under [s.336\(1\)](#) is that “any contract *or other arrangement in relation to the bet* is void”. The words here italicised are capable of applying to the “independent”²⁸¹ or collateral contract under which the chips are bought, so that this contract, no less than the bet itself, becomes void as a result of the order under [s.336\(1\)](#). It is further provided by [s.336\(2\)\(b\)](#) that “any money paid *in relation to the bet* shall be repaid to the person who paid it”. Again the italicised words are wide enough to cover money paid for chips. Further flexibility is given by [s.337](#) to the Commission when making an order under [s.336\(1\)](#). The Commission’s discretion in this respect is discussed in para.[43-040](#) above. It will be recalled that under [s.337\(2\)](#) the Commission “may make an order under section 336(1) in relation to the whole, *or any part or aspect of*, a betting transaction”. The words here italicised are capable of referring to the contract relating to the purchase or use of chips. Under [s.337\(3\)\(b\)](#) the Commission may, in an order under [s.336\(1\)](#):

“... make provision about ... the consequences of the order *for other parts or aspects of the betting transaction one part or aspect of which becomes void under the order.*”

It is not entirely clear whether the words here italicised would apply to the situation here under discussion since the effect of the order under [s.336\(1\)](#) would, by virtue of [s.336\(2\)\(a\)](#), appear to cover more than (in the words of [s.337\(3\)\(b\)](#)) “one part or aspect of” the betting transaction, i.e. both the bet itself and²⁸² the contract relating to the purchase and use of the chips. The point could, perhaps, be met by arguing that [s.337\(3\)\(b\)](#) is not restricted to cases in which the order under [s.336\(1\)](#) covered *only* one part of the betting transaction. Alternatively, and perhaps more plausibly, the Commission could, under [s.337\(2\)](#) order that only the main betting transaction was to be void and then rely on [s.337\(3\)\(b\)](#) to deal with the further consequences of the order on the contract relating to the purchase and use of chips. The Commission might wish to do this where it was the purchaser of the chips who was responsible for the unfairness which formed the basis for making an order under [s.336\(1\)](#). It could then make adjustments which it regarded as appropriate in view of the purchaser’s conduct in relation to the betting transaction as a whole.

Footnotes

[264](#) e.g. *Lipkin Gorman v Karpnale Ltd [1991] 2 A.C. 548, 575* (chips treated as a “mechanism for gambling with money”); *Stuart v Stephen (1940) 56 T.L.R. 571; Crockfords Club Ltd v Mehta [1992] 1 W.L.R. 355.*

[265](#) Gaming Act 1968 s.16.

- 266 *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548; for such cases, see now below, paras 43-042, 43-051.
- 267 Above, Vol.I, paras 6-018—6-019.
- 268 *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 at 576; contrast 562 (“only one contract”). And see Vol.I, paras 6-018—6-019.
- 269 See *Ritz Hotel Casino Ltd v Al Daher* [2014] EWHC 2847 (QB) at [31]–[32], citing *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 (above, para.43-041) and other cases on the point here under discussion decided before the coming into force of the *Gambling Act 2005*.
- 270 *Gambling Act 2005* s.335(1); above, para.43-011.
- 271 *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 at 576.
- 272 *Gambling Act 2005* s.335(1).
- 273 Above, para.43-042.
- 274 Above, paras 43-017—43-021.
- 275 *M'Kinnell v Robinson* (1836) 3 M. & W. 434.
- 276 See *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467, discussed above at paras 43-030 and 43-032.
- 277 Contrast *Archbold's (Freightage) Ltd v Spanglett's Ltd* [1961] 1 Q.B. 374 (innocent party's claim upheld) with *Re Mahmoud and Ispahani* [1921] 2 K.B. 716 (innocent party's claim rejected).
- 278 e.g. *St. John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267. See also *Ritz Hotel Casino Ltd v Al Daher* [2014] EWHC 2847 (QB), discussed above in para.43-019.
- 279 See Vol.I, paras 18-241 et seq.
- 280 Marginal note to *Gambling Act 2005* s.336.
- 281 See *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 at 576; above, para.43-042.
- 282 See para.43-040 above for the force of the word “or” in s.336(2)(b).

(g) - Gambling with Stolen Money

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 43 - Gambling Contracts

Section 2. - Enforceability of Gambling Contracts

(g) - Gambling with Stolen Money

Loser using stolen money

- 43-045 Before the coming into force of [Part 17 of the Gambling Act 2005](#)²⁸³ (which deals with the “legality and enforceability of gambling contracts”²⁸⁴), it was settled that a loser who paid money lost under a wager could not recover back the amount so paid from the winner, in spite of the fact that the contract was void under [s.18 of the Gaming Act 1845](#).²⁸⁵ That rule continues, in general, to apply after the coming into force of [Part 17 of the 2005 Act](#), though for the different reason that, as a general rule, the gambling contract under which the money was paid is now legally enforceable.²⁸⁶ But the further question can still arise whether, where the loser uses stolen money to make such a payment, the victim of the theft can recover the amount so paid from the winner. Because of the negotiable quality of money paid and received as currency, the victim cannot recover an equivalent sum from the winner if the winner has received the money in good faith, without notice of the theft, and for valuable consideration. Before the coming into force of [Part 17 of the 2005 Act](#), the view had prevailed that no such valuable consideration had been provided by the winner; the reasons for this view are discussed in Vol.I, paras [6-018—6-020](#) above and [43-047](#) below. The effects on these reasons of [Part 17 of the 2005 Act](#) are discussed in paras [43-046—43-051](#) below.

Stolen money used to pay losses under illegal wagers

- 43-046 In the eighteenth century case of [Clarke v Shee and Johnson](#)²⁸⁷ a clerk stole money from his employer and paid part of the amount so stolen to the defendant under a lottery which had been made illegal and void by the Lottery Act 1772. Lord Mansfield held that the employer was entitled

to recover from the defendant the amount of the stolen money which had been so paid to the defendant because that money was:

“... his [the employer’s] property which has come into the hands of the defendant iniquitously and illegally and in breach of the Act of Parliament.”²⁸⁸

The word “iniquitously” seems to indicate that the defendant was held liable because he had not received the money in good faith, his lack of good faith resulting either from his awareness of the circumstances in which the money had come into the hands of the thief or from his knowing participation in the violation of the Act of 1772. This reasoning is not affected by the [Gambling Act 2005](#). Later discussion of the case treats it as authority for the view that the defendant had not provided any consideration for the payment in the shape of any promise which he had made to the thief, since that promise was illegal and void under the Act of 1772.²⁸⁹ This reasoning, too, would not in a similar case be affected by the [Gambling Act 2005](#) since the general principle contained in [s.335\(1\)](#), that contracts related to gambling are legally enforceable, is by [s.335\(2\)](#) stated to be “without prejudice to any rule of law preventing the enforcement of a contract on the ground of unlawfulness”. A contract now made in similar circumstances would still be illegal and void so that the defendant’s promise would not constitute any consideration for the receipt of the money. But if they had acted in good faith in relation both to the legality of the contract and to the provenance of the money, then they could be said to have provided consideration for the receipt of the money by accepting it in discharge of what they in good faith believed to be their legally enforceable claim against the loser; for this purpose it would be irrelevant that that claim was bad in law.²⁹⁰ If their good faith extended only to the legality of the contract, but not to the provenance of the money, then they would be liable to restore the money to the victim of the theft even if they could be said to have provided consideration for its receipt. This follows from the fact that the recipient of stolen money can avoid liability to restore it only if they have received it in good faith *and* for valuable consideration.²⁹¹

Stolen money used to pay losses under lawful wagers

43-047

In [Clarke v Shee and Johnson](#)²⁹² the transaction in respect of which the stolen money had been paid was illegal and void and the payment had apparently been received in bad faith. But in [Lipkin Gorman v Karpnale Ltd](#)²⁹³ the reasoning of the earlier case was held to apply even though the stolen money had been used for the purpose of wagers which were not illegal but only void under [s.18 of the Gaming Act 1845](#) and even though the defendant had received the stolen money in good faith. In that case one Cass, a salaried partner in a firm of solicitors, wrongfully withdrew money from the firm’s client account and over a period of 10 months used money so stolen²⁹⁴ to pay gambling losses incurred by him at the defendant’s club. The club had acted in good faith, without notice of the fact that the money used by Cass had been stolen, and it would have been entitled

(as against the victim of the theft) to retain the money if it had, in addition, been able to show that it had provided consideration for its receipt of the money. Three arguments were advanced by the Club in support of the view that it had provided such consideration. Its first argument was that it had provided consideration by allowing Cass to gamble and so promising to pay his winnings on bets which he won. This argument was rejected on the ground that the Club's promise was void under [s.18 of the Gaming Act 1845](#); and this reasoning is in accord with the view that, *prima facie*, a void promise does not constitute consideration.²⁹⁵ The Club's second argument was that it had provided consideration by actually paying such winnings to Cass. In cases unconnected with gaming, the law did, at least in some cases, regard the *performance* of a defective promise as consideration,²⁹⁶ even where the mere making of the promise would not be so regarded. But the Club's second argument, too, was rejected on the ground that any such payment to Cass was in law a gift to him.²⁹⁷ This may not be a very realistic view of the intention with which the Club made such payments²⁹⁸; and it may also, with respect, be doubted whether this is really an explanation of the rule, rather than a statement of its legal consequence. The Club's third argument was that it had provided consideration by supplying Cass with gaming chips. This argument was also rejected for reasons discussed in paras [6-018—6-020](#) of Vol.I of this book, where a number of difficulties which arise in reconciling this rejection with rules which, in contexts other than that of the use of stolen money for gambling, determine the presence or absence of consideration, are discussed. It is, however, respectfully submitted that the view that the Club had provided no consideration for its receipt of the stolen money was justified by the context in which the question arose in the *Lipkin Gorman* case. The practical result of that view was twofold. The starting point was that, because the Club had provided no consideration for its receipt of the stolen money, it was liable to restore this money to the victims of the theft. But the House of Lords went on to recognise that claims for the restitution of money were subject to the defence of change of position²⁹⁹; that the Club had changed its position by allowing Cass to enter into a series of transactions which “by the laws of chance [yielded] the occasional winning bet”³⁰⁰; and that, although the Club was not legally liable to pay on bets won by Cass, such bets placed it, as a practical matter, under “an obligation which, in business terms it had to comply with”.³⁰¹ The Club was therefore held liable to restore only part of the stolen money that Cass had used in gambling there.³⁰² The loss resulting from the theft was thus split between two innocent parties (the Club, which had received the stolen money in good faith, and the victim of the theft); and it was no doubt the desire of the House of Lords to reach such a loss-splitting conclusion which led to its rejection of the argument that the Club had provided valuable consideration for the payments to it of the stolen money, and to the recognition of the (partial) defence of change of position.

43-048

The reasoning of the *Lipkin Gorman* case,³⁰³ on the issue of whether the club had provided consideration for its receipt from Cass of the money that he had stolen, is now subverted by (a) the repeal of [s.18 of the Gaming Act 1845](#) by [s.334\(1\)\(c\) of the Gambling Act 2005](#) and (b) the provision of [s.335\(1\) of the 2005 Act](#) that “the fact that a contract relates to gambling shall not prevent its enforcement”.³⁰⁴ The effect of these changes in the law is that, on facts similar to those

of the *Lipkin Gorman* case, the club would be bound by its promise to pay his winnings to Cass (unless the promise was defective for some reason other than that it related to gambling³⁰⁵). That promise, or its performance, would therefore constitute consideration for the payment of the stolen money to the club which, since it had received the money in good faith, would no longer be liable (as it had been in the *Lipkin Gorman* case) to restore the money to the victim of the theft. Since the club would no longer now be liable in restitution, no issue could arise as to any reduction of such liability on the ground of change of position. Hence the loss-splitting solution adopted by the House of Lords in the *Lipkin Gorman* case³⁰⁶ would no longer normally be open to the courts. It will be argued in para.43-051 below that it might be open to the Gambling Commission to reach a similar result in the exercise of its power, conferred by s.336 of the Gambling Act 2005 to “void [a] bet”; but this possibility is restricted to cases in which the bet is “substantially unfair”.³⁰⁷

Effect of order to “void bet”³⁰⁸

- 43-049 The further question arises whether the reasoning of the *Lipkin Gorman*³⁰⁹ case on the issue of consideration would still apply, after the coming into force of Part 17 of the Gambling Act 2005, in a case in which it was arguable that the bet was “unfair” so that the Gambling Commission could make an order in relation to it under s.336(1)³¹⁰; if such an order were made, the contract or any other arrangement relating to the bet would be “void”,³¹¹ and any money which had been “paid in relation to the bet” would have to be “repaid to the person who paid it and repayment may be enforced as a debt due to that person”.³¹² It is submitted that the possibility of the Commission’s making such an order would not deprive the club’s promise to pay Cass his winnings (or the performance of that promise) of its potential of constituting consideration for the payment. The power to make the order is discretionary³¹³ so that there can be no certainty of its being exercised. The club’s promise may (by reason of the existence of that power) be of doubtful value but this is not sufficient to negative the possibility of its amounting to consideration.³¹⁴ Moreover, the power to make an order under s.336 is, in general³¹⁵ exercisable only for six months after the determination of the bet³¹⁶; and, if no attempt were made during that time to obtain such an order there would be no doubt that the club’s promise (unless it were otherwise defective) would then constitute consideration for the payment to it of the stolen money. Where the bet is indeed unfair, there may, however, be mechanisms under the Act by which the victim of the theft can, directly or indirectly, secure the return of the stolen money, or at least of part of it. These mechanisms are discussed in paras 43-050 and 43-051 below.

Application for order under s.336(1) by victim of the theft

- 43-050

It has been suggested in para.43-023 above that there is nothing in s.336 which expressly restricts the power to apply for an order under the section to the parties of the bet. If this is right, an application for such an order could be made by the victim of the theft. Under s.336(1), the effect of the order (in cases of the present kind) would be that any money paid in relation to the bet “shall be repaid to the person who paid it and repayment may be enforced as a debt by that person”.³¹⁷ The person entitled to repayment would indeed be the thief, since they would be the person who would have paid the (stolen) money “in relation to the bet (whether by way of ... stake ... or otherwise)”³¹⁸ to the winner; but the victim of the theft would then have a civil claim against the thief for the restitution of the stolen money. It is an open question whether such a claim would be a proprietary claim or a personal one (under which the victim of the theft would rank equally with the thief’s other creditors³¹⁹). In this respect, the victim’s claim against the thief could be less advantageous to the victim than the victim’s claim against the club was in the *Lipkin Gorman* case.³²⁰ On the other hand, in a restitution claim by the victim of the theft *against the thief* the partial defence of change of position *by the club*, that prevailed in the *Lipkin Gorman* case,³²¹ would not be available to the thief since that defence is not available to a defendant who has changed their position in bad faith.³²² Nor would change of position by the club afford it a partial defence to an order to make repayment to the thief (if the bet is unfair) under s.336. Such repayment “may be enforced as a debt due to that person”³²³ (who would be the payor of the money to the Club, i.e. the thief); and in actions for the recovery of a debt there is no defence of change of position. In this respect the rights of the victim of the theft might at first sight seem to be more favourable to them, if they could invoke s.336, than the victim’s rights against the club were in the *Lipkin Gorman* case; for it is arguable that the victim could, under that section, get an order for the repayment to the thief of all the stolen money lost by the thief, and that the victim could then bring a restitution claim for the return of that money against the thief. But it will be argued in para.43-051 below that the Commission, in making an order under s.336(1) could so formulate the order as to reach a result substantially similar to that reached by the House of Lords in that case.

Flexibility of orders under s.336(1)

- 43-051 It was pointed out in para.43-040 above that s.337 of the *Gambling Act 2005* gives considerable flexibility to the Gambling Commission when making an order in relation to an unfair bet under the powers conferred on it by s.336(1). In particular, s.337(2) empowers the Commission to make such an order “in relation to the whole, or any part or aspect of, a betting transaction”; and by s.337(3) such an order may make:

“... incidental provision; in particular ... about ... (b) the consequences of the order for other parts or aspects of a betting transaction one part or aspect of which becomes void under the order.”

The question here is whether the facts that the bet was made with stolen money, and that the victim has an interest in the recovery of that money, are a “part or aspect” of the betting transaction within these provisions. The circumstance that stolen money was used to make or pay a bet can scarcely be described as a “part” of the betting transaction; and, although it may be an “aspect” of that transaction, even this line of reasoning is not free from difficulty. [Section 337\(3\)\(b\)](#) seems to regard a “part or aspect” of the transaction as something that has the potential of becoming “void under the order” and the circumstance that stolen money was used by a party to the bet can hardly be something that so “becomes void”. The most plausible argument would seem to be that, under [s.337\(3\)\(b\)](#), the court could order that the *payment* made with stolen money was “void” and that the Commission could then, as one of the “consequences of the order” specify that the stolen money should be returned, not to the thief (as [s.336\(2\)\(b\)](#) would seem to require), but to the victim of the theft. This might in turn cause hardship to the other party to the bet if they have received the payment in good faith and for valuable consideration. One solution of this problem would be to say that the Commission’s discretion under [s.337\(3\)\(b\)](#) is sufficiently broad to allow it to take this hardship into account by ordering a partial return of the stolen money to the victim of the theft. This would lead to much the same result (though by a different route) as that which the House of Lords had reached in *Lipkin Gorman v Karpnale Ltd*³²⁴ by subjecting the victim’s right of recovery to the partial defence of change of position. For this purpose, the Commission might be able to take account of the degree of responsibility which the party to whom the stolen money had been paid pursuant to the debt bore for the circumstances making the bet “unfair”.³²⁵ It should be emphasised that the Commission’s power here under discussion exists *only* in relation to such “unfair” bets and, in general, only for six months after the result of the bet had been determined.³²⁶

Footnotes

283 Above, para.[43-001](#).

284 *Gambling Act 2005*, heading to Pt 17.

285 *Bridger v Savage* (184) 15 Q.B.D. 363, 367; *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 562, 577; *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm).

286 Above, para.[43-029](#).

287 (1774) 1 Cowp. 197.

288 (1774) 1 Cowp. 197 at 199–200.

289 *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 at 563, 575.

290 cf. Vol.I, para.[6-052](#).

291 See *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, below, para.[43-047](#), where the defendant was held liable, even though it had received the stolen money in good faith, because it had not provided “valuable” or “full” consideration for it: see at 570 and 560; above, Vol.I, paras [6-018](#)—[6-019](#). For the effect of the *Gambling Act 2005* on the reasoning of this case, see below, para.[43-047](#).

292 (1771) 1 Cowp. 197; above, para.[43-046](#).

- 293 [1991] 2 A.C. 548; see above, Vol.I, paras 6-018–6-020.
- 294 For the amounts involved, see below.
- 295 See above, Vol.I, para.6-194.
- 296 See above, Vol.I, para.6-196.
- 297 [1991] 2 A.C. 548, 562, 577.
- 298 See below (“an obligation which in business terms [the club] had to comply with”).
- 299 See generally, above, Vol.I, para.32-199.
- 300 [1991] 2 A.C. 548, 582.
- 301 [1991] 2 A.C. 548, 581.
- 302 The total amount of stolen money used by Cass in gambling at the Club was £222,908.98; the decision was that the Club was liable for no more than £154,695, this being the net amount lost by Cass (deducting his winnings from his losses) during the period of his having gambled with the stolen money (making allowance also for £20,050 attributable to his own money).
- 303 [1991] 2 A.C. 548, above para.43-047.
- 304 Above, para.43-011. The contract for the purchase of chips would also now generally be enforceable as a contract relating to gambling within s.335(1): above, para.43-042.
- 305 See *Gambling Act 2005* s.335(2), above paras 43-017—43-022.
- 306 See above, para.43-047.
- 307 *Gambling Act 2005* s.336(3); above, para.43-022.
- 308 Marginal note to *Gambling Act 2005* s.336.
- 309 [1991] 2 A.C. 548; above, para.43-047.
- 310 Above, paras 43-022, 43-023.
- 311 *Gambling Act 2005* s.336(2)(a).
- 312 *Gambling Act 2005* s.336(2)(b).
- 313 s.336(1) begins with the words “The Commission *may* make an order ...” (italics supplied).
- 314 cf. above, Vol.I, para.6-051.
- 315 i.e. subject to s.336(6), above para.43-022 (contract unfair because a party has been convicted of cheating, contrary to s.42 of the 2005 Act).
- 316 *Gambling Act 2005* s.336(5).
- 317 *Gambling Act 2005* s.336(2)(b).
- 318 *Gambling Act 2005*.
- 319 See *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [2014] 4 All E.R. 79 where, in the context of a principal’s claim against his agent in respect of a bribe or secret profit received by the agent, Lord Neuberger P at [1] distinguished between a “proprietary” claim and one for “equitable compensation” and said that the two main advantages of a claim of the former kind were that it gave the claimant priority over the debtor’s unsecured creditors and a right to “trace and follow” the subject-matter of the claim in equity, whereas neither of these advantages would be available to a person entitled only to “equitable compensation”. The claim in this case was held to be a proprietary one: see at [46]. For the distinction between the two kinds of remedies, see generally Vol.I, Ch.32, section 4.
- 320 Above, para.43-047. For discussion of the remedy in *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, see *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch),

[2013] Ch. 156 especially at [71]–[75], where the judgment of Mr Stephen Morris QC at [75] accepted counsel’s submission that the *Lipkin Gorman* case was “in substance” one “of a ‘proprietary restitutionary claim’ and not a claim for restitution for unjust enrichment”. It is not entirely clear whether this distinction is concerned with the *basis* of the claim as opposed to its legal *nature*, i.e. whether it is intended to make the same points as the distinction drawn by Lord Neuberger P in *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [2014] 4 All E.R. 79 at [1], quoted above, or as those drawn in the distinction (similar to Lord Neuberger’s) between “proprietary” and “personal” claims.

321 *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548.

322 Above, Vol.I, para.32-204.

323 *Gambling Act 2005* s.336(2)(b).

324 [1991] 2 A.C. 548; above, para.43-047.

325 See *Gambling Act 2005* s.336(4) given a list of such factors. The list is not exhaustive: see above, para.43-022.

326 See above, para.43-022.

Section 1. - The Nature of Insurance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 1. - The Nature of Insurance¹

P. J. S. MacDonald Eggers

- (U)** Replace footnote 1 with: See generally MacGillivray on Insurance Law, 15th edn (2022); Clarke, The Law of Insurance Contracts (looseleaf); Merkin, Colinvaux and Merkin's Insurance Contract Law (looseleaf).

Definition

- 44-001 A contract of insurance is one whereby one party (the insurer) undertakes for a consideration to pay money or provide a corresponding benefit² to or for the benefit of³ the other party (the assured) upon the happening of an event which is uncertain, either as to whether it has or will occur at all, or as to the time of its occurrence,⁴ where the object of the assured is to provide against loss or to compensate for prejudice caused by the event, or to make provision for some identified contingency, such as for the assured's old age (where the event is the reaching of a certain age by the assured) or for the benefit of others upon his death (where the event is the death of the assured).⁵ It is these objectives which distinguish insurance from gaming or wagering.⁶ When embodied in a document the contract is usually called a policy, but save in the case of marine and possibly life insurance,⁷ an oral contract of insurance, though rare, is perfectly valid⁸ and may indeed also be described as a policy.⁹

Types of insurance contract

- 44-002

There are many ways in which an insurance contract may be classified. The nature and legal implications of an insurance contract may depend on the type of risk, the type of benefit to be paid, and the nature or circumstances of the assured. As regards the type of risk, insurance policies are broadly classified as non-marine and marine insurance. Marine insurance is defined in [s.1 of the Marine Insurance Act 1906](#). Although it follows that non-marine insurance lies outside the scope of a marine insurance contract, a number of policies will include both marine and non-marine components. Within this broad division, policies may be sub-classified by reference to whether the risks insured against are, to take a few examples, death, personal accident, fire, theft, negligence, or motor accidents. As regards the type of benefit, one may characterise insurance contracts as either indemnity or contingency contracts. The nature and effect of an insurance policy may also depend on the position or means of the assured in that the policy may be regarded as a consumer policy or a commercial insurance.¹⁰ The law's approach to construing and determining the operation of such contracts can depend on the nature of the contract itself.¹¹

Indemnity insurance

44-003

Most contracts of insurance are contracts of indemnity, whereby the insurer agrees to compensate the assured for the loss that the latter may sustain through the happening of the event upon which the insurer's liability may arise,¹² but this is not necessarily so. If the object of the contract is indemnification (that is, the insurer's obligation does not arise unless and until the assured has sustained a loss), the contract remains one of indemnity even if it quantifies in advance the value of the potential loss, in which case the insurance is called "valued".¹³ The agreed sum is deemed to be an indemnity even if in the particular circumstances it does not represent the true loss,¹⁴ and the insurer can avoid payment on the grounds that the assured is seeking to recover more than an indemnity only if the discrepancy is so great as to make the contract a wager,¹⁵ or unless the assured knew of such discrepancy but failed to disclose it to the insurer or misrepresented the true position to the insurer.¹⁶ The loss which can be indemnified under such an insurance contract may be physical damage to property, financial loss or a legal liability. If a contract is one of indemnity insurance, there are at least three practical consequences in classifying an insurance contract as a contract of indemnity as opposed to a contingency insurance. First, the assured is entitled only to compensation for his loss. He is not entitled to receive or retain any benefits which result in the assured being over-compensated.¹⁷ Secondly, the assured's cause of action against the insurer arises upon the assured suffering the loss in question. Accordingly, once the "loss" has been sustained, subject to the terms of the contract, time then starts running for the purposes of the [Limitation Act 1980](#).¹⁸ Thirdly, if the insurer refuses or fails to pay an indemnity as required by the contract, at common law the insurer is not liable to the assured for any damages above and beyond the amount of the indemnity. This is because the indemnity is itself regarded by the law as damages and the court cannot award damages for the late payment of damages.

U However, the common law position was modified upon the entry into force of ss.13A and 16A of the Insurance Act 2015 on 4 May 2017.²⁰ This new legislation introduced into every insurance contract an implied term that the insurer must pay insurance claims within a reasonable time (allowing for investigation and assessment of the claim). If there is a breach of this implied term, the assured will have remedies (e.g. damages) available at common law (and otherwise) in addition to the payment of the claim under the policy and statutory interest.²¹

Contingency insurance

44-004 Contracts such as life insurance²² and certain accident insurances providing for the payment of a specified sum upon the happening of an event or accident²³ are not contracts of indemnity; they are often described as “contingency” policies; they do not possess the attributes of contracts of indemnity. The insurer’s liability to provide the specified benefit to the assured is generally not dependent on the assured suffering a loss which is the equivalent in value of the specified benefit. Accordingly, the doctrine of indemnity, and related doctrines, such as subrogation, salvage and contribution, will not apply to contingency policies.²⁴

Footnotes

1 See generally MacGillivray on Insurance Law, 14th edn (2018) ; Clarke, The Law of Insurance Contracts (looseleaf) ; Merkin, Colinvaux and Merkin’s Insurance Contract Law (looseleaf) .

2 *Prudential Insurance v Inland Revenue Commissioners [1904] 2 K.B. 658, 662*. Money’s worth is a corresponding benefit, as is any service which cannot logically be distinguished from the payment of money: see *DTI v St Christopher Motorists Assn Ltd [1974] 1 W.L.R. 99, 106*; *Medical Defence Union v Department of Trade [1980] Ch. 82, 94–95*. What benefits fall within the latter category of service is not clear, but it is an exceptional category and the right to the proper consideration of a claim or of a request for a service does not fall within it: see *CVG Siderurgicia de Orinoco SA v London Mutual Steamship Owners Assn (The Vainqueur José) [1979] 1 Lloyd’s Rep. 557, 580*; *Medical Defence Union v Department of Trade [1980] Ch. 82*. See also *Re Sentinel Securities Plc [1996] 1 W.L.R. 316*, where it was held that a guarantee protection scheme (under which a company undertook to the customers of suppliers that, in the event of a supplier ceasing to trade because of financial failure, it would honour the supplier’s guarantee of the goods supplied and installed) constituted insurance business; *Re Digital Satellite Warranty Cover Ltd [2013] UKSC 7, [2013] 1 W.L.R. 605* at [18]–[19]. The insurer’s undertaking is one by which he or she is obliged to provide the

- benefit to the assured in case the specified event occurs. If the undertaking is not obligatory (e.g. because it is discretionary), it is not an insurance contract (*Medical Defence Union Ltd v Department of Trade* [1980] Ch. 82; *CVG Siderurgicia del Orinoco SA v London Steamship Owners' Mutual Insurance Association Ltd (Vainqueur José)* [1979] 1 *Lloyd's Rep.* 557, 580).
- 3 For beneficiaries under life insurance see below, para.44-132.
- 4 *Prudential Insurance v Inland Revenue Commissioners* [1904] 2 K.B. 658; *Fuji Finance Inc v Aetna Life Insurance Co Ltd* [1997] Ch. 173, 188–189, 198, where it was held that the benefit payable must be contingent on the event uncertain; it is not necessary for the insurer to be exposed to a risk of loss.
- 5 See *Tyrie v Fletcher* (1777) 2 Cowp. 666; *Wilson v Jones* (1867) L.R. 2 Ex. 139, 150; *Prudential Insurance v Inland Revenue Commissioners* [1904] 2 K.B. 658; *Gould v Curtis* [1913] 3 K.B. 84. cf. *Lucena v Craufurd* (1806) 2 Bos. & P.N.R. 269, 302; *Fuji Finance Inc v Aetna Life Insurance Co Ltd* [1997] Ch. 173 at 198.
- 6 *Wilson v Jones* (1867) L.R. 2 Ex. 139; *Macaura v Northern Assurance* [1925] A.C. 619, 627. See also, *Newbury International v Reliance National Insurance Co* [1994] 1 *Lloyd's Rep.* 83, where a policy of “prize indemnity insurance” was held to be effectively a wager. The definition of insurance may be of great importance, for legislation imposes many requirements as to financial status, incorporation, etc. on persons carrying on insurance business. See below, para.44-064.
- 7 See *Marine Insurance Act* 1906 ss.1, 21, 22; *Life Assurance Act* 1774 s.2. cf. *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] Q.B. 199, 207–208. There are other statutes which require a written record of specified insurance contracts: see, e.g. *Road Traffic Act* 1988 s.147.
- 8 *Murfitt v Royal* (1922) 38 T.L.R. 334.
- 9 *Re Norwich Equitable Fire* (1887) 57 L.T. 341; *Forsikringsaktieselskabet National v Att-Gen* [1925] A.C. 639.
- 10 The Financial Conduct Authority’s Handbook contains provisions which are specifically aimed at a “consumer” as opposed to a “commercial customer”. See Insurance: New Conduct of Business Sourcebook (ICOBS), made pursuant to the *Financial Services and Markets Act 2000* s.138, at <http://fsahandbook.info/FSA/html/handbook/ICOBS>.
- 11 See recently *Tesco Stores Ltd v Constable* [2007] EWHC 2088 (Comm), [2008] *Lloyd's Rep. I.R.* 302, [2008] EWCA Civ 362, [2008] *Lloyd's Rep. I.R.* 636.
- 12 *Castellain v Preston* (1883) 11 Q.B.D. 380; *Leppard Excess Insurance Co Ltd* [1979] 2 *Lloyd's Rep.* 91, 95; see also the *Marine Insurance Act* 1906 s.1. The indemnity essentially is an undertaking by the insurer that the assured will not suffer loss caused by specified events or perils so that if such loss occurs, the insurer is in breach of his contract and is liable to the assured in unliquidated damages: *Irving v Manning* (1847) 1 H.L. Cas. 287; *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 A.C. 1.
- 13 *Goole Steam Towing Co v Ocean Marine* [1928] 1 K.B. 589, 594.
- 14 *Elcock v Thomson* [1949] 2 K.B. 755.
- 15 *Lewis v Rucker* (1761) 2 Burr. 1167, 1171. For wagers, see above, Ch.43, and see below, paras 44-014—44-016.

- 16 *Thames Mersey Marine v Gunford* [1911] A.C. 529; *Hoff v De Rougemont* (1929) 34 Com. Cas. 291. See also *Visscherij Maatschappij Nieuwe Onderneming v Scottish Metropolitan Assurance Co Ltd* (1922) 10 L.L.R. Rep. 579. For misrepresentation and non-disclosure, see below, paras 44-034, 44-035, 44-038.
- 17 *Castellain v Preston* (1883) 11 Q.B.D. 380, 386.
- 18 *Griffiths v Liberty Syndicate* 4472 [2020] EWHC 948 (TCC), [2020] Lloyd's Rep I.R. 485 at [14].
- 19 *Ventouris v Mountain (The Italia Express)* [1992] 2 Lloyd's Rep. 281; *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep. I.R. 111; *Griffiths v Liberty Syndicate* 4472 [2020] EWHC 948 (TCC), [2020] Lloyd's Rep I.R. 485; *Bann Carraig Ltd v Great Lakes Reinsurance (UK) Plc* [2021] NIQB 63, [2022] Lloyd's Rep. I.R. 1. cf. *Callaghan v Dominion Insurance Co Ltd* [1997] 2 Lloyd's Rep. 541. This characterisation of an indemnity has been adhered to of late in deference to precedent, and has been criticised in that it restricts the scope of recoverable damages: Clarke, *The Law of Insurance Contracts* (looseleaf), para.30-9B1; *Campbell* [2000] L.M.C.L.Q. 42. See also *Pride Valley Foods Ltd v Independent Insurance Co Ltd* [1999] Lloyd's Rep. I.R. 120. See the Law Commission's Consultation Paper: Insurance Contract Law: Post Contract Duties and other Issues (LCCP No.201, December 2011). See below, para.44-105. In the award of interest against an insurer, the Court will generally allow interest to run, not from the date of the loss, but from the date by which the insurer should have considered the validity of the claim, taking into account the nature of the loss, the way the claim was presented and the circumstances which required investigation: *Quorum A/S v Schramm* (No.2) [2002] 2 All E.R. (Comm) 179.
- 20 These provisions of the *Insurance Act 2015* were introduced by the *Enterprise Act 2016* ss.28–30.
- 21 s.13A. See the Explanatory Notes, para.264. See below para.44-112.
- 22 *Dalby v India and London Life* (1854) 15 C.B. 365; *Law v London Indisputable Life Policy Co* (1855) 1 Kay & J. 223; *Gould v Curtis* [1913] 3 K.B. 84, 95; *Fuji Finance Inc v Aetna Life Insurance Co Ltd* [1997] Ch. 173.
- 23 *Theobald v Railway Passengers' Assurance* (1854) 10 Exch. 45; *Bradburn v Great Western Ry* (1874) L.R. 10 Ex. 1.
- 24 See below, paras 44-114—44-118.

Section 2. - Insurable Interest

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 2. - Insurable Interest

In general

44-005

U Indemnity insurance obviously requires the assured to have an interest in the subject matter of the insurance other than that created by the contract itself, for otherwise he will incur no loss through the happening of the event insured against, and so if the assured is without a legally recognised interest, the insurer will have a good defence to any claim under such a contract if he chooses to raise it.

25

U The burden is on the insured to prove that he has an insurable interest.

26

U Contracts which are not contracts of indemnity do not, it would seem, require such an interest at common law to be enforceable as contracts of insurance.

27

U However, whether or not the contract is one of indemnity, if it is made without any legally recognised interest or any expectation of acquiring such an interest, it may well be void or unenforceable.

28

U The kind of interest which is legally recognised and required in indemnity insurance and by statute (called “insurable interest”), the persons who have to possess this interest, the provisions of the statutes in question, and the time when such interest is required, all raise difficulties which are considered separately below.

29

U

Definition of insurable interest

- 44-006 There is no authoritative definition of insurable interest and it is probably impossible to give a general formula to cover all the recognised types of insurable interest.³⁰ The insurable interest must be discernible from the assured's relationship with the subject matter of the insurance. That relationship may have a particular nature or certain manifestations which render the assured's interest insurable. For example, the assured may be prejudiced by the loss of or damage to the subject matter of the insurance (or may benefit from its preservation), because he has a legal or equitable right pertaining to the subject matter, or because he will thereby become subject to a liability by reason thereof or because he will thereby be deprived of an opportunity to earn income or a profit in respect of the subject matter.³¹ Quite apart from such considerations, it may be that the assured's insurable interest arises out of commercial convenience.³² There are no fixed criteria which will determine the existence of an insurable interest. Each interest and each case must be analysed on its own. The principles underlying the court's approach to determining an insurable interest in respect of one type of insurance does not necessarily apply in respect of other types of insurance.³³ However, if there has been a genuine attempt to protect an assured against a specified event by means of a particular type of insurance policy, the court will be reluctant to hold that the assured lacks an insurable interest.

³⁴

- U There need not be a pecuniary element to the assured's relationship with the subject matter of the insurance.

The relevance of the risk of financial loss

- 44-007 An assured can insure against the risk of financial loss, whether it be a loss of income or profits or the loss associated with a monetary expense. The risk of financial loss may indicate an insurable interest for the purposes of other types of insurance. It is generally true that a person who would foreseeably suffer financial loss from the occurrence of an event has an insurable interest in the subject matter which it is sought to insure against that event,³⁵ but this rule of thumb requires qualification. For example, the assured has an insurable interest in his own life, but can hardly be said himself to suffer financial loss by losing his life.³⁶ The nature of the interest required for the purposes of the insurance will depend on the subject matter of the insurance, the nature of the cover provided and the loss against which the insurance has been obtained.³⁷ Normally, the event must either cast upon the assured a legally binding liability, or it must affect a right of the assured

which is recognised and protected by the courts.³⁸ Where a person stands to incur a financial loss, the absence of a legal liability or the absence of harm to a legal or equitable right or expectation will militate against the existence of an insurable interest. For example, a father has no insurable interest in his daughter's personal liability in tort,³⁹ nor does a person have an insurable interest in another's property in respect of which he merely hopes that he will have an interest in the future,⁴⁰ or in his debtor's property over which he has no lien or similar right.⁴¹ Further, an assured has no interest entitling him to insure against an event if he does not seek directly to protect the very right to which he is legally entitled. If, for example, the assured is the sole owner of shares in a company, his interest lies in the shares and their value. The assured has no interest recognised by the law in the profits or assets of the company except insofar as they form the basis of the value of the shares,⁴² and hence the only way in which he may insure against loss occasioned by the destruction of the company's assets is by insuring against the resultant loss in value of the shares.⁴³ Similarly, if the assured is owed a debt by a company he may insure against default in paying the debt, but not against a loss of assets by that company, unless the existence of the debt itself created a proprietary interest in the assets.⁴⁴

Types of insurable interest

⁴⁴⁻⁰⁰⁸ The following instances of insurable interest are supported by authority⁴⁵:



(i) Property insurance:

Legal,

⁴⁶

equitable,
⁴⁷

joint
⁴⁸

or sole
⁴⁹

proprietary rights will give rise to an insurable interest; possession whether defeasible or not

⁵⁰

provided that the possessor has some liability or obligation to the bailor, owner or consignee, or a right to possession,

⁵¹

U will similarly give rise to an insurable interest.
⁵²

U The insured may have an insurable interest if he has a contingent or defeasible interest.
⁵³

U If the assured has an insurable interest in goods or property, he may insure against loss of profits consequent upon their loss or damage,
⁵⁴

U or against other consequential loss,
⁵⁵

U provided that this cover is clearly stipulated in the contract.
⁵⁶

U The participation of contractors or sub-contractors in construction works on the construction site is probably sufficient to endow them with an insurable interest in the property comprising the works. Once the contractors or sub-contractors leave the site, they will cease to have an insurable interest in the works themselves. Any liability which might arise prior to their departure from or by virtue of their presence on the works is emblematic of their relationship with the property and could be insured under a property policy or a liability policy. Any liability which arises thereafter is insurable only under a policy of liability insurance.
⁵⁷

U

(ii) Liability insurance:

All legally enforceable liabilities,⁵⁸ whether based upon statutory duty,⁵⁹ tort⁶⁰ or contract, may represent an insurable interest.⁶¹ It is odd, however, to speak of insurable interest in the context of a liability policy. If the assured's liability is insured by the policy, and the assured is liable, it follows that the policy will respond, whether one speaks of an insurable interest or not. Contractual liability constitutes or gives rise to a reassured's insurable interest for the purposes of reinsurance contracts⁶² and gives the purchaser of goods to whom the risk but not the property has passed an insurable interest in them.⁶³

(iii) Life insurance:

The assured has an insurable interest in the life of the assured himself⁶⁴; the lives of those who are legally recognised as being of financial benefit to the assured, e.g. spouses⁶⁵; the lives of those who are bound by legally enforceable obligations to the assured, e.g. debtors, to the amount of the debt when the insurance is made⁶⁶; the lives of employers, to the amount of any remuneration, etc. due under the contract of employment⁶⁷; the lives of employees, to the value of the contracted employment⁶⁸; the lives of partners⁶⁹; and the lives of co-sureties⁷⁰ as well as the debtor's life⁷¹; the lives of those to whom the assured is responsible; or the lives of those whose death or injury gives rise to an obligation on the part of the assured

to indemnify another against the latter's liability for those lives.⁷² Beneficiaries under life insurances are considered later.⁷³

Interest need not be stated

- 44-009 The nature of the assured's interest in the subject matter need not be stated in the contract of insurance,⁷⁴ unless of course this information is required by an express term or the insurance is to be against loss of profits or other consequential loss.⁷⁵ If upon a claim being made the insurer does not admit that the assured had a valid insurable interest at the relevant date,⁷⁶ it is for the assured to prove his interest at such date.⁷⁷ In cases of nicety the courts will lean towards a finding of valid interest.⁷⁸

Insurance of another's interest

- 44-010 Subject to the ordinary rules of agency,⁷⁹ and the provisions of the **Life Assurance Act 1774** (which is not confined to life insurance),⁸⁰ an agent without interest may effect an enforceable contract of insurance on behalf of a principal who has an insurable interest, and it seems that either the agent⁸¹ or the principal⁸² can sue on such a contract. In addition, certainly in cases of marine insurance⁸³ and probably non-marine insurance,⁸⁴ a principal can, after a loss, ratify a contract of insurance made by an agent without authority in order to claim for that loss. Subject again to the **Life Assurance Act 1774**, a person without any interest at all can insure provided he holds himself trustee for the person who does have an insurable interest.⁸⁵ Furthermore, an assured with an insurable interest may insure the interests of others as well as himself.⁸⁶ Thus, for example, a bailee liable only for negligence can fully insure the goods against any loss⁸⁷; a carrier with a lien over goods may insure them for their full value⁸⁸; a contractor may insure the entire contract works on site for their full value, so as to cover all other contractors and sub-contractors for any damage to the works⁸⁹; and an owner of land subject to a lease may fully insure the property for the benefit of himself and the lessee.⁹⁰ In the case of motor insurance, moreover, the owner of a vehicle can insure against third-party liability incurred in its use by others as well as himself.⁹¹ Whether interests other than those of the assured are covered depends upon the construction of the contract.⁹² The wording of the contract may, of course, limit the interests covered,⁹³ but certainly in the case of an insurance by a bailee in respect of the goods bailed, the insurer must use precise words in order to limit the cover to the bailee's interest alone⁹⁴ or else must establish that the bailee never had any intention of covering the bailor's interest.⁹⁵ For example, an insurance of the

bailee's goods and those held by the bailee "in trust or on commission" covers the interest of the owners as well as the bailee,⁹⁶ whereas an insurance on goods held "in trust"⁹⁷ or on commission for which they (the assured) are responsible" covers only goods for which the assured is liable⁹⁸ and only loss or damage for which he is responsible.⁹⁹ Where the words in an insurance policy describe the assured by a particular class, and not by name, so that numerous persons might fall within that class, whether or not a particular person is insured under that policy depends on the intention of the named assured or the person who entered into the contract.¹⁰⁰

Joint and composite insurance

- 44-011 If the interests of all the assureds are such that in the event of an insured loss occurring, their loss is the same because their interests in the subject matter insured is the same, the insurance may be characterised as "joint". The insurance is described as "composite" if the loss affects each of the assureds in different ways, which is often, but not always, manifested in the differing quantum of their losses.¹⁰¹ A composite policy may be seen as embodying separate contracts for each interest insured.

¹⁰²

U The classic example of a composite insurance is that which covers the interests of the landlord and tenant of property.¹⁰³ Even if any or all of the assureds (such as a bailor and bailee of property) may recover under the policy in respect of the whole loss sustained by the subject matter insured, because their interest relates to the whole of the subject matter insured, their interests, whilst "pervasive", may differ so as to characterise the insurance as composite.¹⁰⁴ The classification of the insurance as joint or composite is necessary to gauge the effect of a breach of duty or misconduct by one assured as regards his co-assured.¹⁰⁵

Rights over the insurance money

- 44-012 If an assured voluntarily insures the interests of others as well as his own interest, he is only obliged to hand over the balance, if any, of the insurance money after meeting the loss for which he insured himself, but if there was any obligation on the assured to cover the other interests, then it would seem that the latter have first call on the insurance money.¹⁰⁶ In any case where the assured receives more than the loss for which he insured himself because he covered interests other than his own, he must account to those interests,¹⁰⁷ but the latter have no rights to proceed against the

insurer directly and, it seems, do not have proprietorial rights to any recoveries in the assured's hands; the funds held by the assured are not trust property.¹⁰⁸

Statutes requiring insurable interest

- 44-013 Certain statutory provisions render contracts of insurance void or unenforceable for lack of interest, and where such provisions are applicable, the contract will be unenforceable whether or not the insurers raise the defence.¹⁰⁹ The relevant statutes are the [Life Assurance Act 1774](#) and the [Marine Insurance Act 1906](#).¹¹⁰

Life Assurance Act 1774

- 44-014 Although directed primarily to life insurance, the Act covers a considerably wider field than its title suggests. Insurances of marine risks and of goods, however, are specifically excluded from the Act¹¹¹; and, as a matter of construction, all forms of indemnity insurance fall outside its scope.¹¹² A capital investment bond paying out a benefit on the death of a person has been held to be an insurance on the life of that person even though the same benefit was also payable on early surrender.¹¹³ The Act renders void all the contracts to which it applies which are made by way of gaming or wagering or without insurable interest.¹¹⁴ It does not follow that merely because the policy is not a gaming or wagering contract, the assured has an insurable interest, although that will be a consideration.¹¹⁵ The Act refers to "policies" and it may be that if the contract is not reduced to writing the Act has no effect,¹¹⁶ though the word "policy" has been used to describe even oral contracts.¹¹⁷ Section 2 renders unlawful any policy to which the Act applies which does not contain the names of all persons interested; or for whose use or benefit, or on whose account, the same is made.¹¹⁸ Thus, the intended beneficiary must have an interest and be named in the policy.¹¹⁹ However, it may be that a trustee without interest, who insures for the benefit of someone with interest, can recover the whole amount insured.¹²⁰ Section 3 limits the amount recoverable to that representing the assured's own interest¹²¹; this section appears inapposite to life insurance which is not an indemnity contract, except in cases where an assured's interest is measurable in money's worth.¹²²

The Marine Insurance Act 1906

- 44-015

This Act applies to marine insurance, which is defined essentially as a contract of indemnity insurance against “marine losses”.¹²³ The Act provides that any claim by an assured without an insurable interest at the relevant time is effectively unenforceable; it further renders void any such contract entered into without either interest and without the expectation of acquiring interest, and any contract of insurance containing a term obviating the requirement that the assured should prove his interest. **Section 5** requires the assured to have an insurable interest in the marine adventure insured, in particular by standing in a “legal or equitable relation to the adventure” or any property within the adventure of a nature such that he may benefit by the safety of the subject matter insured or be prejudiced by its adversity. The existence of such a “legal or equitable relation” however is not essential to the existence of an insurable interest for the purposes of the **Marine Insurance Act 1906**.¹²⁵

Impact of the Gambling Act 2005

44-016



On 1 September 2007, the **Gambling Act 2005** entered into force.¹²⁶ The Act makes no express reference to insurance contracts. Although the Act repealed the **Gaming Act 1845**,¹²⁷ which applied to purported contracts of insurance, no express attempt was made by the Act to amend or repeal the **Life Assurance Act 1774** or the **Marine Insurance Act 1906**.¹²⁸ Insofar as either Act makes provision for the requirement of an insurable interest, the **2005 Act** can have no effect. There is a distinction between the want of an insurable interest and a gaming or wagering policy. The lack of an insurable interest does not of itself render the insurance contract a gaming or wagering contract. A contract purportedly of insurance will be a gaming or wagering contract if the assured lacks an insurable interest at the relevant time and if the assured has no expectation of acquiring such an interest.

129

U The question remains what impact the **2005 Act** has on the statutory provisions in the **1774** and **1906 Acts** rendering gaming policies void. In one sense, this may be an arid issue, given that the lack of an insurable interest of its own is currently sufficient to render the insurance contract unenforceable or void. It may be the case, albeit practically unlikely, that a contract of insurance supported by an insurable interest at the same time is still a gaming contract, although the courts can (erroneously) equate the two concepts.¹³⁰ **Section 335 of the 2005 Act** provides that the fact that a contract relates to gambling shall not prevent its enforcement, but then states that this provision is “without prejudice to any rule of law preventing the enforcement of a contract on the grounds of unlawfulness (other than a rule relating specifically to gambling)”. Although there are clearly issues of the true statutory interpretation of this provision, it appears unlikely that the **2005 Act** will affect **s.1 of the Life Assurance Act 1774** or **s.4 of the Marine Insurance Act 1906**, given that the **2005 Act** makes no express provision in respect of these statutes. Further, it is questionable whether the making of an insurance contract, even a purported insurance contract, is likely to constitute

gambling for the purposes of the [2005 Act](#).¹³¹ Although the general definition of “gambling” and “betting” is potentially applicable to insurance contracts,¹³² [s.10 of the 2005 Act](#) provides that a “bet” does not include a bet the making or accepting of which is a regulated activity within the meaning of the [Financial Services and Markets Act 2000](#) and the making of an insurance contract is a regulated activity.¹³³

When interest is required

- 44-017** The interest of the assured in the subject matter of the insurance need not be present throughout the period of the cover. The time at which the interest must be shown to have existed, in order to enable the assured to recover, depends upon the terms and nature of the contract and statutory provisions. Express contractual terms relating to the time of interest are rare, but insurances which are contracts of indemnity,¹³⁴ whether valued or unvalued, required the assured to have an interest at the time of loss,¹³⁵ whether or not he had an interest previously during the period of cover, save in the case of retrospective insurance “lost or not lost”, where the interest may be acquired after the loss.¹³⁶ Goods which are appropriated to the assured’s sale contract and the insurance contract after they have been damaged may be insured.¹³⁷ The [Life Assurance Act 1774](#) has been held to require the assured in contracts to which it applies¹³⁸ to have an interest at the time of entering into the contract,¹³⁹ so that if a policy governed by the Act is a contract of indemnity the assured may have to establish his interest at the time of the loss and at the time of making the contract. Furthermore, since the Act limits recovery to the amount of the assured’s interest¹⁴⁰ and this interest is that existing at the date of the contract,¹⁴¹ it seems that only in cases where the subject matter of the insurance (as opposed to the interest therein) is by its nature variable can the assured recover the value of his interest at the time of the loss, if that is greater than the earlier value.¹⁴²

Footnotes

- ①25** *Anderson v Morice* (1876) 1 App. Cas. 713; *Macaura v Northern Assurance* [1925] A.C. 619; *Rogerson v Scottish Automobile and General* (1930) 47 T.L.R. 46, 47.
- ①26** *Macaura v Northern Assurance* [1925] A.C. 619, 631–632; *Quadra Commodities SA v XL Insurance Co SE* [2022] EWHC 431 (Comm), [2022] 2 All E.R. (Comm) 334 at [59].
- ①27** “There is nothing in the *common law* of England which prohibits insurance, even if no interest exists”: *Williams v Baltic* [1924] 2 K.B. 282, 288.

- ②8 See below, para.44-013.
- ②9 On 14 January 2008, the Law Commission published Issues Paper No.4 on insurable interest as part of its larger review of insurance contract law: http://www.lawcom.gov.uk/insurance_contract.htm.
- 30 The most famous definition is that given in *Lucena v Craufurd* (1806) 2 Bos. & P.N.R. 269, 302, but this was criticised in *Macaura v Northern Assurance* [1925] A.C. 619, 627. See also *Moran Galloway v Uzielli* [1905] 2 K.B. 555, 563; and *Mark Rowlands Ltd v Berni Inns Ltd* [1986] 2 Q.B. 211, 228. For a consideration of the different senses in which “insurable interest” can be used, see *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd* [1996] 2 All E.R. 487.
- 31 *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals Polymers Ltd* [1999] 1 Lloyd's Rep. 387 at [65]; *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [154]. The nature of the liability is important to determine whether or not the assured has an insurable interest in property or merely intended to insure the liability. If the liability arises out of the assured’s care or custody of the subject matter of the insurance, then there may be an insurable interest in the property (*Petrofina (UK) Ltd v Magnaload Ltd* [1984] Q.B. 127, 135; *O'Kane v Jones*, where a ship manager was held to have an insurable interest in the insured vessel); in other cases, the nature of the liability may be appropriate for no more than a liability insurance (*Deepak*). cf. *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693.
- 32 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] A.C. 451, 477, 481–482; *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389.
- 33 *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693.
- ③4 *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693; *Quadra Commodities SA v XL Insurance Co SE* [2022] EWHC 431 (Comm), [2022] 2 All E.R. (Comm) 334 at [60]–[61].
- 35 *Stockdale v Dunlop* (1840) 6 M. & W. 224.
- 36 cf. *Gould v Curtis* [1913] 3 K.B. 84.
- 37 *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd* [1996] 2 All E.R. 487.
- 38 *Stockdale v Dunlop* (1840) 6 M. & W. 224; *Moran Galloway v Uzielli* [1905] 2 K.B. 555; Marine Insurance Act 1906 s.5(2). The definition in s.5(2) is not exhaustive: *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [145].
- 39 *Vandepitte v Preferred Accident* [1933] A.C. 70, 80: “natural love and affection does not give such an interest at law”.
- 40 *Buchanan v Faber* (1899) 4 Com. Cas. 223; aliter, a legal right depending upon an expectancy: *Cook v Field* (1850) 15 Q.B. 460.

- 41 *Wolff v Horncastle* (1798) 1 B.P. 316, 323; *Moran Galloway v Uzielli* [1905] 2 K.B. 555, 562, 563. It is, of course, possible to insure against the debtor's insolvency caused by loss of his property: *Waterkeyn v Eagle Star* (1920) 5 Ll.L. Rep. 42, 43.
- 42 *Macaura v Northern Assurance* [1925] A.C. 619.
- 43 *Paterson v Harris* (1861) 1 B. & S. 336; *Wilson v Jones* (1867) L.R. 2 Ex. 139.
- 44 *Moran Galloway v Uzielli* [1905] 2 K.B. 555, 562.
- 45 See the "groups of cases" referred to by Waller LJ in *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693.
- ④6 *Lucena v Craufurd* (1806) 2 Bos. & P.N.R. 269, 324; *Ex p. Houghton* (1810) 17 Ves. Jr. 251; *North British and Mercantile v London, Liverpool and Globe* (1877) 5 Ch. D. 569, 583; *Castellain v Preston* (1883) 11 Q.B.D. 380; *Re Betty* [1899] 1 Ch. 821.
- ④7 *Smith v Lascelles* (1788) 2 T.R. 187, 188; *Lucena v Craufurd* (1806) 2 Bos. P.N.R. 269; *Provincial Insurance v Leduc* (1874) L.R. 6 P.C. 224; *Samuel v Dumas* [1924] A.C. 431, 443, 444, 450, 460.
- ④8 *Page v Fry* (1800) 2 Bos. & P. 240; *Robertson v Hamilton* (1811) 14 East 522; *Robinson v Gleadow* (1835) 2 Bing.N.C. 156.
- ④9 *Inglis v Stock* (1885) 10 App. Cas. 263, 270.
- ④10 *Boehm v Bell* (1799) 8 T.R. 154, 161; *Marks v Hamilton* (1852) 7 Exch. 323; *Goulstone v Royal* (1858) 1 F. & F. 276.
- ④11 *Quadra Commodities SA v XL Insurance Co SE* [2022] EWHC 431 (Comm), [2022] 2 All E.R. (Comm) 334 at [88].
- ④12 *North British v Moffat* (1871) L.R. 7 C.P. 25, 30, 31; *Macaura v Northern Assurance* [1925] A.C. 619, 628. The property must exist in order that there may be said to be an insurable interest in such property: *Quadra Commodities SA v XL Insurance Co SE* [2022] EWHC 431 (Comm), [2022] 2 All E.R. (Comm) 334 at [66].
- ④13 Marine Insurance Act 1906 s.7. The payment of the purchase price in advance of delivery of goods agreed to be purchased may give rise to an insurable interest in those goods: *Quadra Commodities SA v XL Insurance Co SE* [2022] EWHC 431 (Comm), [2022] 2 All E.R. (Comm) 334 at [80]–[86].
- ④14 *Barclay v Cousins* (1802) 2 East 544; *Eyre v Glover* (1812) 16 East 218; *Royal Exchange v M'Swiney* (1850) 14 Q.B. 646; *Stockdale v Dunlop* (1840) 6 M. & W. 224.
- ④15 *Inman SS Co v Bischoff* (1882) 7 App. Cas. 670, 676. In order to insure against loss of profits or other consequential loss suffered by virtue of damage to the property, the assured need not

have an interest in the property, but only in the profits or the subject matter lost: *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd* [1996] 2 All E.R. 487; cf. *Marine Insurance Act 1906 s.5*.

56 *Re Sun Fire and Wright* (1834) 3 N. & M. 819; *Re Wright and Pole* (1834) 1 Ad. & El. 621; *Mackenzie v Whitworth* (1875) L.R. 10 Ex. 142; affirmed on appeal (1875) 1 Ex. D. 36; *Dixon v Whitworth* (1879) 4 C.P.D. 371, 375.

57 *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep. 387 at [65]; cf. *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582, 611. See MacGillivray on Insurance Law, 15th edn (2022), para.1-163.

58 The policy may dictate that the liability of the assured may arise by virtue of his particular interest, in which case there must be a sufficient connection between the liability and the interest: see *C.F. Turner v Manx Line Ltd* [1990] 1 Lloyd's Rep. 137, 143; *Chrismas v Taylor Woodrow Civil Engineering Ltd* [1997] 1 Lloyd's Rep. 407, 410–411. But see below, para.44-023, for considerations of public policy, etc. which may invalidate some such contracts.

59 *British Cash and Parcel Conveyors v Lamson Store Service* [1908] 1 K.B. 1006, 1014, 1015.
60 *British Cash v Lamson* [1908] 1 K.B. 1006, 1014, 1015.

61 *Miller v Warre* (1824) 1 C. & P. 237, 239; *Stock v Inglis* (1884) 12 Q.B.D. 564; *Anderson v Morice* (1876) 1 App. Cas. 713.

62 *Re Law Guarantee Trust* [1914] 2 Ch. 617, 631. However, the reinsurer may also have thereby an interest in the subject matter of the original or underlying insurance (see *Marine Insurance Act 1906 s.9(1)*). See also *British Dominion General Insurance Co v Duder* [1915] 2 K.B. 394, 400; *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Rep. 516, 522–524; *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, 387, 392; see below, para.44-127.

63 *Anderson v Morice* (1876) 1 App. Cas. 713, 724. See *Marine Insurance Act 1906 s.7(2)*.

64 *Wainwright v Bland* (1835) 1 Moo. & Rob. 481; *M'Farlane v Royal London Friendly Society* (1886) 2 T.L.R. 755.

65 *Reed v Royal Exchange* (1795) Peake Add. Cas. 70; *Griffiths v Fleming* [1909] 1 K.B. 805. But not other relatives in the absence of legal rights or obligations: *Halford v Kymer* (1830) 10 B. & C. 724; *Shilling v Accidental Death* (1858) 1 F. & F. 116; *Harse v Pearl Life* [1903] 2 K.B. 92 (mother); *Att-Gen v Murray* [1904] 1 K.B. 165 (son). See, however, *Barnes v London, Edinburgh and Glasgow Life* [1892] 1 Q.B. 864. cf. *Howard v Refuge Friendly Society* (1886) 54 L.T. 644, 646; *Elson v Crookes* (1911) 106 L.T. 462; and *Goldstein v Salvation Army* [1917] 2 K.B. 291.

66 *Dalby v India and London Life* (1854) 15 C.B. 365; *Law v London Indisputable Life* (1855) 1 Kay. & J. 223; *Hebdon v West* (1863) 3 B. & S. 579.

67 *Hebdon v West* (1863) 3 B. & S. 579; *Turnbull v Scottish Provident* (1896) 34 S.L.R. 146.

68 *Simcock v Scottish Imperial* (1902) 10 S.L.T. 286.

69 *Griffiths v Fleming* [1909] 1 K.B. 805, 815.

70 *Branford v Saunders* (1877) 25 W.R. 650. In the same case, a joint debtor has an insurable interest in the life of the other joint debtor.

- 71 *Lea v Hinton* (1854) 5 De G.M. & G. 823.
- 72 *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] *Lloyd's Rep. I.R.* 693.
- 73 See below, para.44-132.
- 74 *Mackenzie v Whitworth* (1875) L.R. 10 Ex. 142, 148; see also *Crowley v Cohen* (1832) 3 B. & Ad. 478, 485; *Inglis v Stock* (1885) 10 App. Cas. 263, 270, 274. See *Marine Insurance Act 1906* s.26(2).
- 75 See below, para.44-129.
- 76 See below, para.44-017.
- 77 *Macaura v Northern Assurance* [1925] A.C. 619, 632.
- 78 *Stock v Inglis* (1884) 12 Q.B.D. 564, 571; affirmed (1885) 10 App. Cas. 263; *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] *Lloyd's Rep. I.R.* 693.
- 79 See Vol.I, Ch.21.
- 80 See below, para.44-014.
- 81 *Provincial Insurance v Leduc* (1874) L.R. 6 P.C. 224, 244. An agent may sue on a policy in his own name, for his principal's loss, if the policy is issued in his own name, whether or not the principal's interest is noted; any recovery is held by the agent on behalf of his principal: *The Transcontinental Underwriting Agency SrL v Grand Union Insurance Co Ltd* [1987] 2 *Lloyd's Rep.* 409. It is open to question whether the agent's ability to sue is limited to the situation where the contract is made in the agent's name. This principle applicable to insurance law does not obviate the requirement of an insurable interest: *Sharp v Sphere Drake Insurance Plc (The Moonacre)* [1992] 2 *Lloyd's Rep.* 501, 516.
- 82 *Browning v Provincial Insurance* (1873) L.R. 5 P.C. 263, 272, 273.
- 83 See *Marine Insurance Act 1906* s.86.
- 84 *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 *Lloyd's Rep.* 582, 607–608; cf. *Grover v Matthews* [1910] 2 K.B. 401; *Ferguson v Aberdeen Parish Council*, 1916 S.C. 715.
- 85 *Prudential Staff Union v Hall* [1947] K.B. 685. Thus a seller in possession of the goods when the property and risk have passed may insure his buyer's interest: *North British v Moffat* (1871) L.R. 7 C.P. 25, 30, 31. The intention is necessary, for otherwise the contract is likely to be a wager: *Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451, 480.
- 86 *Castellain v Preston* (1883) 11 Q.B.D. 380, 398. Indeed, the assured may insure another as an undisclosed principal, provided that the insurer is willing to contract with an undisclosed principal: *Talbot Underwriting Ltd v Nausch Hogan & Murray (The Jascon 5)* [2006] EWCA Civ 889, [2006] 2 *Lloyd's Rep.* 195. If an assured does not insure the interest of another, that other person who is interested in the subject matter of the insurance may have recourse against the insurer under the *Contracts (Rights of Third Parties) Act 1999*, cf. *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 C.L.R. 107 *High Court of Australia*. See also *Married Women's Property Act 1882* s.11 (as to an insurance taken out by a married spouse) and *Civil Partnership Act 2004* ss.70, 253 (as to an insurance taken out by a civil partner).
- 87 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E. & B. 870.
- 88 *Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451.

- 89 *Petrofina (UK) Ltd v Magnaload Ltd* [1984] Q.B. 127; *National Oil Well (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582, 608–612. For an application of this principle in the context of a shipbuilding contract, see *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep. 288 (although the actual decision was reversed on appeal, on the basis that, as a matter of construction, the sub-contractor was not intended to have the benefit of the insurance: [1992] 2 Lloyd's Rep. 578). See also *Hopewell Project Management Ltd v Ewbank Preece Ltd* [1998] 1 Lloyd's Rep. 448.
- 90 *Mark Rowlands Ltd v Berni Inns Ltd* [1986] Q.B. 211; *Lonsdale & Thompson Ltd v Black Arrow Group Plc* [1993] 2 W.L.R. 815; cf. *Talbot Underwriting Ltd v Nausch Hogan & Murray (The Jascon 5)* [2006] EWCA Civ 889, [2006] 2 Lloyd's Rep. 195.
- 91 See *Williams v Baltic Insurance Association of London* [1924] 2 K.B. 282; *Tattersall v Drysdale* [1935] 2 K.B. 174; and now Road Traffic Act 1988 s.148(7). See below, para.44-124.
- 92 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 El. & Bl. 870; *Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451. See, for example, *Newcastle Protection and Indemnity Association v V Ships (USA) Inc* [1996] 2 Lloyd's Rep. 515.
- 93 *North British v Moffat* (1871) L.R. 7 C.P. 25; *Engel v Lancashire and General* (1925) 41 T.L.R. 408.
- 94 *London and North Western Ry v Glyn* (1859) 1 El. & El. 652, 663. cf. *DG Finance Ltd v Scott* [1999] Lloyd's Rep. I.R. 387, 392.
- 95 *Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451, 473, 481.
- 96 *Donaldson v Manchester Insurance* (1836) 14 S. 601, Ct of Sess.; *Waters v Monarch Fire and Life Assurance Co* (1856) 5 El. & Bl. 870; *Cochran v Leckie's Trustee* (1906) 8 F. 975, Ct of Sess.
- 97 This means “entrusted”: *Waters v Monarch Fire and Life* (1856) 5 E. & B. 870; cf. *Lake v Simmons* [1927] A.C. 487; *Rigby (Haulage) v Reliance Marine* [1956] 2 Q.B. 468; *Ramco (UK) Ltd v International Insurance Co of Hannover Ltd* [2004] EWCA Civ 675, [2004] 2 Lloyd's Rep. 595 at [8].
- 98 *North British v Moffat* (1871) L.R. 7 C.P. 25; *Ramco (UK) Ltd v International Insurance Co of Hannover Ltd* [2004] EWCA Civ 675, [2004] 2 Lloyd's Rep. 595.
- 99 *Engel v Lancashire and General* (1925) 41 T.L.R. 408; *Ramco (UK) Ltd v International Insurance Co of Hannover Ltd* [2004] EWCA Civ 675, [2004] 2 Lloyd's Rep. 595.
- 100 *Boston Fruit Co v British & Foreign Marine Insurance Co* [1906] A.C. 336, 340–341; *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582, 596–597; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307.
- 101 *Samuel & Co Ltd v Dumas* [1924] A.C. 431; *General Accident Fire & Life Assurance Corp Ltd v Midland Bank Ltd* [1940] 2 K.B. 388, 404–406; *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24; *The State of the Netherlands v Youell* [1997] 2 Lloyd's Rep. 440; affirmed [1998] 1 Lloyd's Rep. 236; *Arab Bank Plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep. 262. cf. *DSG Ltd v QBE International Insurance Ltd* [1999] Lloyd's Rep. I.R. 283.

- Arab Bank Plc v Zurich Insurance Co* [1999] 1 *Lloyd's Rep.* 262; *Corbin & King v Ltd v AXA Insurance UK Plc* [2022] EWHC 409 (Comm), [2022] *Lloyd's Rep. I.R.* 299 at [230]–[237]. See also *Panzera v Simcoe & Erie Insurance Co*, 74 D.L.R. (4th) 197, 200 (1990), SC Canada. As regards the insurance of partnerships or corporate groups, see *Brit Syndicates Ltd v Grant Thornton International* [2008] UKHL 18; cf. *HLB Kidsons v Lloyd's Underwriters* [2007] EWHC 1951 (Comm), [2008] *Lloyd's Rep. I.R.* 237 at [80]–[97], [2008] EWCA Civ 1206, [2009] 1 *Lloyd's Rep.* 8, where the court construed a provision requiring notification by the “Assured” as not imposing an obligation on each individual insured where the claim was brought by a partnership.
- 103 *General Accident Fire & Life Assurance Corp Ltd v Midland Bank Ltd* [1940] 2 K.B. 388.
- 104 *The State of the Netherlands v Youell* [1997] 2 *Lloyd's Rep.* 440; affirmed [1998] 1 *Lloyd's Rep.* 236. See also *Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451; *Petrofina (UK) Ltd v Magnaload Ltd* [1983] 2 *Lloyd's Rep.* 91, 95–96.
- 105 See below, paras 44-022, 44-042.
- 106 *Dalgleish v Buchanan* (1854) 16 D. 332, *Ct of Sess.*; *Martineau v Kitching* (1872) L.R. 7 Q.B. 436; *Ferguson v Aberdeen*, 1916 S.C. 715. The assured cannot, of course, deduct for losses for which he was not covered: *Maurice v Goldsborough* [1939] A.C. 452.
- 107 *Holland v Smith* (1806) 6 Esp. 11; *Re Emmett Ex p. Andrews* (1816) 1 Mad. 573; *Sidaways v Todd* (1818) 2 Stark. 400; *Armitage v Winterbottom* (1840) 1 Man. & G. 130; *Lea v Hinton* (1854) 5 De G.M. & G. 823.
- 108 *DG Finance Ltd v Scott* [1999] *Lloyd's Rep. I.R.* 387, 392. In this case, the Court of Appeal held that the others whose interests were insured had no right to proceed directly against the insurer. However, the position might now be different under the Contracts (Rights of Third Parties) Act 1999. cf. *Cochran v Leckie's Trustee* (1906) 8 F. 975, *Ct of Sess.*; cf. *Vandepitte v Preferred Accident* [1933] A.C. 70, 79. If the insurance covers only the interest of the assured, others have no rights over the insurance money in law or equity: *Re Law Guarantee Trust* [1915] 1 Ch. 340; *Re Harrington Motor* [1928] Ch. 105. cf. *Foskett v McKeown* [1998] 2 W.L.R. 298 (rights of beneficiaries to policy proceeds where trustee without authority uses trust funds in payment of premium). Statutory provisions now protect third parties in liability and motor insurance cases. See below, paras 44-122—44-124.
- 109 *Anctil v Manufacturer's Life* [1899] A.C. 604; *Gedge v Royal Exchange* [1900] 2 Q.B. 214. cf. *Smith v Ralph* [1963] 2 *Lloyd's Rep.* 439.
- 110 The Gaming Act 1845, which had been applicable to contracts purportedly of insurance and had rendered contracts entered into by way of gaming or wagering, was repealed by ss.334 and 356 of and Sch.17 to the Gambling Act 2005, which entered into force on 1 September 2007 (SI 2006/3272).
- 111 Life Assurance Act 1774 s.4. A motor policy containing, inter alia, third-party liability cover has been held to be an insurance on goods: *Williams v Baltic Insurance Association of London* [1924] 2 K.B. 282; and so has an insurance against loss of money: *Prudential Staff Union v Hall* [1947] K.B. 282.
- 112 *Mark Rowlands Ltd v Berni Inns Ltd* [1985] Q.B. 211 (limiting the Act to insurances which provide for the payment of a specified sum upon the happening of an insured event). The view of the Court of Appeal in the *Mark Rowlands* case to the effect that the Act was not

- intended to apply to indemnity insurance was expressly approved by the Privy Council in *Siu v Eastern Insurance Co Ltd* [1994] 2 A.C. 199. See *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693.
- 113 *Fuji Finance Inc v Aetna Life Insurance Co Ltd* [1997] Ch. 173, CA, holding that it was enough that a benefit was payable on an event which was sufficiently life or death related (as was the case here, since the policy came to an end on the death of the person, and the right to surrender was related to the continuance of life). Furthermore, even were it necessary for the benefit payable upon surrender to be different from the benefit upon death, the Court of Appeal saw no reason why the difference had to arise from the description or formula adopted for the purpose of fixing the benefit payable. It was sufficient that, given market fluctuations, in practice it was almost inevitable that the benefit payable on death would be different from the value payable on surrender (which would, itself, vary according to when surrender occurred).
- 114 s.1. For the purposes of s.1, the fact that some of the persons who are the subject of the insurance were not identifiable at the inception of the cover and might change over the period of the cover did not affect the insurable interest of the mutual insurer who had promised to indemnify the shipowner in respect of crew on board his vessels; *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm), [2002] All E.R. (Comm) 492; affirmed [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693. For the time when the interest is required, see below, para.44-017. Married Women's Property Act 1882 s.11 provides that a married woman may take out a policy on her own life or on the life of her husband. Civil Partnership Act 2004 s.253 provides that a civil partner has an interest in the life of the other civil partner for the purposes of the Life Assurance Act 1774 s.1. See also Civil Partnership Act 2004 s.70.
- 115 *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693. *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [145].
- 116 *Roebuck v Hammerton* (1778) 2 Cowp. 737; *Good v Elliott* (1790) 3 T.R. 693, 706; *Paterson v Powell* (1832) 9 Bing. 320, 328.
- 117 See above, para.44-001.
- 118 *Hodson v Observer Life* (1857) 8 El. & Bl. 40; *Evans v Bignold* (1869) L.R. 4 Q.B. 622. Insurance Companies Amendment Act 1973 s.50 provides that s.2 of the 1774 Act does not invalidate a policy for the benefit of unnamed persons from time-to-time falling within a specified class if the class is stated with sufficient particularity so that the identity of all persons within the class can be established. In *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693, the Court of Appeal applied a similar consideration in holding that the mere fact that the lives insured were identified by a class and not by name did not mean that the policy was invalidated by s.1 of the 1774 Act.
- 119 *M'Farlane v Royal London Friendly Society* (1886) 2 T.L.R. 755.
- 120 *Collett v Morrison* (1851) 9 Hare 162.
- 121 *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693.
- 122 Such as when a creditor takes out a policy on the life of his debtor: Clarke, The Law of Insurance Contracts (looseleaf), para.3-2; cf. *Fuji Finance Inc v Aetna Life Insurance Co Ltd* [1997] Ch. 173, CA (investment account policy). The purpose of s.3 is to outlaw gaming:

Feasey v Sun Life Assurance Co of Canada [2002] EWHC 868 (Comm), [2002] 2 All E.R. (Comm), 492; affirmed [2002] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693. This purpose may have to be readdressed in light of the [Gambling Act 2005](#). See below, para.44-016.

123 See s.1.

124 s.4. The parties to such a contract may be subject to criminal penalties: [Marine Insurance \(Gambling Policies\) Act 1909](#).

125 *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693; *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [145].

126 SI 2006/3272.

127 ss.334 and 356 and Sch.17.

128 Or indeed the [Marine Insurance \(Gambling Policies\) Act 1909](#).

129 See [Marine Insurance Act 1906](#) s.4(2)(a); MacGillivray on Insurance Law, 15th edn (2022), para.1-027, 1-039.

130 cf. *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693 at [53].

131 See also above, para.43-009.

132 ss.3 and 9.

133 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) arts 3, 4, 10, 64, 75 and Sch.1.

134 See above, para.44-003.

135 *Anderson v Morice* (1876) 1 App. Cas. 713. Apart from the statutory provision considered below, interest at any other time appears to be unnecessary: *Williams v Baltic* [1924] 2 K.B. 282, 291.

136 *Sutherland v Pratt* (1943) 11 M. & W. 296. cf. [Marine Insurance Act 1906](#) s.6(1), and see below, para.44-024.

137 It may be that the loss is sustained by the assured when he acquires his insurable interest by the fortuitous appropriation of damaged goods. See *Wünsche Handelsgesellschaft International mbH v Tai Ping Insurance Co Ltd* [1998] 2 Lloyd's Rep. 8, where it was also held that goods which were missing could not be appropriated to the contract.

138 See above, para.44-014.

139 *Dalby v India and London Life* (1854) 15 C.B. 365. This was a case of life insurance, but there seems to be no reason why the same reasoning should not apply to other policies covered by the Act. See also *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm), [2002] 2 All E.R. (Comm) 492; affirmed [2003] EWCA Civ 885, [2003] Lloyd's Rep. I.R. 693.

140 See above, para.44-014.

141 *Dalby v India and London Life* (1854) 15 C.B. 365.

142 *Barnes v London, Edinburgh and Glasgow Life* [1892] 1 Q.B. 864, 867. cf. *Griffiths v Fleming* [1909] 1 K.B. 805, 810.

Section 3. - The Event Insured Against

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 3. - The Event Insured Against

Event insured against

- 44-018 An insurer undertakes to pay money upon the happening of the event

U

U or events stipulated in the contract. The nature of the event, the time and place of its occurrence and the nature of the loss suffered (in indemnity insurance) must be within the scope of the contractual definition.

Footnotes

- ① 143 The word “event” here refers to the “peril” insured against. In many policies, the word “event” may be used to refer to the originating cause of the peril. This, however, is not necessarily so, being a matter of construction of the contract. As to the meaning of the words “event”, “occurrence”, “cause” and “claim”, see *Kuwait Airways Corp v Kuwait Insurance Co SAK [1996] 1 Lloyd's Rep. 664, 686, QB, [1997] 2 Lloyd's Rep. 687, CA, [1999] 1 Lloyd's Rep. 803, HL. Caudle v Sharp [1995] L.R.L.R. 433; Cox v Bankside Members' Agency Ltd [1996] 1 Lloyd's Rep. 26; AXA Reinsurance (UK) Plc v Field [1996] 1 W.L.R. 1026; Municipal Mutual Insurance Ltd v Sea Insurance Co [1998] C.L.C. 957; Brown v GIO Insurance Ltd [1998] Lloyd's Rep. I.R. 201; Roberts Irving & Burns v Stone [1998] Lloyd's Rep. I.R. 258; Spire Healthcare Ltd v Royal & Sun Alliance Insurance Plc [2016] EWHC 3278 (Comm), [2017] Lloyd's Rep. I.R. 118, [2018] EWCA Civ 317, [2018] Lloyd's Rep. I.R. 425; Spire Healthcare Ltd v Royal & Sun Alliance Insurance Plc [2022] EWCA Civ 17, [2022] Lloyd's Rep. I.R. 130; Rawson Homes Pty Ltd v Allianz Australia Insurance*

Ltd [2020] NSWSC 1654. In *Simmonds v Gammell [2016] EWHC 2515 (Comm), [2016] 2 Lloyd's Rep. 631* at [22]–[27], Sir Jeremy Cooke confirmed that in identifying an aggregating “event”, it should be appropriate to the aggregating function, it should be a common factor which could properly be described as an event, and it should be causative of the losses claimed under the policy, which need not be proximate, but must not be too remote. Such words often define the application of monetary limits or excess or deductible clauses and must be construed having regard to the policy as a whole and applied having regard to the degree of unity of time, cause and location: *Mann v Lexington Insurance Co [2001] 1 Lloyd's Rep. 1*. See also *Aioi Nissay Dowa Insurance Co Ltd v Heraldglen Ltd [2013] EWHC 154 (Comm), [2013] 2 All E.R. 231*, where it was held that losses arising on a reinsurance contract in respect of liabilities incurred by reason of the attacks on the World Trade Center in September 2001 arose out of two events, not one. The words “related series of acts or omissions” have been interpreted to embrace several losses having a common causal relationship, meaning that the acts or events together resulted in each of the claims; the fact that claims might have the same underlying cause and were of a very similar nature was not sufficient to constitute a “related series” in *Lloyd's TSB General Insurance Holdings v Lloyds Bank Group Insurance Co Ltd [2003] UKHL 48, [2003] Lloyd's Rep. I.R. 623* at [27]–[29], [51]. See also *AIG Europe Ltd v Woodman [2017] UKSC 18, [2017] 1 W.L.R. 1168*; *Moore v IAG New Zealand Ltd [2020] NZCA 319*. cf. *Bank of Queensland Ltd v AIG Australia Ltd [2019] NSWCA 190, [2019] Lloyd's Rep. I.R. 639* (NSWCA); *Lord Bishop of Leeds v Dixon Coles & Gill [2021] EWCA Civ 1211; [2021] Lloyd's Rep. I.R. 410*.

(a) - The Nature of the Event

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 3. - The Event Insured Against

(a) - The Nature of the Event

Nature of event

- 44-019 In construing contracts of insurance the courts apply four principles which have the effect of excluding the insurer's liability on the occurrence of particular events, even though such events *prima facie* may appear to fall within the contractual definition. These principles relate to uncertainty, inherent vice, wilful misconduct and public policy.

Uncertainty

- 44-020 Contracts of insurance are construed to cover events which are uncertain either as to their occurrence or as to the time of the occurrence.¹⁴⁴ Losses occasioned to the subject matter in the ordinary course of affairs,¹⁴⁵ such as ordinary depreciation and wear and tear,¹⁴⁶ do not therefore entitle the assured to recover unless an express stipulation enables him to do so, and simply to insure against "all risks" is not enough.¹⁴⁷ The courts consider that it is extremely unlikely that an insurance contract will indemnify the assured against a loss or a peril, which is inevitable, that is which is not fortuitous.¹⁴⁸ Fortuity is to be determined at the time of the making of the contract or, possibly, the inception of the risk.

Inherent vice

- 44-021

Contracts of insurance are construed to cover losses arising from events that impinge upon the subject matter, and not those that arise from its very nature and condition. Losses arising from such an internal cause, termed “inherent vice”, will not be covered¹⁴⁹ unless there is an express stipulation to that effect,¹⁵⁰ and again an insurance against “all risks” is not enough.¹⁵¹ “Inherent vice” refers to the risk of deterioration of the subject matter insured as a result of its natural behaviour or the inability of the subject matter insured to withstand the ordinary incidents of carriage or ordinary use without the involvement of an external fortuitous event.¹⁵² Of course, certain types of insurance by their nature cover instances of inherent vice, notwithstanding this general principle of construction. Life insurance, for example, covers death from disease and senility as well as from accident.¹⁵³ Similarly, an insurance against loss caused by latent defects is regarded as cover for inherent vice.¹⁵⁴

Wilful misconduct

- 44-022 Contracts of insurance are construed as protecting the assured against misfortune, and not against his own wilful misconduct. If the assured himself intentionally and without justification¹⁵⁵ brings about the event insured against, then in the absence of express provision he will not be entitled to recover.¹⁵⁶ If the assured’s deliberate act was itself the product of insanity, so that it could be said that the assured was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know that what he was doing was wrong, the assured would not be disabled from recovering under the policy.¹⁵⁷ The disability from recovering is confined to the assured¹⁵⁸ whose wilful misconduct (or that of a third party procured or connived at by the assured) caused the loss.¹⁵⁹ Another assured with a separate interest in the same subject matter may recover to the extent of his interest,¹⁶⁰ and loss caused by the wilful misconduct of third parties not procured or connived at by the assured is not within this rule,¹⁶¹ though loss through intentional acts of third parties may not be within the scope of the cover granted.¹⁶² Except in the case of marine insurance,¹⁶³ losses caused by the wilful misconduct of the assured may be covered by express stipulation or necessary implication. In such cases, the assured or his estate may recover¹⁶⁴ unless the misconduct is of such a kind that it would be contrary to public policy to allow this to happen.¹⁶⁵ Losses caused by the negligence of the assured do not fall within the principles discussed in this paragraph¹⁶⁶; but the assured’s conduct may be so reckless as to be regarded as wilful,¹⁶⁷ or considerations of public policy may arise so as to disentitle recovery even in the absence of any deliberate intention to cause loss.¹⁶⁸

Public policy

- 44-023 The assured will not be entitled to recover upon the occurrence of an event if it would be contrary to public policy to allow him to do so.

169

U Considerations of public policy are difficult to define, but it is clear that a person will not normally be permitted to recover, or be indemnified, under an insurance policy if to do so would allow him to benefit, directly or indirectly, from his own deliberate criminal conduct.

170

U Nor may a person enforce an insurance to indemnify him against a fine or other punishment imposed for committing a criminal offence, at least where the offence was committed deliberately or the assured's conduct is sufficiently anti-social.

171

U Similarly, a contract to indemnify a person against the consequences of an intentional and manifestly serious civil wrong or tort is void or at least unenforceable.

172

U Therefore, an assured who is liable to a third party by reason of his deceit could not recover under a contract of insurance against his legal liability.

173

U On the other hand, not all torts, even if committed deliberately, are unindemnifiable. The prohibition will depend on the seriousness of the act, whether it was committed intentionally and the anti-social nature of the act.

174

U There must be turpitude and a sufficient degree of causation between the illegality and the claim under the policy before the assured will be disabled from pursuing a claim under an insurance contract by reason of illegality.

175

U The position is more difficult where recovery is sought in respect of a loss which has been caused unintentionally in the course of committing a criminal offence, since much may turn upon an assessment of the competing policy considerations at stake, but it is clear that there are at least some circumstances in which an assured will be denied recovery even though the loss was not caused on purpose.

176

U It is not contrary to public policy for an employer to recover under a contract of insurance in respect of his vicarious liability to pay damages in respect of the oppressive or unlawful acts of his servants or agents.

177

U Unlike the first three principles discussed above, moreover, public policy considerations will override even express stipulations providing for cover against the forbidden event.

178

U Save where an insurance policy is entirely void, however (as being illegal from the outset, or prohibited by statute), the inability of an original assured to recover under the policy on account of his unlawful conduct will not necessarily prevent third parties from enforcing the policy themselves,

179

U provided of course that the loss falls within the scope of the insurance cover. This is because the assured's inability to recover on the grounds of public policy is a personal disability.

180

U However, where the third party stands in the shoes of the assured under the [Third Parties \(Rights against Insurers\) Act 1930](#) or the [Third Parties \(Rights against Insurers\) Act 2010](#),

181

U public policy will defeat any claim made by that third party if the claim arises out of the assured's criminal conduct.

182

U The principles of public policy as they apply to insurance contracts have been cast into some doubt by the recent decision of the majority of the Supreme Court in [Patel v Mirza](#),

183

U where it was held that a claim will not be enforced if it is contrary to the public interest, meaning that it would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality). The Supreme Court decided not to follow the reliance test adopted by the House of Lords in [Tinsley v Milligan](#).

184



Footnotes

144 The requirement of a fortuity will often be found to exist, even if the language of the policy does not expressly require it: see e.g. [CA Blackwell \(Contracts\) Ltd v Gerling General](#)

- Insurance Co [2007] EWHC 94 (Comm), [2007] Lloyd's Rep. I.R. 511* at [42]–[43]. See above, para.44-001; *Bennett [2007] L.M.C.L.Q. 315.*
- 145 *The Xantho (1887) 12 App. Cas. 503, 509.* See also *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila) [1997] 2 Lloyd's Rep. 146.*
- 146 The policy may contain exclusions against specific types of wear and tear, e.g. corrosion, condensation, and if so it may be interpreted as excluding only that corrosion or condensation which would arise in any event: *Manchikalapati v Zurich Insurance Plc [2019] EWCA Civ 2163, [2020] Lloyd's Rep. I.R. 77* at [175].
- 147 *British & Foreign Marine Insurance Co Ltd v Gaunt [1921] 2 A.C. 41.* cf. *Harris v Poland [1941] 1 K.B. 462.* An event may be fortuitous even if it is foreseeable: *CA Blackwell (Contracts) Ltd v Gerling General Insurance Co [2007] EWHC 94 (Comm), [2007] Lloyd's Rep. I.R. 511* at [44]–[48]; *Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd [2006] SGCA 28, [2007] 1 Lloyd's Rep. 66* at [56] Singapore Court of Appeal. In *Quock Kwee Kee v American International Assurance Co Ltd [2016] SGHC 47, [2016] Lloyd's Rep. I.R. 660* at [42]–[54], the Singapore High Court confirmed that the unexpected consequences of a voluntary act may constitute an “accident” under an insurance contract, i.e. a fortuity. See also *Leeds Beckett University v Travelers Insurance Co Ltd [2017] EWHC 558 (TCC), [2017] Lloyd's Rep. I.R. 417* at [199]–[208].
- 148 *British & Foreign Marine Insurance Co Ltd v Gaunt [1921] 2 A.C. 41* at 52, 57. In *Soya GmbH v White [1982] 1 Lloyd's Rep. 136, 149; affirmed on other grounds [1983] 1 Lloyd's Rep. 122,* Donaldson LJ stated that it was “highly improbable” that the parties would insure an inevitability, but preferred to use the term “known certainty”, rather than “inevitability”, because it was commonly the case that inevitabilities were insured. It is suggested that this approach to construction should apply to all inevitabilities, known or unknown. The fundamental nature of insurance contracts is that they insure risks, not certainties. See also *Leeds Beckett University v Travelers Insurance Co Ltd [2017] EWHC 558 (TCC), [2017] Lloyd's Rep. I.R. 417* at [199]–[208]. Donaldson LJ referred to the fact that overdue ships or cargoes can be insured, notwithstanding that the loss might already have occurred. However, such marine losses which have already occurred will only be insured if the vessel or cargo is insured “lost or not lost”: see s.6(1), r.1, Sch.1 to the Marine Insurance Act 1906.
- 149 *Taylor v Dunbar (1869) L.R. 4 C.P. 206; Pink v Fleming (1890) 25 Q.B.D. 396; Wadsworth Lighterage v Sea Insurance (1929) 35 Com. Cas. 1; British & Foreign Marine Insurance Co Ltd v Gaunt [1921] 2 A.C. 41;* Marine Insurance Act 1906 s.55(2)(c).
- 150 See the illustrations considered by Sellers J in *Berk v Style [1956] 1 Q.B. 180; Overseas Commodities v Style [1958] 1 Lloyd's Rep. 546.*
- 151 See above, para.44-020.
- 152 *Soya GmbH v White [1983] 1 Lloyd's Rep. 122, 126; Noten BV v Harding [1990] 2 Lloyd's Rep. 283; Global Process Systems Inc v Syarikat Takaful Malaysia Berhad [2009] EWCA Civ 1398, [2010] Lloyd's Rep. I.R. 221, [2011] UKSC 5, [2011] Lloyd's Rep. I.R. 302* (disapproving *Mayban General Insurance BHD v Alstom Power Plants Ltd [2004] EWHC 1038 (Comm), [2004] 2 Lloyd's Rep. 609*). In *Global Process Systems*, the Supreme Court held that a loss will be caused by an inherent vice, where the inherent vice is the sole cause of the loss. In *TKC London Ltd v Allianz Insurance Plc [2020] EWHC 2710 (Comm), [2020]*

- Lloyd's Rep. I.R. 631* at [114], the Court said that “the word “accidental” is not … apt to include the natural process of the decay or deterioration”.
- 153 Though conversely an accident policy does not cover death by natural disease: *Winspear v Accident Insurance* (1880) 6 Q.B.D. 42; *Isitt v Railway Passengers'* (1889) 22 Q.B.D. 504.
- 154 *The Caribbean Sea* [1980] 1 Lloyd's Rep. 338, 347.
- 155 *Gordon v Rimmington* (1807) 1 Camp. 123; *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582 at 622 (as to meaning of “misconduct”). cf. *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes)* [1977] 1 Q.B. 49; *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2001] 2 W.L.R. 170 concerning the assured’s “privity” under Marine Insurance Act 1906 s.39(5). See also *Genesisuk.net Ltd v Allianz Insurance Ltd* [2014] EWHC 3676 (QB) at [20]–[21].
- 156 *Thurtell v Beaumont* (1823) 1 Bing. 339; *Beresford v Royal* [1938] A.C. 586, 595; *Yorkshire Dale SS Co v Minister of War Transport* [1942] A.C. 691, 704. Marine Insurance Act 1906 s.55(2)(a) does not permit the policy to allow an assured to recover in respect of his own wilful misconduct: *The State of the Netherlands v Youell* [1997] 2 Lloyd's Rep. 440; affirmed [1998] 1 Lloyd's Rep. 236.
- 157 *Porter v Zurich Insurance Co* [2009] EWHC 376 (QB), [2010] Lloyd's Rep. I.R. 373 at [17]–[24].
- 158 And his assigns. cf. *British Equitable v GWR* (1869) 48 L.J. Ch. 314. As to whose acts are to be attributed to the assured in respect of a clause excluding from cover the assured’s deliberate acts, see, *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582 at 620–621; *KR v Royal & Sun Alliance Plc* [2006] EWCA Civ 1454, [2007] Lloyd's Rep. I.R. 368.
- 159 *Midland Insurance v Smith* (1881) 6 Q.B.D. 561; *Samuel v Dumas* [1924] A.C. 431; see also *Rankin v North Waterloo Farmers Mutual Insurance Co* (1979) 25 O.R. (2d) 102 Can.
- 160 Provided he is innocent and so long as his recovery would not necessarily benefit the wrongdoer: *Samuel v Dumas* [1924] A.C. 431; *Central Bank of India v Guardian Assurance* (1936) 54 Ll.L. Rep. 247; *Lombard Australia v NRMA Insurance* [1969] 1 Lloyd's Rep. 575. See also *The State of the Netherlands v Youell* [1997] 2 Lloyd's Rep. 440; affirmed [1998] 1 Lloyd's Rep. 236. See above, para.44-011. cf. *Bains v Yorkshire Insurance*, 38 D.L.R. (2d) 417 (1963); and compare the position as regards fraudulent claims. See below, para.44-098.
- 161 *Shaw v Robberds* (1837) 6 Ad. & El. 75, 84; *Midland Insurance v Smith* (1881) 6 Q.B.D. 561 (assured’s wife); *Letts v Excess Insurance* (1916) 32 T.L.R. 361 (stranger); *Lind v Mitchell* (1928) 45 T.L.R. 54, 56 (assured’s servants). See also, *Schiffshypothenbank zu Luebeck v Compton (The Alexion Hope)* [1988] 1 Lloyd's Rep. 311.
- 162 e.g. insurance against “collapse” of a building would not cover intentional demolition: *Allen Billposting v Drysdale* [1939] 4 All E.R. 113.
- 163 Marine Insurance Act 1906 s.55(2)(a); *The State of the Netherlands v Youell* [1997] 2 Lloyd's Rep. 440; affirmed [1998] 1 Lloyd's Rep. 236.
- 164 *Moore v Woolsey* (1854) 4 E. & B. 243; *Beresford v Royal* [1938] A.C. 586, 600.
- 165 See below, para.44-023.

- 166 *Austin v Drewe* (1815) 4 Camp. 360, 362; *Busk v Royal Exchange* (1818) 2 B. & Ald. 73; *Cornish v Accident Insurance* (1889) 23 Q.B.D. 453; *Cole v Accident Insurance* (1889) 5 T.L.R. 736; *Trinder v Thames and Mersey Marine* [1898] 2 Q.B. 114; *Harris v Poland* [1914] 1 K.B. 462; *Yorkshire Dale SS Co v Minister of War Transport* [1942] A.C. 691, 704; *Walters v Whessoe and Shell Refining Co* (1960) 6 B.L.R. 23, 30; *Global Tankers Inc v Amercoat Europa NV (The Diane)* [1977] 1 Lloyd's Rep. 61, 66; *Marcel Beller Ltd v Hayden* [1978] 1 Q.B. 694; and see also *Pentagon Construction* (1969) *Co Ltd v United States Fidelity & Guarantee Co* [1978] 1 Lloyd's Rep. 93. cf. *Marine Insurance Act* 1906 s.55(2)(a).
- 167 See, e.g. *Pipon v Cope* (1808) 1 Camp. 434; as explained in *Trinder v Thames and Mersey Marine* [1898] 2 Q.B. 114, per Collins LJ at 129. cf. *Mutual of Omaha Insurance Co v Stats*, 87 D.L.R. (3d) 169 (1978) Can; *CNA Assurance Co v MacIsaac*, 102 D.L.R. (3d) 160 (1979) Can; and also the approach in *Gray v Barr* [1971] 2 Q.B. 554, 567, 580 and 587. See also *Dhak v Insurance Co of North America (UK) Ltd* [1996] 1 W.L.R. 936 where it was held, in the context of a personal accident policy which covered bodily injury “caused by accidental means”, that bodily injury which was the natural and direct consequence of a course of conduct embarked upon by an assured taking a calculated risk (in this case, excessive alcohol consumption) was not covered by the policy. In *Patrick v Royal London Mutual Insurance Society Ltd* [2006] EWCA Civ 421, [2007] Lloyd's Rep. I.R. 85, the Court of Appeal considered a policy provision which excluded claims arising from “any wilful, malicious or criminal acts” and held that the insured will have acted wilfully if he was reckless as to the consequences of his act, i.e. if he does something knowing that it is risky or not caring whether it is risky or not. However, in *Burnett v International Insurance Co of Hanover Ltd* [2021] UKSC 12, [2021] 1 W.L.R. 2465, in the context of a public liability insurance policy, the Supreme Court held that an exclusion in respect of an employee’s “deliberate acts” did not extend to acts of recklessness, as that involved a different state of mind.
- 168 See below, para.44-023.
- ①169 As to illegality and public policy in the context of a marine war risks policy and the payment of ransom to recover detained property, see *Royal Boskalis Westminster NV v Mountain* [1997] 2 All E.R. 929; *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 24, [2011] 1 Lloyd's Rep. 630. For the effect of public policy/illegality on contracts in general, see Vol.I, Ch.18.
- ①170 *Amicable Assurance v Bolland* (1830) 4 Bli.(N.S.) 194; *Beresford v Royal* [1938] A.C. 586; *Euro-Diam Ltd v Bathurst* [1988] 2 W.L.R. 517, 526. Thus, for example, an assured is precluded from recovery under his policy for the theft of his goods if he has evaded paying import duty on them (*Geismar v Sun Alliance & London Ltd* [1978] Q.B. 383); and a beneficiary under a life policy is precluded from benefiting from the policy if he murders the assured (*Cleaver v Mutual Reserve* [1892] 1 Q.B. 147; *Davitt v Titcomb* [1990] Ch. 110). At common law, the same rule probably applies for manslaughter (see *Re Hall* [1914] P. 1); but see now the *Forfeiture Act 1982*, which gives the court general discretion to permit a person who has unlawfully killed another to receive the benefits of, inter alia, that other’s life

assurance policy. (*Re K (deceased)* [1986] Ch. 180; *Dunbar v Plant* [1997] 4 All E.R. 289.) The Act, however, does not apply to murder: see s.5. Where the assured is insane within the M'Naghten rules, he may not have the requisite state of mind to debar him from his claim on the grounds of deliberate misconduct: *Porter v Zurich Insurance Co* [2009] EWHC 376 (QB), [2010] *Lloyd's Rep.* I.R. 373.

- ①171 See *Askey v Golden Wine Co* [1948] 2 All E.R. 35; cf. *Osman v J Ralph Moss Ltd* [1970] 1 *Lloyd's Rep.* 313; *Charlton v Fisher* [2001] EWCA Civ 112, [2002] Q.B. 578 at [58], [60]. Such insurances which are contrary to public policy are totally void: *Haseldine v Hosken* [1933] 1 K.B. 822, 837. Public policy is unlikely to defeat a recovery where the insurance is compulsorily required by law (such as motor insurance): *Lancashire CC v Municipal Mutual Insurance Ltd* [1996] 3 All E.R. 545, 554. See *Bristol Alliance Ltd Partnership v Williams* [2011] EWHC 1657 (QB), [2012] R.T.R. 9.
- ①172 *Burrows v Rhodes* [1899] 1 Q.B. 816, 828; *Haseldine v Hosken* [1933] 1 K.B. 822. A claim for an indemnity under an insurance policy will be defeated where the loss sustained is sufficiently caused by the illegal or tortious conduct: *Delaney v Pickett* [2011] EWCA Civ 1532, [31]–[37], [60], [73].
- ①173 It is an open question whether a contract to indemnify a person against the consequences of his libelling of another is enforceable at common law (see MacGillivray on Insurance Law, 15th edn (2022), para.28–010). However, under the *Defamation Act 1952* s.11, such a contract is not “unlawful unless at the time of the publication that person knows that the matter is defamatory and does not reasonably believe there is a good defence to any action brought upon it”. The implication is that an intentional defamation cannot be indemnified.
- ①174 *Hardy v Motor Insurers' Bureau* [1964] 2 Q.B. 745, 767–770. In *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] A.C. 430 at [23]–[29], the Supreme Court said that generally the conduct should be criminal or quasi-criminal before public policy might be engaged. See also *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm), [2010] Bus. L.R. 974; [2010] EWCA Civ 1472, [2011] 1 *Lloyd's Rep.* 462.
- ①175 *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] A.C. 1339 at [27]–[30], [51]–[54]; *Delaney v Pickett* [2011] EWCA Civ 1532, [2013] *Lloyd's Rep.* I.R. 24 at [34]–[37]; *Les Laboratoires Servier v Apotex Inc* [2012] EWCA Civ 593, [2013] Bus. L.R. 80 at [77]–[78], [2014] UKSC 55, [2015] A.C. 430 at [22]–[29]; *Sea Glory Maritime Co v Al Sagr National Insurance Co* [2013] EWHC 2116 (Comm), [2014] 1 *Lloyd's Rep.* 14 at [303].
- ①176 See *Gray v Barr* [1971] 2 Q.B. 554, where an insured was denied any indemnity under his third-party “hearth and home” policy because (inter alia) the death he had unintentionally caused arose whilst threatening another with a gun (although acquitted of murder and manslaughter); but cf. *Tinline v White Cross Insurance* [1921] 3 K.B. 327; and *James v British General* [1927] 2 K.B. 311 (both approved in *Gray v Barr*), where assureds were

not precluded from recovering under motor policies which included third-party risks, even though convicted of manslaughter in respect of the deaths caused by their driving. See also *Charlton v Fisher* [2001] EWCA Civ 112, [2002] Q.B. 578 at [58], [60].

- ①177 *Lancashire CC v Municipal Mutual Insurance Ltd* [1996] 3 All E.R. 545, holding that there was nothing contrary to public policy per se in an insurance which, amongst other things, covered the vicarious liability of a chief constable to pay exemplary damages for wrongful arrest, malicious prosecution, and false imprisonment.

- ①178 *Beresford v Royal* [1938] A.C. 586. The abolition of the crime of suicide in 1961 might well produce a different decision on the same facts today, although in the absence of a stipulation covering suicide, the insurance would still be unenforceable since the event would have resulted from the wilful act of the assured: see above, para.44-022.

- ①179 Thus, assignees of a life insurance policy may be able to sue on the policy (*Moore v Woolsey* (1854) 4 El. & Bl. 243), at least if they provided valuable consideration for the assignment (see *Beresford v Royal* [1938] A.C. 586, 601, 605); and a person who is deliberately run down or injured by a motorist is not deprived of his statutory right against the motorist's insurer (as to which, see below, para.44-124) by virtue of the motorist's unlawful conduct: see *Hardy v Motor Insurer's Bureau* [1964] 2 Q.B. 745; *Gardner v Moore* [1984] A.C. 548 (both cases arising in the context of the Motor Insurers' Bureau scheme). See also *Total Graphics Ltd v AGF Insurance Ltd* [1997] 1 Lloyd's Rep. 599, 606; cf. *Charlton v Fisher* [2001] EWCA Civ 112, [2002] Q.B. 578; *Bristol Alliance Ltd Partnership v Williams* [2011] EWHC 1657 (QB), [2012] R.T.R. 9.

- ①180 *Total Graphics Ltd v AGF Insurance Ltd* [1997] 1 Lloyd's Rep. 599, 606.

- ①181 See, below, para.44-122.

- ①182 *Charlton v Fisher* [2001] EWCA Civ 112, [2002] Q.B. 578.

- ①183 [2016] UKSC 42, [2016] 3 W.L.R. 399 at [101], [120], [174], [186]. This decision was explained further in *Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, [2020] 3 W.L.R. 1124 and *Stoffel v Grondona* [2020] UKSC 42, [2020] 3 W.L.R. 1156.

- ①184 [1994] 1 A.C. 340. See above, paras 18-025 et seq.

(b) - The Time of the Event

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 3. - The Event Insured Against

(b) - The Time of the Event

The period of cover

- 44-024 Contracts of insurance may stipulate the time when the cover begins and ends but difficulties may arise in deciding whether the commencement or the termination dates stated in the contract are included in the period of cover. In accordance with ordinary rules of construction the courts seek to determine the intention of the parties from the terms of their contract but it seems that in cases of doubt the question is likely to be decided in favour of the assured.¹⁸⁵ Certain rules of construction should be noted. First, unless otherwise stipulated, “month” means calendar month.¹⁸⁶ Secondly, a person becomes over N years of age on reaching his Nth birthday.¹⁸⁷ Thirdly, a period “from”¹⁸⁸ or “after”¹⁸⁹ a named day excludes that day, and a period “until” a named day includes that day.¹⁹⁰ Lastly, in the absence of provisions to the contrary, an insurance contract does not apply retrospectively.¹⁹¹

Event and loss during period of cover

- 44-025 Subject to the terms of the policy, the event insured against must happen during the period of the insurance¹⁹² and (in indemnity insurance¹⁹³) the loss resulting from that event must, it seems, also occur in that period,¹⁹⁴ though it is immaterial that the full extent of the loss is not known or made manifest until later,¹⁹⁵ and generally, of course, the event and the loss coincide. Insurances against liabilities to third parties¹⁹⁶ are usually construed as contracts indemnifying against the incurring of a liability and not the discharge of that liability, so that only the facts giving rise to a

liability¹⁹⁷ or the making of a claim against the assured¹⁹⁸ need occur during the period. Those facts may be equated with the insured peril.¹⁹⁹ The loss arising from those facts, namely a liability established by judgment, award or agreement, may not arise for a considerable period after the insured peril. Accordingly, in the case of liability insurance, it is the facts underlying the liability or the making of a claim against the assured, or the notification of a circumstance which might give rise to a claim, and not the establishment of that liability, which generally must occur during the relevant period, subject to the terms of the policy.

Footnotes

185 *Re North* [1895] 2 Q.B. 264, 270.

186 Law of Property Act 1925 s.61(a).

187 *Lloyds Bank v Eagle Star* [1951] 1 T.L.R. 803.

188 *South Staffordshire Tramways v Sickness and Accident* [1891] 1 Q.B. 402. cf. *Cartwright v MacCormack* [1963] 1 W.L.R. 18 (cover note).

189 *Lester v Garland* (1808) 15 Ves. Jr. 248.

190 *Isaacs v Royal* (1870) L.R. 5 Ex. 296; *Hirdes GmbH v Edmund* [1991] 2 Lloyd's Rep. 546. Whether this third "rule" is inflexible may perhaps be doubted: see *Re North* [1895] 2 Q.B. 264.

191 *Pritchard v Merchants' Life* (1858) 3 C.B.(N.S.) 622; *Oceanic SS Co v Faber* (1907) 23 T.L.R. 673; *Marine Insurance v Grimmer* [1944] 2 All E.R. 197; *Reinhart v Joshua Hoyle* [1961] 1 Lloyd's Rep. 346. For a recent example of retrospective cover, see *Wünsche Handelsgesellschaft International mbH v Tai Ping Insurance Co Ltd* [1998] 2 Lloyd's Rep. 8.

192 *Buchanan v Faber* (1899) 4 Com. Cas. 223; *Oceanic v Faber* (1907) 23 T.L.R. 673; *Hutchins Brothers v Royal Exchange* [1911] 2 K.B. 398; *Reinhart v Joshua Hoyle* [1961] 1 Lloyd's Rep. 346; *Kelly v Norwich Union Fire Insurance Society Ltd* [1990] 1 W.L.R. 139. cf. *Soole v Royal Insurance Co Ltd* [1971] 2 Lloyd's Rep. 332.

193 See above, para.44-003.

194 *Hough v Head* (1885) 55 L.J. Q.B. 43; *Moore v Evans* [1918] A.C. 185; *Allis Chalmers Co v Fidelity Deposit* (1916) 32 T.L.R. 263; *Pennsylvania Insurance v Mumford* [1920] 2 K.B. 537. *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep. 146; *Mitsui Marine and Fire Insurance Co Ltd v Bayview Motors Ltd* [2002] EWCA Civ 1605, [2003] Lloyd's Rep. I.R. 117.

195 *Knight v Faith* (1850) 15 Q.B. 649; *Andersen v Marten* [1908] A.C. 334, 339. cf. *Frewin v Poland* [1968] 1 Lloyd's Rep. 100; and *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep. 664, 686, QB, [1997] 2 Lloyd's Rep. 687, CA, [1999] 1 Lloyd's Rep. 803, HL.

196 See below, para.44-119.

197 *Hood's Trustees v Southern Union General* [1928] Ch. 793, 800, 801; *Chandris v Argo Insurance* [1963] 2 Lloyd's Rep. 65. cf. *Ellerbeck Collieries v Cornhill Insurance* [1932] 1 K.B. 401; *Bosma v Larsen* [1966] 1 Lloyd's Rep. 22; *Soole v Royal Insurance Co Ltd*

[1971] 2 *Lloyd's Rep.* 332; *County and District Property Ltd v Jenner & Sons Ltd* [1976] 2 *Lloyd's Rep.* 728; *Walker v Pennine Insurance Co Ltd* [1979] 2 *Lloyd's Rep.* 139; affirmed [1980] 2 *Lloyd's Rep.* 156. In *Bolton MBC v Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50, [2006] 1 W.L.R. 1492, the Court of Appeal held that in respect of a claim relating to mesothelioma under a public liability policy insuring against “injury” which took place during the policy period, the “injury” took place when the disease first occurred or manifested itself, not when the body was first exposed to asbestos. The position with respect to employees’ liability policies was distinguished by the Supreme Court in *BAI (Run Off) Ltd v Durham* [2012] UKSC 14, [2012] *Lloyd's Rep. I.R.* 371.

- 198 Many liability policies will attach to claims made during the policy period or to claims arising after the policy period provided notice of a circumstance which might give rise to a claim is given to the insurer during the policy period: *HLB Kidsons v Lloyd's Underwriters* [2007] EWHC 1951 (Comm), [2008] *Lloyd's Rep. I.R.* 237 at [23], [2008] EWCA Civ 1206, [2009] 1 *Lloyd's Rep.* 8; *McManus v European Risk Insurance Co HF* [2013] EWHC 18 (Ch), [2013] *Lloyd's Rep. I.R.* 533. As to when a claim is made, see *West Wake Price & Co v Ching* [1957] 1 W.L.R. 45; *J Rothschild Assurance Plc v Collyear* [1999] *Lloyd's Rep. I.R.* 6; *MJ Gleeson Group Plc v AXA Corporate Solutions Assurance SA* [2013] *Lloyd's Rep. I.R.* 677 at [51]–[59].
- 199 cf. *Yorkshire Water Services Ltd v Sun Alliance & London Insurance Plc* [1997] 2 *Lloyd's Rep.* 21, 28.

(c) - The Place of the Event

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 3. - The Event Insured Against

(c) - The Place of the Event

Place of event

- 44-026 A contract of insurance may refer to the place where the subject matter of the insurance is, or is to be, situated.²⁰⁰ In such cases it may be necessary to determine whether the cover extends to all goods at that place when a loss occurs,²⁰¹ or only to goods at that place when the contract is made,²⁰² and difficulties often arise over the definition of the place at which the goods are to be.²⁰³

Footnotes

200 *Dawsons v Bonnin* [1922] 2 A.C. 413.

201 *Crowley v Cohen* (1832) 3 B. & Ad. 478; *Joyce v Kennard* (1871) L.R. 7 Q.B. 78.

202 *Gorman v Hand-in-Hand* (1877) Ir.R. 11 C.L. 224; *Harrison v Ellis* (1857) 7 El. & Bl. 465.

203 e.g. *Wulfsen v Switzerland General* (1940) 56 T.L.R. 701 (whilst in store at x); *Leo Rapp v McClure* [1955] 1 Lloyd's Rep. 292 (in warehouse); *Overseas Commodities v Style* [1958] 1 Lloyd's Rep. 546; *John Martin Ltd v Russell* [1960] 1 Lloyd's Rep. 554 (final warehouse); *Crow's Transport v Phoenix Assurance* [1965] 1 Lloyd's Rep. 139 (in transit); *Firmin and Collins v Allied Shippers* [1967] 1 Lloyd's Rep. 633 (whilst in public warehouse); *SCA (Freight) Ltd v Gibson* [1974] 2 Lloyd's Rep. 533 (whilst in the normal course of transit temporarily housed); *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1998] 1 Lloyd's Rep. 664, QB, [1997] 2 Lloyd's Rep. 687, CA, [1999] 1 Lloyd's Rep. 803, HL (definition of "any one location" in policy limit); *Wünsche Handelsgesellschaft International mbH v Tai Ping Insurance Co Ltd* [1998] 2 Lloyd's Rep. 8 ("ex factory").

End of Document

© 2022 SWEET & MAXWELL

(d) - The Nature of the Loss or Damage

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 3. - The Event Insured Against

(d) - The Nature of the Loss or Damage

Nature of loss

- 44-027 Contracts of insurance providing cover for loss or damage are construed so as to extend only to loss²⁰⁴ of or damage to the subject matter of the insurance itself.²⁰⁵ Thus loss of profits²⁰⁶ and other consequential losses, such as loss of rents when a house is burnt down,²⁰⁷ or loss of salary after an accident²⁰⁸ or loss in value of uninjured goods due to damage to other goods,²⁰⁹ are not covered unless expressly stipulated. Furthermore, the word "loss" does not bear so wide a meaning as might be supposed. The fact that the assured is unlikely to recover the goods, as when they are in enemy territory though not seized by the enemy,²¹⁰ is not sufficient to establish a loss under cover for "all losses",²¹¹ and the doctrine of constructive total loss in marine insurance has no application to other kinds of insurance.²¹² Earlier suggestions that goods are not "lost" within the meaning of that word in a contract of insurance, when the assured intentionally parted with the property in them, although induced to do so by fraud, should be treated with caution.²¹³

Damage

- 44-028 Contracts of insurance may provide cover in respect of "damage to" the subject matter of the insurance. "Damage" is often construed as physical damage.
 ²¹⁴

U There are two elements to the notion of physical damage. First, there has to have been a physical alteration to the subject matter.

215

U This alteration may take place at the molecular level and may not be palpable without testing or analysis.

216

U The alteration need not be permanent or irreparable.

217

U Secondly, the physical alteration should be commercially harmful, for example the physical alteration should result in a decrease in the value or in the impairment of the utility of the subject matter insured.

218

U It is not sufficient if a decrease in value results from the mere suspicion that there has been a physical alteration.

219

U

Expenses incurred to prevent loss

44-029

If an assured incurs expense, sacrifices property or waives valuable rights²²⁰ in order to avert or minimise loss recoverable under the insurance contract, in the absence of a contractual provision to the contrary the assured may not be able to recover such expense, even though the insurer benefits as a result of such efforts.²²¹ However, such expenses may be recovered if they may be said to be a loss caused by the event insured against.²²² It is commonplace, particularly in marine policies, to include a provision²²³ allowing the assured to recover such expenses from the insurer.

Footnotes

204 The loss must be a real loss and not a notional loss (*Royal Boskalis Westminster NV v Mountain* [1997] 2 All E.R. 929, where the waiver of a contractual claim unenforceable because of illegality or duress did not constitute a damifiable loss) nor a negligible loss (*Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd* [1996] 2 All E.R. 487). See also *McMahon v AGF Holdings (UK) Ltd* [1997] L.R.L.R. 159.

205 *Mitsui v Mumford* [1915] 2 K.B. 27; *Campbell v Denman* (1915) 21 Com. Cas. 357; *Moore v Evans* [1918] A.C. 185. As to the meaning of damage, see, e.g. *Promet Engineering*

- (*Singapore) Pte Ltd v Sturge (The Nukila*) [1997] 2 Lloyd's Rep. 146; *Quorum A/S v Schramm* [2002] 1 Lloyd's Rep. 249 at [90]. See below, para.44-028.
- 206 *Maurice v Goldsborough Mort* [1939] A.C. 452, 461; *Horbury Building Systems Ltd v Hampden Insurance NV* [2004] EWCA Civ 418, [2007] Lloyd's Rep. I.R. 237 at [13]–[27].
- 207 *Re Wright and Pole* (1834) 1 Ad. & El. 621; *Menzies v North British* (1847) 9 D. 694, Ct of Sess.; *Theobald v Railway Passengers* (1854) 10 Ex. 45; *Westminster Fire v Glasgow Provident* (1888) 13 App. Cas. 699. But see *City Tailors v Evans* (1922) 38 T.L.R. 230.
- 208 *Theobald v Railway Passengers* (1854) 10 Ex. 45.
- 209 *Cator v Great Western* (1873) L.R. 8 C.P. 552.
- 210 *Moore v Evans* [1918] A.C. 185; *Fooks v Smith* [1942] 2 K.B. 508.
- 211 But see *Webster v General Accident* [1953] 1 Q.B. 520.
- 212 *Moore v Evans* [1918] A.C. 185; *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2002] EWHC 1348 (Comm), [2002] Lloyd's Rep. I.R. 775; affirmed [2003] EWCA Civ 688, [2003] Lloyd's Rep. I.R. 752. cf. *Marine Insurance Act 1906 ss.60–63*. As to the distinction between actual and constructive total loss in marine insurance law, see *Fraser Shipping Ltd v Colton (The Shakir III)* [1997] 1 Lloyd's Rep. 586; *Kastor Navigation Co Ltd v AXA Global Risks (UK) Ltd* [2002] EWHC 2601 (Comm), [2003] Lloyd's Rep. I.R. 262; affirmed [2004] EWCA Civ 277, [2004] Lloyd's Rep. I.R. 481.
- 213 cf. *Eisinger v General Accident* [1955] 1 W.L.R. 869. cf. *Webster v General Accident* [1953] 1 Q.B. 520. See *Dobson v General Accident Fire & Life Assurance Corp Plc* [1990] 1 Q.B. 274.
- 214 The precise definition will, of course, depend on the construction of the contract: Clarke, *The Law of Insurance Contracts* (looseleaf), para.16–2C. See *James Longly & Co v Forest Giles Ltd* [2001] EWCA Civ 1242, [2002] Lloyd's Rep. I.R. 421 at [22]–[23]. In *Cementation Piling and Foundations Ltd v Aegon Insurance Co Ltd* [1995] 1 Lloyd's Rep. 97, 102, it was held that an insurance against the cost incurred “in respect of physical damage” included the cost of rectifying the defect which caused the physical damage, but was not itself physical damage.
- 215 *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep. 146, 151.
- 216 *Ranicar v Frigmobile Pty Ltd* [1983] Tas. R. 113, 116, Tas SC; *Quorum A/S v Schramm* [2002] 1 Lloyd's Rep. 249 at [90]; cf. the non-insurance decision in *Bacardi-Martini Beverages v Thomas Hardy Packaging* [2002] 1 Lloyd's Rep. 62, 68–69; affirmed [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379 at [10]–[18], and the authorities referred to therein.
- 217 *Ranicar v Frigmobile Pty Ltd* [1983] Tas. R. 113.
- 218 *Ranicar v Frigmobile Pty Ltd* [1983] Tas. R. 113; *McMullin v ICI Australian Operations Pty Ltd* [1997] FCA 541, (1997) 72 F.C.R. 1, Aust Fed Ct; *Pilkington United Kingdom Ltd v CGU Insurance Plc* [2004] EWCA Civ 23, [2004] Lloyd's Rep. I.R. 891 at [49]–[53]; *TKC London*

Ltd v Allianz Insurance Plc [2020] EWHC 2710 (Comm), [2020] Lloyd's Rep. I.R. 631; *LCA Marrickville Pty Ltd v Swiss Re International SE [2021] FCA 1206, [2022] FCAFC 17 at [669]–[676]*.

②19 *Quorum A/S v Schramm [2002] 1 Lloyd's Rep. 249.*

220 *Royal Boskalis Westminster NV v Mountain [1997] 2 All E.R. 929, 940, 951, 973.*

221 *Yorkshire Water Services Ltd v Sun Alliance and London Insurance Plc [1997] 2 Lloyd's Rep. 21; Baker v Black Sea and Baltic General Insurance Co Ltd [1998] 2 All E.R. 833 (reinsurance); Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd [2013] EWHC 349 (Comm), [2013] Lloyd's Rep. I.R. 290 at [137], affirmed [2013] EWCA Civ 1660, [2014] Lloyd's Rep. I.R. 509.* cf. Clarke, *The Law of Insurance Contracts* (looseleaf) para.28-8G. cf. *Jan de Nul (UK) Ltd v AXA Royale Belge SA [2002] EWCA Civ 209, [2002] 1 Lloyd's Rep. 583, 595.*

222 See, for example, *Berens v Rucker (1760) 1 Wm. Bl. 313, 315; Dent v Smith (1869) L.R. 4 Q.B. 414; Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd [1941] AC 55, 70, 71.*

223 Known as a “sue and labour” clause in marine policies: see *Aitchison v Lohre (1879) 4 App. Cas. 755; Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674*. See *Marine Insurance Act 1906 s.78*. As to where the purpose of the expense is avert or minimise both an insured loss and an uninsured loss, see *Standard Life Assurance Ltd v Ace European Ltd [2012] EWHC 104 (Comm), affirmed [2012] EWCA Civ 1713, [2013] Lloyd's Rep. I.R. 415*; cf. *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674*. As to when the right to recover under a sue and labour clause comes to an end, see *Atlasnavios-Navegacao Lda v Navigators Insurance Co Ltd [2014] EWHC 4133 (Comm), [2015] Lloyd's Rep. I.R. 151* at [335]–[344]; reversed on other grounds [2018] UKSC 26, [2018] 2 W.L.R. 1671; *Suez Fortune Investments Ltd v Talbot Underwriting Ltd [2015] EWHC 42 (Comm), [2015] 1 Lloyd's Rep. 651* at [283]–[305].

Section 4. - Utmost Good Faith and Fair Presentation of the Risk

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 4. - Utmost Good Faith and Fair Presentation of the Risk

Introduction

- 44-030 Insurance contracts have long been regarded as imposing on the parties to the contract obligations based upon what has been described as the “utmost good faith”. Such obligations are most commonly manifested by a duty upon the parties prior to the conclusion of the insurance contract, requiring them not only not to misrepresent material circumstances, but also to provide full disclosure of such circumstances. The nature of the obligation of utmost good faith has been such that it has been relied upon as supporting certain post-contractual duties. Such duties were imposed as a matter of the common law. In 1906, Parliament passed the [Marine Insurance Act 1906, ss.17–20](#) of which codified the common law as it then stood, with an emphasis on the assured’s pre-contractual duty of disclosure. Even though the duty of disclosure was set out in the [Marine Insurance Act 1906](#), the Courts had long recognised that [ss.17–20](#) represented the common law applicable to non-marine insurance contracts, as well as to marine insurance contracts.²²⁴ However, Parliament has recently enacted two statutes which modify the assured’s pre-contractual duty of utmost good faith, namely the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) and the [Insurance Act 2015](#). Although the common law governing the fair presentation of the risk has now been modified by this legislation, the common law will still be relevant to determining disputes relating to insurance contracts agreed before the entry into force of this legislation and to assist in the interpretation of these statutes. Accordingly, the common law will be considered before considering the impact of the [2012 Act](#) and the [2015 Act](#).

Consumer Insurance (Disclosure and Representations) Act 2012

- 44-031 The [2012 Act](#) was passed on 8 March 2012 and entered into force on 6 April 2013.²²⁵ This Act applies to consumer insurance contracts, which are contracts of insurance entered into between

an insurer (being a person who carries on the business of insurance) and an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession. The Act applies to consumer insurance contracts, and variations to consumer insurance contracts, where the contract or the variation was agreed after the Act comes into force.²²⁶ The common law, and ss.17–20 of the Marine Insurance Act 1906, relating to the duties of utmost good faith applicable to consumer insurance contracts have been modified by the 2012 Act.²²⁷

Insurance Act 2015

- 44-032 The 2015 Act was passed on 12 February 2015 and entered into force on 12 August 2016, and applies (insofar as the pre-contractual duty of utmost good faith is concerned) to insurance contracts, and variations to insurance contracts, agreed after the Act entered into force.²²⁸ Part 2 of the Act, which deals with the duty of disclosure on the part of the assured, applies to non-consumer insurance contracts.²²⁹ The common law, and ss.17–20 of the Marine Insurance Act 1906, relating to the duties of utmost good faith applicable to non-consumer insurance contracts have been modified by Pt 2 of the 2015 Act.²³⁰

Footnotes

- 224 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61* at [5], [42].
- 225 The Consumer Insurance (Disclosure and Representations) Act 2012 (Commencement) Order 2013 (SI 2013/450). The 2012 Act was amended by the Insurance Act 2015 (ss.14(2), 14(4) and 21(6)).
- 226 2012 Act s.12(4). The 2012 Act was amended by the Insurance Act 2015 (ss.14(2), 14(4) and 21(6)).
- 227 2012 Act ss.2(5), 11(1)–(2). Section 2(5) was replaced by s.14(3) of the Insurance Act 2015. Road Traffic Act 1988 s.52 is also modified by this Act: s.11(3). See below, para.44-125.
- 228 2015 Act ss.22, 23(2).
- 229 2015 Act s.2. A “consumer insurance contract” has the same meaning as in the Consumer Insurance (Disclosure and Representations) Act 2012: s.1.
- 230 2015 Act s.21(2)–(3). Road Traffic Act 1988 s.152 is also modified by this Act: s.21(4).

(a) - The Common Law

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 4. - Utmost Good Faith and Fair Presentation of the Risk

(a) - The Common Law

Utmost good faith

44-033 An insurance contract is a contract uberrimae fidei

231

U : it is a contract based on the utmost good faith and if the utmost good faith is not observed by either party the contract may be avoided by the other party.²³² The obligation to observe utmost good faith, moreover, is a continuing one, which does not cease on the conclusion or execution of the insurance contract, although the ambit of the duty in pre-contract and post-contract situations is not the same.²³³ The reason for this principle of insurance law is that contracts of insurance are founded on facts which are nearly always in the exclusive knowledge of one party (usually the assured) and, unless this knowledge is shared, the risk insured against may be different from that intended to be covered by the party in ignorance.²³⁴ The duty most commonly manifests itself as a duty to disclose material facts and not to misrepresent material facts at or before the making of the insurance contract. Although there have been suggestions in the past that the pre-contractual duty of disclosure is founded upon an implied term of the contract,²³⁵ the weight of authority is to the effect that the duty to disclose, as well as the duty not to misrepresent, material facts are obligations imposed by law.²³⁶ Although there is a post-contractual aspect of this duty of good faith, the discussion which follows will concentrate on the duty of full disclosure which applies up to the conclusion of the insurance contract for non-consumer assureds.

The duty to disclose material circumstances

44-034 Subject to what follows, the duty is upon the assured, and insurer,

[237](#)

U to disclose every material circumstance to the other party. In the case of the assured, this requires that he disclose every circumstance which would influence the judgment of a prudent insurer in fixing the premium or in determining whether to take the risk.

[238](#)

U The test of materiality, therefore, is not what the assured considers material,

[239](#)

U nor what a reasonable assured would consider material,

[240](#)

U but whether the circumstance would be taken into account by a prudent insurer when assessing the risk (even if it would not, of itself, have had a decisive effect on his decision whether to accept the risk and, if so, at what premium).

[241](#)

U The materiality of the circumstances must be assessed by reference to the true facts, whether or not all such facts have been fully and accurately disclosed.

[242](#)

U Where the insurer asks the assured to answer specific questions, the parties are taken to have agreed that the facts involved in answering the questions are material,

[243](#)

U but this does not affect the duty to disclose material circumstances not covered by the questions,

[244](#)

U unless the way they are drafted has this effect,

[245](#)

U and except insofar as the failure to ask a particular question may make it difficult for the insurers afterwards to assert that the circumstances which would have been elicited were material.

[246](#)

U Indeed, the assured is not required to disclose every minute detail of every material circumstance, but rather only to disclose sufficient detail to allow the insurer to ask for more information, if he requires further facts on which to evaluate the risk.

247

U Materiality is a question of fact, but it has long been the practice to adduce expert evidence on the point from insurers, brokers and the like.

248

U A circumstance is material for disclosure by the assured if the circumstance relates to the likelihood or the extent of loss which might be sustained by the insurer under the insurance contract,

249

U whether the circumstance relates to the likelihood of the operation of an insured peril or renders the subject matter of the insurance more or peculiarly susceptible to a peril to be insured against,

250

U or relates to matters of subrogation, or to the “moral hazard” of the assured.

251

U Thus, so far as the assured is concerned, circumstances which diminish the risk need not be disclosed.

252

U So far as the insurer’s duty is concerned, a circumstance is material and must be disclosed to the assured if it is relevant to the nature of the risk sought to be covered, or to the recoverability of a claim under the policy which a prudent assured would take into account in deciding whether or not to place the risk with the proposed insurer.

253

U

Scope of duty of disclosure

44-035 The duty of disclosure extends only to circumstances which are within the knowledge of one party but not within the knowledge of the other. The assured must disclose what he knows, even though he does not appreciate that it is material.²⁵⁴ An assured is deemed to know every circumstance which in the ordinary course of business ought to be known to him,²⁵⁵ so that the assured may be liable to disclose circumstances known to someone acting on his behalf of which he is unaware. The kinds of situation in which the knowledge of an agent will so affect the position of the assured have been summarised²⁵⁶ as being: (i) where the agent, although not effecting the insurance on behalf of the assured, is relied upon by the assured for information concerning the subject matter of the insurance (sometimes referred to as an “agent to know”)²⁵⁷; (ii) where the agent is in such a predominant position in relation to the assured that his knowledge can be regarded as the

knowledge of the assured²⁵⁸; and (iii) where the agent is used to effect the insurance (in which case the agent is required to disclose not just all material circumstances which the assured is bound to disclose, but also every material circumstance which ought to be known by the agent, or communicated to him, in the ordinary course of business).²⁵⁹ However, the assured will not be adversely affected by the knowledge of his agent where the information concerns the agent's own fraud on his principal.²⁶⁰ Where the assured is a private individual, or effects insurance otherwise than "in the course of business",²⁶¹ it is his duty to disclose those circumstances which are known to him, not those which ought to be known to him.²⁶²

Exceptions to the duty of disclosure

44-036 There are four traditional exceptions to the duty of disclosure (at least insofar as it rests on the assured's shoulders). First, the assured need not disclose any circumstance which diminishes the risk.

²⁶³

U Secondly, the assured need not disclose circumstances which are either known to the insurer, or presumed to be known to him as matters of common notoriety or knowledge or which an insurer ought to know in the ordinary course of business.

²⁶⁴

U Thirdly, the assured is not obliged to disclose circumstances where the insurer has waived disclosure of such circumstances. For example, if the insurer forbears to ask questions after disclosure of circumstances have put him on inquiry, he may be taken to have waived the right to disclosure of the circumstances which such inquiry would have disclosed

²⁶⁵

U; but the doctrine is not applicable to circumstances which are so unusual or special that their non-disclosure would distort the presentation of the risk, since the duty to disclose would otherwise be undermined.

²⁶⁶

U Similarly, the question which the insurer may ask the assured (usually in a proposal form) may be so framed as to indicate that the insurer does not require further information on the matters in question, thus relieving the assured from doing more than answering the specific questions.

²⁶⁷

U Fourthly, an assured is not bound to disclose to the insurer circumstances, disclosure of which is rendered superfluous by the existence of a warranty in the policy.

²⁶⁸

U There may be further exceptions to the duty of disclosure, for example where there is an express exemption granted by a statute. For example, under the provisions of the [Rehabilitation of Offenders Act 1974](#), an assured is specifically dispensed from any obligation to disclose “spent” convictions, or the circumstances ancillary to them, although this is subject to the Court’s discretion to admit evidence of the conviction and so render the conviction a material circumstance requiring disclosure.

[269](#)

U Further, where the assured is possessed of information which is subject to a privilege belonging to another person, the assured may be excused from disclosing such information.

[270](#)

U If however the information is subject to a privilege belonging to the assured itself, the assured remains obliged to disclose it to the insurer.

[271](#)

U Given the reciprocal nature of the duty of disclosure, it is likely that comparable exceptions are applicable to the insurer’s duty of disclosure.

[272](#)

U In addition, circumstances relating to a person’s race, nationality, religious belief or gender may not be disclosable, because an insurer is not permitted to assess the risk by reference to a person’s race, nationality or religious belief after 1 October 2010 or gender after 21 December 2012. As the law currently stands, the insurer is permitted to assess risks by reference to age or disability.

[273](#)



Time of disclosure

44-037 Full disclosure must be made and continue to be made up until the moment there is a concluded contract of insurance,²⁷⁴ and where the assent of the insurer is required for renewal, the duty exists for that renewal.²⁷⁵ Before the contract is made, any material circumstance which comes to light,²⁷⁶ or any previous immaterial circumstance which becomes material through change of circumstances²⁷⁷ must be disclosed. It seems that where a contract of insurance is made and then altered, only circumstances material to the alteration need to be disclosed up to the date of the alteration,²⁷⁸ although whether the whole contract or only the alteration is vitiated by the failure to disclose such circumstances is undecided.²⁷⁹ The materiality of a circumstance is judged by the circumstances existing at the time when the contract is concluded,²⁸⁰ so that, for example, failure to disclose a rumour which at the time would have been considered material is not excused by the

fact that after the contract is made it proves unfounded.²⁸¹ Conversely a circumstance which at the time would not have been considered material does not affect the validity of the contract even if after the contract is made it becomes material or even causes the loss.²⁸² However, although once the contract is made there is normally no duty to disclose material circumstances which later occur or which previously were neither known nor ought to have been known,²⁸³ the continuing nature of the duty of good faith may impose upon an assured a limited obligation to inform the insurer of subsequently arising material facts where the terms of the insurance itself require the assured to give the insurer further information after inception of the risk.²⁸⁴

Misrepresentation

44-038



Apart from the ordinary rules relating to misrepresentation²⁸⁵ the principle of utmost good faith imports a duty not to misrepresent facts which are material in the sense discussed above.

286

U The misrepresentation may be of fact or of belief, expectation, opinion or intention. A statement of belief, expectation or opinion may be true even if the belief, expectation or opinion is erroneous,²⁸⁷ for the representation in such cases is only that the belief, expectation or opinion is then sincerely held.²⁸⁸ For some reason which has not been adequately explained, the representation of an intention is treated as an ordinary representation of fact and not in the same way as a representation of an opinion or belief.²⁸⁹ So long as the assured honestly entertains his opinion or belief, there need be no reasonable grounds for the opinion or belief.²⁹⁰ Changes of belief, opinion or intention after the contract has been made are immaterial, for, like non-disclosure, the duty only exists up to the moment when the contract is concluded²⁹¹: until that time, of course, such changes must be communicated.²⁹² Where a representation is made a substantial period of time before the conclusion of the insurance contract or during the negotiation of an earlier insurance contract, the assured will either be under a duty to correct the earlier representation if it has become untrue (which would be akin to a duty of disclosure and so would require the assured to be aware of the falsity of the representation),²⁹³ or the representation will be treated as a continuing representation so that if it is untrue at the time of the conclusion of the insurance contract in question, there will have been a misrepresentation.²⁹⁴ The right analysis awaits an authoritative decision of the Courts. It is clear, however, that not all representations will be treated as continuing.²⁹⁵

Partial non-disclosure

- 44-039 A statement, though true in itself, may be a misrepresentation because it does not tell the whole truth, and thereby gives a false impression.²⁹⁶ An ambiguous statement may be false if it is in fact understood in a false sense, though equally it could have been understood in a sense that was true.²⁹⁷ However, statements are considered as a whole and will not constitute misrepresentations if inaccurate only in trivial or immaterial particulars which do not colour the whole picture.²⁹⁸

Honesty

- 44-040 As a general rule misrepresentation makes the contract voidable however innocent the representor may have been.²⁹⁹ There is some authority that the misrepresentation has to be fraudulent to have this effect in respect of life insurance policies,³⁰⁰ but such an exception is to be doubted. Even if this is so, an innocent misrepresentation may well also involve non-disclosure so that the contract may be avoided on the latter ground.³⁰¹

Inducement

- 44-041 The decision of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*
302

U established that an insurer cannot rely upon the misrepresentation or non-disclosure of a material circumstance to avoid the insurance contract if that misrepresentation or non-disclosure did not in fact induce the making of the contract on the terms accepted (in the sense in which “inducement” is used in the general law of misrepresentation). The insurer has to show that the misrepresentation or non-disclosure was an effective cause of his entering into the contract on the terms in fact agreed; he must show at least that but for the misrepresentation or non-disclosure he would not have entered into the contract on those terms,

303

U though “the effective cause test can exceptionally be satisfied where the “but for” test is not”
304

U; he does not have to show it was the sole effective cause.

305

U Whether the insurer has been induced is a question of fact, not one of degree; therefore, if the non-disclosure or misrepresentation had only a slight or trivial effect on the decision of the insurer (for example, if the insurer would have insisted on only slightly different terms), he will have been induced.

306

U However, if the non-disclosed or misrepresented circumstance is deemed trivial by a prudent underwriter, the circumstance may not be material. If the insurer would merely have asked further questions of the assured had full and accurate disclosure been made, that would not be sufficient to constitute inducement.

307

U There is said to be a presumption of inducement in the event that a material non-disclosure or misrepresentation is established.

308

U If there is such a presumption, it is not one of law, but an inference of fact.

309

U It is unlikely that the Court will rely on such a presumption or inference if the underwriter who assessed the risk is called to give evidence.

310

U In some cases, the materiality of the circumstance may be so obvious that the Court will readily infer that the insurer was induced to enter into the insurance contract by reason of the circumstance being withheld or misrepresented, but even in such cases the inference may be rebutted by evidence.

311

U

Remedies for non-disclosure or misrepresentation

44-042 Non-disclosure or misrepresentation by one party entitles the other party to avoid the contract,³¹² and the avoidance takes effect ab initio.³¹³ Despite misgivings expressed by the courts, an insurer confronted with a fraudulent claim is entitled to avoid the insurance contract.³¹⁴ In the event of a breach of the duty of utmost good faith, the innocent party has an unfettered right to avoid the insurance contract. There is no equitable discretion exercisable by the court which could restrain or set aside an otherwise effective avoidance of the contract.³¹⁵ In any event, it would appear that a claim paid out by an insurer is recoverable if, after payment is made, a non-disclosure or misrepresentation comes to the notice of the insurer who then avoids the

contract.³¹⁶ In some cases, moreover, damages may be recoverable. An action for damages in deceit will lie for deliberate misrepresentation and, possibly, for deliberate concealment of material circumstances,³¹⁷ provided that there is a duty to speak.³¹⁸ Damages will be recoverable if a misrepresentation (as opposed to a non-disclosure) is made negligently in breach of a duty of care³¹⁹; damages will be recoverable under the **Misrepresentation Act 1967** if the misrepresentation is made without reasonable grounds.³²⁰ Apart from this, however, no action for damages will lie³²¹; so that damages cannot be recovered for breach of the duty to disclose material circumstances.³²² It would seem that non-disclosure or misrepresentation by one joint assured enables the insurer to avoid the contract against the others as well.³²³ However, if one co-assured under a composite, as opposed to a joint, insurance fails to disclose or misrepresents a material circumstance, the insurance contract with each innocent co-assured may not be avoided, unless the latter is implicated in a breach of the duty of the utmost good faith.³²⁴

Affirmation and waiver by estoppel

44-043 Non-disclosure or misrepresentation makes the contract voidable, not void, so that the aggrieved party has an election whether or not to avoid the contract.³²⁵ Once the aggrieved party knows all the facts, he should inform the other party within a reasonable time if he elects to avoid the contract,³²⁶ for otherwise his subsequent conduct may be taken to be either an affirmation of the contract, or as leading the other party to suppose that the contract is being affirmed and causing him to act accordingly.³²⁷ Thus where the aggrieved party does some act which is inconsistent with an intention to avoid the contract,³²⁸

U such as paying a claim³²⁹ or accepting further premiums³³⁰ after acquiring the requisite knowledge, the right to avoid the contract will be lost. However, the aggrieved party will not have affirmed the contract and lost his right to avoid³³¹ unless he has knowledge both of the facts concerning the non-disclosure or misrepresentation and of his resulting right to avoid³³²; constructive knowledge or being put on inquiry is not sufficient.³³³ Once the aggrieved party has made his election it is irrevocable.³³⁴ The insurer may also lose the right to avoid the insurance contract by estoppel if the insurer promises not to exercise the right to avoid, even if he does not have full knowledge of the circumstances giving rise to his right to avoid (provided that the promise carries with it some apparent awareness of the right to avoid),³³⁵ and if the assured relies on that promise to his detriment, and it would be inequitable to allow the insurer to rescile from that promise.³³⁶

Modification of the duty by contract

- 44-044 The duty to act in good faith in the manner discussed above is often modified by the contract. Thus there may be in the contract a condition precedent based on the accuracy of statements made during the negotiations or a warranty³³⁷ that such statements are true, and in such case it is no defence that the statement was immaterial or did not induce the making of the insurance contract.³³⁸ Conversely, the contract may expressly restrict the duty as, for example, by providing that the insurance is to be indisputable except on the ground of fraud,³³⁹ or that the policy is voidable only if the assured is guilty of a fraudulent non-disclosure or misrepresentation,³⁴⁰ or by defining the extent of disclosure required from the assured,³⁴¹ or by excluding or limiting liability or restricting the remedies available for any breach.

³⁴²

U In either case the duty becomes pro tanto contractual,³⁴³ and stipulations which extend the duty are strictly construed against the party relying on them.³⁴⁴ However, the law will not permit any attempt to restrict or exclude liability for the assured's own fraud, although excluding or limiting liability for the fraud of the assured's agent is not prohibited as a matter of law.³⁴⁵

FCA Insurance Conduct of Business Sourcebook (ICOBS)

- 44-045 In the light of the harsh consequences which may sometimes be caused by the absolute nature of the obligations to disclose, and not misrepresent, material facts,³⁴⁶ the Association of British Insurers and Lloyd's of London issued a Statement of General Insurance Practice, to which their members were expected to adhere, with a view to mitigating the severity of the obligations in the case of private policies. There were also statements dealing separately with non-life policies, and long-term life policies.³⁴⁷ Since January 2005, the self-regulatory Statement of General Insurance Practice was replaced by the Financial Services Regulation, ICOB and in January 2008 by ICOBS,³⁴⁸ which currently provides that insurers must handle claims promptly and fairly, provide reasonable guidance to policyholders, not unreasonably reject a claim, and pay claims promptly after agreeing to a settlement.

³⁴⁹

U The Regulation further provides that the rejection of a consumer policyholder's claim is unreasonable where, in the absence of any evidence of fraud, the ground relied on by the insurer

is the non-disclosure of a material fact which the policyholder could not reasonably be expected to disclose or non-negligent misrepresentation.³⁵⁰

Footnotes

- ②31 See Vol.I, paras 9-167 et seq., and generally, MacGillivray on Insurance Law, 15th edn (2022), Chs 16–17; Clarke, The Law of Insurance Contracts (looseleaf), Chs 22–23; MacDonald Eggers and Picken, Good Faith and Insurance Contracts, 4th edn (2017); Hasson, “*The Doctrine of Uberrima Fides in Insurance Law—A Critical Evaluation*” (1969) 32 M.L.R. 615; Bennett [1999] L.M.C.L.Q. 165. For a somewhat looser duty arising when one insurer authorises another to write insurance on its behalf under a “binding authority” (which is not, strictly speaking, a contract uberrimae fidei), see *Pryke v Gibbs Hartley Cooper [1991] 1 Lloyd's Rep. 602*. See, however, *GMA v Storebrand and Kansa [1995] L.R.L.R. 333, 348–349*, where scepticism was expressed as to whether contracts closely analogous to those of insurance could attract the duty of disclosure attached to contracts uberrimae fidei.
- 232 These are the words used in the *Marine Insurance Act 1906 s.17* (as amended by the *Insurance Act 2015*), which codifies, in relation to marine insurance, a principle applicable to all insurance contracts: *Carter v Boehm (1766) 3 Burr. 1905, 1909; Duffell v Wilson (1808) 1 Camp. 401; London Assurance v Mansel (1879) 11 Ch. D. 363, 367; Re Bradley and Essex Accident [1912] 1 K.B. 415, 430; Rozanes v Bowen (1928) 32 Ll.L. Rep. 98, 102; Claude R Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Pty Ltd [1975] 1 Lloyd's Rep. 52; HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [5], [42]; Dalecroft Properties Ltd v Underwriters [2017] EWHC 1263 (Comm), [2017] Lloyd's Rep. I.R. 511 at [80]*.
- 233 *Royal Boskalis Westminster NV v Mountain [1997] L.R.L.R. 523*; reversed on other grounds by the Court of Appeal: [1999] Q.B. 674; *Manifest Shipping & Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea) [2001] UKHL 1, [2001] 2 W.L.R. 170; The Mercandian Continent [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep. 563*; cf. *Agapitos v Agnew (The Aegeon) [2002] EWCA Civ 247, [2002] 2 Lloyd's Rep. 42*. See Soyer [2003] L.M.C.L.Q. 45.
- 234 *Carter v Boehm (1766) 3 Burr. 1905, 1909; London General Omnibus v Holloway [1912] 2 K.B. 72, 86*.
- 235 *Moens v Heyworth (1842) 10 M. & W. 147, 157; Blackburn Low & Co v Vigors (1886) 17 Q.B.D. 553*, reversed on other grounds (1887) 12 App Cas. 531, 536–537, 539.
- 236 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd [1989] 2 Lloyd's Rep. 238, 263*.
- ②37 For consideration of the insurer’s duty of good faith, see *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 664, 769–773*; affirmed by the House of Lords on somewhat different grounds, but see [1991] 2 A.C. 249 at 268, 281–282; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck) [1990] 1*

Q.B. 818; reversed by the House of Lords on other grounds at [1992] 1 A.C. 233; *Aldrich v Norwich Union Life Insurance Co Ltd* [2000] *Lloyd's Rep. I.R.* 1.

- ②238 These are the words used in the Marine Insurance Act 1906 s.18(2), but the test is the same for all types of insurance: see *Road Traffic Act 1988* s.151(9)(b); *Berger v Pollock* [1973] 2 *Lloyd's Rep.* 442; *Lambert v Co-operative Insurance Society Ltd* [1975] 2 *Lloyd's Rep.* 485; *Marine Knitting Mills Property Ltd v Greater Pacific & General Insurance Ltd* [1976] 2 *Lloyd's Rep.* 631, 642, PC; *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 *Lloyd's Rep.* 440, 461; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501. The materiality of a fact will depend on the nature of the insurance product: *Johnson v IGI Insurance Co Ltd* [1997] 6 *Re L.R.* 283.

- ②239 *Bates v Hewitt* (1867) L.R. 2 Q.B. 595, 607; *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B. 863, 884; *Godfrey v Britannic Insurance* [1963] 2 *Lloyd's Rep.* 515, 529; *Roselodge v Castle* [1966] 2 *Lloyd's Rep.* 113.

- ②240 *Lambert v Co-operative Insurance Society Ltd* [1975] 2 *Lloyd's Rep.* 485. Though note *Longmore* [2001] L.M.C.L.Q. 356, 365–368.

- ②241 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501 (rejecting the “decisive influence” test of materiality, but holding that an insurer cannot rely upon a material non-disclosure (or misrepresentation) as a ground for avoiding the contract if the non-disclosure (or misrepresentation) did not actually *induce* the making of the contract), as interpreted by the Court of Appeal in *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All E.R. 96. On this basis, a circumstance can be “material” even if it actually *decreases* the risk, but this does not mean that such a circumstance would have to be disclosed because, in the absence of inquiry, *Marine Insurance Act 1906* s.18(3)(a) specifically exempts the assured from having to disclose any circumstance which diminishes the risk: see *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All E.R. 96 at 107. As to the relationship between the concepts of materiality and risk, see *Niramax Group Ltd v Zurich Insurance Plc* [2020] EWHC 535 (Comm) at [148]–[158]; [2021] EWCA Civ 590, [2022] *Lloyd's Rep. I.R.* 56.

- ②242 *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, [2004] Q.B. 601 at [75], [138]; *Sea Glory Maritime Co v Al Sagr National Insurance Co* [2013] EWHC 2116 (Comm), [2014] 1 *Lloyd's Rep.* 14 at [163]–[166].

- ②243 *Anderson v Fitzgerald* (1853) 4 H.L.C. 484, 503; *London Assurance v Mansel* (1879) 11 Ch. D. 363; *Dawsons v Bonnin* [1922] 2 A.C. 413; *Glicksman v Lancashire and General* [1925] 2 K.B. 593, 608; affirmed [1927] A.C. 139, 144; *Kumar v Life Insurance Corp of India* [1974] 1 *Lloyd's Rep.* 147; *Whitlam v Hazel* [2004] EWCA Civ 1600, [2005] *Lloyd's*

- Rep. I.R. 168.* As to the position where an agent of the insurer incorrectly fills in the proposal form, see *Stone v Reliance Marine Insurance Co Ltd [1972] 1 Lloyd's Rep. 469*.
- ①244 *Wainwright v Bland (1836) 1 M. & W. 32; Dawsons v Bonnin [1922] 2 A.C. 413; Glicksman v Lancashire and General [1925] 2 K.B. 593; Bond v Commercial Union (1930) 36 Ll.L. Rep. 107; Taylor v Eagle Star Insurance (1940) 67 Ll.L. Rep. 136; Schoolman v Hall [1951] 1 Lloyd's Rep. 139; Lee v British Law Insurance Co Ltd [1972] 2 Lloyd's Rep. 49; March Cabaret Club v London Assurance [1975] 1 Lloyd's Rep. 169.*
- ①245 See below, para.44-035. For the effect of failing to answer a question, see *Marcovitch v Liverpool Victoria (1912) 28 T.L.R. 188; Roberts v Avon [1956] 2 Lloyd's Rep. 240; Arterial Caravans Ltd v Yorkshire Insurance Co Ltd [1973] 1 Lloyd's Rep. 169; Roberts v Plaisted [1989] 2 Lloyd's Rep. 341, 347–348; O'Kane v Jones [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [237]–[239].*
- ①246 *Newsholme Bros v Road Transport and General [1929] 2 K.B. 356, 362; McCormick v National Motor Accident (1934) 40 Com. Cas. 76, 78; Zurich General v Morrison [1942] 2 K.B. 53, 64; Doheny v New India Assurance Co Ltd [2004] EWCA Civ 1705, [2005] Lloyd's Rep. I.R. 251 at [16]–[20].*
- ①247 *Asfar & Co v Blundell [1896] 1 Q.B. 123, 129.*
- ①248 *Ionides v Pender (1874) L.R. 9 Q.B. 531, 535; Glasgow Assurance v Symondson (1911) 16 Com. Cas. 109; Yorke v Yorkshire Insurance [1918] 1 K.B. 662, 669; Roselodge v Castle [1966] 2 Lloyd's Rep. 113.* The Court may well be able to assess materiality without the benefit of expert evidence: *Bate v Aviva Insurance UK Ltd [2014] EWCA Civ 334, [2014] Lloyd's Rep. I.R. 527 at [35].*
- ①249 *Glasgow Assurance Corp Ltd v William Symondson and Co (1911) 16 Com. Cas. 109, 119–120; Société Anonyme d'Intermédiaires Luxembourgeois v Farex Gie [1995] L.R.L.R. 116, 149; O'Kane v Jones [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [222].* See also MacDonald, Eggers and Picken, Good Faith and Insurance Contracts, 4th edn (2017), paras 14.62–14.81; *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (2003) 77 A.L.J.R. 1070 at [32]–[33]* High Court of Australia.
- ①250 *Sealion Shipping Ltd v Valiant Insurance Co [2012] EWHC 50 (Comm), [2012] Lloyd's Rep. I.R. 252.*
- ①251 As to the disclosure of circumstances relating to the moral hazard, see *Strive Shipping Corp v Hellenic Mutual War Risks Association (The Grecia Express) [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep. 88, 131; Brotherton v Aseguradora Colseguros SA [2003] EWCA Civ 705, [2003] Lloyd's Rep. I.R. 746; Sharon's Bakery (Europe) Ltd v AXA Insurance UK Plc [2011] EWHC 210 (Comm), [2012] Lloyd's Rep. I.R. 164; Berkshire Assets (West*

London) Ltd v AXA Insurance UK Plc [2021] EWHC 2689 (Comm), [2022] *Lloyd's Rep. I.R.* 275. This may involve an assured having to disclose the fact that he has been dishonest in the past or has been convicted or charged with some offence impugning his honesty or competence or disclose any other fact affecting the “moral hazard”: *Inversiones Manria SA v Sphere Drake Insurance Co Plc (The Dora)* [1989] 1 *Lloyd's Rep.* 69, 93; *Insurance Corp of the Channel Islands Ltd v McHugh* [1998] *Lloyd's Rep. I.R.* 151; *North Star Shipping Ltd v Sphere Drake Insurance Plc* [2006] EWCA Civ 378, [2006] 2 *Lloyd's Rep.* 183; *ERC Frankona Reinsurance v American National Insurance Co* [2005] EWHC 1381 (Comm), [2006] *Lloyd's Rep. I.R.* 157. The assured indeed may be obliged to disclose that he has obtained another insurer’s agreement to this or an earlier policy by reason of a breach of the duty of the utmost good faith: *Aneco Reinsurance Underwriting Ltd (In Liquidation) v Johnson & Higgins* [1998] 1 *Lloyd's Rep.* 565. As regards subrogation, see *Tate & Sons v Hyslop* (1885) 15 Q.B.D. 368.

①252 *Carter v Boehm* (1766) 3 Burr. 1905; Marine Insurance Act 1906 s.18(3)(a).

①253 *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, 771–772. The decision of the Court of Appeal was subsequently affirmed by the House of Lords on somewhat different grounds, but the statement of the ambit of the duty was not dissented from: [1991] 2 A.C. 249, 268, 269, although Lord Jauncey was prepared to consider a test of materiality which was reciprocal to that applicable to the assured’s duty of disclosure (281–282). See also *Aldrich v Norwich Union Life Insurance Co Ltd* [2000] *Lloyd's Rep. I.R.* 1.

254 *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B. 863, 883–884; *Zeller v British Caymanian Insurance Co Ltd* [2008] UKPC 4, [2008] *Lloyd's Rep. I.R. Plus* 16.

255 Both at common law (*Proudfoot v Montefiore* (1867) L.R. 2 Q.B. 511) and statute: Marine Insurance Act 1906 s.18(1).

256 See *Simner v New India Assurance Co Ltd* [1995] L.R.L.R. 240; *ERC Frankona Reinsurance v American National Insurance Co* [2005] EWHC 1381 (Comm), [2006] *Lloyd's Rep. I.R.* 157 at [122]–[124].

257 See, in particular, *Fitzherbert v Mather* (1785) 1 T.R. 12; *Gladstone v King* (1813) 1 M. & S. 35; *Proudfoot v Montefiore* (1867) L.R. 2 Q.B. 511; *Blackburn Low Co v Vigors* (1887) 12 App. Cas. 531. In order to determine whether a particular person is the assured’s agent to know, it is necessary to analyse both the nature of the relationship between that person and the assured and the nature of the information in question: *ERC Frankona Reinsurance v American National Insurance Co* [2005] EWHC 1381 (Comm), [2006] *Lloyd's Rep. I.R.* 157 at [132].

258 As to when an agent will be treated as being in such a position that his knowledge is attributed to his principal, see *Simner v New India Assurance Co Ltd* [1995] L.R.L.R. 240; *PCW Syndicates v PCW Reinsurers* [1996] 1 All E.R. 774; *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 *Lloyd's Rep.* 345; and, more generally, *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500.

259 See Marine Insurance Act 1906 s.19. The section does not operate by imputing the knowledge of the agent to the assured, but by requiring the agent to disclose the material

circumstances, and enabling the insurer to avoid the contract if he does not: *Société Anonyme D'Intermédiaires Luxembourgeois v Farrex Gie* [1995] *L.R.L.R.* 116; *PCW Syndicates v PCW Reinsurers* [1996] *1 All E.R.* 774. The duty on the agent is independent of that on the assured: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] *UKHL* 6, [2003] *2 Lloyd's Rep.* 61 at [7]–[8], [50]–[54]. However, the section applies only to an agent who actually deals with the insurer, and makes the contract in question, and not to “intermediate” agents: *PCW Syndicates v PCW Reinsurers* [1996] *1 All E.R.* 774; nor to an agent who earlier had been instructed to effect the insurance, but did not in fact place the insurance: *Blackburn Low Co v Vigors* (1887) *12 App. Cas.* 531.

- 260 *PCW Syndicates v PCW Reinsurers* [1996] *1 All E.R.* 774; *Group Josi Re v Walbrook Insurance Co Ltd* [1996] *1 Lloyd's Rep.* 345. Further, the agent's knowledge of any “irregularity” in the performance of his duty, short of fraud, will not be imputed to the assured, if it cannot be inferred that the agent would have informed the assured of that irregularity in the ordinary course of business: *Kingscroft Insurance Co Ltd v Nissan Fire and Marine Insurance Co Ltd* [1999] *Lloyd's Rep. I.R.* 371.
- 261 Marine Insurance Act 1906 s.18(1).
- 262 *Economides v Commercial Union Assurance Co Plc* [1997] *3 W.L.R.* 1066; cf. *Group Josi Reinsurance Co Ltd v Walbrook Insurance Co Ltd* [1996] *1 W.L.R.* 1152, 1159.
- 263 *Carter v Boehm* (1766) *3 Burr.* 1905, 1910; *The Dora* [1989] *1 Lloyd's Rep.* 69, 89–90; Marine Insurance Act 1906 s.18(3)(a).
- 264 *Carter v Boehm* (1766) *3 Burr.* 1905; *Foley v Tabor* (1861) *2 F. & F.* 663; *Bates v Hewitt* (1867) *L.R.* 2 *Q.B.* 595; *London General Insurance Co v General Marine Underwriters' Association* [1921] *1 K.B.* 104; Marine Insurance Act 1906 s.18(3)(b). See also *Aldridge Estates Investments Co Ltd v McCarthy* [1996] *E.G.C.S.* 167; *Marc Rich & Co AG v Portman* [1997] *1 Lloyd's Rep.* 225, 231–232; *Hua Tyan Development Ltd v Zurich Insurance Co Ltd (The Ho Feng 7)* [2013] *HKCA* 414, [2014] *Lloyd's Rep. I.R.* 1 at [16.14], Hong Kong CA, [2014] *HKCFA* 72, [2015] *Lloyd's Rep. I.R.* 14 (*Hong Kong Court of Final Appeal*). As to whether an insurer will be presumed to know information reasonably available by reason of searches on electronic databases, see *Sea Glory Maritime Co v Al Sagr National Insurance Co* [2013] *EWHC* 2116 (Comm), [2014] *1 Lloyd's Rep.* 14 at [170]–[179]. There is no duty upon the assured to disclose the existence, contents, purpose or effect of a term of the insurance contract to the insurer: *ABN AMRO NV v Royal & Sun Alliance Insurance Plc* [2021] *EWHC* 442 (Comm), [2021] *Lloyd's Rep. I.R.* 467 at [610]–[632]; [2021] *EWCA Civ* 1789, [2022] *1 W.L.R.* 1773.
- 265 *Carter v Boehm* (1766) *3 Burr.* 1905; Marine Insurance Act 1906 s.18(3)(c); *Ayrey v British Legal* [1918] *1 K.B.* 136; *Becker v Marshall* (1922) *12 Ll. L. Rep.* 413, 414; *Greenhill v Federal Insurance* [1927] *1 K.B.* 65; *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA* [2004] *EWCA Civ* 962, [2004] *2 Lloyd's Rep.* 483; *Doheny v New India Assurance Co Ltd* [2004] *EWCA Civ* 1705, [2005] *Lloyd's Rep. I.R.* 251 at [16]–[20]; *Aldridge v Liberty Mutual Insurance Europe Ltd* [2016] *EWHC* 3037 (Comm) at [33]–[38];

Ristorante Ltd v Zurich Insurance Plc [2021] EWHC 2538 (Ch), [2022] Lloyd's Rep. I.R. 109 at [80]–[95]. As to the degree of knowledge required by the insurer to waive disclosure, see *New Hampshire Insurance Co v Oil Refineries Ltd [2002] 2 Lloyd's Rep. 462*.

- ②266 *CTI v Oceanus Mutual [1984] 1 Lloyd's Rep. 476, 497–498; Marc Rich & Co AG v Portman [1997] 1 Lloyd's Rep. 225* at 234.

- ②267 e.g. “Have you or your driver during the past five years been convicted of any offence?” This would relieve the assured from disclosing older offences: *Jester-Barnes v Licenses and General (1934) 49 Ll.L. Rep. 231, 237*; see also *Joel v Law Union and Crown Insurance Co [1908] 2 K.B. 863; Brewtnall v Cornhill (1931) 40 Ll.L. Rep. 166; Schoolman v Hall [1951] 1 Lloyd's Rep. 139; Bate v Aviva Insurance UK Ltd [2013] EWHC 1687 (Comm), [2013] Lloyd's Rep. I.R. 492; affirmed [2014] EWCA Civ 334, [2014] Lloyd's Rep. I.R. 527*; cf. *McCormick v National Motor Accident (1934) 40 Com. Cas. 76, 78*. See also *Roberts v Plaisted [1989] 2 Lloyd's Rep. 341; O'Kane v Jones [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389* at [237]–[239]; *Noblebright Ltd v Sirius International Corp [2007] Lloyd's Rep. I.R. 584*; cf. *James v CGU Insurance Plc [2002] Lloyd's Rep. I.R. 206, [85]*.

- ②268 *Cantiere Meccanico Brindisino v Janson [1912] 2 K.B. 112, 116, [1912] 3 K.B. 452, 462; Inversiones Manria SA v Sphere Drake Insurance Co Plc (The Dora) [1989] 1 Lloyd's Rep. 69, 92; O'Kane v Jones [2003] EWHC 3470 (Comm)* at [240]; s.18(3)(d) of the Marine Insurance Act 1906. It is an open question whether this exception to the duty of disclosure applies to all warranties. It is likely that the notion of superfluity extends only to promissory warranties, rather than to descriptive warranties. It appears that there is no exception to the duty where the relevant circumstance relates to a policy exclusion (cf. *International Lottery Management Ltd v Dumas [2002] Lloyd's Rep. I.R. 237* at [59]), unless of course disclosure would diminish the risk; see also *Synergy Health (UK) Ltd v CGU Insurance Plc [2010] EWHC 2583 (Comm), [2011] Lloyd's Rep. I.R. 500* at [183]–[184].

- ②269 Rehabilitation of Offenders Act 1974 s.4. See *Reynolds v Phoenix Assurance Co Ltd [1978] 2 Lloyd's Rep. 440; Inversiones Manria SA v Sphere Drake Insurance Co Plc (The Dora) [1989] 1 Lloyd's Rep. 69, 80; Power v Provincial Insurance Plc [1998] R.T.R. 60; Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd [2010] EWHC 2192 (QB), [2011] Lloyd's Rep. I.R. 238*.

- ②270 *Quinn Direct Insurance Ltd v Law Society [2010] EWCA Civ 805, [2011] 1 W.L.R. 308*.

- ②271 *March Cabaret Club & Casino Ltd v London Assurance [1975] 1 Lloyd's Rep. 169; Quinn Direct Insurance Ltd v Law Society [2010] EWCA Civ 805, [2011] 1 W.L.R. 308* at [11].

- ②272 cf. *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665; affirmed [1991] 2 A.C. 249; Aldrich v Norwich Union Life Insurance Co Ltd [2000] Lloyd's Rep. I.R. 1*.

- 273 Equality Act 2010 ss.4–13, 28–29, 31 and Sch.3 Pt 5 paras 20–23, as amended by Equality Act 2010 (Amendment) Regulations 2012 (SI 2012/2992). See MacGillivray on Insurance Law, 15th edn (2022), paras 16-038—16-042.
- 274 *Wake v Atty* (1812) 4 *Taunt.* 493; *British Equitable v GW Railway* (1869) 20 *L.T.* 422; *Allis Chalmers v Fidelity Deposit* (1916) 32 *T.L.R.* 263; *Looker v Law Union* [1928] 1 *K.B.* 554; *Berger v Pollock* [1973] 2 *Lloyd's Rep.* 442; *Hadenfayre v British National Insurance Society* [1984] 2 *Lloyd's Rep.* 393, 398.
- 275 *Pim v Reid* (1843) 6 *Man. & G.* 1, 25; *Re Wilson and Scottish* [1920] 2 *Ch.* 28.
- 276 *British Equitable v GW Railway* (1869) 38 *L.J. Ch.* 314; *Canning v Farquhar* (1886) 16 *Q.B.D.* 727; *Allis Chalmers v Fidelity Deposit* (1916) 114 *L.T.* 433; *Looker v Law Union* [1928] 1 *K.B.* 554.
- 277 *Re Yager and Guardian* (1912) 108 *L.T.* 38; *Allis Chalmers v Fidelity Deposit* (1916) 32 *T.L.R.* 263; *Looker v Law Union* [1928] 1 *K.B.* 554.
- 278 *Sawtell v Loudon* (1814) 5 *Taunt.* 359; *Lishman v Northern Maritime* (1875) *L.R.* 10 *C.P.* 179; *Niger v Guardian Assurance* (1922) 13 *Li.L. Rep.* 75.
- 279 The Court of Appeal has expressed the opinion (obiter) that it is only the alteration which is affected: *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1997] 1 *Lloyd's Rep.* 360, 370; affirmed [2001] *UKHL* 1, [2001] 2 *W.L.R.* 170 at [54]–[55]. If this is the case, there may be circumstances where the alteration is of such proportion effectively as to vitiate the whole contract. See also *K/S Merc-Scandia XXXII v Lloyd's Underwriters* [2001] *EWCA Civ* 1275, [2001] 2 *Lloyd's Rep.* 563 at [22(2)].
- 280 *Lynch v Dunsford* (1811) 14 *East* 494; *Watson v Mainwaring* (1813) 4 *Taunt.* 763; *Seaton v Burnand* [1900] *A.C.* 135.
- 281 *Lynch v Dunsford* (1811) 14 *East* 494. It is not open to the assured to disprove materiality by proving at the trial that the rumour is unfounded: *Brotherton v Aseguradora Colseguros SA* [2003] *EWCA Civ* 705, [2003] *Lloyd's Rep. I.R.* 746.
- 282 *Watson v Mainwaring* (1813) 4 *Taunt.* 763; *Associated Oil Carriers v Union Insurance* [1917] 2 *K.B.* 184.
- 283 *Benham v United Guarantee* (1852) 7 *Ex.* 744; *Whitwell v Autocar Fire and Accident* (1927) 27 *Li.L. Rep.* 418; but cf. *Berger v Pollock* [1973] 2 *Lloyd's Rep.* 442. In *New Hampshire Insurance Co v MGN Ltd* [1997] *L.R.L.R.* 24, it was held that the exercise of the insurer's contractual right of cancellation does not impose on the assured a continuing duty of disclosure. See also *Iron Trades Mutual v Companhia de Seguros Imperio* [1991] 1 *Re. L.R.* 213. Where, however, the insurer is asked to withdraw the notice of cancellation, with the effect of reinstating or continuing the cover, the duty may be engaged: *Kingscroft Insurance Co Ltd v Nissan Fire & Marine Insurance Co Ltd (No.2)* [1999] *Lloyd's Rep. I.R.* 603. However, if there is a “held covered” provision whereby the insurer is required to extend cover on agreement of an additional premium, the assured will be subject to a duty of disclosure: *Overseas Commodities Ltd v Style* [1958] 1 *Lloyd's Rep.* 546, 559; *Liberian Insurance Agency Inc v Mosse* [1977] 2 *Lloyd's Rep.* 560, 568; *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 *Lloyd's Rep.* 437, 511–2; *New Hampshire Insurance Co v MGN Ltd* [1997] *L.R.L.R.* 24.

- 284 As to the effect of provisions requiring post-contractual disclosure, see *Hussain v Brown* [1996] 1 Lloyd's Rep. 627, 631; *Kausar v Eagle Star Insurance Co Ltd* [1997] C.L.C. 129; *Swiss Reinsurance Co v United India Insurance Co Ltd* [2005] EWHC 237 (Comm), [2005] Lloyd's Rep. I.R. 341 at [35]–[36]. See *K/S Merc-Scandia XXXII v Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep. 563 for a review of those situations where the duty of disclosure may arise after the insurance contract is made.
- 285 See Vol.I, Ch.9.
- 286 See *Everett v Desborough* (1829) 5 Bing. 503, 518; *Wainwright v Bland* (1836) 1 M. & W. 32; *Anderson v Fitzgerald* (1853) 4 H.L.C. 484, 504; *Dawsons v Bonnin* [1922] 2 A.C. 413. Where the representation is made in answer to a question in a proposal form, the question must be construed objectively and any ambiguity will be construed by applying the contra proferentem principle: *R&R Developments Ltd v AXA Insurance UK Plc* [2009] EWHC 2429 (Ch), [2010] 2 All E.R. (Comm) 527. See further *Ristorante Ltd v Zurich Insurance Plc* [2021] EWHC 2538 (Ch), [2022] Lloyd's Rep. I.R. 109.
- 287 *Wheelton v Hardisty* (1857) 8 El. & Bl. 232; *Anderson v Pacific Fire and Marine* (1871-72) L.R. 7 C.P. 65.
- 288 *Bowden v Vaughan* (1809) 10 East 415; *Jones v Provincial Insurance* (1857) 3 C.B. N.S. 65.
- 289 *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep. 116, 127; *Limit No.2 Ltd v AXA Versicherung AG* [2007] EWHC 2321 (Comm), [2008] Lloyd's Rep. I.R. 330 at [46], reversed in part [2008] EWCA Civ 1231, [2009] Lloyd's Rep. I.R. 396; cf. *Benham v United Guarantee* (1852) 7 Ex. 744; *Grant v Aetna Insurance* (1862) 15 Moo. P.C. 516; *Weber and Berger v Employers' Liability* (1926) 24 Ll.L. Rep. 321.
- 290 *Economides v Commercial Union Assurance Co Plc* [1997] 3 W.L.R. 1066; *Rendall v Combined Insurance Co of America* [2005] EWHC 678 (Comm), [2006] Lloyd's Rep. I.R. 732; see *Marine Insurance Act 1906 s.20(5)*; contra, *Highland Insurance Co v Continental Insurance Co* [1987] 1 Lloyd's Rep. 109. There may be occasions where the opinion is expressed in such a way or such circumstances as to imply that there are reasonable grounds for the belief or opinion: cf. above, Vol.I, paras 9-008—9-017.
- 291 *Benham v United Guarantee* (1852) 7 Ex. 744. cf. *Notman v Anchor Assurance* (1858) 4 C.B.(N.S.) 476, and see above, para.44-037.
- 292 *Traill v Baring* (1864) 4 De G.J. & S. 318; *Canning v Farquhar* (1886) 16 Q.B.D. 727; *Re Marshall and Scottish Employers* (1901) 85 L.T. 757. See also *Limit No.2 Ltd v AXA Versicherung AG* [2007] EWHC 2321 (Comm), [2008] Lloyd's Rep. I.R. 330 at [78]–[81], [2008] EWCA Civ 1231, [2009] Lloyd's Rep. I.R. 396 at [22]–[28].
- 293 *Traill v Baring* (1864) 4 De G.J. & S. 318 at 330; *With v O'Flanagan* [1936] Ch. 575 at 583–585; *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15, [2002] E.M.L.R. 27 at [51].
- 294 *Smith v Kay* (1859) 7 H.L.C. 750 at 769; *Briess v Woolley* [1954] A.C. 333 at 344, 349, 352–353, 358; *Synergy Health (UK) Ltd v CGU Insurance Plc* [2010] EWHC 2583 (Comm), [2011] Lloyd's Rep. I.R. 500 at [159]–[163].

- 295 *WPP Group Plc v Reichmann* [2000] All E.R. (D) 1409 (Aug) at [62]–[63]; *Limit No.2 Ltd v AXA Versicherung AG* [2008] EWCA Civ 1231, [2009] Lloyd's Rep. I.R. 396. See Vol.I, paras 9-025—9-028.
- 296 *Re General Provincial Life* (1870) 18 W.R. 396; *Dent v Blackmore* (1927) 29 Ll.L. Rep. 9.
- 297 *Glicksman v Lancashire and General* [1925] 2 K.B. 593.
- 298 *Re Universal Non-Tariff Fire* (1875) L.R. 19 Eq. 485; *Dawsons v Bonnin* [1922] 2 A.C. 413, 425. See Marine Insurance Act 1906 s.20(4); cf. *Svenska Handelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 Lloyd's Rep. 519, 561–562.
- 299 *Golding v Royal London* (1914) 30 T.L.R. 350, 351; *Graham v Western Australian* (1931) 40 Ll.L. Rep. 64, 66; *Merchant's and Manufacturers' Insurance v Hunt* [1941] 1 K.B. 295, 318; *Whitlam v Hazel* [2004] EWCA Civ 1600, [2005] Lloyd's Rep. I.R. 168 at [28]; cf. Marine Insurance Act 1906 s.20. cf. *Economides v Commercial Union Assurance Co Plc* [1997] 3 W.L.R. 1066.
- 300 *Anderson v Fitzgerald* (1853) 4 H.L.C. 484, 504; *Wheelton v Hardisty* (1857) 8 El. & Bl. 232, 299; *Thomson v Weems* (1884) 9 App. Cas. 671, 683; *Scottish Provident v Boddam* (1893) 9 T.L.R. 385; *Joel v Law Union* [1908] 2 K.B. 863, 877.
- 301 *British Equitable v Great Western Ry* (1869) 38 L.J. Ch. 314; *London Assurance v Mansel* (1879) 11 Ch. D. 363; *British Equitable v Musgrave* (1887) 3 T.L.R. 630.
- ③02 [1995] 1 A.C. 501.
- ③03 *Niramax Group Ltd v Zurich Insurance Plc* [2020] EWHC 535 (Comm); [2021] EWCA Civ 590, [2022] Lloyd's Rep. I.R. 56 at [31]–[35].
- ③04 *Zurich Insurance Plc v Niramax Group Ltd* [2021] EWCA Civ 590, [2022] Lloyd's Rep. I.R. 56 at [35].
- ③05 *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] Lloyd's Rep. I.R. 131 at [62]; *AXA Versicherung AG v Arab Insurance Group (BSC)* [2017] EWCA Civ 96, [2017] Lloyd's Rep. I.R. 216 at [138]. For cases where the following underwriters were induced to enter into a contract by reason of the decision of the leading underwriter to enter into the contract, see *International Lottery Management Ltd v Dumas* [2002] Lloyd's Rep. I.R. 237 at [72], [78]; *Brotherton v Aseguradora Colseguros SA* [2003] EWHC 1741 (Comm), [2003] Lloyd's Rep. I.R. 762.
- ③06 *Aldridge Estates Investments Co Ltd v McCarthy* [1996] E.G.C.S. 167.
- ③07 *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [235].
- ③08 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501; *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Contractors Ltd* [1995] 2 Lloyd's Rep. 116, 127; *Svenska Handelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 Lloyd's Rep. 519, 564; *Gunns v Par Insurance Brokers* [1997] 1 Lloyd's Rep. 173, 176. In *Marc*

Rich & Co AG v Portman [1996] 1 Lloyd's Rep. 430, 442–442, the court suggested that the presumption should be relied upon where the underwriter cannot be called for good reason to give evidence and no reasonable supposition can be made that he acted imprudently; affirmed [1997] 1 Lloyd's Rep. 225. See also *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [2009] EWCA Civ 62, [2009] Lloyd's Rep. I.R. 704 at [69]–[70].

- ③09 309 *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] Lloyd's Rep. I.R. 131; *Aldridge v Liberty Mutual Insurance Europe Ltd* [2016] EWHC 3037 (Comm) at [28].

- ③10 310 *Sea Glory Maritime Co v Al Sagr National Insurance Co (The Nancy)* [2013] EWHC 2116 (Comm), [2014] 1 Lloyd's Rep. 14 at [56], [116].

- ③11 311 *Bate v Aviva Insurance UK Ltd* [2014] EWCA Civ 334, [2014] Lloyd's Rep. I.R. 527 at [35]; *Aldridge v Liberty Mutual Insurance Europe Ltd* [2016] EWHC 3037 (Comm) at [29].

- 312 312 *Morrison v Universal Marine* (1872-73) L.R. 8 Ex. 197. See also above, para.44-033 (note). If the contract is separable into distinct parts such that they represent separate insurances, the insurer's remedy of avoidance is likely to relate to that divisible part rather than the entire contract: *Dalecroft Properties Ltd v Underwriters* [2017] EWHC 1263 (Comm), [2017] Lloyd's Rep. I.R. 511 at [99]–[100]. Misrepresentation Act 1967 s.2(2) provides that the court or arbitrator may declare the contract subsisting where a party would otherwise be entitled to rescind, so it is arguable that the right to avoid a contract of insurance for misrepresentation of a material fact now depends upon the discretion of the tribunal. However, dicta in *Highland Insurance Co v Continental Insurance Co* [1987] 1 Lloyd's Rep. 109, 117 indicate that, in contracts of reinsurance at least, relief from avoidance will be wholly exceptional. It may be that the parties have agreed that the various sections constituting the policy are each separate insurance contracts, in which case a non-disclosure or misrepresentation might result in the avoidance of one section of the policy, as opposed to the entire policy (*James v CGU Insurance Plc* [2002] Lloyd's Rep. I.R. 206). There is, of course, a statutory right to avoid contracts of marine insurance for material misrepresentation: see Marine Insurance Act 1906 s.20.

- 313 313 *Cornhill Insurance Co v Assenhein* (1937) 58 L.L. Rep. 27, 31; *Black King Shipping Corp v Massie (The Litision Pride)* [1985] 1 Lloyd's Rep. 437, 514–516 (where even post-contract breaches of the duty of utmost good faith were held to be capable of entitling avoidance ab initio).

- 314 314 *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep. I.R. 209; *Direct Line Insurance Plc v Khan* [2001] EWCA Civ 1794, [2002] Lloyd's Rep. I.R. 364 at [29]; cf. *Manifest Shipping & Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1, [2001] 2 W.L.R. 170; *K/S Merc-Scandia XXXII v Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep. 563; *Agapitos v Agnew (The Aegeon)* [2002] EWCA Civ 247, [2002] 2 Lloyd's Rep. 42; *Bennett* [1999] L.M.C.L.Q. 165.

- 315 315 *Drake Insurance Plc v Provident Insurance Plc* [2003] EWHC 109 (Comm), [2003] 1 All E.R. (Comm) 759 at [31]–[32]; *Brotherton v Aseguradora Colseguros SA* [2003] EWCA Civ

- 705; overruling *Strive Shipping Corp v Hellenic Mutual War Risks Association (The Grecia Express)* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep. 88, 129. However, the Court of Appeal has expressed the opinion that the insurer cannot avoid the contract if the insurer acts in bad faith: *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, [2004] Q.B. 601. See *MacDonald Eggers* [2003] L.M.C.L.Q. 249.
- 316 *Holland v Russell* (1863) 4 B. & S. 14; *Cornhill Insurance Co v Assenheim* (1937) 58 Ll.L. Rep. 27, 31. Moreover, in *Magee v Pennine Insurance Co* [1969] 2 Q.B. 507, a compromise of a claim was set aside on the grounds that the insurance had been procured by a misrepresentation. As to whether a settlement may be avoided if it was procured by a non-disclosure, there is conflicting authority: *Callisher v Bischoffsheim* (1870) L.R. 5 Q.B. 449; *Miles v New Zealand Alford Estate Co* (1886) 32 Ch. D. 266; *Piper v Royal Exchange Assurance* (1932) 44 Ll.L. Rep. 103, 117 (per Roche J); *Diggens v Sun Alliance and London Insurance Plc* [1994] C.L.C. 1146; *Royal Boskalis Westminster NV v Mountain* [1997] L.R.L.R. 523, 600; reversed on other grounds [1997] 2 All E.R. 929. See also *Direct Line Insurance Plc v Fox* [2009] EWHC 386 (QB), [2009] 1 All E.R. (Comm) 1017.
- 317 *Dalglish v Jarvie* (1850) 2 Mac. & G. 231, 243. The dishonest concealment of material facts, or the intentional or reckless making of misleading statements, may also amount to a criminal offence: see the Fraud Act 2006 ss.2–3 and ss.89–90, 93 of the Financial Services Act 2012; Financial Services Act 2012 (Misleading Statements and Impressions) Order 2013 (SI 2013/637) art.2. The predecessor to these provisions, s.397 of the Financial Services and Markets Act 2000, did not impose a wider duty of disclosure than that which subsists at common law and does not create an entitlement to damages or other civil relief: *Aldrich v Norwich Union Life Insurance Co Ltd* [2000] Lloyd's Rep. I.R. 1. See also Road Traffic Act 1988 s.174(5). In respect of actions in deceit for fraudulent misrepresentation, see Vol.I, paras 9-055—9-081.
- 318 It is questionable if the duty of utmost good faith suffices for the purposes of the “duty to speak”. See *Brownlie v Campbell* (1880) 5 App. Cas. 925, 950; *Society of Lloyd's v Jaffray* [2002] EWCA Civ 1101, [2002] All E.R. (D) 399 at [29]; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [21], [75].
- 319 The Court of Appeal has recently held that, in the usual case, there is no duty of care not to make negligent misstatements implicit in the relationship between insurer and assured: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483 at [74]; reversed in part on other grounds [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61.
- 320 *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep. 61 at [41]–[45], [2011] EWCA Civ 1572, [2012] 1 Lloyd's Rep. 129 at [35]; cf. *Highlands Insurance Co v Continental Insurance Co* [1987] 1 Lloyd's Rep. 109, 117–118.
- 321 *Glasgow Assurance v Symondson* (1911) 104 L.T. 254, 258.
- 322 *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, 773–805 (affirmed by the House of Lords on somewhat different grounds, though see [1991] 2 A.C. 249, 280); *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1990] 1 Q.B. 818, 886–888, 890–902; reversed by the House of Lords

- on a different point: [1992] 1 A.C. 233. It is possible that interest might be recoverable as damages pursuant to the House of Lords' decision in *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34, [2007] 3 WLR 354; see *Clarke* [2008] J.B.L. 291.
- 323 *General Accident Fire and Life v Midland Bank* [1940] 2 K.B. 388, *Direct Line Insurance Plc v Khan* [2001] EWCA Civ 1794, [2002] *Lloyd's Rep.* 364 and see below, para.44-098—44-099.
- 324 *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24. *Arab Bank Plc v Zurich Insurance Co* [1999] 1 *Lloyd's Rep.* 262; *First National Commercial Bank Plc v Barnet Devaney (Harrow) Ltd* [1999] 1 *Lloyd's Rep.* I.R. 43. See above, para.44-011.
- 325 *Morrison v Universal Marine* (1872) L.R. 8 Ex. 197; *Mackender v Feldia AG* [1967] 2 Q.B. 590. For a statement of the principles applicable to affirmation, see *Moore Large & Co Ltd v Hermes Credit and Guarantee Plc* [2003] EWHC 26 (Comm), [2003] *Lloyd's Rep.* I.R. 315.
- 326 *McCormick v National Motor* (1934) 40 Com. Cas. 76, 81, 82; *Simon, Haynes v Beer* (1946) 78 *Ll.L. Rep.* 337; *Svenska Handelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 *Lloyd's Rep.* 519, 569.
- 327 *Hemmings v Sceptre Life* [1905] 1 Ch. 365; *Holdsworth v Lancashire and Yorkshire* (1907) 23 T.L.R. 521; *Ayrey v British Legal* [1918] 1 K.B. 136; *Liberian Insurance v Mosse* [1977] 2 *Lloyd's Rep.* 560.
- 328 In *ABN AMRO NV v Royal & Sun Alliance Insurance Plc* [2021] EWHC 442 (Comm), [2021] *Lloyd's Rep.* I.R. 467 at [541] a plea to rectify the insurance contract was held to be an affirmatory act; appeal allowed in part on other grounds [2021] EWCA Civ 1789, [2022] 1 W.L.R. 1773.
- 329 *Bilbie v Lumlie* (1802) 2 East 469; *Wing v Harvey* (1854) 5 De G.M. & G. 265.
- 330 *Scottish Equitable v Buist* (1877) 4 R. 1076, Ct of Sess.; merely not returning premiums already paid does not amount to waiver: *March Cabaret Club v London Assurance* [1975] 1 *Lloyd's Rep.* 169. As to whether the issuance of a policy may constitute an affirmation, see *Morrison v The Universal Marine Insurance Co* (1872) L.R. 8 Ex. 40; (1873) L.R. 8 Ex. 197; cf. *Svenska Handelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 *Lloyd's Rep.* 519, 569. As to the affirmatory effect of a contractual notice of cancellation, see *Mint Security Ltd v Blair* [1982] 1 *Lloyd's Rep.* 188 at 198; *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 *Lloyd's Rep.* 483. See also *Scottish Coal Co Ltd v Royal & Sun Alliance Insurance Plc* [2008] EWHC 880 (Comm), [2008] *Lloyd's Rep.* I.R. Plus 31.
- 331 The aggrieved party alternatively might be estopped from denying his affirmation of the contract: see below, para.44-086. As to when an insurer will be treated as knowing all the relevant facts by reason of the knowledge of an agent being imputed to him, compare *Evans v Employers' Mutual Insurance Association Ltd* [1936] 1 K.B. 505; and *Malhi v Abbey Life Assurance Co Ltd* [1996] L.R.L.R. 237. If the affirming conduct was that of an agent, rather than the aggrieved party himself, that agent himself must have the authority and capacity to affirm the contract: *Tate & Sons v Hyslop* (1885) 15 Q.B.D. 368, 374; *Aldridge Estates Investments Co Ltd v McCarthy* [1996] E.G.C.S. 167. See also *Callaghan v Thompson* [2000] *Lloyd's Rep.* I.R. 125.

- 332 *Insurance Corp of the Channel Islands Ltd v McHugh* [1997] L.R.L.R. 94, [1998] *Lloyd's Rep. I.R.* 151. In *Sea Glory Maritime Co v Al Sagr National Insurance Co* [2013] EWHC 2116 (Comm), [2014] 1 *Lloyd's Rep.* 14 at [126], it was held that an insurer is entitled to a reasonable time to conduct its enquiries before making an election to affirm the contract. As to the requirement of knowledge of the legal right to avoid in circumstances where the insurer is being advised by solicitors, see *Moore Large & Co Ltd v Hermes Credit and Guarantee Plc* [2003] EWHC 26 (Comm), [2003] *Lloyd's Rep. I.R.* 315 at [92]–[100]; *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm), [2015] 2 *Lloyd's Rep.* 289 at [157]–[161].
- 333 *Morrison v Universal Marine* (1872) L.R. 8 Ex. 197; *McCormick v National Motor* (1934) 40 Com. Cas. 76; *Simon, Haynes v Beer* (1946) 78 *Ll.L. Rep.* 337; *CTI v Oceanus Mutual* [1984] 1 *Lloyd's Rep.* 476; *Hadenfayre v British National Insurance Society* [1984] 2 *Lloyd's Rep.* 393; *Insurance Corp of the Channel Islands Ltd v McHugh* [1997] L.R.L.R. 94, [1998] *Lloyd's Rep. I.R.* 151.
- 334 *Clough v London & NW Ry* (1871) L.R. 7 Ex. 26, 34, 35.
- 335 *IHC v Amtrust Europe Ltd* [2015] EWHC 257 (QB).
- 336 See below, para.44-086.
- 337 See below, para.44-080. The Consumer Insurance (Disclosure and Representations) Act 2012 s.6, and the Insurance Act 2015 s.9 abolish such warranties.
- 338 *Newcastle Fire v Macmorran* (1815) 3 Dow 225; *Anderson v Fitzgerald* (1853) 4 H.L.C. 484, 503; *Stebbing v Liverpool and London and Globe Insurance Co Ltd* [1917] 2 K.B. 433, 437; *Condolianis v Guardian Assurance* [1921] 2 A.C. 125, 129; *Dawsons v Bonnin* [1922] 2 A.C. 413; *Mackay v London General* (1935) 51 *Ll.L. Rep.* 201; *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] 2 *Lloyd's Rep.* 314; see, generally, *Hasson* (1971) 34 M.L.R. 29; *Svenska Handelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 *Lloyd's Rep.* 519, 551–553. Such terms are to be interpreted in accordance with established rules of construction and, unless the parties so intended, will not be interpreted as a continuing warranty: *Hussain v Brown* [1996] 1 *Lloyd's Rep.* 627, 629.
- 339 *Hemmings v Sceptre Life* [1905] 1 Ch. 365; *Anstey v British National Premium Life* (1908) 24 T.L.R. 594, 871; *Toomey v Eagle Star (No.2)* [1995] 2 *Lloyd's Rep.* 88, where it was held that it is possible in principle to include a provision excluding the right to rescind for material misrepresentation or non-disclosure, but that the clause in that case (which provided that the policy was “neither cancellable nor voidable by either party”) did not, on its proper construction, preclude rescission for a misrepresentation or non-disclosure made negligently. cf. *Highland Insurance Co v Continental Insurance Co* [1987] 1 *Lloyd's Rep.* 109, 116–117; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1992] 1 *Lloyd's Rep.* 101, 108–109, [1993] 1 *Lloyd's Rep.* 496, 502–503 (both cases concerned an “errors and omissions” clause which purported to excuse inadvertent misrepresentations and non-disclosures). Regard should also be had to s.3 of the Misrepresentation Act 1967, which treats contractual provisions relieving a misrepresentor, from liability as invalid, unless reasonable; it is unlikely that such clauses will be struck down, at least from the assured’s perspective, given the harshness of the remedy of avoidance as perceived by the court. See above, paras 9-157 et seq.

- 340 *Mutual Energy Ltd v Starr Underwriting Agents Ltd* [2016] EWHC 590 (TCC), [2016] B.L.R. 312.
- 341 *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep. 487, 495.
- ③42 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61; *Seashell of Lisson Grove Ltd v Aviva Insurance Ltd* [2011] EWHC 1761 (Comm). As to the effect of innocent non-disclosure clauses, see *Arab Bank Plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep. 262; *Kumar v AGF Insurance Ltd* [1999] 1 W.L.R 1747; *UK Acorn Finance Ltd v Markel (UK) Ltd* [2020] EWHC 922 (Comm), [2020] Lloyd's I.R. 356; *ABN AMRO NV v Royal & Sun Alliance Insurance Plc* [2021] EWHC 442 (Comm), [2021] Lloyd's Rep. I.R. 467 at [472]–[484]; [2021] EWCA Civ 1789, [2022] 1 W.L.R. 1773.
- 343 *Anderson v Fitzgerald* (1853) 4 H.L.C. 484, 496; *Joel v Law Union* [1908] 2 K.B. 863, 886; *Stebbing v Liverpool and London Globe* [1917] 2 K.B. 433, 437.
- 344 *Thomson v Weems* (1884) 9 App. Cas. 671, 682; *Joel v Law Union* [1908] 2 K.B. 863.
- 345 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483; reversed in part on other grounds [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61.
- 346 For consideration of the harsh effects of the absolute obligation to disclose material facts, and recommendations for reform, see the Law Commission's Report No.104, Cmnd.8064 (1980). See also Australian Law Reform Commission Report No.91 (April 2001), Review of the Marine Insurance Act 1909; *Derrington* [2002] L.M.C.L.Q. 214; Insurance Contract Law Reform, Recommendations to the Law Commission, A Report of the Sub-Committee of the British Insurance Law Association, 1 September 2002; Law Commission's Consultation Paper No.182 on "Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured" (July 2007); Law Commission's Consultation Paper No.204 on "The Business Insured's Duty of Disclosure and the Law of Warranties" (June 2012).
- 347 For the texts of the Statement of General Insurance Practice, see <http://www.abi.org.uk>.
- 348 See <https://www.handbook.fca.org.uk/handbook/ICOBS> made pursuant to ss.137A to 137F, 137T and 139A of the Financial Services and Markets Act 2000, as amended by s.24 of the Financial Services Act 2012. In *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep. I.R. 253 at [197], it was held that the obligations under ICOBS were not implied terms of the insurance contract. See also *Bate v Aviva Insurance UK Ltd* [2013] EWHC 1687 (Comm), [2013] Lloyd's Rep. I.R. 492 at [33]–[34]; affirmed [2014] EWCA Civ 334, [2014] Lloyd's Rep. I.R. 527. A contravention of such rules by an authorised person may entitle a private person to claim damages for loss sustained pursuant s.138D(2) of the 2000 Act, introduced pursuant to an amendment by s.24 of the Financial Services Act 2012. See *Goodman v Central Capital Ltd* [2012] EWHC 8 (QB), [12].
- ③49 ICOBS para.8.1.1. See *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep. I.R. 253 at [193]–[202]; *Bate v Aviva Insurance UK Ltd* [2013] EWHC 1687 (Comm), [2013] Lloyd's Rep. I.R. 492, affirmed [2014] EWCA Civ 334, [2014] Lloyd's Rep. I.R. 527. In *Komives v Hick Lane Bedding Ltd*

[2021] EWHC 3139 (QB), [2022] Lloyd's Rep. I.R. 431 it was held that the duty under para.8.1.1(3)—the duty not to reject claims unreasonably—was limited to the relationship between the insurer and the insured and that it did not apply to any claims made by third parties under the Third Parties (Rights against Insurers) Act 1930 (or, presumably the 2010 Act). Further, it was held that this duty imposed only a process requirement in that it regulated how the insurer would handle a claim; it did not inform the insurer what decision on the claim should be made.

- 350 ICOBS para.8.1.2. In *Bate v Aviva Insurance UK Ltd* [2013] EWHC 1687 (Comm), [2013] Lloyd's Rep. I.R. 492, [2014] EWCA Civ 334, [2014] Lloyd's Rep. I.R. 527 at [48]–[49], the Court held that a fraudulent device used in the pursuit of a fraudulent claim was sufficient to attract the fraud exception. See also *Ashfaq v International Insurance Co of Hannover Plc* [2017] EWCA Civ 357, [2017] H.L.R. 29.
-

(b) - Consumer Insurance Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 4. - Utmost Good Faith and Fair Presentation of the Risk

(b) - Consumer Insurance Contracts

Consumer Insurance (Disclosure and Representations) Act 2012

- 44-046 On 8 March 2012, the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) was passed. The [2012 Act](#) applies to consumer insurance contracts agreed on or after 6 April 2013 or to variations to pre-existing contracts agreed on or after that date.³⁵¹ This Act has fundamentally altered the consumer assured's duty of utmost good faith as it applies up to the making of the insurance contract. A consumer is an individual who contracts wholly or mainly for purposes unrelated to the individual's trade, business or profession.³⁵² The consumer assured's duty of utmost good faith and the insurer's remedies for breach of that duty are exhaustively set out in the Act. The previous law no longer applies to consumer assureds and the common law duty of disclosure no longer applies to such consumer assureds. By [s.10](#), a term of a consumer insurance contract which would put the consumer in a worse position in respect of the disclosure and representations required of the consumer and the insurer's remedies than the consumer would be in by the provisions of the [2012 Act](#) are of no effect.³⁵³

The duty to take reasonable care not to misrepresent

- 44-047 Under [s.2\(2\) of the 2012 Act](#), it is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer.³⁵⁴ Whether or not a consumer has taken reasonable care not to make a misrepresentation is to be determined in the light of all the relevant circumstances, including: the type of consumer insurance contract and its target market, any relevant explanatory material or publicity produced or authorised by the insurer; how clear and how specific the insurer's questions to the assured were; in the case of a failure to respond to the insurer's questions

in connection with the renewal or variation of a consumer insurance contract, how clearly the insurer communicated the importance of answering those questions; and whether or not an agent was acting for the consumer.³⁵⁵ The standard of care required by the assured's duty is that of a reasonable consumer.³⁵⁶ A misrepresentation made dishonestly is always to be taken as showing a lack of reasonable care.³⁵⁷

Basis of the contract clauses

- 44-048 Insurance contracts in many instances contain provisions which warrant the truth of pre-contractual representations, for example contained in a proposal form, or which render the truth of such representations as conditions precedent to the insurer's liability under the insurance contract. Such provisions often take the form of a clause providing that the representations made by the assured form the "basis" of the insurance contract or are incorporated into the insurance contract, without identifying any particular representation. The effect of such a warranty (or condition precedent) is that if a pre-contractual representation coming within the basis of the contract clause is untrue, there is a breach of warranty (or condition precedent) and the insurer is discharged from liability from the date of the breach, which in many cases is the date of the inception of the cover or the conclusion of the contract.³⁵⁸ The [Consumer Insurance \(Disclosure and Representations\) Act 2012](#), by s.6, abolishes such warranties with respect to consumer insurance contracts. This prohibition, however, is unlikely to apply to specific warranties, i.e. warranties that specific representations of fact (e.g. that the assured has suffered no losses during the previous 12 months) are true, so that such warranties will remain valid.³⁵⁹

The insurer's remedies

- 44-049 The insurer will have a remedy for a misrepresentation made by the consumer assured where the assured has breached its duty under s.2(2) and where the insurer shows that without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms.³⁶⁰ The insurer's remedies will depend on whether the misrepresentation is deliberate or reckless (in the sense that the assured knew that, or did not care whether, the representation was untrue or misleading and the representation was relevant to the insurer) or careless. The finding that an assured's breach of duty was deliberate or reckless may be supported by the presumptions allowed under s.5(5), in particular that the consumer knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer.³⁶¹ If the misrepresentation was deliberate or reckless, the insurer may avoid the contract and retain the premium.³⁶² If it was careless (i.e. lacking in reasonable care), and if the insurer would not have entered into the contract had the truth been told, the insurer may avoid

the contract but must return the premium. If it was careless, and the insurer would have entered into the same contract had the truth been told but on different terms (other than as to premium), the insurer may require the contract to be treated as if it had been concluded on those terms. If the misrepresentation was careless, and the insurer would have entered into the same contract but at a higher premium, the claims payable under the contract will be proportionately reduced.³⁶³ Contracting out is not permitted under the Act.³⁶⁴

FCA Insurance Conduct of Business Sourcebook (ICOBS)³⁶⁵

- 44-050** Under ICOBS, a “consumer” is any natural person who is acting for purposes which are outside his trade or profession.³⁶⁶ ICOBS provides that insurers must handle claims promptly and fairly, provide reasonable guidance to policyholders, not unreasonably reject a claim, and pay claims promptly after agreeing to a settlement.

³⁶⁷

U Further, ICOBS provides that, in respect of insurance contracts concluded on or before 5 April 2013, the rejection of a consumer policyholder’s claim is unreasonable where, in the absence of any evidence of fraud, the ground relied on by the insurer is the non-disclosure of a material fact which the policyholder could not reasonably be expected to disclose or non-negligent misrepresentation.³⁶⁸ In respect of insurance contracts concluded on or after 6 April 2013, the rejection of a consumer policyholder’s claim is unreasonable where, in the absence of fraud, the ground relied on by the insurer is a misrepresentation which is not made in breach of the consumer’s duty in [s. 2\(2\) of the Consumer Insurance \(Disclosure and Representations\) Act 2012](#) or is such that the insurer would have entered into contract on the same terms even if no misrepresentation had been made.³⁶⁹ It is worth noting that in consumer cases the approach of the Financial Ombudsman Service (FOS)³⁷⁰ is to consider, first whether there has been a clear case of misrepresentation or non-disclosure inducing the conclusion of the insurance contract³⁷¹ and, secondly, the policyholder’s state of mind.³⁷² The FOS will permit the insurer to avoid the policy in the case of a deliberate or reckless misrepresentation or non-disclosure, will require the insurer to pay the claim in respect of an innocent breach of duty, and in the case of an “inadvertent” breach will require the insurer to handle the claim on the basis of what contract the insurer would have entered into, if any, had full disclosure been made.

Footnotes

- 351 2012 Act s.12(4); The Consumer Insurance (Disclosure and Representations) Act 2012 (Commencement) Order 2013 (SI 2013/450).
- 352 2012 Act s.1. cf. *Ashfaq v International Insurance Co of Hannover Plc [2017] EWCA Civ 357*, [2017] H.L.R. 29 at [45]–[58]. The 2012 Act did not apply to the insurance contract in this case: at [15].
- 353 This provision does not apply to settlement contracts in respect of claims made under a consumer insurance contract: s.10(3).
- 354 *Jones v Zurich Insurance Plc [2021] EWHC 1320 (Comm)*.
- 355 2012 Act s.3(2).
- 356 2012 Act s.3.
- 357 2012 Act s.3(5).
- 358 See above, para.44-044.
- 359 Explanatory Notes to the 2012 Act, paras 41–42. Such warranties, to be valid, would have to be fair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) and, for contracts made on or after 1 October 2015, the Consumer Rights Act 2015 ss.62–66, as to which see paras 30-273 et seq.
- 360 2012 Act s.4.
- 361 *Tesco Underwriting Ltd v Achunche Unreported 7 July 2016*.
- 362 An allegation that a misrepresentation was deliberate or reckless must be pleaded: *Jones v Zurich Insurance Plc [2021] EWHC 1320 (Comm)* at [30].
- 363 2012 Act s.5 and Sch.1.
- 364 2012 Act s.10.
- 365 See above, para.44-045.
- 366 ICOBS para.2.1.1(3).
- ③67 ICOBS para.8.1.1. See *Parker v National Farmers Union Mutual Insurance Society Ltd [2012] EWHC 2156 (Comm)*, [2013] Lloyd's Rep. I.R. 253 at [193]–[202]; *Bate v Aviva Insurance UK Ltd [2013] EWHC 1687 (Comm)*, [2013] Lloyd's Rep. I.R. 492, affirmed [2014] EWCA Civ 334, [2014] Lloyd's Rep. I.R. 527. In *Komives v Hick Lane Bedding Ltd [2021] EWHC 3139 (QB)*, [2022] Lloyd's Rep. I.R. 431 it was held that this duty imposed only a process requirement in that it regulated how the insurer would handle a claim; it did not inform the insurer what decision on the claim should be made. The duty therefore did not require the insurer not to avoid an insurance contract if there were valid grounds on which to avoid.
- 368 ICOBS para.8.1.2(1). In *Bate v Aviva Insurance UK Ltd [2013] EWHC 1687 (Comm)*, [2013] Lloyd's Rep. I.R. 492, [2014] EWCA Civ 334, [2014] Lloyd's Rep. I.R. 527 at [48]–[49], the Court held that a fraudulent device used in the pursuit of a fraudulent claim was sufficient to attract the fraud exception.
- 369 ICOBS para.8.1.2(2), 8.1.3.
- 370 The approach is set out in various of the FOS's publications (see <http://www.financial-ombudsman.org.uk>) and in an appendix to the Law Commission's Consultation Paper

No.182 (see <http://www.lawcom.gov.uk>). The FOS may also apply the same approach to small businesses.

- 371 The FOS appears to apply a test which is more appropriate for misrepresentations, than non-disclosures, by focusing on the insurer's question and the assured's response.
 - 372 At various points in its publications, the FOS appears to distinguish between five states of mind: fraudulent, deliberate, reckless, inadvertent and innocent.
-

(c) - Insurance Act 2015

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 4. - Utmost Good Faith and Fair Presentation of the Risk

(c) - Insurance Act 2015

The duty of the utmost good faith

- 44-051 The [Insurance Act 2015](#) entered into force on 12 August 2016 and applies to contracts of insurance, and variations to contracts of insurance, agreed after the Act entered into force.³⁷³ The [2015 Act](#) makes a number of modifications to the duty of utmost good faith which applies to the contract of insurance at common law and under the [Marine Insurance Act 1906](#). By [s.14 of the 2015 Act](#), any rule of law permitting a party to an insurance contract to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished. [Section 17 of the 1906 Act](#) (which declares the law applicable to non-marine insurance contracts as well as to marine insurance contracts) is therefore amended to provide that “A contract of marine insurance is a contract based upon the utmost good faith”. Accordingly, the concept of utmost good faith is retained by the [2015 Act](#), but any remedy for failing to observe the utmost good faith is abolished and is replaced by remedies provided for by the [2015 Act](#), which apply only to a breach of the assured’s pre-contractual duty of fair presentation. Any duty which applies after the conclusion of the contract (other than in respect of claims) or which applies to the insurer might still exist after the [2015 Act](#) entered into force, but as matters stand there is no obvious remedy available for any such failures. In the Explanatory Notes accompanying the Act, it is said that “good faith will remain an interpretative principle”.³⁷⁴

The duty of fair presentation

- 44-052 By [s.3\(1\) of the 2015 Act](#), the assured is under a duty to make a fair presentation of the risk before the insurance contract is entered into. There are four elements of the duty of fair presentation. First,

the assured is obliged to disclose to the insurer every material circumstance which the assured knows or ought to know. Failing such full disclosure, the assured is obliged to disclose sufficient information to put a prudent insurer on notice that it needs to make further inquiries to reveal further material circumstances.³⁷⁵ Secondly, the assured must provide such disclosure in a manner which is reasonably clear and accessible to a prudent insurer.³⁷⁶ A fair presentation need not be contained in only one document or oral presentation.³⁷⁷ Thirdly, the assured must ensure that every material representation of fact is substantially correct. A material representation of fact is substantially correct, if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material.³⁷⁸ Fourthly, the assured must ensure that every material representation of expectation or belief is made in good faith.³⁷⁹ In many respects, the duty of fair presentation is substantially similar to the requirements of the common law insofar as it governs the assured's pre-contractual duty of full and accurate disclosure. There are however some substantial changes effected by the [2015 Act](#). The two most substantial changes relate to the concept of knowledge as it applies to the assured and the insurer, and the remedies available to the insurer in the event of a breach of the assured's duty of fair presentation.³⁸⁰

Materiality

- 44-053 The [2015 Act](#) retains the test of materiality as applied under the common law, namely that 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.

³⁸¹

U This is the same test as is currently applied at common law and under ss.18(2) and [20\(2\) of the Marine Insurance Act 1906](#).³⁸² However, the [2015 Act](#) identifies certain facts which *may* be material, namely special or unusual facts relating to the risk, any particular concerns which led the assured to seek insurance cover for the risk, and anything which those concerned with the class of insurance and the field of insured activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.³⁸³

Exceptions to the duty of disclosure

- 44-054 The exceptions to the assured's duty of disclosure as required by the duty to make a fair presentation are largely the same as apply under the common law.³⁸⁴ The assured is not obliged to disclose a circumstance, even if material, if it diminishes the risk, if the insurer knows, ought to know or is presumed to know the circumstance in question, or if the circumstance is something

as to which the insurer waives information.³⁸⁵ There is one exception which applies under the common law, but which has been omitted by the [2015 Act](#): under the common law, the assured is not obliged to disclose a circumstance if its disclosure is superfluous by reason of the presence in the policy of a promissory warranty. This exception has been removed by reason of the changes introduced by the [2015 Act](#) to the law governing promissory warranties.³⁸⁶

The assured's knowledge

- 44-055** Pursuant to the duty of fair presentation, the assured is in the first instance obliged to disclose every material circumstance which the assured knows (actual knowledge) or ought to know (constructive knowledge).³⁸⁷ With respect to the assured's actual knowledge, if the assured is an individual, the assured knows only what is known to that individual or to the individual or individuals who are responsible for the assured's insurance (typically, an insurance broker).³⁸⁸ If the assured is not an individual (such as a company or an unincorporated association), the assured knows only what is known to one or more individuals who are part of the assured's "senior management" or responsible for the assured's insurance.³⁸⁹ The Act defines "senior management" to mean those individuals who play significant roles in the making of decisions about how the assured's activities are to be managed or organised.³⁹⁰ In the Explanatory Notes to the Act, it is said that in a corporate context the senior management is likely to include members of the board of directors but may extend beyond this, depending on the structure and management arrangements of the assured.³⁹¹ However, the assured will not be taken to know information known to its insurance agent, where the insurance agent acquired the information in question through a business relationship with a person who is not connected with the contract of insurance.³⁹² Furthermore, the assured will be taken to know a circumstance which the individual suspected and of which the individual would have had knowledge but for deliberately refraining from confirming or enquiring about such circumstance.³⁹³ With respect to the assured's constructive knowledge, whether the assured is an individual or not, the assured ought to know that which should reasonably have been revealed by a reasonable search of information available to the assured (whether the search is conducted by making enquiries or by any other means) and includes information held within the assured's organisation or by any other person.³⁹⁴ In this respect, the assured's constructive knowledge is apparently much broader than the assured's constructive knowledge under the common law, where the assured was deemed to know only that which ought to have been known to the assured "in the ordinary course of business".³⁹⁵

The insurer's knowledge

- 44-056**

Pursuant to the duty of fair presentation, the assured is not obliged to disclose to the insurer a circumstance if the insurer knows it, ought to know it, or is presumed to know it.³⁹⁶ An insurer knows something only if it is known to one or more of the individuals who participate in the decision whether or not to insure the risk on behalf of the insurer, namely the individual underwriters.³⁹⁷ An insurer ought to know something only if an employee or agent knows it and ought reasonably to have passed on the relevant information to the underwriter in question or if the relevant information is held by the insurer and is readily available to the underwriter in question. In the Explanatory Notes, it is suggested that an insurer ought to know information held by the claims department or reports produced by surveyors or medical experts for the purpose of assessing the risk and information which would be revealed to the underwriter in question by making a reasonable effort to search for such information as is available to the underwriter within the insurer's organisation, such as in the insurer's electronic records.³⁹⁸ An insurer is presumed to know things which are common knowledge and things which an insurer offering insurance of the class in question to assureds in the field of activity in question would reasonably be expected to know in the ordinary course of business.³⁹⁹ An insurer's knowledge will include its "blind-eye" knowledge.⁴⁰⁰

The insurer's remedies for unfair presentation of the risk

- 44-057 If there has been a breach of the duty of fair presentation and if the insurer has been induced by the breach in the sense that but for the breach the insurer would not have entered into the insurance contract at all or would have done so on different terms, the insurer is entitled to a remedy for that breach.⁴⁰¹ By s.14(1), the 2015 Act abolished the avoidance of the insurance contract as the universal remedy for any breach of the duty of utmost good faith. In its place, where there has been a breach of the duty of fair presentation, the 2015 Act provides different remedies depending on (a) whether the breach was deliberate or reckless and (b), where the breach was not deliberate or reckless, the extent of the inducement.⁴⁰² If the breach was deliberate (meaning that the assured knew that it was in breach of the duty) or reckless (meaning that the assured did not care whether or not it was in breach of the duty), the insurer is entitled to avoid the insurance contract and to retain the premium.⁴⁰³ If the breach was neither deliberate nor reckless, and if the insurer would not have entered into the insurance contract at all, but for the breach, the insurer is entitled to avoid the insurance contract, but must also return the premium.⁴⁰⁴ If the breach is neither deliberate nor reckless and, but for the breach, the insurer would have entered into the insurance contract on different terms, there are two remedies depending on whether the different terms relate to premium or not; these remedies are cumulative.⁴⁰⁵ If they do not relate to premium, the insurer may treat the insurance contract as having been written on those different terms.⁴⁰⁶ If the different terms relate to premium, and if the insurer would have charged a higher premium but for the breach, the insurer is entitled to reduce proportionately any amount to be paid on the claim. For example, if the insurer actually charged a premium of £1,000 but would have charged a premium of £2,000 but for

the breach, a claim under the insurance contract which ordinarily would be quantified in the sum of £1,000,000 may be reduced by 50 per cent to £500,000.⁴⁰⁷ There are similar remedies available where the breach of the duty of fair presentation relates to the agreement of a variation.⁴⁰⁸

The insurer's election and waiver

- 44-058 The 2015 Act does not state in what circumstances the insurer may lose the right to the remedies stipulated by the Act by way of affirmation or estoppel. It is clear however that the remedial rights available to the insurer under the 2015 Act may be exercised if the insurer so chooses. The 2015 Act provides that the insurer "may" avoid or "may" reduce proportionately the amount of the recoverable claim and that the insurance contract will be treated as if written on the different terms the insurer would have agreed but for the breach of duty, "if the insurer so requires".⁴⁰⁹ Accordingly, the insurer must elect to exercise any such remedial rights. The insurer may lose such rights by affirmation or estoppel in accordance with the principles explained above.⁴¹⁰

Basis of the contract clauses

- 44-059 It has been a common feature of many commercial insurance contracts that pre-contractual representations of fact made by the assured to the insurer, often in a proposal form, are warranted to be true or that the policy contains conditions precedent to the liability of the insurer that such pre-contractual representations are true. Such warranties or conditions precedent may be express or may be introduced by provisions stating that the pre-contractual representations are the "basis" of the contract or are incorporated into the contract. The effect of such provisions is that if any pre-contractual representation which is the subject of such a warranty or condition precedent is untrue, the insurer is automatically discharged from all liability under the insurance contract as from the date of the breach of the warranty or condition precedent.⁴¹¹ The 2015 Act renders such provisions as invalid in that s. 9(2) provides that a representation made by the assured cannot be converted into such a warranty (or presumably conditions precedent) by such means (including by means of a "basis of the contract" clause). This prohibition appears to be aimed at provisions which seek to convert, without discrimination, all or a large number of pre-contractual representations into a warranty by basis of the contract clauses or the like. As recognised in the Explanatory Notes accompanying the Act, it should remain possible for insurers to include specific warranties relating to existing or past facts within their policies.⁴¹²

Contracting out of the 2015 Act

- 44-060 Except in one instance, the [2015 Act](#) recognises that the parties to the insurance contract may contract out of the provisions of the [2015 Act](#), for example providing for different duties of disclosure or different remedies for an unfair presentation of the risk. Where such a term of the insurance contract intends to contract out of the provisions of the [2015 Act](#) and where a term (if valid) would put the assured in a worse position than it would be in under the provisions of the Act, in order to be effective, any such “disadvantageous” term purporting to contract out of the Act must satisfy two conditions (which are described as the “transparency requirements”).⁴¹³ First, the insurer must take sufficient steps to draw the disadvantageous term to the assured’s attention before the insurance contract is agreed (or before the relevant variation is agreed).⁴¹⁴ However, the assured may not rely on any failure to comply with this condition if the assured or its agent had actual knowledge of the disadvantageous term when the contract (or variation) was agreed.⁴¹⁵ Second, the disadvantageous term must be clear and unambiguous as to its effect.⁴¹⁶ In order to assess whether these conditions have been complied with, the characteristics of the assured of the kind in question and the circumstances of the transaction are to be taken into account.⁴¹⁷ The exception referred to at the beginning of this paragraph relates to “basis of the contract” clauses which put the assured in a worse position than allowed by [s.9 of the 2015 Act](#); such provisions are not permitted in any circumstances.⁴¹⁸ The [2015 Act](#)’s provisions relating to contracting out do not apply to contracts for the settlement of claims under an insurance contract.⁴¹⁹

Footnotes

373 [2015 Act ss.22, 23\(2\).](#)

374 [Explanatory Notes, para.117.](#)

375 [2015 Act s.3\(3\)–\(4\).](#)

376 [2015 Act s.3\(3\)\(b\).](#)

377 [2015 Act s.7\(1\).](#)

378 [2015 Act ss.3\(3\)\(c\), 7\(5\).](#)

379 [2015 Act s.3\(3\)\(c\).](#) See *Economides v Commercial Union Assurance Co Plc [1997] 3 W.L.R. 1066.*

380 See below, para.44-057.

381 [2015 Act s.7\(3\).](#) See *Berkshire Assets (West London) Ltd v AXA Insurance UK Plc [2021] EWHC 2689 (Comm), [2022] Lloyd's Rep. I.R. 275.*

382 See above, para.44-034.

383 [2015 Act s.7\(4\).](#)

- 384 See above, para.44-036.
- 385 2015 Act s.3(5). See *Young v Royal and Sun Alliance Plc* [2019] CSOH 32, [2019] *Lloyd's Rep. I.R.* 482; affirmed [2020] CSIH 25, 2020 S.L.T. 597.
- 386 See below, para.44-080.
- 387 2015 Act s.3(4)(a).
- 388 2015 Act s.4(2).
- 389 2015 Act s.4(3).
- 390 2015 Act s.4(8)(c).
- 391 Explanatory Notes, para.55.
- 392 2015 Act s.4(4)–(5).
- 393 2015 Act s.6(1).
- 394 2015 Act s.4(6)–(7).
- 395 See above, para.44-035.
- 396 2015 Act s.3(5)(b)–(d).
- 397 2015 Act s.5(1).
- 398 2015 Act s.5(2); Explanatory Notes, para.64–65.
- 399 2015 Act s.5(3). See *North British Fishing Boat Insurance Co Ltd v Starr* (1922) 13 *Ll.L. Rep.* 206, 210; cf. *Greenhill v Federal Insurance Co Ltd* [1927] 1 K.B. 65; *Marc Rich & Co AG v Portman* [1996] 1 *Lloyd's Rep.* 430, 442; affirmed [1997] 1 *Lloyd's Rep.* 225.
- 400 2015 Act s.6(1).
- 401 2015 Act s.8(1).
- 402 2015 Act s.8 and Sch.1.
- 403 2015 Act ss.8(2), 8(5) and Sch.1 para.2. As to what constitutes a deliberate non-disclosure, see *Mutual Energy Ltd v Starr Underwriting Agents Ltd* [2016] EWHC 590 (TCC), [2016] *B.L.R.* 312.
- 404 2015 Act s.8(2) and Sch.1 para.4.
- 405 2015 Act s.8(2) and Sch.1 paras 5–6; para.6 begins with the words “In addition”.
- 406 2015 Act s.8(2) and Sch.1 para.5. See *Davey* [2019] L.M.C.L.Q. 360.
- 407 2015 Act s.8(2) and Sch.1 para.6.
- 408 2015 Act s.8(2) and Sch.1 paras 7–11.
- 409 2015 Act Sch.1 paras 2, 4, 5, 6(1). As regards variations, see Sch.1 paras 8, 9(2), 9(3), 10(2), 10(3), 11(1).
- 410 See above, para.44-043 and below, para.44-086.
- 411 See above, para.44-044.
- 412 Explanatory Notes, para.85.
- 413 2015 Act s.16.
- 414 2015 Act s.17(2).
- 415 2015 Act s.17(5).
- 416 2015 Act s.17(3).
- 417 2015 Act s.17(4).
- 418 2015 Act ss.9, 16(1).

419 2015 Act s.16(4).

End of Document

© 2022 SWEET & MAXWELL

(d) - Post-contractual Duty of Utmost Good Faith

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 4. - Utmost Good Faith and Fair Presentation of the Risk

(d) - Post-contractual Duty of Utmost Good Faith

The post-contractual duty of utmost good faith: the common law

- 44-061 The preceding discussion has concentrated on the duty of full disclosure which exists up to the time of the making of the insurance contract. There are, however, other aspects of the duty. For example, there is a “post-contractual” duty of disclosure in cases where the insurance contract is to be amended or renewed; in reality, in such cases, the pre-contractual duty of disclosure revives so that the insurer may exercise his underwriting judgment afresh with the benefit of material information.⁴²⁰ In other contexts, concerning the insurance contract’s performance, the courts have held that there is a duty not to be fraudulent, but no wider duty.⁴²¹ Obviously, there is a duty not to present fraudulent claims, although the precise nature and ambit of this duty is presently uncertain; in particular, it is unclear whether it properly falls within the wider duty of utmost good faith. The duty not to make fraudulent claims, which at the least is recognised as a *sui generis* common law duty, is considered separately in the context of claims in general.⁴²² In addition, the parties should not perform the insurance contract, in contexts other than claims, fraudulently: for example, where the assured provides information to the insurer during the course of the risk. It may be that the doctrine of utmost good faith has a wider role to play, such as where a liability insurer or a reinsurer assumes a contractual right to act on behalf of the assured or reassured respectively,⁴²³ or possibly influencing the construction to be given to the terms of an insurance contract.⁴²⁴ There may be circumstances where, having regard to the duty of utmost good faith, the insurer will assume a duty to warn the assured that it is not complying with the relevant terms of the insurance contract in respect of claims.⁴²⁵

Post-contractual duty of utmost good faith: Insurance Act 2015

- 44-062 Although the *2015 Act* does not remove the general post-contractual duty of utmost good faith insofar as it applies to insurance contracts, it does abolish any rule of law which allows the insurer to avoid the insurance contract for the breach of the duty of utmost good faith.⁴²⁶ Accordingly there is no remedy available for such failures to observe the utmost good faith, save insofar as the *2015 Act* provides for alternative remedies. The only such remedy which the *2015 Act* provides for in this post-contractual context are remedies for the assured's presentation of a fraudulent claim.⁴²⁷ The *2015 Act* does not alter the law concerning what constitutes a fraudulent claim and whether or not a fraudulent claim represents a breach of duty; it only makes provision for the remedies for any such offending fraudulent claim.⁴²⁸

Footnotes

- 420 For a survey of the post-contractual duty of disclosure, see *K/S Merc-Scandia XXXXII v Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep. 563. It is now established that there is no general duty of disclosure in respect of claims: *Royal Boskalis Westminster NV v Mountain* [1997] L.R.L.R. 523; reversed on other grounds by the Court of Appeal: [1999] Q.B. 674; *Manifest Shipping & Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1, [2001] 2 W.L.R. 170. As to the scope of the post-contractual duty, see further *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718, [2019] Lloyd's Rep. I.R. 359 at [104].
- 421 *Manifest Shipping & Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1, [2001] 2 W.L.R. 170; *K/S Merc-Scandia XXXXII v Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep. 563; *Agapitos v Agnew (The Aegeon)* [2002] EWCA Civ 247, [2002] 2 Lloyd's Rep. 42. cf. where a settlement agreement was procured by the insurer's non-fraudulent misrepresentation: *Dodds v Southern Response Earthquake Services Ltd* [2019] NZHC 2016, [2020] Lloyd's Rep. I.R. 129 (NZHC).
- 422 See below, para.44-098.
- 423 *Cox v Bankside Members' Agency Ltd* [1995] 2 Lloyd's Rep. 437, 471–472; cf. *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2 and 3)* [2001] 1 Lloyd's Rep. I.R. 667 at [68], [76].
- 424 *Harrower v Hutchinson* (1870) LR 5 Q.B. 584, 592.
- 425 *Ted Baker Plc v AXA Insurance UK Plc* [2017] EWCA Civ 4097, [2017] Lloyd's Rep. I.R. 682 at [69]–[90].
- 426 2015 Act s.14.
- 427 2015 Act s.12.

428 See below, paras 44-099—44-100.

End of Document

© 2022 SWEET & MAXWELL

Section 5. - The Parties

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 5. - The Parties

The assured

- 44-063 The assured (often referred to as the “insured”) is a person who may enter into and bind himself by a contract may effect a valid contract of insurance, provided he has the necessary insurable interest in its subject matter.⁴²⁹ A minor will not be bound by an insurance contract that is not for his benefit⁴³⁰; and in any event a minor is not bound by the assignment of an insurance contract as security for an unenforceable loan.⁴³¹ The assured is usually identified in the insurance contract specifically or as a member of a class, although there is no reason why the assured cannot contract as an undisclosed principal, provided that the insurer has not manifested his unwillingness to contract with such principals. In such cases, however, there may be a duty of disclosure to identify the principal to the insurer, if it is material.⁴³²

The insurer

- 44-064 Persons carrying on business as insurers are required by the [Financial Services and Markets Act 2000](#)⁴³³ to be authorised by the Financial Conduct Authority and to comply with the regulatory regime instituted thereunder.⁴³⁴ At common law, a contract of insurance with an insurer acting without statutory authorisation was void for illegality and therefore as unenforceable by an innocent assured as by the insurer himself.⁴³⁵ [Sections 26 and 28 of the Financial Services and Markets Act 2000](#) now provide statutory relief from the consequences of this rule, which includes a right to compensation and may include, subject to the discretion of the court, the enforcement of the contract.⁴³⁶

Agents of the insurer

- 44-065 An insurer often employs local agents to solicit business.⁴³⁷ The extent of the authority of such agents varies widely and depends upon the facts of each case. In general, the authority is limited to issuing and receiving proposal forms,⁴³⁸ but it may be extended, depending upon the circumstances, either expressly or impliedly,⁴³⁹ or by holding out,⁴⁴⁰ to embrace, for example, the granting of temporary cover,⁴⁴¹ the acceptance of premiums⁴⁴² or the receipt of notices.⁴⁴³ Whether the knowledge of the agent is imputed to the insurer depends upon whether the agent is one to whom the principal looks for information of the kind in question,⁴⁴⁴ and often insurers are estopped from denying that an agent has passed on information to them.⁴⁴⁵ The insurer's agent is not, by reason of the agency alone, a party to the insurance contract.⁴⁴⁶

Broker

- 44-066 Persons seeking insurance frequently engage brokers, whose services are usually remunerated on a commission basis by the insurer,⁴⁴⁷ but who are nonetheless agents of the assured,⁴⁴⁸ though they may act for the insurer as well,⁴⁴⁹ in which case conflicts of interest may well arise.⁴⁵⁰ The broker will remain subject to a duty of care even if he has assumed responsibilities to another principal creating a potential conflict of interests.⁴⁵¹ The broker must act with reasonable care and skill,⁴⁵² and if, for example, he fails to arrange a contract of insurance as instructed or fails to make full disclosure, it is no defence that the insurer could have escaped liability if the contract had been made, if as a matter of business the insurer would not have refused payment.⁴⁵³ Nor can the broker escape liability where his negligence does not in fact prejudice the assured's insurance cover, if by his negligence he has exposed the assured to the uncertainties of a dispute or litigation with the insurer.⁴⁵⁴ The broker will be responsible for the maintenance of records and accounts.⁴⁵⁵ The conduct of the business of insurance brokers is regulated by the Financial Conduct Authority pursuant to the [Financial Services and Markets Act 2000](#).

Lloyd's

- 44-067 The members of Lloyd's who act as insurers, called underwriters, enter into insurance contracts as individual members,⁴⁵⁶ though for convenience they group themselves into syndicates, the

head of each syndicate usually having authority to bind the other members of that syndicate. The syndicates are composed of individual and corporate members, whose capital provide the security of the policies written at Lloyd's. Lloyd's is an organisation governed by the Corporation of Lloyd's which operates pursuant to the Lloyd's Act 1982. Persons seeking to insure at Lloyd's cannot approach the underwriters directly, but must engage brokers, who are nonetheless agents of the assured, except for the purpose of receiving the premium.⁴⁵⁷ Pursuant to Pt XIX of the Financial Services and Markets Act 2000, Lloyd's is an authorised person and has permission to carry on regulated activities, including the arranging of deals in contracts of insurance written at Lloyd's and arranging deals in participation in Lloyd's syndicates.⁴⁵⁸ The Council of Lloyd's retains responsibilities under the Lloyd's Act for the governance of Lloyd's. By usage, underwriters and Lloyd's brokers deal with each other as principals, settling quarterly accounts between themselves relating to premiums due and money payable for claims, and this usage may affect the assured as regards the payment of premiums and claims if he has knowledge of it and acquiesces in its adoption.

⁴⁵⁹

U It is also the practice at Lloyd's for Lloyd's brokers to collect claims on behalf of assureds when called upon to do so, and a Lloyd's broker is under a continuing duty to exercise reasonable care and skill to retain the information enabling him to advance the claim for as long as a reasonable broker would regard a claim as possible.⁴⁶⁰

Footnotes

- 429 See above, paras 44-005 et seq. See *New Hampshire Insurance Co v MGN Ltd [1997] L.R.L.R. 24, 56; Sumitomo Bank Ltd v Banque Bruxelles Lambert SA [1997] 1 Lloyd's Rep. 487, 495*. As to the insurance for the benefit of more than one assured, see above, paras 44-010—44-011.
- 430 *Clements v London, NW Ry [1894] 2 Q.B. 482*.
- 431 *Nottingham Building Society v Thurston [1903] A.C. 6* (decided under the Infants Relief Act 1874, now repealed by the Minors' Contracts Act 1987); see above, Vol.I, paras 11-005—11-023.
- 432 *National Oilwell (UK) Ltd v Davy Offshore Ltd [1993] 2 Lloyd's Rep. 582, 596–597; Talbot Underwriting Ltd v Nausch Hogan & Murray (The Jascon 5) [2006] EWCA Civ 889, [2006] 2 Lloyd's Rep. 195*.
- 433 As amended by the Financial Services Act 2012. The “effecting” and “carrying out” of a contract of insurance is a regulated activity for the purposes of s.22 of the Act: the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) art.10. The expressions “effecting” and “carrying out” include the making and performance of insurance contracts (*Bedford Insurance Co Ltd v Institutio de Resseguros do Brasil [1985] 1 Q.B. 966, 981–982; Bates v Barrow Ltd [1995] 1 Lloyd's Rep. 680, 689; Group Josi Reinsurance Co Ltd v Walbrook Insurance Co Ltd [1996] 1 Lloyd's Rep. 345, 369*) and their negotiation

which begins not later than the invitation to treat (*R. v Wilson [1997] 1 All E.R. 119, 126*; *Re Great Western Assurance Co SA [1999] Lloyd's Rep. I.R. 377*). “Contract of insurance” is defined in art.3 of the Order. This probably includes a contract of reinsurance (*Re NRG Victory Reinsurance Ltd [1995] 1 All E.R. 533*; *New Hampshire Insurance Co v Grand Union Insurance Co Ltd [1996] L.R.L.R. 102, 104, HK CA*); note that “a reinsurance contract” is excluded from the definition of “qualifying contract of insurance” in art.3.

- 434 See *McMeel [2005] L.M.C.L.Q. 186*.
- 435 *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co [1988] Q.B. 216* (where the Court of Appeal expressed an admittedly obiter view after full argument in order to resolve the uncertainty caused by the conflict between *Bedford Insurance Co v Instituto de Ressaguros do Brasil [1985] Q.B. 966*; and *Stewart v Oriental Fire and Marine Insurance Co [1985] Q.B. 988*); *Re Cavalier Insurance Co Ltd [1989] 2 Lloyd's Rep. 430*; *DR Insurance Co v Seguros America Banamex [1993] 1 Lloyd's Rep. 120*. See, however, the observations of Parker LJ in *Overseas Union Insurance Ltd v Incorporated General Insurance Ltd [1992] 1 Lloyd's Rep. 439, 444–445*; and of the Court of Appeal in *Fuji Finance Inc v Aetna Life Insurance Co Ltd [1997] Ch. 173*. The *Insurance Companies Act 1982* prohibited the effecting or carrying out of unauthorised insurance business within the UK, whether or not the proper law of the insurance contract is English law (*DR Insurance Co v Central National Insurance Co [1996] 1 Lloyd's Rep. 74*). The *1982 Act* did not prohibit the insurance of UK risks offshore: *Secretary of State for Trade and Industry v Great Western Assurance Co SA [1997] Re L.R. 197*. The fact that the contract of insurance is made outside the jurisdiction does not mean that insurance business is not conducted in the jurisdiction, if for example there is continuity or regularity of services provided within the jurisdiction, which are an integral part of the way in which the insurer conducts business: *Re Great Western Assurance Co SA [1999] Lloyd's Rep. I.R. 377*. See also *Financial Services and Markets Act 2000* s.418.
- 436 See *New Hampshire Insurance Co v Grand Union Insurance Co Ltd [1996] L.R.L.R. 102*. As to the transitional effect of the statutory predecessor to ss.26 and 28 (s.132 of the *Financial Services Act 1986*, now repealed by the *Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001* (SI 2001/3649) art.3); see *Bates v Barrow Ltd [1995] 1 Lloyd's Rep. 680*; *Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd [1996] 1 All E.R. 791*.
- 437 As to the regulatory requirements for the authorisation of agents and representatives, see s.39 of the *Financial Services and Markets Act 2000* and art.25 of the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (SI 2001/544). See *Personal Touch Financial Services Ltd v Simphysure Ltd [2016] EWCA Civ 461, [2016] Bus. L.R. 1049* (private medical insurance).
- 438 *Gale v Lewis (1846) 9 Q.B. 730*; *Linford v Provincial Horse and Cattle (1864) 34 Beav. 291*.
- 439 *Murfitt v Royal (1922) 38 T.L.R. 334*. cf. *Mackie v European Assurance (1869) 21 L.T. 102*.
- 440 *Willis, Faber v Joyce (1911) 27 T.L.R. 388*. cf. *Rossiter v Trafalgar Life (1859) 27 Beav. 377*.
- 441 *Murfitt v Royal (1922) 38 T.L.R. 334*.
- 442 *Rossiter v Trafalgar Life (1859) 27 Beav. 377*; *Linford v Provincial Horse and Cattle (1864) 34 Beav. 291*; *London and Lancashire Life v Fleming [1897] A.C. 499*. cf. *British Industry Life v Ward (1856) 17 C.B. 644*.

- 443 *Marsden v City and County* (1865) *L.R. 1 C.P.* 232.
- 444 *Blackburn v Vigors* (1887) *12 App. Cas.* 531, 537; *Evans v Employers' Mutual Insurance Association Ltd* [1936] *1 K.B.* 505; *Malhi v Abbey Life Assurance Co Ltd* [1996] *L.R.L.R.* 237, 242–243.
- 445 *Wing v Harvey* (1854) *5 De. G.M. & G.* 265; *Golding v Royal London* (1914) *30 T.L.R.* 350; *Lennard's Co v Asiatic Petroleum* [1915] *A.C.* 705; *Ayrey v British Legal* [1918] *1 K.B.* 136; *Houghton v Northard, Lowe* [1928] *A.C.* 1; *Newsholme v Road Transport* [1929] *2 K.B.* 356. cf. *Acey v Fernie* (1840) *7 M. & W.* 151; *Bawden v London, Edinburgh and Glasgow* [1892] *2 Q.B.* 534; *Biggar v Rock Life* [1902] *1 K.B.* 516; *Keeling v Pearl Assurance Co* (1923) *129 L.T.* 573; *St Margaret's Trust v Navigation and General* (1949) *82 Ll.L. Rep.* 752; *Facer v Vehicle & General* [1965] *1 Lloyd's Rep.* 113; *Stone v Reliance Mutual Insurance Co Ltd* [1972] *1 Lloyd's Rep.* 469; *Woolcott v Excess Insurance Co Ltd* [1978] *1 Lloyd's Rep.* 633, 638; approved on the point of law involved [1979] *1 Lloyd's Rep.* 231, 240–241.
- 446 *Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd* [2009] *EWCA Civ* 453, [2009] *Lloyd's Rep. I.R.* 544; *PM Law Ltd v Motorplus Ltd* [2016] *EWHC 193 (QB)*, [2016] *1 Costs L.R.* 143 at [58].
- 447 The broker will be entitled to commission if he was effective in achieving the result for the accomplishment of which the principal had promised to pay him: *Harding Maughan Hambly Ltd v Compagnie Européene de Courtage d'Assurances et de Reassurances SA* [2000] *1 Lloyd's Rep.* 316. As to the broker's entitlement to claim commission from either the insurer or the assured, see *Carvill America Inc v Camperdown UK Ltd* [2005] *EWCA Civ* 645, [2005] *2 Lloyd's Rep.* 457.
- 448 *Empress Assurance v Bowring* (1905) *11 Com. Cas.* 107; *Glasgow Assurance v Symondson* (1911) *16 Com. Cas.* 109; *Rozanes v Bowen* (1928) *32 Ll.L. Rep.* 98; *Anglo African Merchants Ltd v Bayley* [1970] *1 Q.B.* 311; *North and South Trust Co v Berkeley* [1971] *1 W.L.R.* 470. In the latter two cases the right of the assured to see documents in the possession of the brokers (or the duty of the brokers in relation to such documents) is discussed. See also *Roberts v Plaisted* [1989] *2 Lloyd's Rep.* 341, 343; *Pryke v Gibbs Hartley Cooper Ltd* [1991] *1 Lloyd's Rep.* 602, 614–615; *Searle v AR Hales & Co Ltd* [1996] *L.R.L.R.* 68, 71. *Aneco Reinsurance Underwriting Ltd (In Liquidation) v Johnson & Higgins* [1998] *1 Lloyd's Rep.* 565. As to the scope of the broker's authority, see *Pacific and General Insurance Co v Hazell* [1997] *L.R.L.R.* 65. As to the relationship between assureds, producing brokers and placing brokers, see *Prentis Donegan & Partners v Leeds & Leeds Co Inc* [1998] *2 Lloyd's Rep.* 326.
- 449 *Gale v Lewis* (1846) *9 Q.B.* 730; *Edwards v Martin* (1865) *L.R. 1 Eq.* 121; *Equitable Life v General Accident, 1904* *12 S.L.T.* 348; *Stockton v Mason* [1978] *2 Lloyd's Rep.* 430. See also *Goldschlager v Royal Insurance*, 84 *D.L.R.* (3d) 355 (1978) Can.
- 450 *Anglo African Merchants Ltd v Bayley* [1970] *1 Q.B.* 311; *North and South Trust Co v Berkeley* [1971] *1 W.L.R.* 470; *Eagle Star Insurance Co Ltd v Spratt* [1971] *2 Lloyd's Rep.* 116; *Excess Life Insurance Co v Fireman's Insurance Co of New York* [1982] *2 Lloyd's Rep.* 599, 618–620. If the broker acts as agent for the insurer, he ceases to be the assured's broker and may be in breach of duty to the assured: *Re Great Western Assurance Co SA* [1999] *Lloyd's Rep. I.R.* 377, 386.

- 451 *HIH Casualty & General Insurance Ltd v JLT Risk Solutions Ltd* [2007] EWCA Civ 710, [2007] 2 Lloyd's Rep. 278.
- 452 *Park v Hammond* (1816) 6 *Taunt.* 495; *Levy v Merchants' Marine* (1885) 52 L.T. 263; *Dickson v Devit* (1916) 86 L.J. K.B. 315; *Sarginson Bros v Keith Moulton* (1943) 73 *Ll.L. Rep.* 104; *General Accident v Minet* (1943) 74 *Ll.L. Rep.* 1; *Lyons v Bentley* (1944) 77 *Ll. L. Rep.* 335; *United Mills v Bray* [1952] 1 T.L.R. 149; *Osman v J Ralph Moss Ltd* [1970] 1 *Lloyd's Rep.* 313; *London Borough of Bromley v Ellis* [1971] 1 *Lloyd's Rep.* 97; *O'Connor v BDB Kirby & Co* [1972] 1 Q.B. 90; *Warren v Henry Sutton & Co* [1976] 2 *Lloyd's Rep.* 276; *McNealy v Pennine Insurance Co Ltd* [1978] 2 *Lloyd's Rep.* 18; *The Superhulls Cover Case* [1990] 2 *Lloyd's Rep.* 431, 445; *Harvest Trucking Co Ltd v Davis* [1991] 2 *Lloyd's Rep.* 638; *Bates v Barrow Ltd* [1995] 1 *Lloyd's Rep.* 680, 689–691; *Jones v Environcom Ltd* [2010] EWHC 759 (Comm), [2011] EWCA Civ 1152; *Ground Gilbey Ltd v Jardine Lloyd Thompson UK Ltd* [2011] EWHC 124 (Comm), [2012] *Lloyd's Rep.* I.R. 12; *Eurokey Recycling Ltd v Giles Insurance Brokers Ltd* [2014] EWHC 2989 (Comm), [2015] *Lloyd's Rep.* I.R. 225 at [86]; *RR Securities Ltd v Towergate Underwriting Group Ltd* [2016] EWHC 2653 (QB); Jackson & Powell on Professional Negligence, 7th edn (2012), Ch.16. For an informative discussion of the scope of a broker's duty as to the collection and payment of premiums and claims proceeds, as to the making of claims, and as to the maintenance of records, see *Equitas Ltd v Walsham Bros & Co Ltd* [2013] EWHC 3264 (Comm), [2014] P.N.L.R. 8. As to the assumption of a duty of care, see *European International Reinsurance Co Ltd v Curzon Insurance Ltd* [2003] EWCA Civ 1074, [2003] 1 *Lloyd's Rep.* 793. For the possibility of contributory negligence by an assured, see *Mint Security Ltd v Blair* [1982] 1 *Lloyd's Rep.* 188, 200; and by a sub-broker, see *Tudor Jones v Crowley Colosso Ltd* [1996] 2 *Lloyd's Rep.* 619; *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm), [2015] 2 *Lloyd's Rep.* 289 at [288]–[292]. As to the scope of damages recoverable from a negligent broker, see *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] UKHL 51, [2002] 1 *Lloyd's Rep.* 157.
- 453 *Fraser v Furman (Productions) Ltd* [1967] 1 W.L.R. 898; though damages may be awarded on the basis that a compromise would have been reached with the insurer (*Everett v Hogg, Robinson & Gardner Mountain (Insurance) Ltd* [1973] 2 *Lloyd's Rep.* 217), or be assessed by reference to the chance of recovering on the policy (*Dunbar v A & B Painters Ltd* [1986] 2 *Lloyd's Rep.* 38).
- 454 *FNCB Ltd v Barnet Devaney (Harrow) Ltd* [1999] *Lloyd's Rep.* I.R. 459; *Talbot Underwriting Ltd v Nausch Hogan & Murray Inc* [2005] EWHC 2359 (Comm), [2006] 2 *Lloyd's Rep.* 195 at [103]–[112] (Cooke J); affirmed [2006] EWCA Civ 889, [2006] 2 *Lloyd's Rep.* 195.
- 455 *Johnston v Leslie & Godwin Financial Services Ltd* [1995] L.R.L.R. 472; *Equitas Ltd v Horace Holman & Co Ltd* [2007] EWHC 903 (Comm), [2007] *Lloyd's Rep.* I.R. 567.
- 456 And they may be able to sue in their own name when the reputation of "Lloyd's" is put at risk: *Scott v Tuff-Kote (Australia) Pty Ltd* [1976] 2 *Lloyd's Rep.* 103, NSW SC. For a description of the business conducted at Lloyd's, see *Society of Lloyd's v Robinson* [1997] L.R.L.R. 1 at 7.8, [1999] 1 W.L.R. 756, 759–760.

- 457 See the cases cited in para.44-066. As to the relationship between the underwriters, brokers and assureds in the context of premium payable under a marine policy, see *Marine Insurance Act 1906* s.53, *Prentis Donegan & Partners v Leeds & Leeds Co Inc* [1998] 2 *Lloyd's Rep.* 326; and *JA Chapman & Co Ltd (In Liquidation) v Kadirga Denizcilik Ve Ticaret AS* [1998] *Lloyd's Rep. I.R.* 377; *Heath Lambert Ltd v Sociedad de Corretaje de Seguros* [2004] *EWCA Civ* 792, [2004] 1 *W.L.R.* 2820. As to the brokers' lien on the policy in respect of unpaid premium see *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] *Q.B.* 199; *Heath Lambert Ltd v Sociedad de Corretaje de Seguros* [2006] *WHC 1345 (Comm)*, [2006] 2 *Lloyd's Rep.* 551.
- 458 As amended by the *Financial Services Act 2012* s.40 and the *Financial Services and Markets Act 2000 (PRA-regulated Activities) Order 2013* (SI 2013/556) art.2. See also the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (SI 2001/544) arts 56–58.
- 459 See the discussion in Arnould's Law of Marine Insurance and Average, 20th edn (2021), Ch.4 and MacGillivray on Insurance Law, 15th edn (2022), Ch.35.
- 460 *Johnstone v Leslie & Godwin* [1995] *L.R.L.R.* 472, holding also that the broker is under a duty not to destroy a policy held on behalf of his principal (which is the principal's property) or, where there is no policy, the slip (which belongs to the broker) without the consent of the principal. In *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] *EWCA Civ* 54, [2006] 1 *Lloyd's Rep.* 566, the Court of Appeal held that there is an implied term in a contract of insurance between an assured and a Lloyd's underwriter that the Lloyd's broker will make available to the underwriter documents previously shown to the underwriter during the placement of the risk or the presentation of a claim; in addition, certain premium accounting documents would be disclosable to the underwriter.

Section 6. - The Contract of Insurance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 6. - The Contract of Insurance

Formation of the contract

44-068 Apart from the duty of utmost good faith or fair presentation of the risk,

 461

 462 normal principles of contract law apply to the formation of the contracts of insurance,

 463 though an offer by an insurer to insure may (in the absence of stipulations to the contrary) be subject to an implied condition that the risk does not materially change prior to acceptance.

 464 There must, of course, be an unconditional acceptance by one party of the offer made by the other.

464

 465 Thus where an insurer “accepts” a proposal subject to payment of the premiums, his acceptance is in truth either a counter-offer to be accepted by tendering that premium, or perhaps only an invitation to the assured to offer that premium to the insurer for his acceptance of it and the terms proposed.

465

 466 If an offer is made and accepted on the basis that the insurer will not be liable unless the premium is paid within a specified time, it appears that a binding contract is made at once, though the insurer will escape liability if the premium is not paid.

466

 467 As in contract generally, one party may be taken to have contracted on terms of which he was only constructively aware,

467

U and generally the insurer's proposal form, which the assured uses to give the insurer particulars of the risk, contains express reference to the insurer's terms and conditions.

468

U The contract of insurance may be concluded in circumstances more complex than a simple offer and acceptance.

469



The slip

44-069

U In London, brokers commonly submit to underwriters a document called a slip which contains brief particulars of the risk, and each underwriter approached (if willing to accept the risk) initials the slip and puts against his initials the percentage of the risk he is willing to insure. Save for marine and possibly life insurance where, by statute, the contract must be embodied in a policy,⁴⁷⁰ the slip itself constitutes a binding contract of insurance on which an underwriter may be sued even if no signed policy is subsequently issued.⁴⁷¹ The writing of a line on the slip by each underwriter gives rise to an independent binding contract with that underwriter (distinct from the contracts with the other underwriters) to the extent of the percentage written, from which neither party can resile even if the slip is never fully subscribed.

472

U By custom at Lloyd's, however, the percentage of risk accepted by any particular underwriter may be proportionately "written down" if the slip is oversubscribed on closing.⁴⁷³ Furthermore, where one or more underwriters are permitted under a "leading underwriter's clause" contained in the slip to make amendments to cover, they have (subject to the particular terms of the clause) actual authority to bind the other underwriters on the same slip, and act as their agents in doing so.⁴⁷⁴ One consequence of each line on the slip giving rise to a distinct contract appears to be that a false statement made to a leading underwriter will not, in itself, permit the other (following) underwriters to avoid their own contracts for misrepresentation,⁴⁷⁵ although the non-disclosure to the following underwriter of that misrepresentation may allow the following underwriter to avoid their respective contracts,⁴⁷⁶ or the presentation of the risk to the following underwriter might have taken place on the assumption that a fair presentation had been made to the leading underwriter.⁴⁷⁷

Open covers and declarations

- 44-070 The contract of insurance may be constituted by means of a declaration which is presented to the insurer pursuant to the terms of an open cover.⁴⁷⁸ The open cover identifies the terms and conditions of the insurance and the scope of the risk which might be declared thereunder. Upon the presentation and acceptance of the declaration, provided that it falls within the scope of the risk permitted by the open cover, the contract is formed on the terms and conditions set out in the open cover. It may be that the open cover provides that the insurer is obliged to accept the declaration⁴⁷⁹ or that the insurer is entitled to refuse or accept the declaration as he pleases. It is often the case that the assured can choose whether or not to declare a particular risk under the open cover.⁴⁸⁰ Occasionally, it may be that the open cover provides that the assured is obliged to present all risks falling within the scope of the open cover to the insurer. Whether or not the insurer or the assured is obliged to accept or present the declaration will consequently determine the time at which the contract is made and at which the duty of disclosure of material facts ceases.⁴⁸¹

Cover notes

- 44-071 The assured may require cover from the moment when he offers to enter into a contract with an insurer who is usually willing to provide such preliminary protection.⁴⁸² Such an engagement is usually set out in a “cover note”⁴⁸³ (though cover may, of course, be given informally),⁴⁸⁴ and constitutes a separate contract.⁴⁸⁵ The cover note usually incorporates by reference the terms and conditions of the insurer’s ordinary policy, but in the absence of such a reference, or of actual or constructive notice of those terms and conditions, the preliminary cover will not be subject to them.⁴⁸⁶ The period of the preliminary cover commonly takes one of two forms: either a fixed length of time; or the period until the insurer indicates his decision whether or not to enter into a more permanent contract.⁴⁸⁷ Since promptness may be of importance, an insurer may authorise local agents to grant temporary cover and issue cover notes on his behalf, and such authority has sometimes been implied.⁴⁸⁸

Issue of policy

- 44-072 The contract of insurance may be embodied in a policy, but unless required by statute or contract, the contract may exist and be enforceable without a policy. The policy is the physical incarnation of the contract, but they should not be confused.⁴⁸⁹ Where the contract pre-dates the issue of the

policy, questions will arise as to whether the parties intended that the policy supersede the pre-existing contract. Even in cases where the policy supersedes the earlier contract, the court may have regard to the earlier contract (which may be in the form of a slip or an insurer's cover note) with a view to construing the policy.⁴⁹⁰ There is no longer a requirement that life or any other policies be stamped.⁴⁹¹ The **Life Assurance Act 1774**⁴⁹² makes it unlawful to make a policy without inserting the name of the persons interested in it, but does not specifically enact that a policy shall be made, although such a requirement might be implied. Marine insurance contracts must be embodied in a policy in accordance with the **Marine Insurance Act 1906**.⁴⁹³

Renewal

- 44-073 If the event insured against occurs after the termination of the period of insurance, the assured cannot, of course, recover unless the contract has been renewed. The term "renewal" is used to denote both the extension of the original period of cover by the exercise of a right given to one party (almost invariably the assured) by the contract to extend the period of the cover without the assent of the other, and the making of a new contract through the agreement of both. It is important to distinguish the two types of renewal, since only in the former case will vitiating elements in the original contract, such as failure to make full disclosure, affect the extension, and conversely only in the latter case will a duty arise to make full disclosure at the time of the renewal.⁴⁹⁴ Life insurance usually gives the assured the right to renew automatically on the payment of a further premium at the end of the first period, and such renewal does not constitute a new contract,
495
- U** but contracts which provide for the tender of the renewal premium *and* its acceptance by the insurer,⁴⁹⁶ and those which provide for automatic renewal unless one party gives notice to the other,⁴⁹⁷ are of the other type.

Days of grace

- 44-074 Often the assured is given a period beyond the end of the original period of insurance during which the renewal premium may be paid. This period, termed "days of grace", may be granted either by an express stipulation in the original contract, or by the terms of a renewal notice sent by the insurer to the assured. Whether the assured may recover for a loss occurring during this period depends upon the nature of the stipulation providing for the days of grace.⁴⁹⁸ If the insurer has a right not to accept the renewal premium, then *prima facie* he will not be liable for such a loss if he chooses not to renew.⁴⁹⁹ On the other hand, if the assured can renew as of right, then it seems

that the insurer is liable if the premium is tendered before the days of grace expire,⁵⁰⁰ but each case must depend upon the provisions used.

Payment of premium

- 44-075** The price for which the insurer agrees to insure is called the premium and is usually payable in money.
U ⁵⁰¹

U Some contracts contain a term that the insurer shall not be on risk until the premium is paid⁵⁰² and such a term is effective,⁵⁰³ but in its absence the insurer is bound before actual payment.⁵⁰⁴ The insurer can maintain an action for the premium if he comes on risk before it is paid,⁵⁰⁵ and this may be the case even where there is a term that he shall not be on risk until it is paid.⁵⁰⁶ Subject to the foregoing the assured is liable to pay the premium as soon as the contract is made⁵⁰⁷ and his failure to do so might, depending on the circumstances, amount to a repudiation of the contract open to acceptance by the insurer.⁵⁰⁸ The amount, manner and form of payment of the premium are, of course, to be decided by agreement between the parties as may be modified by their conduct,⁵⁰⁹ and an insurance “at a premium to be arranged”,⁵¹⁰ would, it seems, be a valid and enforceable contract and a reasonable premium would be payable,⁵¹¹ though in such a case the assured need make no payment by way of premium until the amount of a reasonable premium has been agreed or determined by the court.⁵¹²

Return of premium

- 44-076** In some circumstances the assured may be able to recover the premium and generally his right to do so depends upon whether the insurer has ever been on risk.⁵¹³ In marine insurance recovery of the premium is governed by the **Marine Insurance Act 1906**⁵¹⁴ but the wide rights of recovery provided therein have not been applied to non-marine insurance and it is unwise to assume that the same rules will be applied.⁵¹⁵ It seems, however, that the assured can claim a refund of the premium if:

(a)The contract is void for mistake of fact,⁵¹⁶ even if the true facts make it illegal.⁵¹⁷ Thus if a house is insured in the mistaken belief that it is still standing, or a life in the mistaken belief that the life assured is still living,⁵¹⁸ the premium may be recovered.

(b)The contract is void for illegality, provided that the assured was not in pari delicto,⁵¹⁹ or withdrew before the risk (but for the illegality) would have commenced to run.⁵²⁰ Where the assured enters into an unenforceable contract of insurance with an insurer acting without statutory authorisation, he has a statutory right to recover his premium.⁵²¹

(c)The insurer avoids the contract for innocent misrepresentation or non-disclosure not amounting to fraudulent concealment.⁵²² But, even where the assured has acted fraudulently, the insurer, if he seeks to avoid the contract,⁵²³ will be entitled to retain the premium in the case of marine insurance by reason of s.84(3)(a) of the Marine Insurance Act 1906.⁵²⁴ In the case of non-marine insurance, however, as a matter of principle, there is no reason why the insurer should be entitled to retain the premium because the contract's avoidance is dependent on *restitutio in integrum*.

⁵²⁵

U The policy may provide that premium is not returnable in the event of a misrepresentation or non-disclosure even in the absence of fraud.⁵²⁶

(d)The insurer is discharged from liability under the contract for breach of warranty occurring before he came on risk,⁵²⁷ or before renewal in the case of renewal premiums.⁵²⁸

(e)The assured exercises his right of cancellation of a long-term insurance contract under the Financial Conduct Authority's Insurance Conduct of Business Sourcebook.⁵²⁹

(f)The insurer exercises a contractual right of cancellation, in which case the assured may depending on the construction of the contract be entitled, or pursuant to an implied term, to a return of the balance of the premium in respect of that part of the risk which has not yet been run.⁵³⁰

Subject to the terms of the contract, once the insurer has been on risk, the risk is indivisible. If the assured cancels the contract prior to the expiry of the policy, at common law, the assured is not entitled to a return of premium in respect of that proportion of the risk that has not expired.⁵³¹ However, it has recently been held that in the event of the insurer's contractual cancellation of the policy, the assured may be entitled to a return of the premium pursuant to an implied term and the indivisible nature of the risk will not prevent that recovery.⁵³²

Construction of insurance contracts

44-077

U Insurance contracts are subject to the same approach to contractual construction as other contracts, namely that the words of the contract will be interpreted to divine their contextual meaning consistently with the sense and purpose of the policy, even if that is at odds with the literal meaning of the contract.⁵³³ The commercial purpose of the insurance contract, however, should not be

lightly invoked to undermine the importance of the contractual language which the parties have chosen to embody their agreement.

⁵³⁴

U Therefore, where a word is used in an insurance policy which has a technical, legal connotation, the court will not necessarily infer that the parties intended that meaning and will inquire into the ordinary, commercial meaning to be ascribed to the word.⁵³⁵ On the other hand, if an insurance term has a settled judicially accepted meaning, the courts are loathe to apply a different interpretation.⁵³⁶ Similarly, the Court will assume that the parties intended to use words which had a special or peculiar meaning in the particular market or trade in that sense.⁵³⁷ If the insurance contract is based on a standard form of contract to which the parties have added special clauses, greater weight will be given to the special provisions, and, in the event of conflict or inconsistency between the general and special provisions, the latter will prevail.⁵³⁸ Where there is a primary contractual document, such as a slip, in which the parties set out their key contractual provisions, the parties would not generally expect incorporated wordings to explain or inform the meaning of the key provisions.⁵³⁹ There is one rule of construction applicable to ordinary contracts which applies with particular force in the context of insurance contracts, namely that *verba chartarum fortius accipiuntur contra proferentem*: i.e. where the contractual provision is ambiguous, the provision will be construed against the person who drafts or puts forward the provision, which in many (but not all) cases will be the insurer.⁵⁴⁰ The construction of contractual terms “against the insurer” is not limited to cases where the insurer has produced the wording. If the insurer seeks to rely on a provision, such as a condition precedent or warranty, so as to extinguish or reduce his basic obligations, the court will resist such a construction unless the contractual terms are especially clear.⁵⁴¹ Having regard to the decision of the Supreme Court in *Impact Funding Solutions Ltd v Barrington Support Services Ltd*,⁵⁴² the fact that a provision in an insurance contract is expressed as an exception or exclusion does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly or restrictively, at least insofar as it delineates the scope of the insurer’s primary obligation of indemnity, as opposed to excluding a liability or a remedy where the primary obligation would otherwise have rendered the insurer liable.

Footnotes

⁵⁴¹ See above, para.44-033.

⁵⁴² *Canning v Farquhar (1886) 16 Q.B.D. 727; Rust v Abbey Life Assurance Co Ltd [1979] 2 Lloyd's Rep. 334*. For an example of a contract concluded by exchange of emails, see *Allianz Insurance Co Egypt v Aigaion Insurance Co SA (No.2) [2008] EWCA Civ 1455, [2009] Lloyd's Rep. I.R. 3*. As to when a contract is concluded at Lloyd’s, see *Jaglom v Excess*

Insurance Co Ltd [1971] 2 *Lloyd's Rep.* 171. For the application of agency principles of undisclosed principal and ratification where a named insured takes out insurance cover on behalf of another as well as himself, see *National Oil Well (UK) Ltd v Davy Offshore Ltd* [1993] 2 *Lloyd's Rep.* 582, 592–602. See, also, *Siu v Eastern Insurance Co Ltd* [1994] 2 A.C. 199, PC, holding that the personal nature of an insurance contract does not, of itself, preclude the application of the doctrine of undisclosed principal to contracts of indemnity insurance. See also *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 *Lloyd's Rep.* 389; *Talbot Underwriting Ltd v Nausch Hogan & Murray* [2005] EWHC 2359 (Comm), [2006] 2 *Lloyd's Rep.* 195; [2006] EWCA Civ 889, [2006] 2 *Lloyd's Rep.* 195. cf. *Haberdashers' Aske's Federation Trust Ltd v Zurich Insurance Plc* [2018] EWHC 558 (TCC), [2018] *Lloyd's Rep. I.R.* 382.

④63 *Siu v Eastern Insurance Co Ltd* [1994] 2 A.C. 199, PC.

④64 In *Rust v Abbey Life Assurance Co Ltd* [1979] 2 *Lloyd's Rep.* 334 at 340, the Court of Appeal held that it was an inevitable inference from the assured's retention of the policy document for seven months after receipt that she had accepted the insurer's offer. See also *Yona International Ltd v La Réunion Française Société Anonyme d'Assurances et de Réassurances* [1996] 2 *Lloyd's Rep.* 84, 109–111; *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24, 32–34, 54.

④65 *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24, 32–34, 54. See also *Re Yager & Guardian* (1912) 108 L.T. 38.

④66 *Roberts v Security Co* [1897] 1 Q.B. 111; *Equitable Fire and Accident v Ching Wo Hong* [1907] A.C. 96; *Harrington v Pearl Life* (1914) 30 T.L.R. 613. But see the cases cited in para.44-066, above.

④67 *Adie v Insurance Corp* (1898) 14 T.L.R. 544; *Rust v Abbey Life Assurance Co Ltd* [1979] 2 *Lloyd's Rep.* 334.

④68 The contract of insurance is exempt from the stricture upon exemption clauses imposed by the *Unfair Contract Terms Act 1977*: see s.1(2), Sch.1 para.1(a). See, however, see below, paras 44-087—44-088.

④69 See e.g. *Markel Bermuda Ltd v Caesars Entertainment Inc* [2021] EWHC 1931 (Comm), [2021] *Lloyd's Rep. I.R.* 601.

470 See *Marine Insurance Act 1906* s.22; *Life Assurance Act 1774* s.2. This is a formal or evidential requirement; the contract of marine insurance is concluded when the proposal is accepted by the insurer, by the signing of his line of the slip: *Marine Insurance Act 1906* s.21; *General Accident Fire & Life Assurance Corp v Tanter (The Zephyr)* [1984] 1 *Lloyd's Rep.* 58, 69. There are other statutes which require a written record of specified insurance contracts: see, e.g. *Road Traffic Act 1988* s.147.

- 471 *Thompson v Adams* (1889) 23 Q.B.D. 361; *Grover v Mathews* [1910] 15 Com. Cas. 249; *Re Yager and Guardian* (1912) 108 L.T. 38; *Eagle Star Insurance v Spratt* [1971] 2 Lloyd's Rep. 116; *The Zephyr* [1984] 1 Lloyd's Rep. 58. For the position where a policy wording differs from slip, see *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 All E.R. (Comm) 39 at [81]–[95], where the Court of Appeal held that there was no rule of law that the policy was conclusive evidence of the insurance contract. Identifying the terms and meaning of the contract depended on a process of construction and analysis of the relationship between the slip and the policy and determining the parties' intention (cf. *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127). See *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24, 32–34, 53–54; *Generali Italia SpA v Pelagic Fisheries Corp* [2020] EWHC 1228 (Comm), [2020] Lloyd's Rep. I.R. 466 at [85].
- 472 General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria [1983] Q.B. 856, where the Court of Appeal held, inter alia, that (at least on the evidence adduced in that case) there was no legally binding custom in the Lloyd's market, nor could a term be implied, giving the assured a right of cancellation prior to full subscription of the slip. See *Marine Insurance Act 1906* s.24(2); *Royal & Sun Alliance Plc v Textainer Group Holdings Ltd* [2021] EWHC 2102 (Comm), [2021] 1 W.L.R. 4683 at [23].
- 473 *General Reinsurance Corp v Forsakringsaktiebolaget Fennie Patria* [1983] Q.B. 856. For the reasons for oversubscription, and the position which arises if a broker misstates the likely level of "writing down", see *The Zephyr* [1984] 1 Lloyd's Rep. 58, [1985] 2 Lloyd's Rep. 529.
- 474 *Roadworks (1952) Ltd v JR Charman* [1994] 2 Lloyd's Rep. 99 (where it was held that the particular leading underwriter's clause under consideration even gave the leading underwriter authority to waive a contingent condition to which the entire cover had been subject); cf. *Mander v Commercial Union Assurance* [1998] Lloyd's Rep. I.R. 93, 143–144. Similar authority may be given to a leading underwriter to settle claims: see *Roar Marine Ltd v Bimeh Iran Insurance Co* [1998] 1 Lloyd's Rep. 423; *Unum Life Insurance Co of America v Israel Phoenix Assurance Co Ltd* [2002] Lloyd's Rep. I.R. 374; *PT Buana Samudra Pratama v Marine Mutual Insurance Association (NZ) Ltd* [2011] EWHC 2413 (Comm), [2011] 2 Lloyd's Rep. 655.
- 475 *Bank Leumi Le Israel BM v British National Insurance Co* [1988] 1 Lloyd's Rep. 71, though it was there accepted that following underwriters may well be able to take advantage of misrepresentations or non-disclosures to a lead underwriter if they had subscribed on the basis of trusting the skill and judgment of the leading underwriter, and assumed that he had, himself, subscribed only after considering full and accurate information about the risk; and cf. *The Zephyr* [1984] 1 Lloyd's Rep. 58, 70.
- 476 *Aneco Reinsurance Underwriting Ltd (In Liquidation) v Johnson & Higgins* [1998] 1 Lloyd's Rep. 565.
- 477 *Brotherton v Aseguradora Colseguros SA* [2003] EWHC 1741 (Comm), [2003] Lloyd's Rep. I.R. 762.
- 478 See *Glencore International AG v Ryan* [2001] EWCA Civ 2051, [2002] 1 Lloyd's Rep. 574.

- 479 In the case of an open cover which obliges the insurer to accept declarations under it, the open cover is a standing offer whereby the insurer agrees to accept liability in respect of any declarations made within the terms of the cover; however, the insurer is not bound until the declaration—the acceptance of his offer—has been communicated to him: *BP Plc v GE Frankona Reinsurance Ltd* [2003] EWHC 344 (Comm), [2003] 1 Lloyd's Rep. 537 at [82]–[87]. This is, however, subject to a contrary market practice: *Limit No.2 Ltd v AXA Versicherung AG* [2007] EWHC 2321 (Comm), [2008] Lloyd's Rep. I.R. 330 at [108]–[111], reversed in part [2008] EWCA Civ 1231, [2009] Lloyd's Rep. I.R. 396. Such open covers are to be distinguished from “floating policies” as defined by *Marine Insurance Act 1906 s.29*, where the making of the declaration is not operative in binding the insurer: *Glencore International AG v Ryan (The Beursgracht)* [2001] EWCA Civ 2051, [2002] Lloyd's Rep. I.R. 335 at [26]–[32]; *Hanwha Non-Life Insurance Co Ltd v Alba Pte Ltd* [2011] SGHC 271, [2012] Lloyd's Rep. I.R. 505 at [48] (Singapore High Court).
- 480 Where the assured is able to choose whether or not to declare a risk under an open cover and the insurer is bound to accept such declaration as is made by the assured, there is no obligation upon the assured to exercise care in his selection of the risks he chooses to declare: *BP Plc v GE Frankona Reinsurance Ltd* [2003] EWHC 344 (Comm), [2003] 1 Lloyd's Rep. 537. As regards the insurer's obligations towards his reinsurer in deciding whether or not to accept a risk which would be ceded to the reinsurer, see *Bonner v Cox Dedicated Corporate Member Ltd* [2004] EWHC 2963 (Comm) at [255], [2005] EWCA Civ 1512, [2006] 2 Lloyd's Rep. 152 at [85]–[111].
- 481 See *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483; reversing in part [2001] 1 Lloyd's Rep. 30; reversed in part [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61. See above, para.44-037.
- 482 In the case of motor insurance, the cover note must give the holder immediate protection; see *Road Traffic Act 1988* s.143.
- 483 *Thompson v Adams* (1889) 23 Q.B.D. 361, 366; *Re Yager and Guardian* (1912) 108 L.T. 38, 40. Cover notes should be distinguished from brokers' cover notes, which if issued without the authority of the insurer, merely record the terms of the insurance contract agreed between the insurer and broker. Whilst brokers' cover notes might evidence the terms of the insurance contract, it is not itself a contractual document.
- 484 *Murfitt v Royal* (1922) 38 T.L.R. 334; *Stockton v Mason* [1978] 2 Lloyd's Rep. 430.
- 485 *Mackie v European Assurance* (1869) 21 L.T. 102.
- 486 *Re Coleman's Depositories* [1907] 2 K.B. 798; *Symington v Union Insurance (No.2)* (1928) 142 L.T. 48; *Queen Insurance v Parsons* (1881) 7 App. Cas. 96.
- 487 See *Mackie v European Assurance* (1869) 21 L.T. 102; *Levy v Scottish Employers* (1901) 17 T.L.R. 229. cf. *Cartwright v MacCormack* [1963] 1 W.L.R. 18.
- 488 *Mackie v European Assurance* (1869) 21 L.T. 102; *Murfitt v Royal* (1922) 38 T.L.R. 334; *Stockton v Mason* [1978] 2 Lloyd's Rep. 430. See above, para.44-064, for the position of agents in insurance.
- 489 *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24, 42 (per Potter J), 58 (per Staughton LJ). Note also the use of the words “contract” and “policy” in the *Marine Insurance Act 1906*. See also M.A. Clarke, *The Law of Insurance Contracts* (looseleaf), para.1-1A.

- 490 *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 All E.R. (Comm) 39 at [81]–[95].
- 491 Finance Act 1970 s.32 and Sch.7 Pt I para.1(2)(b); Finance Act 1989 ss.173, 187 and Sch.17.
- 492 See above, para.44-014.
- 493 s.22. cf. *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] Q.B. 199, 207–208.
- 494 See above, paras 44-034—44-037 for the duty of disclosure.
- ④495 *Pritchard v Merchant's Life* (1858) 3 C.B.(N.S.) 622, 643; *Phoenix Life v Sheridan* (1860) 8 H.L. Cas. 745, 750; *Stuart v Freeman* [1903] 1 K.B. 47. cf. MacGillivray on Insurance Law, 15th edn (2022), paras 7-038—7-039.
- 496 *Sun Fire v Hart* (1889) 14 App. Cas. 98.
- 497 *Solvency Mutual v Froane* (1861) 7 Hurl. & N. 5. See *Dalecroft Properties Ltd v Underwriters* [2017] EWHC 1263 (Comm), [2017] Lloyd's Rep. I.R. 511 at [85.2].
- 498 cf. *Salvin v James* (1805) 6 East 571; *McKenna v City Life* [1919] 2 K.B. 491.
- 499 *Tarleton v Staniforth* (1794) 5 T.R. 695; *Simpson v Accidental Death* (1857) 2 C.B.(N.S.) 257. Quaere whether the Unfair Terms in Consumer Contracts Regulations 1999 or, for contracts made on or after 1 October 2015, the Consumer Rights Act 2015 (see above, paras 40-273 et seq.) might circumscribe the insurer's right of refusal: see below, paras 44-087—44-088.
- 500 *Stuart v Freeman* [1903] 1 K.B. 47; but see *Pritchard v Merchants' Life* (1858) 3 C.B.(N.S.) 622.
- ⑤501 *Equitable Fire v Ching Wo Hong* [1907] A.C. 96. The premium need not necessarily be money: *Lion Insurance v Tucker* (1883) 12 Q.B.D. 176, 187; *Great Britain 100 AI v Wyllie* (1889) 22 Q.B.D. 710, 722. If the insurer gives the assured (being an individual) credit for the premium, the Consumer Credit Act 1974 may regulate the transaction; see, further, MacGillivray on Insurance Law, 15th edn (2022), paras 7-019—7-021.
- 502 *Roberts v Security Co* [1897] 1 Q.B. 111; *Equitable Fire v Ching Wo Hong* [1907] A.C. 96; *Re Yager and Guardian* (1912) 108 L.T. 38; *Looker v Law Union* [1928] 1 K.B. 554. Subject, of course, to days of grace: see above, para.44-074. Premium warranties may be inserted into the contract, whereby the insurer is discharged from liability if the premium is not paid in accordance with the warranty: *JA Chapman & Co Ltd (In Liquidation) v Kadirga Denizcilik Ve Ticaret AS* [1998] Lloyd's Rep. I.R. 377; *Heath Lambert Ltd v Sociedad de Corretaje de Seguros* [2004] EWCA Civ 792, [2004] 1 W.L.R. 2820.
- 503 *Phoenix Life v Sheridan* (1860) 8 H.L. Cas. 745.
- 504 *Kelly v London and Staffordshire Fire* (1883) 1 Cab. & El. 47, 48.
- 505 *General Accident v Cronk* (1901) 17 T.L.R. 233.
- 506 *Municipal Mutual v Pontefract* (1917) 116 L.T. 671. cf. *Solvency Mutual v York* (1858) 3 Hurl. & N. 588. But see above, para.44-074 and the cases cited there.
- 507 *General Accident v Cronk* (1901) 17 T.L.R. 233; *JA Chapman & Co Ltd (In Liquidation) v Kadirga Denizcilik Ve Ticaret AS* [1998] Lloyd's Rep. I.R. 377. As regards the position in respect of marine insurance, see *Heath Lambert Ltd v Sociedad de Corretaje de Seguros* [2004] EWCA Civ 792, [2004] 1 W.L.R. 2820.

- 508 cf. *Salvin v James* (1805) 6 East 571; *Edge v Duke* (1849) 18 L.J. Ch. 183; *Kirby v Cosindit Societa per Azioni* [1969] 1 Lloyd's Rep. 75. See also, *Fenton Insurance Co Ltd v Gothaer* [1991] 1 Lloyd's Rep. 172, 180, where the view was expressed that one could rarely infer a repudiatory intention by reason merely of non-payment of balances under a reinsurance treaty (as opposed to persistent non-payment in the face of demands or protests). See also *Figre v Mander* [1999] Lloyd's Rep. I.R. 193; cf. *Pacific and General Insurance Co v Hazell* [1997] L.R.L.R. 65.
- 509 See *London and Lancashire Life v Fleming* [1897] A.C. 499; *Daff v Midland Colliery* (1913) 82 L.J. K.B. 1340.
- 510 *Gliksten v State Assurance* (1922) 10 Ll.L. Rep. 604.
- 511 Marine Insurance Act 1906 s.31. cf. *Kirby v Cosindit Societa per Azioni* [1969] 1 Lloyd's Rep. 75. There seems no reason why the rule for marine insurance should not be applied generally, since it accords with the analogous rule for the sale of goods. See, however, *Canning v Farquhar* (1886) 16 Q.B.D. 727; *Re Yager and Guardian* (1912) 108 L.T. 38; *Murfit v Royal Insurance* (1922) 38 T.L.R. 334. In *American Airlines v Hope* [1973] 1 Lloyd's Rep. 233 the Court of Appeal decided as a matter of construction that the words "at additional premium to be agreed" in the particular context conferred no cover until agreement was reached.
- 512 *Kirby v Cosindit Societa per Azioni* [1969] 1 Lloyd's Rep. 75.
- 513 *Stevenson v Snow* (1761) 3 Burr. 1237, 1240.
- 514 ss.82–84.
- 515 *Wolenburg v Royal Co-operative Society* (1915) 84 L.J. K.B. 1316.
- 516 *Kelly v Solari* (1841) 9 M. & W. 54.
- 517 *Oom v Bruce* (1810) 12 East 225; *Hentig v Staniforth* (1816) 5 M. & S. 122.
- 518 *Pritchard v Merchant's Life* (1858) 3 C.B.(N.S.) 622, 645.
- 519 *Howarth v Pioneer Life* (1912) 107 L.T. 155; *British Workman's v Cunliffe* (1902) 18 T.L.R. 502; *Hughes v Liverpool Victoria* [1916] 2 K.B. 482; *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep. 430. Contrast *Harse v Pearl Life* [1904] 1 K.B. 558; *Phillips v Royal London Mutual* (1911) 105 L.T. 136.
- 520 *Lowry v Bourdieu* (1780) 2 Doug. 468; *Busk v Walsh* (1812) 4 Taunt. 290; *Kearley v Thomson* (1890) 24 Q.B.D. 742.
- 521 See Financial Services and Markets Act 2000 ss.26, 28. See above, para.44-063.
- 522 *Feise v Parkinson* (1812) 4 Taunt. 640, 641; *Anderson v Thornton* (1853) 8 Exch. 425; *Anderson v Fitzgerald* (1853) 4 H.L.C. 484, 507; *Biggar v Rock Life* [1902] 1 K.B. 516, 526. See above, paras 44-033—44-046.
- 523 See above, para.44-042.
- 524 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [73], [88].
- 525 *Clarke v Dickson* (1858) El. Bl. & El. 148; see also Vol.I, paras 9-132—9-139. There are conflicting authorities concerning the return of premium where a contract of non-marine insurance has been avoided: *Whittingham v Thornburgh* (1690) 2 Vern. 206; *Feise v Parkinson* (1812) 4 Taunt. 640, 641; *Anderson v Thornton* (1853) 8 Exch. 425; *Anderson v*

- Fitzgerald* (1853) 4 H.L.C. 484, 507; *Biggar v Rock Life Assurance Co* [1902] 1 K.B. 516, 526; *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B. 431, 440. See MacGillivray on Insurance Law, 15th edn (2022), para.8-030.
- 526 *Thomson v Weems* (1884) 9 App. Cas. 671; *Kumar v Life Insurance Corp of India* [1974] 1 *Lloyd's Rep.* 147.
- 527 *Thomson v Weems* (1884) 9 App. Cas. 671, 682.
- 528 *Sparenborg v Edinburgh Life* [1912] 1 K.B. 195, 204. Contrast *Annen v Woodman* (1810) 3 *Taunt.* 299; *Langhorn v Cologan* (1812) 4 *Taunt.* 330.
- 529 Rule 7 of Insurance Conduct of Business Sourcebook (ICOBS), made pursuant to ss.137A to 137F, 137T and 139A of the Financial Services and Markets Act 2000, as amended by s.24 of the Financial Services Act 2012.
- 530 *Re Drake Insurance Plc* [2001] *Lloyd's Rep. I.R.* 643, 646. In that case, the making of a claim did not vitiate the right to a return of premium at (649). cf. *Swiss Reinsurance Co v United India Insurance Co Ltd* [2005] EWHC 237 (Comm), [2005] *Lloyd's Rep. I.R.* 341.
- 531 *Lynch v Dalzell* (1729) 4 Bro.P.C. 431; *Sadlers Co v Badcock* (1743) 2 Atk. 554; *Tyrie v Fletcher* (1777) 2 Cowp. 666; *Berman v Woodbridge* (1781) 2 Doug.K.B. 781; *Swiss Reinsurance Co v United India Insurance Co Ltd* [2005] EWHC 237 (Comm), [2005] *Lloyd's Rep. I.R.* 341. Where the payment of premium by instalment during the currency of a marine policy is warranted and premium has not been paid with the effect that the insurer is discharged before the expiry of the policy term, the insurer still is entitled to the entire premium: *JA Chapman & Co Ltd (In Liquidation) v Kadirga Denizcilik Ve Ticaret AS* [1998] *Lloyd's Rep. I.R.* 377. The Apportionment Act 1870, by s.6, does not apply.
- 532 *Re Drake Insurance Plc* [2001] *Lloyd's Rep. I.R.* 643, 646–647.
- 533 *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 W.L.R. 3251 at [18]–[19]; *Blackburn Rovers Football & Athletic Club Plc v Avon Insurance Plc* [2005] EWCA Civ 423, [2005] *Lloyd's Rep. I.R.* 447 at [9]. In *AXA Corporate Solutions SA v National Westminster Bank Plc* [2010] EWHC 1915 (Comm), [2011] *Lloyd's Rep. I.R.* 438, the Court construed the term “*Terrorism exclusion (wording to be agreed)*” to operate as an exclusion and did not require a further clause to be identified. See *Manchikalapati v Zurich Insurance Plc* [2019] EWCA Civ 2163, [2020] *Lloyd's Rep. I.R.* 77 at [68].
- 534 *Spire Healthcare Ltd v Royal & Sun Alliance Insurance Plc* [2016] EWHC 3278 (Comm), [2017] *Lloyd's Rep. I.R.* 118 at [11], [2018] EWCA Civ 317, [2018] *Lloyd's Rep. I.R.* 425; *ABN AMRO NV v Royal & Sun Alliance Insurance Plc* [2021] EWHC 442 (Comm), [2021] *Lloyd's Rep. I.R.* 467 at [175]–[178]; [2021] EWCA Civ 1789, [2022] 1 W.L.R. 1773.
- 535 *Wooldridge v Canelhas Comercio Importacao e Exportacao Ltda* [2004] EWCA Civ 984, [2005] 1 All E.R. (Comm) 43 (“robbery”); cf. *Dobson v General Accident Fire & Life Assurance Corp Plc* [1990] 1 Q.B. 274 (“theft”).
- 536 See, e.g. *Ramco (UK) Ltd v International Insurance Co of Hannover Ltd* [2004] EWCA Civ 675, [2004] 2 *Lloyd's Rep.* 595 at [32]; *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* [2006] EWHC 2707, [2007] *Lloyd's Rep. I.R.* 267 at [24]; reversed on other grounds [2007] EWCA Civ 1208, [2008] *Lloyd's Rep. I.R.* 454.

- 537 *Gard Marine v Tunnicliffe* [2011] EWHC 1658 (Comm), [2012] *Lloyd's Rep. I.R.* 1.
- 538 *Milton Furniture Ltd v Brit Insurance Ltd* [2015] EWCA Civ 671, [2016] *Lloyd's Rep. I.R.* 192 at [24].
- 539 *Generali Italia SpA v Pelagic Fisheries Corp* [2020] EWHC 1228 (Comm), [2020] *Lloyd's Rep. I.R.* 466 at [91].
- 540 *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] EWCA Civ 845, [2005] 1 All E.R. (Comm) 132.
- 541 *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] EWCA Civ 845, [2005] 1 All E.R. (Comm) 132; *Royal & Sun Alliance Insurance Plc v Dornoch Ltd* [2005] EWCA Civ 238, [2005] 1 All E.R. (Comm) 590; *Blackburn Rovers Football & Athletic Club Plc v Avon Insurance Plc* [2005] EWCA Civ 423, [2005] *Lloyd's Rep. I.R.* 447 at [9].
- 542 [2016] UKSC 57, [2017] A.C. 73 at [35]. See also *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm), [2018] *Lloyd's Rep. I.R.* 83; *Manchikalapati v Zurich Insurance Plc* [2019] EWCA Civ 2163, [2020] *Lloyd's Rep. I.R.* 77 at [46]–[48]; *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm), [2020] *Lloyd's Rep. I.R.* 527 at [71]–[74]; cf. *Burnett v International Insurance Co of Hanover Ltd* [2021] UKSC 12, [2021] 1 W.L.R. 2465 at [29].

Section 7. - The Terms of the Insurance Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 7. - The Terms of the Insurance Contract

Classification of terms

44-078 Insurance contracts nearly always contain a number of terms and conditions which may be classified according to their effect as follows:

- (i)terms which, if not fulfilled, entitle the insurer to treat himself as discharged from further liability under the contract;
- (ii)terms which, if not fulfilled, entitle the insurer to refuse to pay a particular claim under the policy, but which do not affect the continued validity of the policy;
- (iii)terms the breach of which gives the insurer the right to claim damages only;
- (iv)terms which delimit the scope of the risk covered, failure to comply with which will take the insurer off risk while the breach continues;
- (v)innominate terms, which are neither an essential term which discharge the insurer from all liability under the contract or merely a term the breach of which results in damages, but terms which give the insurer different rights depending on the seriousness of the breach.

The most stringent of such terms are conditions precedent and warranties, which shall now be considered. These are to be contrasted with the terms of the policy which identify whether a particular event, loss or damage falls within the scope of cover afforded by the insurance contract. ⁵⁴³

Conditions precedent

44-079



The term “condition precedent” often refers to a condition which, if not fulfilled, entitles the insurer to refuse payment under the insurance policy, without necessarily importing the right to treat the entire contract as discharged. So, a term, depending on its context, may be interpreted as a condition precedent to an insurer’s liability (actual or contingent) in respect of a particular claim or under the entire policy⁵⁴⁴ or may be construed as a condition precedent to the attachment of the risk or the continuance of the insurance cover.⁵⁴⁵ The use or absence of the words “condition precedent” are not determinative; nonetheless, the use of the term “condition precedent” to the insurer’s liability will often be construed as such unless the term is used indiscriminately.⁵⁴⁶ Typically, conditions precedent will be concerned with obligations which an assured must comply with after the loss has occurred,⁵⁴⁷ but in principle it should be possible for such conditions to be concerned with obligations imposed upon the assured during the currency of the policy.

⁵⁴⁸

U Moreover, what is described as a condition precedent in a policy may sometimes simply be construed as a collateral promise giving the insurer neither the right to treat the policy as terminated, nor even to refuse payment of the claim, when not complied with.⁵⁴⁹ Indeed, a term may be classified as an innominate term and the insurer’s rights upon its breach may be determined by the seriousness of that breach.⁵⁵⁰ Ambiguities in conditions or warranties will usually be construed against the insurer.⁵⁵¹ Furthermore, conditions will be construed in the context of the commercial purpose of the policy, so that, for example, a condition requiring the assured to take reasonable precautions to prevent an accident, or to take all reasonable steps to safeguard any property insured, will usually be construed as requiring more than mere negligence upon the part of the assured before the condition is breached, particularly if the assureds’ negligence is an insured peril under the policy in question.⁵⁵²

Promissory warranties and their effect: the common law

44-080

U A warranty is a promise by the assured that a particular thing shall or shall not be done in the future (a continuing or future warranty) or that a particular state of facts exists or does not exist (an existing fact warranty).⁵⁵³ Such a promissory warranty may be express in the policy or may be implied (usually as a matter of law).⁵⁵⁴ An express warranty should be written in the policy (assuming one exists).

⁵⁵⁵

U In addition to those expressly set out in the policy, warranties may arise from statements made by an assured in a proposal form, the accuracy of which is warranted in a declaration which is said to be “the basis of the contract”.⁵⁵⁶ All such warranties must be exactly complied with,⁵⁵⁷ and it is immaterial that a breach of warranty has no connection with the loss⁵⁵⁸ or that it does not

affect the risk⁵⁵⁹ or has been remedied before the loss⁵⁶⁰ or that it occurs without the fault of the assured.⁵⁶¹ In the case of continuing warranties, the insurer is discharged from any further liability under the contract as from the date the warranty is breached (thereby still allowing the assured to claim in respect of any loss occurring before the warranty was breached) and the discharge operates automatically without the insurer having to accept any repudiation or make any election.⁵⁶² In the case of existing fact warranties, the contract is effectively, although not technically, vitiated ab initio, since fulfilment of the warranty is a condition precedent to the attachment of the risk.⁵⁶³ Given the draconian nature of some warranties, such terms will be construed, in the absence of a clearly expressed provision, against being a continuing warranty⁵⁶⁴ and any ambiguity will be construed against the insurer,⁵⁶⁵ and might be construed to be limited in their scope to a discrete part or section of the policy, rather than to the entire contract.⁵⁶⁶ Further, a warranty may be construed to apply subject to implied exceptions.⁵⁶⁷ When construing whether a statement in a proposal form gives rise to a continuing warranty or a warranty as to past or existing fact, there is no special principle of insurance law requiring answers to be read as importing promises as to the future.⁵⁶⁸ The insurer will not be entitled to rely on a breach of warranty as a defence if non-compliance with the warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.⁵⁶⁹ Further, the insurer will not be entitled to rely on a breach of warranty if the breach has been waived by the insurer.⁵⁷⁰

Suspensive, delimiting or descriptive warranties

44-081 In order to evade the harsher effects of a breach of a promissory warranty, the courts have often resorted to construing a “warranty” not as a promissory warranty, but rather as a suspensive (or delimiting or descriptive) warranty. Such a warranty does not impose a promissory obligation on the assured; instead, it purports to delineate the risk being insured, much like an exclusion clause. A breach of a suspensive warranty does not entitle the insurer either to terminate the contract or sue for damages if not complied with⁵⁷¹; it merely means that the relevant loss or damage is not covered by the insurance policy if the loss or damage is sustained whilst the breach is operating; but the cover would be reinstated once the breach comes to an end or is remedied. Such a suspensive warranty is more likely to be found to exist where the term is not fundamental to the risk and where a breach of the term is not likely to alter or increase the risk after the breach lapses or has been rectified.⁵⁷²

Warranties and the Insurance Act 2015

44-082

The **2015 Act** applies to all insurance contracts agreed on or after 12 August 2016.⁵⁷³ The **2015 Act**, by s.10, applies to “warranties”. Although it does not say so expressly, it appears to be aimed at promissory warranties.⁵⁷⁴ The effect of s.10 is to treat promissory warranties in both consumer and non-consumer insurance contracts in the same way as suspensive warranties. Thus, any rule of law that a breach of an express or implied warranty results in the discharge of the insurer’s liability under the insurance contract is abolished.⁵⁷⁵ In place of such a rule of law, the **2015 Act** provides that where there has been a breach of warranty, the insurer has no liability under the insurance contract in respect of any loss occurring, or attributable to something happening, after the breach of warranty but before the breach has been remedied.⁵⁷⁶ Thus, the insurer will remain liable under the insurance contract where the loss occurred or was attributable to something happening before the breach of warranty or after the breach has been remedied.⁵⁷⁷ The **2015 Act** provides when a breach of warranty will be regarded as remedied. If the warranty is one which requires something to be done or not done or a condition to be fulfilled or something to be the case or not the case by an “ascertainable time”⁵⁷⁸ and that requirement is not complied with, the breach will be remedied when the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties.⁵⁷⁹ In any other case, the breach of warranty will be remedied when the assured ceases to be in breach of warranty. The legislation recognises that there are some warranties which cannot be remedied, for example a specific warranty as to a past fact or event (such as a warranty that the assured has suffered no losses during the previous 12 months).⁵⁸⁰ The insurer cannot rely on a breach of warranty as a defence where by reason of a change of circumstances the warranty ceases to be applicable to the circumstances of the contract, compliance with the warranty is rendered unlawful by any subsequent law, or the insurer waives the breach of warranty. These exceptions are the same as that provided for under the common law.⁵⁸¹ As discussed above, “basis of the contract” clauses are no longer permitted.⁵⁸²

Contracting out of the Insurance Act 2015 provisions applicable to warranties

- 44-083 In respect of consumer insurance contracts, it is not open to the parties to contract out of the provisions of the **2015 Act** applicable to warranties where the contractual provision would put the consumer in a worse position than the consumer would be in by virtue of the **2015 Act**.⁵⁸³ However, this prohibition does not apply to contracts for the settlement of claims under a consumer insurance contract.⁵⁸⁴ “Basis of the contract” clauses cannot be agreed in any circumstances.⁵⁸⁵ Similarly, in respect of non-consumer insurance contracts, the parties are not permitted to agree a contractual provision which would put the assured in a worse position than allowed by s.9 (which abolishes “basis of the contract” clauses).⁵⁸⁶ Other than the prohibition against “basis of the contract” clauses, it is open to the parties to a non-consumer insurance contract to contract out of the **2015 Act** insofar as it is applicable to warranties by a provision in their insurance contract

which puts the assured in a worse position by the insurer, provided that the insurer takes sufficient steps to draw the assured's or his agent's attention to the provision in question and the provision is clear and unambiguous as to its effect.⁵⁸⁷

Terms not relevant to the actual loss

- 44-084 Section 11 of the Insurance Act 2015 introduces a restriction upon the ability of insurers to rely on certain terms of the insurance contract as a defence to an insurance claim. The terms to which this restriction applies are, subject to one exception, all terms, including warranties,⁵⁸⁸ compliance with which would tend to reduce the risk of loss of a particular kind, loss at a particular location or loss at a particular time. The exception is a term which defines the risk as a whole. Presumably, this exception would apply to a policy exclusion which provides that an insurer is not liable for losses caused by certain specified excluded perils; but it may not be so limited. If the contract term is one compliance with which would tend to reduce the risk of loss as described, the insurer may not rely on non-compliance with such a term to exclude, limit or discharge its liability under the insurance contract in answer to a claim under the insurance contract in respect of a loss, if the assured shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.⁵⁸⁹ If for example the insurance contract contains a warranty or condition that the insured property will be secured by a specified type of lock or alarm and if the property was damaged by flood or fire, it is likely that the assured could show that a failure to secure the property with the specified lock could not have increased the risk of loss by flood or fire.⁵⁹⁰ It is not open to the parties to a consumer insurance contract to contract out of the effect of s.11 if such a contract would put the assured in a worse position than that allowed under s.11.⁵⁹¹ It is open to the parties to a non-consumer insurance contract to contract out of the effect of s.11 by a provision which puts the assured in a worse position than that allowed under s.11, provided that the transparency requirements of the Act are complied with.⁵⁹²

FCA Insurance: Conduct of Business Sourcebook (ICOBS)

- 44-085 In the case of policies taken out by individuals in a private capacity, the harsh effects of these rules⁵⁹³ were to some extent mitigated by the Statement of General Insurance Practice.⁵⁹⁴ Since January 2008, the Financial Services Authority Regulation, ICOBS, provides that insurers must handle claims promptly and fairly, provide reasonable guidance to policyholders, not unreasonably reject a claim, and pay claims promptly after settlement,
⁵⁹⁵

U and that it is unreasonable for an insurer to reject a consumer policyholder's claim on the ground of breach of warranty or breach of condition, unless there is evidence of fraud or unless the circumstances of the claim are connected to the breach of warranty or condition and the warranty was material to the risk and was drawn to the policyholder's attention before the conclusion of the contract. ⁵⁹⁶

Waiver

44-086 The insurer may, of course, waive any breach of condition or warranty either expressly or by conduct. ⁵⁹⁷

U The insurance contract itself may restrict or exclude the remedies available for a breach of warranty. ⁵⁹⁸ There are generally said to be two (principal) types of waiver: waiver by election and waiver by estoppel. The former arises where the insurer, with full knowledge of the facts, ⁵⁹⁹ acts unequivocally in a manner consistent only with an intention to continue with the contract, ⁶⁰⁰ as, for example, where he accepts premiums, ⁶⁰¹ or possibly where he renews the contract. ⁶⁰² However, waiver by election is inapplicable to cases where the insurer's liability is automatically discharged by a breach of warranty or a condition precedent. ⁶⁰³ It has been held by the Court of Appeal that a breach of warranty or a breach of a condition precedent may be waived only by estoppel. This will be so where the insurer promises to the assured, by words or by conduct, that he will not act upon the assured's breach, and the assured so alters his position in reliance upon this promise as to make it unjust for the insurer to go back upon it. In this situation (unlike a waiver by election), an insurer may lose the right to treat himself as discharged from liability before he has full knowledge of the circumstances and of his right to treat himself as discharged. ⁶⁰⁴

Unfair Terms in Consumer Contracts Regulations 1999 ⁶⁰⁵

44-087 Although insurance contracts are excluded from the ambit of the **Unfair Contract Terms Act 1977**, ⁶⁰⁶ the **Unfair Terms in Consumer Contracts Regulations 1999** (which implement Council Directive 93/13 and apply to consumer contracts concluded after 1 October 1999 and before 1 October 2015 ⁶⁰⁷) ⁶⁰⁸ do embrace insurance contracts. The **1999 Regulations** replaced the **Unfair Terms in Consumer Contracts Regulations 1994**, which applied to consumer contracts concluded after 1 July 1995. ⁶⁰⁹ The Regulations provide that unfair terms included in a contract with a consumer ⁶¹⁰ by a seller or supplier ⁶¹¹ are not binding on the consumer. ⁶¹² A contract term which

has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith,⁶¹³ it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.⁶¹⁴ If the contract is capable of continuing in existence without the offending unfair term, it is to continue to bind the parties, albeit that the unfair term is not to be binding upon the consumer.⁶¹⁵ Furthermore, terms reduced to writing must be in plain, intelligible language, and if there is any doubt about the meaning of a term, the interpretation most favourable to the consumer must prevail.⁶¹⁶ Despite the apparent width of these provisions, it is to be borne in mind that many of the severer aspects of insurance law (such as the absolute nature of the obligation to disclose material facts⁶¹⁷) derive from the general principles of insurance law, rather than specific terms in the insurance contract. The Regulations therefore will not apply to such principles of law.⁶¹⁸ Furthermore, the Regulations specifically provide that assessment of the unfair nature of terms shall not relate to the definition of the main subject matter of the contract, nor to the adequacy of the price and remuneration on the one hand, as against the services or goods supplied in exchange on the other.⁶¹⁹ Thus, terms of the insurance which define or circumscribe the insured risk will not directly be subject to assessment as fair or unfair.⁶²⁰ However, conditions concerned with, for example, the assured's obligations following the occurrence of a loss should be subject to assessment.

Consumer Rights Act 2015

- 44-088 The [Consumer Rights Act 2015](#) entered into force on 1 October 2015 and applies to contracts made on or after that date.⁶²¹ The [Unfair Terms in Consumer Contracts Regulations 1999](#) are revoked, remaining applicable only to contracts made before 1 October 2015.⁶²² By [s.62\(1\)–\(5\) of the 2015 Act](#), a term of a consumer contract is not binding on the consumer if it is unfair, although the consumer may choose to rely on it. A term of a consumer contract 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, taking into account the nature and terms of the contract and all of the circumstances existing when the term was agreed.⁶²³ However, a term of a consumer contract will not be assessed for unfairness if it specifies the main subject matter of the contract or if the assessment concerns the appropriateness of the price payable under the contract for the services provided,⁶²⁴ provided that the term is transparent (meaning it is both legible if in writing and expressed in plain and intelligible language) and prominent (meaning that it is brought to the consumer's attention in such a way that an average—reasonably well-informed, observant and circumspect—consumer would be aware of the term).⁶²⁵ The Act contains certain restrictions as to a term which purports to exclude or restrict liability for negligence; however, such restrictions do not apply to insurance contracts.⁶²⁶

Footnotes

- 543 See below, paras 44-102—44-103.
- 544 See, e.g. *Kazakstan Wool Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV* [2000] *Lloyd's Rep. I.R.* 371.
- 545 See, e.g. *Zeus Tradition Marine Ltd v Bell (The Zeus)* [2000] 2 *Lloyd's Rep.* 587.
- 546 *George Hunt Cranes Ltd v Scottish Boiler and General Insurance Co Ltd* [2001] *EWCA Civ* 1964, [2002] *Lloyd's Rep. I.R.* 178; *HLB Kidsons v Lloyd's Underwriters* [2007] *EWHC 1951 (Comm)*, [2008] *Lloyd's Rep. I.R.* 237 at [51]—[54]. See also *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) Plc* [2017] *EWHC 391 (Comm)*, [2017] *Lloyd's Rep. I.R.* 240 at [22]—[40].
- 547 Such as timely notification. See, generally, below, paras 44-093. As to a claims control clause in a reinsurance policy, see *Eagle Star Insurance Co Ltd v Cresswell* [2004] *EWCA Civ* 602, [2004] 2 *All E.R. (Comm)* 244.
- 548 See, e.g. *Jones v Provincial Insurance Co Ltd* (1929) 35 *Li.L. Rep.* 135; *Brown v Zurich General Accident Co* [1954] 2 *Lloyd's Rep.* 243; and the observations in MacGillivray on Insurance Law, 15th edn (2022), paras 10-010—10-011.
- 549 See, e.g. *Stoneham v Ocean Railway and General* (1887) 19 *Q.B.D.* 237; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 *K.B.* 415.
- 550 *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] 1 *Lloyd's Rep.* 437, where the Court of Appeal held that a breach of an innominate term might result in the entire policy being repudiated or the liability for the claim being defeated or might have other serious consequences. See also *Trans-Pacific Insurance Co (Australia) Ltd v Grand Union Insurance Co Ltd* (1989) 18 *N.S.W.L.R.* 675; *K/S Merc-Scandia XXXXII v Lloyd's Underwriters* [2001] *EWCA Civ* 1275, [2001] 2 *Lloyd's Rep.* 563. That there is a separate class of innominate terms, the breach of which will entitle the insurer to decline the claim as opposed to terminate the contract, is now in doubt, given the Court of Appeal's decision in *Sirius International Insurance Corp v Friends Provident Life & Pensions Ltd* [2005] *EWCA Civ* 601, [2005] 2 *Lloyd's Rep.* 517, although (putting aside the good sense of that decision) it must be questioned whether the Court of Appeal was free to overrule the court's decisions in *Alfred McAlpine v BAI* and *K/S Merc-Scandia v Lloyd's Underwriters*.
- 551 *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 *K.B.* 415; *S & M Hotels Ltd v Legal and General Assurance Society Ltd* [1972] 1 *Lloyd's Rep.* 157; *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] *EWCA Civ* 845, [2005] 1 *All E.R. (Comm)* 132; *Royal & Sun Alliance Insurance Plc v Dornoch Ltd* [2005] *EWCA Civ* 238, [2005] *Lloyd's Rep. I.R.* 544. See also Unfair Terms in Consumer Contracts Regulations 1999 reg.7 and the Consumer Rights Act 2015 s.64 (below, paras 44-087—44-088) and *Re Drake Insurance Plc* [2001] *Lloyd's Rep. I.R.* 643, 649.

- 552 *Fraser v BN Furman (Productions) Ltd* [1967] 1 W.L.R. 898 (where a condition in an employers' liability policy requiring the assured to take reasonable precautions to prevent an accident was construed as applying only where inadequate measures are taken by the assured in the face of a recognised danger, without caring whether or not it was averted); *Sofi v Prudential Insurance Co Ltd* [1993] 2 Lloyd's Rep. 559 (applying a similar approach to a property insurance, where the policy required all reasonable steps to be taken to safeguard the property). In *Gunns v Par Insurance Brokers* [1997] 1 Lloyd's Rep. 173, 177, it was suggested that this approach should apply to all types of insurance policy. It has been held in *Amey Properties Ltd v Cornhill Insurance Plc* [1996] L.R.L.R. 259 that, in the case of motor policies, a condition requiring a vehicle to be kept in good repair will not have been satisfied if the insurer proves the assured simply to have been negligent in the upkeep of his vehicle. See also *Frans Maas (UK) Ltd v Sun Alliance and London Insurance Plc* [2003] EWHC 1803 (Comm), [2004] 1 Lloyd's Rep. 484; *The Board of Trustees of the Tate Gallery v Duffy Construction Ltd (No.2)* [2007] EWHC 912 (TCC), [2008] Lloyd's Rep. I.R. 159; cf. *Milton Furniture Ltd v Brit Insurance Ltd* [2014] EWHC 965 (QB), [2014] Lloyd's Rep. I.R. 540 at [157]–[172], [2015] EWCA Civ 671. It may be that (unless the context or wording compels a contrary conclusion) the word "reasonable" will be interpreted more leniently to the assured in respect of obligations to safeguard the subject matter of the insurance than in respect of obligations to maintain, although the distinction will often be blurred: *Hayward v Norwich Union Insurance Ltd* [2000] Lloyd's Rep. I.R. 382.
- 553 Marine Insurance Act 1906 s.33. See *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233, a marine insurance case. It is generally assumed that the law of warranties is the same for marine and non-marine insurance: see, e.g. *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233, 262–264; *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 All E.R. (Comm) 39 at [122].
- 554 For example, certain marine insurance policies have implied into them a warranty of seaworthiness and a warranty of legality (Marine Insurance Act 1906 ss.39–41). There is no equivalent warranty of legality implied into non-marine insurance contracts as a matter of law: *Euro-Diam Ltd v Bathurst* [1988] 2 W.L.R. 517.
- 555 MacGillivray on Insurance Law, 15th edn (2022), paras 10-026—10-027.
- 556 See, e.g. *Thomson v Weems* (1884) 9 App. Cas. 671; *Dawsons Ltd v Bonnin* [1922] 2 A.C. 413; *Provincial Insurance v Morgan* [1993] A.C. 240. The truth of the circumstances warranted may be qualified by that which is known to the assured: *Arab Bank Plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep. 262, 283; *International Lottery Management Ltd v Dumas* [2002] Lloyd's Rep. I.R. 237 at [65]. See also *Zeller v British Caymanian Insurance Co Ltd* [2008] UKPC 4, [2008] Lloyd's Rep. I.R. 545; *Genesis Housing Association Ltd v Liberty Syndicate Management Ltd* [2013] EWCA Civ 1173, [2014] Lloyd's Rep. I.R. 318; *Aldridge v Liberty Mutual Insurance Europe Ltd* [2016] EWHC 3037 (Comm) at [119]; *Ashfaq v International Insurance Co of Hannover Plc* [2017] EWCA Civ 357, [2017] H.L.R. 29 at [58]–[59].

- 557 *Pawson v Watson* (1778) 2 Cowp. 785; *De Hahn v Hartley* (1786) 1 T.R. 343.
- 558 *Maynard v Rhode* (1824) 1 Car. & P. 360; *Glen v Lewis* (1853) 8 Ex. 607; *Foley v Tabor* (1861) 2 F. & F. 663.
- 559 *Newcastle Fire v Macmorran* (1815) 3 Dow. 255; *Dawsons v Bonnin* [1922] 2 A.C. 413. cf. *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161.
- 560 Marine Insurance Act 1906 s.34(2).
- 561 *Philips v Baillie* (1784) 3 Doug. K.B. 374; *Worsley v Wood* (1796) 6 T.R. 710. Note, however, that a condition requiring all reasonable precautions to be taken may be construed as applying only to the assured himself, and not to neglects or defaults of his employees: *Fraser v BN Furman (Productions) Ltd* [1967] 2 Lloyd's Rep. 1; *Duncan Logan (Contractors) v Royal Exchange Assurance Group*, 1973 S.L.T. 192.
- 562 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233.
- 563 *Thomson v Weems* (1884) 9 App. Cas. 671, 683–684.
- 564 *Hussain v Brown* [1996] 1 Lloyd's Rep. 627. cf. *Cornhill Insurance Plc v DE Stamp Felt Roofing Contractors Ltd* [2002] EWCA Civ 395, [2002] Lloyd's Rep. I.R. 648 at [20].
- 565 *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225; *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep. I.R. 301; *Amlin Corporate Member Ltd v Oriental Assurance Corp (The Princess of the Stars)* [2013] EWHC 2380 (Comm), [2013] 2 Lloyd's Rep. 523 at [30], [2014] EWCA Civ 1135, [2014] 2 Lloyd's Rep. 561 at [43]–[45].
- 566 *Printpak v AGF Insurance Ltd* [1999] Lloyd's Rep. I.R. 542. cf. *International Management Group (UK) Ltd v Simmonds* [2003] EWHC 177 (Comm), [2004] Lloyd's Rep. I.R. 247, [118].
- 567 See, e.g. *GE Frankona Reinsurance Ltd v CMM Trust No 1400 (The Newfoundland Explorer)* [2006] EWHC 429 (Admly), [2006] Lloyd's Rep. I.R. 704; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225. Further exceptions are provided for in Marine Insurance Act 1906 s.34(1).
- 568 *Hussain v Brown* [1996] 1 Lloyd's Rep. 627, where the answer yes to a question “Are the premises fitted with any system of intruder alarm?” was held not to constitute a continuing warranty that the premises would be fitted with such an alarm.
- 569 Marine Insurance Act 1906 s.34(1). cf. *Agapitos Laiki Bank (Hellas) SA v Agnew (No.2)* [2002] EWHC 1558 (Comm), [2003] Lloyd's Rep. I.R. 54 at [59]; *Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 2636 (Comm), [2011] Lloyd's Rep. I.R. 198 at [42].
- 570 Marine Insurance Act 1906 s.34(3). See below, para.44-086.
- 571 See, e.g. *CTN Cash and Carry Ltd v General Accident Fire and Life Assurance Corp Plc* [1989] 1 Lloyd's Rep. 299. See also *Farr v Motor Traders Mutual Society* [1920] 3 K.B. 669; *Roberts v Anglo-Saxon Insurance Co* (1927) 27 Ll.L. Rep. 313; *Morgan v Provincial Insurance Co* [1932] 2 K.B. 70. For an illustration of the expression “warranty” apparently even being used to refer to a term the breach of which sounds in damages only, see *W. & J. Lane v Spratt* [1970] 2 Q.B. 480, 487, 493.

- 572 *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd* [1967] 2 *Lloyd's Rep.* 550, 558–559; *Svenska Handelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 *Lloyd's Rep.* 519, 551–553. It appears the court will be inclined to construe a term as a suspensive condition if it purports to impose a continuing obligation on the assured: *Kler Knitwear Ltd v Lombard General Insurance Co Ltd* [2000] *Lloyd's Rep. I.R.* 47. See also *Toomey v Banco Vitalicio de Espana sa de Seguros y Reaseguros* [2003] *EWHC* 1102 (Comm); affirmed [2004] *EWCA Civ* 622, [2004] *Lloyd's Rep. I.R.* 354 at [40]–[46]; *Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) Plc* [2010] *EWHC* 2636 (Comm), [2011] *Lloyd's Rep. I.R.* 198; *Bluebon Ltd (In Liquidation) v Ageas (UK) Ltd* [2017] *EWHC* 3301 (Comm), [31]–[67].
- 573 2015 Act s.22(2).
- 574 Explanatory Notes, paras 86–87, 92. Further, 2015 Act s.10(7) amends ss.33–34 of the Marine Insurance Act 1906, which applies to promissory warranties.
- 575 2015 Act s.10(1).
- 576 2015 Act s.10(2).
- 577 2015 Act s.10(4).
- 578 Explanatory Notes, para.91, refer to this as a “deadline”.
- 579 2015 Act ss.10(5)(a), 10(6).
- 580 Explanatory Notes, para.89. See 2015 Act s.10(4)(b).
- 581 2015 Act ss.10(3). See Marine Insurance Act 1906 ss.34(1) and (3). See above, para.44-080 and below, para.44-086.
- 582 See above, paras 44-048, 44-059.
- 583 2015 Act s.15(1).
- 584 2015 Act s.15(3).
- 585 Consumer Insurance (Disclosure and Representations) Act 2012 ss.6, 10(1)–(2). This prohibition does not apply to contracts for the settlement of claims under a consumer insurance contract: s.10(3). See above, para.44-048.
- 586 2015 Act s.16(1).
- 587 2015 Act ss.16–17. See above, para.44-060.
- 588 2015 Act s.11(4). See Explanatory Notes, paras 95, 98.
- 589 2015 Act ss.11(1)–(3).
- 590 Explanatory Notes, para.96.
- 591 2015 Act s.16(1).
- 592 2015 Act s.17. See above, para.44-060.
- 593 For criticism of insurers’ avoidance of liability in reliance upon the assured’s breach of warranty, see *Hasson* (1971) 34 *M.L.R.* 29; Law Commission Report, Non-Disclosure and Breach of Warranty, Cmnd.8064 (1980); *Merkin* (1981) *L.M.C.L.Q.* 347; *Clarke* [2007] *L.M.C.L.Q.* 474.
- 594 See above, para.44-045.
- 595 ICOBS para.8.1.1. In *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] *EWHC* 2156 (Comm), [2013] *Lloyd's Rep. I.R.* 253 [196]–[197], it was held that the standards of conduct in ICOBS were not implied terms of the contract but that their breach

gave rise to a civil action for damages. See *Goodman v Central Capital Ltd* [2012] EWHC 8 (QB), [12]; *Bate v Aviva Insurance UK Ltd* [2013] EWHC 1687 (Comm), [2013] *Lloyd's Rep. I.R.* 492, affirmed [2014] EWCA Civ 334, [2014] *Lloyd's Rep. I.R.* 527; s.138D(2) of the Financial Services and Markets Act 2000. In *Komives v Hick Lane Bedding Ltd* [2021] EWHC 3139 (QB), [2022] *Lloyd's Rep. I.R.* 431, it was held that the duty under para.8.1.1(3)—the duty not to reject claims unreasonably—was limited to the relationship between the insurer and the insured and that it did not apply to any claims made by third parties under the *Third Parties (Rights against Insurers) Act 1930* (or, presumably the *2010 Act*). Further, it was held that this duty imposed only a process requirement in that it regulated how the insurer would handle a claim; it did not inform the insurer what decision on the claim should be made.

596 ICOBS para.8.1.2(3). ICOBS may be viewed at the FSA's website: <https://www.handbook.fca.org.uk/handbook/ICOBS>. As to the fraud exception, see *Bate v Aviva Insurance UK Ltd* [2013] EWHC 1687 (Comm), [2013] *Lloyd's Rep. I.R.* 492; affirmed [2014] EWCA Civ 334, [2014] *Lloyd's Rep. I.R.* 527. See also *Ashfaq v International Insurance Co of Hannover Plc* [2017] EWCA Civ 357, [2017] H.L.R. 29.

597 For waiver generally, and the different senses in which the word is used, see above, Vol.I, paras 27-060—27-063. See also the discussion in MacGillivray on Insurance Law, 15th edn (2022), paras 10-098—10-121.

598 *Seashell of Lissone Grove Ltd v Aviva Insurance Ltd* [2011] EWHC 1761 (Comm).

599 *Ayrey v British Legal* [1918] 1 K.B. 136; *Scottish Equitable v Buist* (1877) 4 R. 1076, Ct of Sess.; *Russell v Thornton* (1860) 6 Hurl. & N. 140; see also *Melik Co Ltd v Norwich Union* [1980] 1 *Lloyd's Rep.* 523.

600 *Compagnia Tirrena Di Assicurazione SpA v Grand Union Insurance Co Ltd* [1991] 2 *Lloyd's Rep.* 143; *Fortisbank SA v Trenwick International Ltd* [2005] EWHC 399 (Comm), [2005] *Lloyd's Rep. I.R.* 464.

601 *Wing v Harvey* (1854) 5 De G.M. & G. 265; *Ayrey v British Legal* [1918] 1 K.B. 136; *Compagnia Tirrena Di Assicurazione SpA v Grand Union Insurance Co Ltd* [1991] 2 *Lloyd's Rep.* 143.

602 *Sulphur Pulp v Faber* (1895) 1 Com. Cas. 146; *Handler v Mutual Reserve Fund* (1904) 90 L.T. 192; *Barrett Bros (Taxis) Ltd v Davies* [1966] 1 W.L.R. 1334.

603 *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* [2002] 2 *Lloyd's Rep.* 458, 467; *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions* [2002] *Lloyd's Rep. I.R.* 325; affirmed [2002] EWCA Civ 1253, [2003] *Lloyd's Rep. I.R.* 1; *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] *Lloyd's Rep. I.R.* 489; *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWCA Civ 1572, [2012] 1 *Lloyd's Rep.* 129; *UK Acorn Finance Ltd v Markel (UK) Ltd* [2020] EWHC 922 (Comm) at [50]; cf. *Bhopal v Sphere Drake Insurance Plc* [2002] *Lloyd's Rep. I.R.* 413. See also *Soyer* [2002] L.M.C.L.Q. 199, 208–209.

604 *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWCA 1572, [2012] 1 *Lloyd's Rep.* 129. See also above, Vol.I, paras 27-060 et seq. There remains one unexplained aspect of a waiver of a breach of warranty: s.34(3) of the Marine Insurance Act 1906 provides that the

insurer may waive a breach of warranty, but when the [1906 Act](#) was passed, there was no concept of a waiver by equitable estoppel. This suggests that the draftsman of the Act had some other species of waiver in mind.

605 [SI 1999/2083](#). For a comprehensive discussion, see above, Ch.[40](#).

606 [Unfair Contract Terms Act 1977 Sch.1 para.1](#).

607 See next paragraph.

608 [SI 1999/2083 reg.1](#).

609 [SI 1994/3159 reg.1](#).

610 A “consumer” is any natural person who, in contracts covered by the Regulations, is acting for purposes which are outside his trade, business or profession: [reg.3\(1\), 1999 Regulations](#); [reg.2\(1\), 1994 Regulations](#). See *Ashfaq v International Insurance Co of Hannover Plc [2017] EWCA Civ 357, [2017] H.L.R. 29* at [45]–[58].

611 A “seller or supplier” is any person (natural or legal) who, in making a contract to which the Regulations apply, is acting for purposes relating to his trade, business or profession, whether publicly or privately owned.

612 [1999 Regulations reg.8\(1\); 1994 Regulations reg.5\(1\)](#). If the term is capable of being both fair and unfair depending on the circumstances, it may be that the term will be binding only to the extent that the term is fair: *Bankers Insurance Co Ltd v South [2003] EWHC 380 (QB)*; cf. *The Hollandia [1983] 1 A.C. 565, 575* (concerning the interpretation of “clause, covenant or agreement” being void under art.III r.8 of the Hague Rules).

613 *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd [1997] 2 Lloyd's Rep. 369, 385*.

614 [1999 Regulations reg.5\(1\); 1994 Regulations reg.4\(1\)](#). In *Parker v National Farmers Union Mutual Insurance Society Ltd [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep. I.R. 278* at [189]–[190], it was held that a condition requiring the provision of information was not unfair.

615 [1999 Regulations reg.8\(2\); 1994 Regulations reg.5\(2\)](#).

616 [1999 Regulations reg.7; 1994 Regulations reg.6](#). See *Re Drake Insurance Plc [2001] Lloyd's Rep. I.R. 643, 649*. In *AJ Building and Plastering Ltd v Turner [2013] EWHC 484 (QB), [2013] Lloyd's Rep. I.R. 629* at [53], the Court said that there was no material difference between this principle of construction and the contra proferentem principle. See also art.31 and Annex II of the Third Life Assurance Directive (92/96) which specifies certain information, both about the insurer and about the life assurance policy, which must be communicated to the proposed policy-holder in a clear and accurate manner, and in writing, before the contract is concluded, and further information which must be provided during the term of the contract. This Directive was implemented by the [Insurance Companies \(Third Insurance Directives\) Regulations 1994 \(SI 1994/1696\)](#).

617 See above, para.44-034.

618 *Direct Line Insurance Plc v Khan [2001] EWCA Civ 1794, [2002] Lloyd's Rep. I.R. 364*.

619 [1999 Regulations reg.6\(2\); 1994 Regulations reg.3\(2\)](#). Terms delimiting the scope of cover, such as the description of the insured perils or exceptions to cover, should not (if expressed in plain intelligible language) fall for consideration as fair or unfair: cf. *Bankers Insurance Co Ltd v South [2003] EWHC 380 (QB)*.

- 620 para.19 of the Preamble, which has not been included in the Regulations, although reg.6(2) of the 1999 Regulations; reg.3(2) of the 1994 Regulations deals with such terms with respect to all contracts.
- 621 See *Consumer Rights Act 2015 (Commencement) (England) Order 2015* (SI 2015/965) and above, Ch.40. As to the meaning of “consumer”, cf. *Ashfaq v International Insurance Co of Hannover Plc [2017] EWCA Civ 357, [2017] H.L.R. 29* at [45]–[58].
- 622 2015 Act s.75, Sch.4 para.34.
- 623 2015 Act Sch.2 lists a number of terms which may be assessed as unfair: see s.63.
- 624 See *Van Hove v CNP Assurances SA (C-96/14) EU:C:2015:262, [2015] 3 C.M.L.R. 31* at [34]–[35].
- 625 2015 Act s.64.
- 626 2015 Act ss.65, 66(1)(a).

Section 8. - Assignment

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 8. - Assignment

Assignment of the policy

44-089

U In principle, contracts of insurance, whether or not contracts of indemnity, are choses in action⁶²⁷; and, as such, the assured has rights which (subject to what follows) may be assigned at law under the provisions of s.136 of the Law of Property Act 1925, or in equity in any of the ways in which contractual rights may be so assigned.

628

U Two sorts of restriction, however, upon the assignability of policies must be noted. First: subject to any contrary stipulation, a policy cannot normally be assigned without the consent of the insurer⁶²⁹; though, if it is assigned without any such consent, it seems that the policy is only voidable, and therefore remains in force until avoided by the insurer.⁶³⁰ In practice, most policies will contain express provisions dealing with assignment. Secondly: if the contract is one of indemnity, the assignment of the policy must accompany the transfer of an interest in the subject matter of the insurance,⁶³¹ since a policy which is assigned after a transfer of the subject matter will have ceased to be in force.⁶³² There is nothing objectionable in the assured assigning a policy to another person who has an insurable interest in the subject matter insured (such as a mortgagee), but a policy which is assigned prior to the assignment of the subject matter to a person with no insurable interest in the subject matter will thereby become void.⁶³³ A partial equitable assignment of an insurance policy occurs when it is taken out pursuant to a covenant to insure contained in a mortgage. If the policy is effected in the name of the mortgagor, the mortgagee has a charge to secure repayment of the mortgage debt, which takes effect by way of assignment; if it is effected in the name of the mortgagee, the mortgagees' interest remains by way of charge, and he is accountable to subsequent mortgagees or the mortgagor for any surplus.⁶³⁴

Position of assignees

- 44-090 When a policy is effectively transferred, the assignee takes the policy subject to equities, so that the insurer will still be able to rely on any misrepresentation or non-disclosure by the assignor which took place before assignment.⁶³⁵ Where, however, an assignee has taken an assignment of the policy by way of security, it is unclear whether the insurer can rely upon breaches of duty by the assignor after assignment. There are cases which suggest that the assignee is not affected by an assignor's post-assignment breaches,⁶³⁶ but recent authority suggests the contrary.⁶³⁷ If the assignment is absolute, the assignee will be bound by and entitled to observance of the policy conditions so that any conduct on the part of the assignor which otherwise would render the contract voidable, will not affect the contract to the prejudice of the assignee. Where only the benefit of the contract has been assigned, if the assignor acts in breach of the duty of utmost good faith or of a warranty or condition precedent after the assignment, the insurer still may hold the contract as avoided or discharged respectively.⁶³⁸

Assignment of a right under or the proceeds of the policy

- 44-091 Quite separately from assigning the policy itself, it is possible to assign the right to recover under the policy or the proceeds of the policy either before or after a loss has occurred.⁶³⁹ Where the loss has already occurred, the assignment can simply operate as an assignment of the existing right to an indemnity or the proceeds⁶⁴⁰; but in the case of an assignment of proceeds prior to any loss arising, it would seem that it operates in equity as an assignment of a future chose in action,⁶⁴¹ and therefore being an agreement to assign requires consideration to be enforceable by the assignee.⁶⁴² Since, in either case, the assignment is not of the policy itself, the consent of the insurer is not required,⁶⁴³ and it is irrelevant that the assignment is not accompanied by the transfer of an interest in the subject matter of the insurance⁶⁴⁴; but the corollary is that the insurer may rely upon breaches of condition or duty by the assignor after as well as before assignment, and even after the loss itself.⁶⁴⁵ Whether there has been an assignment of the policy or an assignment of the right to its proceeds may in some cases be a fine question of construction.

Footnotes

627 *Re Moore* (1878) 8 Ch. D. 519, 520; *Castellain v Preston* (1883) 11 Q.B.D. 380, 388.

⑥628

- Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC [2001] EWCA Civ 68, [2001] 2 W.L.R. 1344.* For general principles of assignment, see above, Vol.I, Ch.22. Marine policies are assignable at law merely by indorsement or in any other customary manner: see *Marine Insurance Act 1906 s.50*. For life insurance policies, see below, para.44-132; MacGillivray on Insurance Law, 15th edn (2022), paras 24-070—24-113.
- 629 Special rules govern life assurance policies (see *Policies of Assurance Act 1867*), and policies of marine insurance (see *Marine Insurance Act 1906 s.50(1)*).
- 630 *Doe d Pitt v Laming (1814) 4 Camp. 73, 75.*
- 631 *Lloyd v Fleming (1872) L.R. 7 Q.B. 299; North of England Oil and Cake Co v Archangel Marine (1875) 10 Q.B. 249;* though a contemporaneous *agreement* to transfer the subject matter may suffice (*North of England Oil and Cake Co v Archangel Marine (1875) 10 Q.B. 249* at 253). For a transfer of the subject matter accompanied by an agreement to assign, see *Powles v Innes (1843) 11 M. & W. 10.*
- 632 See *Marine Insurance Act 1906 s.51*. cf. *Dodson v Peter H Dodson Insurance Services [2001] 1 W.L.R. 1012*, where a motor insurance policy was held to continue to provide liability cover even though the car which the policy insured had been sold.
- 633 *Lynch v Dalzell (1729) 4 Bro. P.C. 431.*
- 634 *Colonial Mutual Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd [1995] 1 W.L.R. 1140, PC.*
- 635 *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd [1912] 3 K.B. 614, 617.* The position is otherwise if, as a matter of construction, the third party has an original interest in the subject matter of the policy which has not been derived by assignment: *Samuel & Co v Dumas [1924] A.C. 431*. See *Marine Insurance Act 1906 s.50(2)*.
- 636 *Burton v Gore District Mutual Fire Insurance (1865) 12 Gr. 156; Central Bank of India v Guardian Assurance Co (1936) 54 Ll. L. Rep. 247, 259–260.*
- 637 *Black King Shipping Corp v Massie (The Litsion Pride) [1985] 1 Lloyd's Rep. 437, 517–519*, where mortgagees were affected by the assignor's breach of good faith in making a fraudulent claim after the loss had occurred (although the judgment appears to treat the mortgagees as assignees of the *proceeds* of the policy). For the effect upon assignees of a deliberate act of the assured and of public policy, see above, paras 44-022—44-023.
- 638 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck) [1988] 1 Lloyd's Rep. 514, 546–547, [1989] 2 Lloyd's Rep. 238, 264.*
- 639 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC [2001] EWCA Civ 68, [2001] 2 W.L.R. 1344.*
- 640 *Lloyd v Fleming (1872) L.R. 7 Q.B. 299, 302–303.*
- 641 *Re Turcan (1889) 40 Ch. D. 5.*
- 642 *Tailby v Official Receiver (1888) 13 App. Cas. 523.*
- 643 *Re Turcan (1889) 40 Ch. D. 5; McPhillips v London Mutual Fire Insurance Co (1896) 23 A.R. 524.*
- 644 *Lloyd v Fleming (1872) L.R. 7 Q.B. 299; McPhillips v London Mutual Fire Insurance Co (1896) 23 A.R. 524.*

- 645 *Black King Shipping Corp v Massie (The Litsion Pride) [1985] 1 Lloyd's Rep. 437, 517–519.*
Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck) [1988] 1 Lloyd's Rep. 514, 546–547, [1989] 2 Lloyd's Rep. 238, 264.
-

End of Document

© 2022 SWEET & MAXWELL

Section 9. - Claims

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 9. - Claims

Contractual provision

- 44-092 In a simple contract of insurance the assured becomes entitled to payment upon the occurrence of the event insured against.⁶⁴⁶ The law does not imply any terms requiring the assured to give notice or to furnish details of the event or his loss,⁶⁴⁷ save in the case of a constructive total loss in marine insurance, when the assured must give notice of abandonment.⁶⁴⁸ It is, however, the general practice for insurance contracts to contain terms stipulating the steps which the assured must take after the occurrence of the event insured against,⁶⁴⁹ and it is a matter of construction in each case⁶⁵⁰ as to whether such terms are conditions precedent to the liability of the insurer,⁶⁵¹ innominate terms the breach of which (if sufficiently serious) will entitle the insurer to terminate the contract or decline the claim,⁶⁵² or only collateral terms not enabling the insurer to escape liability but merely entitling him to recover or set off any damages suffered by the breach.⁶⁵³ In the absence of clear words, the courts are reluctant to construe provisions as conditions precedent.⁶⁵⁴ Where such provisions are included in consumer insurance contracts, assuming they have not been separately negotiated, they may fall foul of the [Unfair Terms in Consumer Contracts Regulations 1999](#) or, for contracts made on or after 1 October 2015, the [Consumer Rights Act 2015](#),⁶⁵⁵ if they, contrary to the requirement of good faith, cause an imbalance in the parties' position to the detriment of the consumer.⁶⁵⁶

Notice of loss

44-093



Often the contract stipulates the time and manner in which, and the persons to whom, the assured must notify the event or loss.⁶⁵⁷ If drafted precisely the provision will enable the insurer to escape liability even if the breach occurred through no fault of the assured,⁶⁵⁸ or has not even prejudiced the insurer.⁶⁵⁹ This is regularly achieved by the agreement of a notice provision as a condition precedent to the insurer's liability to pay a claim.

⁶⁶⁰

U Alternatively, the courts may construe the provision as an innominate term, the consequences of the breach of which will depend on the seriousness of that breach.⁶⁶¹ However, it seems that even a provision requiring notice to be given "immediately" will only be construed as meaning within a reasonable time and without unjustifiable delay,⁶⁶² and it seems that if the insurer has received the required information from another source, at least an authoritative source, he cannot rely upon the failure of the assured to furnish it.⁶⁶³ Where notification is required of the possibility or likelihood of a loss, and where the circumstances giving rise to the potential loss are fluid, the assessment of that possibility or likelihood should not be coloured by hindsight.⁶⁶⁴ There is no rule of law which relieved an assured of the obligation to comply with policy provisions concerning the notification of a claim or loss where the insurer had earlier repudiated liability under the policy on other grounds.⁶⁶⁵

Details of loss

- 44-094 In the absence of fraud, minor inaccuracies in detailing the nature and extent of the loss will not usually prevent the assured from altering the sum claimed or from recovering under the contract,⁶⁶⁶ but again, if drafted precisely, a provision requiring these particulars can have this effect (especially by way of a condition precedent).⁶⁶⁷ The assured may be required by the contract to give assistance to the insurer in substantiating the loss or dealing with claims made by third parties against the assured.⁶⁶⁸

Arbitration

- 44-095 Insurance contracts often provide for arbitration in the case of disputes and such provisions may validly make arbitration a condition precedent to the insurer's liability.⁶⁶⁹ The arbitration clause in the policy is treated as separable from the insurance contract⁶⁷⁰ so that if the contract is void or avoided ab initio, the arbitration clause will generally survive and bind the parties to resolve their dispute by arbitration, unless the arbitration agreement may be avoided.⁶⁷¹ There is implied into an arbitration agreement a term that the parties will keep confidential the resulting arbitration

award, unless it is necessary to disclose the award to a third party in order to enforce or protect the legal rights of one of the parties.⁶⁷² Arbitration, if commenced after 30 January 1997, is governed by the **Arbitration Act 1996**.⁶⁷³ The **1996 Act**⁶⁷⁴ extends the **Unfair Terms in Consumer Contracts Regulations 1999** to arbitration agreements and provides that a term of the contract which amounts to an arbitration agreement is unfair for the purposes of the **1999 Regulations** to the extent that it relates to a claim for a pecuniary remedy not exceeding £5,000.⁶⁷⁵

Jurisdiction

- 44-096 Where a dispute arises between the insurer and the assured, the country in which suit may or must be brought will be determined in accordance with: (i) Regulation (EU) 1215/2012 of the European Parliament and Council which applies in respect of EU Member States and proceedings instituted on or after 15 January 2015⁶⁷⁶; (ii) EC Council Regulation 44/2001 (Brussels I Regulation) which applies in respect of the EU Member States and proceedings instituted before 15 January 2015⁶⁷⁷; (iii) the **Civil Jurisdiction and Judgments Act 1991**, which applies to the Contracting States to the Lugano Convention⁶⁷⁸; or (iv) in all other cases, in accordance with the non-Regulation and non-Convention rules in each Member or Contracting State.⁶⁷⁹ This regime continues to apply until 11.00 pm on 31 December 2020 (IP Completion Day).⁶⁸⁰ Articles 10 to 16 of Regulation 1215/2012 determine where suit may be brought where the defendant insurer or assured is domiciled in a Member State.⁶⁸¹ These provisions generally allow the assured to sue the insurer in a Member State where the insurer or the assured is domiciled, or where the insurer is a co-insurer in a Member State where the leading insurer is sued.⁶⁸² Where the insurance contract insures immovable property or liability, the insurer may additionally be sued in the Member State where the harmful event occurred⁶⁸³; in the case of liability insurance, the insurer may also be sued in the Member State by being joined in the proceedings by which the assured is sued by a third party.⁶⁸⁴ By contrast, Regulation 1215/2012 requires the insurer to sue the assured only in the Member State where the assured is domiciled.⁶⁸⁵ A third party, such as a person to whom the assured is liable, may sue the insurer in the Member States where the insurer or the assured is domiciled in the Member State where the harmful event occurred or as a co-defendant in proceedings instituted by the third party against the assured.⁶⁸⁶ The insurance contract may provide that any dispute under the contract be submitted to the courts of a particular country. By arts 15(5) and 16,⁶⁸⁷ such agreements will be enforced in respect of marine and aviation policies and insurance contracts in respect of “large risks”,⁶⁸⁸ provided that there has been a consensual agreement to the jurisdiction and that the formal requirements are satisfied.⁶⁸⁹ Jurisdiction agreements in other types of policy will be enforced in the more limited circumstances set out in art.13.⁶⁹⁰ Reinsurance contracts are not governed by arts 8 to 14, but are treated as normal commercial contracts and are dealt with

under the general provisions of the Regulation.⁶⁹¹ From IP completion day, the Hague Convention on Choice of Court Agreements 2005 has the force of law.⁶⁹²

Applicable law

- 44-097 Where an English arbitration tribunal or court is properly seised of a dispute, the choice of law is determined by the application of the Contracts (Applicable Law) Act 1990 which incorporates the Rome Convention 1980.⁶⁹³ Where contracts insure risks in the territories of EEA States and the contracts were concluded before 17 December 2009, the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001 apply to determine the applicable law.⁶⁹⁴ The law applicable to contracts of insurance concluded on or after 17 December 2009 is determined in accordance with Regulation (EC) 593/2008 on the law applicable to contractual obligations (the Rome I Regulation).⁶⁹⁵ Article 7 of the Rome I Regulation makes provision for insurance contracts covering a “large risk” wherever the risk is located and all other insurance contracts covering risks situated within the territory of a Member State.⁶⁹⁶ These provisions continue as retained EU law as from 31 January 2020 (the date of the UK’s exit from the European Union).⁶⁹⁷

Fraudulent claims

- 44-098 There appear to be three species of “fraudulent claim”,⁶⁹⁸ namely: (a) a fraudulent claim for a loss which is non-existent; (b) a fraudulent claim for a loss which is itself genuine, but which is excluded or not covered by the insurance policy; (c) a fraudulent claim for a loss which is otherwise genuine and covered by the policy but which is exaggerated.⁶⁹⁹ Each of these will attract the same remedy. The precise definition of a fraudulent claim has not been authoritatively stated, although it is likely to require proof of the elements of deceit (other than inducement).⁷⁰⁰ In order to be fraudulent, the claim must be substantially fraudulent, that is if the fraudulent element of the claim was de minimis, the assured would not bear the legal consequences of a fraudulent claim.⁷⁰¹ Mere exaggeration is not conclusive evidence of fraud,⁷⁰² though it affords strong evidence of fraud if the claim is out of all proportion to the true loss,⁷⁰³ as does gross negligence.⁷⁰⁴ The availability of the remedy for a fraudulent claim does not depend on actual inducement of the insurer, so that the fraud does not have to be successful; the mere making of the fraudulent claim is sufficient to engage the appropriate remedy.⁷⁰⁵ In order for the fraudulent claim rule to apply, the fraud must be material to the recoverability of the claim under the insurance policy or, in other words, to the insurer’s liability under the policy. That is, if the insurer would be liable to indemnify the assured in respect of the claim, absent any lie, the making of such a lie is necessarily collateral and will not constitute

a fraudulent claim in itself. This was the finding of the Supreme Court in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*,⁷⁰⁶ overriding earlier authorities.⁷⁰⁷ The fraud of the assured will preclude his trustee in bankruptcy,⁷⁰⁸ and any joint assured, from recovering, and the same appears to be true for an assignee of the policy.⁷⁰⁹ Where, however, the policy is a composite one (embodying a separate insurance contract for each assured) insuring several parties for their different interests, an innocent assured is not prejudiced by another's fraud.⁷¹⁰ The assured, although himself innocent, may be affected by a claim presented fraudulently by his agent insofar as the latter was acting within the scope of his authority.⁷¹¹ The duty of utmost good faith does not impose any duty to disclose or not to misrepresent material facts in connection with a claim wider than the duty not to present a fraudulent claim.⁷¹²

Remedy for fraudulent claims: the common law

- 44-099 It is axiomatic that if the assured presents a fraudulent claim, the claim will fail.⁷¹³ If, it is the case, albeit it is not entirely clear, that, the duty not to present fraudulent claims is a breach of the duty of utmost good faith, the insurer would be entitled to avoid the insurance contract *ab initio*.⁷¹⁴ However, the harshness of the remedy of avoidance has led recently to a fundamental reappraisal of the circumstances in which the contract of insurance might be avoided. Lord Hobhouse in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)*⁷¹⁵ was sceptical as to whether the remedy of avoidance was applicable to a fraudulent claim. In *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*,⁷¹⁶ Lords Sumption and Hughes were similarly sceptical. Mance LJ in *Agapitos v Agnew (The Aegeon)*⁷¹⁷ considered that the common law had its own rule for the presentation of fraudulent claims, quite apart from the duty of utmost good faith and held that the remedy appropriate in the event of a fraudulent claim is the forfeiture of benefit under the policy (although the scope of that remedy remains undecided).⁷¹⁸ It has been held by the Court of Appeal that it is an implied term of the contract of insurance that the making of a fraudulent claim will result in the assured forfeiting all benefit under the policy,⁷¹⁹ and not just the benefit which attaches to the fraudulent claim or fraudulent part of the claim.⁷²⁰ Nevertheless, it has been subsequently suggested by the Court of Appeal that forfeiture is limited to the fraudulent claim itself (including the non-fraudulent parts of the claim) or, less likely, only prospective benefit under the policy.⁷²¹ In *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*,⁷²² the Supreme Court appeared to assume that forfeiture of the insurance claim (including the genuine parts of the claim)—as opposed to the forfeiture of any other benefit under the policy—was the consequence of a fraudulent claim. As is evident from this discussion, the common law was in an uncertain state.⁷²³ If, however, the insurance contract contains a clause permitting the insurer to avoid the contract in the event of a fraudulent claim, avoidance pursuant to the clause is likely to be effective.⁷²⁴

Remedy for fraudulent claims under the Insurance Act 2015

- 44-100 The [Insurance Act 2015](#) applies to insurance contracts agreed on or after 12 August 2016.⁷²⁵ The [2015 Act](#), by [s.12](#), clarifies the uncertain state of the law as explained in the previous paragraph. The [2015 Act](#) does not identify what constitutes a fraudulent claim, leaving such matters to the common law.⁷²⁶ Under [s.12](#), where there has been a fraudulent claim, the insurer has two distinct remedies, both of which he may exercise. First, the insurer is not liable to pay the claim and the insurer may recover from the assured any sums paid by the insurer to the assured in respect of the claim.⁷²⁷ Where the insurance claim comprises both fraudulent and honest parts, it is not clear whether this means that the insurer is absolved from paying the entire claim tainted by fraud, even the genuine parts of the claim, or whether the insurer is absolved from paying only the fraudulent part of the claim. It seems likely that the insurer will not be liable to pay any part of the claim tainted by fraud, including those parts which are genuine.⁷²⁸ Second, the insurer may by notice to the assured treat the insurance contract as having been terminated with effect from the time of the fraudulent act. If the insurer does terminate the insurance contract in this way, he may refuse all liability to the assured under the insurance contract in respect of a “relevant event” (namely, the event which gives rise to the insurer’s liability under the insurance contract such as the occurrence of a loss, the making of a claim or the notification of a potential claim, depending on the terms of the contract) occurring after the time of the fraudulent act and he may retain all premiums paid under the contract. Nevertheless, in the case of such termination, the insurer’s obligations with respect to a “relevant event” before the time of the fraudulent act will remain unaffected.⁷²⁹ The parties may contract out of the effect of [s. 12](#), but in the case of a consumer insurance contract, any such contracting out is not permitted if it would put the assured in a worse position; in the case of a non-consumer insurance contract, any such contracting out which puts the assured in a worse position would be effective provided that the transparency requirements of the [2015 Act](#) are complied with.⁷³⁰

The burden of proof

- 44-101 The burden is upon the assured to prove on the balance of probabilities that his loss or the event was proximately caused by perils insured against.⁷³¹ Thus under an “all risks” insurance the assured must establish that the loss was due to a fortuitous event,⁷³² and similarly where there is a claim for loss by perils of the sea,⁷³³ and though theoretically there is no need to go further and prove the exact nature of the casualty,⁷³⁴ in practice this generally has to be done.⁷³⁵ The burden of proving that the assured caused the loss deliberately lies on the insurer,⁷³⁶ but where the assured

has to establish an accident, he will, of course, fail if the evidence is equally consistent with his wilful misconduct.⁷³⁷

Proof of insured and excepted perils

- 44-102 The assured must bring himself within the scope of the perils insured against but when, as is usual, these are expressed in general terms and then made subject to specific exceptions which do not qualify the whole of the general undertaking but merely exclude certain forms of the perils, leaving part of the general undertaking unqualified, it seems that it is sufficient for the assured to adduce evidence to bring the loss or the event within the scope of the general undertaking, and it is then for the insurer to prove on a balance of probabilities that the loss or the event resulted from one of the specific excepted causes.⁷³⁸ When, however, the whole of the general undertaking is qualified, the assured cannot bring himself within the cover, unless he shows that the loss or the event resulted from the perils so limited.⁷³⁹ In each case it is a question of construction⁷⁴⁰ whether there is a general promise subject, to a degree, to exceptions, or only a limited and qualified promise; and though perhaps illogical, the courts are inclined to treat as cases falling into the former category contracts where the excepted perils are described as such⁷⁴¹ or as conditions precedent⁷⁴² or warranties.⁷⁴³ It is, of course, open to the parties to make provision in the contract as to the incidence of the burden of proof on any issue that may arise between them.⁷⁴⁴

Causation

- 44-103 The courts seek the “proximate”, “direct”,⁷⁴⁵ “dominant”,⁷⁴⁶ “operative and efficient”⁷⁴⁷ cause of the loss or an event in order to determine whether it was caused by an insured or an excepted peril, though by the use of apt words in the contract, such as “directly or indirectly”,⁷⁴⁸ it is, of course, possible to include or exclude losses or events not caused proximately by the perils insured or excepted. The application of this doctrine of proximate cause cannot be reduced to rigid rules and its application is really a matter of common sense rather than logic.⁷⁴⁹ The doctrine of causation applied to insurance contracts is the same as that applied in the realm of tort or other breach of duty.⁷⁵⁰ The peril insured against or excepted must operate,⁷⁵¹ and the loss or the event must be such as can fairly be attributed to that operation.⁷⁵² Thus loss caused by trying to avert a peril which has not yet begun to operate is not a loss caused by that peril,⁷⁵³ whereas loss caused by trying to minimise the effects of an operating peril is regarded as being proximately caused by that peril.⁷⁵⁴ Similarly, death through disease attributable to an accident⁷⁵⁵ or through an operation necessitated by an accident⁷⁵⁶ is generally regarded as caused by the accident, whereas losses

merely facilitated by an insured peril, as where an air raid facilitates theft,⁷⁵⁷ are not caused by that peril.

Multiple causes

- 44-104 There may be more than one cause which contributes to a loss. Where the causes are concurrent and it is their combination which procures the loss,⁷⁵⁸ then the loss will be covered by the insurance, if at least one of the causes is a peril insured against,⁷⁵⁹ unless one of the causes is an excepted peril, in which case there is no cover.⁷⁶⁰ Where the loss is caused by a peril which itself inevitably is attributable to another peril, the loss will generally be covered if the peril first in time is insured against, and excluded if the first peril is excepted.⁷⁶¹ This analysis applies whether the causes acting in combination are each capable of procuring the loss on their own (independent causes) or whether they must act together to produce the loss (interdependent causes).⁷⁶² In cases where there are two or more contributing causes and each of them independently would have resulted in the loss had each cause been the sole cause, there is no requirement that the cause or causes satisfy any “but for” causation.⁷⁶³

The amount recoverable

- 44-105 A claim under a contract of insurance which is a contract of indemnity is a claim for unliquidated damages even, it seems, when the contract is a valued one.⁷⁶⁴ The amount recoverable, or the “measure of indemnity”, will depend on the nature (and terms) of the insurance contract. Losses under contingency policies and insurances against financial loss or liability will be readily calculated. As regards property policies, for the purposes of measuring the indemnity under the policy, there are two types of losses, namely a total loss and a partial loss. A total loss generally refers to the irretrievable deprivation of possession of the property (e.g. theft or confiscation) or to the physical destruction of the property.⁷⁶⁵ In the realm of marine insurance, there is an additional category of total loss, namely a “constructive total loss”, which applies commercial considerations to establishing the existence of a total loss.⁷⁶⁶ A partial loss is any loss other than a total loss. A partial loss is often measured by reference to a depreciation in value or the cost of reinstatement or repair.⁷⁶⁷ The measure of damages in the case of valued contracts⁷⁶⁸ raises few difficulties. If there is a total loss the assured recovers the agreed value, and if there is a partial loss the assured recovers a proportion (which reflects the depreciation in the actual value) of the agreed value or, where appropriate, the cost of repair or reinstatement.⁷⁶⁹ The measure of indemnity under the unvalued contracts is the value⁷⁷⁰ at the date⁷⁷¹ and place⁷⁷² of the loss, and, if available, the

market value will *prima facie* be the amount recoverable, but otherwise the cost of restoration may provide the basis for the indemnity,⁷⁷³ and this latter basis is usually used for cases of partial loss.⁷⁷⁴ In marine insurance rules have been worked out to make an adjustment for “new for old”⁷⁷⁵ but there are no settled rules for this in non-marine insurance.⁷⁷⁶ The policy may contain a policy limit, often referred to as the “the sum insured”. This does not represent the sum which the assured will receive in the event of a loss. The assured will recover the amount of his loss, subject to the ceiling imposed by the limit.⁷⁷⁷ However, subject to the terms of the policy, it will be presumed that the policy limit will apply to each of successive losses under the policy and not to the aggregate of those losses, even if the aggregate exceeds the policy limit.⁷⁷⁸ It may be that the policy will provide that the limit will apply to aggregated losses.⁷⁷⁹

U In such cases, where the assured has a number of claims to be presented under the policy, the assured, not the insurer, has the right to determine the sequence in which the claims are presented against the insurer.⁷⁸⁰ Where two or more assureds, or third parties deriving title to sue, present claims under the one policy and there is insufficient cover to indemnify all the claimants, the available cover shall respond to each claim in the order it is established under the policy⁷⁸¹ and if each of the claims are established at the same time, the claims must be satisfied on a pro rata basis.⁷⁸²

Indemnification aliunde

- 44-106 The insurer is liable to pay a claim against him irrespective of any rights which the assured may have against others in respect of the loss⁷⁸³ and in the absence of stipulation to the contrary, before payment⁷⁸⁴ he has no right⁷⁸⁵ nor is obliged⁷⁸⁶ to call upon the assured to reduce the loss by enforcing such rights. If, however, before payment by the insurer under a contract of indemnity, the loss (which in a valued policy is taken to be the amount of the valuation)⁷⁸⁷ is extinguished by the assured enforcing such rights⁷⁸⁸ or by a voluntary payment by a third party intended to have this effect,⁷⁸⁹ the insurer’s liability is extinguished, since there is nothing left to indemnify.⁷⁹⁰ Similarly, if the loss is reduced the insurer’s liability is limited to the balance of the loss remaining.⁷⁹¹

Express provisions permitting less than a full indemnity

- 44-107

Contracts of insurance which are contracts of indemnity often contain three kinds of provisions which may prevent the assured from recovering more than a certain proportion of the amount insured, viz rateable proportion provisions, those dealing with underinsurance, and excess clauses.

Rateable proportion clauses

- 44-108 These clauses are designed to prevent the assured who has insured with other insurers from recovering his loss in full from one of them, leaving that one to obtain contribution from the others.⁷⁹² Such clauses apply only if the same loss is insured by each insurer.⁷⁹³ They usually provide that where there are other insurances, the assured can only recover a rateable proportion under the insurance in question⁷⁹⁴; but they can go so far as to relieve the insurers from all liability when the assured is entitled to recover under another policy,⁷⁹⁵ though this latter category is construed strictly against the insurers by the courts,⁷⁹⁶ and the burden in either case is upon the insurers to show that the assured is in fact so entitled.⁷⁹⁷ There has been no authoritative statement as to how a rateable proportion should be calculated.⁷⁹⁸

Underinsurance

- 44-109 The assured may not insure the subject matter fully, and by so doing may pay less by way of premium than he would otherwise. In marine insurance the assured is deemed to be his own insurer for the balance uninsured,⁷⁹⁹ so that on a partial loss he has to bear his proportion of the loss even if it is less than the amount for which he has insured. This rule does not apply in non-marine insurance,⁸⁰⁰ and in order to prevent the assured from receiving a full indemnity on the occurrence of a partial loss, despite not having paid the premium for complete cover, the insurers often insert a provision making this rule applicable.⁸⁰¹ The provision is often known as the “subject to average” or “average” clause.⁸⁰²

Excess clauses

- 44-110 Often (and notoriously in motor insurance)⁸⁰³ the insurer stipulates that the assured must bear the amount of any loss up to a specified figure, the insurer only being liable for the excess (if any) over that figure.⁸⁰⁴

Reinstatement

- 44-111 The insurer's normal liability is to pay money; but the contract may give him an option either to pay or to reinstate the loss or damaged property.⁸⁰⁵ Once the insurer has made his election he is bound by it.⁸⁰⁶ If he has elected to reinstate, the contract is treated as if it had always been a contract to reinstate without the option of payment.⁸⁰⁷ It follows that the insurer is not bound to expend the sum insured and equally cannot limit his expenditure to that sum, and he will be liable in damages if he fails to restore the damaged property, even though restoration proves more expensive than he expected.⁸⁰⁸ The assured must allow the insurer to take possession of the property to reinstate it,⁸⁰⁹ and the insurer must bear any loss or damage to the property while he is in possession.⁸¹⁰ By the **Fires Prevention (Metropolis) Act 1774**,⁸¹¹ the insurer under a fire policy may in certain circumstances be obliged to apply the insurance moneys to the reinstatement of the damaged premises.⁸¹² Where the policy provides for reinstatement and if the insurer initially declines the claim, any policy requirement that the reinstatement should be undertaken by the assured with reasonable despatch will be enforced only once the insurer has confirmed that he will provide an indemnity.⁸¹³ If the policy allows for reinstatement as the basis of indemnity, it does not necessarily follow (depending on the policy wording) that the assured must undertake the reinstatement (or any remedial work) before becoming entitled to an indemnity measured by reference to the cost of such reinstatement (or remedial work).⁸¹⁴

Late payment of insurance claims

- U** 44-112 At common law, if the insurer unreasonably failed to pay an insurance claim within a reasonable time, the assured had no remedy over and above the entitlement to an insurance indemnity and statutory interest.⁸¹⁵ This was the result of a peculiarity of insurance law in that the claim for an indemnity is, as a legal fiction, a claim for unliquidated damages for breach of contract by the insurer (the breach being constituted by the assured's suffering an insured loss),⁸¹⁶ and in that a contracting party is not entitled to recover damages for the late payment of damages.⁸¹⁷ In addition, the Court held that there was no implied term in the insurance contract obliging the insurer to assess and pay an insurance claim with reasonable diligence and due expedition.⁸¹⁸ In order to address the perceived unfairness with this state of the law, the **Enterprise Act 2016 ss.28–30** were passed so as to amend the **Insurance Act 2015** (by the addition of ss.13A and 16A). This legislation entered into force on 4 May 2017 and introduces into every insurance contract an implied term that the insurer must pay insurance claims within a reasonable time (allowing for

investigation and assessment of the claim).⁸¹⁹ If there is a breach of this implied term, the assured will have remedies (e.g. damages) available at common law (and otherwise) in addition to the payment of the claim under the policy and statutory interest.⁸²⁰ By s.13A(4), if the insurer shows there are reasonable grounds for disputing the claim,

⁸²¹

U there is no breach of the implied term while the dispute is continuing. Insofar as any term of the insurance contract puts the assured in a worse position as regards the implied term provided for in s.13A, such term is invalid insofar as consumer insurances are concerned and, as far as non-consumer insurance contracts are concerned, insofar as any breach of the implied term by the insurer is deliberate or reckless. Otherwise, such a term is valid if it satisfies the transparency requirements of the *Insurance Act 2015*.⁸²²

Footnotes

646 Ordinarily, the sum payable under an insurance contract is payable to the assured himself. However, the contract may provide that the “loss payee”, that is the person who is to receive the insurance proceeds, is a person other than the assured (e.g. a bank). At common law, the loss payee, not being privy to the contract, had no right to enforce this contractual provision, relying on the assured to enforce the insurer’s contractual undertaking. However, with the passage of the *Contracts (Rights of Third Parties) Act 1999*, the loss payee is likely to be able to enforce this contractual right directly against the insurer, subject of course to the terms of the policy.

647 *Rankin v Potter* (1873) L.R. 6 H.L. 83.

648 *Marine Insurance Act 1906 ss.61–62*.

649 *Wilkinson v Car and General* (1913) 110 L.T. 468; *Terry v Trafalgar Insurance Co Ltd [1970] 1 Lloyd's Rep. 524*, where it was unsuccessfully argued that a condition prohibiting admissions of liability without the consent of the insurers was contrary to public policy.

650 *Stoneham v Ocean Accident* (1887) 19 Q.B.D. 237; *Re Coleman's Depositories* [1907] 2 K.B. 798; see above, paras 44-077—44-078.

651 e.g. *Elliott v Royal Exchange* (1867) L.R. 2 Ex. 237; *Cassel v Lancashire and Yorkshire Accident* (1885) 1 T.L.R. 495; *Cox v Orion Insurance Co Ltd* [1982] R.T.R. 1; *Hamptons Residential Ltd v Field* [1998] 2 Lloyd's Rep. 248.

652 *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] 1 Lloyd's Rep. 437. The possibility of declining a claim for a breach of an innominate term is unlikely since the Court of Appeal’s decision in *Sirius International Insurance Corp v Friends Provident Life & Pensions Ltd [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep. 517*.

653 e.g. *Stoneham v Ocean Accident* (1887) 19 Q.B.D. 237; *Re Bradley and Essex Accident [1912] 1 K.B. 415*.

654 *Jones and James v Provincial* (1929) 46 T.L.R. 71, 73; *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] 1 Lloyd's Rep. 437. However, if the condition precedent is express and

unequivocal, then the Court will construe it accordingly: *Bass Brewers Ltd v Independent Insurance Co Ltd*, 2002 S.L.T. 512; *AXA Insurance UK Plc v Thermonex* [2012] EWHC B10 (Merc), [2013] *Lloyd's Rep. I.R.* 323. See above, para.44-078.

655 See above, paras 40-273 et seq.

656 See above, paras 44-087—44-088.

657 *Hamptons Residential Ltd v Field* [1998] 2 *Lloyd's Rep.* 248; *Layher Ltd v Lowe* [1997] 58 Con. L.R. 42, where it was held that an assured was not obliged, under a clause requiring the assured to notify the insurer of an occurrence “likely” to give rise to a claim, to notify the insurer of the mere possibility of a claim; *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] 1 *Lloyd's Rep.* 437; *J Rothschild Assurance Plc v Collyear* [1999] 1 *Lloyd's Rep. I.R.* 6; *Zurich Insurance Plc v Maccaferri Ltd* [2016] EWCA Civ 1302, [2017] *Lloyd's Rep. I.R.* 200. In *Tioxide Europe Ltd v Commercial Union Assurance Co Plc* [2005] EWCA Civ 928, [2006] *Lloyd's Rep. I.R.* 31, the relevant notice was given to the wrong addressee. For an example of a clause which exercised the court’s powers of interpretation, see *Royal & Sun Alliance Insurance Plc v Dornoch Ltd* [2005] EWCA Civ 238, [2005] *Lloyd's Rep. I.R.* 544; cf. *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* [2007] EWCA Civ 1208, [2008] *Lloyd's Rep. I.R.* 454. See also *William McIlroy (Swindon) Ltd v Quinn Insurance Ltd* [2011] EWCA Civ 825, [2012] 1 All E.R. (Comm) 241.

658 *Cassel v Lancashire and Yorkshire Accident* (1885) 1 T.L.R. 495; *Adamson v Liverpool and London* [1953] 2 *Lloyd's Rep.* 355; *CVG Siderurgicia Orinoco SA v London Steamship Owners Mutual Insurance Assn Ltd (The Vainqueur Jose)* [1979] 1 *Lloyd's Rep.* 557; *Walker v Pennine Insurance Co Ltd* [1979] 2 *Lloyd's Rep.* 139; affirmed [1980] 2 *Lloyd's Rep.* 156.

659 *Pioneer Concrete (UK) Ltd v National Employers' Mutual General Insurance* [1985] 2 All E.R. 395. The reasoning in the *Pioneer Concrete* case was expressly approved by the Privy Council in *Motor and General Insurance Co Ltd v Pavys* [1994] 1 W.L.R. 462, 469 as fully and correctly stating the law. See also *Total Graphics Ltd v AGF Insurance Ltd* [1997] 1 *Lloyd's Rep.* 599, 608.

660 *HLB Kidsons v Lloyd's Underwriters* [2007] EWHC 1951 (Comm), [2008] *Lloyd's Rep. I.R.* 237 at [51]–[54], [2008] EWCA Civ 1206, [2009] 1 *Lloyd's Rep.* 8; *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm), [2009] *Lloyd's Rep. I.R.* 440; *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm), [2015] 2 *Lloyd's Rep.* 289 at [225]–[243]; *Arch Insurance (UK) Ltd v McCullough* [2021] EWHC 2798 (Comm), [2022] *Lloyd's Rep. I.R.* 137. As to the construction of a provision requiring notification of a circumstance “which may give rise to a claim”, see also *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [2009] EWCA Civ 62, [2009] *Lloyd's Rep. I.R.* 704 at [78]–[81]; *AXA Insurance UK Plc v Thermonex* [2012] EWHC B10 (Merc), [2013] *Lloyd's Rep. I.R.* 323; *Arch Insurance (UK) Ltd v McCullough* [2021] EWHC 2798 (Comm), [2022] *Lloyd's Rep. I.R.* 137.

661 *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] 1 *Lloyd's Rep.* 437.

662 *Williams v Lancashire and Yorkshire Accident* (1902) 51 W.R. 222. In *Zurich Insurance Plc v Maccaferri Ltd* [2016] EWCA Civ 1302, [2017] *Lloyd's Rep. I.R.* 200 at [31]–[32], the Court of Appeal held that “‘Immediately’ itself does not mean instantaneously but ‘with all

reasonable speed considering the circumstances of the case””. As to the impact of prejudice in determining what is a reasonable time, see *Shinedean Ltd v Alldown Demolition (London) Ltd [2006] EWCA Civ 939*, [2006] *Lloyd's Rep. I.R.* 846. For a recent decision on the meaning of “as soon as practicable”, see *HLB Kidsons v Lloyd's Underwriters [2007] EWHC 1951 (Comm)*, [2008] *Lloyd's Rep. I.R.* 237 at [60], [2008] *EWCA Civ 1206*, [2009] *1 Lloyd's Rep. 8*. In *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) Plc [2017] EWHC 391 (Comm)*, [2017] *Lloyd's Rep. I.R.* 240 at [55]–[56], the Court considered the meaning of “as soon as” and “without delay” in a different context. See also *Towergate Financial (Group) Ltd v Hopkinson [2020] EWHC 984 (Comm)* (“as soon as possible”).

- 663 *Barrett Bros (Taxis) Ltd v Davies [1966] 1 W.L.R. 1334*. cf. *The Vainqueur José [1979] 1 Lloyd's Rep. 557*; *The Mozart [1985] 1 Lloyd's Rep. 239*. This decision has been confined and questioned in reinsurance disputes (*CNA International Reinsurance Co Ltd v Companhia de Seguros Tranquilidade SA [1999] Lloyd's Rep. I.R. 289, 302–303*). Under the **Third Parties (Rights against Insurers) Act 2010 s.9(2)**, it is provided that anything done by the third party which, if done by the insured, would have amounted to or contributed to fulfilment of the condition is to be treated as if done by the insured. This would include notification obligations. However, under ss.9(3) and (4), any condition requiring the insured to provide information or assistance to the insurer—other than notification of the existence of a claim—need not be fulfilled if the insured no longer exists.
- 664 *Clothing Management Technology Ltd v Beazley Solutions Ltd [2012] EWHC 727 (QB)*, [2012] *1 Lloyd's Rep. 571, [44]*.
- 665 *Nasser Diab v Regent Insurance Co Ltd [2006] UKPC 29*, [2007] *1 W.L.R. 797*.
- 666 *Mason v Harvey (1853) 8 Exch. 819*. As to the adequacy of particulars provided by the assured, see *Super Chem Products Ltd v American Life and General Insurance Co Ltd [2004] UKPC 2*, [2004] *Lloyd's Rep. I.R. 446* at [28]–[30].
- 667 *Hiddle v National Fire of New Zealand [1896] A.C. 372*; *Welch v Royal Exchange [1939] 1 K.B. 294*. The effect of such provisions may be mollified for consumers by the **Unfair Terms in Consumer Contracts Regulations 1999** or, for contracts made on or after 1 October 2015, the **Consumer Rights Act 2015**: see above, paras 44-087—44-088.
- 668 *Braunstein v Accidental Death (1861) 1 B. & S. 782*; *Manby v Gresham Life (1861) 4 L.T. 347*; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (Nos 2 and 3) [2001] 1 Lloyd's Rep. I.R. 667*. cf. *All Leisure Holidays Ltd v Europaische Reiseversicherung AG [2011] EWHC 2629 (Comm)*, [2012] *Lloyd's Rep. I.R. 193, [27]–[29]*. See also *Porter v Zurich Insurance Co [2009] EWHC 376 (QB)*, [2010] *Lloyd's Rep. I.R. 373* at [124]–[130]. See also *Ted Baker Plc v AXA Insurance UK Plc [2017] EWCA Civ 4097*, [2017] *Lloyd's Rep. I.R. 682*. In *Widefree Ltd v Brit Insurance Ltd [2009] EWHC 3671 (QB)*, [2010] *2 All E.R. (Comm) 477*, the Court held that a condition precedent requiring the assured to provide such information as the insurers may reasonably require, should be construed to extend only to information which was in the insured's power to provide when the insurer requested the information.
- 669 *Scott v Avery (1856) 5 H.L.C. 811*; *Jureidini v National British [1915] A.C. 499, 504*; *Atlantic v Louis Dreyfus [1922] 2 A.C. 250, 255*; *Czarnikow v Roth, Schmidt [1922] 2 K.B. 478, 488*; *Callaghan v Dominion Insurance Co Ltd [1997] 2 Lloyd's Rep. 541, 545* (where the agreement which required only disputes on quantum to be referred to arbitration, provided

that the award would be a condition precedent to a right of action against the insurer). In *William McIlroy Swindon Ltd v Quinn Insurance Ltd [2011] EWCA Civ 825, [2012] 1 All E.R. (Comm) 241*, the Court of Appeal construed a clause in a public liability insurance contract requiring the reference of a dispute “*in respect of a claim*” to arbitration as applying only to claims which can arise only upon or after the public liability in question has been established by the ascertainment of both liability and quantum: see below, para.44-120.

- 670 Arbitration Act 1996 s.7.
- 671 *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] 1 Lloyd's Rep. 455*.
- 672 *Insurance Co v Lloyd's Syndicate [1995] 1 Lloyd's Rep. 272*. See also *Hassneh Insurance Co v Mew [1993] 2 Lloyd's Rep. 243; Ali Shipping Corp v Shipyard Trogir [1998] 2 All E.R. 136*.
- 673 Arbitrations commenced before 30 January 1997 are governed by the Arbitration Acts 1950, 1975 and 1979. By the 1996 Act, international insurance arbitration agreements now may exclude the court’s jurisdiction in respect of any appeal on a point of law, whereas previously such agreements were ineffective (Arbitration Act 1979 ss.3 and 4). Such exclusion agreements relating to “domestic” arbitrations are effective if agreed after the commencement of proceedings (Arbitration Act 1996 s.87(1)).
- 674 ss.89–91. The Regulations apply whatever the applicable law of the contract: s.89(3). The Arbitration Act 1996 was amended to accommodate the Consumer Rights Act 2015, instead of the 1999 Regulations, when the 2015 Act entered into force: s.75, Sch.4 paras 30–33.
- 675 This limit was fixed by the Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167).
- 676 Civil Jurisdiction and Judgments (Amendment) Regulations 2014 (SI 2014/2947) reg.1.
- 677 By the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), the Regulation entered into force on 1 March 2002. Prior to this date, the Civil Jurisdiction and Judgments Act 1982, incorporating the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, as amended, and the Civil Jurisdiction and Judgments Act 1991 applied.
- 678 See the Civil Jurisdiction and Judgments Act 1991, as amended by the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929). A new Lugano Convention was signed on 30 October 2007, designed to harmonise the rules applicable under the Lugano Convention and Regulation 44/2001: see the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131).
- 679 In England and Wales, such rules are found in CPR r.6.37 and Practice Direction 6B.
- 680 European Union (Withdrawal) Act 2018 ss.1B, 2, 3; the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) regs 82, 92–93; European Union (Withdrawal Agreement) Act 2020 ss.2, 39. The UK has submitted a formal application to re-join the Lugano Convention as an individual member at the end of the implementation period but the outcome of that application, which will depend on assent being given by the current members, is presently unknown.
- 681 See recently *Aspen Underwriting Ltd v Credit Europe Bank NV [2020] UKSC 11, [2020] Lloyd's Rep. I.R. 274*.

- 682 Regulation 1215/2012 art.11. See *New Hampshire Insurance Co v Strabag Bau AG [1992] 1 Lloyd's Rep. 361*; *Tradigrain SA v SIAT SpA [2002] EWHC 106 (Comm)*, [2002] 2 Lloyd's Rep. 553. See also arts 8 to 11 of the 2007 Lugano Convention.
- 683 Regulation 1215/2012 art.12.
- 684 Regulation 1215/2012 art.13(1).
- 685 Regulation 1215/2012 art.14(1). Under art.14(1) of the Regulation (art.12 of the 2007 Convention), the insurer must sue the assured in the state of domicile of the assured, whether or not the insurer is domiciled in a Member State: *Jordan Grand Prix Ltd v Baltic Insurance Group [1999] 1 All E.R. 289*. As to the scope of art.12, see also *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.2) [2000] 1 W.L.R. 603*.
- 686 Regulation 1215/2012 arts 11–13. See *FBTO Schadeverzekeringen NV v Odenbreit Case 463/06 [2008] Lloyd's Rep. I.R. 354*; *Mapfre Mutualidad Compania de Seguros y Reaseguros SA v Keefe [2015] EWCA Civ 598*.
- 687 Lugano Convention 2007 arts 13(5) and 14. See *Charman v WOC Offshore BV [1993] 1 Lloyd's Rep. 378*, [1993] 2 Lloyd's Rep. 551; *Tradigrain SA v SIAT SpA [2002] EWHC (Comm) 106*, [2002] 2 Lloyd's Rep. 553.
- 688 “Large risks” are defined in Directive 2009/138/EC of the European Parliament and Council.
- 689 See art.23 of the Regulation (art.23 of the 2007 Convention). See *AIG Europe (UK) Ltd v Anonymous Greek Insurance Co of General Insurances (The Ethniki) [2000] Lloyd's Rep. I.R. 343*. As an example of a case where the Court has had to decide whether the parties have chosen a particular jurisdiction from a variety listed in the open cover, see *Tradigrain SA v SIAT SpA [2002] EWHC (Comm) 106*, [2002] 2 Lloyd's Rep. 553.
- 690 2007 Convention art.13.
- 691 *Fisher v Unione Italiana de Riassicurazione SpA [1999] Lloyd's Rep. I.R. 215*; *Agnew v Lansförsäkringsbølagens AB [2000] 1 All E.R. 737*; *AIG Europe (UK) Ltd v Anonymous Greek Insurance Co of General Insurances (The Ethniki) [2000] Lloyd's Rep. I.R. 343*; *Group Josi Reinsurance Co SA v Universal General Insurance Co (C-412/98) EU:C:2000:399*, [2001] *Lloyd's Rep. I.R. 483*.
- 692 Civil Jurisdiction and Judgments Act 1982 s.3D and Sch.3F implemented by the Private International Law (Implementation of Agreements) Act 2020 s.1(2).
- 693 Incorporating the Convention on the Law Applicable to Contractual Obligations 1980. See *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [1999] Lloyd's Rep. I.R. 472*. See above, Vol.I, Ch.33.
- 694 SI 2001/2635. As amended by the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) (Amendment) Regulations 2001 (SI 2001/3542). See *Crédit Lyonnais v New Hampshire Insurance Co [1997] 2 Lloyd's Rep. 1*; *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206*, [2003] *Lloyd's Rep. I.R. 295* (a case concerning a composite policy); *Travelers Casualty & Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd [2004] EWHC 1704 (Comm)*, [2004] *Lloyd's Rep. I.R. 846*. The Regulations do not apply to contracts of reinsurance (reg.3(1)). By the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009 (SI 2009/3075), the 2001 Regulations do not apply to contracts of insurance concluded on or after 17 December 2009.

- 695 See above, Vol.I, Ch.33.
- 696 art.7. See Vol.I, paras 33-173—33-200. As to “large risks” and where a risk is situated, see Council Directive 73/239/EEC and Council Directive 88/357/EEC, as amended by Directive 2005/68/EC.
- 697 European Union (Withdrawal) Act 2018; Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834).
- 698 In *Agapitos v Agnew (The Aegeon)* [2002] EWCA Civ 247, [2002] 2 Lloyd's Rep. 42 at [15]–[18] the Court of Appeal considered that an originally honest claim which was subsequently appreciated as unfounded or exaggerated would be a fraudulent claim and that the deliberate suppression of a valid defence would render a claim fraudulent. See also *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] A.C. 1 at [96]. A fraud committed in performance of a contract of compromise of an insurance claim will not be a fraudulent claim attracting the remedies discussed in this paragraph: *Direct Line Insurance Plc v Fox* [2009] EWHC 386 (QB), [2009] 1 All E.R. (Comm) 1017.
- 699 As to exaggerated claims, see *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] A.C. 1 at [25]–[26], [36], [51], [92]–[93].
- 700 *Lek v Mathews* (1927-28) 29 Ll. L. Rep. 141; *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB), [2012] Lloyd's Rep. I.R. 211 at [61]–[73], although in this case it was submitted that there was an additional requirement of dishonesty within the meaning discussed in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164; such an additional requirement would appear to go beyond the bounds of the authorities. There is also a question whether the fraudulent claim can be constituted by a non-disclosure, as well as by a misrepresentation: *Marc Rich Agriculture Trading SA v Fortis Corporate Insurance NV* [2004] EWHC 2632 (Comm), [2005] Lloyd's Rep. I.R. 396; *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB), [2012] Lloyd's Rep. I.R. 211 at [64].
- 701 *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep. I.R. 209; *Tonkin v UK Insurance Ltd* [2006] EWHC 1120 (TCC), [2007] Lloyd's Rep. I.R. 283 at [176]–[178]; *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB), [2012] Lloyd's Rep. I.R. 211 at [76]–[77].
- 702 *London Assurance v Clare* (1937) 57 Ll.L. Rep. 254, 268; *Orakpo v Barclays Insurance Services Co Ltd* [1995] L.R.L.R. 443 at 451.
- 703 *Chapman v Pole* (1870) 22 L.T. 306; *Herman v Phoenix Assurance Co Ltd* (1924) 18 Ll.L. Rep. 371; *Dome Mining Corp Ltd v Drysdale* (1931) 41 Ll.L. Rep. 109; *Central Bank of India Ltd v Guardian Assurance Co Ltd* (1936) 54 Ll.L. Rep. 247; *Shoot v Hill* (1936) 55 Ll.L. Rep. 29.
- 704 *Goodman v Harvey* (1836) 4 Ad. & El. 870.
- 705 *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] A.C. 1 at [28]–[36], although Lord Sumption in that case appeared to curtail the principle underlying the fraudulent claim rule to the fact that inducement was not required.
- 706 [2016] UKSC 45, [2017] A.C. 1 at [36], [39], [92]–[93], [100]–[103], [109]. See also *K/S Merc-Scandia XXXII v Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep. 563 at [35].
- 707 *Agapitos v Agnew (The Aegeon)* [2002] EWCA Civ 247, [2002] 2 Lloyd's Rep. 42 at [38].
- 708 *Re Carr and Sun Insurance* (1897) T.L.R. 186.

- 709 *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep. 437, 517–519.
- 710 *General Accident, Fire and Life Assurance Corp Ltd v Midland Bank Ltd* [1940] 2 K.B. 388; *Lombard Australia v NRMA Insurance* [1969] 1 Lloyd's Rep. 575. See also *Woolcott v Sun Alliance and London Insurance Ltd* [1978] 1 Lloyd's Rep. 629; *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24; *Arab Bank Plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep. 262.
- 711 *Savash v CIS General Insurance Ltd* [2014] EWHC 375 (TCC), [2014] Lloyd's Rep. I.R. 471 at [55]–[59].
- 712 *Royal Boskalis Westminster NV v Mountain* [1997] L.R.L.R. 523; reversed on other grounds [1997] 2 All E.R. 929; *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2001] 2 W.L.R. 170. See also *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] 1 Lloyd's Rep. 437, where it was held that mere negligence in supplying details of claim pursuant to a notice provision in the policy did not constitute a breach of the obligation of utmost good faith.
- 713 *Manifest Shipping & Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1, [2001] 2 W.L.R. 170 at [62].
- 714 *Manifest Shipping & Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1, [2001] 2 W.L.R. 170; affirming [1997] 1 Lloyd's Rep. 360; *K/S Merc-Scandia XXXII v Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep. 563. See above, para.44-042. See also *Goulstone v Royal* (1858) 1 F. & F. 276; *Britton v Royal* (1866) 4 F. & F. 905, 909; *Royal Boskalis Westminster NV v Mountain* [1997] L.R.L.R. 523; reversed on other grounds by the Court of Appeal: [1999] Q.B. 674. The duty not to make a fraudulent claim persists even after the insurer wrongfully repudiates the policy (*Transthene Packaging Co Ltd v Royal Insurance (UK) Ltd* [1996] L.R.L.R. 32, 43) but not after the commencement of litigation (*Agapitos v Agnew (The Aegeon)* [2002] EWCA Civ 247, [2002] 2 Lloyd's Rep. 42 at [52]).
- 715 [2001] UKHL 1, [2001] 2 W.L.R. 170. Lord Hobhouse does not appear to have come to any conclusion concerning the availability of the remedy of avoidance. Lords Clyde and Scott left the question open.
- 716 [2016] UKSC 45, [2017] A.C. 1 at [8], [67].
- 717 [2002] EWCA Civ 247, [2002] 2 Lloyd's Rep. 42 at [45].
- 718 In *The Aegeon*, at [21], [35] and [45], the Court of Appeal expressed a preference for the forfeiture to be prospective applying to all claims or benefits which had not yet accrued at the date of the fraudulent claim. There were earlier dicta that the forfeiture extended to all benefit under the policy, including entitlements which had already accrued (see *Royal Boskalis Westminster NV v Mountain* [1997] L.R.L.R. 523, 592–595). In many cases there is an express provision in the policy that in the event of the presentation of a fraudulent claim “the policy shall become void and all claims hereunder shall be forfeited”.
- 719 *Diggens v Sun Alliance and London Assurance Plc* [1994] C.L.C. 1146; *Orakpo v Barclays Insurance Services* [1995] L.R.L.R. 443 (disapproved by the Court of Appeal in *K/S Merc-Scandia XXXII v Lloyd's Underwriters*, in reliance on the judgment of the obiter dicta of Lord Hobhouse in *The Star Sea*). As to forfeiture clauses, see *Insurance Corp of the Channel Islands Ltd v McHugh* [1997] L.R.L.R. 94; cf. *Fargnoli GA Bonus Plc* [1997] C.L.C. 653.

- 720 *Orakpo v Barclays Insurance Services* [1995] *L.R.L.R.* 443; *Royal Boskalis Westminster NV v Mountain* [1997] *L.R.L.R.* 523; reversed on other grounds by the Court of Appeal: [1999] *Q.B.* 674; *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] *Lloyd's Rep. I.R.* 209; *Aviva Insurance Ltd v Brown* [2011] *EWHC* 362 (QB), [2012] *Lloyd's Rep. I.R.* 211 at [78], [122].
- 721 *Agapitos v Agnew (The Aegeon)* [2002] *EWCA Civ* 247, [2002] 2 *Lloyd's Rep.* 42; *AXA General Insurance Ltd v Gottlieb* [2005] *EWCA Civ* 112, [2005] *Lloyd's Rep. I.R.* 369; *Churchill Car Insurance v Kelly* [2007] *EWHC* 18 (QB), [2007] *R.T.R.* 26.
- 722 [2016] *UKSC* 45, [2017] *A.C.* 1.
- 723 *Interpart Comerciao e Gestao SA v Lexington Insurance Co* [2004] *Lloyd's Rep. I.R.* 690; *Marc Rich Agriculture Trading SA v Fortis Corporate Insurance NV* [2004] *EWHC* 2632 (Comm), [2005] *Lloyd's Rep. I.R.* 396. See the Law Commission's Consultation Paper: Insurance Contract Law: Post Contract Duties and other Issues (LCCP No.201, December 2011).
- 724 *Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd* [2010] *EWHC* 2192 (QB), [2011] *Lloyd's Rep. I.R.* 238 at [88]–[99]. In the event of a fraudulent claim, the insurer may also have a remedy for deceit. In *AXA Insurance UK Plc v Financial Claims Solutions Ltd* [2018] *EWCA Civ* 1330, [2019] *R.T.R.* 1, the Court of Appeal allowed an insurer to recover exemplary damages by reason of a fraudulent claim.
- 725 2015 Act s.22(2).
- 726 Explanatory Notes, para.100.
- 727 2015 Act s.12(1)(a)–(b).
- 728 See above, para.44-099; *Agapitos v Agnew (The Aegeon)* [2002] *EWCA Civ* 247, [2002] 2 *Lloyd's Rep.* 42; *AXA General Insurance Ltd v Gottlieb* [2005] *EWCA Civ* 112, [2005] *Lloyd's Rep. I.R.* 369.
- 729 2015 Act s.12(1)(c), (2)–(4).
- 730 2015 Act ss.15–17. See above, para.44-060.
- 731 *British and Foreign Marine v Gaunt* [1921] 2 *A.C.* 41, 58; *Regina Fur v Bossom* [1958] 2 *Lloyd's Rep.* 425; *Richard Aubrey Film Productions v Graham* [1960] 2 *Lloyd's Rep.* 101; see also *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd* [1980] 1 *Lloyd's Rep.* 656; *Rhesa Shipping Co SA v Edmunds* [1985] 1 *W.L.R.* 948; *Kastor Navigation Co Ltd v AXA Global Risks (UK) Ltd* [2002] *EWHC* 2601 (Comm), [2003] *Lloyd's Rep. I.R.* 262 at [63]; affirmed, [2004] *EWCA Civ* 277, [2004] *Lloyd's Rep. I.R.* 481. Where there are a number of insured perils, only one insured peril need be proved: *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1999] 1 *Lloyd's Rep.* 803.
- 732 *British and Foreign Marine v Gaunt* [1921] 2 *A.C.* 41.
- 733 *The Tropaioforos* [1960] 2 *Lloyd's Rep.* 469; *The Gold Sky* [1972] 2 *Lloyd's Rep.* 187; *The Vainqueur* [1973] 2 *Lloyd's Rep.* 275 (US); affirmed [1974] 2 *Lloyd's Rep.* 494.
- 734 *British and Foreign Marine v Gaunt* [1921] 2 *A.C.* 41.
- 735 *Regina Fur v Bossom* [1958] 2 *Lloyd's Rep.* 425.
- 736 *London Assurance v Clare* (1937) 57 *Ll.L. Rep.* 254; *Slattery v Mance* [1962] 1 *Q.B.* 676; though generally the assured has the right and duty to begin at the trial of his claim, even if the substantial issue is fraud: *Grunther Industrial Developments v Federated Employers*

- Insurance Association Ltd* [1973] 1 *Lloyd's Rep.* 394; affirmed [1976] 2 *Lloyd's Rep.* 259; *S and M Carpets (London) Ltd v Cornhill Insurance Co Ltd* [1981] 1 *Lloyd's Rep.* 667; affirmed [1982] 1 *Lloyd's Rep.* 423; *Watkins & Davis v Legal General Assurance Co Ltd* [1981] 1 *Lloyd's Rep.* 674; *Broughton Park Textiles (Salford) Ltd v Commercial Union Assurance* [1987] 1 *Lloyd's Rep.* 194; *Polvitte v Commercial Union Assurance* [1987] 1 *Lloyd's Rep.* 379. Where the insurer alleges fraud or wilful misconduct, the standard of proof remains the civil standard, although the difficulty in satisfying the court will be greater in proportion to the seriousness of the insurer's charge: *Hornal v Neuberger Products Ltd* [1957] 1 Q.B. 247, 258; *The Zinovia* [1984] 2 *Lloyd's Rep.* 264; *Re H* [1996] A.C. 563, 586–587; *Re D* [2008] UKHL 33.
- 737 *Regina Fur v Bossom* [1958] 2 *Lloyd's Rep.* 425 at 434. cf. *Slattery v Mance* [1962] 1 Q.B. 676; with *The Tropaioforos* [1960] 2 *Lloyd's Rep.* 469.
- 738 *Munro Brice v War Risks Association* [1918] 2 K.B. 78; reversed on facts [1920] 3 K.B. 94. cf. *Motor Union v Boggan* (1923) 130 L.T. 588, 591; *Greaves v Drysdale* (1935) 53 *Ll.L. Rep.* 16; reversed on facts (1936) 55 *Ll.L. Rep.* 95; *Pan American World Airways v Aetna* [1974] 1 *Lloyd's Rep.* 207 US; affirmed [1975] 1 *Lloyd's Rep.* 77; *Leeds Beckett University v Travelers Insurance Co Ltd* [2017] EWHC 558 (TCC), [2017] *Lloyd's Rep.* I.R. 417 at [199]–[208].
- 739 *Munro Brice v War Risks Association* [1918] 2 K.B. 78; reversed on facts [1920] 3 K.B. 94. See *Hurst v Evans* [1917] 1 K.B. 352, which can hardly be reconciled with *Greaves v Drysdale* (1935) 53 *Ll.L. Rep.* 16; reversed on facts (1936) 55 *Ll.L. Rep.* 95. Where the assured and the insurer put forward rival explanations as to the cause of the loss, if the Court is in doubt as to the probable cause, it may reject the assured's claim on the ground that it has failed to discharge the onus of proof: *European Group Ltd v Chartis Insurance UK Ltd* [2012] EWHC 1245 (Comm), [2012] 2 *Lloyd's Rep.* 117 at [78]–[81]; *Nulty v Milton Keynes BC* [2013] EWCA Civ 15, [2013] *Lloyd's Rep.* I.R. 243.
- 740 *Gorman v Hand-in-Hand* (1877) Ir. R. 11 C.L. 224. In *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1999] 1 *Lloyd's Rep.* 803 the House of Lords held that an extension of cover by reference to a list of perils "other than" a specified peril was not an exclusion.
- 741 *American Tobacco v Guardian* (1925) 69 S.J. 621; *Re National Benefit* (1933) 45 *Ll.L. Rep.* 147.
- 742 *Gorman v Hand-in-Hand* (1877) Ir.R. 11 C.L. 224.
- 743 *Macbeth v King* (1916) 115 L.T. 221; *Bond Air Services v Hill* [1955] 2 Q.B. 417.
- 744 *Levy v Assicurazioni Generali* [1940] A.C. 791.
- 745 *Becker, Gray v London Assurance* [1918] A.C. 101, 114.
- 746 *Leyland v Norwich Union* [1918] A.C. 350, 363; *Gray v Barr* [1971] 2 Q.B. 554, 567; *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA* [1978] A.C. 853, 865, 881; *Marcel Beller Ltd v Hayden* [1978] 1 Q.B. 694.
- 747 *Leyland v Norwich Union* [1918] A.C. 350 at 369, 370; *Samuel v Dumas* [1924] A.C. 431, 447. See also *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2015] EWHC 42 (Comm), [2015] 1 *Lloyd's Rep.* 651 at [283]–[297].
- 748 *Coxe v Employers Liability* [1916] 2 K.B. 629; *American Tobacco v Guardian* (1925) 69 S.J. 621; *Oei v Foster and Eagle Star Insurance* [1982] 2 *Lloyd's Rep.* 170; *ARC Capital*

- Partners Ltd v Brit Syndicates Ltd* [2016] EWHC 141 (Comm), [2016] 4 W.L.R. 18; *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm), [2018] *Lloyd's Rep. I.R.* 83 at [71]. cf. *Smith v Accident Insurance* (1870) L.R. 5 Ex. 302.
- 749 *Yorkshire Dale SS Co v Minister of War Transport* [1942] A.C. 691, 706; *Boiler Inspection Co v Sherwin-Williams* [1951] A.C. 319, 333, 334. Many examples of the application of the doctrine are to be found in Ivamy, General Principles of Insurance Law, 6th edn (1993), Ch.38.
- 750 *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2001] 1 All E.R. (Comm) 13, 23 Q.B.D., [2001] EWCA Civ 1643, [2002] *Lloyd's Rep. I.R.* 113 at [42]; reversed on other grounds [2003] UKHL 48, [2003] *Lloyd's Rep. I.R.* 623.
- 751 *Kacianoff v China Traders* [1914] 3 K.B. 1121; *Becker, Gray v London Assurance* [1918] A.C. 101.
- 752 *Fitton v Accidental Death* (1864) 17 C.B.(N.S.) 122; *Re Etherington and Lancashire and Yorkshire Accident* [1909] 1 K.B. 591.
- 753 *Knight of St Michael* [1898] P. 30; *Yorkshire Water v Sun Alliance & London Insurance* [1997] 2 *Lloyd's Rep.* 21 (where the assured unsuccessfully sued for the recovery of expenses incurred to prevent the incurring of insured liabilities on the alternative grounds that the event which would result in the insured liability had already occurred, although the insured peril had not yet operated, and that it was an implied term of the policy that such expenses would be indemnified).
- 754 *Johnston v West of Scotland* (1828) 7 S. 52, Ct of Sess.; *Stanley v Western Insurance* (1868) L.R. 3 Ex. 71; *Symington v Union Insurance of Canton* (1928) 97 L.J. K.B. 646.
- 755 *Isitt v Railway Passengers* (1889) 22 Q.B.D. 504; *Mardorf v Accident Insurance* [1903] 1 K.B. 584; *Re Etherington and Lancashire and Yorkshire Accident* [1909] 1 K.B. 591; *Fidelity and Casualty Co of New York v Mitchell* [1917] A.C. 592. But cf. *Cawley v National Employers' Accident* (1885) 1 T.L.R. 255; and *Jason v Batten* (1930) Ltd [1969] 1 *Lloyd's Rep.* 281. Indeed, a failure reasonably to attempt to minimise such loss may interfere with the chain of causation and deprive the assured of an indemnity for some or all of his loss: *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 *Lloyd's Rep.* 582, 618–619; *The State of The Netherlands v Youell* [1997] 2 *Lloyd's Rep.* 440; affirmed [1998] 1 *Lloyd's Rep.* 236; See also *Strive Shipping Corp v Hellenic Mutual War Risks Association (The Grecia Express)* [2002] EWHC 203 (Comm), [2002] 2 *Lloyd's Rep.* 88, 159–162.
- 756 *Fitton v Accidental Death* (1864) 17 C.B.(N.S.) 122.
- 757 *Winicosky v Army and Navy* (1919) 35 T.L.R. 283. See also *Marsden v City and Country* (1865) L.R. 1 C.P. 232; *Liverpool and London War Risks v Ocean SS Co* [1948] A.C. 243; *Costain-Blankevoort (UK) Dredging Co Ltd v Davenport (The Nassau Bay)* [1979] 1 *Lloyd's Rep.* 395. cf. *Tappoo Holdings Ltd v Stuchbery* [2006] FJSC 1, [2008] *Lloyd's Rep. I.R.* 34, where the Supreme Court of the Fiji Islands held that loss and damage caused by looters amidst the breakdown of law and order following the armed seizure of Parliament constituted an “insurrection” which was excluded by the relevant policy.
- 758 There must first be a finding that the loss is attributable to concurrent causes: *Handelsbanken Norwegian Branch of Svenska Handelsbanken AB v Dandridge (The Aliza Glacial)* [2002] EWCA Civ 577, [2002] 2 *Lloyd's Rep.* 421 at [47]–[48]. If it is possible to attribute a discrete

part of the loss to one concurrent cause and another part to the other concurrent cause, then the loss will be recoverable to the extent that it is attributable to a peril insured against. If however, both causes would have independently procured the same loss, the loss will be covered if one of the perils is insured against, unless the other is excepted. See Clarke, *The Law of Insurance Contracts* (looseleaf), para.25-6B.

- 759 *Dudgeon v Pembroke* (1877) 2 App. Cas. 284, 297; *Reischer v Bornwick* [1894] 2 Q.B. 548, 551; *Lloyd Instruments Ltd v Northern Star Insurance Co (The Miss Jay Jay)* [1987] 1 Lloyd's Rep. 32. See also *Reynolds v Accidental Insurance* (1870) 22 L.T. 820; *Winspear v Accidental Insurance* (1880) 6 Q.B.D. 42; and *Lawrence v Accident Insurance* (1881) 7 Q.B.D. 216; *Seashore Marine SA v Phoenix Assurance Plc* [2002] Lloyd's Rep. I.R. 51 at [94]–[95]; *Kiriakouli Lines SA v Compagnie D'Assurances Maritime Aeriennes et Terrestre (Camat) (The Demetra K)* [2002] EWCA Civ 1070, [2002] 2 Lloyd's Rep. 581 at [18]; *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] Lloyd's Rep. I.R. 63 at [173].
- 760 *Saqui v Stearns* [1911] 1 K.B. 426; *Lawrence v Accident Insurance* (1881) 7 Q.B.D. 216; *Wayne Tank Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] Q.B. 57; see also *Seddon v Binions* [1978] 1 Lloyd's Rep. 382; *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042, [2004] 2 Lloyd's Rep. 604; *Navigators Insurance Co Ltd v Atlasnavios-Navegacao Lda* [2018] UKSC 26, [2018] 2 W.L.R. 1671, [43]; *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] Lloyd's Rep. I.R. 63 at [174]. cf. *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep. 664, [1997] 2 Lloyd's Rep. 687, [1999] 1 Lloyd's Rep. 803.
- 761 It may be too early to say that this is a rule of law, as the inquiry into proximate cause is one concerned with fact; nevertheless there are several decisions of the courts which follow the pattern of this proposition (e.g. *P Samuel & Co Ltd v Dumas* [1924] A.C. 431), but there are those which run counter (e.g. *Cory & Son v Burr* (1883) 8 App. Cas. 393). It is submitted to be a sensible formulation of the doctrine of successive proximate causes, as proposed by Clarke, *The Law of Insurance Contracts* (looseleaf), paras 25-5 and 25-7. In *Atlasnavios-Navegacao Lda v Navigators Insurance Co Ltd* [2014] EWHC 4133 (Comm), [2015] Lloyd's Rep. I.R. 151 at [233]–[247], Flaux J considered such an approach to be too mechanistic; on appeal, the Supreme Court considered that *Cory v Burr* was a case of concurrent causes: [2018] UKSC 26; [2018] 2 W.L.R. 1671, [49].
- 762 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] Lloyd's Rep. I.R. 63 at [171]–[176].
- 763 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] Lloyd's Rep. I.R. 63 at [177]–[185].
- 764 *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139. Accordingly, the assured may not recover as damages any losses occasioned as a result of the insurer's failure to pay other than that which was to be indemnified under the policy: *Ventouris v Mountain (The Italia Express)* [1992] 2 Lloyd's Rep. 281; *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep. I.R. 111; *Callaghan v Dominion Insurance Co Ltd* [1997] 2 Lloyd's Rep. 541; contra *Grant v Co-operative Insurance Society Ltd* (1983) 134 N.L.J. 81; *Transthene Packaging Co Ltd v Royal Insurance (UK) Ltd* [1996] L.R.L.R. 32, 41.

The assured's entitlement to damages may be different if the insurer is in breach of other obligations under the insurance contract: *Transthene Packaging Co Ltd v Royal Insurance (UK) Ltd* [1996] *L.R.L.R.* 32, 41; cf. *Sprung v Royal Insurance (UK) Ltd* [1999] *Lloyd's Rep. I.R.* 111; *Tonkin v UK Insurance Ltd* [2006] *EWHC* 1120 (TCC), [2007] *Lloyd's Rep. I.R.* 283 at [34]–[39]. Upon the entry into force of ss.13A and 16A of the Insurance Act 2015 on 4 May 2017, the assured is entitled to recover damages for the late payment of a claim under an insurance contract in breach of a term implied by s.13A requiring the insurer to pay insurance claims within a reasonable time. In non-consumer insurance contracts, it is open to the parties to agree to a modification of this implied term to the insurer's benefit subject to the restrictions imposed by s.16A of the 2015 Act and the transparency requirements of the Insurance Act 2015. See below, para.44-112.

- 765 *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] *EWCA Civ* 688, [2003] *Lloyd's Rep. I.R.* 752 at [22], [34]–[40]. The fact that there is a “mere chance” of recovery of the property does not mean that there has been no loss: at [40].
- 766 **Marine Insurance Act 1906** s.60. The doctrine of constructive total loss does not apply to non-marine insurance: *Moore v Evans* [1917] *1 K.B.* 458; *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] *EWCA Civ* 688, [2003] *Lloyd's Rep. I.R.* 752.
- 767 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] *NZSC* 158, [2017] *Lloyd's Rep. I.R.* 175 at [38]–[43].
- 768 The policy may be in part a valued policy and in part an unvalued policy: *Grimaldi Ltd v Sullivan* [1997] *C.L.C.* 64.
- 769 *Elcock v Thomson* [1949] *2 K.B.* 755; *Kusel v Atkin* [1997] *2 Lloyd's Rep.* 749. As to the relationship between depreciation in value and the reasonable cost of repair, see *Coles v Hetherton* [2012] *EWHC* 1599 (Comm), [2013] *Lloyd's Rep. I.R.* 9 at [31].
- 770 This value does not include loss of profits or other consequential losses unless specifically insured: see above, para.44-027.
- 771 *Hercules Insurance v Hunter* (1835) *14 S. 147*, Ct of Sess.; *Chapman v Pole* (1870) *22 L.T. 306*; *Re Wilson and Scottish Insurance* [1920] *2 Ch. 28*; *Leppard v Excess Insurance Co Ltd* [1979] *2 Lloyd's Rep.* 91; *Tonkin v UK Insurance Ltd* [2006] *EWHC* 1120 (TCC), [2007] *Lloyd's Rep. I.R.* 283 at [20]–[25].
- 772 *Rice v Baxendale* (1861) *7 H. & N.* 96, 101.
- 773 *Westminster Fire v Glasgow Provident* (1888) *13 App. Cas.* 699, 713; *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co* [1983] *1 Lloyd's Rep.* 674, 688–689; affirmed [1984] *1 Lloyd's Rep.* 149. cf. *Anderson v Commercial Union*, *1998 S.L.T.* 826, where it was held that whilst the insurer was bound to indemnify the assured against the costs of repair, he was not obliged (absent a clause) to indemnify the assured *as and when* such costs were incurred. In *Great Lakes Reinsurance (UK) SE v Western Trading Ltd* [2016] *EWCA Civ* 1003, [2016] *Lloyd's Rep. I.R.* 643 at [40], the Court of Appeal held that where real property is destroyed the measure of indemnity to which the insured is entitled will depend on: (i) the terms of the policy; (ii) the interest of the insured in, or its obligations in respect of, the property insured; and (iii) the facts of the case including, in particular, the intention of the insured at the time of the loss. If the insured has a limited interest in the property it will be material to consider whether the subject matter of the insurance is the whole interest in the property

insured and not solely that of the insured himself and, if it is the whole interest, whether the insured is accountable to others for any sum received in excess of his interest. At [67]–[75], the Court held that where no reinstatement costs had yet been incurred, whether or not the cost of reinstatement was the correct measure of indemnity depended on whether the insured had a fixed, settled and genuine intention to reinstate. However, see also *Manchikalapati v Zurich Insurance Plc* [2019] EWCA Civ 2163, [2020] *Lloyd's Rep. I.R.* 77 at [86]–[89], [96]–[110]; *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Ltd* [2020] EWCA Civ 308, [2020] *Lloyd's Rep. I.R.* 397 at [60]–[73]. See also *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] *Lloyd's Rep. I.R.* 175 at [38]–[43].

- 774 *Scottish Amicable v Northern Assurance* (1883) 11 R. 287, Ct of Sess., 295; *Pleasurama v Sun Alliance* [1979] 1 *Lloyd's Rep.* 389, 393. However, the position may vary depending on the practicability of doing the repairs and the genuineness of the assured's intentions to undertake them or to sell: *Glad Tidings v Wellington Fire Insurance Co*, 46 D.L.R. (2d.) 475 (1964); *Reynolds v Phoenix Assurance Co* [1978] 2 *Lloyd's Rep.* 440; *Leppard v Excess Insurance Co Ltd* [1979] 2 *Lloyd's Rep.* 91; *Sartex Quilts and Textiles Ltd v Endurance Corporate Capital Ltd* [2019] EWHC 1103 (Comm); [2020] EWCA Civ 308, [2020] *Lloyd's Rep. I.R.* 397. See also *Gleniffer Finance Corp v Bamar Wood and Products* [1978] 2 *Lloyd's Rep.* 49.
- 775 See *Marine Insurance Act 1906* s.69(1). As to claims for partial losses under the *Marine Insurance Act 1906* ss.69 and 77; see *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1995] 1 *Lloyd's Rep.* 651, 664–666, [1997] 1 *Lloyd's Rep.* 360; affirmed [2001] UKHL 1, [2001] 2 W.L.R. 170; *Kusel v Atkin* [1997] 2 *Lloyd's Rep.* 749.
- 776 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] *Lloyd's Rep. I.R.* 175 at [38]–[43]. cf. *Vance v Forster* (1841) Ir. Circ. Rep. 47; *Castellain v Preston* (1883) 11 Q.B.D. 380, 400.
- 777 *Leppard v Excess Insurance Co Ltd* [1979] 2 *Lloyd's Rep.* 91, 95. See also *Kyzuna Investments Ltd v Ocean Marine Mutual Insurance Association (Europe)* [2000] 1 *Lloyd's Rep.* 505, where it was held that the words "sum insured" did not represent the insured value for the purposes of *Marine Insurance Act 1906* s.27(2). The principles applicable to determining whether a policy of marine insurance is a valued or unvalued policy are generally applicable to non-marine insurance policies: *Quorum A/S v Schramm* [2002] 1 *Lloyd's Rep.* 249; *Thor Navigation Inc v Ingosstrakh Insurance Co Ltd* [2005] EWHC 19 (Comm), [2005] 1 *Lloyd's Rep.* 547.
- 778 *South Staffordshire Tramways Co Ltd v Sickness & Accident Assurance Association Ltd* [1891] 1 Q.B. 402; *Re Law Car and General Insurance Corp Ltd* [1913] 2 Ch. 103, 118. See also *Marine Insurance Act 1906* s.77. In *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 117, [2015] *Lloyd's Rep. I.R.* 34 at [48]–[52] the New Zealand Supreme Court held that the doctrine of merger (by which the assured is not entitled to recover an indemnity for unrepaired damage amounting to a partial loss where it is followed by a total loss) did not apply, as a matter of law, to non-marine insurance.
- 779 Where there is a danger of the policy limit being exhausted, it is important to be able to identify to what event, peril or cause the limit will apply: *Kuwait Airways Corp v Kuwait*

- Insurance Co SAK [1996] 1 Lloyd's Rep. 664, 686; affirmed [1997] 2 Lloyd's Rep. 687, [1999] 1 Lloyd's Rep. 803; Caudle v Sharp [1995] L.R.L.R. 433; Cox v Bankside Members' Agency Ltd [1996] 1 Lloyd's Rep. 26; AXA Reinsurance (UK) Plc v Field [1996] 1 W.L.R. 1026; Mann v Lexington Insurance Co [2001] 1 Lloyd's Rep. 1; Standard Life Assurance Ltd v Oak Dedicated Ltd [2008] EWHC 222 (Comm), [2008] Lloyd's Rep. I.R. 552 ("and/or claimant"); Aioi Nissay Dowa Insurance Co Ltd v Heraldglen Ltd [2013] EWHC 154 (Comm), [2013] 2 All E.R. 231; Lord Bishop of Leeds v Dixon Coles & Gill [2021] EWCA Civ 1211, [2021] Lloyd's Rep. I.R. 410.*
- 780 *Cox v Deeny [1996] L.R.L.R. 288, 298–299.*
- 781 *Cox v Bankside Members' Agency Ltd [1995] 2 Lloyd's Rep. 437.*
- 782 *Cox v Deeny [1996] L.R.L.R. 288, 299.*
- 783 *Cullen v Butler (1816) 5 M. & S. 461; Quebec v St Louis (1851) 7 Moo. P.C. 286; Dickenson v Jardine (1868) L.R. 3 C.P. 639, 644; North British v London, Liverpool and Globe (1877) 5 Ch. D. 569; Collingridge v Royal Exchange (1877) 3 Q.B.D. 173, 176, 177. cf. Royal Boskalis Westminster NV v Mountain [1997] 2 All E.R. 929, where the Court of Appeal held that the fact that the waiver of contractual claims was ineffective as a matter of law meant that no damnable loss was suffered.*
- 784 For the position after payment see below, paras 44-113—44-118.
- 785 *Dickenson v Jardine (1868) L.R. 3 C.P. 639; Collingridge v Royal Exchange (1877) 3 Q.B.D. 173; Darrell v Tibbetts (1880) 5 Q.B.D. 560.*
- 786 *West of England Fire v Isaacs [1897] 1 Q.B. 226.*
- 787 *Bruce v Jones (1863) 1 H. & C. 769; Goole and Hull Steam Towing Co v Ocean Marine [1928] 1 K.B. 589. See above, para.44-003.*
- 788 *Bruce v Jones (1863) 1 H. & C. 769.*
- 789 *Godsall v Boldero (1807) 9 East 72 (overruled by Dalby v Indian and London Life (1854) 15 C.B. 365 on the grounds that the insurance was not one of indemnity so that the principles discussed did not apply). See also Colonia Versicherung AG v Amoco Oil Co [1997] 1 Lloyd's Rep. 261, 270–271.*
- 790 *Law v London Indisputable Life (1855) 1 Kay. & J. 223, 228; Burnand v Rodocanachi (1882) 7 App. Cas. 333, 339.*
- 791 *Bruce v Jones (1863) 1 H.C. 769; Goole and Hull Steam Towing Co v Ocean Marine [1928] 1 K.B. 589.*
- 792 *North British v London, Liverpool and Globe (1877) 5 Ch. D. 569; Commercial Union Assurance Co Ltd v Hayden [1977] 1 Lloyd's Rep. 1; Legal and General Assurance Society Ltd v Drake Insurance Co Ltd [1992] Q.B. 887; Drake Insurance Plc v Provident Insurance Plc [2003] EWHC 109 (Comm), [2003] 1 All E.R. (Comm) 759, [2003] EWCA Civ 1834, [2004] Q.B. 601 and see below, para.44-118.*
- 793 If the loss is divisible over policies covering successive years, the same loss may have been insured by both insurers and the rateable proportion clause might apply: *International Energy Group Ltd v Zurich Insurance Plc [2015] UKSC 33, [2015] 2 W.L.R. 1411* at [58]–[64]; *Phillips v Gunner [2003] EWHC 1084, [2004] Lloyd's Rep. I.R. 426* at [22]–[23].
- 794 *Phillips v Gunner [2003] EWHC 1084 (Comm), [2004] Lloyd's Rep. I.R. 426* at [22]–[23].

- 795 See *Gale v Motor Union* [1928] 1 K.B. 359; *Weddell v Road Transport and General* [1932] 2 K.B. 563; *National Employees Mutual General Insurance Assn Ltd v Haydon* [1980] 2 *Lloyd's Rep.* 149.
- 796 *National Employees Mutual General Insurance Assn Ltd v Haydon* [1980] 2 *Lloyd's Rep.* 149. cf. *Portavon Cinema v Price* (1939) 161 L.T. 417.
- 797 *Jenkins v Deane* (1933) 103 L.J. K.B. 250, 255.
- 798 cf. *Weddell v Road Transport and General* [1932] 2 K.B. 563; Marine Insurance Act 1906 s.80(1); *Commercial Union Assurance Co Ltd v Hayden* [1977] 1 *Lloyd's Rep.* 1; *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 *Lloyd's Rep.* 389. See also *American Surety Co v Wrightson* (1910) 27 T.L.R. 91.
- 799 Marine Insurance Act 1906 s.81.
- 800 *Sillem v Thornton* (1854) 3 El. & Bl. 868; *Joyce v Kennard* (1871) L.R. 7 Q.B. 78; *Fifth Building Society v Traveller Insurance* (1893) 9 T.L.R. 221; *Newman v Maxwell* (1899) 80 L.T. 681; *Anglo-Californian Bank v London Marine and General* (1904) 10 Com. Cas. 1.
- 801 *Carreras v Cunard SS Co* [1918] 1 K.B. 118, 122. cf. *Crowley v Cohen* (1832) 3 B. & Ad. 478.
- 802 *Acme Wood Flooring v Marten* (1904) 20 T.L.R. 229.
- 803 See below, paras 44-124 et seq.
- 804 See *Re Law Guarantee Trust* [1914] 2 Ch. 617, 645; *Beacon Insurance v Langdale* [1939] 4 All E.R. 204. cf. *Trollope & Colls Ltd v Haydon* [1977] 1 *Lloyd's Rep.* 244. The excess clause is often called a “deductible” in commercial insurances. For the effect of such a clause on the assured’s obligations to account to his insurer by way of subrogation, see *Lord Napier and Ettrick v Hunter* [1993] 2 W.L.R. 42, and see below, para.44-115.
- 805 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] *Lloyd's Rep.* I.R. 175 at [38].
- 806 *Times Fire v Hawke* (1858) 1 F. & F. 406.
- 807 *Brown v Royal* (1859) 1 El. & El. 853, 858. As the clause is for the insurer’s benefit, the assured cannot demand reinstatement if the insurer elects to pay: see *Leppard v Excess Insurance Co Ltd* [1979] 2 *Lloyd's Rep.* 91.
- 808 *Brown v Royal* (1859) 1 El. & El. 853 at 860; cf. *Anderson v Commercial Union* (1885) 55 L.J. Q.B. 146.
- 809 *Bisset v Royal Exchange* (1821) 1 S. 174, Ct of Sess.
- 810 *Waring & Gillow v Doughty*, *The Times*, 21 February 1922.
- 811 s.83.
- 812 See below, para.44-131.
- 813 *Western Trading Ltd v Great Lakes Reinsurance (UK) Plc* [2015] EWHC 103 (QB) at [127]–[129].
- 814 *Manchikalapati v Zurich Insurance Plc* [2019] EWCA Civ 2163, [2020] *Lloyd's Rep.* I.R. 77 at [86]–[89], [96]–[110]; *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Ltd* [2020] EWCA Civ 308, [2020] *Lloyd's Rep.* I.R. 397 at [60]–[73].
- 815 *The Italia Express* [1992] 2 *Lloyd's Rep.* 281; *Sprung v Royal Insurance (UK) Ltd* [1999] *Lloyd's Rep.* I.R. 111; *Callaghan v Dominion Insurance Co Ltd* [1997] 2 *Lloyd's Rep.* 541; *Tonkin v UK Insurance Ltd* [2006] EWHC 1120 (TCC), [2007] *Lloyd's Rep.* I.R. 283 at [34]–

[38]; *Turville Heath Inc v Chartis Insurance UK Ltd* [2012] EWHC 3019 (TCC), (2012) 145 Con L.R. 163 at [36].

816 *Grant v Royal Exchange Assurance Co* (1816) 5 M. & S. 439, 442; *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co* [1907] 1 K.B. 116, 123–124; *William Pickersgill & Sons Ltd v London and Provincial Marine & General Insurance Co Ltd* [1912] 3 K.B. 614, 622; *Seele Austria GmbH & Co KG v Tokio Marine Europe Insurance Ltd* [2009] EWHC 2066 (TCC) at [50]–[52].

817 *President of India v Lips Maritime Corp* [1988] 1 A.C. 395, 424–425.

818 *Insurance Corp of the Channel Islands Ltd v McHugh* [1997] L.R.L.R. 94, 136–138.

819 What constitutes a reasonable time depends on all of the circumstances of the case, including the type, size and complexity of the claim, compliance with statutory or regulatory rules or guidance and factors beyond the control of the insurer ([s.13A\(3\)](#)).

820 Explanatory Notes, para.264. See also [s.13A\(5\) of the 2015 Act](#). By amendment to the [Limitation Act 1980 s.5](#), introduced by the [Enterprise Act 2016 s.30](#), a claim for breach of the implied term may not be brought after the expiration of one year from the date on which the insurer has paid all the sums due under the insurance contract.

⑧21 *Quadra Commodities SA v XL Insurance Co SE* [2022] EWHC 431 (Comm), [2022] 2 All E.R. (Comm) 334 at [137] and [140]–[147]. In respect of consumer insurances, ICOBS specifies what constitutes an unreasonable rejection of a claim under para.8.1.2 (in respect of contracts concluded before 1 August 2017) and paras 8.1.2A–2B (in respect of contracts concluded on or after 1 August 2017).

822 [Insurance Act 2015 s.16A](#). As to the transparency requirements, see para.44-060.

Section 10. - The Rights of the Insurer upon Payment

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 10. - The Rights of the Insurer upon Payment

Rights of insurer

- 44-113 If the contract of insurance is not one of indemnity,⁸²³ then in the absence of a right to rescind the contract or of express contractual rights the insurer has no right to recoup from the assured or other persons any of the money paid under the contract.⁸²⁴ On the other hand, if the insurance cover is intended to indemnify the assured, the insurer may be entitled, apart from express contractual provisions, to exercise three distinct rights. These rights are salvage, subrogation, and contribution.

Salvage

- 44-114 In both marine and non-marine insurance, if the subject matter is lost⁸²⁵ or totally destroyed, and the insurer pays to the assured a sum representing an indemnity for the total loss of the subject matter, the assured may be required to abandon his interest in the subject matter to the insurer.
⁸²⁶

- U** If the subject matter is subsequently found or becomes of value, the insurer benefits to the extent of such interest.⁸²⁷ If the insurer takes the money value of such interest (which may be given as a credit against the claim) rather than the subject matter of the insurance itself, the value will be the market value of the property as at the time of its recovery rather than its insured value (if there is one).⁸²⁸ In marine insurance these principles apply to circumstances in which the subject matter has not actually been lost or destroyed, but in which it is not commercially worthwhile or not foreseeably likely to recover or restore it.⁸²⁹ In such circumstances of “constructive total loss”, the assured may offer to abandon his interest in the subject matter to the insurer who may accept

the abandoned interest and who then pays as for a total loss.⁸³⁰ The doctrine of constructive total loss applies only to marine insurance.⁸³¹

Subrogation⁸³²

44-115 If the insurer does pay under a valid⁸³³ insurance contract, even if he is under no legal liability to do so,⁸³⁴

U and the assured then receives a payment or benefit in respect of the loss,⁸³⁵ which together with the insurance money exceeds the loss insured against, again taken to be the valuation in a valued policy,⁸³⁶ he must (subject to any terms in the contract to the contrary) by the doctrine of subrogation account to the insurer for the excess up to the amount that the insurer has paid.⁸³⁷ Not only does the insurer have an action in money had and received against the assured to recover the amount payable to the insurer,⁸³⁸ but the insurer also has an equitable proprietary interest in the money received from the third party by the assured.⁸³⁹ The proprietary interest takes the form of an equitable lien over the fund of money received by the assured, and it is enforceable against the fund to secure repayment of the amount payable to the insurer so long as the fund is traceable and has not been acquired by a bona fide purchaser for value without notice.⁸⁴⁰ The insurer, however, does not have a proprietary interest in the assured's cause of action against a third party in respect of the loss which has been indemnified by the insurer.⁸⁴¹ The assured's obligation to account to his insurer arises once he is indemnified in respect of the particular loss against which he has insured: if, therefore, the assured has agreed to bear a part of a loss himself, the assured may have to account to the insurer before he receives a complete indemnity against his overall loss.⁸⁴² The doctrine of subrogation applies to voluntary payments⁸⁴³ so long as the gift was not intended to benefit the assured beyond the insurance money.⁸⁴⁴

Subrogation: rights of action

44-116 Similarly, the insurer, once he has paid under the insurance,⁸⁴⁵ is entitled to the benefit of all rights possessed by the assured in respect of the loss insured against.⁸⁴⁶ Thus the insurer is entitled to enforce the assured's right of action against tortfeasors who have caused the loss⁸⁴⁷ or against persons who are contractually bound to compensate the assured in damages for the loss,⁸⁴⁸ and

such parties cannot raise as a defence or in mitigation of damages the fact that the assured has been indemnified by the insurer.⁸⁴⁹ An insurer, however, is not entitled to sue one co-insured in the name of another co-insured where the former is covered under the policy for the loss,⁸⁵⁰ although it may be that this is dependent on any contract between the assured and the co-assured excluding a right of action

⁸⁵¹

U; nor can he sue a person for whose joint benefit the insurance has been effected if it was intended by the assured and that other person that any loss should be recouped solely from the insurance moneys.⁸⁵² The rights to which the insurer is subrogated⁸⁵³ are those of the assured so that they must be exercised in the name of the assured⁸⁵⁴ unless they are assigned at law to the insurer,⁸⁵⁵ and the assured can be compelled to allow the insurer the use of his name against an indemnity as to costs.⁸⁵⁶ Where the contract does not provide for a full indemnity it seems that the insurer (in the absence of provisions to the contrary) cannot prevent the assured from exercising the rights himself so long as he acts in good faith,⁸⁵⁷ and he may deduct his reasonable expenses of recovery before accounting to the insurer,⁸⁵⁸ but otherwise it seems that the insurer can, if he wishes, restrain the assured from so doing.⁸⁵⁹ Where the insurer recovers funds which are in excess of the amount to which the insurer is entitled pursuant to his right of subrogation, the insurer will hold that excess on trust for the assured so that the assured will have an equitable proprietorial interest in that excess.⁸⁶⁰

Duty of assured

⁴⁴⁻¹¹⁷ The assured is under a duty to do nothing which prejudices the insurer's rights of subrogation,⁸⁶¹ and thus if he releases or compromises with persons who are under a liability to him in respect of the loss insured against, he will be liable to the insurer for the full value of the rights released or compromised.⁸⁶² Indeed it may be that even before a loss has occurred the assured is possibly under a similar duty not to contract so as to diminish or exclude rights to which the insurer would otherwise become subrogated upon paying for a loss.⁸⁶³

Contribution

⁴⁴⁻¹¹⁸ There is nothing to prevent an assured from taking out as many insurances as he chooses against the same risks, and he may claim payment from his insurers in such order as he chooses,⁸⁶⁴ though, once he has received a full indemnity, other insurers will be under no liability (for there will be nothing left to indemnify).⁸⁶⁵ If the assured receives more than a full indemnity, he will hold

the excess on trust for the insurers.⁸⁶⁶ It also seems that, in cases where the *Life Assurance Act 1774* applies, once the assured has insured to the full extent of his interest any further insurances will be void and illegal.⁸⁶⁷ Although it is no defence to an insurer against whom a claim is made that other insurers are liable in respect of the same loss, such an insurer has, upon payment, an equitable⁸⁶⁸ right to require contribution from the other insurers so that the payment is borne fairly by all.⁸⁶⁹ This right exists only between insurers who have covered, by enforceable contracts of insurance,⁸⁷⁰ the same interest⁸⁷¹ in the same subject matter⁸⁷² and against the same perils.⁸⁷³ The right to contribution arises as between the insurers upon the occurrence of the loss, because it is at that point that the insurers each become liable to indemnify the assured in respect of the loss.⁸⁷⁴ The nature and extent of all the provisions of the cover need not be the same, provided that each contract is alike in covering the actual loss that has occurred.⁸⁷⁵ Where both policies in question contain exclusions in respect of losses covered by other insurances, the exclusions will cancel each other out and will be ineffective.⁸⁷⁶ Where (as will frequently be the case in practice) the relevant insurance policies contain “rateable proportion” clauses, making each insurer liable only for its rateable proportion of any loss or damage, despite earlier authority, it would seem that the right of contribution will still exist as between those insurers, even if one insurer mistakenly pays the entire claim in ignorance of the existence of another policy.⁸⁷⁷ The amount of the contribution recoverable will depend on calculating the insurers’ respective proportionate shares, although the precise method of calculation has still not been authoritatively determined.⁸⁷⁸

Footnotes

823 See above, paras 44-003—44-004.

824 *Simpson v Thompson* (1877) 3 App. Cas. 279, 284; cf. *Edwards v Motor Union* [1922] 2 K.B. 249, 252.

825 See above, paras 44-027 and 44-105.

826 *Rankin v Potter* (1873) L.R. 6 H.L. 83; *Kaltenbach v Mackenzie* (1878) 2 C.P.D. 467, 471; *Dane v Mortgage Insurance* [1894] 1 Q.B. 54; *Holmes v Payne* [1930] 2 K.B. 301. See *Marine Insurance Act 1906* s.79(1). But cf. MacGillivray on Insurance Law, 15th edn (2022), paras 22-006—22-010. It has been held, with respect to a marine insurance policy, that the insurer’s election to take over the insured property will endow him with a beneficial interest under a trust pending the completion of all legal formalities for the transfer of ownership: *Dornoch Ltd v Westminster International BV (The W D Fairway)* [2009] EWHC 889 (Admty), [2009] 2 Lloyd’s Rep. 191.

827 *Oldfield v Price* (1860) 2 E. & F. 80; *Rankin v Potter* (1873) L.R. 6 H.L. 83; *Kaltenbach v Mackenzie* (1878) 2 C.P.D. 467. It may be that this benefit accrues to the insurer as an instance of subrogation.

828 *Kuwait Airways Corp v Kuwait Insurance Co SAK (No.2)* [2000] 1 Lloyd’s Rep. 252.

- 829 Marine Insurance Act 1906 ss.60–63. In *Fraser Shipping Ltd v Colton (The Shakir III) [1997]* 1 *Lloyd's Rep.* 586, 591–593, it was held that if the insured vessel was salvageable even at exorbitant costs, the vessel was constructively, not actually, lost.
- 830 *Royal Boskalis Westminster NV v Mountain [1997] L.R.L.R.* 523, 554–558; *Kastor Navigation Co Ltd v AGF MAT [2002] EWHC 2601 (Comm), [2003] 1 Lloyd's Rep.* 296, [2004] *EWCA Civ* 277, [2004] 2 *Lloyd's Rep.* 119.
- 831 *Moore v Evans [1917] 1 K.B.* 458; *Scott v Copenhagen Reinsurance Co (UK) Ltd [2002] EWHC 1348 (Comm), [2002] Lloyd's Rep. I.R.* 775; affirmed [2003] *EWCA Civ* 688, [2003] *Lloyd's Rep. I.R.* 752.
- 832 For a useful monograph on the doctrine, see Mitchell and Watterson, *Subrogation—Law and Practice* (2007), Ch.10. Subrogation applies to contracts of indemnity generally: see *AXA SA v Genworth Financial International Holdings Inc [2019] EWHC 3376 (Comm), [2020] 1 Lloyd's Rep.* 229.
- 833 *Edwards v Motor Union [1922] 2 K.B.* 249.
- 834 *King v Victoria Insurance [1896] A.C.* 250; *BUPA Australia Pty Ltd v Shaw [2013] VSC 507, [2014] Lloyd's Rep. I.R.* 151, *Victoria SC; AAI Ltd v Technology Swiss Pty Ltd [2021 FCAFC 168, [2022] Lloyd's Rep. I.R.* 343; MacGillivray on *Insurance Law*, 15th edn (2022), para.22-032; cf. *Scottish Union & National Insurance Co v Davis [1970] 1 Lloyd's Rep.* 1.
- 835 *Castellain v Preston (1883) 11 Q.B.D.* 380; *Law, Fire v Oakley (1888) 4 T.L.R.* 309; *Ironfield v Eastern Gas Board [1964] 1 W.L.R.* 1125n. This right of subrogation, however, does not extend to the purchase price received by the assured for the sale of the subject matter insured in circumstances where the insurer chooses not to exercise salvage rights in respect of the subject matter: *Dornoch Ltd v Westminster International BV (The W D Fairway) (No.3) [2009] EWHC 1782 (Admlty), [2009] 2 Lloyd's Rep. I.R.* 191 at [14]–[17].
- 836 *Thames and Mersey Marine v British and Chilean SS Co [1916] 1 K.B.* 30.
- 837 *Commercial Union v Lister (1873-74) L.R.* 9 Ch. App. 483; *Darrell v Tibbets (1880) 5 Q.B.D.* 560; *Castellain v Preston (1883) 11 Q.B.D.* 380; *Thames and Mersey Marine v British and Chilean SS Co [1916] 1 K.B.* 30; *Yorkshire Insurance v Nisbet [1962] 2 Q.B.* 330. But cf. *The Commonwealth [1907] P.* 216, where a system of apportionment was applied to a marine policy where the sum insured was less than the agreed value; and *L. Lucas Ltd v ECGD [1974] 1 W.L.R.* 909 where a system of apportionment was stipulated in the contract.
- 838 *Yorkshire Insurance v Nisbet [1962] 2 Q.B.* 330.
- 839 *Lord Napier and Ettrick v Hunter [1993] 2 W.L.R.* 42. See also *Bristol & West Building Society v May May & Merrimans [1998] 1 W.L.R.* 336; *Arab Bank Plc v John D Wood [2000] Lloyd's Rep. P.N.* 173. For the position where the assured is paid by his insurer after having received a payment from a third party, see *Stearns v Village Main Reef Gold Mining Co Ltd (1905) 10 Com. Cas.* 89.
- 840 *Lord Napier and Ettrick v Hunter [1993] 2 W.L.R.* 42.
- 841 *Re Ballast Plc; St Paul Travellers Insurance Co Ltd v Dargan [2006] EWHC 3189 (Ch), [2007] Lloyd's Rep. I.R.* 4 at [87]–[109].
- 842 *Re Ballast Plc [2006] EWHC 3189 (Ch), [2007] Lloyd's Rep. I.R.* 4 distinguishing between the part of a loss sustained by an assured above a monetary *limit* in a policy (which the

assured can recoup in full before accounting to the insurer) and the loss sustained below an excess in the policy (which the assured can recoup only after fully accounting to the insurer for the money paid under the policy). This is occasionally referred to as the “top-down” principle, namely that any recoveries from third parties are applied to the uppermost layer of the loss first and the bottom-most last.

- 843 *Stearns v Village Main Reef Gold Mining Co Ltd* (1905) 10 Com. Cas. 89.
- 844 *Burnand v Rodocanachi* (1882) 7 App. Cas. 333. cf. *Merrett v Capitol Indemnity Corp* [1991] 1 Lloyd's Rep. 169. See also *Colonia Versicherung AG v Amoco Oil Co* [1997] 1 Lloyd's Rep. 261, where the Court of Appeal confirmed that the assured need not account for the voluntary payment only if the donor intended to benefit the assured to the exclusion of the insurer and rejected the suggestion that the insurer may be subrogated only if the donor had to intend to benefit the insurer.
- 845 *City Tailors v Evans* (1921) 91 L.J. K.B. 379, 385; *Edwards v Motor Union* [1922] 2 K.B. 249. If the parties agree that the insurer can exercise rights of subrogation prior to payment under the policy, such a term will not be given effect: *Rathbone Brothers Plc v Novae Corporate Underwriting* [2013] EWHC 3457 (Comm), [2014] Lloyd's Rep IR 203 at [60]–[61], [2014] EWCA Civ 1464, [2015] Lloyd's Rep IR 95 at [109].
- 846 *Castellain v Preston* (1883) 11 Q.B.D. 380, 388. See also *Marine Insurance Act 1906* s.79. See further the *Mercantile Law Amendment Act 1856*. Subrogation applies where the indemnified person and the person possessed of the right of action against a third party is the same person or entity: *AXA SA v Genworth Financial International Holdings Inc* [2019] EWHC 3376 (Comm), [2020] 1 Lloyd's Rep. 229 at [153].
- 847 *King v Victoria Insurance* [1896] A.C. 250; *Horse, Carriage and General v Petch* (1916) 33 T.L.R. 131. But cf. *Morris v Ford Motor Co Ltd* [1973] Q.B. 792. The assured may maintain an action against the tortfeasor for the full amount of his claim notwithstanding that he has already been paid by his insurers: see *Hobbs v Marlowe* [1978] A.C. 16. See *Automated and Electric Vehicles Act 2018* s.5 (not yet in force).
- 848 *North British v London, Liverpool and Globe* (1877) 5 Ch. D. 569. The insurer is entitled to enforce by way of subrogation the assured's right to a contractual indemnity, rather than pursuing a right of contribution, because the contractual indemnity is not co-ordinate with the insurer's secondary liability to indemnify: *Caledonia North Sea Ltd v British Telecommunications Plc* [2002] UKHL 4, [2002] Lloyd's Rep. I.R. 261 at [14]–[16].
- 849 *Mason v Sainsbury* (1782) 3 Doug. 61; *Clark v Blything* (1823) 2 B. & C. 254; *Yates v Whyte* (1838) 4 Bing. N.C. 272; *Bradburn v GW Ry* (1874) L.R. 10 Ex. 1; *Nichols v Scottish Union* (1885) 2 T.L.R. 190; *King v Victoria Insurance* [1896] A.C. 250; *Parry v Cleaver* [1970] A.C. 1; *The Yasin* [1979] 2 Lloyd's Rep. 45. *Brown v Albany Construction Co* [1995] N.P.C. 100; *Europe Mortgage Co v Halifax Estate Agencies* [1996] E.G.C.S. 84; *FNCB Ltd v Barnet Devanney (Harrow) Ltd* [1999] Lloyd's Rep. I.R. 43; *Caledonia North Sea Ltd v British Telecommunications Plc* [2002] UKHL 4, [2002] Lloyd's Rep. I.R. 261. As to the award of interest on damages where the assured has been indemnified by the insurer, see *H Cousins & Co Ltd v D. & C. Carriers Ltd* [1971] 2 Q.B. 230.
- 850 *Petrofina (UK) Ltd v Magnaload Ltd* [1984] Q.B. 127; *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep. 288; reversed on appeal, however, on the

basis that, as a matter of construction, the sub-contractor was not intended to be covered by the policy: *[1992] 2 Lloyd's Rep. 578*; *National Oil Wells (UK) Ltd v Davy Offshore Ltd [1993] 2 Lloyd's Rep. 582*. cf. *Woodside Petroleum Development Pty Ltd v H & R-E & W Pty Ltd* (1999) 20 W.A.R. 380, Full Ct, WA; *Cape Distribution Ltd v Cape Intermediate Holdings Plc [2016] EWHC 1786 (QB), [2017] Lloyd's Rep. I.R. 1*. The corollary is that the insurer may exercise rights of subrogation against a co-assured where the co-assured is not entitled to cover under the policy, subject to any express or implied terms in the policy and subject to the terms of any contract between the co-assureds: In *Rathbone Brothers Plc v Novae Corporate Underwriting [2013] EWHC 3457 (Comm), [2014] Lloyd's Rep. I.R. 203*, reversed *[2014] EWCA Civ 1464*, *[2015] Lloyd's Rep. I.R. 95*. See also *Gard Marine & Energy Ltd v China National Chartering Co Ltd [2017] UKSC 35, [2017] 1 W.L.R. 1793* at [109]–[126], [131]–[146]; contra at [48]–[57], [89], [99]–[103].

⑧51 *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd [2008] EWCA Civ 286, [2008] 2 All E.R. (Comm) 584*. See, however, *Ward, "Joint names insurance and contracts to insure: untangling the threads"* [2009] L.M.C.L.Q. 239, 242–245. See also *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory) [2013] EWHC 2199, [2014] 1 Lloyd's Rep. 59* at [199]–[204], reversed *[2015] EWCA Civ 16, [2015] 1 Lloyd's Rep. 381; Rugby Football Union v Clark Smith Partnership Ltd [2022] EWHC 956 (TCC), [2022] P.N.L.R. 21*.

852 *Mark Rowlands Ltd v Berni Inns Ltd [1986] Q.B. 211; Fresca-Judd v Golovina [2016] EWHC 497 (QB), [2016] 4 W.L.R. 107*. cf. *Woolwich Building Society v Brown [1996] C.L.C. 625*, where it was held that an insurer who had paid the assured building society under a mortgage indemnity insurance was entitled, by way of subrogation, to sue the defaulting mortgagor in the name of the building society, since the insurance against the mortgagor's non-payment was not for the joint benefit of mortgagee and mortgagor in the relevant sense contemplated in the *Rowlands* case. The Contracts (Rights of Third Parties) Act 1999 may well improve the position of the beneficiary.

853 If, therefore, an assured has himself sued to recover his uninsured losses from a tortfeasor, the insurer may not thereafter bring a separate action in the name of the assured for the balance of the claim: see *Buckland v Palmer [1964] 1 W.L.R. 1109*. The CA in that case did contemplate circumstances where an insurer might be able to pursue the rest of the claim by resurrecting the assured's original action; but it seems this will rarely be permitted: see *Hayler v Chapman [1989] 1 Lloyd's Rep. 490, CA*.

854 *Symons v Mulkern* (1882) 46 L.T. 763; *Dickenson v Jardine* (1868) L.R. 3 C.P. 639, 644; cf. *Oriental Fire and General Insurance Co Ltd v American President Lines Ltd [1968] 2 Lloyd's Rep. 372; Smith (Plant Hire) Ltd v DL Mainwaring [1986] 2 Lloyd's Rep. 244*.

855 *Cia Columbiana de Seguros v Pacific Steam Navigation [1965] 1 Q.B. 101*.

856 *Duus Brown v Binning* (1906) 11 Com. Cas. 190; *Edwards v Motor Union [1922] 2 K.B. 249, 254*. But cf. *Morris v Ford Motor Co Ltd [1973] Q.B. 792*.

857 *Commercial Union v Lister* (1873-74) L.R. 9 Ch. App 483. cf. *Page v Scottish Insurance (1929) 140 L.T.R. 571, 576*.

- 858 *Assicurazioni v Express Assurance* [1907] 2 K.B. 814. Such expenses may be deducted only if the recoveries were made after the insurance proceeds were paid, when the insurer's rights of subrogation crystallise. It does not matter that such expenses were incurred in unsuccessful litigation, provided that they were reasonably spent: *England v Guardian Insurance Ltd* [1999] 2 All E.R. (Comm) 481.
- 859 *Law, Fire v Oakley* (1888) 4 T.L.R. 309. Most contracts of insurance contain express provisions giving the insurer the right to conduct proceedings, etc.
- 860 *Lonrho Exports Ltd v Export Credit Guarantee Department* [1996] 2 Lloyd's Rep. 649, 661–663; cf. *Lord Napier and Ettrick v Kershaw* [1993] 1 Lloyd's Rep. 197.
- 861 The question whether this duty extends to the insurer's right of contribution was not decided in *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [252]–[253].
- 862 *West of England v Isaacs* [1897] 1 Q.B. 226; affirming [1896] 2 Q.B. 377; *Phoenix Assurance v Spooner* [1905] 2 K.B. 753; *Horse, Carriage and General v Petch* (1916) 33 T.L.R. 131; *Boag v Standard Marine* [1937] 2 K.B. 113; *Faircharm Investments Ltd v Citibank International Plc* [1998] Lloyd's Rep. Bank 127. In *BUPA Australia Pty Ltd v Shaw* [2013] VSC 507, [2014] Lloyd's Rep. I.R. 151, Victoria SC), the Court ordered equitable compensation to the insurer for breach of the assured's obligation. In the United States it has been held that where the third party knows that the assured has been paid by the insurers, a release of the assured's rights is void as being a fraud on the insurers. See, for example, *Monmouth County Fire v Hutchinson* (1870) 21 N.J.Eq. 107.
- 863 See *Boag v Standard Marine* [1937] 2 K.B. 113, 124; *Canadian Transport v Court Line* [1940] A.C. 934. Sed quaere. Failure to disclose that the assured is accustomed to make such contracts may amount to non-disclosure: *Tate v Hyslop* (1885) 15 Q.B.D. 368, 377. cf. *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep. 430, 440; affirmed [1997] 1 Lloyd's Rep. 225.
- 864 *Godin v London Assurance* (1758) 1 Burr. 489; *Newby v Reed* (1762) 1 Wm. Bl. 416; *Rogers v Davis* (1777) 2 Park (8th edn) 601; *North British v London, Liverpool and Globe* (1877) 5 Ch. D. 569, 583, 587. In cases of "valued" policies the order in which the claims are made may affect the amount finally recoverable: see *Bruce v Jones* (1863) 1 H. & C. 769. See also *Marine Insurance Act 1906* s.32.
- 865 See above, para.44-106.
- 866 *Marine Insurance Act 1906* s.32(2)(d).
- 867 See above, para.44-014, and *Hebdon v West* (1863) 3 B. & S. 579; *Simcock v Scottish Imperial* (1902) 10 S.L.T. 286.
- 868 *American Surety Co v Wrightson* (1910) 27 T.L.R. 91, 93. The right of contribution may also arise under s.80 of the *Marine Insurance Act 1906*. As to the availability of a contribution under the *Civil Liability (Contribution) Act 1978*, see *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [188]; *Greene Wood & McClean LLP v Templeton Insurance Ltd* [2009] EWCA Civ 65, [2009] Lloyd's Rep. I.R. 505, [2010] EWHC 2679 (Comm), [2011] Lloyd's Rep. I.R. 557; *International Energy Group Ltd v Zurich Insurance Plc* [2015] UKSC 33, [2016] A.C. 509, [181]; cf. *Bovis Construction Ltd v Commercial Union Assurance Co Plc* [2000] 1 Lloyd's Rep. 416.

- 869 *Newby v Reed* (1762) 1 Wm. Bl. 416; *North British v London, Liverpool and Globe* (1877) 5 Ch. D. 569; *Sickness and Accident v General Accident* (1892) 19 R. 977, Ct of Sess.; *American Surety Co v Wrightson* (1910) 27 T.L.R. 91, 93; *Commercial Union Assurance Co v Hayden* [1977] 1 Lloyd's Rep. 1. See Mitchell, *The Law of Contribution and Reimbursement* (2003). In *International Energy Group Ltd v Zurich Insurance Plc* [2015] UKSC 33, [2015] 2 W.L.R. 1471, the Supreme Court held that there may be rights of contribution between insurers insuring different periods of time, in respect of the same loss ([58]–[64]).
- 870 *Woods v Co-operative Insurance*, 1924 S.C. 692; *Jenkins v Deane* (1933) 103 L.J. K.B. 250; *Monksfield v Vehicle and General Insurance Co Ltd* [1971] 1 Lloyd's Rep. 139. In *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] Q.B. 887, a majority of the Court of Appeal (Ralph Gibson LJ dissenting) overruled the *Monksfield* case, expressing the view that, provided the second policy was in force at the time of the loss, an insurer could obtain contribution from the second insurer even if the assured would no longer have been able to claim on that second policy himself (because of a failure to notify the claim in accordance with a condition precedent to liability under the policy). See now, however, *Eagle Star Insurance Co v Provincial Insurance Plc* [1993] 3 All E.R. 1, where the Privy Council (in applying the principle of contribution to a case where both insurers were *statutorily* liable to a third party) disapproved *Legal and General v Drake Insurance*. The decision in *Legal and General* stands as binding precedent, subject to any contrary decision of the House of Lords and, in any event, is to be preferred, because its reasoning rests on an analysis of a right to contribution which is consistent with the liability of the insurer to the assured. See *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389 at [196]–[203].
- 871 *Scottish Amicable v Northern Assurance* (1883) 11 R. 287, Ct of Sess.; *Nichols v Scottish Union* (1885) 2 T.L.R. 190; *Portavon Cinema v Price* (1939) 161 L.T. 417.
- 872 *North British v London Liverpool and Globe* (1877) 5 Ch. D. 569; *American Surety Co v Wrightson* (1910) 27 T.L.R. 91; *Boag v Standard Marine* [1937] 2 K.B. 113.
- 873 *American Surety Co v Wrightson* (1910) 27 T.L.R. 91.
- 874 *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] Q.B. 887, 892; *O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389; contra *Eagle Star Insurance Co Ltd v Provincial Insurance Plc* [1994] 1 A.C. 130. See also *Marine Insurance Act 1906* s.80. Accordingly, if after the occurrence of an insured loss, one insurer agreed with the assured that their insurance contract be cancelled, that cancellation would be ineffective to deprive the other insurer of his right of contribution, even though the cancellation would be effective to deprive the assured of any rights against the insurer under the cancelled contract (*O'Kane v Jones* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389). The position will be different in the event that one of the insurance contracts has been avoided for a breach of the duty of the utmost good faith, in which case the other insurer will have no right of contribution (*Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] Q.B. 887). cf. *Bolton MBC v Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50, [2007] Lloyd's Rep. I.R. 173, [42].
- 875 See *North British v London, Liverpool and Globe* (1877) 5 Ch. D. 569.
- 876 *Weddell v Road Transport & General Insurance Co Ltd* [1932] 2 K.B. 563. The position is more complex where one policy contains an “other insurance” exclusion and the other policy

- contains a rateable proportion clause: *National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd [2010] EWHC 773 (Comm), [2011] Lloyd's Rep. I.R. 86*. See further *Allianz Australia Insurance Ltd v Lloyd's Underwriters [2019] NSWCA 271, [2020] Lloyd's Rep. I.R. 203* (NSWCA). See above, para.44-108.
- 877 *Drake Insurance Plc v Provident Insurance Plc [2003] EWCA Civ 1834, [2004] Q.B. 601*, doubting *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd [1992] Q.B. 887* (holding that, because the insurer who pays the entirety of the loss is legally liable to the assured to pay only its due proportion, the payment as to the balance is a voluntary payment made without legal obligation, and therefore outside the scope of the equitable doctrine of contribution).
- 878 The two most acceptable methods are: (a) the independent liability method, which calculates the proportions by reference to the amounts for which each insurer would be liable to the assured under their respective policies for the particular loss; and (b) the maximum liability method, which calculates the proportions by reference to the maximum amounts for which each insurer would be liable to the assured for any loss under their respective policies. See *Commercial Union Assurance Co Ltd v Hayden [1977] 1 Lloyd's Rep. 1; O'Kane v Jones [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep. 389*.

Section 11. - Specific Types of Insurance Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 11. - Specific Types of Insurance Contract

Introduction

- 44-119 The principles so far discussed in [sections 1–10](#) above are applicable to contracts of insurance in general. Below are outlined the peculiar features of the specific types of insurance contract most commonly encountered. The reader should consult the specialist books referred to in the footnotes for more detailed consideration of these features and the problems to which they give rise.

(a) - Liability Insurance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 11. - Specific Types of Insurance Contract

(a) - Liability Insurance ⁸⁷⁹



Replace footnote 875 with: See MacGillivray on Insurance Law, 15th edn (2022), Ch.28; Clarke, The Law of Insurance Contracts (looseleaf), s.17–4; Simpson (ed.), Professional Negligence and Liability (looseleaf).

General characteristics

- 44-120 Under contracts of liability insurance, the insurer undertakes to indemnify the assured against legal liability to third persons. Proof of liability is usually a condition precedent to the assured's right to recover, but proof of payment to the third party is not required in the absence of a stipulation to that effect.⁸⁸⁰ Detailed provisions usually give the insurer the right to contest or to compromise the assured's liability,⁸⁸¹ since otherwise the insurer cannot use his ordinary rights of subrogation without first paying the assured the full amount of his estimated loss.⁸⁸² The terms of the policy usually indemnify the assured against the costs of his defence.⁸⁸³ Often liability insurance excludes contractual as opposed to tortious liability, and it may be that even where both exist in respect of the same damage to the same person, the insurer is protected.⁸⁸⁴ However, if a policy covers an assured against all sums which he may become liable at law to pay as damages, the natural and ordinary meaning of "liable at law" includes contractual liability.⁸⁸⁵ "Liability" for these purposes exists when it has been established by judgment, award or agreement.⁸⁸⁶ The establishment of loss by a judgment or settlement does not automatically establish the existence or basis of such legal liability; it is still open to the insurer to challenge that there was an actual legal liability, in which case it is for the assured to prove that there was such an actual legal liability.⁸⁸⁷ The actual cause of the liability must be established in order to determine whether the liability falls within the insured perils of the policy; the manner in which the claim is brought against the assured

is not determinative.⁸⁸⁸ Liability policies place much importance on notification provisions, by which the assured will inform the insurer either of a claim or a circumstance which might give rise to a claim. The purpose of such provisions is to give the insurer the opportunity to investigate the claim or require the assured to defend the claim. It also serves as a mechanism to attach the policy under which notice was given to a claim arising subsequently to the expiry of the policy.⁸⁸⁹

Employers' liability

- 44-121 The **Employers' Liability (Compulsory Insurance) Act 1969** requires employers⁸⁹⁰ carrying on business in the United Kingdom to maintain insurance against liability for bodily injury or disease sustained by their employees.⁸⁹¹ The **1969 Act** requires employers to take out an “approved policy” against such liability. Regulations⁸⁹² made under this Act prescribe the amount of insurance required, make provision for the issue of insurance certificates and their display at places of work and have extended the requirement to insure so as to protect employees who are only temporarily in this country. The Regulations prohibit certain conditions being included in the policy which would otherwise entitle the insurer to be discharged from liability in the event of a breach.⁸⁹³ The Act does not impose any civil liability upon an employing company or its directors, for the consequences of a failure to insure.⁸⁹⁴

Statutory assignment

- 44-122 The **Third Parties (Rights against Insurers) Act 1930** enables the third party, in the event of the insolvency of the assured,⁸⁹⁵ to claim against the insurer; but the third party cannot proceed directly against the insurer until the existence and extent of the liability of the assured has been ascertained by judgment or agreement.⁸⁹⁶ If two or more third party claimants obtain judgments against an insolvent assured, their respective statutory rights to claim directly from his insurer take effect in the order in which the extent of the assured's liability to the third parties was ascertained: there is no mechanism, either under the general law or under the Act, to enable rateable division of the proceeds of the insurance policy between the third party claimants, except where their judgments are simultaneous.⁸⁹⁷ The third party can have no better right against the insurer than the assured had, and the insurer is entitled to raise against the third party any defence under the contract which he could have raised against the assured.⁸⁹⁸ The parties cannot effectively contract out of the Act by purporting, directly or indirectly, to avoid the insurance or to alter the rights of the parties under it on insolvency⁸⁹⁹; nor can the rights of the third party be defeated by an agreement made between the insurer and the insolvent assured after the liability has been incurred to the third party.⁹⁰⁰ The cause of action under the Act will become time-barred unless the third

party, himself, commences proceedings within six years of the assured's cause of action against the insurer having accrued; and this is so even if the assured has already commenced proceedings against the insurer within the limitation period.⁹⁰¹

The Third Parties (Rights against Insurers) Act 2010

- ⁴⁴⁻¹²³ The 1930 Act has been replaced by the *Third Parties (Rights against Insurers) Act 2010*.⁹⁰² The 2010 Act entered into force on 1 August 2016.⁹⁰³ Under s.1(2) of the 2010 Act, the insured's rights under a contract of liability insurance are transferred to a third party claimant where the insured is insolvent and is liable to that third party, and where either the liability was incurred or the insolvency took place after the Act's commencement. The rights are transferred only up to the limits of the insurance contract.⁹⁰⁴ The Act applies irrespective of any connection with the United Kingdom.⁹⁰⁵ Subject to the insurer's own insolvency, the third party cannot enforce the insured's liability against the insured to the extent that the insured's rights under the insurance contract are transferred to the third party.⁹⁰⁶ The insurer is entitled to exercise rights of set off with respect to the insured's liability.⁹⁰⁷ By s.9(2), conditions in the insurance policy may be performed by the third party claimant. By s.9(5), the transfer of rights under the policy is not subject to a condition requiring prior discharge by the insured of the insured's liability to the third party claimant.⁹⁰⁸ Accordingly, "pay to be paid" clauses cannot be relied on by the insurer in answer to a claim under the 2010 Act. By s.17, provisions which purport to terminate the policy on the insured's insolvency are ineffective. The 2010 Act permits the third party claimant to institute proceedings against the insurer seeking a declaration as to the insurer's liability to the insured or the insured's liability to the third party, before the insured's liability to the third party is established by judgment, award or agreement, even if there is a dispute as to whether the third party claim, if proved and established, falls within the scope of cover afforded by the policy.⁹⁰⁹ However, any such declaration cannot be enforced prior to the establishment of the insured's liability. In such proceedings, the insurer can rely on any defence available to the insured.⁹¹⁰ The 2010 Act contains extensive provisions as to the third party claimant's rights to information concerning the insurance policy and claims made thereunder.⁹¹¹

Footnotes

879 See MacGillivray on Insurance Law, 14th edn (2018), Ch.30 ; Clarke, The Law of Insurance Contracts (looseleaf), s.17–4 ; Simpson (ed.), Professional Negligence and Liability (looseleaf).

880 *Johnston v Salvage Association* (1887) 19 Q.B.D. 458, 460; *Lancashire Insurance v IRC* [1899] 1 Q.B. 353, 359; *Brice v Wackerbarth* [1974] 2 Lloyd's Rep. 274.

- 881 As to the effect of clauses requiring the insurer's consent to any settlement of the assured's liability and/or prohibiting admissions of liability, see *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1042, [2001] Lloyd's Rep. I.R. 291; *Beazley Underwriting Ltd v Al Ahleia Insurance Co* [2013] EWHC 677 (Comm), [2013] Lloyd's Rep. I.R. 561.
- 882 See above, para.44-116.
- 883 See, e.g. *Forney v Dominion Insurance Co Ltd* [1969] 1 W.L.R. 928. As to cases where defence costs are incurred in respect of both an insured liability and a non-insured liability, see *New Zealand Forest Products Ltd v New Zealand Insurance Co Ltd* [1997] 1 W.L.R. 1237; *John Wyeth & Brothers Ltd v Cigna Insurance Co of Europe SA/NV* [2001] EWCA Civ 175, [2001] Lloyd's Rep. I.R. 420, 454. In the absence of a contractual provision providing such cover, there is no entitlement to defence costs under a liability insurance policy: *Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* [2013] EWCA Civ 1660, [2014] Lloyd's Rep. I.R. 509. Defence costs cover is itself not an instance of liability insurance: *The Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm); contra *Tarbuck v Avon Insurance* [2002] Lloyd's Rep. I.R. 393, 395, which was commented on obiter in *In Re OT Computers* [2004] EWCA Civ 653, [2004] Lloyd's Rep. I.R. 669, [17]–[22].
- 884 See *Dominion Bridge Co v Toronto General*, 32 D.L.R. (2d) 374 (1962). See also *Foundation of Canada Engineering Corp Ltd v Canadian Indemnity Co* [1977] 2 W.W.R. 75 Can. In *Cape Distribution Ltd v Cape Intermediate Holdings Plc* [2016] EWHC 1786 (QB), [2017] Lloyd's Rep. I.R. 1 at [161]–[163] the Court held that the contractual liability exclusion applied only to claims which could be made only in contract.
- 885 *Aswan Engineering Establishment Co Ltd v Iron Trades Mutual Insurance Co Ltd* [1989] 1 Lloyd's Rep. 289. cf. *Smit Tak Offshore Services v Youell* [1992] 1 Lloyd's Rep. 154; *Tesco Stores Ltd v Constable* [2007] EWHC 2088 (Comm), [2008] Lloyd's Rep. I.R. 302, [26], [30]–[31], [2008] EWCA Civ 362, [2008] Lloyd's Rep. I.R. 636 (where it was held that a public liability policy did not cover contractual liability); *MJ Gleeson Group Plc v AXA Corporate Solutions Assurance SA* [2013] Lloyd's Rep. I.R. 677. If the policy insures against the assured's legal liability to pay "as damages" to third parties, this suggests that compensation must be payable by reason of the assured's wrongdoing: *Bartoline Ltd v Royal & Sun Alliance Insurance Plc* [2007] Lloyd's Rep. I.R. 423; and a claim for restitution may not be covered: *Peninsular and Oriental Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep. 136, 141. Certain types of liability policies may be subject to certain restrictions if not prohibition. As regards "directors and officers" liability insurance, see *Companies Act 2006 ss.232–234*.
- 886 *Post Office v Norwich Union Fire Insurance Society* [1967] 2 Q.B. 363; *Bradley v Eagle Star* [1989] 1 Lloyd's Rep. 465; *Yorkshire Water v Sun Alliance & London Insurance Ltd* [1997] 2 Lloyd's Rep. 21. In *Lumbermens Mutual Casualty Co v Bovis Lend Lease Ltd* [2004] EWHC 2197 (Comm), [2005] Lloyd's Rep. 74, the court held that a liability will not be established by a settlement agreement where that settlement agreement does not identify the specific cost of discharging the liability in question. Accordingly, where under a global settlement agreement, the assured agreed to receive, not pay, a single sum in settlement of all claims

and counterclaims, the assured's liability for the counterclaims was held not to have been established and extrinsic evidence could not be adduced for that purpose. This proposition is questionable. The decision in *Lumbermens* was subjected to a disapproving critique in *Enterprise Oil Ltd v Strand Insurance Co Ltd [2006] EWHC 58 (Comm), [2006] 1 Lloyd's Rep. 500* at [150]–[175]; *AIG Europe (Ireland) Ltd v Faraday Capital Ltd [2006] EWHC 2707, [2007] Lloyd's Rep. I.R. 267* at [69]–[71]; reversed on other grounds *[2007] EWCA Civ 1208, [2008] Lloyd's Rep. I.R. 454*. If the assured settles a claim made against him, it may be open to the insurer to defend the claim under the policy on the ground that there had been no legal liability: *Peninsular and Oriental Steam Navigation Co v Youell [1997] 2 Lloyd's Rep. 136*; *Beazley Underwriting Ltd v Travelers Companies Inc [2011] EWHC 1520 (Comm), [2012] Lloyd's Rep. I.R. 78*; cf. *Commercial Union Assurance Co Plc v NRG Victory Reinsurance Ltd [1998] 2 All E.R. 434* (reinsurance).

- 887 887 *Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd [2013] EWHC 349 (Comm), [2013] Lloyd's Rep. I.R. 290* at [38]–[39], [96]; affirmed *[2013] EWCA Civ 1660, [2014] Lloyd's Rep. I.R. 509*.
- 888 888 *West Wake Price & Co v Ching [1957] 1 W.L.R. 45*; *Thornton Springer v NEM Insurance Co Ltd [2000] 1 All E.R. (Comm) 486*. This is so, even if the policy uses the word “alleging” in order to describe the insured peril (*MDIS Ltd v Swinbank [1999] Lloyd's Rep. I.R. 516*), although it will always be a question of construction. As to the effect of a judgment obtained by a claimant against the assured, see *Omega Proteins Ltd v Aspen Insurance UK Ltd [2010] EWHC 2280 (Comm), [2011] Lloyd's Rep. I.R. 183*; cf. *London Borough of Redbridge v Municipal Mutual Insurance Ltd [2001] Lloyd's Rep. I.R. 545, 550–551*; cf. *Cheltenham & Gloucester Plc v Sun Alliance and London Insurance Plc Unreported 30 May 2001, Inner House, Ct of Sess.*; cf. *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co [2004] EWCA Civ 1660, [2005] 1 Lloyd's Rep. 606*. As to the operation of an insolvency exclusion by reference to a “claim”, see *AIG Australia Ltd v Kaboko Mining Ltd [2019] FCAFC 96, [2019] Lloyd's Rep. I.R. 575* (Full Fed. Ct of Australia).
- 889 889 *HLB Kidsons v Lloyd's Underwriters [2007] EWHC 1951 (Comm), [2008] Lloyd's Rep. I.R. 237* at [22]–[23], *[2008] EWCA Civ 1206, [2009] 1 Lloyd's Rep. 8*. See also *Euro Pools Plc v Royal & Sun Alliance Insurance Plc [2019] EWCA Civ 808*.
- 890 890 s.3 exempts certain employers such as state corporations and local government authorities.
- 891 891 s.2 excludes from the definition of “employee” persons who are employed by close relatives. As to the boundary between the 1969 Act and the Road Traffic Act 1988 s.145(4A), see *AXA Insurance UK Plc v Norwich Union Insurance Ltd [2007] EWHC 1046 (Comm), [2008] Lloyd's Rep. I.R. 122*. As to the insurance of the employers’ liability for exposing an employee to the risk of harm from asbestos, see *International Energy Group Ltd v Zurich Insurance Plc UK [2013] EWCA Civ 39, [2013] Lloyd's Rep. I.R. 379* reversed in part *[2015] UKSC 33, [2015] 2 W.L.R. 1471; BAI (Run Off) Ltd v Durham [2012] UKSC 14, [2012] Lloyd's Rep. I.R. 371*.
- 892 892 Employers’ Liability (Compulsory Insurance) Regulations 1998 (SI 1998/2573, amended SI 2004/2882). As to reg.3, see *R (on the application of Geologistics Ltd) v Financial Services Compensation Scheme [2003] EWCA Civ 1877, [2004] Lloyd's Rep. I.R. 336* at [20]–[22].
- 893 893 reg.2. See *Amlin UK Ltd v Geo-Rope Ltd [2016] CSOH 165, [2017] Lloyd's Rep. I.R. 277*.

- 894 *Richardson v Pitt-Stanley* [1995] Q.B. 123; *Campbell v Gordon* [2016] UKSC 38, [2016] *Lloyd's Rep. I.R.* 591. The Contracts (Rights of Third Parties) Act 1999 may grant rights of recourse to third parties in so far as they are contemplated by the insurance contract. See *Amlin UK Ltd v Geo-Rope Ltd* [2016] CSOH 165, [2017] *Lloyd's Rep. I.R.* 277 at [25]–[27].
- 895 *Re Compania Merabelllo San Nicholas SA* [1973] Ch. 75.
- 896 *Post Office v Norwich Union Fire* [1967] 2 Q.B. 363. Although doubts have occasionally been expressed about the reason for this requirement (see, e.g. *Poclain SA v SCAC SA* [1986] 1 *Lloyd's Rep.* 404, 407), it has been affirmed by the House of Lords: see *Bradley v Eagle Star* [1989] 1 *Lloyd's Rep.* 465. See also *Sea Voyager Maritime Inc v Bielecki* [1999] *Lloyd's Rep. I.R.* 356; *William McIlroy (Swindon) Ltd v Quinn Insurance Ltd* [2011] EWCA Civ 825, [2012] 1 All E.R. (Comm) 241. As to the nature of the liability to which the Act applies, see *T & N Ltd (in administration) v Royal & Sun Alliance Plc* [2003] EWHC 1016 (Ch), [2004] *Lloyd's Rep. I.R.* 106; *In the matter of OT Computers Ltd (in administration)* [2004] EWCA Civ 653, [2004] 2 All E.R. (Comm) 331; *Freakley v Centre Reinsurance International Co* [2005] EWCA Civ 115, [2005] *Lloyd's Rep. I.R.* 303; *The Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm).
- 897 *Cox v Bankside Members' Agency Ltd* [1995] 2 *Lloyd's Rep.* 437; *Cox v Deeny* [1996] L.R.L.R. 288, 299; *Teal Assurance Co Ltd v WR Berkley Insurance (Europe) Ltd* [2011] EWCA Civ 1570, [2012] *Lloyd's Rep. I.R.* 315, [2013] UKSC 57, [2014] *Lloyd's Rep. I.R.* 56.
- 898 *Farrell v Federated Employers' Assurance Association* [1970] 1 W.L.R. 1400; *CVG Siderurgicia de Orinoco SA v London Mutual Steamship Owners Assn Ltd (The Vainqueur José)* [1979] 1 *Lloyd's Rep.* 557; *Socony Mobil Oil Inc v West of England Shipowners Mutual Assurance (The Padré Island)* [1984] 2 *Lloyd's Rep.* 408; *Pioneer Concrete (UK) Ltd v National Employers' Mutual General Insurance* [1985] 2 All E.R. 395; *Centre Reinsurance International Co v Curzon Insurance Ltd* [2004] EWHC 200 (Ch), [2004] 2 All E.R. (Comm) 28. As to the availability of a set off to the insurer in respect of the insurer's claims against the assured, see the conflicting decisions in *McCormick v National Motor and Accident* (1934) 40 Com. Cas. 76; *Murray v Legal and General Assurance Society* [1970] 2 Q.B. 495; *Cox v Bankside Members' Agency Ltd* [1995] 2 *Lloyd's Rep.* 437, 451; *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) Plc* [2017] EWHC 391 (Comm), [2017] *Lloyd's Rep. I.R.* 240 at [142]–[152]. For the position as regards motor insurance (see below, para.44-124) and public policy (see above, para.44-023), see *Charlton v Fisher* [2001] EWCA Civ 112, [2001] 1 All E.R. (Comm) 769.
- 899 s.1(3). See also s.2(1). An insurance containing a clause requiring the assured to have paid the third party before he becomes entitled to an indemnity under the insurance does not fall foul of s.1(3)—even though its effect is to prevent the third party having a cause of action against the insurer on the assured's insolvency—since such a clause does not avoid the policy or alter the rights of the parties under it: *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 A.C. 1.
- 900 s.3.
- 901 *Lefevre v White* [1990] 1 *Lloyd's Rep.* 569.
- 902 Amendments have been made to the 2010 Act by the Insurance Act 2015 ss.19–20 and Sch.2.

- 903 Third Parties (Rights against Insurers) Act 2010 (Commencement) Order 2016 (SI
2016/550). See also Third Parties (Rights against Insurers) Regulations 2016 (SI 2016/570).
- 904 s.8.
- 905 s.18.
- 906 s.14.
- 907 s.10. Though note *International Energy Group Ltd v Zurich Insurance Plc [2015] UKSC 33, [2015] 2 W.L.R. 1471, [93], [97]*.
- 908 Although this is subject to an exception in respect of claims under a marine insurance policy other than in respect of death or personal injury: s.9(6).
- 909 *BAE Systems Pension Funds Trustees Ltd v Royal & Sun Alliance Insurance Plc [2017] EWHC 2082 (TCC), [2018] 1 W.L.R. 1165* at [15]–[24]. In *Irwell Insurance Co Ltd v Watson [2021] EWCA Civ 67, [2021] Lloyd's Rep. I.R. 145*, it was held that where proceedings are instituted by an employee before the Employment Tribunal against an employer insured under an employers' liability insurance policy, and where the Employment Tribunal has exclusive jurisdiction over the employee's claim, the general policy of the 2010 Act overrides the arbitration agreement in the employers' liability insurance policy so that the proceedings against the insurer should not be stayed pursuant to s.9 of the Arbitration Act 1996. For this purpose, the Employment Tribunal is a "court" within the meaning of s.2(6) of the 2010 Act.
- 910 s.1(3)–(4), 2(2)–(4). As to time bar defences, see ss.2(5) and 12.
- 911 s.11 and Sch.1.

(b) - Motor Insurance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 11. - Specific Types of Insurance Contract

(b) - Motor Insurance ⁹¹²

 Replace footnote 908 with: See MacGillivray on Insurance Law, 15th edn (2022), Ch.29.

Road Traffic Act 1988

44-124 The Road Traffic Act 1988

 913

 requires persons who control
914

 the use
915

 of motor vehicles
916

 on the road or other public place
917

 to maintain insurance
918

 against liability for death or injury to third parties (including passengers
919

U in the vehicle) arising out of such use

920

U and also against the liability (imposed by the Act)

921

U to pay for emergency medical treatment for injuries (including fatal injuries) arising out of such use. With effect from 31 December 1988, insurance against liability for damage to the property of a third party has also been compulsory.

922

U The Act does not require the personal liability of everyone using the vehicle to be covered so long as the insurance covers the use by the person in question

923

U : thus an insurance by an employer which covers his liability for use by his employees is sufficient, though if the insurance specifies the persons or classes of persons who are covered, such persons are given a statutory right to seek indemnity from the insurer, although not strictly parties to the contract of insurance.

924

U The Act does not require insurance, inter alia, against contractual liability, against liability for death or injury sustained by persons in the employment of a person insured in accordance with the foregoing requirements, where the injury arises out of and in the course of that employment, or against damage to the vehicle insured; or cover in excess of £1,000,000 in respect of property damage arising out of any one accident.

925

U An insurance is ineffective for the purposes of the Act unless a certificate of insurance in prescribed form is delivered by the insurer to the assured.

926

U Failure to insure in accordance with the statutory requirements not only constitutes a criminal offence

927

U but also a breach of a statutory duty which may give rise to liability in damages to persons thereby prejudiced.

928

U On 19 July 2018, the [Automated and Electric Vehicles Act 2018](#) received Royal Assent. By [s.2\(1\) of that Act](#), an insurer is liable for any damage (meaning death, personal injury and, subject to exceptions, property damage) sustained by an insured person or any other person which has been caused by an automated vehicle when driving itself on a road or other public place in Great Britain. By [s.2\(4\)](#), unless there has been an unauthorised software alteration or a failure to update

software, the insurer's liability for such damage cannot be excluded or limited by a term of the insurance policy or in any other way. This Act has not yet entered into force.

Rights of third parties

44-125 The Act entitles the third party to make a direct claim upon the insurer upon obtaining judgment against the person insured,

929

U so long as notice

930

U of the bringing of proceedings has been given to the insurer before or within seven days after their commencement and there has been no stay of execution pending an appeal.

931

U In order that the third party may make a direct claim against the insurer, the assured's liability to the third party must be covered by the terms of the policy.

932

U This right is not available, however, if before the happening of the event which was the cause of the death or bodily injury or damage to property giving rise to the liability, the insurance was cancelled (and the certificate dealt with in accordance with the Act)

933

U or the insurer has obtained a declaration that he is entitled (apart from any provision in the insurance) to avoid the insurance for non-disclosure or misrepresentation or has avoided the insurance on that ground (apart from any provision in the insurance).

934

U In addition to the foregoing, the Act renders ineffective any provisions of the insurance restricting the cover by reference to such matters as the characteristics of the vehicle or the driver,

935

U though the insurer can recover from the person insured any payments made to third parties which but for the provision he would not have been obliged to make. Similarly provisions relieving the insurer by reason of some act or omission after the event giving rise to a claim under the insurance are ineffective

936

U as are other rights to avoid or cancel the insurance unless falling within the qualifications to the rights of the third party outlined above.

937

U Finally, it should be noted that the Act also renders ineffective any prior agreement or understanding between the user of a vehicle and a passenger whereby the liability of the user is restricted or excluded or the enforcement of such liability is made subject to conditions.

938

U European Council Directives

939

U require Member States to ensure that insurance coverage exists for civil liability for personal injuries and property damage arising as a result of the use of motor vehicles. The intention of the Directives is to ensure that the victims of motor accidents are able to prosecute and establish their claims in comparable ways in each Member State.

940

U By the European Communities (Rights against Insurers) Regulations 2002,

941

U where a person has a cause of action in tort against a person insured under a policy complying with [s.145 of the Road Traffic Act 1988](#) arising out of an accident involving the insured vehicle,
942

U the claimant may, without prejudice to his right against the insured person, issue proceedings directly against the insurer immediately and the insurer shall be liable to the claimant to the extent that he is liable to the insured person.

Third parties and uninsured drivers

44-126 In 1945 the Motor Insurers' Bureau (MIB)

943

U entered into an agreement with the Minister of Transport under which the MIB undertook (subject to the terms of the agreement) to satisfy any judgment in respect of a liability compulsorily insurable under the Act against any person or persons and whether or not covered by a contract of insurance, where the judgment was not satisfied in full within seven days from the date when it became enforceable. The current agreements are on agreement dated 13 August 1999 which is between the MIB and the Secretary of State for the Environment, Transport and the Regions, and applies to claims arising on or after 1 October 1999 and before 1 August 2015; and there is a further agreement dated 3 July 2015 (as supplemented by a further agreement on 10 January 2017) in respect of accidents on or after 1 August 2015. It is effectively based upon the original 1945 agreement, with subsequent agreements in 1946, 1971, 1972 and 1988. A more complex scheme

(first introduced in 1969) covers the position of untraced drivers. This is now governed by the Untraced Drivers Agreement dated 14 February 2003, in respect of accidents occurring before 1 March 2017, and a further agreement dated 28 February 2017 in respect of accidents occurring on or after 1 March 2017.⁹⁴⁴ The MIB's liability under the 2003 and 2017 Agreements is dependent on establishing that the untraced driver would have been liable to the victim and that that liability is of a kind required to be covered by compulsory insurance under the [Road Traffic Act 1988](#).⁹⁴⁵ It is the publicly declared policy of the MIB not to take the point that there is no privity of contract between the MIB and persons seeking to enforce the undertaking of the MIB.⁹⁴⁶ If the claimant knew or "ought to have known" that the driver was uninsured, the MIB will not be liable.⁹⁴⁷ Further, the liability of the MIB is subject to the following principal conditions precedent⁹⁴⁸: that notice of bringing, or intention to bring, legal proceedings against an insured person is given to the MIB within specified periods of time⁹⁴⁹; that the MIB is supplied with any information it reasonably requires; that the claimant has demanded relevant information from the relevant driver in accordance with [s.154 of the Road Traffic Act 1988](#); that (if required to do so by the MIB) the claimant take steps to obtain judgment against all responsible tortfeasors; and that any judgments obtained should be assigned to the MIB. The liability of the MIB is not affected by the fact that the uninsured motorist deliberately injured the person seeking recovery.⁹⁵⁰

Footnotes

⁹¹² See MacGillivray on Insurance Law, 14th edn (2018), Ch.31.

⁹¹³ s.143(1). Replacing the [Road Traffic Act 1972](#), as amended by (*inter alia*) the [Motor Vehicle \(Compulsory Insurance\) \(No.2\) Regulations 1973 \(SI 1973/2143\)](#); [SI 1974/791](#) (extending compulsory motor-vehicle insurance to cover liabilities arising out of use in other European Community countries); and the [Motor Vehicles \(Compulsory Insurance\) Regulations 1987 \(SI 1987/2171\)](#) (extending compulsory insurance to cover liability for damage to the property of a third party); and the [Motor Vehicles \(Compulsory Insurance\) Regulations 1992 \(SI 1992/3036\)](#) (ensuring that cover extends to the entire Community and affords cover no less than the law required than by the relevant Member States). The 1973, 1987 and 1992 Regulations each seek to implement EC Directives 72/166, 84/5 and 90/232. The 1988 Act came into force (subject to the transitory provisions in [Sch.5 to the Road Traffic \(Consequential Provisions\) Act 1988](#)) on 15 May 1989: see [Road Traffic Act 1988 s.197](#).

⁹¹⁴ See [Monk v Warbey \[1935\] 1 K.B. 75, 80](#); [Lloyd v Singleton \[1953\] 1 Q.B. 357](#); [Kelly v Cornhill Insurance \[1964\] 1 Lloyd's Rep. 1](#); [Newbury v Davis \[1974\] R.T.R. 367](#).

⁹¹⁵ "Use" connotes control, management or operation: [Brown v Roberts \[1965\] 1 Q.B. 1](#); and has been held to include the owner of a parked vehicle which owing to its condition could only be moved and not driven: [Elliott v Grey \[1960\] 1 Q.B. 367](#); but there is no use if the

vehicle is completely immovable: *Thomas v Hooper [1986] R.T.R. 1*. In *R&S Pilling v UK Insurance Ltd [2019] UKSC 16*, [2019] 2 W.L.R. 1015, the Supreme Court held that the repair of a car, which the owner was driving but due to disrepair could not be lawfully and safely driven, and which the owner wished to effect as soon as possible in order to be able to drive the car lawfully and safely, did not amount to “use” of the car. See also: *Leathley v Tatton [1980] R.T.R. 21*; *B (A Minor) v Knight [1981] R.T.R. 136*; *Stinton v Stinton [1995] R.T.R. 167*; *Hatton v Hall [1997] R.T.R. 212*. In *O'Mahoney v Joliffe [1999] Lloyd's Rep. I.R. 321*, the Court of Appeal held that a pillion passenger on a motorcycle who had agreed on a joint venture to go for a drive was a “user” within the meaning of the 1972 Uninsured Drivers Agreement (see below, para.44-126) and that “user” had the same meaning under the 1988 Act. See *Vnuk v Zavarovalnica Triglav dd (C-162/13) EU:C:2014:2146*, [2015] *Lloyd's Rep. I.R. 142*. In *Sahin v Havard [2016] EWCA Civ 1202*, [2017] 1 W.L.R. 1853 at [20], the Court of Appeal held that permitting the use of a vehicle is not the same as using the vehicle such that the liability of someone who permits another to use a vehicle without an insurance policy is not a liability which is itself required to be insured under s.145 and is not therefore a liability which an insurer is obliged to satisfy under s.151.

- ⑨16 As to the meaning of “vehicle”, see *Advantage Insurance Co Ltd v Stoodley [2018] EWHC 2135 (QB)*, [2019] R.T.R. 7.
- ⑨17 As to the definition of “road”, see s.192(1); *Lister v Romford Ice and Cold Storage Co [1957] A.C. 555*. The House of Lords held that a car park was not a “road”: *Clarke v General Accident Fire and Life Assurance Corp Plc [1998] 1 W.L.R. 1647*. The legislation was amended to extend to “other public place” by the Motor Vehicles (Compulsory Insurance) Regulations 2000 (SI 2000/726). See further *R&S Pilling v UK Insurance Ltd [2019] UKSC 16*, [2019] 2 W.L.R. 1015; *Brown v Fisk [2021] EWHC 2769 (QB)*, [2022] P.I.Q.R. P4.
- ⑨18 See ss.144 and 146 for alternative schemes for deposits and securities and for the classes of persons exempted from the provisions of the Act.
- ⑨19 See *Farrell v Whitty (C-356/05) EU:C:2007:229*, [2007] *Lloyd's Rep. I.R. 525*; *Drozdovs v Baltikums AAS (C-277/12) EU:C:2013:685*, [2014] R.T.R. 14; *Haasová v Petrik (Note) (C-22/12) EU:C:2013:692*, [2014] R.T.R. 15.
- ⑨20 In *Dunthorne v Bentley [1996] R.T.R. 428*, the Court of Appeal held that the plaintiff’s injuries were caused by the defendant who, having run out of petrol had left her car to seek assistance, ran in front of the plaintiff’s car, and that the injuries arose out of the defendant’s use of her vehicle. In *Dodson v Peter H Dodson Insurance Services [2001] 1 W.L.R. 1012*, a motor insurance policy was construed as continuing to provide an indemnity against the driver’s liabilities even though the principal vehicle which had been insured under the policy had been sold. cf. *Slater v Buckinghamshire CC [2004] Lloyd's Rep. I.R. 432*. In *AXN v Worboys [2012] EWHC 1730 (QB)*, [2013] *Lloyd's Rep. I.R. 207* the Court held that the liability of an insured taxi driver who administered poison and carried out sexual assaults

on his passengers did not arise out of the use of a motor vehicle on the road or other public place, because such acts broke the chain of causation.

①921 See ss.157 and 158.

①922 Road Traffic Act 1988 s.145(3)(a).

①923 *Ellis v Hinds [1947] K.B. 475*; see also *Baugh v Crago [1976] 1 Lloyd's Rep. 563*. Nor does it require cover in respect of liability to a person driving the vehicle: *Cooper v MIB [1985] Q.B. 575*.

①924 s.148(7); *Tattersal v Drysdale [1935] 2 K.B. 174*; *Austin v Zurich [1945] 1 K.B. 250, 255*.

①925 Road Traffic Act 1988 s.145(4), as amended by the Motor Vehicles (Compulsory Insurance) Regulations 2007 (SI 2007/1426). As to the boundary between the Employers Liability (Compulsory Insurance) Act 1969 and the Road Traffic Act 1988 s.145(4A), see *AXA Insurance UK Plc v Norwich Union Insurance Ltd [2007] EWHC 1046 (Comm), [2008] Lloyd's Rep. I.R. 122*.

①926 s.147.

①927 s.143(2). The offence is an absolute one: *Baugh v Crago [1976] 1 Lloyd's Rep. 563*.

①928 *Monk v Warbey [1935] 1 K.B. 75*; *Martin v Dean [1971] 2 Q.B. 208*. In *Norman v Aziz [2000] Lloyd's Rep. I.R. 52*, a civil right to damages for breach of s.143(1)(b) of the 1988 Act was held to exist in favour of a victim against the owner of a vehicle who allowed an uninsured driver to use that vehicle; the existence of the Motor Insurers Bureau uninsured drivers agreement (see below, para.44-125) and the relevant EC Directive had no effect on this cause of action. The defendant to a claim for damages for personal injury is not entitled to counterclaim for a breach of this statutory duty for purely economic losses in connection with the defendant's liability to the claimant, as opposed to the defendant's own injuries: *Bretton v Hancock [2005] EWCA Civ 404, [2005] Lloyd's Rep. I.R. 454* at [42]–[50].

①929 Proceedings cannot be pursued against an “unknown” or “unnamed” driver if it is conceptually not possible to serve, and therefore, bring the proceedings to the attention of, the defendant: *Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6, [2019] 1 W.L.R. 1471*.

①930 As to the requirements of the notice to be given, see *Wylie v Wake [2001] P.I.Q.R. P13*.

①931 ss.151–152. With effect from 31 December 1988, an insurer is bound, subject to certain exceptions, to satisfy a judgment obtained even against a person not insured by the policy if it relates to a liability required to be covered: see Road Traffic Act 1988 s.151(2)(b). In

Churchill Insurance Co Ltd v Fitzgerald [2012] EWCA Civ 1166, [2013] *Lloyd's Rep. I.R.* 137 the Court of Appeal considered s.151(8) of the Road Traffic Act 1988, by which the insurer is entitled to recover the amount of the judgment from the assured who caused or permitted the use of the vehicle which gave rise to the liability.

- ①932 s.151(2)(a). In *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267, [2013] *Lloyd's Rep. I.R.* 351 the Court of Appeal held that the third party could not recover from the motor insurer in circumstances where the damage to property to which the third party's claim related arose by reason of the assured's deliberate act, which was expressly excluded from cover under the motor policy. See also *Stych v Dibble* [2012] EWHC 1606 (QB), [2013] *Lloyd's Rep. I.R.* 80; *AXN v Worboys* [2012] EWHC 1730 (QB), [2013] *Lloyd's Rep. I.R.* 207.

- ①933 s.152(1)(c).

- ①934 s.152(2), as amended by the Insurance Act 2015 s.21(4) and the Motor Vehicles (Compulsory Insurance) (Miscellaneous Amendments) Regulations 2019 (SI 2019/1047). In *Colley v Shuker* [2019] EWHC 781 (QB) the Court considered that s.152(2) in its then form was incompatible with EU jurisprudence, in particular EU Directive 2009/103/EC. See *Colley v Shuker* [2020] EWHC 3433 (QB), [2021] 1 W.L.R. 1889.

- ①935 s.148.

- ①936 s.148.

- ①937 s.152. cf. *Matadeen v Caribbean Insurance Co Ltd* [2002] UKPC 69, [2003] 1 W.L.R. 670.

- ①938 s.149.

- ①939 Directives 72/166, 84/5, 88/357, 90/232, 2000/26 and 2005/14.

- ①940 *Criminal Proceedings against Ruiz Bernáldez (C-129/94)* EU:C:1996:143, [1996] All E.R. (EC) 741.

- ①941 SI 2002/3061.

- ①942 In *Carroll v Taylor* [2020] EWHC 153 (QB), [2020] *Lloyd's Rep. I.R.* 216, the claimant suffered injuries 40 minutes after being left by a taxi driver, who had accepted the claimant's passage but had stolen the claimant's debit card and PIN; it was held that the claimant's injuries had not arisen out of the use of the taxi on a road.

- ①943 In *Motor Insurers' Bureau v Lewis* [2019] EWCA Civ 909; [2019] *Lloyd's Rep. I.R.* 390, the Court of Appeal held that the MIB was a direct emanation of the State and that Council

Directive EU Directive 2009/103/EC had direct effect against the MIB. See *Colley v Shuker [2022] EWCA Civ 360, [2022] 1 W.L.R. 2930*.

- 944 Applicants for compensation under these agreements cannot rely on the doctrine of direct effect as against the MIB in the event that there is any shortfall in the cover provided by them (including issues of time limitation) as against the cover required to be legislated by the United Kingdom by the EC Directives, because the MIB is not an emanation of the state: *Byrne v Motor Insurers Bureau [2007] EWHC 1268 (QB), [2007] 3 All E.R. 499 at [48]–[63] affirmed [2008] EWCA Civ 574, [2008] Lloyd's Rep. I.R. Plus 30*; cf. *Evans v Motor Insurers' Bureau [1999] Lloyd's Rep. I.R. 30; Farrell v Whitty (C-356/05) EU:C:2007:229, [2007] Lloyd's Rep. I.R. 525, ECJ*. However, *Francovich* damages might be recoverable from the Secretary of State for any failure to implement the Directive (*Byrne v Motor Insurers Bureau [2007] EWHC 1268 (QB), [2007] 3 All E.R. 499 at [78] affirmed [2008] EWCA Civ 574, [2008] Lloyd's Rep. I.R. 705; Delaney v Secretary of State for Transport [2014] EWHC 1785 (QB), [2014] R.T.R. 25*; cf. *Moore v Secretary of State for Transport [2007] EWHC 879 (QB), [2007] P.I.Q.R. P24*). Further, in *Evans v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 32, [2002] Lloyd's Rep. I.R. 1* at [4], the Court of Appeal indicated that the victim might have the right to enforce the Agreement pursuant to the *Contracts (Rights of Third Parties) Act 1999*. Clause 31(5) of the Untraced Drivers Agreement dated 14 February 2003, confirms that the Agreement is intended to benefit the victim. As to the level of compensation obtainable under the agreements, see *Evans v Secretary of State for the Environment, Transport and the Regions (C-63/01) EU:C:2003:650, [2004] Lloyd's Rep. I.R. 391, ECJ*. As to the relationship between the MIB and the Secretary of State, see *Sharp v Pereira [1999] Lloyd's Rep. I.R. 242*.
- 945 In *Moreno v Motor Insurers' Bureau [2016] UKSC 52, [2017] Lloyd's Rep. I.R. 99* at [39] the Supreme Court held that the *Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003* (SI 2003/37) proceed on the basis that a victim's entitlement to compensation will be measured on a consistent basis, by reference to the law of the state of the accident, whichever of the routes to recovery provided by the Directives he invokes. In so doing, the Court overruled *Jacobs v Motor Insurers' Bureau [2010] EWCA Civ 1208, [2011] 1 All E.R. 844*. See also *Wigley-Foster v Wilson [2016] EWCA Civ 454, [2016] 1 W.L.R. 4769*.
- 946 In *Carswell v Secretary of State for Transport [2010] EWHC 3230 (QB), [2011] Lloyd's Rep. I.R. 644* at [57]–[63]; cf. *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745; Gurtner v Circuit [1968] 2 Q.B. 587; Albert v Motor Insurers' Bureau [1972] A.C. 301; Persson v London Country Buses [1974] 1 W.L.R. 569; Porter v Addo [1978] R.T.R. 503; Phillips v Rafiq [2006] EWHC 1461 (QB) at [12]; affirmed [2007] EWCA Civ 74, [2007] 1 W.L.R. 1351*.
- 947 In *White v White [2001] UKHL 9, [2001] 1 W.L.R. 481*, the House of Lords construed the words "ought to have known" by reference to Directive 84/5 and held that the agreement excused the MIB where the claimant actually knew or deliberately refrained from making inquiries, but not where the claimant's ignorance was occasioned by mere negligence or carelessness. cf. *Delaney v Pickett [2011] EWCA Civ 1532* at [44]–[49], [67], [75]. In *Pickett v Motor Insurers Bureau [2004] EWCA Civ 6, [2004] Lloyd's Rep. I.R. 513*, the Court

of Appeal considered whether the MIB was liable under the 1988 Agreement where the claimant, who was also the owner of, but a passenger in, the vehicle, knew that the vehicle was uninsured. The court held that the claimant had not withdrawn her consent to be carried in the vehicle because she had not unambiguously required the vehicle to be stopped so that she could get out, thus permitting the MIB to rely on an exception to liability. The 1999 Agreement provides that the relevant knowledge is that of the claimant as opposed to the person suffering the relevant injury, whereas the 1988 Agreement applied the relevant exception to the knowledge of the person who suffered the injury. This distinction proved to be critical in *Phillips v Rafiq [2006] EWHC 1461 (QB), [2007] EWCA Civ 74, [2007] 1 W.L.R. 1351*, where the deceased's wife brought the proceedings and was entitled to maintain the claim against the MIB even though her husband was aware that the driver was uninsured. Where the third party claimant is himself an insured, see *Churchill Insurance Co Ltd v Wilkinson [2010] EWCA Civ 556, [2010] Lloyd's Rep. I.R. 591*.

948 See the 1999 Agreement cll.9–5.

949 Where a policy of insurance actually exists, the claimant should notify the insurer within seven days of having commenced proceedings against the driver.

950 *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745; Gardner v Moore [1984] A.C. 548.*

(c) - Reinsurance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 11. - Specific Types of Insurance Contract

(c) - Reinsurance ⁹⁵¹



Replace footnote 948 with: Butler and Merkin's Reinsurance Law (looseleaf); O'Neill and Woloniecki, The Law of Reinsurance in England and Bermuda, 4th edn (2015), MacGillivray on Insurance Law, 15th edn (2022), Ch.33; Edelman and Burns, The Law of Reinsurance, 3rd edn (2021).

General characteristics

44-127

An insurer may take out insurance in respect of the risk covered by the original insurance.⁹⁵² Such a contract of reinsurance is quite separate from the underlying contract of insurance,⁹⁵³ so that there is no privity of contract between the insured and the reinsurer,⁹⁵⁴ though the contract of reinsurance will often provide (by the use of general words such as "all terms, clauses and conditions as original") for the terms and conditions of the underlying insurance to be incorporated into the reinsurance. The fact that the reinsurer and reassured intended the reinsurance cover to be "back-to-back" with the original direct insurance policy will be a persuasive aid to construing the scope of cover afforded by the reinsurance policy,⁹⁵⁵ but it will not be sufficient to override a sufficiently explicit term of the reinsurance contract which alters or restricts the scope of cover compared to that afforded by the original policy.⁹⁵⁶ In the event of an attempt so to incorporate the general terms and conditions of the underlying insurance, difficult questions may arise as to which of the terms are appropriate for incorporation,⁹⁵⁷ and how to construe the terms if the contracts of insurance and reinsurance are governed by the laws of different countries.⁹⁵⁸ The contract of reinsurance will also be governed by the same rules as apply to the underlying insurance, so that, for example, the duty of utmost good faith will apply so as to require the reinsured to disclose all material facts to the reinsurer and to make a fair and substantially accurate presentation of the

risk,⁹⁵⁹ and, if the underlying insurance is a marine policy, the reinsurance contract must itself be embodied in a policy in the form required by the **Marine Insurance Act 1906**.⁹⁶⁰ The restrictions imposed by the **Financial Services and Markets Act 2000** (and the statutory instruments made thereunder) on the carrying on of insurance business apply to reinsurance.⁹⁶¹

Liability of the reinsurer

- 44-128 Subject to contrary stipulation, a reinsurer is only obliged to reimburse the reinsured if the latter was legally liable on the underlying insurance,⁹⁶² so that the reinsurer may take against the reinsured all the defences which were available to the reinsured against the insured.⁹⁶³ If, however, the reinsured's liability has been established by judgment or award, that judgment or award will be evidence of that liability for the purposes of the reinsurance contract. The ascertainment of loss by a judgment or settlement does not automatically establish such actual legal liability or the basis of such liability; it is still open to the reinsurer to challenge that there was an actual legal liability, in which case it is for the reinsured to prove that there was such an actual legal liability.⁹⁶⁴ Because of the impractical restriction which this places on the bona fide settlement of claims by the insured on the underlying policy, it is very common for reinsurance contracts to include a "follow the settlements" clause so as to make strict proof by the reinsured of his legal liability to the insured unnecessary.⁹⁶⁵ The effect of such a clause is to bind the reinsurer to indemnify the reinsured in respect of a settlement made with the insured provided the claim as recognised by the reinsured falls within the risks covered by the reinsurance as a matter of law, and provided also the reinsured has acted honestly and taken all proper and business-like steps in making the settlement.⁹⁶⁶ Moreover, the burden is upon the reinsurer to prove that one or other exception to its obligation to follow the reinsured's settlements is made out.⁹⁶⁷ It seems, however, that the inclusion of a "claims co-operation" clause in the reinsurance contract (providing that the reinsured should co-operate with the reinsurer and not make a settlement without the approval of the reinsurer)⁹⁶⁸ will effectively emasculate a "follow the settlements" clause, since it has been held that, as a matter of construction, the combined effect of the clauses is to require the reinsurer to follow only those settlements which the reinsurer has himself approved.⁹⁶⁹ In *Hill v Mercantile & General Reinsurance Co Plc*,⁹⁷⁰ a "follow settlements" clause which provided for all loss settlements by the reinsured to be binding on its reinsurers:

"... providing such settlements are within the terms and conditions of the original policies and/or contracts ... and within the terms and conditions of this reinsurance"

was held by the House of Lords to contemplate a distinction between the facts generating a particular claim, and the legal extent of the respective covers. Although the reinsurers could be bound by the reassured's honest conclusions as to the former, it would not be bound by its

determination of the latter, since this would enable the reinsured to bind its reinsurers to a definition of cover different from that which they had contracted to accept. It should be noted that the *Third Parties (Rights against Insurers) Act 1930* and the *Third Parties (Rights against Insurers) Act 2010* do not apply to reinsurance contracts.⁹⁷¹

Footnotes

- 951 Butler and Merkin's *Reinsurance Law* (looseleaf); O'Neill and Woloniecki, *The Law of Reinsurance in England and Bermuda*, 4th edn (2015), MacGillivray on *Insurance Law*, 14th edn (2018), Ch.35; Edelman and Burns, *The Law of Reinsurance*, 2nd edn (2013).
- 952 *Mackenzie v Whitworth* (1875) 45 *L.J. Q.B.* 233; *Phoenix General Insurance Co v Halvanon Insurance Co* [1985] 2 *Lloyd's Rep.* 599, 607, [1986] 2 *Lloyd's Rep.* 552, 563. See, *Toomey v Eagle Star* [1993] 1 *Lloyd's Rep.* 429, emphasising that reinsurance is the insurance of an insurable interest in the subject matter of the original insurance, and not inherently a form of liability insurance. The reinsurer may himself reinsure, the reinsurance of a contract of reinsurance being commonly, though not universally, known as a retrocession: see *Commonwealth Insurance Co of Vancouver v Sprinks* [1983] 1 *Lloyd's Rep.* 67, 87–88.
- 953 *Re Law Guarantee Trust and Accident Society* [1914] 2 *Ch.* 617, 647–648; *English Insurance Co v National Benefit Assurance Co* [1929] *A.C.* 114, 124; *Phoenix General Insurance Co v Halvanon Insurance Co* [1985] 2 *Lloyd's Rep.* 599, 614.
- 954 *British Dominions General Insurance Co Ltd v Duder* [1915] 2 *K.B.* 394. See also *Excess Insurance Co Ltd v Mander* [1997] 2 *Lloyd's Rep.* 119; See also *The Federal Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd* [2014] *EWHC* 2002 (Comm), [2014] *Lloyd's Rep. I.R.* 671; *Marine Insurance Act 1906* s.9(2).
- 955 *Groupama Navigation et Transports v Catatumbo CA Seguros* [2000] 2 *Lloyd's Rep.* 350; *WASA International Insurance Co Ltd v Lexington Insurance Co* [2008] *EWCA Civ* 150, [2008] *Lloyd's Rep. I.R.* 510, [2009] *UKHL* 40, [2009] 3 *W.L.R.* 575.
- 956 *GE Reinsurance v New Hampshire* [2003] *EWHC* 302 (Comm), [2004] 1 *Lloyd's Rep. I.R.* 404. See also *Metlife Insurance Ltd v RGA Reinsurance Company of Australia Ltd* [2016] *NSWSC* 980, [2017] *Lloyd's Rep. I.R.* 160 at [57] (NSWSC).
- 957 See, e.g. *Pine Top Insurance Co Ltd v Unione Italiana Anglo-Saxon Reinsurance Co Ltd* [1987] 1 *Lloyd's Rep.* 476; and *Trygg Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 *Lloyd's Rep.* 439 (with respect to *Arbitration Act 1996* s.6) where an arbitration clause in the contract of insurance was held not to be incorporated into the reinsurance. See also *AIG Group (UK) Ltd v Ethniki* [1998] 4 *All E.R.* 301 (jurisdiction clause); *American International Marine Agency of New York Inc v Dandridge* [2005] *EWHC* 829 (Comm), [2005] *Lloyd's Rep. I.R.* 643 (“follow the leader” clause). The principles governing the incorporation into the reinsurance contract of provisions found in the original insurance contract were helpfully explained in *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] *EWCA Civ* 735, [2001] 2 *All E.R. (Comm)* 39. For a case where the terms of the underlying insurance are summarised in the reinsurance contract itself, see *Toomey v Banco*

- Vitalcio De Espana SA de Seguros y Reasseguros [2004] EWCA Civ 622, [2005] Lloyd's Rep. I.R. 423.*
- 958 See, e.g. *Forsikringsaktieselskapet Vesta v Butcher [1989] A.C. 852*, holding in the context of a back to back reinsurance, that the provision there incorporated into a reinsurance governed by English law should, in the absence of any express provision to the contrary, be regarded as having the same effect as it did in the underlying insurance from which it was incorporated, notwithstanding that the latter was governed by Norwegian law. See recently *Amlin Corporate Member Ltd v Oriental Assurance Corp [2012] EWHC 540 (Comm), affirmed [2012] EWCA Civ 1341, [2013] Lloyd's Rep. I.R. 131*.
- 959 See, e.g. *CTI v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 1 Lloyd's Rep. 476; Highlands Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep. 109; Mander v Commercial Union Assurance Co Plc [1998] Lloyd's Rep. I.R. 93*.
- 960 *Imperial Marine v Fire Insurance Corp (1879) 4 C.P.D. 166*.
- 961 *DR Insurance Co v Seguros America Banamex [1993] 1 Lloyd's Rep. 120. Re NRG Victory Reinsurance Ltd [1995] All E.R. 533* (holding, also, that retrocessions are “insurance” business for the purposes of the Insurance Companies Act 1982). See also *New Hampshire Insurance Co v Grand Union Insurance Co Ltd [1996] L.R.L.R. 102*.
- 962 *Assicurazioni Generali SpA v CGU International Insurance Plc [2003] EWHC 1073 (Comm), [2003] Lloyd's Rep. I.R. 725, [2004] EWCA Civ 429, [2004] 2 Lloyd's Rep. I.R. 457*. The reinsurance contract, however, may not be an insurance of the reinsured’s liability; the subject matter of the reinsurance contract may be the same as the insurance contract: *Toomey v Eagle Star Insurance Co Ltd [1994] 1 Lloyd's Rep. 516, 522–524; Charter Reinsurance Co Ltd v Fagan [1997] A.C. 313, 387, 392; Marine Insurance Act 1906 s.9(1); cf. Commercial Union Assurance Co Plc v NRG Victory Reinsurance Ltd [1998] 2 All E.R. 434, 448; Travellers Casualty & Surety Co of Europe Ltd v Commissioners of Customs and Excise [2006] Lloyd's Rep. I.R. 63 (VAT Tribunal)*. See the discussion in O’Neill and Woloniecki, *The Law of Reinsurance in England and Bermuda*, 4th edn (2015), Ch.1. In an excess of loss reinsurance, the contract may provide for reimbursement of losses in excess of an ultimate net loss which is to be determined by reference to the sum actually paid in settlement of losses. In *Charter Reinsurance Co Ltd v Fagan [1997] A.C. 313*, however, it was held that, on a proper construction of the policies before the court, this did not mean that payment of the relevant losses by the reassured was a condition precedent to the liability of the reinsurer to reimburse him. Liability under the reinsurance contract is dependent on the establishment of the insurer’s liability and not payment by the insurer: *Re Eddystone Marine Insurance Co [1892] 2 Ch. 423*.
- 963 *Chipendale v Holt (1895) 65 L.J. Q.B. 104*.
- 964 *Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd [2013] EWHC 349 (Comm), [2013] Lloyd's Rep. I.R. 290 at [39], [96]; affirmed [2013] EWCA Civ 1660, [2014] Lloyd's Rep. I.R. 509*. It has been suggested that there is an implied term that if the judgment is of a foreign court of competent jurisdiction, the court will treat that as decisive, unless the judgment was manifestly perverse or was obtained in breach of a jurisdiction clause or if the reinsured had failed to take proper defences: *Commercial Union Assurance Co Plc v NRG Victory Reinsurance Ltd [1998] 2 All E.R. 434*. In *Astrazeneca Insurance Co Ltd v*

XL Insurance (Bermuda) Ltd [2013] EWHC 349 (Comm), [2013] Lloyd's Rep. I.R. 290 at [62]–[65] Flaux J did not follow this obiter suggestion. The Court of Appeal affirmed this decision: *[2013] EWCA Civ 1660, [2014] Lloyd's Rep. I.R. 509.*

- 965 See, e.g. *Excess Liability Insurance Co Ltd v Mathews* (1925) 31 Com. Cas. 43.
- 966 *Insurance Co of Africa v SCOR (UK) Reinsurance Ltd* [1985] 1 Lloyd's Rep. 312. However, the clause will not bind the reinsurer where the settlement involves the reassured waiving or failing to consider a policy defence: *Assicurazioni Generali SpA v CGU International Insurance Plc* [2003] EWHC 1073 (Comm), [2003] Lloyd's Rep. I.R. 725; affirmed [2004] EWCA Civ 429, [2004] 2 Lloyd's Rep. I.R. 457. The clause does not bind the reinsurer to judgments: *Amlin Corporate Member Ltd v Oriental Assurance Corp* [2012] EWHC 540 (Comm), affirmed [2012] EWCA Civ 1341, [2013] Lloyd's Rep. I.R. 131. For the scope of the first proviso (that the claim falls within the risks covered by the reinsurance), and its impact upon the second proviso, in a situation where the reinsurance is subject to the same terms and conditions as the underlying insurance, cf. *Insurance Co of the State of Pennsylvania v Grand Union Insurance Co* [1990] 1 Lloyd's Rep. 208; and *Hiscox v Outhwaite (No.3)* [1991] 2 Lloyd's Rep. 524. The clause does not require the reinsurer to indemnify the reinsured in respect of his costs of investigating, settling and defending claims under the underlying insurance nor will a term be implied to such effect: *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 2 All E.R. 833. As to the reinsurer's right of inspection of the reinsured's records of his settlement of the underlying claim, see *Pacific & General Insurance Co Ltd (In Liquidation) v Baltica Insurance Co (UK) Ltd* [1996] L.R.L.R. 8; *Commercial Union Assurance Co v Mander* [1996] 2 Lloyd's Rep. 640. See also *Aegis Electrical and Gas International Services Ltd v Continental Casualty Co* [2007] EWHC 1762 (Comm), [2008] Lloyd's Rep. I.R. 17. For twin decisions concerning the application of different aspects of the follow settlements clause, see *Tokio Marine Europe Insurance Ltd v Novae Corporate Underwriting Ltd* [2013] EWHC 3362 (Comm), [2014] Lloyd's Rep. I.R. 490 and [2014] EWHC 2105 (Comm), [2014] Lloyd's Rep. I.R. 638.
- 967 *Insurance Co of the State of Pennsylvania v Grand Union Insurance Co* [1990] 1 Lloyd's Rep. 208; *Charman v Guardian Royal Exchange Assurance Plc* [1992] 2 Lloyd's Rep. 607.
- 968 On the construction of this provision, see *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] Lloyd's Rep. I.R. 291, [2001] EWCA Civ 1042, [2002] Lloyd's Rep. I.R. 612; *Beazley Underwriting Ltd v Al Ahlia Insurance Co* [2013] EWHC 677 (Comm), [2013] Lloyd's Rep. I.R. 561.
- 969 *Insurance Co of Africa v SCOR (UK) Reinsurance Ltd* [1985] 1 Lloyd's Rep. 312.
- 970 [1996] 1 W.L.R. 1239.
- 971 1930 Act s.1(5); 2010 Act s.15.

(d) - Insurance Against Financial Loss

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 11. - Specific Types of Insurance Contract

(d) - Insurance Against Financial Loss ⁹⁷²



Replace footnote 969 with: See MacGillivray on Insurance Law, 15th edn (2022), Ch.31.

Types of financial loss insurance

- 44-129 The essential characteristic of an insurance against financial loss is that it indemnifies the assured against his economic loss. Economic loss may take the form of a loss of anticipated profits,⁹⁷³ the incurring of an expense or additional expense,⁹⁷⁴ the loss of an advance,⁹⁷⁵ the loss of a source of revenue⁹⁷⁶ or the waste of an expense. Such insurance contracts are often referred to as “consequential loss” policies. Tailored policies have been developed to protect the assured against specific types of loss caused by specific perils and include guarantee (or credit) insurance, fidelity insurance, business interruption insurance,⁹⁷⁷ and insurance guaranteeing the assured’s warranty of performance. Insurance policies against financial loss often afford an indemnity only if the loss itself arises by reason of damage to property⁹⁷⁸; in some cases, the assured must have an interest in the property.⁹⁷⁹ If consequential loss alone is to be insured, and there is no reason in principle why such losses cannot be insured, the draftsmen of the policy should be assiduous in making their intention clear.

Guarantee insurance

- 44-130 Guarantee insurance, whereby the assured is indemnified against loss caused by the non-payment of a debt, closely resembles guarantee by way of surety. A fine distinction is drawn between

them,⁹⁸⁰ but in practice the distinction is probably negligible.⁹⁸¹ Fidelity policies, whereby the assured is indemnified against breaches of his contract of employment by an employee, are also regarded as guarantee policies.⁹⁸²

Footnotes

- 972 See MacGillivray on Insurance Law, 14th edn (2018), Ch.33.
- 973 *Maurice v Goldsborough, Mort & Co [1939] A.C. 452.*
- 974 *Henry Booth v Commercial Union Assurance Co (1923) 14 Ll.L. Rep. 114;* cf. *Polikoff v North British and Mercantile Insurance Co Ltd (1936) 55 Ll.L. Rep. 279.*
- 975 e.g. a mortgagee indemnity policy: *Svenska Handelsbanken v Sun Alliance and London Insurance Plc [1996] 1 Lloyd's Rep. 519.*
- 976 *Farmers Co-operative Ltd v National Benefit Assurance Co Ltd (1922) 13 Ll.L. Rep. 530;* *Agra Trading Ltd v McAuslin (The Frio Chile) [1995] 1 Lloyd's Rep. 182.*
- 977 See *The Financial Conduct Authority v Arch Insurance (UK) Ltd [2020] EWHC 2448 (Comm), [2020] Lloyd's Rep. I.R. 527; [2021] UKSC 1, [2021] Lloyd's Rep. I.R. 63.*
- 978 *Agra Trading Ltd v McAuslin (The Frio Chile) [1995] 1 Lloyd's Rep. 182;* cf. *Pilkington United Kingdom Ltd v CGU Insurance Plc [2004] EWCA Civ 23, [2004] Lloyd's Rep. I.R. 891.*
- 979 *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd [1996] 2 All E.R. 487.*
- 980 *Trade Indemnity Co v Workington Harbour Board [1937] A.C. 1;* *Seaton v Heath [1899] 1 Q.B. 782;* reversed on other grounds *[1900] A.C. 135;* *Re Denton's Estate [1904] 2 Ch. 178.* See also below, Ch.47.
- 981 Except for the purposes of the Financial Services and Markets Act 2000, the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) and associated statutory instruments made under the 2000 Act; see above, para.44-064. See also *Travellers Casualty & Surety Co of Europe Ltd v Commissioners of Customs and Excise [2006] Lloyd's Rep. I.R. 63 (VAT Tribunal).*
- 982 The term “Guarantee Insurance” has also been used to describe a policy covering the assured’s liability under a guarantee: *Global Tankers Inc v Amercoat Europa NV [1977] 1 Lloyd's Rep. 61.*

(e) - Fire Insurance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 11. - Specific Types of Insurance Contract

(e) - Fire Insurance ⁹⁸³



Replace footnote 980 with: See MacGillivray on Insurance Law, 15th edn (2022), Ch.26.

Special features

44-131

Insurance against fire is governed by the general principles of insurance, but presents certain recurrent problems, in particular that of causation, in that fire may be accompanied by explosion or pilfering, which may be the cause or effect of the fire and may themselves be excepted perils. The law is complex and in some respects archaic, and the reader is referred to the specialised works of reference for guidance.

⁹⁸⁴

Where premises are damaged by fire, reinstatement may be specifically required by statute. In certain circumstances the insurer may be obliged, by virtue of the *Fires Prevention (Metropolis) Act 1774*,⁹⁸⁵ to apply the insurance moneys to the restoration of the damaged premises. Unlike the case of reinstatement under the contract of insurance,⁹⁸⁶ the insurer may limit his expenditure to the sum insured.

Footnotes

983 See MacGillivray on Insurance Law, 14th edn (2018), Ch.28 .

984

See MacGillivray on Insurance Law, 15th edn (2022), Ch.26.

985 s.83.

986 See above, para.44-111.

End of Document

© 2022 SWEET & MAXWELL

(f) - Life Insurance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 11. - Specific Types of Insurance Contract

(f) - Life Insurance ⁹⁸⁷



Replace footnote 984 with: See MacGillivray on Insurance Law, 15th edn (2022), Ch.24.

Life insurance

- 44-132 Everyone has an insurable interest in his own life, and may under certain circumstances acquire an insurable interest in the life of another.⁹⁸⁸ Suicide of the assured was formerly an exception to the risk under a life policy even where the contract was expressed to extend to suicide.⁹⁸⁹ Since the abolition of the crime of suicide⁹⁹⁰ the rule no longer applies; however, in certain circumstances suicide may still be a bar to recovery under a life policy.⁹⁹¹ Since the insurer is bound to pay the sum insured at some date, apart from the operation of excepted perils, life policies are frequently treated as securities.⁹⁹² The assignment of life policies is therefore a matter of some importance, and most of the cases relating to the assignment of insurance contracts have been decided in this field. The principles of assignment in the context of insurance have been discussed above.⁹⁹³ In the case of life assurance, the assured also has power to nominate as beneficiary, the spouse, civil partner or children of the assured, pursuant to [s.66 of the Friendly Societies Act 1974](#) or [s.11 of the Married Women's Property Act 1882](#), thus creating a direct right of enforcement against the insurer, by virtue of a trust.⁹⁹⁴

Footnotes

⁹⁸⁷ See MacGillivray on Insurance Law, 14th edn (2018), Ch.26.

- 988 See above, para.44-008.
- 989 *Beresford v Royal [1938] A.C. 586.*
- 990 Suicide Act 1961.
- 991 See above, para.44-023. cf. *Dunbar v Plant [1997] 4 All E.R. 289* (beneficiary aided and abetted the assured's suicide).
- 992 cf. *Fuji Finance Inc v Aetna Life Insurance Co Ltd [1997] Ch. 173.*
- 993 See above, paras 44-089—44-091.
- 994 See *Rooney v Cardona, The Times, 4 March 1999*. As to civil partners, see Civil Partnership Act 2004 ss.70, 253, 261(1) and Sch.27 para.52.

(g) - Marine Insurance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 44 - Insurance

Section 11. - Specific Types of Insurance Contract

(g) - Marine Insurance

Marine Insurance Act 1906

44-133

- Marine insurance is governed by the [Marine Insurance Act 1906](#), the general provisions of which differ in certain respects from the general law applicable to all other forms of insurance contracts. The [1906 Act](#) applies to contracts of marine insurance, which are defined as contracts under which the insurer undertakes to indemnify the assured against “marine losses”.⁹⁹⁵ Accordingly, a contingency policy cannot be a marine policy for these purposes. Marine losses are property losses, financial losses or liabilities, which occur incidentally to a “marine adventure”, namely those situations where insurable property (especially, a ship, offshore rigs or platforms, or cargo) is exposed to maritime perils.⁹⁹⁶ As noted in this chapter, although there are many similarities between the law governing marine insurance and non-marine insurance, there are important differences. The reader should consult the standard works on the subject.

⁹⁹⁷



Footnotes

995 Marine Insurance Act 1906 s.1.

996 Marine Insurance Act 1906 s.3.

997

Arnould's Law of Marine Insurance and Average, 20th edn (2021); Chalmers' Marine Insurance Act 1906, 11th edn (2019); Rose, Marine Insurance: Law and Practice, 2nd edn (2012); Bennett, The Law of Marine Insurance, 2nd edn (2006).

End of Document

© 2022 SWEET & MAXWELL

Section 1. - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 1. - Introduction

M. O'Regan

Scope and plan of the chapter

- 45-001 The way in which the common law treats agreements in restraint of trade is dealt with in Vol.I of this work.¹ The present chapter considers the ways in which agreements may be affected by the competition law applicable in the United Kingdom, primarily under the [Competition Act 1998](#). It also considers the corresponding provisions of European Union (EU) competition law that were applicable in the UK before its withdrawal from the EU on 31 January 2020, continued to be applicable thereafter on a transitional basis until 31 December 2020, and continue to be relevant in interpreting and applying the [Competition Act 1998](#). The chapter first describes the competition law implications of the UK's withdrawal from the EU and the relationship between UK and EU competition law, both before and after Brexit, including under Council Regulation 1/2003, which significantly changed the way in which the EU competition rules were enforced by the European Commission (Commission) and by national courts and competition authorities, such as, in the UK, the Competition and Markets Authority (CMA). The competition rules of the EU themselves are described in section 2 of this chapter, and the domestic system of law contained in the [Competition Act 1998](#) is explained in section 3. Brief mention will also be made in [section 3 of the Enterprise Act 2002](#), as amended by the [Enterprise and Regulatory Reform Act 2013](#), which provides for the possibility of "market investigations" by the CMA and for criminal sanctions, including imprisonment, to be imposed upon individuals responsible for cartel activity.

Implications of the United Kingdom's withdrawal from the European Union ("Brexit")

45-002

The legal implications of the United Kingdom's withdrawal from the EU ("Brexit") are dealt with in Vol.I of this work.

2

U As described there, the United Kingdom left the EU at 11.00pm on 31 January 2020,
3

U although under the terms of the Withdrawal Agreement concluded between the UK and the EU, EU law continued to apply in the UK until the end of a transition period (referred to in the European Union (Withdrawal) Act 2018 as an "implementation period"
4

U) that expired at 11.00pm on 31 December 2020 (referred to in domestic legislation as "IP completion day").
5

U Therefore, until 31 December 2020, EU competition law, including arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)
6

U and Regulation 1/2003, continued to be applicable in and to the UK, and was to be interpreted and applied, as if the UK were still an EU member
7

U ; and s.60 of the Competition Act 1998 (which required that the provisions of that Act "be dealt with in a manner that is consistent" with EU competition law
8

U) remained in force. It therefore follows that, until the expiry of the implementation period, arts 101 and 102 formed part of English law.
9

U

- 45-003 On 24 December 2020 the UK and the EU concluded an agreement, the Trade and Cooperation Agreement (TCA), to govern their future relationship, including on matters relating to trade and investment.¹⁰ The TCA was given effect in UK law by the European Union (Future Relationship) Act 2020.¹¹ It was provisionally applied by the EU from 1 January 2021,¹² pending conclusion of an authentic and definitive text of the agreement in all EU official languages, the consent of the European Parliament (which was given on 27 April 2021) and the approval of the European Council (which was given on 29 April 2021¹³), and it entered into force on 1 May 2021. Under the TCA, each party is required to maintain a competition law that effectively addresses anti-competitive agreements between economic actors, decisions by associations of economic actors

and concerted practices, and the abuse by one or more economic actors of a dominant position.¹⁴ Each party is also required to take appropriate measures to enforce its competition law in its territory and to maintain an operationally independent competition authority.¹⁵ At IP completion day (31 December 2020), a statutory instrument, the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#),¹⁶ came into effect to amend the [Competition Act 1998](#), the [Enterprise Act 2002](#), certain other primary and secondary legislation, and certain retained EU law,¹⁷ to reflect the changes in national law as a result of Brexit. This chapter sets out the position following “IP completion day” under these Regulations.

45-004 Articles 101 and 102 (and arts 53 and 54 of the EEA Agreement

18

U) ceased to have effect in the UK with effect from 31 December 2020.

19

U At this point, Regulation 1/2003 was revoked in the UK

20

U; the CMA (and other regulators

21

U) and national courts ceased to have jurisdiction to apply arts 101 and 102

22

U; and [s.60](#) was repealed

23

U and replaced by a new [s.60A](#) that applies to national courts, the CMA and regulatory authorities when applying the [Competition Act 1998](#).

24

U EU block exemption regulations continued to apply under [s.10](#) of the [Competition Act 1998](#), as “retained exemptions” until their expiry,

25

U with various modifications consequential on Brexit.

26

U All Commission decisions adopted before 31 December 2020 and addressed to the UK or to natural and legal persons residing or established in the UK remain binding,

27

U are enforceable by the Commission

28

U and are subject to review by the EU courts, following an application for annulment made under art 263 TFEU.

29

U The Commission also remains competent in respect of any administrative procedures initiated by it under Regulation 1/2003 before 31 December 2020 into suspected infringements of arts 101 and/or 102 concerning natural or legal persons residing or established in the UK or compliance with EU competition law in the UK

30

U; any final decision adopted by the Commission in any proceedings initiated before this date is binding on and in the UK,

31

U enforceable by the Commission

32

U and reviewable exclusively by the EU courts, following an application for annulment made under art 263 TFEU.

33

U The Commission, similarly, remained competent to review mergers notified to it under the EU Merger Regulation before 31 December 2020.

34

U

- 45-005 Although arts 101 and 102 ceased to apply in the UK from 31 December 2020, all existing rights, powers, liabilities, obligations, restrictions, remedies and procedures under them as at that date continue to apply as provisions of domestic law.³⁵ Accordingly, agreements entered into before that date that infringe art.101(1) and are not exempt under a block exemption regulation or art.101(3) are void and unenforceable (under art.101(2))³⁶ and affected parties remain entitled to damages for losses caused by an infringement of arts 101 and/or 102,³⁷ including in respect of infringements found by a Commission decision adopted before that day or after it in accordance with arts 92 and 95 of the Withdrawal Agreement 2020. Accordingly, claims (or a defence to a claim) before a court or tribunal relating to pre-IP completion day infringements of arts 101 and/or 102 (or of arts 53 and/or 54 of the EEA Agreement) may continue or be brought after 31 December 2020.³⁸ In *Allianz Global Investors GmbH v Barclays Bank Plc*, the High Court confirmed that a claimant may, after that date, bring an action for damages suffered by an infringement of art.101(1) committed before that date.³⁹

Council Regulation 1/2003

- 45-006 The way in which arts 101 and 102 TFEU are applied in practice was fundamentally changed as a result of the application of Regulation 1/2003 from 1 May 2004.⁴⁰ Since 1962, the Commission had been the principal institution charged with the enforcement of the competition provisions of the TFEU as a result of powers conferred upon it by Council Regulation 17/62.⁴¹ That Regulation provided for the notification of agreements to the Commission, which had exclusive competence to grant an “individual exemption” under art.101(3) to an agreement that infringed art.101(1). However, it became increasingly clear that a centralised system of enforcement was no longer appropriate for the effective application of the competition rules, especially with the enlargement of the EU to 25 Member States on 1 May 2004 (and subsequently to 27 on 1 January 2007 and to 28 on 1 July 2013). Regulation 1/2003 introduced significant changes to the enforcement of arts 101 and 102. The system of notification of agreements for individual exemption was abolished and in its place art.101, in its entirety, and art.102 are directly applicable without prior decision of the Commission. The Commission shares the competence to apply arts 101 and 102 with national competition authorities and national courts.⁴²

Relationship between the EU competition rules and the provisions of UK competition law

- 45-007 One of the main principles behind the reforms leading to the enactment of the [Competition Act 1998](#) in the UK was the desire to harmonise domestic law with the EU competition rules in order to reduce the costs incurred by the business community in complying with the previous domestic regime, which was formulated in very different terms from arts 101 and 102. Many agreements which fall within art.101 TFEU may also infringe the [Ch.I](#) prohibition in the [Competition Act 1998](#); similarly conduct which is unlawful under art.102 TFEU may also infringe the [Ch.II](#) prohibition.⁴³ There may, however, have been, whilst the UK was an EU Member State, a small number of cases where, notwithstanding the modelling of the [Ch.I](#) and [II](#) prohibitions upon arts 101 and 102, different outcomes would have been achieved under the EU and the domestic rules.
- 45-008 With effect from 1 May 2004, art.3 of Regulation 1/2003 determined the relationship between the EU competition rules and the provisions of domestic competition law. Where the UK national competition authorities and courts applied national competition law to agreements and conduct that may have affected trade between Member States, they were also required to apply arts 101 and 102.⁴⁴ If an agreement that affected trade between Member States but did not fall within the scope of art.101(1) or satisfied the conditions for exemption, whether in a block exemption regulation or

under art.101(3), it was not possible for the UK authority or court to apply stricter provisions of domestic competition law to it.⁴⁵ However, where conduct affected trade between Member States but did not infringe art.102, national competition authorities and courts were not precluded from imposing stricter national competition laws or sanctions on such conduct.⁴⁶ It was also possible for a Member State to apply stricter national rules, both in relation to agreements and to conduct, where those rules predominantly pursued an objective different from that pursued by arts 101 and 102 TFEU.⁴⁷

45-009 Articles 101 and 102 TFEU ceased to have effect in the UK from 31 December 2020, but remain applicable to agreements and conduct until that date,⁴⁸ and Regulation 1/2003 was revoked on this date.⁴⁹ The extent to which the provisions of the [Competition Act 1998](#) must be interpreted consistently with EU law (both before and after the expiry on 31 December 2020 of the transitional period under the Withdrawal Agreement 2020) is considered below at paras [45-145](#)—[45-151](#).

Footnotes

- 1** Vol.I, paras [18-123](#) et seq. In *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd [2004] EWHC 44 (Comm)* at [263]–[266] the High Court held that, by virtue of art.3(2) of Regulation 1/2003 (see below, para. [45-008](#)), the common law doctrine of restraint of trade could not be applied to prohibit an exclusive distribution agreement that it considered was in unreasonable restraint of trade but was lawful under art.101(1) TFEU, it having neither the object nor the effect of restricting competition. In reaching this conclusion, the court held (at [265]) that the doctrine did not predominantly pursue an objective different from arts 101 and 102 TFEU, such that it was, for the purposes of art.3(2) of Regulation 1/2003, “national competition law”. Arts 101 and 102 TFEU ceased to apply, and Regulation 1/2003 was revoked, in the United Kingdom with effect from 31 December 2020 (see below, para. [45-009](#)); therefore, from this date, the principle laid down in *Days Medical v Pihsiang* no longer has any application. The Ch.I prohibition in the [Competition Act 1998](#) (see below, paras [45-152](#) et seq.) was not considered by the court, but as the only reason why the doctrine did not apply to the agreement was the prohibition in art.3(2) of Regulation 1/2003, before 31 December 2020 the doctrine could be applied to an agreement to which art.101(1) did not apply (because it did not have an effect on trade between Member States: see below, para. [45-043](#)) but was lawful under the Ch.I prohibition (because it did not have the object or effect of restricting competition: see below, paras [45-162](#)—[45-166](#)), or it benefitted from an individual exemption under [s.9 of the Competition Act 1998](#) (see below, paras [45-195](#)—[45-196](#)), a block exemption under [s.6](#) (see below, para. [45-198](#)) or a parallel exemption under [s.10](#) (see below, paras [45-199](#)—[45-200](#)).
- 2** Vol.I, paras [1-016](#)—[1-030](#).

- ③ Vol.I, paras 1-016—1-019.
- ④ European Union (Withdrawal) Act 2018 s.1A(6), as inserted by the European Union (Withdrawal Agreement) Act 2020 s.1. See Vol.I, paras 1-018—1-019.
- ⑤ European Union (Withdrawal) Act 2018 ss.1A and 1B. See Vol.I, paras 1-018—1-019. For simplicity, “IP completion day” will be referred to in this chapter as “31 December 2020”, unless the context requires otherwise.
- ⑥ Treaty on the Functioning of the European Union, consolidated version [2016] O.J. C202/47. Arts 101 and 102 TFEU were previously arts 85 and 86 of the European Economic Community Treaty (“EEC”) and subsequently arts 81 and 82 of the European Community Treaty (“EC”). Much of the relevant case law and literature, of course, refers to the articles by their former numbers; however, the text of the chapter will refer to the numbering of treaty articles under the TFEU.
- ⑦ 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 2020”), arts 126 (Transition period) and 127 (Scope of the transition).
- ⑧ See below, paras 45-145—45-147.
- ⑨ *JJH Enterprises Ltd v Microsoft Corp [2022] EWHC 929 (Comm)* at [44] and [77].
- 10 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, and the United Kingdom of Great Britain and Northern Ireland (24 December 2020) [2021] O.J. L149/10. The authentic and definitive text was agreed on 21 April 2021 and replaced ab initio the signed version of the TCA published on 31 December 2020 ([2020] O.J. L444/14). See generally, Vol.I, para.1-030.
- 11 European Union (Future Relationship) Act 2020 s.29. See generally, Vol.I, para.1-030.
- 12 Council Decision (EU) 2020/2252 art.12(1) [2020] O.J. L 444/2.
- 13 Council Decision (EU) 2021/689 [2021] O.J. L149/2.
- 14 TCA art.359(1). The concept of an “economic actor” is defined as an entity, regardless of its legal status, that is engaged in an economic activity by offering goods or services on a market: art.358(2). This is essentially the same concept as that of an “undertaking” applied in both EU competition law (see below, paras 45-022—45-026) and UK competition law (see below, paras 45-157—45-159).
- 15 TCA art.360. In the case of the EU, this authority is the Commission, whilst in the case of the UK, this authority is the CMA, as well as the sectoral regulators with concurrent powers to apply the Competition Act 1998 (see below, para.45-139).
- 16 SI 2019/93. These Regulations were themselves amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1343).

- 17 On “retained” EU law, see Vol.I, paras 1-020—1-028.
- ①18 See below, para.45-019.
- ①19 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.62. Accordingly, arts 101, 102 and 106(1) and (2) TFEU (and arts 53, 54 and 57 of the EEA Agreement) ceased to apply in the UK from this date. See below, para.45-005.
- ①20 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.63(a) and Sch.3 para.1(f). See below, para.45-005.
- ①21 See below, para.45-139.
- ①22 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) regs. 62 and 64 and Sch.4 paras 4–6. See below, paras 45-115, 45-117 and 45-132. The CMA (and other regulators) and national courts will continue to apply equivalent provisions of the [Competition Act 1998](#), i.e. the Ch.I and Ch.II prohibitions, which are considered below: see below, paras 45-153 et seq. (in relation to the Ch.I prohibition) and 45-201 et seq. (in relation to the Ch.II prohibition).
- ①23 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.22. See below, paras 45-145—45-147.
- ①24 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.23. See below, paras 45-148—45-151.
- ①25 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.3(5). See below, paras 45-199—45-200.
- ①26 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.63, Sch.3 Pt 2 paras 3–10.
- ①27 Withdrawal Agreement 2020 art.95(1).
- ①28 Withdrawal Agreement 2020 art.95(2). The Commission may monitor and enforce commitments given or remedies imposed by it in any proceedings for the application of arts 101 and 102 TFEU. The Commission may, with the agreement of the CMA, by decision transfer monitoring and enforcement of such commitments or remedies in the UK to the CMA, whose powers of monitoring and enforcement in national law are set out in the [Competition Act 1998 ss.40ZA–40ZD](#) (inserted by [SI 2019/93 reg.13A](#)). As at 31 July 2021 no such transfer had taken place. Financial penalties imposed by the Commission on natural and legal persons residing or established in the UK may be enforced in the UK courts, pursuant to art.299 TFEU: Withdrawal Agreement 2020 art.95(4).

- ②9 Withdrawal Agreement 2020 art.95(3).
- ③0 Withdrawal Agreement 2020 art.92(1) and (2)(b). The Commission has published guidance on how these provisions will be applied: Commission Notice to Stakeholders, Withdrawal of the United Kingdom and EU rules in the field of Competition REV1 (2 December 2020) (Commission Notice to Stakeholders). The CMA may not open or re-open any investigation into the competition concerns with which the Commission's investigation is concerned, although it may do so in relation to competition concerns relating to effects on and after 31 December 2020: the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.64 and [Sch.4 para.8A](#). The CMA has also published guidance on investigations by it and the Commission after 31 December 2021: CMA, Guidance on the functions of the CMA after the end of the Transition Period (CMA125, 1 December 2020), section 4.
- ③1 Withdrawal Agreement 2020 art.95(1).
- ③2 Withdrawal Agreement 2020 art.95(2).
- ③3 Withdrawal Agreement 2020 art.95(3).
- ③4 Withdrawal Agreement 2020 art.92(1) and (2)(c). Any final decision adopted before this date, or adopted after that date in proceedings opened before that date, in such proceedings shall be binding on and in the UK (art.95(1)) and the Commission may enforce any commitments given to it in such proceedings (art.95(2)). All such decisions shall be reviewed exclusively by the EU courts, following an application for annulment made under art.263 TFEU (art.95(3)).
- 35 European Union (Withdrawal) Act 2018 s.4(1) and the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.62. See below, para.45-014.
- 36 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.62.
- 37 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) regs 62 and 64 and [Sch.4 para.14](#). See below, para.45-124.
- 38 The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) reg.64 and [Sch.4 para.14](#).
- 39 *[2021] EWHC 399 (Comm), [2021] 4 C.M.L.R. 18* at [64]–[66].
- 40 [2003] O.J. L1/1.
- 41 [1962] O.J. 204/62, [1962] O.J.S.P.Ed. 87.
- 42 See below, paras [45-114](#)–[45-132](#) (in relation to enforcement by national courts and competition authorities) and [45-133](#)–[45-138](#) (in relation to enforcement by the Commission).
- 43 This was more obviously the case when the UK was an EU Member State, as an agreement or conduct implemented in the UK could also infringe arts 101(1) and/or 102 TFEU if it affected trade between Member States. However, this may remain the case following the UK's withdrawal from the EU, if an agreement or conduct is implemented both in the UK (so

infringing the Ch.I and/or II prohibitions) and one or more EU Member States (so infringing also arts 101(1) and/or 102 TFEU).

44 Regulation 1/2003 art.3(1).

45 Regulation 1/2003 art.3(2).

46 Regulation 1/2003 art.3(3).

47 Regulation 1/2003 art.3(3).

48 See above, paras [45-003](#)—[45-005](#). It should be noted, however, that the CMA does not have the power, after 31 December 2020, to apply arts 101 and 102 TFEU to such agreements, only to apply the Ch.I and II prohibitions: see below para.[45-132](#).

49 See above, para.[45-004](#) and below, para.[45-115](#).

(a) - In General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(a) - In General

Purpose of this section

- 45-010 The purpose of this section is to outline of the rules on competition law under the TFEU insofar as they may affect contractual rights and obligations. Specialised works should be consulted for a fuller treatment.

⁵⁰

- U Articles 101 and 102 ceased to have effect in the UK from 31 December 2020, although rights, liabilities and obligations existing at that date continue to be enforceable under UK law.⁵¹

Article 101

- 45-011 The principal provision of the TFEU likely to affect contracts is art.101⁵² which was applicable in the United Kingdom between 1 January 1973⁵³ and 31 December 2020.⁵⁴ Article 101(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Article 101(2) provides that any agreement or decision prohibited under art.101(1) “shall be automatically void”.⁵⁵ Article 101(3) provides that, in certain circumstances, the prohibition in art.101(1) “may

be declared inapplicable” either to individual agreements on their particular merits⁵⁶ or by the application of block exemptions covering certain common types of agreement.⁵⁷

Article 102

- 45-012 Contractual obligations may also be affected by art.102 TFEU, which applies to one or more undertakings which hold a dominant position within the internal market and prohibits any abuse by such an undertaking of its dominant position, in so far as it may affect trade between Member States. Certain terms in agreements between dominant firms and their customers have been held to constitute abusive conduct and are therefore unenforceable by the dominant firm.⁵⁸

Direct effect

- 45-013 Both arts 101 and 102 have direct effect



59

U in the national legal systems of the Member States,

60

U which means that they impose obligations and confer rights on individuals, which can be enforced in the national courts of the Member States and which those courts must protect

61

U without the need for any express empowerment under EU law.

62

U The implications of the direct effect of TFEU provisions are discussed below.

63



- 45-014 Articles 101 and 102 ceased to have effect in the UK from 31 December 2020.⁶⁴ However, all existing rights, powers, liabilities, obligations, restrictions, remedies and procedures under arts 101 and 102 that existed as of that date continue to be recognised, available, enforced, allowed and followed after that date.⁶⁵ Therefore, rights and obligations under arts 101 and 102 will remain enforceable in relation to agreements entered into or conduct committed before 31 December 2020, including a right to damages for losses caused by an infringement of these provisions committed

before that date. In accordance with arts 92 and 95 of the Withdrawal Agreement 2020, this applies in respect of infringements found by a Commission decision adopted both before that date and, in respect of proceedings opened before it, after it.⁶⁶ Accordingly, claims (or a defence to a claim) before a court or tribunal relating to infringements of arts 101 and/or 102 (or of arts 53 and/or 54 of the EEA Agreement) committed before that date may continue or be brought after 31 December 2020.⁶⁷ Any rights, etc. derived from arts 101 and 102 ceased to be recognised and available in domestic law (and to be enforced, allowed and followed) from 31 December 2020 in respect of infringements of EU competition law committed after that date.⁶⁸

Principal sources of law

- 45-015 Apart from the relevant provisions of the EU treaties, in particular, the Treaty on European Union,⁶⁹ the Charter of Fundamental Rights and Freedoms⁷⁰ and the TFEU, there is a considerable body of secondary legislation, in particular block exemption regulations,⁷¹ promulgated by the EU institutions.⁷² The Commission, which, together with the national competition authorities and national courts, is responsible for the enforcement of the competition law provisions of the TFEU, also publishes official notices and communications giving guidance on matters of the interpretation and application of arts 101 and 102.

⁷³

U In addition, decisions of the Commission concerning particular agreements and conduct, and the jurisprudence of the General Court of the European Union and the Court of Justice of the European Union⁷⁴ are important sources of EU competition law.

Supremacy of EU law

- 45-016 When the UK was a Member State of the EU, EU law had primacy over the UK's domestic law, including constitutional law.⁷⁵ In *Irish Sugar v Commission*,⁷⁶ which concerned rebates granted by the dominant supplier of sugar in Ireland, the General Court stressed that it was immaterial whether the grant of the price rebates in dispute in that case was compatible with Irish law given the supremacy (or primacy) of EU law and the direct effect of art.102. Similarly, in *Deutsche Telekom*, it was no defence to a finding of abusive margin squeeze that Deutsche Telekom's wholesale and retail prices were set by the national regulator.⁷⁷ Thus, national legislation that is contrary to arts 101 and 102 must be disapplied by a national court or competition authority.⁷⁸ Accordingly, in certain circumstances intellectual property rights which would have been valid under domestic

law could not be exercised where such exercise would have been contrary to the provisions and objectives of the TFEU.⁷⁹

- 45-017 The English courts took judicial notice of the TFEU, the contents of the Official Journal of the European Union⁸⁰ and the judgments of the General Court and the Court of Justice.⁸¹ In *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC, Mastercard Inc* the Supreme Court held that it was bound to follow the judgment of the Court of Justice in *MasterCard Inc v Commission*⁸² that multilateral interchange fees set by Mastercard had an appreciable effect on competition and thus infringed art.101(1), as the factual basis of the Court of Justice's judgment and the cases before it, concerning fees set by both Mastercard and Visa, were materially indistinguishable.⁸³

- 45-018 The supremacy of EU law continues to apply after 31 December 2020 in so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before that date.⁸⁴ It does not apply to any enactment or rule of law passed or made on or after that date.⁸⁵ A court or tribunal is not bound by any principles laid down, or any decisions made, on or after 31 December 2020 by the EU courts,⁸⁶ but may have regard to anything done on or after this day by the EU courts, another EU entity (such as the Commission) or the EU so far as it is relevant to any matter before it.⁸⁷

U However, neither the Supreme Court⁸⁸ nor the Court of Appeal⁸⁹ are bound by EU case law made before 31 December 2020 and may, where they consider it appropriate to do so, depart from it.

European Economic Area

- 45-019 The European Economic Area (EEA), first established in 1994, now comprises all 27 Member States of the EU and three EFTA States (namely Iceland, Norway and Liechtenstein, but not Switzerland). The aim of the EEA Agreement is, inter alia, to ensure the uniform application of competition law throughout the EEA, and to this end art.53 of the EEA Agreement in effect reproduces art.101 TFEU and art.54 of the EEA Agreement reproduces art.102 TFEU. Other provisions of the EEA Agreement contain procedural and substantive rules which mirror EU secondary legislation in the competition field, including block exemption regulations.⁹⁰ The EEA Agreement also provides for the establishment of the EFTA Surveillance Authority which has similar powers to the Commission and is subject to review by the EFTA Court of Justice. Article 56 of the EEA Agreement provides complex rules for the allocation of jurisdiction between the

Commission and the EFTA Surveillance Authority in competition cases depending on the effect that the agreement or conduct under scrutiny has on trade between the EU and the EFTA States, and art.58 contains provisions for cooperation between the two authorities in enforcing EU and EEA competition law. A full analysis of the scope of the EEA Agreement is beyond the scope of this chapter,⁹¹ but practitioners should bear in mind the possible application of EU (or EEA) competition law to contracts affecting the above-named territories. As a result of the UK having left the EU, it also withdrew from the EEA Agreement with effect from 11.00pm on 31 January 2020, subject to a transitional period that expired at 11.00pm on 31 December 2020.⁹²

Footnotes

- ⑤0 e.g. Bailey and John (eds.), Bellamy and Child, European Union Law of Competition, 8th edn (2018). For a comparative treatment of EU and UK competition law, see Whish and Bailey, Competition Law, 10th edn (2021).
- 51 See above, paras 45-004—45-005 and below, para.45-014.
- 52 See below, paras 45-020 et seq.
- 53 European Communities Act 1972 s.2.
- 54 European Union (Withdrawal) Act 2018 s.1.
- 55 See below, paras 45-119—45-120.
- 56 See below, paras 45-049—45-051.
- 57 See below, paras 45-052—45-053.
- 58 See below, paras 45-100 et seq.
- ⑤9 On direct effect generally, see e.g. Barnard and Peers (eds), European Union Law, 3rd edn (2020), pp.157–168 and Kuijper, Amtenbrink et al (eds), The Law of the European Union, 5th edn (2018), pp.427–442.
- ⑥0 e.g. *BRT v SABAM* (127/73) [1974] E.C.R. 51, EU:C:1974:6 at [15]–[17]; *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297, EU:C:2001:465 at [23]. Art.101(3) TFEU has direct effect by virtue of Regulation 1/2003, arts 1(3), 5 and 6. In the UK, the direct effect of EU law was ensured in national law in the European Communities Act 1972 s.2(1), which was repealed by the European Union (Withdrawal) Act 2018 s.1, with effect from 31 December 2020.
- ⑥1 Treaty on European Union consolidated version [2016] O.J. C202/13 art.4(3). For the English courts' analysis of this obligation see *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130 (HL); *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716 (CA); *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603 (HL).

- 62 *Stichting Cartel Compensation and Equilib Netherlands BV v Koninklijke Luchtvaart Maatschappij NV* (C-819/19) EU:C:2021:904.
- 63 See below, paras 45-114—45-126.
- 64 See above, paras 45-004—45-005.
- 65 European Union (Withdrawal) Act 2018 s.4(1) and the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.62. See above, para.45-005.
- 66 See above, para.45-014.
- 67 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.64 and Sch.4 para.14.
- 68 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.62.
- 69 Treaty on European Union, consolidated version [2016] O.J. C202/13.
- 70 Charter of Fundamental Rights of the European Union [2016] O.J. C202/389. The Charter ceased to be part of UK law from 31 December 2020: European Union (Withdrawal) Act 2018 s.5(4).
- 71 See below, paras 45-052—45-053.
- 72 For a description of the EU institutions and of the different forms of secondary legislation see Hartley, *The Foundations of European Union Law*, 8th edn (2014). The relevant legislation, notices, etc. can be found in Bavasso and Battersby (eds), Butterworths Competition Law Handbook, 27th edn (2021). The European Commission also issues an Annual Report on Competition Policy, available on its website, at: https://ec.europa.eu/competition/publications/annual_report/index.html.
- 74 The General Court was established in 1988 and hears appeals from Commission decisions in, inter alia, competition cases. Appeals from the General Court on points of law are made to the Court of Justice. Decisions of these courts were binding on the English courts, whilst the UK was an EU Member State: European Communities Act 1972 s.3(1) (as amended by the European Communities (Amendment) Act 1986). For the effect of “Brexit” on the binding nature of judgments of the General Court and the Court of Justice, see below, para.45-018.
- 75 European Communities Act 1972 ss.2(1) and 3(1), which were repealed by the European Union (Withdrawal) Act 2018 s.1. For the EU point of view, see e.g. *Simmenthal SpA v Amministrazione delle Finanze dello Stato* (106/77) [1978] E.C.R. 629, EU:C:1978:49; *Melloni v Ministerio Fiscal* (C-399/11) EU:C:2013:107. For the English courts’ approach, see *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603 (HL). See generally e.g. Barnard and Peers (eds), European Union Law, 3rd edn (2020), pp.174–180 and Kuijper, Amtenbrink et al (eds), The Law of the European Union, 5th edn (2018), pp.417–427.
- 76 *Irish Sugar v Commission* (T-228/97) [1999] E.C.R. II-2969, EU:T:1999:246.
- 77 *Deutsche Telekom v Commission* (C-280/08P) [2010] E.C.R. I-9555, EU:C:2010:603.
- 78 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* (C-198/01) [2003] E.C.R. I-8055, EU:C:2003:430.
- 79 See below, paras 45-096—45-098.

- 80 Regulations, directives, notices and Commission decisions are generally published in the Official Journal.
- 81 European Communities Act 1972 s.3(2) (as amended by the European Communities (Amendment) Act 1986).
- 82 *MasterCard Inc v Commission (C-382/12P) EU:C:2014:14*.
- 83 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC, Mastercard Inc [2020] UKSC 24, [2020] 4 All E.R. 807* at [92]–[94].
- 84 European Union (Withdrawal) Act 2018 s.5(2). See generally, Vol.I, para.1-026.
- 85 European Union (Withdrawal) Act 2018 s.5(1).
- 86 European Union (Withdrawal) Act 2018 s.6(1). See generally, Vol.I, para.1-027.
- ⑧7 European Union (Withdrawal) Act 2018 s.6(2). See generally, Vol.I, para.1-027. In *JJH Enterprises Ltd v Microsoft Corp [2022] EWHC 929 (Comm)* at [45], the High Court considered that it was “somewhat unrealistic” that a court would decide not to follow a judgment of the Court of Justice on a summary judgment application rather than at trial.
- 88 European Union (Withdrawal) Act 2018 ss.6(4)(a) and (5). See generally, Vol.I, para.1-027.
- 89 The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).
- 90 EEA Agreement Protocol 21 and Annex XIV.
- 91 For discussion of the EEA rules on competition see Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 1.077—1.087.
- 92 Withdrawal Agreement 2020 arts 126 and 129. Although the UK and the three EFTA States that are party to the EEA Agreement concluded a Separation Agreement on 28 January 2020, this does not contain provisions on competition law that are equivalent to the Withdrawal Agreement 2020 arts 92 and 95. Arts 53 and 54 EEA ceased to have effect in the UK from 31 December 2020: the *Competition (Amendment etc.) (EU Exit) Regulations 2019* (SI 2019/93) reg.62.

(b) - Article 101(1)

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(b) - Article 101(1)

Article 101(1)

45-020 Article 101(1) provides that:

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or

according to commercial usage, have no connection with the subject of such contracts.

The elements in the test

- 45-021 In deciding whether a particular agreement or practice falls within art.101(1) it is necessary to consider: (i) whether there exists an “agreement” or “concerted practice” made between, or operated by, “undertakings”, or a “decision” by an “association of undertakings”; (ii) whether competition within the internal market may be prevented, restricted or distorted, whether by object or effect; and (iii) whether there is an actual or potential effect on trade between Member States. It is also necessary to consider whether the effects on competition and on trade between Member States are appreciable.⁹³

Undertaking

- 45-022 A “functional” approach must be taken to the meaning of the term “undertaking”: a legal entity may be acting as an undertaking when performing some functions but not when performing others.⁹⁴ The term “undertaking” is a wide one covering almost any legal or natural person engaged in an economic activity, that is offering goods or services for remuneration on a market, regardless of its legal status and the way in which it is financed.⁹⁵ It is capable of covering public and private companies, partnerships, trade associations,⁹⁶ individuals,⁹⁷ professionals,⁹⁸ sole traders,⁹⁹ occupational pension schemes¹⁰⁰ and religious organisations.¹⁰¹ There is no requirement that the activity be profit-making¹⁰²; it is sufficient that the activity could be carried on to make a profit.¹⁰³ Employees are not undertakings¹⁰⁴; in *Becu*¹⁰⁵ the Court of Justice confirmed that employees are incorporated into the economic unit of the undertaking they work for and so are not themselves undertakings within the meaning of EU competition law. Equally, in *Albany*, it was held that an agreement between business and labour organisations to improve employment conditions fell outside of art.101 as its purpose was to pursue social policy objectives, including collective bargaining.¹⁰⁶ However, a self-employed individual can constitute an undertaking.¹⁰⁷ A commercial agent is capable of acting as an undertaking, although an agreement between a principal and a “genuine” commercial agent will normally fall outside the scope of art.101(1) if the agent acts on behalf of the principal and does not bear the commercial and financial risks of the transaction.¹⁰⁸ So far as Member States and public bodies are concerned, a distinction must be drawn between the situation where the State acts in the exercise of its powers as a public authority

(i.e. essential functions of the state, such as defence or the police, air navigation control and safety, and pollution control)¹⁰⁹ or carries on non-economic activities (such as publicly-provided healthcare, social security, education and research, and some cultural and heritage activities)¹¹⁰ in relation to which it is not to be treated as an undertaking and where it is engaged in economic activities of an industrial or commercial nature, in relation to which it is within the scope of art.101(1).¹¹¹

Parents and subsidiaries: the concept of the “single economic entity”

- 45-023 Agreements between a parent company and its subsidiary, or between members of a group of companies under common control, ordinarily fall outside the scope of art.101(1).¹¹² This is because the parent and subsidiary, or the group companies, even if separate legal entities, form a “single economic entity” and thus a single undertaking.
- 45-024 In *Hydrotherm v Compact*¹¹³ the Court of Justice stated that the term “undertaking” must be understood as “designating an economic unit … even if in law that economic unit consists of several persons, natural or legal”. Therefore, where a number of parties to an agreement have identical interests and are controlled by the same person, who also participates in the agreement, those parties can be treated as a single undertaking.¹¹⁴ However, the mere fact of common ownership is not decisive, as account must be taken of the actual nature of the relationship between the companies and in particular whether they have economic independence or pursue the same market strategy as determined by, and carry out the instructions of, the parent company: the parent company must not only be in a position to exercise “decisive influence” over its subsidiary, but must be shown to have actually exercised it.¹¹⁵
- 45-025 Where a parent company owns 100 per cent of the subsidiary, or close to this level of shareholding, it is rebuttably presumed that the parent exercises decisive influence over it, such that they form part of a single economic entity.¹¹⁶ In *Goldman Sachs*, the Court of Justice confirmed that this presumption applies to investment managers, such as private equity groups, that control all the voting rights in a company, even if they have a lesser level of shareholding.¹¹⁷ Below these levels, including in the case of joint ventures, it is for the Commission to demonstrate that the parent company in fact did exercise such decisive influence, for example by having the power to appoint a majority of board members, exercising that power, having the power to call a shareholder meeting to remove directors, playing an important role in board committees of the subsidiary, receiving regular updates and reports on its performance and carrying out behaviour that is typical of an industrial owner.¹¹⁸

45-025A In *Sumal*, the Court of Justice held that where an economic unit infringes art.101(1), any entity or company within that unit may be held liable for the anti-competitive conduct of an entity that forms part of the undertaking constituted by that unit, as all entities comprising the unit are jointly and severally liable for the undertaking's infringement; thus, a subsidiary can be liable for the conduct of its parent company.

¹¹⁹

U Similarly, a parent company will be liable for the anti-competitive conduct of a wholly-owned or near wholly-owned subsidiary with which it formed a single undertaking, in accordance with the presumption of decisive influence.

¹²⁰

U In *JJH Enterprises Ltd v Microsoft Corp*, the High Court refused to strike out a claim against Microsoft's UK subsidiary because it was alleged to form part of the same economic entity as its ultimate parent company, Microsoft Corp and an affiliate, Microsoft Ireland, which were alleged to have infringed arts 101 and 102.

¹²¹

U Similarly, in *Churchill Gowns Ltd v Ede & Ravenscroft Ltd* the Competition Appeal Tribunal considered that companies under common ownership, and their non-trading holding company, are each responsible and jointly and severally liable for the infringement committed by the undertaking of which they are part, even if the subsidiaries' management has a high degree of autonomy over operational decisions.

¹²²



45-026 An agent is not a separate economic entity from its principal, but forms part of the principal's undertaking.¹²³ In certain circumstances an undertaking may be liable for the acts of an independent service provider that supplies it with services and which has participated in an anti-competitive concerted practice, even though that provider is a separate undertaking.¹²⁴

Agreements

45-027 The term "agreement" in art.101(1) is not confined to legally binding contracts, but covers any morally binding commitment¹²⁵: it is sufficient if the undertakings have expressed their joint intention to conduct themselves in the market in a particular way.¹²⁶ An agreement may be

written or oral or inferred from the circumstances and can consist in a continuing course of business dealings between the parties.¹²⁷ It is not necessary for an agreement to be legally binding (such that art.101(1) can apply to an informal so-called “gentlemen’s agreement”¹²⁸), to be complete¹²⁹ or to have been implemented.¹³⁰ An agreement between undertakings may be made on the undertaking’s behalf by an employee acting in the course of his employment despite the ignorance of more senior management¹³¹ and even where this is contrary to the employee’s express instructions¹³²; this is also the case where an agent concludes an agreement on behalf of his principal.¹³³ A series of agreements can be read together as one agreement.¹³⁴ The incorporation of a particular term in an agreement can be inferred from the surrounding circumstances,¹³⁵ but the placing of new orders by a customer does not necessarily indicate acceptance of a new policy introduced by the supplier, which may therefore be a unilateral measure and not constitute an agreement for the purposes of art.101(1).¹³⁶

- 45-028 The leading case on the consensual nature of the conduct required to infer an agreement, as opposed to genuinely unilateral conduct (which falls outside the scope of art.101(1)) is *Bayer v Commission*. In *Bayer*, the General Court stressed that, to support the finding of an agreement for the purposes of art.101(1), there must be evidence of:

“... the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market.”¹³⁷

In *Bayer* the General Court rejected the Commission’s argument that the mere continuation by wholesalers of commercial relations with the manufacturer when it had adopted a policy designed to inhibit exports amounted to “implicit acquiescence” by them in that policy so as to create an agreement pursuant to which they would limit their exports to other Member States; the evidence showed rather that the wholesalers had actively tried to circumvent the supplier’s policy by other means.¹³⁸ However, the fact that a supplier has not taken steps to enforce a clause imposing an export ban or that a customer is acting contrary to its best interests in agreeing to such a clause is not sufficient to remove the clause from the ambit of art.101(1).¹³⁹

“Horizontal” and “vertical” agreements

- 45-029 The competition affected by prohibited conduct covered by an agreement may be competition between the parties to the agreement themselves. This will be the case in a “horizontal” agreement where the parties are active at the same level of production or supply, for example where a number

of manufacturers agree on the prices they will charge to their respective customers. But art.101(1) also applies to “vertical” agreements where the parties are at different levels of the production or supply chain and the competition affected is between them and third parties.¹⁴⁰ For example, where a manufacturer concludes an exclusive supply and purchasing agreement with its dealer, the competition affected is between that manufacturer and other manufacturers who wish to supply that dealer, and between that dealer and other dealers who wish to obtain supplies from that manufacturer.

Concerted practices

- 45-030 The concept of a “concerted practice” is very wide and covers:

“... any form of co-ordination by undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”¹⁴¹

For a concerted practice to exist, two or more undertakings must concert together, they must behave on the market pursuant to those collective practices and there must be a relationship of cause and effect between the concertation and the conduct on the market.¹⁴² A concerted practice may result from direct or indirect contact¹⁴³ between undertakings that has the object or effect of influencing the conduct of a competitor or disclosing to it the course of conduct that they have decided to adopt on the market, but does not require a plan to be worked out nor must it have been put into effect for art.101(1) to apply.¹⁴⁴ There is a rebuttable presumption that where participating undertakings remain active on the market they will take account of discussions between them and information disclosed to them in determining their own conduct.¹⁴⁵ Parallel conduct by undertakings does not necessarily constitute evidence of collusion if another plausible explanation for such parallelism can be found, for example in the characteristics of the market, particularly one that is oligopolistic and in which undertakings will take account of rivals’ conduct.¹⁴⁶ However, where there is parallel conduct and evidence of meetings or the exchange of commercial information between the parties, a concerted practice will often be inferred.¹⁴⁷

Decisions of associations of undertakings

- 45-031 The concept of “decisions between associations of undertakings” includes agreements entered into by and the constitution of, or other rules governing, an association, decisions taken by the association that are binding upon its members, codes of conduct and non-binding recommendations

issued by the association to members¹⁴⁸ that are intended to coordinate members' behaviour on the market and/or to exclude competitors, so as to restrict competition by object or effect. An "association of undertakings" is an association that represents and defends the interests of its member undertakings, for example a trade association, a company owned by its members,¹⁴⁹ or a professional¹⁵⁰ or sporting¹⁵¹ regulatory body. A decision will not infringe art.101(1) if it pursues a legitimate objective and is proportionate to those objectives.¹⁵²

Prevention, restriction or distortion of competition

- 45-032 The requirement that the agreement, decision or concerted practice must have as its object or effect the prevention, restriction or distortion of competition lies at the heart of art.101(1). In applying this test one must bear in mind the dual purpose of the competition provisions of the TFEU. First, the TFEU aims to promote competition as the means of bringing about increased efficiency, wider choice, better products, greater innovation and lower prices, thereby ensuring the optimal allocation of resources. The examples set out in art.101(1) of the kinds of agreements likely to be prohibited illustrate the classic forms of anti-competitive behaviour: price fixing, market sharing and agreements to limit production.¹⁵³
- 45-033 Secondly, the competition provisions of the TFEU contribute to the creation of an internal market, the establishment of which is a Union objective,¹⁵⁴ in which trade barriers between the Member States are eliminated and the free movement of goods and services is ensured.¹⁵⁵ EU law is therefore particularly concerned to proscribe conduct which has the effect of re-erecting or reinforcing national boundaries between markets or impeding the free movement of goods or services. Any contractual terms which prevent or limit the export of goods to other Member States should be scrutinised very carefully to ensure that they are compatible with art.101(1).¹⁵⁶ The enlargement of the EU on 1 May 2004 and again subsequently, with the possibility of further enlargement to follow, means that internal market integration has influenced and will continue to influence the way in which the EU competition rules are applied.

The test to be applied in determining the object or effect of an agreement

- 45-034 The test for determining whether an agreement, decision or concerted practice has as its object or effect¹⁵⁷ the prevention, restriction or distortion of competition has been laid down in a number of leading cases, in particular in *Société Technique Minière*,¹⁵⁸ *Delimitis v Henninger Bräu*,¹⁵⁹ *Wouters*,¹⁶⁰ *Cartes Bancaires*,¹⁶¹ *Generics*¹⁶² and *Budapest Bank*.¹⁶³ In *Budapest Bank*, the Court of Justice confirmed that, although if an agreement has an anti-competitive object there

is no requirement to examine its effects on competition, a court or competition authority may nevertheless do so and the same anti-competitive conduct may be regarded as having as both its object and its effect the restriction of competition.¹⁶⁴

- 45-035 The first step is to determine the object of the agreement. If it is not clear that the object is to restrict competition, one must then analyse the effect of the agreement within its legal and economic context; that is, assess the way in which competition would occur in the absence of the agreement and consider how this is likely to have been affected by the operation of the agreement. Among the many relevant factors for working out whether an agreement has a restrictive effect are the nature and quantity of the products covered by the agreement, the position and importance of the parties in the market for the products concerned, the isolated nature of the agreement or, alternatively, whether it forms part of a network of similar agreements that in aggregate have a negative effect on competition.¹⁶⁵ Other material factors include the existence of any intellectual property rights and the number and size of competing undertakings.
- 45-036 An agreement or decision that would appear to be restrictive of competition by object or to have restrictive effects on competition may nevertheless not fall within the scope of art.101(1) if it is necessary and proportionate to protect legitimate non-economic objectives, for example the regulation of a profession¹⁶⁶ or to uphold sporting rules.¹⁶⁷ However, this will not be the case where the rule pursues an economic objective.¹⁶⁸

The “object” of the agreement

- 45-037 The purpose of the agreement must be ascertained objectively and it is not necessary to show that the parties’ subjectively intended to restrict competition,¹⁶⁹ although evidence of such an intention may be taken into account in finding that an agreement has the object of restricting competition.¹⁷⁰ Some kinds of agreement have been held to have “by their very nature” the object of restricting competition. The question to be asked is whether the agreement “reveals in itself a sufficient degree of harm to competition”.¹⁷¹ Such agreements include horizontal agreements¹⁷² to fix prices, to limit production or to partition markets and vertical agreements¹⁷³ imposing export bans or requiring the buyer to re-sell the products at fixed or minimum prices. Provided that such agreements appreciably affect trade between Member States they will fall within art.101(1)¹⁷⁴ without the need to show an appreciable effect on competition,¹⁷⁵ that there has been harm to final consumers¹⁷⁶ or that the agreement was implemented or enforced.¹⁷⁷

45-038



In *Generics (UK) Ltd v Competition and Markets Authority*, the Court of Justice confirmed that the concept of a “restriction of competition by object” must be interpreted strictly and can be applied only to agreements that, taking account of their provisions, objectives and legal and economic context (i.e. the nature of the goods or services affected, as well as the conditions for the functioning and structure of the market in question), have “a sufficient degree of harm to competition” such that it is not necessary to assess their effects as by their very nature they are harmful to the proper functioning of normal competition,¹⁷⁸ including by disguising or being equivalent to a market-sharing or market-exclusion agreement.¹⁷⁹ An agreement that, by its terms, restricts normal competition between actual or potential competitors and has no explanation other than the parties’ commercial interest not to engage in competition will infringe art.101(1) by object.¹⁸⁰ The Court of Justice confirmed this approach in *Budapest Bank*,¹⁸¹ such that an agreement that indirectly fixes purchase or selling prices may be regarded as restricting competition by object by “neutralising” one aspect of competition.¹⁸² The Court also held, however, that although there is not an exhaustive list of agreements that are to be regarded as restricting competition by object, there must be “sufficiently reliable and robust experience” of an agreement’s nature, purpose and potential to affect competition for it to be found, by its very nature, to be harmful to the proper functioning of competition for a restriction of competition by object to be found¹⁸³; this may also be established if there are “strong indications” of a negative effect on prices.¹⁸⁴ In *Lundbeck*, the Court of Justice held that it is not, however, necessary that the same type of agreement or practice has been found to be unlawful in the past: all that matters is that it can be inferred from the specific characteristics of the agreement that it is by its very nature harmful to competition.¹⁸⁵ Where this is not the case, an in-depth examination of its effects on competition is required.¹⁸⁶ In *Visma*, the Court of Justice held that a series of vertical agreements for the distribution of software under which the distributor who was first to register with the supplier a potential transaction with an end user enjoyed a six month priority period to complete the sale, unless the end user objected, did not appear to have the object of restricting competition as this did not prevent distributors from actively approaching potential customers, unless it could nevertheless be shown that it posed a sufficient degree of harm to competition.

¹⁸⁷

The “effect” of the agreement

45-039

If an agreement does not have an anti-competitive object, which will be the case where it may have—in theoretical or abstract terms—a variety of outcomes not all of which are anti-competitive,¹⁸⁸

¹⁸⁸

U it is necessary to consider whether it has an appreciable negative effect on the key parameters of competition, such as the price, quantity or quality of goods or services.

189

U This analysis must consider the agreement in its proper legal and economic context,

190

U i.e. against a “counterfactual” of what would have happened in its absence, including an assessment of actual or potential competition

191

U and economic conditions

192

U on a properly defined relevant market.

193

U A finding of infringement “by effect” must be based upon qualitative and quantitative evidence; it cannot be determined at the level of theory, supplemented by qualitative material,

194

U or bare assertion,

195

U although there is no requirement to quantify actual effects, merely to show that the agreement is likely to harm the competitive structure of the market.

196

U It is not sufficient to show that the agreement was implemented, i.e. “effective”: anti-competitive effects must be shown.

197

U

45-039A In assessing the effects of an agreement, it is necessary to consider how the parties would have been expected to act in the absence of the agreement: has their freedom to determine the terms and conditions on which they supply their goods or services been curtailed in any way; has their choice of potential suppliers or potential customers been narrowed by the agreement; is it more difficult for other manufacturers to start supplying goods or services which compete with those offered by the parties to the agreement? In short, is the agreement likely to alter the commercial decisions of the parties to the agreement or of third parties

198

U when they respond to changing market conditions? A contractual restriction on a party's conduct does not necessarily result in a restriction of competition on the market as a whole; account should be taken of the actual conditions in which the agreement operates, the products or services covered by the agreement and the actual structure of the market to properly analyse its effect thereon.

199

U The factual evidence and economic analysis required in the application of this test may appear somewhat daunting. In practice, guidance exists from the jurisprudence of the EU courts and in guidelines and notices published by the Commission in respect of the application of art.101(1) to certain categories of agreement and certain contractual terms. In particular, valuable guidance can be derived from the Commission's guidelines on art.101(3),

200

U vertical restraints,

201

U horizontal co-operation agreements

202

U and technology transfer agreements.

203

U

Requirement of an appreciable effect on competition

45-040

In *Völk v Vervaecke*²⁰⁴ the Court of Justice stated that art.101(1) is not infringed if the agreement has only an insignificant effect on competition. In that case the parties to an exclusive agreement for the distribution of washing machines had only a 0.2 per cent share of the market and the agreement fell outside of the scope of the prohibition in art.101(1) as the agreement was treated as "de minimis". Subsequently, in *Expedia Inc v Autorité de la Concurrence*²⁰⁵ the Court of Justice held that any agreement that has an appreciable effect on trade between Member States and that "restricts competition by object" has an appreciable effect on competition, irrespective of the parties' size and market shares. Factors other than market share may be relevant to an assessment of the appreciability of a restriction, including the parties' size and importance on the market,²⁰⁶ whether the market is concentrated, in which case a restriction of competition may be more likely to be appreciable,²⁰⁷ and whether the agreement is part of a network or parallel networks of agreements²⁰⁸ so as to significantly contribute to the anti-competitive effects.²⁰⁹

Notice concerning agreements of minor importance

- 45-041 Following the decision in *Völk*, the Commission published a notice giving guidance on the thresholds below which an agreement would be considered to be de minimis and not have an appreciable effect on competition. The Commission's current Notice on Agreements of Minor Importance was adopted in June 2014²¹⁰ and further guidance is provided in the Commission's Guidelines on Horizontal Cooperation and Vertical Restraints. The Notice provides that the Commission considers that horizontal agreements between undertakings with a market share of 10 per cent or less, and vertical agreements between undertakings each with a market share of 15 per cent or less, do not restrict competition to an appreciable extent. Where the parties' market shares are above these thresholds, it is necessary to undertake a full analysis of whether the agreement has an appreciable effect on competition, particularly when their share is only slightly above these thresholds.²¹¹ However, consistently with the judgment in *Expedia*, the Notice does not apply to restrictions of competition by object, such as horizontal or vertical price fixing, market sharing or the imposition of export bans on distributors, which infringe art.101(1) irrespective of the parties' market shares. Further, the Notice is not binding on national courts and competition authorities,²¹² such that if an agreement falls below the de minimis thresholds set out in the Notice, the possibility remains that a national court or competition authority might find an infringement of either art.101(1) or its equivalent in national competition law.

Relevance of networks of agreements

- 45-042 When considering whether the effect on competition of an agreement is likely to be appreciable, it is necessary to consider whether it is one of a network of similar agreements in the relevant market.²¹³ For example, when assessing whether an agreement between a manufacturer and one of its distributors has an appreciable effect on competition, account must be taken not only of the market share and turnover of the parties to that particular agreement but also of the other dealers in that manufacturer's network who are party to agreements in similar terms. Where the industry in which the agreement operates is characterised by a series of parallel networks of restrictive agreements involving different manufacturers and dealers,²¹⁴ account should be taken of the proportion of the market covered by such agreements and their duration when assessing the extent of the effect of an agreement, as even if an individual agreement would have a de minimis effect it may, as part of a network or parallel networks of agreements, significantly contribute to a cumulative negative effect on competition.²¹⁵ Where a supplier has a network of distributors, the de minimis threshold is applied to the network of all such agreements.²¹⁶ The Commission's Notice on Agreements of Minor Importance states that agreements between undertakings with a market share of 5 per cent or less are not generally considered to significantly contribute to a

cumulative foreclosure effect and that such an effect is unlikely to exist if less than 30 per cent of the market is covered by parallel networks of agreements having similar effects.

Effect on trade between Member States

- 45-043 An agreement that appreciably restricts competition falls within the prohibition in art.101(1) if it appreciably affects trade between Member States²¹⁷; if it does not do so, then art.101 does not apply, and national competition alone will be applicable.²¹⁸ However, this requirement has been widely interpreted by the Commission and the EU courts and will be satisfied if the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States so that it may hinder the attainment of the internal market,²¹⁹ in particular by sealing off national markets or affecting the structure of competition in the internal market.²²⁰ Thus, many agreements between parties in a single Member State which concern the supply of goods or services within that same state satisfy the test. It is not necessary that every restrictive clause in an agreement should be shown to have an effect on trade before it falls within art.101(1), provided that the agreement as a whole satisfies the test.²²¹ The Commission has published guidance on applying the effect on trade concept.²²² It considers that an agreement will not have an appreciable effect on trade between Member States if it is concluded between SMEs with limited market shares and turnover.²²³

“Direct or indirect, actual or potential” effect on trade

- 45-044 An agreement, decision or concerted practice affects trade between Member States if it is possible to foresee with a sufficient degree of probability that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.²²⁴ They will also be held to affect trade if they alter or have “repercussions” on the competitive structure of the internal market.²²⁵ It is not necessary to show that they have *in fact* affected trade; it is enough that, with a sufficient degree of probability, they are *capable* of having such an effect.²²⁶ The effect on trade may be indirect, for example where the agreement affects a raw material for a product that is traded between Member States, even if the raw material itself is not,²²⁷ or where an agreement concerning certain services has effects on markets for other services.²²⁸
- 45-045 An agreement which directly or indirectly restricts exports between Member States will satisfy the test. Agreements which cover the whole territory of a single Member State usually have the necessary effect, because they tend to reinforce national boundaries and hinder the economic inter-

penetration which the TFEU is designed to realise,²²⁹ by making it more difficult for suppliers from other Member States to compete in that state. There have been some cases in which the EU courts and the Commission have concluded that an agreement did not have an appreciable effect on trade between Member States. In *Bagnasco v BPN and Carige*²³⁰ the Court of Justice held that an agreement between banks in Italy setting the terms on which they offered current accounts to customers fell outside art.101(1) because the economic activities in question had very limited impact on trade. This was followed by the Commission in *Dutch Acceptance Giro System*,²³¹ where it found that the agreement did have an appreciable effect on competition but did not appreciably affect trade between Member States because the banking services were concentrated on domestic activity.

Undertakings outside the EU

45-046 Agreements between undertakings outside the EU may fall within art.101(1) if the agreement is implemented within the internal market

²³²

U or if it produces foreseeable, immediate and substantial effects within it.

²³³

U These effects may be found in agreements not to sell to customers located in the EU, as part of a global market-sharing agreement

²³⁴

U; they may also be found in agreements between non-EU undertakings that are entered into in a non-EU country, but which have global reach and thus are implemented in the EU.

²³⁵

U

Agreements concerning trade outside the EU

45-047 Agreements between undertakings concerning trade outside the EU may fall within art.101(1) if they produce an appreciable effect both on competition and on trade between Member States, which will depend on the structure of competition in the EU market, in particular whether it is oligopolistic and the volume of trade affected by the agreement.²³⁶

Footnotes

- 93 See below, paras 45-040—45-045.
- 94 See, e.g. *SELEX Sistemi Integrati SpA v Commission* (C-113/07P) [2009] E.C.R. I-2207, EU:C:2009:191.
- 95 *Höfner & Elser v Macrotron* (C-41/90) [1991] E.C.R. I-1979, EU:C:1991:161; *Enichem Anic SpA v Commission* (T-6/89) [1991] E.C.R. II-1623, EU:T:1991:74 at [235]; *Commission v Italy* (C-35/96) [1998] E.C.R. I-3851, EU:C:1998:303, where the Court of Justice held that any activity consisting in offering goods or services on a given market is an economic activity.
- 96 *H.G. Oude Luttikhuis v Verenigde Coöperatieve Melkindustrie Coberc* (C-399/93) [1995] E.C.R. I-4515, EU:C:1995:434 (dairy co-operative); *Dansk Pelsdyravlerforening v Commission* (T-61/89) [1992] E.C.R. II-1931, EU:T:1992:79 (fur traders association). A body can be both an undertaking and an association of undertakings: *Frubo v Commission* (71/74) [1975] E.C.R. 563, EU:C:1975:61; *Piau v Commission* (T-193/02) [2005] E.C.R. II-209, EU:T:2005:22, appeal dismissed (C-171/05P) [2006] E.C.R. I-37, EU:C:2006:149.
- 97 See, e.g. *RAI v UNITEL* [1978] O.J. L157/39 (opera singer). However, where an apparently self-employed person, such as a musician in an orchestra, is engaged in a relationship of “false self-employment” and is in a comparable situation to an employee, he or she will not constitute an undertaking: *FNV Kunsten Informatie en Media v Staat der Nederlanden* (C-413/13) EU:C:2014:2411.
- 98 See, e.g. *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] E.C.R. I-1577, EU:C:2002:98 at [45]–[49].
- 99 *CNSD* [1993] O.J. L203/27 (customs agents); *COAPI* [1995] O.J. L122/37 (industrial property agents).
- 100 e.g. *Pavlov v Stichting Pensioenfonds Medische Specialisten* (C-180/98 etc.) [2000] E.C.R. I-6451, EU:C:2000:428.
- 101 *Congregacion de Escuelas Pias Provincia Betania v Ayuntamiento de Getafe* (C-74/16) EU:C:2017:496 (Catholic Church an undertaking in respect of education services for which it charged a fee).
- 102 See e.g. *Ambulanz Glöckner v Landkreis Südwestpfalz* (C-475/99) [2001] E.C.R. I-8089, EU:C:2001:577 (German Red Cross Association an undertaking as it provided ambulance services for remuneration, even though it was a non-profit-making organisation).
- 103 *Höfner & Elser v Macrotron* (C-41/90) [1991] E.C.R. I-1979, EU:C:1991:161 (provision of employment procurement services by a government-owned body an economic activity, even though the services were provided free of charge).
- 104 *Suiker Unie v Commission* (40/73 etc.) [1975] E.C.R. 1663, EU:C:1975:174 at [539].
- 105 *Criminal proceedings against Jean Claude Becu* (C-22/98) [1999] E.C.R. I-5665, EU:C:1999:419.

- 106 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (C-67/96) [1999] E.C.R. I-5751, EU:C:1999:430.*
- 107 e.g. *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (C-309/99) [2002] E.C.R. I-1577, EU:C:2002:98* (lawyers); *Pavlov v Stichting Pensioenfonds Medische Specialisten (C-180/98 etc.) [2000] E.C.R. I-6451, EU:C:2000:428* (medical practitioners).
- 108 See e.g. *Suiker Unie v Commission (40/73 etc.) [1975] E.C.R. 1663, EU:C:1975:174* at [538]–[540]; *Marlines v Commission (T-56/99) [2003] E.C.R. II-5225, EU:T:2003:333, appeal dismissed (C-112/04P) EU:C:2005:554*. See below, para.45-072.
- 109 See, e.g. *SAT Fluggesellschaft v Eurocontrol (C-364/92) [1994] E.C.R. I-43, EU:C:1994:7* and *SELEX Sistemi Integrati v Commission (C-113/07P) [2009] E.C.R. I-2207, EU:C:2009:191* (body established under international law to provide air traffic control services not an undertaking); *Diego Calì & Figli v Servizi ecologici Porto di Genova (C-343/95) [1997] E.C.R. I-1547, EU:C:1997:160* (body providing harbour pollution control services not an undertaking).
- 110 *Poucet et Pistre v AGF and Cancava (C-159/91, etc.) [1993] E.C.R. I-637, EU:C:1993:63* (body administering sickness and retirement benefit funds on the basis of the principle of solidarity not an undertaking); *AG2R Prévoyance v Beaudout (C-437/09) [2011] E.C.R. I-973, EU:C:2011:112* (provider of a healthcare scheme not an undertaking where it applies the principle of solidarity and is subject to state supervision); *FENIN v Commission (C-205/03P) [2006] E.C.R. I-6295, EU:C:2006:453* (organisations responsible for operation of the Spanish public health service not undertakings).
- 111 See e.g. *IAZ International Belgium v Commission (96/82 etc.) [1983] E.C.R. 3369, EU:C:1983:310* (water supply companies); *Motosyklistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio (C-49/07) [2008] E.C.R. I-4863, EU:C:2008:376* (non-profit-making association responsible for governing motorcycle competitions an undertaking insofar as it organised and commercially exploited its own motorcycling events).
- 112 *Viho Europe BV v Commission (T-102/92) [1995] E.C.R. II-17, EU:T:1995:3, upheld on appeal (C-75/93) [1996] E.C.R. I-5457, EU:C:1996:405.*
- 113 (170/83) [1984] E.C.R. 2999, EU:C:1984:271 at [11].
- 114 This is important in applying the block exemption regulations, some of which stipulate that agreements covered by them must have only two parties, e.g. Regulation 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] O.J. L93/17 art.2 (Technology Transfer Block Exemption): see below, para.45-099.
- 115 *EI du Pont de Nemours v Commission (C-172/12P) EU:C:2013:601* at [44]; *The Dow Chemical Co v Commission (C-179/12 P) EU:C:2013:605* at [55]; *Toshiba v Commission (T-104/13) EU:T:2015:610* at [95].
- 116 e.g. *Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce (C-293/13P etc.) EU:C:2015:416* at [75]; *Pirelli & C. SpA v Commission (C-611/18P) EU:C:2020:868* at [68]. A 60 per cent shareholding was not sufficient to engage this presumption, where the other shareholder held a 40 per cent shareholding and could also exercise decisive influence: *FLS Plast v Commission (T-64/06) EU:T:2012:102*.
- 117 *The Goldman Sachs Group Inc v Commission (C-595/18P) EU:C:2021:73* at [31]–[36].

- 118 *The Goldman Sachs Group Inc v Commission* (C-595/18P) EU:C:2021:73 at [31]–[36]. See also *Deutsche Telekom AG v Commission* (C-152/19) EU:C:2021:238 (decided under art.102), in which liability for the conduct of a subsidiary was imputed to a parent company that held a 51 per cent shareholding, as its senior managers were also directors, and were involved in the development of the commercial policy, of the subsidiary.
- 119 *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [38]–[50]. The claimant must, however, show that, having regard to the economic, organisational and legal links between the entities and the infringement, the parent company and the subsidiary carry on the same economic activity and thus form part of the same economic unit, for example because the subsidiary markets the same products as those covered by the anti-competitive agreement entered into by its parent company: at [51]–[52]. This may not be the case in conglomerate groups that have several unrelated activities: at [45]–[47].
- 120 *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato* (C-377/20) EU:C:2022:379 at [121]–[123].
- 121 [2022] EWHC 929 (Comm) at [34]–[42]. Accordingly, there was no need for the claimant to plead that Microsoft’s UK subsidiary had itself infringed arts 101 and 102, only that it was a member of an infringing undertaking: at [54].
- 122 [2022] CAT 34 at [202]–[223].
- 123 *Bundeskartellamt v Volkswagen and VAG Leasing GmbH* (C-266/93) [1995] E.C.R. I-3508, EU:C:1995:345 at [18]–[19]; *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* (C-217/05) [2006] E.C.R. I-11987, EU:C:2006:784 at [38]–[63].
- 124 *SIA “VM Remonts”, formerly SIA “DIV un KO” v Konkurencies padome* (C-542/14) EU:2016:578. For this to be the case, (i) the service provider must be acting under the direction or control of the undertaking, or (ii) the undertaking must be aware of anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or (iii) the undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed.
- 125 *Van Landewyck v Commission* (C209/78 etc.) [1980] E.C.R. 3125, EU:C:1980:248.
- 126 *Hercules Chemicals v Commission* (T-7/89) [1991] E.C.R. II-1711, EU:T:1991:75 at [256].
- 127 *Konica* [1988] 4 C.M.L.R. 848, [40].
- 128 e.g. *Groupe Danone v Commission* (T-38/02) [2005] E.C.R. II-4407, EU:T:2005:367, appeal dismissed (C-3/06P) [2007] E.C.R. I-1331, EU:C:2007:88.
- 129 *HFB Holding v Commission* (T-9/99) [2002] E.C.R. II-1487, EU:T:2002:70. However, in *Jaeger v Opel Norge* (E-3/97) [1998] Rep EFTA Ct 1, the EFTA Court held, in applying art.53(1) EEA, that if the parties are still in negotiation, they have not concluded an agreement; however, such negotiations may be evidence of a concerted practice.
- 130 e.g. *ENI SpA v Commission* (T-558/08) EU:T:2014:1080.

- 131 *Musique Diffusion Française v Commission* (100/80 etc.) [1983] E.C.R. I-1825, EU:C:1983:158.
- 132 *Marlines v Commission (Greek Ferries)* (T-56/99) [2003] E.C.R. II-5225, EU:T:2005:333.
- 133 *H&R ChemPharm v Commission (Candle Waxes)* (T-551/08) EU:T:2014:1081.
- 134 *ENI/Montedison* [1989] 4 C.M.L.R. 444.
- 135 *Sandoz prodotti farmaceutici SpA v Commission* (C-277/87) [1990] E.C.R. I-45, EU:C:1990:6.
- 136 *Bayer v Commission (Adalat)* (T-41/96) [2000] E.C.R. II-3383, EU:T:2000:242 at [71]–[72]. For further examples of cases where the General Court concluded that the evidence did not support the inference of an agreement, see *JCB Service v Commission* (T-67/01) [2004] E.C.R. II-49, EU:T:2004:3; *General Motors v Commission* (T-368/00) [2003] E.C.R. II-4491, EU:T:2003:275; *Volkswagen v Commission* (C-74/04P) [2006] E.C.R. I-6585, EU:C:2006:460.
- 137 e.g. *ACF Chemiefarma v Commission* (41/69) [1970] E.C.R. 661, EU:C:1970:71 at [112]; *Van Landewyck v Commission* (209/78 etc.) [1980] E.C.R. 3125, EU:C:1980:248 at [86]; *Bayer v Commission (Adalat)* (T-41/96) [2000] E.C.R. II-3383, EU:T:2000:242 at [173], upheld on appeal (C-2/01P etc.) [2004] E.C.R. I-23, EU:C:2004:2.
- 138 *Bayer v Commission (Adalat)* (T-41/96) [2000] E.C.R. II-3383, EU:T:2000:242 at [73]–[157]. For an example of where implementation of such an export ban policy was found to constitute an agreement, due to the manufacturer checking its distributor's compliance with the policy and the distributor increasing its prices to make parallel trade economically unattractive, see *Tipp-Ex GmbH v Commission* (C-279/87) [1990] E.C.R. I-261, EU:C:1990:57.
- 139 *Sandoz prodotti farmaceutici SpA v Commission* (C-277/87) [1990] E.C.R. I-45, EU:C:1990:6.
- 140 *Consten and Grundig v Commission* (56 and 58/64) [1966] E.C.R. 299, EU:C:1966:41 (affirmed many times).
- 141 *Imperial Chemical Industries Ltd v Commission (Dyestuffs)* (48/69) [1972] E.C.R. 619, EU:C:1972:70 at [64]. This formulation has been reaffirmed in numerous subsequent cases, including *Limburgse Vinyl Maatschappij NV v Commission (PVC Cartel II)* (T-305/94 etc.) [1999] E.C.R. II-931, EU:T:1999:80 at [720]; *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingsautoriteit* (C-8/08) [2009] E.C.R. I-4529, EU:C:2009:343 at [26].
- 142 *Commission v Anic Partecipazione (Polypropylene)* (C-42/92P) [1999] E.C.R. I-4125, EU:C:1999:356 at [118].
- 143 Indirect contact between undertakings may be facilitated by a third party, for example a “hub and spoke” arrangement in which two retailers (A and C) exchange information on their future pricing intentions via common supplier (B): *Argos Ltd & Littlewoods Ltd and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318. A concerted practice may be implemented by using a common IT platform to exchange information: “*Eturas*” UAB v *Lietuvos Respublikos konkurencijos taryba* (C-74/14) EU:C:2016:42.
- 144 *Suiker Unie v Commission* (40/73 etc.) [1975] E.C.R. 1663, EU:C:1975:174.

- 145 See e.g. *Hercules Chemicals SA/NV v Commission* (T-7/89) [1991] E.C.R. II-1711, EU:T:1991:75 at [259]–[261]; *Hüls AG v Commission* (C-199/92P) [1999] E.C.R. I-4287, EU:C:1999:358 at [158]–[166]; *T-Mobile Netherlands BV v Raad van bestur van de Nederlandse Mededingsautoriteit* (C-8/08) [2009] E.C.R. I-4529, EU:C:2009:343 at [52]. Whilst the presumption is rebuttable, the undertaking must prove that the concerted action did not have any influence on its own conduct on the market, including that it did not take account of the information exchanged in determining its own conduct, including its prices: see e.g. *Solvay SA v Commission (Hydrogen Peroxide)* (C-455/11P) EU:C:2013:796 at [44]–[45].
- 146 *Imperial Chemical Industries Ltd v Commission (Dyestuffs)* (48/69) [1972] E.C.R. 619, EU:C:1972:70; *Åhlström Oy v Commission (Wood Pulp II)* (C-89/85 etc.) [1993] E.C.R. I-1307, EU:C:1993:120.
- 147 e.g. *Società Italiano Vetro SpA v Commission (Italian Flat Glass)* (T-68/89 etc.) [1992] E.C.R. II-1403, EU:T:1992:38; *Solvay SA v Commission (Hydrogen Peroxide)* (C-455/11P) EU:C:2013:796 at [40].
- 148 At least if a significant number of the members in fact comply with the recommendation: *Van Landewyck v Commission* (209/78 etc.) [1980] E.C.R. 3125, EU:C:1980:248.
- 149 *MasterCard v Commission* (C-382/12P) EU:C:2014:2201 at [62]–[77] (MasterCard was an association of undertakings, comprised of its shareholder banks, when taking decisions on multilateral interchange fees, as the banks had decision-making powers within MasterCard, and its and the banks' interests coincided in regulating fees).
- 150 *Ordre national des pharmaciens (ONP) v Commission* (T-90/11) EU:T:2014:1049 (association of pharmacists); *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* (C-1/12) EU:C:2013:81 (association of chartered accountants).
- 151 *Meca-Medina and Majcen v Commission* (C-519/04P) EU:C:2006:492; *International Skating Union* (T-93/18) EU:T:2020:610, appeal pending (C-124/21P).
- 152 *Meca-Medina and Majcen v Commission* (C-519/04P) EU:C:2006:492 at [42].
- 153 The categories of anti-competitive agreements set out in the sub-paras of art.101(1) are illustrative, not exhaustive.
- 154 Treaty on European Union art.3(3).
- 155 See, e.g. *Consten and Grundig v Commission* (56/64 etc.) [1966] E.C.R. 299, EU:C:1966:41 (absolute territorial protection for distributors infringed art.101(1)); *Football Association Premier League Ltd v QC Leisure* (C-403/08 etc.) [2011] E.C.R. I-94/19, EU:C:2011:649 (use of intellectual property rights to prohibit or limit the cross-border provision of broadcasting services infringed art.101(1)); *Pierre Fabre Dermo-Cosmétique* (C-439/09) [2011] E.C.R. I-9419, EU:C:2011:649 (prohibition of online sales by distributors infringed art.101(1)).
- 156 See below, paras 45-081—45-085.
- 157 The terms “object” or “effect” are disjunctive rather than cumulative, so that the existence of either is sufficient: see *Société Technique Minière v Maschinenbau Ulm* (56/65) [1966] E.C.R. 235, EU:C:1966:38.
- 158 *Société Technique Minière v Maschinenbau Ulm* (56/65) [1966] E.C.R. 235, EU:C:1966:38.

- 159 *Delimitis v Henninger Bräu* (C-234/89) [1991] E.C.R. I-935, EU:C:1991:91. For an analysis of the application of art.101(1) to a distribution agreement covering non-EEA states see *Javico International v Yves Saint Laurent Parfums* (C-306/96) [1998] E.C.R. I-1983, EU:C:1998:173.
- 160 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] E.C.R. I-1577, EU:C:2002:98.
- 161 *Groupement des cartes bancaires* (CB) v *Commission* (C-67/13) EU:C:2014:2204.
- 162 *Generics (UK) Ltd v Competition and Markets Authority* (C-307/18) EU:C:2020:52.
- 163 *Gazdasági Versenyhivatal v Budapest Bank Nyrt* (C-228/18) EU:C:2020:265.
- 164 *Gazdasági Versenyhivatal v Budapest Bank Nyrt* (C-228/18) EU:C:2020:265 at [40]–[44].
- 165 The *Delimitis* judgment restated the law on the relevance of the existence of a network of agreements; cf. the earlier case of *Brasserie De Haecht v Wilkin* (23/67) [1967] E.C.R. 407, EU:C:1967:54.
- 166 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] E.C.R. I-1577, EU:C:2002:98 (rules prohibiting lawyers from forming multi-disciplinary partnerships with accountants did not infringe art.101(1), as the rules were necessary for the proper practice of the legal profession).
- 167 *Meca-Medina and Majcen v Commission* (C-519/04P) [2006] E.C.R. I-6991, EU:C:2006:492 (anti-doping rules of the International Olympic Committee were not a restriction of competition within art.101(1), as they were necessary to ensure that sport was conducted fairly and to protect athletes' health, the integrity of sport and ethical values in sport).
- 168 In respect of professional regulation, see e.g. *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* (C-1/12) EU:C:2013:127 (regulations for the compulsory training of chartered accountants were capable of restricting competition by effect as only the Order of Chartered Accountants or providers approved by it could provide such training). In respect of sporting rules, see e.g. *International Skating Union v Commission* (T-93/18) EU:T:2020:610 (rules of the ISU imposing lengthy bans from competitions authorised by it or its members on skaters who participated in non-authorised events infringed art.101(1) as they protected the ISU's economic interests from competition by organisers of other events), appeal pending (C-124/21P).
- 169 e.g. *IAZ International Belgium v Commission* (96/82 etc.) [1983] E.C.R. 3369, EU:C:1983:310.
- 170 e.g. *T-Mobile Netherlands BV v Raad van bestur van de Nederlandse Mededingingsautoriteit* (C-8-08) [2009] E.C.R. I-4259, EU:C:2009:343 at [27]; *Groupement des cartes bancaires* (CB) v *Commission* (C-67/13) EU:C:2014:2204 at [54].
- 171 *Groupement des cartes bancaires* (CB) v *Commission* (C-67/13) EU:C:2014:2204.
- 172 See below, paras 45-054 et seq.
- 173 See below, paras 45-069 et seq.
- 174 For the “appreciability” of an effect on trade between Member States, see below, paras 45-043—45-045.
- 175 *Expedia Inc v Autorité de la concurrence* (C-226/11) EU:C:2012:795 at [37].

- 176 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (C-8/08) [2009] E.C.R. I-4259, EU:C:2009:343* at [39].
- 177 e.g. *Sandoz prodotti farmaceutici SpA v Commission (C-277/87) [1990] E.C.R. I-45, EU:C:1990:6* (export ban not enforced, but still constituted a restriction of competition by object).
- 178 *Generics (UK) Ltd v Competition and Markets Authority (C-307/18) EU:C:2020:52* at [67]–[68]. See also *H. Lundbeck A/S v Commission (C-591/16 P) EU:C:2021:243* at [112].
- 179 *Generics (UK) Ltd v Competition and Markets Authority (C-307/18) EU:C:2020:52* at [76]–[77]. See also *Gazdasági Versenyhivatal v Budapest Bank Nyrt (C-228/18) EU:C:2020:265* at [33]–[40] and [51].
- 180 *Generics (UK) Ltd v Competition and Markets Authority (C-307/18) EU:C:2020:52* at [81]–[82] and [87].
- 181 *Gazdasági Versenyhivatal v Budapest Bank Nyrt (C-228/18) EU:C:2020:265* at [62]–[63].
- 182 *Gazdasági Versenyhivatal v Budapest Bank Nyrt (C-228/18) EU:C:2020:265* at [33]–[40] and [51]–[56].
- 183 *Gazdasági Versenyhivatal v Budapest Bank Nyrt (C-228/18) EU:C:2020:265* at [76].
- 184 *Gazdasági Versenyhivatal v Budapest Bank Nyrt (C-228/18) EU:C:2020:265* at [82]–[83].
- 185 *H. Lundbeck A/S v Commission (C-591/16 P) EU:C:2021:243* at [130]–[136]; *Lexon (UK) Ltd v Competition and Markets Authority [2021] CAT 5* at [225]–[227].
- 186 *Gazdasági Versenyhivatal v Budapest Bank Nyrt (C-228/18) EU:C:2020:265* at [77]–[79].
- ① 187 “Visma Enterprise” SIA v Konkurencies padome (C-306/20) EU:C:2021:935 at [64]–[70].
- ① 188 *BGL (Holdings) Ltd v Competition and Markets Authority [2022] CAT 36* at [203]–[205].
- ① 189 *MasterCard Inc v Commission (C-382/12P) EU:C:2014:2201* at [93]. In *BGL (Holdings) Ltd v Competition and Markets Authority [2022] CAT 36* at [29], the Competition Appeal Tribunal set out a framework for assessing the existence or otherwise of an anti-competitive effect, comprising: (i) identifying the agreement or provision that is said to constitute a restriction of competition; (ii) defining the relevant market; (iii) articulating the theory of harm by which it is alleged that anti-competitive effects arise; and (iv) assessment of those effects against the counterfactual, i.e. the position that would have existed in the absence of the allegedly infringing agreement or provision. This does not involve consideration of pro-competitive effects, which are relevant, if at all, in considering exemption under art.101(3) TFEU: at [31].
- ① 190 *Société Technique Minière v Maschinenbau Ulm (56/65) [1966] E.C.R. 235, EU:C:1966:38.*
- ① 191 e.g. *European Night Services v Commission (T-374/94 etc.) [1998] E.C.R. II-3141, EU:T:1998:198* at [136]–[137].
- ① 192

- e.g. *Gøtstrup-Klim v Dansk Landbrugs* (C-250/92) [1994] E.C.R. I-5641, EU:C:1998:198 at [31]; *SIA “Maxima Latvija” v Konkurences padome* (C-345/14) EU:C:2015:784 at [26]–[31].
- ①193 e.g. *Delimitis v Henninger Bräu* (C-234/89) [1991] E.C.R. I-935, EU:C:1991:91 at [15]–[16] (beer supply agreements); *SIA “Maxima Latvija” v Konkurences padome* (C-345/14) EU:C:2015:784 at [27] (shopping centre leases). In *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36, the Competition Appeal Tribunal assessed the “essential purpose” of market definition, which is to identify neutrally the relevant context in which the effects on competition of an agreement or provision can be assessed (at [107]–[113]). It is, therefore, important to understand what is being bought and sold, and why, in order to identify products or services that are sufficiently close substitutes to the “focal product” supplied by the undertaking or undertakings concerned (at [114]). In the case of “two-sided markets” (such as those for intermediary or platform services through which different users interact), a service may simultaneously form part of two different product markets, reflecting the different types of buyers of the platform’s services, in that case sellers and buyers of home insurance (at [115]–[120]), which need to be defined separately, even if the competitive effects on them are considered as a whole (at [145]–[148]).
- ①194 *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36 at [178(3)], [202] and [224(2)].
- ①195 *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36 at [224(2)] and [243].
- ①196 *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36 at [220].
- ①197 *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36 at [243]–[244].
- ①198 e.g. in exclusive distribution or licensing agreements which foreclose outlets to competing manufacturers’ goods.
- ①199 See, e.g. *European Night Services v Commission* (T-374/94 etc.) [1998] E.C.R. II-3141, EU:T:1998:198 at [136] and *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36 at [240]–[263] (the fact that wide MFN clauses may have constrained the pricing policy of providers of home insurance that advertised on BGL’s price comparison website did not mean that competition on the market for home insurance was negatively affected on the relevant market, which was wider than for insurance sold via price comparison websites: see below, para.45-087).
- ①200 [2004] O.J. C101/97.
- ①201 [2010] O.J. C130/1 (expired on 31 May 2022) and [2022] O.J. C248/1 (from 1 June 2022).

- 202 [2011] O.J. C11/1.
- 203 [2014] O.J. C89/3.
- 204 (5/69) [1969] E.C.R. 295, EU:C:1969:35.
- 205 *Expedia Inc v Autorité de la Concurrence* (C-226/11) EU:C:2012:795.
- 206 *Miller v Commission* (19/77) [1978] E.C.R. 131, EU:C:1978:19; *Musique Diffusion Française v Commission* (100/80 etc.) [1983] E.C.R. 1825, EU:C:1983:158.
- 207 e.g. *John Deere Ltd v Commission* (C-7/95P) [1998] E.C.R. I-3111, EU:C:1998:256 at [66]–[68] and [88]–[90].
- 208 *Delimitis v Henninger Bräu* (C-234/89) [1991] E.C.R. I-935, EU:C:1991:91; *Schöller v Commission* (T-9/93) [1995] E.C.R. II-1611, EU:T:1995:99; *Langnese-Iglo v Commission* (T-7/93) [1995] E.C.R. II-1533, EU:T:1995:98.
- 209 See below, para.45-042.
- 210 [2014] O.J. C291/1.
- 211 *European Night Services v Commission* (T-374/94 etc.) [1998] E.C.R. II-3141, EU:T:1998:198 at [102]–[103].
- 212 *Expedia Inc v Autorité de la Concurrence* (C-226/11) EU:C:2012:795 at [27]–[31]. See also *Network Rail Infrastructure Ltd v Achilles Information Ltd* [2020] EWCA Civ 323, [2020] 4 C.M.L.R. 21 at [93].
- 213 *Brasserie De Haecht v Wilkin* (C-23/67) [1967] E.C.R. 407, EU:C:1967:54 (concerning exclusive beer supply agreements); *Neste Markkinointi Oy v Yötuli Ky* (C-214/99) [2000] E.C.R. I-11121, EU:C:2000:679 (concerning a network of petrol station exclusive purchasing agreements, in which a one-year exclusive agreement did not significantly contribute to market foreclosure caused by parallel networks of exclusive agreements, and so did not infringe art.101(1)).
- 214 e.g. brewery tied house estates, petrol solus agreements, selective distribution of luxury perfumes.
- 215 *Delimitis v Henninger Bräu* (C-234/89) [1991] E.C.R. I-935, EU:C:1991:91; *VGB v Commission* (T-77/94) [1997] E.C.R. II-759, EU:T:1997:70.
- 216 *Schöller Lebensmittel GmbH v Commission* (T-9/93) [1995] E.C.R. II-1611, EU:T:1995:99.
- 217 The requirement is satisfied even if the effect is to increase trade since the aim of the TFEU is to maintain undistorted competition: *Consten and Grundig v Commission* (56 and 58/64) [1966] E.C.R. 299, EU:C:1966:41. However, art.101(1) does not apply where the effect on trade is not appreciable, i.e. is “insignificant”: *Javico International v Yves Saint Laurent Parfums* (C-306/96) [1998] E.C.R. I-1983, EU:C:1998:173 at [16].
- 218 *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome* (AKKA/LAA) (C-177/16) EU:C:2017:689 at [26].
- 219 *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome* (AKKA/LAA) (C-177/16) EU:C:2017:689 at [27].
- 220 *Dalmine SpA v Commission* (C-407/04P) [2007] E.C.R. I-901, EU:C:2007:53 at [89]–[91].

- 221 *Windsurfing International v Commission* (193/83) [1986] E.C.R. 611, EU:C:1986:75; affirmed in *VGB v Commission* (T-77/94) [1997] E.C.R. II-759, EU:T:1997:70; *Hitachi v Commission* (T-112/07) [2011] E.C.R. II-3871, EU:C:2011:342.
- 222 Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2014] O.J. C291/1.
- 223 Guidelines on the effect on trade, paras 52–57. The parties' aggregate market share must be below 5 per cent. In the case of a horizontal agreement, their aggregate EU turnover in the products concerned by the agreement must be below €40 million, and in the case of a vertical agreement, the supplier's aggregate EU turnover in those products must be below €40 million.
- 224 *Société Technique Minière v Maschinenbau Ulm* (56/65) [1966] E.C.R. 235, EU:C:1966:38 and affirmed many times, e.g. in *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios* (C-238/05) [2006] E.C.R. I-11125, EU:C:2006:734 at [33].
- 225 This formulation of the test is sometimes used in cases under art.102, e.g. *Commercial Solvents v Commission* (6/73 etc.) [1974] E.C.R. 223, EU:C:1974:18, in which conduct that eliminated a competitor within the EU, even though most of its production was exported outside of the EU, was held to infringe art.102.
- 226 *Miller International Schallplatten GmbH v Commission* (19/77) [1978] E.C.R. 131, EU:C:1978:19.
- 227 *Bureau national interprofessionnel du cognac v Clair* (123/83) [1985] E.C.R. 391, EU:C:1985:33.
- 228 *Raffeisen Zentralbank Österreich v Commission* (T-259/02 etc.) [2006] E.C.R. II-5169, EU:T:2006:396 at [174].
- 229 *Cementhandelaren v Commission* (8/72) [1972] E.C.R. 2181, EU:C:1972:84; confirmed subsequently many times; see e.g. *Raffeisen Zentralbank Österreich AG v Commission* (T-259/02 etc.) [2006] E.C.R. II-5169, EU:T:2006:396, in which the General Court considered that there was a rebuttable presumption that an agreement covering the whole of a national market affected inter-State trade, which was upheld by the Court of Justice in *Erste Group Bank v Commission* (C-125/07P) [2009] E.C.R. I-8681, EU:C:2009:576.
- 230 (C-215 and 216/96) [1999] E.C.R. I-135, EU:C:1999:12.
- 231 [1999] O.J. L271/28.
- ②232 *Åhlström Osakeyhtiö v Commission* (Wood Pulp I) (89/95 etc.) [1988] E.C.R. 5193, EU:C:1988:447.
- ②233 *Intel Corp Inc v Commission* (C-413/14 P) EU:C:2017:632.
- ②234 *Hitachi v Commission* (Gas Insulated Switchgear) (T-112/07) [2011] E.C.R. II-3871, EU:T:2011:342.
- ②235 *Nichicon Corp v Commission* (T-342/18) EU:T:2021:635 (cartel between Japanese producers of electrolytic capacitors who held anti-competitive meetings and exchanges of

information in Japan was nevertheless implemented in the EU, as the products covered by the cartel were sold there).

- 236 *Javico International v Yves Saint Laurent Parfums (C-306/96) [1998] E.C.R. I-1983, EU:C:1998:173* (clause prohibiting reimportation of perfumes into the EU did not have an appreciable effect on trade between Member States).
-

(c) - Article 101(3)

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(c) - Article 101(3)

Criteria of art.101(3)

- 45-048 If an agreement, decision or concerted practice falls within art.101(1), it is always open to the parties to show that their agreement, decision or practice fulfils the criteria for exemption contained in art.101(3), which provides the framework for an assessment of the pro- and anti-competitive aspects of an agreement that restricts competition under art.101(1).²³⁷ Article 101(3) provides that the prohibition may be “declared inapplicable” to an agreement which:

... contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the benefit, and which does not:

- (a) impose upon the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Application of art.101(3)

- 45-049 Under the formerly applicable Regulation 17/62, parties could notify their agreement to the Commission in order to obtain an individual exemption decision, or at least a “comfort letter” setting out the Commission’s non-binding views, under art.101(3).²³⁸ However, under Regulation 1/2003, an agreement that is caught by art.101(1) but which satisfies the conditions of art.101(3) is lawful, without any prior decision to that effect being required; accordingly, on 1 May 2004 the system of notification of agreements to the Commission for individual exemption under art.101(3) and the exclusive competence of the Commission to adopt decisions under that provision in individual cases were abolished; instead the parties to agreements and their advisers are expected to assess the application of art.101(1) and, if required, art.101(3) themselves. The Commission has published Guidelines on the application of art.101(3)²³⁹ and reference should also be made to specialist works for a detailed analysis of this topic.

²⁴⁰



Agreements likely to satisfy art.101(3)

- 45-050 All four criteria must be satisfied in order for art.101(3) to be applicable.



²⁴¹ **U** Whilst any agreement may benefit from exemption under art.101(3),
²⁴²

U agreements that restrict competition by object may be more difficult to justify under art.101(3) than agreements that restrict competition by effect.

²⁴³

U The burden of proof of demonstrating that the four criteria of art.101(3) are satisfied falls on the party (or parties) claiming the benefit of exemption under art.101(3),

²⁴⁴

U whether in proceedings before the Commission, a national competition authority or a national court. It must do so on the balance of probabilities

²⁴⁵

U and this requires a complex, empirical assessment to be made of the likely negative effects of an agreement on competition and consumers (i.e. anti-competitive effects) and any efficiencies and other benefits resulting from the restriction (i.e. pro-competitive effects)

²⁴⁶

U; this in turn requires the party seeking to rely on art.101(3) to produce robust and cogent evidence, including empirical analysis and data to show that all four criteria are met, as it may not rely on economic theory alone.

²⁴⁷

U

- 45-051 The benefits of an agreement must provide an appreciable objective advantage that compensates for its negative effects on competition²⁴⁸ and must arise from the restrictions on competition contained in the agreement.²⁴⁹ Such benefits may include cost efficiencies (e.g. from new or more efficient production processes or combining existing assets, economies of scale or scope, or improved distribution networks) or qualitative efficiencies (e.g. new or higher quality products or services).²⁵⁰ Consumers must also receive a fair share of the benefits, for example in the form of lower prices or new or improved products, such that overall the net effect of the agreement is positive. In *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC, Mastercard Inc* the Supreme Court held that the requirement that consumers receive a “fair share” of the benefits means that art.101(3) is not satisfied where an agreement causes disadvantages to consumers on one market but has benefits for consumers on another market, unless the two groups of consumers are the same.²⁵¹ Article 101(3) also requires that the restrictions in the agreement are “indispensable” to the attainment of the objective benefits, i.e. that they cannot be achieved by other, realistic means that are less restrictive of competition.²⁵² Finally, the agreement must not substantially eliminate competition, whether actual or potential, on the relevant market affected by the agreement.²⁵³

Block exemptions

- 45-052 The Council and, under delegated powers, the Commission can adopt block exemption regulations. **U** There are presently seven block exemption regulations in force, covering rail, road and inland waterway transport services,²⁵⁴ liner shipping transport services,²⁵⁵ vertical agreements,²⁵⁶ vertical agreements in the motor vehicle sector,²⁵⁷ research and development agreements,²⁵⁸ specialisation and production agreements,²⁵⁹ and technology transfer licensing agreements.²⁶⁰

These regulations identify for certain common types of agreements the contractual terms and conditions which fulfil the criteria set out in art.101(3) and which are therefore entitled to the benefit of exemption. Agreements which fall within the scope, and comply with the provisions, of a particular block exemption regulation automatically benefit from exemption under art.101(3) and are therefore valid and enforceable.²⁶¹

- 45-053** Each regulation specifies the contractual provisions that, if included in an agreement, will take it outside of the scope of the block exemption; agreements which contain such provisions may still satisfy the criteria of art.101(3), but an individual assessment will have to be made by the parties and their legal advisers in each case. Whilst the terms of each regulation vary, they generally identify specific “hardcore” (or by object) restrictions that, if included in an agreement, remove the benefit of the block exemption.

²⁶²

U In some regulations, a specific restriction within an agreement, known as an “excluded restriction” will not benefit from exemption, but the remainder of the agreement will do so.

²⁶³

U Another key feature of these regulations is the use of a market share cap to determine eligibility of agreements for block exemption

²⁶⁴

U; if the parties’ market shares on any relevant market exceed these levels, the agreement will require individual assessment under art.101(3). The Commission and the national competition authorities have the power to withdraw the benefit of the block exemption from an agreement which has effects which are incompatible with the criteria of art.101(3).

²⁶⁵**U**

Footnotes

237 e.g. *MasterCard v Commission (C-382/12P) EU:C:2014:2201* at [93].

238 See above, para.45-006.

239 Commission Guidelines on the application of Article 81(3) of the Treaty [2004] O.J. C101/97. The Commission has also provided, in other guidelines, guidance on the application of art.101(3) to specific categories of agreements that do not satisfy the conditions of a block exemption regulation, including for horizontal agreements (see below, paras 45-054 et seq.), vertical agreements (see below, paras 45-069 et seq.) and technology transfer agreements (see below, paras 45-096 et seq.). In addition, guidance

- on the application of art.101(3) to agreements in the insurance sector is contained in the Commission Communication on the application of Article 101(3) TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector [2010] O.J. C82/20.
- ②40 e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), Ch.3; Whish and Bailey, Competition Law, 10th edn (2021), Ch.4.
- ②41 See, e.g. *Métropole Télévision SA v Commission* (T-185/00 etc.) [1996] E.C.R. II-649, EU:T:1996:99; *JCB Service v Commission* (C-167/04P) [2006] E.C.R. I-8935, EU:C:2006:594; “Visma Enterprise” SIA v Konkurencies padome (C-306/20) EU:C:2021:935 at [84].
- ②42 *Matra Hachette v Commission* [1994] E.C.R. II-595, EU:T:1994:89 at [85]; “Visma Enterprise” SIA v Konkurencies padome (C-306/20) EU:C:2021:935 at [83].
- ②43 *Gazdasági Versenyhivatal v Budapest Bank Nyrt* (C-228/18) EU:C:2020:265 at [41].
- ②44 Regulation 1/2003 art.2.
- ②45 *GlaxoSmithKline Services Unlimited v Commission* (C-501/06P etc.) [2009] E.C.R. I-9291, EU:C:2009:610 at [83].
- ②46 See e.g. *GlaxoSmithKline Services Unlimited v Commission* (T-168/01) [2006] ECR II-2969, EU:T:2006:265 at [241]–[307], upheld on appeal (C-501/06P etc.) [2009] ECR I-9291, EU:C:2009:610. See also *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC, Mastercard Inc* [2020] UKSC 24, [2020] 4 All E.R. 807 at [106]–[138].
- ②47 *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC, Mastercard Inc* [2020] UKSC 24, [2020] 4 All E.R. 807 at [116]–[137].
- 248 e.g. *GlaxoSmithKline Services Unlimited v Commission* (C-501/06P etc.) [2009] E.C.R. I-9291, EU:C:2009:610 at [92]; *MasterCard v Commission* (C-382/12P) EU:C:2014:2201 at [234]–[235].
- 249 e.g. *GlaxoSmithKline Services Unlimited v Commission* (C-501/06P etc.) [2009] E.C.R. I-9291, EU:C:2009:610 at [112]–[121]; *MasterCard v Commission* (C-382/12P) EU:C:2014:2201 at [230]–[232].
- 250 Horizontal Cooperation Guidelines, paras 59–72.
- 251 *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC, Mastercard Inc* [2020] UKSC 24, [2020] 4 All E.R. 807 at [144] and [170]–[174].
- 252 e.g. *Matra Hachette v Commission* (T-17/93) [1994] E.C.R. II-595, EU:T:1995:89 at [138]; *H. Lundbeck A/S v Commission* (T-472/13) EU:T:2016:449 at [719].
- 253 e.g. *Atlantic Container Line v Commission* (T-395/94) [2002] E.C.R. II-875, EU:T:2002:49.
- 254 Council Regulation 169/2009 [2009] O.J. L61/1.
- 255 Commission Regulation 906/2009 [2009] O.J. L256/31.

- ②56 Commission Regulation 2022/720 [2022] O.J. L134/4, which entered into force on 1 June 2022; until 31 May 2020 Commission Regulation 330/2010 [2010] O.J. L102/1 applied. The Commission has published guidance on the application of these Regulations: see Guidelines on Vertical Restraints [2010] O.J. C130/1 (in respect of Regulation 330/2010) and Guidelines on Vertical Restraints [2020] O.J. C248/1 (in respect of Regulation 2022/720). See below, paras [45-088](#) et seq.
- 257 Commission Regulation 461/2010 [2010] O.J. L129/52, which applies to the motor vehicle after market; Regulation 330/2010 is applicable to the sale of new motor vehicles. See below, para.[45-088](#).
- 258 Commission Regulation 1217/2010 [2010] O.J. L335/36. Guidance on the application of Articles 101(1) and 101(3) and Regulation 1217/2010 to research and development agreements is provided in the Commission's Horizontal Cooperation Guidelines, section 3. See below, para.[45-063](#).
- 259 Commission Regulation 1218/2010 [2010] O.J. L335/43. Guidance on the application of Articles 101(1) and 101(3) and Regulation 1218/2010 to specialisation and production agreements is provided in the Commission's Horizontal Cooperation Guidelines, section 4. See below, para.[45-062](#).
- 260 Commission Regulation 316/2014 [2014] O.J. L93/17. The Commission has published guidance on the application of this Regulation: see Guidelines on the application of Article 101 TFEU to technology transfer agreements [2014] O.J. C89/3. See below, para.[45-099](#).
- 261 If an agreement complies with the conditions set out in an EU block exemption, it will automatically enjoy exemption from the Ch.I prohibition in UK competition law by virtue of the [Competition Act 1998 s.10](#), whether as a “parallel exemption” (until 31 December 2020) or as a “retained exemption” (after that date): see below, paras [45-199](#)—[45-200](#).
- ②62 e.g. in relation to vertical agreements, Regulation 2022/720 art.4 provides (and Regulation 330/2010 art.4 provided) that the exemption for vertical agreements does not apply to agreements that, subject to limited exceptions, have as their object restrictions on: the buyer’s ability to determine its sale price; the territory into which the buyer or the customers to which the buyer may sell the contract goods or services; restrictions on sales by members of a selective distribution system to end users; cross-supplies between distributors within a selective distribution system; and the ability of a supplier of components to sell the components as spare parts to end-users or independent repairers. Regulation 2022/720 art.4(e) also additionally prohibits restrictions of the effective use of the internet by the buyer or its customers to sell the contract goods and services.
- ②63 e.g. in relation to vertical agreements, Regulation 2022/720 art 5(1) provides (and Regulation 330/2010 art.5(1) provided) that, subject to limited exceptions, exemption will not be applicable to: a non-compete obligation, the duration of which is indefinite or exceeds five years; a post-termination prohibition on the buyer manufacturing, purchasing, selling or reselling the contract goods or services; or an obligation that prohibits members of a selective distribution system from selling the brands of competing suppliers. Regulation 2022/720

art.5(1)(d) further provides that exemption is not applicable to a “most favoured nation” obligation that prevents a buyer of online intermediation services from selling goods or services under more favourable conditions via competing online intermediation services.

②264 e.g. in relation to vertical agreements, Regulation 2022/730 art.3 imposes (and Regulation 330/2010 art.3 imposed) market share thresholds of 30 per cent on both the supplier and the buyer on the relevant markets on which they sell and purchase the contract goods or services, respectively; in relation to transfer agreements, Regulation 316/2014 art.3 imposes market share thresholds of 20 per cent (where the parties are competing undertakings) and 30 per cent (where parties are not competing undertakings); and in relation to specialisation and production agreements, Regulation 1218/2010 art.3 imposes a market share threshold of 20 per cent.

②265 Regulation 1/2003 art.29.

(d) - Application of art.101 to Horizontal Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(d) - Application of art.101 to Horizontal Agreements

Typical horizontal agreements

45-054

U Horizontal agreements are agreements concluded between firms that are actual or potential competitors in a market. An undertaking that is not present in a market is a potential competitor if, at the time the agreement is entered into,

[266](#)

U there are real and concrete possibilities of it entering the market and competing with undertakings already present in it, taking account of the structure of the market, whether it has a firm intention and an inherent ability to enter the market, whether it does not face barriers to entry that are insurmountable, and whether it has taken preparatory steps to enter the market.

[267](#)

U In the context of “pay for delay” agreements in the pharmaceuticals sector, the Court of Justice has held that the existence of a process patent is not an insurmountable barrier to entry, where an undertaking has shown a readiness to challenge the validity of the patent and to take the risk, on entering the market, of the proprietor of the patent bringing infringement proceedings.

[268](#)

U In *Prochlorperazine*, the CMA imposed substantial fines in respect of what it termed to be a “market exclusion agreement” under which a manufacturer of a generic medicine made, through its distributor, substantial payments to a potential competitor in return for it not entering the market.

[269](#)

U Some horizontal agreements may also have vertical aspects, which should be considered separately.

[270](#)

U The Commission's Horizontal Cooperation Guidelines provide guidance on the application of arts 101(1) and 101(3) to some of the most common forms of horizontal agreements.

[271](#)

U The following paragraphs consider some of the most frequently encountered kinds of horizontal agreement in relation to which the application of art.101(1) needs to be carefully considered, in particular because very substantial fines can be imposed on the members of horizontal cartels,

[272](#)

U which constitute restrictions of competition by object, and victims of such cartels may sue the participants in the cartel for damages.

[273](#)



Price-fixing

45-055

U Since price is—in almost all markets—the principal instrument of competition, art.101(1)(a) expressly prohibits agreements which “directly or indirectly fix purchase or selling prices or any other trading conditions”.

[274](#)

U Price-fixing agreements constitute a restriction of competition by object, irrespective of whether they have an actual effect on prices^{[275](#)} or on consumer prices,^{[276](#)} and are unlikely to be capable of exemption under art.101(3). There have been many cases in which horizontal price-fixing agreements have been condemned and in which very substantial fines have been imposed. Price-fixing in any form is caught, including, for example, agreements on the level of discounts or surcharges, agreements to maintain and not reduce prices, agreements on an important component of a price, prior consultation on price lists, agreements on minimum, maximum, target or recommended prices, and collective resale price maintenance. Price-fixing in the services sector is unlawful as well as in the goods sector. Buyers' cartels, to set maximum purchasing prices, are also prohibited by art.101(1).^{[277](#)}

Output restrictions and market-sharing

- 45-056 Prominent among agreements which fall within art.101(1)(b) and (c) are horizontal agreements between competitors to limit output or refrain from supplying into each other's markets.

²⁷⁸

U In *Ranbaxy*, the General Court held that a “market exclusion agreement”, whereby (in return for substantial payment) a party to an agreement to settle patent litigation agreed not to manufacture or sell a pharmaceutical in the EEA, was an “extreme form” of an agreement to share a market and limit production, contrary to art.101(1)(b) and (c).²⁷⁹ Agreements to restrict output and share markets frustrate the aims of the TFEU, since they often divide-up supplies along the lines of national boundaries and thus directly inhibit the free movement of goods and the creation of the internal market, so as to restrict competition by object. Market-sharing can be achieved by the sharing of specific customers or groups of customers, as well as by allocating geographic areas to the parties and agreements to limit output or supply. In an agreement involving both EU and non-EU parties, an agreement by the non-EU parties not to supply customers located in the EU will infringe art.101(1).²⁸⁰ In *Telefónica and Portugal Telecom*, the General Court confirmed that an agreement by two telecommunications operators not to compete with each other in the Iberian markets restricted competition by object.²⁸¹ A further kind of agreement likely to infringe art.101(1) occurs where manufacturers allocate to each other quotas for the production or supply of products to the market of each participant, as is an agreement between manufacturers to restructure their industry to remove over-capacity.²⁸² Article 101(1) may also be infringed where one manufacturer grants exclusive selling rights to a competitor in respect of a particular territory. A market-sharing arrangement confined to the territory of one Member State may still infringe art.101(1), since it is liable to affect the patterns of imports and exports that might otherwise take place.²⁸³

Exchange of information

- 45-057 Whether the exchange of information restricts competition, whether by object or effect, within the meaning of art.101(1) depends inter alia on the nature of the information exchanged and the structure of the market to which the information agreement relates.

²⁸⁴

U Other forms of horizontal collaboration (including production and specialisation, research and development, and joint selling and production agreements) will often involve some form of information exchange. The Commission has published guidance on the application of art.101 to exchanges of information.²⁸⁵

- 45-058 The leading cases on information exchange include *T-Mobile Netherlands*,²⁸⁶ *Phillips v Commission*,²⁸⁷ *Dole v Commission*²⁸⁸ and *Balmoral Tanks v Competition and Markets Authority*.²⁸⁹ In *Lexon (UK) Ltd v Competition and Markets Authority*,²⁹⁰ the Competition Appeal Tribunal summarised the key principles from these and other cases on when an exchange of information will restriction competition by object. An exchange may be reciprocal or unilateral, and a single instance of an exchange may be sufficient to infringe art.101(1).²⁹¹ The exchange of information within a cartel will constitute a concerted practice. The exchange of information among competitors, whether directly or through a body such as a trade association, is likely to infringe art.101(1) by object if that information would normally be regarded as a business secret and the exchange reduces strategic uncertainty as to the future operation of the market, thereby facilitating collusion on price, output, product quality or variety, or innovation.²⁹² Information about commercial strategies, prices and discounts, customers, production capacity, future investments and other trading conditions is usually regarded as commercially sensitive and confidential.

- 45-059 If an exchange of information does not restrict competition by object, because it has an obvious, legitimate commercial purpose, it may—depending on the nature of the information and the frequency it is exchanged—restrict competition by effect; this requires a case-by-case analysis to be undertaken.²⁹³ There is no objection to the collection by a trade association of statistical information giving an aggregate picture of the output and sales of the industry provided that individual company figures cannot be identified, or provided that the information is sufficiently historical that it is unlikely to affect future behaviour.

Collusive tendering

- 45-060 The practice of collusive tendering, also known as “bid rigging”, whereby firms agree amongst themselves to collaborate over their responses to invitations to tender infringes art.101(1) and may attract large fines.

²⁹⁴

U This includes arrangements whereby firms decide which firm will win a particular tender, with other bidders submitting higher prices (also known as “cover pricing”)

²⁹⁵

U and those where some firms will refrain from bidding at all on specific contracts (also known as “bid suppression”), both of which may involve compensation payments to losing or non-bidding parties.

²⁹⁶

U Joint bidding by two or more undertakings for a tender will infringe art.101(1) only where the parties are capable of bidding independently.

²⁹⁷

U Where a contract has been awarded following unlawful collusion between bidders, the final element of the infringement of art.101(1) is the entry, by the undertaking that has been awarded the tender and the contracting authority, of an agreement that determines the essential characteristics of the contract, in particular the overall price, the performance of the contract and payment of the contract price.

²⁹⁸



Joint selling or purchasing

45-061 Joint selling or purchasing agreements between competitors may fall within art.101(1). The Commission has published guidance on the applicability of art.101(1) to joint selling and joint purchasing agreements.²⁹⁹ Joint distribution or purchasing arrangements may also have a vertical aspect, which is considered below at paras [45-073](#) and [45-074](#). Joint selling, distribution or promotion of competing products will often be regarded as a form of price-fixing, output limitation or market-sharing, as it involves the coordination of the parties’ competitive behaviour.³⁰⁰ Joint purchasing may lead to the alignment of participating firms’ costs, which may reduce competition between them and may also foreclose competitors by limiting their access to efficient suppliers, particularly if the parties have market power. Joint purchasing, for example through a cooperative, may give smaller buyers a counterweight against the power of large sellers and so not restrict competition.³⁰¹ In *Agents' Mutual v Gascoigne Halman*, the Competition Appeal Tribunal held that an obligation on estate agents that were members of a new online property sales portal to list sales only on that portal and one other did not restrict competition by object or effect and was in fact pro-competitive by facilitating the successful market entry of a new portal.³⁰² Collaboration will not restrict competition if the parties are not competitors (e.g. because they operate on different geographic markets) or because it is objectively necessary for them to collaborate to facilitate market entry or because they could not undertake the activity individually.³⁰³

Production and specialisation agreements

- 45-062 Businesses will often enter into sub-contracting or joint production agreements, as well as specialisation agreements, in which the parties unilaterally or reciprocally agree to fully or partly cease or refrain from producing certain products and to purchase them from the other party or parties.

³⁰⁴

- U The Commission has published guidance on the application of art.101 to exchanges of information.

³⁰⁵

- U Such agreements may restrict competition by coordinating the parties' competitive behaviour as suppliers, unless they enable the parties to develop new products that they would not have been able to develop individually, due to limited technical, financial or other capabilities. Such agreements may benefit from block exemption under Regulation 1218/2010,

³⁰⁶

- U provided the parties' combined market share is below 20 per cent and the agreement does not contain any "hardcore" restrictions, i.e. price-fixing, limitations on output or sales, and market-sharing.

Research and development agreements

- 45-063 Businesses, whether or not competitors, may collaborate in research and development projects, whether to improve existing technologies or develop new ones. The Commission has published guidance on the application of art.101 to research and development agreements.³⁰⁷ Cooperation in research and development may reduce competition by reducing the level of innovation, leading to fewer or inferior products coming to the market or if one party (particularly if it has market power) has the exclusive right to exploit the results. However, it may also have benefits for competition, particularly where the parties are not competitors, cannot carry out the project independently, have small market positions or collaborate to develop new technologies that they will exploit independently. Collaborative research and development agreements between two or more undertakings may benefit from block exemption under Regulation 1217/2010,³⁰⁸ provided that all parties have (subject to some exceptions) full access to the final results of the joint research and development project. Exemption is available if the parties' market shares are below 20 per cent (where they are competitors) or 25 per cent (where they are not competitors) and the agreement

does not contain any “hardcore” restrictions, in particular restrictions on further independent research and development, output restrictions, price-fixing and market-sharing. Exemption is for the duration of the project and, where the results are jointly exploited, for seven years from when products are first put on the market and will continue to apply thereafter, provided the parties’ market shares do not exceed 25 per cent.

“Pay for delay” agreements

- 45-064 A “pay for delay” agreement is an agreement to settle litigation between the owner of a patent for an active pharmaceutical ingredient and generic manufacturers that are preparing to enter the market with generic versions of the same medicinal product and who dispute the validity of that patent and/or that their own product infringes that patent, whereby the generic manufacturers undertake not to enter the market and not to pursue revocation of the patent in return for payments by the patent owner and, in some cases, the generic manufacturers purchasing the patented product from the patent owner for resale.³⁰⁹ In *Generics (UK) Ltd v Competition and Markets Authority*, the Court of Justice held, following a reference made by the Competition Appeal Tribunal under art.267 TFEU, that a case-by-case assessment must be made into whether such an agreement constitutes a restriction of competition by object; however, it will do so where the transfer of value by the patent owner has no explanation other than the parties’ commercial interest not to engage in competition on the merits.³¹⁰ The Tribunal subsequently held that the generics manufacturers were potential competitors to the patent holder, as they had the ability and firm intention to enter the market, given their confidence that they did not infringe the patents,³¹¹ and that the settlement agreements in question had both the object and effect of restricting competition,³¹² given the very substantial net transfers of value made by the patent owner (which represented a sharing of the profits it would make by not facing generic competition), the net gains made by the generic manufacturers from not independently entering the market and the maintenance of prices above the competitive level that would have applied had they entered the market following a successful defence of the patent litigation.

Agreements to delay the introduction of new technologies

- 45-064A In *Car Emissions*, the Commission imposed heavy fines on three car manufacturers for agreeing to delay the introduction of new technologies that would have reduced emissions of nitrogen oxide from diesel cars to below the levels set by EU legislation.

³¹³

U The Commission considered that this constituted a restriction of competition by object, by limiting technical development, which is expressly prohibited by art.101(1)(b) TFEU.

Footnotes

- ①266 *H. Lundbeck A/S v Commission (C-591/16P) EU:C:2021:243* at [66].
- ①267 *Generics (UK) Ltd v Competition and Markets Authority (C-307/18) EU:C:2020:52* at [32]–[45]; *H. Lundbeck A/S v Commission (C-591/16P) EU:C:2021:243* at [54]–[58].
- ①268 *Generics (UK) Ltd v Competition and Markets Authority (C-307/18) EU:C:2020:52* at [46]–[51]; *H. Lundbeck A/S v Commission (C-591/16P) EU:C:2021:243* at [57]–[59]. See also *Generics (UK) Ltd v Competition and Markets Authority [2021] CAT 9* at [8]–[32].
- ①269 *Prochlorperazine* (3 February 2022); see CMA press release, CMA fines firms over £35m for illegal arrangement for NHS drug (3 February 2022). Appeals pending: *Advanz Pharma Corp Cinven Capital Management (V) General Partner Ltd, Lexon (UK) Ltd, Alliance Pharmaceuticals Ltd v Competition and Markets Authority (Cases 1432, 1434, 1438 and 1439/1/12/22)*.
- ①270 See e.g. *Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman) [2017] CAT 15*.
- ①271 Commission Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements [2011] O.J. C11/1 (Horizontal Cooperation Guidelines). Following a period of public consultation, the Commission has announced that it intends to revise the Horizontal Cooperation Guidelines in order to improve their effectiveness in the light of economic and societal developments, in particular digitalisation and the increasing focus on sustainability issues arising from the climate change emergency: see Commission press release, *Antitrust: Commission publishes findings of the evaluation of rules on horizontal agreements between companies* (IP/21/2094; 6 May 2021). A further consultation on revised draft Guidelines will be held in early 2022. Further information on the Commission's review of the Horizontal Cooperation Guidelines is available on its website, at: https://ec.europa.eu/competition-policy/public-consultations/2019-hbers_en [Accessed 1 September 2021].
- ①272 See below, para.45-138.
- ①273 See below, paras 45-123—45-126.
- ①274

For detailed analysis of horizontal price-fixing agreements, see Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 5.041—5.065; Whish and Bailey, Competition Law, 10th edn (2021), pp.547–558.

- 275 *Archer Daniels Midland v Commission (T-224/00) [2003] E.C.R. II-2597, EU:T:2003:195 at [120], appeal dismissed (C-397/03P) [2006] E.C.R. I-4429, EU:C:2006:328; Dole Food Co Inc v Commission (C-286/13P) EU:C:2015:184 at [115]; Groupement des cartes bancaires (CB) v Commission (C-67/13P) EU:C:2014:2204 at [115].*
- 276 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (C-8/08) [2009] E.C.R. I-4529, EU:C:2009:343 at [36]–[39]* (fixing of remuneration paid to dealers infringed art.101(1)).
- 277 e.g. *Alliance One International v Commission (T-24/05) [2010] E.C.R. II-5329, EU:T:2010:453* (fixing by Spanish processors of maximum purchase prices for raw tobacco); *Deltafina SpA v Commission (T-12/06) [2011] E.C.R. II-5639, EU:T:2011:441* (fixing by Italian processors of maximum purchase prices for raw tobacco).
- 278 For detailed analysis of horizontal market-sharing agreements, see Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 5.071—5.091; Whish and Bailey, Competition Law, 10th edn (2021), pp.559–564.
- 279 *Sun Pharmaceuticals Industries Ltd (formerly Ranbaxy Laboratories Ltd) v Commission (T-460/13) EU:T:2016:453 at [222], appeal dismissed (C-586/16P) EU:C:2021:241.*
- 280 *Toshiba Corp v Commission (C-373/14P) EU:C:2016:26 at [30]–[35].*
- 281 *Portugal Telecom SGPS, SA v Commission (T-208/13) EU:T:2016:368; Telefónica, SA v Commission (T-216/13) EU:T:2016:369, confirmed on appeal (C-487/16P) EU:C:2017:961.*
- 282 *Competition Authority v Beef Industry Development Society (C-209/07) [2008] E.C.R. I-8637, EU:C:2008:643* (agreement to pay some Irish beef and veal processors to leave the market infringed art.101(1) by object, even in the absence of a subjective intention to restrict competition).
- 283 e.g. *Belasco v Commission (246/86) [1989] E.C.R. 2117, EU:C:1989:301.*
- 284 For detailed analysis of the application of art.101(1) to exchange of information, see Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 5.092—5.097 and 6.022—6.046; Whish and Bailey, Competition Law, 10th edn (2021), pp.568–576.
- 285 Horizontal Cooperation Guidelines, section 2.
- 286 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (C-8/08) [2009] E.C.R. I-4529, EU:C:2009:343.*
- 287 *Phillips v Commission (T-762/14) EU:T:2016:738, appeal dismissed (C-98/17P) EU:C:2018:774.*
- 288 *Dole Food and Dole Fresh Fruit Europe v Commission (C-286/13P) EU:C:2015:184.*
- 289 *Balmoral Tanks Ltd v Competition and Markets Authority [2019] EWCA Civ 162.*
- 290 *[2021] CAT 5 at [178]–[187].*

- 291 See e.g. *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] E.C.R. I-4529, EU:C:2009:343 at [59]; *Balmoral Tanks Ltd v Competition and Markets Authority* [2019] EWCA Civ 162 at [18].
- 292 See *Lexon (UK) Ltd v Competition and Markets Authority* [2021] CAT 5 at [187] and cases cited therein.
- 293 e.g. *Asnaf-Equifax v Ausbanc* (C-238/05) [2006] E.C.R. I-11125, EU:C:2006:734.
- ②294 For detailed analysis of the application of art.101(1) to collusive tendering agreements, see Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 5.102—5.112; Whish and Bailey, Competition Law, 10th edn (2021), pp.564–567.
- ②295 e.g. *Commission v Verhuizingen Coppens NV* (C-441/11P) EU:C:2012:778. In the UK, the Competition Appeal Tribunal has considered cover pricing in numerous cases concerning the construction sector, e.g. *Apex Asphalt and Paving Co Ltd v Office of Fair Trading* [2005] CAT 4; *Kier Group Plc v Office of Fair Trading* [2011] CAT 3; *GMI Construction Holdings Plc v Office of Fair Trading* [2011] CAT 12.
- ②296 e.g. *Kier Group Plc v Office of Fair Trading* [2011] CAT 3 at [286].
- ②297 *Ski Taxi SA v Den norske stat v Konkurransetilsynet* (E-3/16) Unreported 22 December 2016 (EFTA Court).
- ②298 *Kilpailu-ja kuluttajavirasto* (C-450/19) EU:C:2021:10. The limitation period within which a claim for damages must be brought thus commences on this date.
- 299 Horizontal Cooperation Guidelines, sections 5 (joint purchasing) and 6 (joint selling and commercialisation).
- 300 e.g. *Dansk Pelsdyravlervforening v Commission* (T-61/89) [1992] E.C.R. II-1931, EU:T:1992:79.
- 301 *Gøtstrup Klim v Dansk Landbrugs Grovvareselskab* (C-250/92) [1994] E.C.R. I-5641, EU:C:1994:413.
- 302 *Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)* [2017] CAT 15 at [178]–[185] (no restriction by object) and [196]–[240] (no restriction by effect), appeal dismissed in *Gascoigne Halman Ltd v Agent's Mutual Ltd* [2019] EWCA Civ 24 at [47]–[59].
- 303 See e.g. *Eurotunnel* [1988] O.J. L311/36 (consortium between construction and engineering groups to construct the Channel Tunnel fell outside art.101(1) due to the risks of the project); Bookmakers' *Afternoon Greyhound Services v Amalgamated Racing* [2009] EWCA Civ 750 (grant of exclusive broadcasting rights to new joint venture objectively justified to enable it to compete with incumbent broadcaster); *Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)* [2017] CAT 15 at [241]–[248] (restriction on estate agents advertising on other portal sites objectively necessary to achieve market entry of a new portal in which they were members).
- ③04

For a detailed analysis of the application of art.101(1) to production and specialisation agreements, see Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 6.063–6.072; Whish and Bailey, Competition Law, 10th edn (2021), pp.627–631.

①305 Horizontal Cooperation Guidelines, section 4.

①306 [2010] O.J. L335/43. On 5 September 2019, the Commission announced that was undertaking an evaluation of the functioning of Regulation 1218/2010 and Regulation 1217/2010 (on research and development agreements: see below, para.45-063) and the Horizontal Cooperation Guidelines, to determine whether they should lapse, be prolonged or revised upon expiry of the Regulations on 31 December 2022. Following earlier public consultations, on 1 March 2022, the Commission published for consultation draft revised R&D and Specialisation Block Exemption Regulations and draft revised Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements. Further information is available on the Commission website, at: https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

307 Horizontal Cooperation Guidelines, section 3.

308 [2010] O.J. L335/36. The Commission is undertaking an evaluation of the functioning of Regulation 1217/2010: see above, para.45-062.

309 *H. Lundbeck A/S v Commission (C-591/16P) EU:C:2021:243*; *Servier SAS v Commission (T-691/14) EU:T:2018:922*, further appeals pending in *Commission v Servier SAS (C-176 and 201/19P)*.

310 *Generics (UK) Ltd v Competition and Markets Authority (C-307/18) EU:C:2020:52* at [84]–[94]. See also *H. Lundbeck A/S v Commission (C-591/16P), EU:C:2021:243* at [113]–[118]. Where the patent owner holds a dominant position for medicines containing the active ingredient, it will also infringe art.102 by excluding potential competition from generic manufacturers that would otherwise have entered the market: see below, para.45-112.

311 *Generics (UK) Ltd v Competition and Markets Authority [2021] CAT 9* at [19]–[32].

312 *[2021] CAT 9* at [42]–[58] (restriction of competition by object) and [63]–[78] (restriction of competition by effect).

①313 *Car Emissions (Case AT.40178) [2021] O.J. C458/16*.

(e) - Application of art.101 to Joint Ventures and Mergers

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(e) - Application of art.101 to Joint Ventures and Mergers

Joint ventures

45-065

U One category of arrangement which is often considered by the Commission is where two or more undertakings set up a joint venture and pool their resources for the purpose of carrying out joint research and development of a new product or to establish more efficient production, distribution or promotion of their products. Such arrangements often impose restrictions on the parent companies' ability to compete with each other and/or with the joint venture, the grant by the parents of intellectual property or know-how licences to the joint venture, agreements for the distribution by the parents of the joint venture's products, and restrictions on the use by the parents of the results of the activities of the joint enterprise. Reference should be made to specialist works for the detailed rules to be applied to these kinds of agreements.

314

45-066

U The formation of some such joint ventures will, if "full-function" and controlled by two or more of the joint venture parties, be assessed by the Commission as concentrations under the EU Merger Regulation.

315

U The formation of other joint ventures (which are not full-function and/or are not controlled by at least two parties, or which coordinate the independent competitive behaviour of the

parent companies) will be assessed under art.101(1). The basic principles according to which such arrangements are assessed under art.101(1) are set out in the Commission's Guidelines on Horizontal Cooperation Agreements.³¹⁶ Article 101(1) is likely to be infringed only where the parties are actual or potential competitors and do not face effective competition from third parties. In addition to considering the formation of the joint venture, art.101(1) may apply to specific restrictions accepted by the parties, unless they are directly related and necessary for (i.e. ancillary to) the transaction, for example non-compete obligations, exclusive supply or distribution agreements between the joint venture and its parent companies, and intellectual property licences. Where appropriate, either the formation of the joint venture or specific contractual provisions may require exemption under art.101(3). Some joint venture arrangements may benefit from the block exemption regulations for research and development agreements and specialisation agreements.³¹⁷

Mergers

45-067 Article 101(1) does not apply to the acquisition of control of one company by another and mergers (known in EU competition law as “concentrations”), which are governed by a separate legal regime under the EU Merger Regulation, Regulation 139/2004,³¹⁸ the Implementing Regulation³¹⁹ and Commission Notices.³²⁰ Some joint ventures fall to be considered under the EU Merger Regulation, if they are controlled by at least two of the parties and are “full function”, that is if they have all the necessary resources in terms of funding, staff and assets to carry out on a lasting basis all the functions normally carried out by an autonomous undertaking operating on the same market.³²¹ Although the Commission does not undertake a separate assessment of any restrictions contained in related agreements entered into between the parties (such as non-compete and non-solicitation obligations accepted by the vendors; ongoing purchase, supply and distribution arrangements; and intellectual property licences), these are deemed by the Commission's decision to approve a concentration to not infringe art.101(1), provided that they are “ancillary” to the transaction, in that they are directly related to and necessary for the concentration.³²² Again, reference should be made to specialist works for an analysis of this complex area of the law.³²³

45-068 As a result of the UK leaving the EU, the EU Merger Regulation ceased to apply to and in the UK from 31 December 2020,³²⁴ although the Commission remained competent to review any merger notified to it before that date³²⁵ and to enforce commitments given to it by merging parties.³²⁶

Footnotes

- ❶314 e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), Ch.6; Whish and Bailey, Competition Law, 10th edn (2021), Ch.15.
- ❶315 See below, para.[45-067](#). Where a joint venture is “full function”, the Commission will assess under the EU Merger Regulation both the formation of the joint venture and also any “co-operative” aspects of the transaction, by which the independent competitive behaviour of the parent companies’ businesses outside of the joint venture may be coordinated; in assessing such “co-operative” aspects, the Commission will apply the principles of arts 101(1) and 101(3).
- 316 [2010] O.J. C11/1.
- 317 Regulation 1217/2010 (research and development agreements) and Regulation 1218/2010 (specialisation agreements); see above, paras [45-062](#)—[45-063](#).
- 318 [2004] O.J. L24/1.
- 319 Commission Regulation 802/2004 [2004] O.J. L133/1, as amended by Regulation 1033/2008 [2008] O.J. L279/3 and Regulation 1269/2013 [2013] O.J. L336/1.
- 320 The Commission has published numerous notices and guidelines on jurisdictional, procedural and substantive matters concerning the application of the EU Merger Regulation, which are available on its website, at: https://ec.europa.eu/competition-policy/mergers/legislation/notices-and-guidelines_en [Accessed 1 September 2021].
- 321 Regulation 139/2004 art.3(4). See *Commission Consolidated Jurisdictional Notice [2008]* O.J. C95/1.
- 322 Regulation 139/2004 arts. 6(1)(b), 8(1) and 8(2). See Commission Notice on restrictions directly related and necessary to concentrations [2005] O.J. C56/24.
- ❶323 See, e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), Ch.8; Whish and Bailey, Competition Law, 10th edn (2021), Ch.21; Lindsay and Berridge, The EU Merger Regulation: Substantive Issues, 5th edn (2017).
- 324 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.63 and Sch.3 para.1(g). See Commission Notice to Stakeholders, section B.
- 325 Withdrawal Agreement 2020 art.92(1), (2) and (3)(c).
- 326 Withdrawal Agreement 2020 art.95(1) and (2). The Commission may, with the CMA’s agreement, transfer to it responsibility to enforce such commitments: art.95(2).

(f) - Application of art.101 to Vertical Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(f) - Application of art.101 to Vertical Agreements

Typical vertical agreements covered by art.101(1)

45-069

U The prohibition in art.101(1) applies to vertical agreements between suppliers and wholesalers or retailers, operating at different levels of the supply chain, as it does to horizontal agreements between undertakings at the same level of production.

[327](#)

U The kind of vertical agreements most likely to be encountered by the practitioner and which require consideration under art.101(1) include: exclusive distribution agreements; exclusive purchasing agreements; brewery tied house agreements; service station solus agreements; intellectual property licences; franchise agreements; subcontracting agreements; agency agreements; and selective distribution agreements. There are some clauses which are commonly found in the various categories of vertical agreements which may require particularly careful scrutiny under art.101(1) and these are described in the following paragraphs. Reference should be made to specialist works for a detailed analysis of the application of art.101(1) to vertical agreements.

[328](#)

U

45-069A Between 1 June 2010 and 31 May 2022, Regulation 330/2010 provided a block exemption for **U** vertical agreements that fulfilled the conditions for exemption set out therein. Following the expiry

on 31 December 2020 of the implementation period that applied following the United Kingdom's withdrawal from the European Union,

329

U this Regulation applied in the United Kingdom as a "retained block exemption" under [s.10](#) of the Competition Act 1998 until 31 May 2022, when it expired,

330

U subject to a one year transition period for pre-existing agreements.

331

U In its 2010 Guidelines on Vertical Restraints,

332

U which applied until 31 May 2022, the Commission provided specific guidance on the application of art.101(1) and 101(3) to individual vertical agreements, identifying those agreements that fall outside of art.101(1), as well as discussing issues arising from the application of Regulation 330/2010, and, in cases where it does not apply, the application of art.101(3), as well as its enforcement policy in relation to vertical agreements.

45-069B Following the expiry of the implementation period, the 2010 Guidelines on Vertical Restraints applied in relation to the application and interpretation of the Chapter I prohibition of the Act to vertical agreements until 31 May 2022.

333

U Since 1 June 2022, a block exemption under [s.6 of the Act](#) has applied to vertical agreements

334

U and the CMA has adopted new guidance, the Vertical Agreements Block Exemption Order ("VABEO") Guidance, on the application of the Chapter I prohibition to vertical agreements.

335

U The Commission has also adopted a new block exemption regulation under art.101

336

U and new, 2022 Guidelines on Vertical Restraints

337

U that have been applicable from 1 June 2022, although these do not apply in the United Kingdom. To assist the reader, paras [45-070](#) to [45-095](#) below set out the position applicable under Regulation 330/2010 (and the domestic Retained Vertical Agreements Block Exemption) and the Commission's 2010 Guidelines on Vertical Restraints until 31 May 2022 and also provide references to the CMA's VABEO Guidance. The relevant provisions of the new Vertical Agreements Block Exemption Order are considered in para.[45-198A](#), below. The provisions

of Regulation 2022/720 and the Commission's 2022 Guidelines on Vertical Restraints are not considered, as they are not applicable in the United Kingdom, although they will be applicable to vertical agreements that concern the distribution of goods and services in both the United Kingdom and one or more EU Member States.

Application of art.101(1) to vertical agreements

45-070 Vertical agreements, other than those that involve vertical price-fixing (i.e. resale price maintenance)

[338](#)

or which otherwise pose a sufficient degree of harm to competition to be considered as restrictions of competition "by object",

[339](#)

are, in general, likely to have a detrimental effect on competition only where competition with other firms' products, so-called "inter-brand competition", is restricted and not simply where competition between distributors of one supplier's products, so-called "intra-brand competition", is restricted

[340](#)

; this may be the case either directly as a result of a contractual restraint or due to the power of a supplier over the market in which it operates. It should be borne in mind that in the EU the integration of the internal market is also an important consideration when applying art.101(1) to vertical agreements.

45-071 Many vertical agreements, while in one sense restricting competition, have countervailing benefits in terms of improving distribution which satisfy the requirements of art.101(3). Accordingly, when considering the application of art.101 to a vertical agreement, it is necessary to consider both whether the agreement as a whole and specific terms within it fall within art.101(1) and, if so, whether the agreement (or specific terms) benefits from block exemption under Regulation

330/2010 (in the case of vertical agreements) or Regulation 461/2010 (in the case of certain vertical agreements in the motor vehicle sector),

[341](#)

which remains applicable in the United Kingdom as a "retained block exemption regulation" until its expiry on 31 May 2023.

[342](#)

U In practice, the latter question—does the agreement and specific restrictions within it benefit from one of the block exemptions—may be considered first; only where the agreement as a whole, or specific restrictions within it, does not benefit from the block exemption is the question of the application of art.101(1) and 101(3) to such clauses an important issue.

³⁴³

U Therefore, in negotiating and drafting vertical agreements, practitioners should be aware that even if an agreement does not benefit, in whole or part, from a block exemption (for example, because it contains a “non-compete obligation” of longer than five years’ duration

³⁴⁴

U) it does not mean that it necessarily infringes art.101(1) and does not meet the conditions for individual exemption under art.101(3): an individual assessment is required in each case.

Agency agreements

45-072 Article 101(1) does not generally apply to an agreement between a principal and agent under which the latter agrees to procure business or to close transactions in the name and on behalf of the principal, in circumstances in which the agent is not acting as an independent trader on its own account and does not bear the financial and commercial risks of the transaction.

³⁴⁵

U However, the position is different where the agent is in business on its own account and bears financial or commercial risk in addition to carrying out its agency duties.

³⁴⁶

U In such circumstances, clauses whereby the agent agrees not to act for suppliers other than the principal or to promote the principal’s products in preference to those of other suppliers need to be scrutinised under art.101(1).

³⁴⁷

U In *DaimlerChrysler v Commission*

³⁴⁸

U the General Court annulled the Commission’s finding of an infringement of art.101(1) because it had, by failing to consider the commercial risks borne by them, incorrectly concluded that DaimlerChrysler’s dealers were not agents. Further guidance on the application of art.101(1) to agency agreements can be found in the Court of Justice’s judgment in *CEPSA*,

³⁴⁹

U in which it held, in the context of service station agreements for the sale of petrol, that the decisive factor was whether the operator independently determined its conduct and assumed the

financial and commercial risks linked to the sale of goods to third parties. The Commission's 2010 Guidelines on Vertical Restraints provide guidance on how it considers that art.101(1) applies to agency agreements

[350](#)

 ; reference should also be made to specialist works for a more detailed assessment of this issue.

[351](#)



Exclusive distribution, supply and purchasing agreements

[45-073](#) Many vertical agreements contain exclusivity provisions.^{[352](#)} In an exclusive distribution agreement, the supplier appoints a single dealer in a particular territory and undertakes not to supply any other dealer in that territory,^{[353](#)} whilst in an exclusive supply agreement, the dealer undertakes to buy all, or a minimum quantity, of the contract goods only from a single supplier.^{[354](#)} In other agreements, exclusivity may relate to either a specific category of customers or to a specific end-use for the product, with other categories of customer or end-uses reserved for either the supplier or another dealer.

[45-074](#) The mere grant of exclusive marketing rights, whether for a particular territory, customer group or end-use, does not, of itself, have as its object the restriction of competition; it must, therefore, be examined in its legal, factual and economic context in order to determine whether it has an appreciable negative effect on competition.

[355](#)

 A wide range of factors must be taken into account in deciding whether an exclusive distribution, supply or purchasing agreement falls within the scope of art.101(1), including: the market position of the parties, competitors and buyers; the novelty or technical complexity of the product to which the agreement relates; the level of investment and marketing commitment the distributor is expected to undertake; the level of trade, i.e. whether the contract concerns intermediate or final products; barriers to entry; and whether other suppliers also enter into similar exclusive agreements.

[356](#)

 The block exemption provided by Regulation 330/2010 applied to agreements containing exclusivity clauses provided the supplier's and the buyer's market shares on the relevant markets on which they operated were less than 30 per cent, and that they were not combined with any "hardcore" restrictions prohibited by art.4 of the Regulation

357

U; the exemption did not apply to any “excluded” restrictions contained in art.5 of the Regulation.

358

U

Selective distribution systems

45-075 A supplier may choose to distribute its goods through a limited number of approved dealers who are able to offer a level of technical expertise or whose premises are in keeping with the “luxury” or “prestige” image of the goods. Agreements between the supplier and the dealers in these cases will contain restrictions on the on-sale of the goods to dealers outside the network and will place obligations on the dealer concerning the training of staff and the extent and quality of promotional and advertising activity, etc.

45-076 Article 101(1) will not in general apply to such agreements, provided that the dealers are selected only on the basis of objective, necessary and non-discriminatory “qualitative” criteria relating to their technical ability to handle the goods and the suitability of their premises, provided that the nature of the product justifies selective distribution.³⁵⁹ However, art.101(1) will be infringed if quantitative requirements are imposed to limit the number of appointed dealers³⁶⁰ or if specific types of dealer, such as low price dealers, are excluded.³⁶¹ In addition, where a market is characterised by cumulative selective distribution systems,³⁶² art.101(1) may be infringed even where only qualitative criteria are applied, although this requires an assessment to be made of any barriers to entry and the extent of price competition on the market concerned.³⁶³ An outright prohibition on dealers within the selective distribution system selling the contract goods online restricts competition by object and, as this is a prohibition on passive sales, means that the agreement could not benefit from block exemption under Regulation 330/2010.³⁶⁴ However, a restriction on the dealer selling online through third-party market places over which the brand owner is unable to exercise control does not constitute a restriction of competition by object.³⁶⁵ Article 101(1) may be infringed if there is any limit on the number of dealers whom the supplier is prepared to approve, if minimum sales volumes are imposed, or if any other additional restrictions or obligations are imposed on the reseller, in which case the selective distribution system would have to satisfy the criteria for individual exemption in art.101(3).

45-077

U

In practice, both qualitative and quantitative selective distribution systems could benefit from the block exemption conferred by Regulation 330/2010, irrespective of the nature of the product, provided that the supplier's and the buyer's market shares were 30 per cent or less; resale prices were not fixed; there were no restrictions on active or passive sales to end-users; and there were no restrictions on cross-supplies between authorised distributors. The Commission's 2010 Guidelines on Vertical Restraints provided guidance on the application of art.101(1) to selective distribution agreements and when they could benefit from exemption under Regulation 330/2010

³⁶⁶

 ; reference should also be made to specialist works.

³⁶⁷



Franchise agreements

45-078 Franchise agreements are those whereby the proprietor of a trade mark, business name or other distinctive marketing presentation (the franchisor) grants one or more parties (each a franchisee) the right to use the mark or other marketing format in the supply of goods or services and to present their premises in accordance with the distinctive layout or format associated with the franchisor. Each franchisee remains an independent trader bearing its own financial risk but it benefits from the goodwill associated with the franchisor's business. To the outside observer the franchisees' premises look uniform and sell products of the same appearance and quality. The franchisee normally undertakes to pay a royalty on sales from its premises and to buy at least part of its stock from the franchisor or from suppliers nominated by the franchisor. The franchisor provides know-how which may include staff training and guidance, as well as allowing the franchisee to use the marketing image which usually has proven customer appeal.

45-079 Article 101(1) may apply to certain provisions of a franchise agreement.³⁶⁸ In the leading case of *Pronuptia*³⁶⁹ the Court of Justice considered the terms of a standard form franchise agreement for the well-known bridal outfitters. The Court held that those clauses which were essential to the proper operation of the franchise system did not fall within art.101(1). Thus, since it is essential that the franchisor be able to protect the know-how and other expertise that it provides to the franchisee, and its reputation, art.101(1) is not infringed if the franchisee is prohibited from opening a business of the same nature outside of its allocated franchise area where it may compete with another member of the network. Similarly, since it is essential that the uniformity of appearance and quality of the outlets in the franchise network is maintained, restrictions on the use of the marks and obligations on the franchisee to operate only from premises approved by the franchisor, to decorate its premises in a certain way or, in some circumstances, to buy its supplies of product from the franchisor do not infringe art.101(1).

- 45-080 For those franchise agreements which may fall within art.101(1), such as those that divide the market territorially, for example by granting each franchisee an exclusive territory, Regulation 330/2010 provided a block exemption, provided that such agreements did not contain restrictions going beyond those set out in the Regulation; in particular they could not prevent passive sales by the franchisee to customers located outside of their allocated area. Provisions of a franchise agreement that prevent price competition between franchisees will infringe art.101(1).

³⁷⁰

- U** The Commission's 2010 Guidelines on Vertical Restraints provided guidance on the application of art.101(1) to franchising agreements and when they could benefit from exemption under Regulation 330/2010.

³⁷¹

- U** In *Carewatch Care Services Ltd v Focus Caring Services Ltd*

³⁷²

- U** the High Court rejected a claim by the defendants that a one-year post-termination non-compete obligation imposed on the franchisee was contrary to art.101(1) and therefore unenforceable, as the obligation was necessary to protect the know-how and goodwill of the franchisor, including by providing sufficient time for a new franchisee to be appointed.

³⁷³

Restrictions on imports or exports

- 45-081 If an agreement contains any term which affects the freedom of the distributor to export the goods or services supplied under the agreement to other Member States or which obstructs the ability of third parties to import or export those goods or services, it needs to be scrutinised carefully for compatibility with art.101(1). In the leading case of *Consten and Grundig*,³⁷⁴ Grundig established a network of distributors in the different Member States, including the French distributor Consten. Grundig assigned the GINT trade mark to its products in France to Consten and agreed not to deliver Grundig products to anyone in France except to Consten and Consten agreed not to sell the products outside France. Grundig further undertook to procure that its distributors in the other Member States would also be subject to an export ban so that Consten enjoyed what is termed “absolute territorial protection”, i.e. it was protected not only from competing sales by other French Grundig distributors but from sales in France of products emanating from distributors in the other Member States. This aspect of the distribution system was condemned by the Court of Justice. The principle laid down in *Consten and Grundig* has been affirmed many times³⁷⁵; any attempt

to ban exports or to provide absolute territorial protection for exclusive dealers will normally be prohibited by art.101(1).

- 45-082 Restrictions on exports may be imposed indirectly, for example by permitting hotel rooms to be resold by tour operators only to customers resident in specific countries,³⁷⁶ using different packaging sizes and labelling in different countries and making the availability of customer promotions conditional on retailers not offering them in other countries,³⁷⁷ and prohibiting the use of brand names and trademarks for online search advertising.³⁷⁸ In *GlaxoSmithKline*, the Court of Justice held that an indirect export ban (implemented by system of dual-pricing, under which a higher price was charged to wholesalers for products that would be exported) had the object of restricting competition as it was intended to limit parallel trade and that this was not justified by the specific conditions of the pharmaceutical sector in the EU, in which national laws and price control regulations had a distortive effect on competition.³⁷⁹ However, the Court of Justice held that the Commission had insufficiently considered Glaxo's argument that the agreements in question might be capable of exemption under art.101(3) TFEU. The Commission subsequently closed its investigation due to a lack of Union interest in continuing its investigation into what were then historic matters.³⁸⁰
- 45-083 In numerous recent cases, the Commission has condemned “geo-blocking” practices, under which a manufacturer uses technical means to identify the location of a customer in order to restrict the online sale of goods and services to customers in particular territories, thereby partitioning national markets and raising prices.³⁸¹

The distinction between “active” and “passive” sales

- 45-084 In defining the extent to which exclusivity can legitimately be granted to a dealer in distribution agreements the block exemption, Regulation 330/2010 and the Commission’s 2010 Guidelines on Vertical Restraints drew a distinction between bans on “active” sales by a dealer outside the contract territory and bans on “passive” sales outside the contract territory.³⁸²
- U** “Active” sales are those which are sought by the dealer, for example by placing advertisements or setting up a branch office or distribution apparatus outside the contract territory and, broadly speaking, a ban on such sales was regarded as legitimate and capable of satisfying art.101(3). “Passive” sales are those made in response to an order or request for products from a customer outside the territory, which is not solicited by the dealer; in general, passive selling includes the advertising or selling of a product via the internet.

383

U Generally speaking, the dealer must remain free to make passive sales outside its territory, even if the territory from which the request comes has been allocated to a different exclusive dealer in the network; this is explained further at para.[45-092](#), below.

Other measures impeding parallel imports

- 45-085 The freedom of a distributor or third party to import and export the goods supplied by the manufacturer to its dealer may be hindered by more sophisticated measures than a simple export ban. A provision requiring that the dealer supply only to end-users,^{[384](#)} or preventing it from supplying goods to other dealers in the network,^{[385](#)} or requiring it to provide information for the purpose of monitoring the destination of products^{[386](#)} infringes art.101(1) and is prohibited. The refusal to service parallel imported goods or to honour guarantees in relation to such goods^{[387](#)} also infringes art.101(1). Suppliers sometimes aim to discourage exports by charging a different price according to the territory into which the goods are to be delivered, or in respect of volumes that it considers to be in excess of local demand for the products.^{[388](#)} An agreement under which different prices are charged to a purchaser merely on the grounds of its nationality or because it intends to export the contract goods or services will very often contravene art.101(1).^{[389](#)} The Commission has, in recent years, condemned the use of an increasingly sophisticated range of techniques to detect and control parallel imports.^{[390](#)}

Resale price maintenance

- 45-086 A provision which seeks to control the price at which a distributor may resell goods, or to impose a fixed price on the distributor, will infringe art.101(1), at least if it applies to goods which are imported or reimported from, or exported to, another Member State.

^{[391](#)}

U However, the communication by the supplier to the distributor of the supplier's recommended resale price is not unlawful unless it forms part of a concerted practice whereby the dealers in fact understand the recommended price to be a fixed price and charge that price.

^{[392](#)}

U A clause requiring the joint setting of prices by supplier and reseller is illegal, even if it is never enforced.

^{[393](#)}

U In four related decisions, the Commission imposed substantial fines on manufacturers of consumer electronics products that used price comparison websites and price monitoring software to detect and discipline low pricing online retailers who did not follow retail prices set by them; as other retailers followed these retailers' prices, using pricing algorithms, these practices resulted in higher overall online prices.

[394](#)

U The Commission's 2010 Guidelines on Vertical Restraints provided guidance on the application of art.101(1) to resale price maintenance.

[395](#)



"Most favoured nation" clauses

45-087

U Certain distributors, such as price comparison websites or marketplace platforms, may require suppliers, such as an insurance or energy provider, that advertise their goods or services on the website or platform to enter into a "most favoured nation" (MFN) or "price parity" clause. These clauses require the supplier not to supply elsewhere that good or service at a lower price. Whilst this will ensure that a customer purchasing through the website or platform obtains the lowest price available, these can reduce the supplier's incentives to cut prices and, if there is a network of agreements across the market, this can lead to the alignment of prices. There are two types of MFN clause, a "wide" MFN and a "narrow" MFN. A wide MFN clause, which is also known as a "price parity" clause, prevents the supplier from quoting lower retail prices on other websites or platforms, including its own website, and possibly also offline (such that its effects are "market wide"), whilst a narrow MFN clause requires the supplier not to quote a lower price on its own direct retail sales channels, including its website, but does not prevent it quoting different prices on different price comparison websites or platforms. The CMA has published guidance on the application of the Ch.I prohibition to MFNs.

[396](#)

U MFNs do not restrict competition by object,

[397](#)

U as they do not necessarily have anti-competitive outcomes and may be justified by the need to prevent the provider or other platform operators free-riding on the platform operator's promotional efforts by undercutting prices charged on that platform.

[398](#)



45-087A In 2015, following a market investigation under the Enterprise Act 2002, the CMA prohibited wide MFNs for private motor insurance.

[399](#)

U In November 2020, the CMA found that BGL, the operator of the well-known price comparison website “Compare the Market” with a share of over 50 per cent of sales of home insurance made through price comparison websites, had infringed both art.101(1) and the Ch.I prohibition by entering into agreements with 32 providers of home insurance that contained wide MFNs as these contractually prevented the insurers from offering lower prices and thereby had the effect of appreciably restricting price competition between price comparison websites and between home insurers and also by restricting the ability of rival websites to expand, leading to higher prices for consumers.

[400](#)

U However, this decision was subsequently set aside by the Competition Appeal Tribunal, which found that the CMA had both incorrectly defined the relevant markets on which the competitive effects of the agreements were to be analysed (which were not limited to insurance sold through price comparison websites) and failed to demonstrate that the agreements had negative effects on competition, by relying primarily on theory and assertion, supplemented by qualitative materials, principally documents (and not by quantitative analysis) to find anti-competitive effects on the markets defined by the Tribunal, whether on premiums (paid by purchasers of insurance), commissions (paid by insurers to platform operators) or promotional discounts.

[401](#)



Application of the block exemption for vertical agreements

45-088 Between 1 June 2010 and 31 May 2022, Regulation 330/2010

[402](#)

U provided a block exemption for vertical agreements generally, including under the Ch.I prohibition, as a “parallel exemption” (until 31 December 2020) and subsequently as a “retained exemption” (from 1 January 2021 until 31 May 2022) under [s.10 of the Competition Act 1998](#)

[403](#)

U although Regulation 461/2010 applies to certain vertical agreements in the motor vehicle sector, concerning after-market sales of spare parts and the provision of repair and maintenance services.

[404](#)

U In the following paragraphs each category of agreement is considered in turn, dealing both with the application of art.101(1) and Regulation 330/2010. It is important to bear in mind that if an agreement contains a clause which takes it, as a whole, outside the block exemption then the agreement cannot enjoy the benefit of the block exemption in respect of any of the clauses in it. In such a case *all* the clauses that are found to fall within art.101(1) and do not fulfil the conditions in art.101(3) will be invalid and unlawful, not just the clauses which go beyond those permitted by the block exemption.

[405](#)

U The following paragraphs contain only a summary of the provisions of the block exemption and reference should be made to the full text of the Regulation in any assessment of an agreement. The Commission's 2010 Guidelines on Vertical Restraints provided guidance on the application of the Regulation.

[406](#)



Meaning of “vertical agreement”

45-089

U Regulation 330/2010 applied to agreements or concerted practices entered into between two or more undertakings, each of which operated, for the purposes of the agreement, at a different level of the production or distribution chain. Typically, this was between a manufacturer and a wholesaler or between a wholesaler and a retailer. However, an agreement for the supply of goods by one manufacturer to another manufacturer counted as a vertical agreement, because they were at different levels of distribution *for the purposes of the agreement*.

[407](#)

U The application of the Regulation was, however, different depending on whether the two manufacturers in question were competing in the same market: where they were competing, their agreement benefitted from the block exemption only if the terms of art.2(4) were satisfied. The key factors in determining whether a vertical agreement benefitted from block exemption were the parties' market shares and whether it contained any “prohibited” restrictions. In addition, the exemption did not apply to any specific “excluded” restrictions.

Market share cap

- 45-090 Where the vertical agreement was between parties who were not in competition with each other, arts 2 and 3 of Regulation 330/2010 provided that the agreement was block exempted provided that the market share of the supplier did not exceed 30 per cent of the relevant market on which it sold the goods or services and that the market share of the buyer did not exceed 30 per cent of the relevant market on which it purchased the goods or services.

[408](#)

- U Article 7 of the Regulation provided guidance on how to ascertain the market shares of the parties, which was to be calculated by market sales (for the supplier) and purchase (for the buyer) values or, if these were not available, market sales and purchase volumes.

Prohibited clauses: resale price maintenance

- 45-091 Article 4(a) of the Regulation provided that it did not apply to an agreement which directly or indirectly restricted the ability of the buyer to set its sale prices. This did not, however, prohibit the supplier from imposing a maximum sales price or from recommending a price provided that there was no pressure or incentive on the buyer to treat this as a fixed price.

Prohibited clauses: territorial restrictions

- 45-092 Article 4(b) of the Regulation set the limits on the applicability of the block exemption to an agreement in so far as it imposed restrictions on the territory into which the buyer could sell the goods or as to the customers to whom it could sell the goods acquired under the contract. The block exemption applied provided that such restrictions limited only active sales into the territory or to a customer group which had been exclusively allocated by the supplier to a different buyer or reserved to the supplier. In other words, the buyer must have been able to make “passive” sales of the goods into the exclusive territory of either the supplier or another buyer if the sale was made at the customer’s initiative. In the case of a selective distribution network, the agreement could prohibit the buyer from selling to unauthorised distributors outside the network but could not prohibit them from selling to other authorised distributors or to any end users. In the case of an

agreement for the supply of components, the agreement could not restrict the supplier from selling the components as spare parts to end users. The CMA indicated that, in applying the Regulation as a “retained block exemption” under s.10 of the Competition Act 1998,

⁴⁰⁹

U passive sales restrictions affecting sales to a UK market or UK customer were to be regarded as hardcore restrictions of competition, such that the agreement did not satisfy the conditions for the retained block exemption.

⁴¹⁰

U

Excluded clauses: non-compete obligations

45-093 Article 5(1)(a) of the Regulation provided that the block exemption did not apply to “any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years”. However, art.5(2) permitted a longer period where goods or services were sold from premises owned by the supplier, or leased by the supplier from a third party, provided that the obligation did not exceed the period of occupancy of the premises by the buyer. A non-compete obligation was defined broadly by art.1 of the Regulation to include any obligation on the buyer to purchase from the supplier more than 80 per cent of its total purchases of the contract goods. Article 5(1) (b) provided that the block exemption did not apply to post-termination non-compete clauses; however, art.5(3) block-exempted such a clause for up to one year where the supplier made the premises available to the buyer.

Networks of parallel agreements

45-094 Article 29 of Regulation 1/2003 provides that the Commission or a national competition authority of a Member State may withdraw the benefit of a block exemption from a particular agreement that is incompatible with the conditions laid down in art.101(3); this may be the case where there are parallel networks of similar vertical agreements which have the cumulative effect of sealing off rivals’ access to the market. Where parallel networks of similar vertical agreements cover more than 50 per cent of the relevant market, art.6 of Regulation 330/2010 authorised the Commission by regulation to disapply the block exemption to vertical agreements containing specific restraints in that market. Any such regulation could not take effect earlier than six months following its adoption.

Transitional provisions

- 45-095** According to art.9 of the Regulation, the exempt status of existing agreements which benefited from exemption under Regulation 2790/99 continued until 1 June 2011. Otherwise, Regulation 330/2010 took effect from 1 June 2010 and expired on 31 May 2022, as did the Retained Vertical Agreements Block Exemption Regulation under [s.10 of the Competition Act 1998](#).

411



Footnotes

- ①327 *Consten & Grundig v Commission (56 and 58/64) [1966] E.C.R. 299, EU:C:1966:41.*
- ①328 e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), Ch.7; Whish and Bailey, Competition Law, 10th edn (2021), Ch.16; Wijckmans and Tuytschaever, Vertical Agreements in EU Competition Law, 3rd edn (2018).
- ①329 See above, paras [45-002—45-009](#).
- ①330 See below, paras [45-199—45-200](#).
- ①331 The [Competition Act 1998 \(Vertical Agreements Block Exemption\) Order 2022 \(SI 2022/516\)](#) art.15. See also Vertical Agreements Block Exemption Order (CMA Guidance) (CMA166, 12 July 2022), para.12.1.
- ①332 See Commission Guidelines on Vertical Restraints [2010] O.J. C130/1.
- ①333 Pursuant to [Competition Act 1998 s.60A\(3\)](#); see below, paras [45-148—45-151](#).
- ①334 The [Competition Act 1998 \(Vertical Agreements Block Exemption\) Order 2022 \(SI 2022/516\)](#); see below, para.[45-198A](#).
- ①335 Vertical Agreements Block Exemption Order (CMA Guidance) (CMA166, 12 July 2022); see below, para.[45-198A](#).
- ①336 Commission Regulation 2022/720 [2022] O.J. L134/4.

- ①337 Commission Guidelines on Vertical Restraints [2022] O.J. C248/1.
- ①338 See below, para.45-086.
- ①339 “Visma Enterprise” SIA v Konkurencess padome (C-306/20) EU:C:2021:935; see above para.45-039.
- ①340 “Visma Enterprise” SIA v Konkurencess padome (C-306/20) EU:C:2021:935 at [78].
- ①341 Commission Regulation 461/2010 [2010] O.J. L129/52. The Commission is conducting a review of the functioning of Regulation 461/2010 and on 6 July 2022 published for public consultation a draft Regulation prolonging Regulation 461/2010 until 31 May 2028: see https://competition-policy.ec.europa.eu/public-consultations/2022-motor-vehicle_en.
- ①342 See below, para.45-200.
- ①343 For an overview of the analysis to be undertaken in such cases, see Commission 2010 Guidelines on Vertical Restraints, paras 111–121 (in respect of art.101(1)) and 122–127 (in respect of art.101(3)). See also, in relation to the Ch.I prohibition, CMA VABEO Guidance, paras 10.17–10.29 (in respect of s.2 of the Competition Act 1998) and 10.30–10.173 (in respect of the conditions for individual exemption under s.9 for different types of vertical restraint).
- ①344 See below, para.45-093.
- ①345 See, e.g. *Suiker Unie v Commission* (40/73 etc.) [1975] E.C.R. 1663, EU:C:1975:174; *Bundeskartellamt v Volkswagen and VAG Leasing* (C-266/93) [1995] E.C.R. I-3477, EU:C:1995:345.
- ①346 *Vereniging van Vlaamse Reisbureaus v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdienste* (Flemish Travel Agents) (311/85) [1987] E.C.R. 3801, EU:C:1987:418.
- ①347 See also 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, brought into force in the UK as from 1 January 1994 by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053).
- ①348 *DaimlerChrysler v Commission* (T-325/01) [2005] E.C.R. II-3319, EU:T:2005:322.
- ①349 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* (C-217/95) [2006] E.C.R. I-11987, EU:C:2006:784.
- ①350

Commission 2010 Guidelines on Vertical Restraints, paras 12–21. See also, in relation to the Ch.I prohibition, CMA VABEO Guidance, paras 4.8–4.33.

- ①351 e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 7.181–7.190; Whish and Bailey, Competition Law, 10th edn (2021), pp.654–658; Wijckmans and Tuytschaever, Vertical Agreements in EU Competition Law, 3rd edn (2018), paras 9.136–9.167.

- 352 e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 7.065–7.093 (exclusive distribution and supply agreements) and 7.140–7.164 (exclusive purchasing agreements).

353 Sometimes the supplier also undertakes that it will not supply end-users itself in the territory.

354 These agreements are also known as “single branding” agreements. Sometimes the dealer also undertakes that it will not deal in goods which compete with the goods supplied under the agreement.

- ①355 See *Société Technique Minière v Maschinenbau Ulm* (56/65) [1966] E.C.R. 235, EU:C:1966:38; *LC Nungesser KG v Commission* (258/78) [1982] E.C.R. 2015, EU:C:1982:211; *Dansk Pelsdyravlerforening v Commission* (T-61/89) [1992] E.C.R. II-1931 (for exclusive supply agreements); and *Delimitis v Henninger Bräu* (C-234/89) [1991] E.C.R. I-935, EU:C:1991:91 (for exclusive purchase agreements).

- ①356 See Commission 2010 Guidelines on Vertical Restraints, paras 129–150 (in respect of exclusive supply or single branding agreements), 151–167 (in respect of exclusive distribution agreements), 168–173 (in respect of exclusive customer allocation agreements) and 192–202 (in respect of exclusive supply agreements). See also, in respect of the Ch.I prohibition, CMA VABEO Guidance, paras 10.37–10.56 (in respect of single branding agreements), 10.57–10.83 (in respect of exclusive distribution and exclusive customer allocation agreements) and 10.108–10.117 (in respect of exclusive supply agreements).

- ①357 See Regulation 330/2010 arts 3 and 4; discussed below, paras 45-091—45-092.

- ①358 See Regulation 330/2010 art.5; discussed below, para.45-093.

- 359 See *Metro Grossmärkte GmbH & Co KG v Commission* (No.1) (26/76) [1977] E.C.R. 1875, EU:C:1977:167; *Leclerc v Commission* (YSL) (T-19/92) [1996] E.C.R. II-1851, EU:T:1996:190.

- 360 See *Metro v Commission* (No.1) (26/76) [1977] E.C.R. 1875, EU:C:1977:167; *Vichy v Commission* (T-19/91) [1992] E.C.R. II-415, EU:T:1992:28.

- 361 *AEG Telefunken v Commission* (107/82) [1983] E.C.R. 3151, EU:C:1983:293.

- 362 *Metro SB-Grossmärkte GmbH & Co KG v Commission* (No.2) (75/84) [1986] E.C.R. 3021, EU:C:1986:399.

- 363 *Leclerc v Commission* (YSL) (T-19/92) [1996] E.C.R. II-1851, EU:T:1996:19; *Leclerc v Commission* (Givenchy) (T-88/92) [1996] E.C.R. II-1961, EU:T:1996:192.

- 364 See *Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorité de la Concurrence* (*C-439/09*) *EU:C:2011:649*; *Ping Europe Ltd v Competition and Markets Authority* [*2020*] *EWCA Civ 13*, [*2020*] *4 All E.R. 276* (whilst providing purchasers of golf clubs with a custom-fitting service was a legitimate aim, a prohibition on online sales was disproportionate to that aim).
- 365 See *Coty Germany GmbH v Parfumerie Akzente GmbH* (*C-230/16*) *EU:C:2017:941*.
- ③66 Commission 2010 Guidelines on Vertical Restraints, paras 174–188. See also, in respect of the Ch.I prohibition, CMA VABEO Guidance, paras 10.83–10.103.
- ③67 See e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), Ch.7; Wijckmans and Tuytschaever, Vertical Agreements in EU Competition Law, 3rd edn (2018), paras 9.14–9.48.
- 368 See e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 7.165–7.180; Wijckmans and Tuytschaever, Vertical Agreements in EU Competition Law, 3rd edn (2018), paras 9.114–9.135.
- 369 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* (*161/84*) [*1986*] *E.C.R. 353*, *EU:C:1986:41*.
- ③70 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* (*161/84*) [*1986*] *E.C.R. 353*, *EU:C:1986:41* at [25].
- ③71 Commission 2010 Guidelines on Vertical Restraints, paras 181–189. See also, in respect of the Ch.I prohibition, CMA VABEO Guidance, paras 10.104–10.107.
- ③72 [*2014*] *EWHC 2313 (Ch)*.
- ③73 See also *Pirtek (UK) Ltd v Joinplace Ltd* [*2010*] *EWHC 1641 (Ch)* (one year post-termination obligation not to compete in the franchise area imposed on the franchisee and its directors did not infringe the Ch.I prohibition); *Kall-Kwik Printing(U.K.) Ltd v Bell* [*1994*] *F.S.R. 674* (18 month non-compete obligation upheld).
- 374 *Consten and Grundig v Commission* (*56 and 58/64*) [*1966*] *E.C.R. 299*, *EU:C:1966:41*.
- 375 See e.g. *General Motors Nederland and Opel Nederland v Commission* (*T-368/00*) [*2003*] *E.C.R. II-4491*, *EU:T:2003:275*, upheld on appeal (*C-551/03P*) [*2006*] *E.C.R. I-3173*, *EU:C:2006:229* (removal of sales bonuses in respect of export sales); *Activision Blizzard v Commission* (*C-260/09P*) [*2011*] *E.C.R. I-0419*, *EU:C:2011:62* (various methods used by a manufacturer of video games to monitor and restrict parallel imports from low price countries infringed art.101(1) even where a distributor engaged in parallel trade, contrary to the agreement).
- 376 *Meliá (Holiday Pricing)* (*Case AT.40528*) (21 February 2020).
- 377 *AB InBev beer trade restrictions* (*Case AT.40134*) (13 May 2019) (decided under art.102). See also *Sanrio—Character Merchandise* (*Case AT.40432*) (9 July 2019) (limitation on the languages used on packaging).

- 378 *Guess* (Case AT.40428) (17 December 2018).
- 379 *GlaxoSmithKline Services Unlimited v Commission* (C-501/06P etc.) [2009] E.C.R. I-9291, EU:C:2009:610. In reaching this conclusion, the Court of Justice reversed the finding of the General Court that in the specific context of the pharmaceutical sector in the EU, Glaxo's dual-pricing scheme did not have the object of restricting competition (*T-168/01*) [2006] E.C.R. II-2969, EU:T:2006:265.
- 380 Appeal against the Commission decision to reject a complaint into GlaxoSmithKline's pricing dismissed in *European Association of Euro-Pharmaceutical Companies (EAEPC) v Commission* (T-574/14) EU:T:2018:695.
- 381 See e.g. *Guess* (Case AT.40428) (17 December 2018) (restrictions on cross-border sales); *Sanrio—Character Merchandise* (Case AT.40423) (9 July 2019) (restriction of online sales to allocated territory and obligation to refer orders for out of territory sales to the manufacturer); *Valve and others—Video Games* (Cases AT.40413 etc.) (20 January 2021) (restrictions on authentication and activation of PC video games), appeal pending, *Valve Corp v Commission* (T-172/21).
- ❶382 This distinction is drawn in art.4(b) of Regulation 330/2010 and by the Commission 2010 Guidelines on Vertical Restraints: see below, para.45-084.
- ❷383 Commission 2010 Guidelines on Vertical Restraints, paras 51–54. See also, in respect of the Ch.I prohibition, CMA VABEO Guidance, paras 8.26–8.50.
- 384 *Société de Vente de Ciments et Bétons v Kerpen & Kerpen* (319/82) [1983] E.C.R. 4173, EU:C:1983:374.
- 385 See e.g. *Hasselblad v Commission* (86/82) [1984] E.C.R. 883, EU:C:1984:65.
- 386 *Hasselblad v Commission* (86/82) [1984] E.C.R. 883, EU:C:1984:65. See also *BASF Coatings v Commission* (T-175/95) [1999] E.C.R. II-1581, EU:T:1999:99, where the General Court concluded that a clause requiring the wholesaler to pass on to the manufacturer any inquiries from customers outside its contract territory operated as an export ban.
- 387 *ETA Fabriques d'Ebauches SA v DK Investment SA* (31/85) [1985] E.C.R. 3933, EU:C:1985:494 (Swatch watches).
- 388 See e.g. *GlaxoSmithKline Services Unlimited v Commission* (C-501/06P etc.) [2009] E.C.R. I-9291, EU:C:2009:610.
- 389 *Distillers Co Ltd v Commission* (30/78) [1980] E.C.R. 2229, EU:C:1980:186.
- 390 See e.g. *Guess* (Case AT.40428) (17 December 2018) (online sales by authorised retailers were made conditional on prior approval from the manufacturer); *Nike—Ancillary Sports Merchandise* (Case AT.40436) (25 March 2019) (clawing back revenues generated from, or imposing double royalties on, out-of-territory sales; limiting the availability of security labelling for suspected out-of-territory sales); *Sanrio—Character Merchandise* (Case AT.40432) (19 July 2019) and *Universal Studios—Film Merchandise* (Case AT.40403) (30 January 2020) (both involving the use of audits to monitor compliance with restrictions on cross-border sales).
- ❸391

Hasselblad v Commission (86/82) [1984] E.C.R. 883, EU:C:1984:65; *Publishers' Association v Commission* (T-66/89) [1992] E.C.R. II-1995, EU:T:1992:84.

①392 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis* (161/84) [1986] E.C.R. 353, EU:C:1986:41.

①393 *Novalliance/Systemform* [1997] O.J. L47/11.

①394 *Asus* (Vertical Restraints) (Case AT.40465) (24 July 2018); *Denon & Marantz* (Vertical Restraints) (Case AT.40469) (24 July 2018); *Philips* (Vertical Restraints) (Case AT.40181) (24 July 2018); *Pioneer* (Vertical Restraints) (Case AT.40182) (24 July 2018).

①395 See Commission 2010 Guidelines on Vertical Restraints, paras 223–229. See also CMA VABEO Guidance, paras 8.10–8.25.

①396 See CMA VABEO Guidance, paras 8.79–8.90 (in respect of “wide” MFN clauses) and 10.164–10.173 (in respect of “narrow” MFN clauses).

①397 *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36 at [202]–[205] and [209]–[210].

①398 *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36 at [203]–[205] and [209]–[210].

①399 Private Motor Insurance Market Investigation Order 2015. On market investigations, see below paras 45-228 et seq.

①400 CMA, Price comparison website: use of most favoured nation clauses (Case 50505) (19 November 2020).

①401 *BGL (Holdings) Ltd v Competition and Markets Authority* [2022] CAT 36 at [221]–[238] (on evidence of effects generally), [240]–[263] (premiums and commissions) and [264]–[278] (promotional discounts).

①402 [2010] O.J. L102/1.

①403 See above, paras 45-069A and 45-069B.

①404 [2010] O.J. L129/52. From 1 June 2013 to 31 May 2022, Regulation 330/2010 applied to the purchase, sale and resale of new motor vehicles: arts 2 and 3. Regulation 461/2010 will continue to apply as a retained block exemption regulation under s.10 of the Competition Act 1998 until its expiry on 31 May 2023: see below, para.45-200.

①405

Delimitis v Henninger Bräu (C-234/89) [1991] E.C.R. I-935, EU:C:1991:91.

- ④06 Commission 2010 Guidelines on Vertical Restraints, paras 23–73 (application of the block exemption regulation) and 74–85 (withdrawal and disapplication of the block exemption regulation).
- ④07 See Commission 2010 Guidelines on Vertical Restraints, paras 24–46. See also CMA VABEO Guidance, paras 6.1–6.57.
- ④08 The block exemption continued to apply if a party's market share rose above 30 per cent, but below 35 per cent, for a period of two consecutive calendar years after it first exceeded 30 per cent: Regulation 330/2010 art.7(d). It also applied for one year after it exceeded 35 per cent: art.7(e). However, these periods could not be combined so as to exceed two calendar years: art.7(f).
- ④09 See below, paras 45-199—45-200.
- ④10 CMA, Guidance on the functions of the CMA after the end of the Transition Period (CMA125, 1 December 2020), para.4.35.
- ④11 See below, para.45-200.

(g) - Application of art.101 to Intellectual Property Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(g) - Application of art.101 to Intellectual Property Agreements

Intellectual property licences

45-096

U The exercise of intellectual property rights may be affected not only by the competition provisions of the TFEU but also by its provisions on the free movement of goods⁴¹² and the freedom to provide services.⁴¹³ There is substantial jurisprudence of the Court of Justice limiting the extent to which the owner or licensee of, say, a French patent, copyright or registered trade mark can rely on the rights conferred by French intellectual property law to prevent “parallel” imports into France of goods which have been lawfully placed on the market in another Member State⁴¹⁴ or the reception of television broadcasts of sports events originating in another Member State.⁴¹⁵ However, art.101(1) may also affect the validity of certain terms in licences of intellectual property rights. This is a complex area with many detailed rules to be applied and reference should be made to specialist works on competition law and/or intellectual property rights.

⁴¹⁶

U The Commission has published guidelines, the Technology Transfer Guidelines, which provide guidance on the application of arts 101(1) and 101(3) to the licensing of patents and know-how.⁴¹⁷

Intellectual property licences and art.101(1)

45-097

Many intellectual property licences provide for the exclusive grant of a licence to the licensee in the particular territory covered by the agreement whereby the licensor undertakes that it will not exploit the property itself in the territory and it will not license any other person to do so. Such a restriction may fall outside art.101(1) if the grant of the exclusive licence is the sole means whereby the licensor is able to ensure that the rights will be fully exploited in the territory concerned, provided that it does not confer absolute territorial protection for the licensee, for example against competition from parallel importers.⁴¹⁸ This depends on the novelty and complexity of the technology involved and the level of investment and other resources which the licensee will have to devote to launching the product incorporating the rights in the territory concerned.⁴¹⁹

- 45-098 Many other terms commonly found in licences may fall within art.101(1), in particular terms for calculating royalties, any terms purporting to limit the number of products manufactured using the rights or the export of any such product, “no challenge” clauses, field of use or exclusive customer group restrictions, or tying obligations which are not essential for the proper exploitation of the rights. Article 101(1) may apply to similar provisions in licences of other intellectual property rights, in particular licences of copyright, computer software, trademarks and plant breeders’ rights, as well as “delimitation agreements” which regulate the parties’ use of their respective trademarks, unless the agreement is intended to avoid confusion or conflict between the marks.⁴²⁰ Article 101(1) may also apply to the collective licensing of patents through “patent pools”, whether the patents are for substitute technologies (which can both be used to make the same product) or for complementary technologies (where both technologies are required to make a product), and also the collective licensing of works protected by copyright, through collecting societies.

Block exemption for technology transfer agreements

- 45-099 The Commission adopted Regulation 316/2014 on 21 March 2014.⁴²¹ It entered into force on 1 May 2014 and will expire on 30 April 2026.⁴²² The format of Regulation 316/2014 is similar to Regulation 330/2010 on vertical agreements. Regulation 316/2014 applies to licences of patents, know-how and software copyright, including mixed licences thereof and licensing of patents through patent pools. Article 2 confers block exemption on certain bilateral technology transfer agreements. Article 3 imposes market share caps, which differ depending on whether an agreement is horizontal or vertical, the former being treated more strictly: the cap is 20 per cent for horizontal agreements and 30 per cent for vertical agreements. Article 4 contains a list of “hardcore” restrictions, the inclusion of which in a licensing agreement will prevent the block exemption from applying: the list is stricter for horizontal than for vertical agreements. Article 5 sets out certain restrictions that are not block exempted, but which do not prevent the application of the Regulation to the rest of the agreement. Articles 6 and 7 provide for the block exemption to be withdrawn from agreements in certain circumstances. Subsequent provisions deal with matters such as the

calculation of market share thresholds and transitional arrangements. Regulation 316/2014 should be read in conjunction with the Commission's Technology Transfer Guidelines.⁴²³

Footnotes

412 arts 34–37 TFEU.

413 arts 56 and 57 TFEU.

414 See, e.g. *Merck & Co Inc v Primecrown Ltd (C-267 and 268/95) [1996] E.C.R. I-6285, EU:C:1996:468* (patents); *Phytheron International SA v Jean Bourdon SA (C-352/95) [1997] E.C.R. I-1729, EU:C:1997:170* (trade marks); *Metronome Musik GmbH v Music Point Hokamp GmbH (C-200/96) [1998] E.C.R. I-1953, EU:C:1998:172* (copyright in sound recordings on compact discs).

415 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services (C-403/08 etc.) [2011] E.C.R. I-9083, EU:C:2011:631*.

④16 See e.g. Bailey and John (eds), Bellamy and Child, European Community Law of Competition, 8th edn (2018), Ch.9; Whish and Bailey, Competition Law, 10th edn (2021), Ch.19; Mellor, Llewellyn et al (eds), Kerly's Law of Trade Marks and Trade Names, 16th edn (2018), Ch.19; Caddick, Harbottle and Suthersanen, Copinger and Skone James on Copyright, 18th edn (2021), Ch.28, Pt 5; Llewellyn and Aplin, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 9th edn (2019), Ch.19.

417 Guidelines on the application of Article 101 TFEU to technology transfer agreements [2014] O.J. C89/03.

418 *LC Nungesser KG and Kurt Eisele v Commission (258/78) [1982] E.C.R. 2015, EU:C:1982:211; Louis Erauw-Jacquery v La Hesbignonne Société Co-opérative (27/87) [1988] E.C.R. 1919, EU:C:1988:183*.

419 *Louis Erauw-Jacquery v La Hesbignonne Société Co-opérative (27/87) [1988] E.C.R. 1919, EU:C:1988:183*.

420 *BAT Cigaretten-Fabriken v Commission (35/83) [1985] E.C.R. 363, EU:C:1985:32*. Similar agreements may also be entered into to settle patent infringement litigation; where these involve the transfer of value from the patent holder to the alleged infringer, and that party is at least a potential competitor to the patent holder and agrees to limit its independent efforts to enter the market with a competing product, art.101(1) is likely to be infringed: see above, para.45-112.

421 [2014] O.J. L93/7; Regulation 316/2014 replaced the earlier technology transfer regulation, Regulation 772/2004 [2004] O.J. L123/11.

422 Regulation 316/2014 art.11.

423 [2014] O.J. C89/3.

(h) - Application of art.102 to Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(h) - Application of art.102 to Contracts

Contractual clauses as infringements of art.102

45-100

U Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or a substantial part of it insofar as it may affect trade between Member States.

[424](#)

U It sanctions not only practices that are likely to cause direct harm to consumers, whether intermediate or final consumers, but also those that cause harm to them indirectly by harming an effective structure of competition.

[425](#)

U A detailed description of the application of art.102 to the conduct of an undertaking with a dominant position is beyond the scope of this chapter and reference should be made to specialist works.

[426](#)

U The Commission has published guidance on its enforcement priorities in applying art.102 TFEU to abusive exclusionary conduct by dominant undertakings, which provides useful insights into how it will analyse particular types of behaviour under art.102, and indicates the circumstances in which it might be inclined to open proceedings in relation to possibly abusive exclusionary behaviour.

[427](#)

U

- 45-101 Articles 101 and 102 are not mutually exclusive, such that certain contractual provisions that infringe art.101(1) may also constitute an abuse of a dominant position when entered into by a dominant firm,⁴²⁸ and art.102 may prohibit provisions entered into by a dominant firm that would not be unlawful if entered into by a non-dominant firm.⁴²⁹ Article 102 may be infringed even where an agreement benefits from a block exemption under art.101(3).⁴³⁰
- 45-102 Article 102 ceased to apply to and in the UK from 31 December 2020, although the Commission remains competent to continue any administrative procedure into a suspected infringement of art.102 that it had initiated before that date⁴³¹ and to enforce commitments given or remedies imposed in any decision adopted either before that date or in procedures that continue after that date.⁴³² At that date, the CMA also ceased to have the power to investigate suspected infringements of art.102, although it may continue any on-going investigations under the Ch.II prohibition.⁴³³

Dominant undertakings

- 45-103 The Court of Justice has held that an undertaking enjoys a dominant position if it has a “position of economic strength... which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.”⁴³⁴ An assessment of dominance requires, firstly, definition of the relevant market⁴³⁵
- U** and, secondly, an assessment of the undertaking’s market power, which requires an assessment of its market share, the number and size of its competitors, the ownership of intellectual property rights, the existence of any barriers to market, expansion and exit, and whether customers and counterparties have countervailing power.⁴³⁶ Although market shares are not determinative of the existence of a dominant position, dominance may be found with a market share of 40 per cent or more⁴³⁷ and may be rebuttably presumed if the undertaking has a share of 50 per cent or more.⁴³⁸

The special responsibility of dominant undertakings

45-104



Dominance of itself is not unlawful,

439

U but dominant undertakings have a “special responsibility” not to engage in any conduct which will hinder the maintenance of such competition that still takes place in the market.

440

U This responsibility becomes greater, and as a corollary a finding of abuse becomes more likely, the weaker the competitive constraints facing the dominant undertaking in a market are. However, this does not prevent a dominant undertaking from protecting its own commercial interests by competing “on the merits” in a manner that would be lawful outside of the context of competition law, even if this marginalises less efficient competitors,

441

U although where price competition marginalises competitors that are as efficient as the dominant undertaking, it will be abusive.

442

U As abuse is an objective concept, conduct can be abusive even where an undertaking intends to compete on the merits by improving its products or services,

443

U and not all price competition can be regarded as legitimate.

444

U It is abusive, and not competition on the merits, for a vertically-integrated dominant undertaking to use, in a market recently opened to competition, customer information that it had obtained in its capacity as a monopoly supplier in order to enter into new supply contracts with those customers, thereby excluding new entrants.

445

U Equally, it is not competition on the merits for a dominant undertaking to prefer its own downstream businesses over its competitors, for example by the operator of a search engine favouring and promoting its own business over others when displaying search results.

446

U A particular clause may be abusive even if it has been included in the contract at the request of the customer.

447

U Firms which are or may be dominant must therefore take care when including clauses in contracts, or implementing commercial strategies, that may be entirely lawful for non-dominant firms to include or implement.



In order to find that a practice is an abuse of a dominant position, it must be shown that it is capable of impairing the structure of effective competition on the relevant market, unless the dominant undertaking can show that the practice has countervailing positive benefits for consumers in terms of price, choice, quality and innovation

448

U ; it is not necessary to prove that there have in fact been such negative effects on competition
449

U or that the abusive strategy was successful.
450

U However, where a dominant firm submits, with supporting evidence, that its conduct is not capable of restricting competition, in particular by excluding rivals, the Commission must analyse whether such effects were likely.

451

U Where an abuse consists of the combination of different practices, their effects must be analysed together.
452

U Not every exclusionary effect is necessarily detrimental to competition, where less efficient competitors exit the market or are marginalised.
453

U Where the abuse concerns pricing practices, it may be appropriate to determine whether the practices would cause a hypothetical competitor that is as efficient as the dominant undertaking to exit the market in the longer term,
454

U but this test is not relevant in assessing the effects on competition of non-pricing abuses.
455

U However, it is not always necessary to conduct an “as efficient competitor” test to determine whether conduct is abusive, particularly where the market structure prevents the emergence of an “as efficient” competitor, or a less efficient competitor would still contribute to increased competition in the market, as this test is only one tool for demonstrating an abuse.
456

U

45-104B It should be noted that, where conduct is objectively justified, it will not infringe art.102 even if
U it is *prima facie* abusive.
457

U Such justifications may be commercial or technical.

458

U In *Streetmap.EU Ltd v Google Inc* it was held that Google was objectively justified in placing its own thumbnail map on its search results as this was a technical improvement in its search services and there was no other way of showing an online map.

459

U A dominant undertaking may also rely on an “efficiency defence”, if it can show that its conduct will have efficiency gains that counterbalance or outweigh any negative effects on competition and consumer welfare, its conduct is necessary for the achievement of these efficiency gains and effective competition is not eliminated.

460

U In each case, the dominant undertaking bears the burden of proof.

461

U

Examples of abusive contractual provisions

45-105

U The following contractual clauses have been held to be capable of amounting to abusive conduct when engaged in by a dominant undertaking: exclusive and long-term contracts, loyalty rebates, turnover-related discounts, tying and bundling obligations and “pay for delay” agreements.

462

U A refusal to supply or contract may also be abusive. The concept of “abuse” is an objective one, where a dominant undertaking engages in methods that are different from those used by commercial operators in normal competition, so as to hinder the maintenance or growth of such competition still existing in the market

463

U by eliminating competitors other than by competition on the merits,

464

U or to harm consumers.

465

U Thus, it is not necessary to show that the undertaking had an intention or policy to exclude rivals, although evidence of this may be a relevant factor in finding an abuse.

466



Exclusive and long-term contracts

- 45-106 Many businesses will enter into exclusive and/or long-term contracts with their customers. The application of art.101(1) and the Vertical Restraints Block Exemption to such agreements has been considered above.

[467](#)

U Article 102 may be infringed if a dominant firm enters into contracts under which customers agree to purchase all or a substantial part of their requirements from the firm, as this may foreclose entry or expansion by competitors, particularly where the contracts are for a long period of time or are regularly renewed.

[468](#)

U Contractual provisions describing the dominant firm as a customer's "preferred, main or primary" supplier may be abusive, if they are intended and understood to be exclusive or quasi-exclusive.

[469](#)

U Incentive payments made by a dominant supplier to a customer on condition it purchases all of its requirements from that supplier, even if requested by the purchaser, are *prima facie* abusive, unless the supplier can show, with evidence and having regard to all relevant facts and circumstances, that they are not capable of restricting competition and having exclusionary effects.

[470](#)

U Where the customer has no technical alternative to the supplier's products, and so cannot switch supplier, such incentive payments cannot have anti-competitive effects.

[471](#)

U A so-called "English clause", where the dominant firm has the right to match an offer made by a competitor, will infringe art.102 as a qualified form of exclusive dealing.

[472](#)

U A payment by a component supplier to a customer, known as a "naked restriction", made on condition that it postpone, cancel or limit the launch of products containing a competitor's components is prohibited by art.102 and it is not necessary to assess its effects by reference to the "as effective competitor" test.

[473](#)

U Agreements by which retailers were prohibited from using freezers supplied free of charge by a dominant firm to store ice creams made by competitors have been condemned as abusive, since retailers generally did not have sufficient space to install a second freezer provided by a competitor.

[474](#)

U

Rebates

45-107 Offering discounts or rebates to customers is a common commercial practice. Typical rebates include “quantity” rebates (linked to the volumes purchased by the customer), “fidelity” or “loyalty” rebates (where the rebate is dependent on the customer purchasing all or almost all of its requirements from the supplier) and “retroactive” rebates (where the level of rebate depends on the quantities purchased by the customer and generally increases as the customer buys an increasing proportion of its requirements from the supplier).

45-108 Volume-related quantity rebates will generally not be abusive,

[475](#)

U unless they are non-linear and only very large purchasers can benefit from the higher levels of discount, so as to be discriminatory.

[476](#)

U Fidelity rebates are presumed to be abusive if they are capable of excluding a competitor that is at least as efficient as the dominant firm, unless it can provide a plausible explanation of the facts that the rebates are not capable of restricting competition, including by reference to the “as efficient competitor” test,

[477](#)

U having regard to the extent of its dominant position, share of the market covered by the rebates, the conditions and arrangements for granting the rebates, the duration and amount of the rebates, and whether the dominant firm had a strategy to exclude as efficient rivals.

[478](#)

U Retroactive quantity rebates will infringe art.102 if they cover a substantial part of total demand, even if the non-foreclosed part of the market might support a limited number of competitors.

[479](#)

U A multi-product rebate that is based on purchases of a number of different products supplied by the dominant firm may infringe art.102 if efficient competitors cannot compete against the discounted price for an individual product in the bundle.

⁴⁸⁰

U

- 45-109 If a rebate is capable of restricting competition, it is not necessary to show that the rebate scheme would have a serious or appreciable effect on competition.⁴⁸¹ In *British Airways*, the General Court held that a discount or rebate may be objectively justified by efficiencies that benefit consumers that outweigh any negative effects on competition, for example where a discount for large orders allows the supplier to produce large volumes of the product at a lower average unit cost⁴⁸²; this assessment is to be undertaken as a second analytical step, once it has been established that the discount or rebate is capable of foreclosing an as efficient competitor.⁴⁸³

Turnover related discounts

- 45-110 Discounts which are related to the customer achieving a certain minimum value or volume of purchases over a set period may be abusive and, in the absence of an objective justification, will infringe art.102.⁴⁸⁴ In *British Airways*, turnover-related bonuses were condemned as infringing art.102, as they restricted travel agents' ability to sell the services of other airlines, as their effect was to encourage agents to increase sales of British Airways' tickets in order to achieve higher levels of discounts.⁴⁸⁵

Tying and bundling clauses

- 45-111 A supplier "ties" two products when a customer is required to purchase both of them together, whilst it "bundles" the products when it is more advantageous for the customer to purchase both together than separately. Bundling has a similar effect to rebates.⁴⁸⁶ Tying may be achieved in various ways, including through contractual means. For tying to take place, four conditions must be satisfied: the tying and tied products must be two separate products, the undertaking must be dominant in the market for the tying product, customers must not have the choice to purchase the tied product independently of the tying product and the tying must foreclose competition on one or both markets.⁴⁸⁷ Tying clauses imposed by a dominant firm will infringe art.102 unless there is an objective justification for doing so, such as making the production or distribution of goods cheaper. In *Hilti*, the tying of nail guns and consumables (nails) was held to be abusive,⁴⁸⁸ as was the tying

of packaging machines and cartons in *Tetra Pak II*⁴⁸⁹; in *Microsoft*, the tying of the Windows Client PC operating system with its Windows Media Player was held to infringe art.102.⁴⁹⁰

“Pay for delay” agreements

- 45-112 “Pay for delay” agreements, whereby the owner of a patent for a pharmaceutical product enters into an agreement with one or more generic manufacturers to settle litigation in which the validity of the patent is challenged, in return for a payment (or other transfer of value) to the generic manufacturers not to enter the market and not to pursue revocation of the patent may infringe art.101(1): see above, para.45-064. Where the patent owner holds a dominant position in the relevant market that includes the pharmaceutical protected by the patent, it will also infringe art.102 by concluding an agreement that has the effect of excluding potential competition from generic manufacturers that would otherwise have entered the market.⁴⁹¹ In *Generics (UK) Ltd v Competition and Markets Authority*, the Competition Appeal Tribunal held that by entering into such agreements with three generic manufacturers that had plans to enter the market, the patent holder abused its dominant position by preventing generic competition.⁴⁹²

Refusal to supply or contract as abusive conduct

- 45-113 The common law doctrine of “freedom of contract”,⁴⁹³ which provides that any business is free to decide not to enter into a contract with a particular business, is circumscribed in relation to dominant undertakings. A dominant undertaking may, in exceptional circumstances, be found to have acted abusively where it holds a dominant position for a product or service and refuses to supply it to an established customer,⁴⁹⁴ and in some cases a new customer,⁴⁹⁵ unless it has an objective justification for such a refusal.⁴⁹⁶ A refusal to supply may be either express or constructive, for example by offering terms that are unreasonable or by unduly delaying negotiations⁴⁹⁷ and will be abusive where it excludes effective competition on the downstream market on which the dominant firm and the customer compete.⁴⁹⁸ Refusal to grant an intellectual property licence can in some circumstances amount to an abuse, where access to the material protected by the intellectual property right is essential for a third party competitor to enter a downstream market.⁴⁹⁹ In *Microsoft*, a refusal to supply interoperability information to competitors was abusive.⁵⁰⁰ In *Intel Corp v VIA Technologies*, the Court of Appeal held that it would be abusive to offer to licence patents only on terms that would infringe art.101(1).⁵⁰¹

Footnotes

- ❶424 The requirement of an actual or potential effect on trade between Member States is discussed above, paras 45-043—45-045. What is a “substantial part” of the internal market is a question of fact in each case. A Member State will usually be a substantial part of the internal market: e.g. *British Broadcasting Corp v Commission* (T-70/89) [1991] E.C.R. II-535, EU:T:1991:40 and *Independent Television Publications v Commission* (T-76/89) [1991] E.C.R. II-575, EU:T:1991:41 (United Kingdom). An important infrastructure may also satisfy this requirement, e.g. *Merci convenzionale porto di Genova* (C-179/90) [1991] E.C.R. I-5889, EU:C:1991:464 (Port of Genoa) and *Aéroports de Paris v Commission* (C-82/01P) [2002] E.C.R. I-9297, EU:C:2002:617 (Orly and Roissy-Charles-de-Gaulle Airports, Paris).
- ❶425 *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato* (C-377/20) EU:C:2022:379 at [44]–[47] and cases cited therein; *Google LLC v Commission (Google Shopping)* (T-612/17) EU:T:2021:763 at [153] and cases cited therein.
- ❶426 See, e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), Ch.10; Whish and Bailey, Competition Law, 10th edn (2021), pp.22–48 and Ch.5; O’Donoghue and Padilla, The Law and Economics of Article 102 TFEU, 3rd edn (2020).
- ❶427 Guidance on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings [2010] O.J. C45/7; this Guidance covers the following forms of conduct that may foreclose rivals: exclusive purchasing obligations imposed on customers, rebates that are conditional on a customer’s purchases exceeding a specified threshold, tying and bundling, predatory pricing, and refusal to supply and margin squeeze.
- 428 See e.g. *Ahmed Saeed Flugreisen* (66/86) [1989] E.C.R. 803, EU:C:1989:140; *Tetra Pak Rausing v Commission* (T-51/89) [1990] E.C.R. II-309, EU:T:1990:41.
- 429 See e.g. *Atlantic Container Line v Commission* (T-191/98 etc.) [2003] E.C.R. II-3275, EU:C:2003:245.
- 430 See e.g. *Compagnie Maritime Belge v Commission* (C-395/96P etc.) [2000] E.C.R. I-1365, EU:C:2000:132.
- 431 Withdrawal Agreement 2020 art.92(1), (2) and (3)(b). See above, para.45-004.
- 432 Withdrawal Agreement 2020 art.95(1) and (2).
- 433 See below, para.45-132.
- 434 See e.g. *Michelin v Commission* (322/81) [1983] E.C.R. 3461, EU:C:1983:313 at [30] and repeated in numerous cases subsequently.

- ④435 The Commission has published guidance on defining the relevant market: Notice on the definition of relevant market for the purposes of Community competition law [1997] O.J. C372/5. See e.g. Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), Ch.4; Whish and Bailey, Competition Law, 10th edn (2021), pp.22–48; Sousa Ferro, Market Definition in EU Competition Law (2019). On 26 June 2020, the Commission announced a public consultation on possible revisions to the Notice; information is available on its website, at https://ec.europa.eu/competition-policy/public-consultations/2020-market-definition-notice_en. On 12 July 2021, the Commission published the findings of its evaluation of the Market Definition Notice: Commission Staff Working Document, Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law (SWD(2021) 199 final, 12 July 2021).
- 436 See e.g. *United Brands Co v Commission* (27/76) [1978] E.C.R. 207, EU:C:1978:22 at [65]–[66]; *AstraZeneca AB v Commission* (T-321/05) [2010] E.C.R. II-2805, EU:T:2010:266, upheld on appeal (C-457/10P) EU:C:2012:770.
- 437 See e.g. *United Brands Co v Commission* (27/76) [1978] E.C.R. 207, EU:C:1978:22 at [108]–[112].
- 438 See e.g. *AKZO Chemie BV v Commission* (C-62/86) [1991] E.C.R. I-3359, EU:C:1991:286 at [61]. In *British Airways Plc v Commission* (T-219/99) [2003] E.C.R. II-5917, EU:T:2003:343, the General Court upheld a finding by the Commission that British Airways had a dominant position with a market share of 39.7 per cent in the market for the procurement of air travel agency services in the United Kingdom, as its market share was significantly larger than its five nearest rivals combined.
- ④439 *Google LLC v Commission (Google Shopping)* (T-612/17) EU:T:2021:763 at [160]. Equally, it is not unlawful for an undertaking to acquire, on its own merits, a dominant, even “super dominant”, position, at [156]–[160] and *Qualcomm Inc v Commission* (T-235/18) EU:T:2022:358 at [349]. The extension by a dominant undertaking of its dominant position into a neighbouring market is not in itself conduct that departs from normal competition, *Google LLC v Commission (Google Shopping)* at [162].
- ④440 *Michelin v Commission (Michelin I)* (322/81) [1983] E.C.R. 3461, EU:C:1983:313 and *Intel Corp v Commission* (C-413/14P) EU:C:2017:632 and [135]. The scope of that special responsibility is case-specific: *Google LLC v Commission (Google Shopping)* (T-612/17) EU:T:2021:763 at [165].
- ④441 *Intel Corp v Commission* (C-413/14P) EU:C:2017:632 at [134]; *Google LLC v Commission (Google Shopping)* (T-612/17) EU:T:2021:763 at [157].
- ④442 See e.g. *Post Danmark A/S v Konkurrencerådet (Post Danmark I)* (C-209/10) EU:C:2012:172 at [22]–[25]; *Intel Corp Inc v Commission* (C-413/14P) EU:C:2017:632 at [133]–[137].

- ❶443 *Google LLC v Commission (Google Shopping) (T-612/17) EU:T:2021:763* at [257]–[266].
- ❶444 *Intel Corp v Commission (C-413/14P) EU:C:2017:632* at [136].
- ❶445 *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato (C-377/20) EU:C:2022:379* at [91]–[103].
- ❶446 *Google LLC v Commission (Google Shopping) (T-612/17) EU:T:2021:763* at [167]–[197]; this is the case even where the conduct in question leads to improvements in a product or service, as this is relevant only when any possible objective justification for, or efficiencies arising from, the conduct are considered: at [188].
- ❶447 *BPB Industries Plc v Commission (T-65/89) [1993] E.C.R. II-389, EU:T:1993:31; Almelo v NV Energiebedrijf IJsselmij (C-393/92) [1994] E.C.R. I-1477, EU:C:1994:171.*
- ❶448 *Intel Corp Inc v Commission (C-413/14P) EU:C:2017:632* at [137]–[138]; *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato (C-377/20) EU:C:2022:379* at [48]. Where an undertaking can show, with sufficient evidence, that its conduct was not capable of having negative effects (and not merely that it had not had such effects), the conduct will not be abusive: *Servizio Elettrico Nazionale* at [58]; see also *Google LLC v Commission (Google Shopping) (T-612/17) EU:T:2021:763* at [439]–[441] and [518].
- ❶449 *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato (C-377/20) EU:C:2022:379* at [48]. See also *Google LLC v Commission (Google Shopping) (T-612/17) EU:T:2021:763* at [442]–[443].
- ❶450 *České dráhy v Commission (C#538 and 539/18 P) EU:C:2020:53* at [53]. However, the mere existence of an increase in the revenues of the dominant undertaking is not sufficient to demonstrate the existence of anti-competitive effects: *Google LLC v Commission (Google Shopping) (T-612/17) EU:T:2021:763* at [456]–[457].
- ❶451 *Intel Corp Inc v Commission (C-413/14P) EU:C:2017:632* at [138]–[139]. The Commission must consider the following five criteria: (i) the extent of the firm’s dominance; (ii) the share of the market covered by the practice; (iii) the conditions and arrangements for the practice in question, e.g. for granting rebates; (iv) the duration of the practice and the amount of any payments made, e.g. rebates; and (v) the possible existence of a strategy for excluding competitors that are at least as efficient as the dominant firm. The dominant firm must put forward a “plausible explanation” of the facts that can be substituted for the one adopted by the Commission: *Intel Corp Inc v Commission (T-286/09 RENV) EU:T:2022:19* at [165]. For an application of these criteria, see *Intel Corp Inc v Commission (T-286/09 RENV) EU:T:2022:19* at [116]–[521].
- ❶452

- [**Google LLC v Commission \(Google Shopping\) \(T-612/17\) EU:T:2021:763**](#) at [372]–[380].
- ④53 [**Qualcomm Inc v Commission \(T-235/18\) EU:T:2022:358**](#) at [350]–[351].
- ④54 In [**Intel Corp Inc v Commission \(T-286/09 RENV\) EU:T:2022:19**](#), the General Court held that the purpose of the “as efficient competitor” test is to determine whether such a competitor could still cover its costs (which are assumed to be the dominant firm’s average avoidable costs) in competing for a customer’s contestable business, including by reducing its price to compensate the customer for rebates that it would lose if it switched from the dominant firm to the competitor; the rebates will be abusive if the competitor’s effective price is below the dominant firm’s average avoidable cost: at [152]–[159].
- ④55 [**Google LLC v Commission \(Google Shopping\) \(T-612/17\) EU:T:2021:763**](#) at [538]–[541]. However, where the Commission chooses to carry out an “as efficient competitor” test, its analysis must be taken into account in determining whether the practice, such as a rebate scheme, is capable of restricting competition: [**Intel Corp Inc v Commission \(T-286/09 RENV\) EU:T:2022:19**](#) at [126].
- ④56 See e.g. [**Post Danmark A/S v Konkurrenserådet \(Post Danmark II\) \(C-23/14\) EU:C:2015:651**](#) at [55]–[62]; and [**Royal Mail Plc v Office of Communications \[2021\] EWCA Civ 669, \[2021\] Bus. L.R. 1045**](#) at [37]–[41] and [62]–[70] (per Arnold LJ) and [74]–[89] (per Males LJ). However, even if an authority is not obliged to apply the “as efficient competitor” test, should it choose to do so, a reviewing court must assess whether the result of that test is vitiated by errors: [**Intel Corp v Commission \(C-413/14P\) EU:C:2017:632**](#) at [138]–[147].
- ④57 See e.g. [**Konkurrensverket v TeliaSonera Sverige AB \(C-52/09\) \[2011\] E.C.R. I-527, EU:C:2011:83**](#) at [112]; [**Telefónica, SA v Commission \(T-336/07\) EU:T:2012:172**](#) at [187]; and [**Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato \(C-377/20\) EU:C:2022:379**](#) at [103].
- ④58 [**Google LLC v Commission \(Google Shopping\) \(T-612/17\) EU:T:2021:763**](#) at [552].
- ④59 [**\[2016\] EWHC 253 \(Ch\).**](#)
- ④60 [**Post Danmark A/S v Konkurrenserådet \(Post Danmark I\) \(C-209/10\) EU:C:2012:172**](#) at [42]; [**Konkurrensverket v TeliaSonera Sverige AB \(C-52/09\) \[2011\] E.C.R. I-527, EU:C:2011:83**](#) at [76]; [**Post Danmark A/S v Konkurrenserådet \(Post Danmark II\) \(C-23/14\) EU:C:2015:651**](#) at [49].
- ④61 [**Google LLC v Commission \(Google Shopping\) \(T-612/17\) EU:T:2021:763**](#) at [551]–[554]. The undertaking must do more than put forward vague, general or theoretical arguments and cannot rely exclusively on its own commercial interests: [**Generics \(UK\) Ltd v Competition and Markets Authority \(C-307/18\) EU:C:2020:52**](#) at [166].

- ④62 Various other clauses were also condemned in *Tetra Pak International v Commission (Tetra Pak II) [1994] E.C.R. II-755, EU:T:1994:246*, including obligations on customers to obtain maintenance services and spare parts only from Tetra Pak, to use only cartons supplied by Tetra Pak in machines manufactured by it and to buy those only from Tetra Pak or a supplier designated by it, to transfer to Tetra Pak ownership of any improvements to or modifications of the machines, restrictions on the sale of machines and restricting guarantees where customers did not comply with their contractual obligations.
- ④63 See e.g. *Hoffmann-La Roche v Commission (85/76) [1979] E.C.R. 461, EU:C:1979:36* at [91]; *AstraZeneca AB v Commission (C-457/10P) EU:C:2012:770* at [74]–[75].
- ④64 *France Télécom SA v Commission (C-202/07P) [2009] E.C.R. I-2369, EU:C:2009:214* at [106].
- ④65 *Van den Bergh Foods Ltd v Commission (T-65/98) [2003] E.C.R. II-4653, EU:T:2003:281* at [157].
- ④66 See e.g. *Tomra Systems ASA v Commission (T-155/06) [2010] E.C.R. II-4361, EU:T:2010:370* at [33]–[41], appeal dismissed (*C-549/10P EU:C:2012:221* at [37]–[49]); *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato (C-377/20) EU:C:2022:379* at [64].
- ④67 See above, paras 45-073—45-074.
- ④68 See e.g. *Tomra Systems ASA v Commission (T-155/06) [2010] E.C.R. II-4361, EU:T:2010:370* at [238]–[246] (exclusivity provisions) and [295]–[300] (quantity commitments), appeal dismissed (*C-549/10P EU:C:2012:221* at [37]–[49]).
- ④69 See e.g. *Tomra Systems ASA v Commission (T-155/06) [2010] E.C.R. II-4361, EU:T:2010:370* at [55]–[67], appeal dismissed (*C-549/10P EU:C:2012:221* at [88]–[100]).
- ④70 *Qualcomm Inc v Commission (T-235/18) EU:T:2022:358* at [353]–[356].
- ④71 *Qualcomm Inc v Commission (T-235/18) EU:T:2022:358* at [398]–[417].
- ④72 *Hoffman-La Roche & Co AG v Commission (85/76) [1979] E.C.R. 461, EU:C:1979:36* at [102]–[108].
- ④73 *Intel Corp v Commission (T-286/09) EU:T:2014:547* at [198]–[220] and (*T-286/09 RENV EU:T:2022:19* at [86]–[96]).
- ④74

Van den Bergh Foods Ltd v Commission (T-65/98) [2003] E.C.R. II-4653, EU:T:2003:281, appeal dismissed in *Unilever Bestfoods (Ireland) Ltd v Commission* (C-552/03P) [2006] E.C.R. I-9091, EU:C:2006:607.

④75 *Michelin v Commission* (*Michelin II*) (T-203/01) [2003] E.C.R. II-4071, EU:T:2003:250 at [58]; *Intel Corp v Commission* (T-286/09) EU:T:2014:547 at [75].

④76 *Portugal v Commission* (*Portuguese Airports*) (C-163/99) [2001] E.C.R. I-2613, EU:C:2001:89 at [48]–[53].

④77 See above, para.45-104A.

④78 *Intel Corp v Commission* (C-413/14P) EU:C:2017:632 at [139]; as the Court of Justice overturned the General Court’s finding that fidelity rebates are by their very nature restrictive of competition, such that it was unnecessary to consider their effects, the case was remitted to the General Court, which held that the Commission had not properly applied the “as efficient competitor” test and had also not taken account of all relevant criteria in assessing the effects of the rebates and payments made by Intel, such that it had not established that these had had an anti-competitive foreclosure effect: *Intel Corp Inc v Commission* (T-286/09 RENV) EU:T:2022:19. The General Court accordingly observed that it is a “mere presumption” that a system of rebates set up by a dominant firm has foreclosure effects and not a “per se infringement” of art.102: at [124].

④79 *Tomra Systems ASA v Commission* (T-155/06) [2010] E.C.R. II-4361, EU:T:2010:370, appeal dismissed (C-549/10P) EU:C:2012:221.

④80 *Hoffmann-La Roche & Co AG v Commission* (85/76) [1979] E.C.R. 461, EU:C:1979:36; see Article 102 Enforcement Priorities Guidance, paras 60–61.

481 *Post Danmark A/S v Konkurrenserådet* (*Post Danmark II*) (C-23/14) EU:C:2015:651 at [70]–[74].

482 *British Airways Plc v Commission* (T-219/99) [2003] E.C.R. II-5917, EU:T:2003:343, appeal dismissed (C-95/04P) [2007] E.C.R. I-2331, EU:C:2007:166.

483 *Intel Corp v Commission* (C-413/14P) EU:C:2017:632 at [140].

484 *Michelin v Commission* (*Michelin I*) (322/81) [1983] E.C.R. 3461, EU:C:1983:313 (stepped discounts, where the level of discount increased as different sales levels were achieved, but were applied to all purchases and not only the incremental sales at each step); *Michelin v Commission* (*Michelin II*) (T-203/01) [2003] E.C.R. II-4071, EU:T:2003:250 (discretionary bonuses, which had loyalty-inducing effects and were potentially discriminatory between dealers).

485 *British Airways Plc v Commission* (T-219/99) [2003] E.C.R. II-5917, EU:T:2003:343, appeal dismissed (C-95/04P) [2007] E.C.R. I-2331, EU:C:2007:166.

486 See above, paras 45-107—45-109.

- 487 *Microsoft Corp v Commission* (T-201/04) [2007] E.C.R. II-3601, EU:T:2007:289 at [859]–[867].
- 488 *Hilti AG v Commission* (T-30/89) [1991] E.C.R. II-315, EU:T:1991:70;
- 489 *Tetra Pak International SA v Commission* (*Tetra Pak II*) (T-83/91) [1994] E.C.R. II-755, EU:T:1994:246, appeal dismissed (C-333/94P) [1996] E.C.R. I-5951, EU:C:1996:436.
- 490 *Microsoft Corp v Commission* (T-201/04) [2007] E.C.R. II-3601, EU:T:2007:289.
- 491 *Generics (UK) Ltd v Competition and Markets Authority* (C-307/18) EU:C:2020:52.
- 492 *Generics (UK) Ltd v Competition and Markets Authority* [2021] CAT 9 at [101]–[106]. However, no separate penalty was imposed for the infringement of the Ch.II prohibition, given that, at the time the agreements were entered into, there was uncertainty as to the scope of the relevant market and thus whether the patent owner had a dominant position: *Generics (UK) Ltd v Competition and Markets Authority* at [143].
- 493 Vol.I, paras 2-003—2-019. This freedom is also recognised in EU competition law: see e.g. *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs* (C-7/97) [1998] E.C.R. I-7791, EU:C:1998:264 at [56] (Opinion of AG Jacobs). Thus, a dominant firm is not obliged to supply a customer that does not abide by “regular commercial practice” or whose orders are “out of the ordinary”: *Sot Lélos kai Sia EE v GlaxoSmithKline AEVE* (C-468/06 etc.) [2008] E.C.R. I-7139, EU:C:2008:504 at [49].
- 494 See e.g. *Commercial Solvents v Commission* (6/73 etc.) [1974] E.C.R. 223, EU:C:1974:18; *CBEM v CLT and IPB (Telemarketing)* (311/84) [1985] E.C.R. 3261, EU:C:1985:394.
- 495 This will be the case only where the product or service that the new customer wishes to obtain is “indispensable” for its own operations on a related downstream or neighbouring market: e.g. *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs* (C-7/97) [1998] E.C.R. I-7791, EU:C:1998:569 at [41]; *Tiercé Ladbroke SA v Commission* (T-504/93) [1997] E.C.R. II-923, EU:T:1997:84 at [124]–[132].
- 496 *Microsoft Corp v Commission* (T-201/04) [2007] E.C.R. II-3601, EU:T:2007:289 at [688]. See e.g. *Leyland DAF Ltd v Automotive Products Ltd* [1994] 1 B.C.C. 389 (CA) (refusal not abusive where customer in administrative receivership had failed to pay for earlier supplies); *VIP Communications Ltd (in administration) v Office of Communications* [2009] CAT 28 (refusal not abusive where use of the product would be unlawful).
- 497 *Orange Polska SA v Commission* (T-486/11) EU:T:2015:1002, appeal dismissed (C-123/16P) EU:C:2018:590; *Clearstream Banking AG v Commission* (T-301/04) [2009] E.C.R. II-3155, EU:T:2009:317.
- 498 *IMS Health GmbH & Co v NDC Health GmbH & Co KG* (C-418/01) [2004] E.C.R. I-5039, EU:C:2004:257 at [38]; *Microsoft Corp v Commission* (T-201/04) [2007] E.C.R. II-3601, EU:T:2007:289 at [332] and [563].
- 499 e.g. *Radio Telefis Eireann v Commission (Magill)* (C-421/91P etc.) [1991] E.C.R. II-485, EU:T:1991:39.
- 500 *Microsoft Corp v Commission* (T-201/04) [2007] E.C.R. II-3601, EU:T:2007:289.
- 501 [2002] EWCA Civ 1905 at [87].

(i) - Enforcement at the National Level

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(i) - Enforcement at the National Level

Direct applicability of arts 101 and 102

⁴⁵⁻¹¹⁴ Article 1 of Regulation 1/2003⁵⁰² provides that arts 101 and 102 are directly applicable: agreements caught by art.101(1) which do not satisfy the conditions of art.101(3) are prohibited,⁵⁰³ whilst those that do satisfy the conditions of art.101(3) shall not be prohibited⁵⁰⁴ and the abuse of a dominant position referred to in art.102 shall be prohibited,⁵⁰⁵ in each case “no prior decision to that effect being required”. National competition authorities and national courts therefore have the power to apply the EU competition rules in full,⁵⁰⁶ and must do so when applying national competition law to an agreement or an abuse of a dominant position if it may affect trade between Member States.⁵⁰⁷

⁴⁵⁻¹¹⁵ Regulation 1/2003 was revoked and ceased to apply in the UK on 31 December 2020⁵⁰⁸ and from that date the CMA ceased to have the power to apply arts 101 and 102, including in relation to investigations commenced, or when investigating suspected infringements of EU competition law committed, before this date.⁵⁰⁹ Claims (or a defence to a claim) before a court or tribunal relating to pre-IP completion day infringements of arts 101 and/or 102 (or of arts 53 and/or 54 of the EEA Agreement) may continue or be brought after 31 December 2020, such that arts 101 and 102 remain directly applicable in proceedings concerning such claims and defences.⁵¹⁰

Role of the national courts

- 45-116 The direct effect of arts 101 and 102 means that contracting parties may rely on those provisions in national courts as a defence to the enforcement of a prohibited restriction and, furthermore, that both a contracting party and third parties may make a claim for damages for losses caused by an infringement of the competition rules. National courts must ensure that their procedures respect the principles of equivalence (with respect to similar cases under national law) and effectiveness, to ensure that rights under EU competition law can be enforced.⁵¹¹
- 45-117 Articles 101 and 102 ceased to have effect in the UK from 31 December 2020, although they remain applicable to agreements and conduct entered into before that date, such that an agreement that, before that date, infringed art.101 is unenforceable and a person who has suffered loss as a result retains a right to obtain damages in respect of such loss.⁵¹² Accordingly, claims (or a defence to a claim) before a court or tribunal relating to infringements of arts 101 and/or 102 (or of arts 53 and/or 54 of the EEA Agreement) committed before 31 December 2020 may continue or be brought after this date.⁵¹³

Effect of Regulation 1/2003

- 45-118 Article 6 of Regulation 1/2003 specifically provides that national courts shall have the power to apply arts 101 and 102 in full, and art.3 goes further by stating that they are under an obligation to apply arts 101 and 102 where an agreement or conduct has an effect on trade between Member States. Regulation 1/2003 contains several further provisions on the role of national courts in enforcing the EU competition rules. Article 15 of the Regulation makes provision for a national court to request the Commission's opinion on the application of the competition rules; requires national courts to submit to the Commission any written judgment deciding on the application of arts 101 and 102; and enables national competition authorities and the Commission to make observations in proceedings before national courts. Article 16 of the Regulation is concerned with preserving the uniform application of EU law and gives effect to the Court of Justice's judgment in *Masterfoods Ltd v HB Ice Cream Ltd*.⁵¹⁴ In that case the Court of Justice stated that when national courts rule on agreements or conduct which are already the subject of a Commission decision they cannot take a decision running contrary to that of the Commission. Article 16 adds that a national court must avoid giving a decision which would conflict with a decision contemplated by the Commission in parallel proceedings and must consider whether to stay its proceedings. The Commission has published a Notice on the cooperation between the Commission and the courts of the Member States in the application of arts 101 and 102 TFEU.⁵¹⁵ In 2019, the "ECN+ Directive" was adopted, requiring the Member States to ensure that their national competition authorities

have the necessary independence, resources and enforcement and fining powers to apply arts 101 and 102 effectively.⁵¹⁶

Severance of void terms

- 45-119 Although art.101(2) provides that the prohibited *agreement* is void, the Court of Justice has held that it is in fact only the restrictive clauses in the agreement which are invalidated by art.101(2).⁵¹⁷ The doctrine of severance also applies to agreements that infringe art.102.⁵¹⁸ The doctrine of severance does not apply where an agreement does not satisfy the requirements of a block exemption, for example because it contains a “hardcore” restriction⁵¹⁹
- U** : in such a case, none of the agreement can benefit from the block exemption, and the agreement as a whole must be analysed under art.101(1) and, if necessary, art.101(3).⁵²⁰ It would appear that the invalidity of the restrictive clauses does not affect the validity of contracts entered into by parties to the infringing agreement with third parties, such as their customers.⁵²¹
- 45-120 If the restrictive clauses can be severed from the agreement in accordance with the test usually applied under domestic law, the remainder of the agreement may be enforced.⁵²² However, in *English Welsh & Scottish Railway Ltd v E.ON Plc*⁵²³ the High Court held that directions by the Office of Rail Regulation⁵²⁴ that various terms of a coal carriage agreement between the parties were anti-competitive and thus unlawful and should be removed from it altered the contract so fundamentally that it became void and unenforceable in its entirety. In *Calor Gas Ltd v Express Fuels (Scotland) Ltd* the Outer House of the Court of Session in Scotland concluded that an exclusive dealing agreement was unenforceable by the supplier, Calor Gas, as it infringed art.101(1).⁵²⁵ In *Jones v Ricoh UK Ltd*⁵²⁶ the Chancery Division of the High Court concluded that a clause in a confidentiality agreement that prevented Ricoh (a manufacturer of photocopiers) from dealing directly with customers of a company owned by Mr Jones which was a distributor of Ricoh photocopiers was void and unenforceable as it was contrary to art.101(1); the High Court subsequently held that this clause was severable from the remainder of the agreement, which remained enforceable.⁵²⁷

Use of arts 101 and/or 102 as a defence

- 45-121

A breach of arts 101(1) and/or 102 may be relied upon by a defendant in order to avoid an action for breach of contract, by arguing that the agreement, or a specific provision within it, is void and unenforceable. However, to do so, it must show that the agreement in question infringes arts 101(1) and/or 102: it is not sufficient to show that it is in some way “connected” to an infringing agreement or practice.⁵²⁸ The defence must also be pleaded in detail and be backed up by sufficient reliable and cogent evidence, including on market definition, which may require expert economic evidence.⁵²⁹

- 45-122 In addition, in some circumstances a defendant who is not a party to a relevant agreement can plead art.101 or art.102 as a defence. This principally arises in actions brought by the holder of an intellectual property right who sues an alleged infringer of the right and is met by the defence that the licence under which it holds the right, or its conduct in exploiting the right, in some way contravenes arts 101 and/or 102.⁵³⁰ However, to avoid its claim being struck out, the party seeking to rely on arts 101 and/or 102 must show that it has an arguable case that enforcement of the intellectual property right would restrict competition and that there is a sufficient nexus between the alleged anti-competitive conduct and the relief sought by the claimant,⁵³¹ for example by forcing the defendant to enter into a licence that would infringe arts 101(1) and/or 102⁵³² or because a dominant firm, in breach of art.102, refuses to licence its intellectual property rights, whether at all or on reasonable terms.⁵³³

Breaches of arts 101 or 102 as a cause of action under EU law

- 45-123 It is clear, following the judgment of the Court of Justice in *Courage Ltd v Crehan*,⁵³⁴ that a person who suffers loss as a result of an infringement of arts 101(1) and/or 102 may bring an action for damages; such an action should, in principle, be available in order to safeguard the effective application (“effet utile”) of the competition rules. This right arises as a matter of EU law, as arts 101 and 102 have direct effect.⁵³⁵ The judgment in *Courage Ltd v Crehan* even establishes that one party to an agreement that infringes art.101(1) may be able to sue the other party for damages where the former does not bear significant responsibility for the infringement, for example because it is in a significantly weaker economic position. The Court of Justice subsequently confirmed, in *Manfredi*,⁵³⁶ that an individual can rely on the invalidity of an agreement or practice prohibited by art.101(1) and, where there is a causal relationship between the unlawful agreement or practice, claim damages for harm suffered as a result of that anti-competitive behaviour. In *Kone AG v ÖBB Infrastruktur AG*⁵³⁷ the Court of Justice held that this right may be relied on by a claimant who was not a customer of any of the parties to the unlawful agreement, but of a third undertaking that had not participated in the cartel, but whose prices had been inflated above the competitive level to the level set by the cartel as a result of a so-called “umbrella effect”. Indeed, damages

may be claimed by a person that was neither a supplier nor a purchaser on the market on which an agreement had anti-competitive effects.⁵³⁸

- 45-124 The private enforcement of EU competition law was given added impetus by the adoption of the EU Damages Directive in November 2014 which entered into force on 27 December 2016⁵³⁹ and was implemented in UK law by the *Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017*.

⁵⁴⁰

U These Regulations made various amendments to the *Competition Act 1998* (in particular, introducing a new *s.47F* and *Sch.8A*, which apply to claims under both arts 101 and 102 and the Ch.I and II prohibitions) and certain other legislation. In particular, they make provision for a “passing on” defence,⁵⁴¹ a rebuttable presumption that cartels cause loss or damage⁵⁴² and that exemplary damages may not be awarded in competition proceedings.⁵⁴³ As a result of the UK’s withdrawal from the EU, this right of action does not apply to any infringement of arts 101 or 102 committed after 31 December 2020, but does continue to apply to any infringement committed before this date, even if the claim is brought after this date.⁵⁴⁴ The amendments to the Act made by the Regulations continue to have effect in the UK after 31 December 2020, as “EU-derived domestic legislation”,⁵⁴⁵ with certain modifications.⁵⁴⁶

Causes of action in English law

- 45-125 Even before the judgment of the Court of Justice in *Courage Ltd v Crehan*, it had been established as a matter of domestic English law that a breach of arts 101 or 102 could give rise to a cause of action on the part of someone injured by an anti-competitive agreement or prohibited abusive conduct.⁵⁴⁷ In the leading case of *Garden Cottage Foods Ltd v Milk Marketing Board*⁵⁴⁸ the House of Lords held that, in light of the doctrine of direct effect, a breach of art.102 could be categorised in English law as a breach of statutory duty (imposed by s.2(1) of the European Communities Act 1972) that was imposed not only for the purpose of promoting the general prosperity of the (then) common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty. *Garden Cottage Foods* was a decision at an interlocutory stage, but it was affirmed obiter by the Court of Appeal⁵⁴⁹ and relied upon in later actions.

45-126

However, the fact that an action may be brought for breach of statutory duty does not preclude the possibility that the conduct constituting an infringement of competition law might also be tortious in some other way, such as conspiracy to use unlawful means to cause economic harm.⁵⁵⁰ Nevertheless, claims based on the economic torts of conspiracy to injure and interference with business by unlawful means have been struck out for failure to show that the cartel participants had intended to injure the claimants.⁵⁵¹ In *Secretary of State for Health v Servier Laboratories Ltd*,⁵⁵² the Supreme Court held that a necessary element of the tort of interference by unlawful means is that the unlawful means must affect a third party's freedom to deal with the claimant; as the allegedly unlawful means (the making of false statements to the European Patent Office and the English courts in obtaining, defending and enforcing a patent) did not do so, the third parties having had no dealing with the claimant, its claim in tort was struck out and a claim could only be brought under competition law, for abuse of a dominant position. In *Gibbs Mew Plc v Gemmell* the Court of Appeal held that, as a matter of English law, there was no action in damages or restitution at the suit of a party to a contract in respect of loss resulting from his compliance with terms which are in fact void and unenforceable because of art.101(2).⁵⁵³ However, this case must be read subject to the judgment of the Court of Justice in *Courage Ltd v Crehan*,⁵⁵⁴ which says quite clearly, as a matter of EU law, that there should not be an absolute bar to a person in the position of a co-contractor bringing an action for damages for loss caused by a contract that is liable to restrict competition; otherwise the effectiveness of art.101 would be put at risk.

Interim injunctions

- 45-127 In England and Wales, interim injunctions can be made by the High Court⁵⁵⁵ and the Competition Appeal Tribunal⁵⁵⁶; this will ordinarily require the applicant to give a cross-undertaking to pay damages in the event of a failure to establish its claim at the trial of the action.⁵⁵⁷ An interim injunction is most likely to be granted where the applicant is threatened with the complete loss of their business, such that damages at trial would not be a sufficient remedy.⁵⁵⁸
- 45-128 Interim relief was successfully obtained by the claimant in *Adidas-Salomon AG v Roger Draper and Paul Howorth*, in which Adidas was granted an interim injunction against the International Tennis Federation and the "Grand Slam" tennis tournaments in relation to the dress rules for players⁵⁵⁹; a settlement was subsequently reached so that the case did not go to final trial. In *Dahabshiil Transfer Services Ltd v Barclays Bank Plc*,⁵⁶⁰ an interim injunction was made against Barclays Bank, requiring it to continue to provide banking services to Dahabshiil, on the basis that Barclays' decision to cease dealing with the latter may have constituted an unlawful refusal to supply contrary to art.102. In *Unlockd Ltd v Google Ireland Ltd*,⁵⁶¹ an interim injunction was made against Google requiring it not to withdraw from its Google Play app store and its "AdMob" service a third-party application that used Unlockd's technology. An interim injunction was also

made in *Preventx Ltd v Royal Mail Group Ltd*,⁵⁶² to require Royal Mail to continue providing a particular postal service to Preventx and not to migrate it to a new service on different terms and conditions. However, in other cases, an injunction has been refused due to the claimant not having demonstrated a serious issue to be tried.⁵⁶³

- 45-129 In *Unique Pub Properties Ltd v Roddy*,⁵⁶⁴ an interim injunction, to require the defendants to comply with an exclusive purchasing obligation contained in the lease of a public house, was made notwithstanding that the defendants alleged that the obligation infringed the Ch.I prohibition: the defence was unlikely to succeed at trial, the defendants did not have the financial means to pay damages should they lose at trial and the claimant could give a cross-undertaking in damages, if it were to be unsuccessful at trial.

Role of national competition authorities

- 45-130 Under the regime introduced by Regulation 1/2003 national competition authorities share the competence to apply arts 101 and 102 alongside the national courts and the European Commission. National competition authorities have the power to make decisions finding an infringement and requiring it to be brought to an end, to order interim measures, to accept commitments from the parties in lieu of a decision finding an infringement and to decide that there are no grounds for action on their part.⁵⁶⁵ Where an authority finds that the conditions for the application of the prohibitions in arts 101(1) or 102 are not met, its power is limited to stating that there are no grounds for action; it may not find that arts 101(1) or 102 have not been infringed.⁵⁶⁶
- 45-131 Regulation 1/2003 contains a number of provisions which are intended to promote cooperation between the Commission and the national competition authorities⁵⁶⁷; a national competition authority may not adopt a decision that runs counter to a decision adopted by the Commission in respect of the same agreement, decision or practice.⁵⁶⁸ A network of competition authorities, the “European Competition Network” (ECN), has been established to facilitate the handling of cases between the Commission and national competition authorities in the EU and has adopted a number of recommendations on different aspects of enforcement of arts 101 and 102.⁵⁶⁹ The Commission has published a Notice on Cooperation within the Network of Competition Authorities⁵⁷⁰ and reference should be made to specialist works for a detailed assessment of national competition authorities’ powers to enforce arts 101 and 102.⁵⁷¹

Role of the Competition and Markets Authority after “Brexit”

- 45-132** Following the UK’s withdrawal from the EU, from 31 December 2020 the CMA (and other regulators with concurrent enforcement powers) no longer has the power to apply arts 101 and 102, including in respect of investigations that it had commenced before that date, which it could not continue after this date.⁵⁷² The CMA has published guidance on the enforcement of competition law, both UK and EU, after 31 December 2020.⁵⁷³ Where an existing investigation had both a “domestic element” and an “EU element”, as the CMA (or other regulator) was investigating a suspected infringement of both UK and EU competition law, the EU law part of the investigation before this date is treated, after this date, as having been done for the domestic element of the investigation.⁵⁷⁴ Any CMA investigation opened after 31 December 2020 will concern only suspected infringements of UK competition law, i.e. the Ch.I and/or II prohibitions, whether the conduct under investigation was before or after that date.⁵⁷⁵ Under the Withdrawal Agreement 2020, the Commission may transfer to the CMA (with its agreement) responsibility for monitoring and enforcing commitments given to or remedies imposed by the Commission in or in relation to the UK in cases investigated by it.⁵⁷⁶ In *Aspen*, commitments given by a pharmaceutical manufacturer to the Commission to reduce prices (including in the UK) became legally binding under EU law only after the UK ceased to be a member of the EU; the CMA accordingly sought and obtained binding commitments from the manufacturer to reduce its prices and to continue supply in the UK.

⁵⁷⁷



Footnotes

- 502** [2003] O.J. L1/1; see also *BRT v SABAM (127/73) [1974] E.C.R. 51, EU:C:1974:6*. For the scope of this doctrine as applied in the UK, see *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2) [1991] 1 A.C. 603 (HL)*. See also *Eco Swiss China Time Ltd v Benetton International NV (C-126/97) [1999] E.C.R. I-3055, EU:C:1999:269* for the effect on an arbitration award of an allegation made on appeal that the agreement was contrary to art.101(1): the Court of Justice held that the national court must set aside the award if it infringes art.101(1).
- 503** Regulation 1/2003 art.1(1).
- 504** Regulation 1/2003 art.1(2).
- 505** Regulation 1/2003 art.1(3).
- 506** Regulation 1/2003 arts 5 (national competition authorities) and 6 (national courts).

- 507 Regulation 1/2003 art.3(1).
- 508 The *Competition (Amendment etc.) (EU Exit) Regulations 2019* (SI 2019/93) reg.63 and Sch.3 para.1(f). See above, para.45-004.
- 509 The *Competition (Amendment etc.) (EU Exit) Regulations 2019* (SI 2019/93) reg.64 and Sch.4 paras 4–6.
- 510 The *Competition (Amendment etc.) (EU Exit) Regulations 2019* (SI 2019/93) reg.64 and Sch.4 para.14. See above, para.45-004.
- 511 e.g. *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2006] E.C.R. I-6619, EU:C:2006:461. This will include in matters such as disclosure: *Pfleiderer AG v Bundeskartellamt* (C-360/09) EU:C:2011:389; *National Grid Electricity Transmission Plc v ABB Ltd* [2011] EWHC 1717 (Ch).
- 512 See above, para.45-005.
- 513 The *Competition (Amendment etc.) (EU Exit) Regulations 2019* (SI 2019/93) reg.64 and Sch.4 para.14. See above, para.45-005.
- 514 (C-344/98) [2000] E.C.R. I-11369, EU:C:2000:689.
- 515 [2004] O.J. C101/54.
- 516 Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] O.J. L11/3.
- 517 *Société de Vente de Ciments et Bétons v Kerpen & Kerpen* (C-319/82) [1983] E.C.R. 4173, EU:C:1983:374.
- 518 *English Welsh & Scottish Railway Ltd v E.ON Plc* [2007] EWHC 599 (Comm), [2007] U.K.C.L.R. 1653 at [27].
- 519 e.g. under art.4 of the Vertical Restraints Block Exemption (see above, paras 45-091 —45-092) or art.8 of the Vertical Agreements Block Exemption Order (see below para.45-198A).
- 520 *Byrne v Inntrepreneur Beer Supply Co Ltd* [1999] Eu. L.R. 834 (CA) at [154].
- 521 *Bookmakers' Afternoon Greyhound Services v Amalgamated Racing* [2008] EWHC 1978 (Ch) at [394]–[410]; *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119 at [39]–[51].
- 522 See e.g. *Richard Cound Ltd v BMW (GB) Ltd* [1997] Eu. L.R. 277 (CA), applied in, e.g. *Benford Ltd v Cameron Equipment* [1997] Eu. L.R. 334 (Merc. Ct); *Parks v Esso Petroleum* [1999] 1 C.M.L.R. 455; *Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)* [2017] CAT 15 at [276]–[281]. For the English law of severance see Vol.I, paras 18-252 et seq.
- 523 [2007] EWHC 599 (Comm), [2007] U.K.C.L.R. 1653.
- 524 Since 16 October 2015 known as the Office of Rail and Road: *Office of Rail Regulation (Change of Name) Regulations 2015* (2015/1682) reg.2(1).
- 525 [2008] CSOH 13.
- 526 [2010] EWHC 1743 (Ch).
- 527 *Jones v IOS (RUK) Ltd and Ricoh UK Ltd* [2012] EWHC 348 (Ch) at [44].

- 528 *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 2793 (Comm), [2013] 2 Lloyd's Rep. 629 at [16]–[33] (claim that credit and swap agreements based on LIBOR were void and enforceable because Deutsche Bank had participated in a cartel to fix LIBOR had no realistic prospect of success, as the two categories of agreement were separate and distinct).
- 529 *A. Nelson & Co Ltd and Bach Flower Remedies Ltd v Guna SpA* [2011] EWHC 1202 (Comm), [2011] E.C.C. 23.
- 530 See *Philips Electronics v Ingman Ltd* [1998] 2 C.M.L.R. 839, [1998] Eu.L.R. 666 (Ch D), and the cases cited therein; *Chiron Corp v Murex Diagnostics (No.2)* [1994] 1 C.M.L.R. 410, [1994] F.S.R. 187; *Sportswear SpA v Stonestyle Ltd* [2006] EWCA Civ 380, [2006] U.K.C.L.R. 893.
- 531 *Sandvik AB v K.R. Pfiffner UK Ltd (No.2)* [1999] Eu. L.R. 755, [2000] F.S.R. 17 (Pat. Ct.); *Chiron Corp v Murex Diagnostics (No.2)* [1994] 1 C.M.L.R. 410 (CA), [1994] F.S.R. 187. If such a nexus cannot be established the defence based on competition law will be struck out.
- 532 *British Leyland Motor Corp v T.I. Silencers Ltd* [1981] 2 C.M.L.R. 75, [1981] F.S.R. 213; *Intel Corp v VIA Technologies Inc* [2002] EWCA Civ 1905, [2003] U.K.C.L.R. 106.
- 533 *Intel Corp v VIA Technologies Inc* [2002] EWCA Civ 1905, [2003] U.K.C.L.R. 106. This may be a particular issue in respect of “standard essential patents”, i.e. patents that are essential to an industry standard established by a standard-setting body, in which case a refusal to license on “fair, reasonable and non-discriminatory terms” will infringe art.102: *Huawei Technologies Co Ltd v ZTE Corp* (C-170/13) EU:C:2015:477. In the English courts, see e.g. *Unwired Planet International Ltd v Huawei Technologies (UK) Ltd* [2020] UKSC 37, [2021] 1 All E.R. 1141 at [149]–[158].
- 534 (C-453/99) [2001] E.C.R. I-6297, EU:C:2001:465.
- 535 *Kone AG v ÖBB Infrastruktur AG* (C-557/12) EU:C:2014:1317 at [20]–[22].
- 536 *Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04 etc.)* [2006] E.C.R. I-6619, EU:C:2006:461.
- 537 (C-557/12) EU:C:2014:1317.
- 538 *Otis GmbH v Land Oberösterreich* (C-435/18) EU:C:2019:1069 (public body which granted loans on favourable terms to purchasers of assets subject to the anti-competitive agreement may seek damages, on the basis that, absent the cartel, it would have provided a lower subsidised loan, and could have used the difference more profitably for other purposes).
- 539 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] O.J. L349/1.
- 540 SI 2017/385; the Regulations took effect on 9 March 2017. On the private enforcement of EU (and UK) competition law in national courts, see generally Whish and Bailey, Competition Law, 10th edn (2021), Ch.8; Brealey and George (eds), Competition Litigation, UK Practice and Procedure, 2nd edn (2019); Ashton, Competition Damages Actions in the EU, 2nd edn (2018).
- 541 Competition Act 1998 Sch.8A, paras 8–11.
- 542 Competition Act 1998 Sch.8A para.13.
- 543 Competition Act 1998 Sch.8A para.36.

- 544 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.64 and Sch.4 para.14. See above, para.45-005.
- 545 See Vol.I, paras 1-020—1-028.
- 546 See the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.30.
- 547 On actions for damages for losses caused by a breach of competition law, see below paras 45-223—45-226.
- 548 *[1984] A.C. 130 (HL)* at 141, per Lord Diplock.
- 549 *Crehan v Inntrepreneur Pub Co* [2004] EWCA Civ 637, [2004] E.C.C. 28 at [156]–[167].
- 550 *W.H. Newson Ltd v IMI Plc* [2013] EWCA Civ 1377, [2014] 1 All E.R. 1132.
- 551 *Air Canada v Emerald Supplies Ltd* [2015] EWCA Civ 1024, [2016] Bus. L.R. 145; *Media-Saturn Holdings GmbH v Toshiba Information Systems (UK) Ltd* [2019] EWHC 1095 (Ch), [2019] 5 C.M.L.R. 7.
- 552 [2021] UKSC 24, [2021] 3 W.L.R. 370.
- 553 [1998] Eu.L.R. 588, [1999] E.C.C. 97.
- 554 (C-453/99) [2001] E.C.R. I-6297, EU:C:2001:465; when the case reverted to the English courts, the High Court held the agreement did not infringe art.101(1) in *Crehan v Inntrepreneur Pub Co* [2003] EWHC 1510 (Ch), [2004] E.C.C. 8, a finding that was upheld by the House of Lords [2006] UKHL 38, [2007] 1 A.C. 333.
- 555 Senior Courts Act 1981 s37(1); CPR 25.
- 556 Competition Act 1998 s.47D. At the time of writing, the Tribunal has not yet made an interim injunction, although in *UKRS Training Ltd v NSAR Ltd Unreported 21 July 2016 (CAT)*, the claimant (and applicant for injunctive relief) was required to give a cross-undertaking in damages after the defendant voluntarily gave an undertaking as to its conduct pending determination of a preliminary issue.
- 557 See the principles established in *American Cyanamid v Ethicon Ltd (No.1)* [1975] A.C. 396 (HL) and *National Commercial Bank Jamaica Ltd v Ollint Corp (Practice Note)* [2009] UKPC 16, [2009] 1 W.L.R. 1405. A cross-undertaking may not be required, or may be capped, in proceedings before the Competition Appeal Tribunal where the claimant is a small or medium-sized enterprise and the proceedings have been allocated to the fast-track procedure: CAT Rules 2015 r.68(5).
- 558 e.g. *Cutsforth v Mansfield Inns* [1986] 1 W.L.R. 558, [1986] 1 All E.R. 577 and *Holleran v Daniel Thwaites Plc* [1989] 2 C.M.L.R 917. An injunction will be refused where there is no such risk, such that damages will be an appropriate remedy at trial, or if an injunction would cause losses to other parties: e.g. *Arriva The Shires Ltd v London Luton Airport Operations Ltd Unreported 18 June 2013* (Roth J); *Arriva Scotland West Ltd v Glasgow Airport Ltd* [2011] CSOH 69.
- 559 [2006] EWHC 1318 (Ch), [2006] U.K.C.L.R. 823.
- 560 [2013] EWHC 3379 (Ch), [2014] U.K.C.L.R. 215.
- 561 *Unreported 9 May 2018* (Roth J).
- 562 [2020] EWHC 2276 (Ch).

- 563 e.g. *Claritas (UK) Ltd v Post Office* [2001] E.C.C. 12; *Chemistree Homecare Ltd v Abbvie Ltd* [2013] EWCA Civ 1338, [2014] U.K.C.L.R. 1; *Intecare Direct Ltd v Pfizer Ltd* [2010] EWHC 600 (Ch), [2010] U.K.C.L.R. 477.
- 564 [2018] EWHC 4019 (Ch).
- 565 Regulation 1/2003 art. 5.
- 566 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o. (now Netia SA)* (C-375/09) [2011] E.C.R. I-3035, EU:C:2011:270.
- 567 Regulation 1/2003 arts 11–13.
- 568 Regulation 1/2003 art. 16(2).
- 569 Regulation 1/2003, recital 15. Documents relating to the ECN are published on the Commission’s website, at https://ec.europa.eu/competition/ecn/index_en.html [Accessed 1 September 2021]. With the UK’s withdrawal from the EU on 31 January 2020, the CMA ceased to be a member of the ECN, but participated—by invitation—in cases involving the UK until the end of the transitional period provided for in art.126 of the Withdrawal Agreement 2020: art.128(5). The CMA may also be consulted by the Commission in any on-going investigations conducted by it after this date that involve anti-competitive conduct in the UK: see Commission Notice to Stakeholders.
- 570 [2004] O.J. C101/43.
- 571 e.g. Bailey and John (eds) Bellamy & Child, European Union Law of Competition, 8th edn (2018), Ch.15.
- 572 The **Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.64** and Sch.4 para.5.
- 573 CMA, Guidance on the functions of the CMA after the end of the Transition Period (CMA125, 1 December 2020), section 4.
- 574 The **Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.64** and Sch.4 para.6. See CMA125, para.4.8.
- 575 CMA125, para.4.9. Therefore, where an agreement or conduct may affect both trade within the UK and trade between Member States, it is possible that there could be concurrent investigations by the CMA and by the Commission (or another NCA): para.4.10.
- 576 See above, para.45-004. As at 1 May 2021, no such transfers had been made. The CMA’s powers to monitor and enforce transferred commitments and remedies are set out in the **Competition Act 1998 ss.40ZA–40ZD**. It has provided guidance on how it would apply these powers: CMA125, paras 4.13–4.17.
- ⑤77 CMA press release, CMA helps NHS secure price and supply commitment for cancer drugs (27 April 2022).

(j) - Enforcement at the EU Level

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 2. - Competition Rules under the Treaty on the Functioning of the European Union

(j) - Enforcement at the EU Level

Regulation 1/2003

- 45-133 The powers of the Commission to enforce arts 101 and 102 were originally laid down in Regulation 17/62; that Regulation was replaced by Regulation 1/2003 with effect from 1 May 2004.⁵⁷⁸ Reference should be made to specialist works for a detailed assessment of the Commission's powers to enforce arts 101 and 102.

⁵⁷⁹



Commission investigations

- 45-134 A Commission investigation into the existence of an anti-competitive agreement or conduct may be prompted by a leniency application made by a business, a complaint made by a competitor or customer, or may result from the Commission's own analysis of a particular market or an ex officio investigation, including after a "sector inquiry" carried out under art.17 of Regulation 1/2003. The Commission has wide powers to seek information and examine documents when carrying out investigations into suspected infringements of arts 101 and/or 102, including by sending requests for information, interviewing natural or legal persons, and conducting inspections of premises of undertakings and associations of undertakings, including the homes of directors, managers and other members of staff.⁵⁸⁰ The Commission has adopted an Implementing Regulation to

accompany the entry into force of Regulation 1/2003, which sets out the circumstances and manner in which it conducts proceedings in art.101 and 102 cases.⁵⁸¹ The Implementing Regulation lays down provisions on the initiation of proceedings, the handing of complaints, the notification of a Statement of Objections (setting out the Commission's provisional findings of fact, legal analysis and its view on appropriate remedies), and the parties' written and oral rights of defence before a final decision is adopted. The Commission may resolve cartel investigations through a "settlement" procedure, in which an undertaking admits that it has infringed art.101(1) and receives a discount on the fine to be imposed on it.⁵⁸² The Commission continues to be competent to investigate any suspected infringement of arts 101 and/or 102 relating to competition in the UK where its investigation was initiated before 31 December 2020.⁵⁸³

Commission decisions

- 45-135 Regulation 1/2003 provides that the Commission may adopt decisions finding and requiring termination of an infringement⁵⁸⁴; accepting commitments which bind the parties and conclude the Commission's proceedings without a finding of infringement⁵⁸⁵; or, where the EU public interest requires, making a finding that art.101 and/or art.102 does not apply to an agreement.⁵⁸⁶ The Commission may order termination of an infringement of arts 101(1) and/or 102 and may impose remedies necessary to bring the infringement to an end⁵⁸⁷; this may include termination of existing agreements,⁵⁸⁸ requiring that future licences be on reasonable terms⁵⁸⁹ and that interoperability information be disclosed⁵⁹⁰; the Commission cannot, however, require an undertaking to enter into new contracts if there are other means by which the infringement can be effectively terminated.⁵⁹¹ Where the Commission accepts commitments, these may oblige the party giving the commitments to amend or not enforce provisions of existing agreements with third parties and should be accepted by the Commission only where the effect on third parties is proportionate and it has taken into account the rights of contractual counterparties.⁵⁹²
- 45-136 A decision of the Commission, including one to accept commitments, is binding on the undertakings to which it is addressed⁵⁹³ but is subject to appeal to the General Court⁵⁹⁴ and, on a point of law, to further appeal to the Court of Justice.⁵⁹⁵ Any decision addressed to the UK or to natural and legal persons residing or established in the UK adopted by the Commission before 31 December 2020⁵⁹⁶ or, if adopted after this date, concerning an investigation that was initiated before this date, is binding on and in the UK.⁵⁹⁷ Such decisions will be enforced by the Commission⁵⁹⁸ and shall be reviewed exclusively by the EU courts.⁵⁹⁹

Interim measures

- 45-137 Article 8 of Regulation 1/2003 gives the Commission the power to order interim measures, either on its own initiative or on the application of the complainant in a case, if, in a case of urgency, there is a *prima facie* finding of infringement and this is necessary to avoid a risk of serious and irreparable damage to competition. Damage is “irreparable” if it cannot be remedied by a decision taken by the Commission after making a finding of infringement.⁶⁰⁰ Financial loss to an undertaking is not irreparable unless its survival is threatened.⁶⁰¹ The Commission has adopted interim measures under art.8 of Regulation 1/2003 only once, given the strict conditions for it to do so; in *Broadcom*, it required a manufacturer of chipsets for television set-top boxes and modems to stop enforcing exclusivity and quasi-exclusivity obligations, rebates and other non-price advantages contained in agreements with six of its main customers.⁶⁰² A complainant in need of interim relief may find this easier to obtain on application to a national court.⁶⁰³

Fines and other remedies

- 45-138 The Commission has the power to impose fines, of up to 10 per cent of their annual global turnover in the business year preceding its decision, on undertakings and associations of undertakings that intentionally or negligently infringe arts 101(1) or 102.⁶⁰⁴ The Commission has issued guidance on the method it will adopt when calculating the level of a fine.⁶⁰⁵ The Commission may, under its leniency regime, either impose no fine or reduce the fine imposed on a company that voluntarily approaches it and “blows the whistle” on a cartel or concerted practice of which it is or was a member.⁶⁰⁶ The Commission may also impose periodic penalty payments in certain circumstances, such as where an undertaking has not complied with a decision requiring it to put an end to an infringement, an interim measures decision or a commitments decision.⁶⁰⁷

Footnotes

578 [2003] O.J. L1/1.

579 e.g. Bailey and John (eds) *Bellamy & Child, European Union Law of Competition*, 8th edn (2018), Ch.13; Whish and Bailey, *Competition Law*, 10th edn (2021), Ch.7; Khan, Kerse & Khan on *EU Antitrust Procedure*, 6th edn (2012); Rousseva (ed), *EU Antitrust Procedure* (2020).

580 Regulation 1/2003 arts 18–21.

- 581 Regulation 773/2004 [2004] O.J. L123/18.
- 582 Regulation 773/2004 art.10 and Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No.1/2003 in cartel cases [2008] O.J. C167/1, as amended by Commission Communication, Amendments to the Commission Notice on the conduct of settlement procedures [2015] O.J. C256/2.
- 583 Withdrawal Agreement 2020 art.92(1) and (2)(b).
- 584 Regulation 1/2003 art.7.
- 585 Regulation 1/2003 art.9.
- 586 Regulation 1/2003 art.10. The Commission has not adopted any decisions under art.10, although it has provided “comfort letters” on co-operation between undertakings to increase the production and supply of critical medicines and vaccines during the Covid-19 pandemic: Medicines for Europe (8 April 2020) and Matchmaking Event—Towards COVID-19 vaccines upscale production (25 March 2021), which are available on the Commission’s website, at: https://ec.europa.eu/competition-policy/antitrust/coronavirus_en [Accessed 1 September 2021].
- 587 Regulation 1/2003 art.7(1).
- 588 *Langnese-Iglo GmbH v Commission (T-7/93) [1995] E.C.R. II-1539, EU:T:1995:98.*
- 589 *Radio Telefis Eireann and Independent Television Publications Ltd v Commission (Magill) (C-241/91P) [1995] E.C.R. I-743, EU:C:1995:98.*
- 590 *Microsoft (Case 37.792) (24 March 2004), upheld on appeal, Microsoft Corp v Commission (T-201/04) [2007] E.C.R. II-3601, EU:T:2007:289.*
- 591 *Automec srl v Commission (No.2) (T-24/90) [1992] E.C.R. II-2250, EU:T:1992:97.*
- 592 *Groupe Canal+ SA v Commission (C-132/19P) EU:C:2020:1007.*
- 593 art.288 TFEU.
- 594 art.261 TFEU (in relation to any fine or penalty payment imposed by the Commission, in respect of which the General Court has unlimited jurisdiction) and art.263(2) TFEU (in relation to a Commission decision).
- 595 Statute of the Court of Justice of the European Union arts 56 and 58.
- 596 Withdrawal Agreement 2020 art.126.
- 597 Withdrawal Agreement 2020 art.95(1).
- 598 Withdrawal Agreement 2020 art.95(2). Monitoring and enforcement of commitments given to and remedies imposed by the Commission, including in decisions adopted after 31 December 2020 may be transferred to the CMA, under art.95(2): see above, para.[45-004](#).
- 599 Withdrawal Agreement 2020 art.95(3).
- 600 *La Cinq SA v Commission (T-44/90) [1992] E.C.R. II-1, EU:T:1992:5.*
- 601 *IMS Health Inc v Commission (T-184/01R) [2001] E.C.R. II-2349, EU:T:2001:200* at [147], upheld on appeal, *NDC Health Corp v Commission and IMS Health Inc (C-481/01P(R)) [2002] E.C.R. I-3401, EU:C:2003:223.*
- 602 *Broadcom (Art.8 Decision) (Case AT.40608) (16 October 2019).* The Commission investigation was subsequently closed after Broadcom offered commitments to remove all existing, and not enter into new, exclusivity or quasi-exclusivity arrangements and leveraging

provisions (whereby certain commercial advantages are dependent on a customer purchasing a minimum percentage of its requirements from Broadcom): *Broadcom (Art.9 Decision) (Case AT.40608) (7 October 2020)*. As a result, Broadcom's challenge to the Commission's interim measures decision, *Broadcom Inc v Commission (T-876/19)*, was withdrawn.

603 See above, paras 45-127—45-129.

604 Regulation 1/2003 art.23(2). On the Commission's powers to impose fines, see e.g. Bailey and John (eds), Bellamy & Child, European Union Law of Competition, 8th edn (2018), Ch.14.

605 Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No.1/2003 [2006] O.J. C210/2.

606 Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] O.J. C298/17.

607 Regulation 1/2003 art.24.

(a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(a) - Introduction

Reform of the law

- 45-139 The domestic competition law of the UK underwent fundamental reform with the passing of the [Competition Act 1998](#), which entered into force on 1 March 2000 and was substantially modelled upon arts 101 and 102 TFEU. It gave the Office of Fair Trading (the predecessor to the CMA)⁶⁰⁸ and, concurrently, sectoral regulators⁶⁰⁹ wide powers to investigate suspected anti-competitive agreements and conduct, to request information and conduct on-the-spot investigations, and to impose substantial fines on undertakings found to have infringed competition law. The [Enterprise Act 2002](#) made further changes to UK competition law, including the introduction of a new merger control regime, a new system of market investigation references,⁶¹⁰ the establishment of a criminal cartel offence⁶¹¹ and the possibility of the disqualification of directors of companies that infringe competition law.⁶¹² Changes were made to the [Competition Act 1998](#) in order to implement Regulation 1/2003⁶¹³ by the [Competition Act 1998 and Other Enactments \(Amendment\) Regulations 2004](#).⁶¹⁴ Further amendments were made by the [Enterprise and Regulatory Reform Act 2013](#), which created the CMA (as successor to the OFT and Competition Commission), strengthened the concurrent application of the [Competition Act 1998](#) by the sectoral regulators and amended the criminal cartel offence, and by the [Consumer Rights Act 2015](#), which increased the jurisdiction of the Competition Appeal Tribunal to include both “standalone” and “collective” claims for damages.⁶¹⁵
- 45-140 The withdrawal by the UK from the EU resulted in a number of changes to the domestic competition law of the UK with effect from 31 December 2020.

616

U However, no significant changes to either the substantive law or to the CMA's investigation procedures have yet occurred or are presently foreseen, other than that, from that date, the CMA may no longer conduct investigations into suspected infringements of arts 101 and 102 TFEU.

617

U On 20 April 2022, the UK Government published its response to a public consultation on its proposals for a new pro-competition regime that would strengthen the CMA's powers to investigate potential breaches of, and to enforce, UK competition law, including under the Competition Act 1998.

618

U

Footnotes

608 Unless the text otherwise requires, the expression "CMA" should be taken to include the sectoral regulators which have concurrent powers to apply the provisions of the Act.

609 **Competition Act 1998 s.54** and **Sch.10**. The sectoral regulators which have concurrent powers to apply the **Ch.I** and **II** prohibitions are presently the Civil Aviation Authority (CAA), the Financial Conduct Authority (FCA), the Gas and Electricity Markets Authority (OFGEM), the Northern Ireland Authority for Utility Regulation (NIAUR), the Office of Communications (OFCOM), the Office of Rail and Road (ORR), the Payment Systems Regulator (PSR) and the Water Services Regulatory Authority (OFWAT). The **Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536)** set out rules and procedures for co-operation between the CMA and the sectoral regulators in applying competition law in the regulated sectors. The CMA has published guidance on the concurrent application of competition law, **Regulated Industries: Guidance on concurrent application of competition law to regulated industries** (CMA10, March 2014). The CMA and the eight sectoral regulators together comprise the UK Competition Network (UKCN); the CMA has published a number of other documents relating to the concurrent application of the **Competition Act 1998**, which are available at <https://www.gov.uk/government/collections/uk-competition-network-ukcn-documents> [Accessed 1 September 2021].

610 See below, paras 45-228—45-231.

611 See below, para.45-227.

612 See below, para.45-222.

613 See above, paras 45-006, 45-008, 45-049 and 45-118.

614 **SI 2004/1261**.

615 See below, paras 45-223—45-226.

616

See below, paras [45-145](#), [45-148—45-151](#), [45-183](#), [45-187](#), [45-191](#), [45-200](#), [45-215](#) and [45-222](#). For a general overview of the effect of Brexit on competition law in the UK, see above, paras [45-002—45-009](#). For a general note on Brexit, see Vol.I, paras [1-016](#) et seq.

⑥17 See above, paras [45-004](#) and [45-009](#).

⑥18 Departments for Business, Energy & Industrial Strategy and for Digital, Culture, Media & Sport, Reforming Competition and Consumer Policy, Government Response to Consultation (CP 656, 20 April 2022).

(b) - Competition Act 1998: Overview

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(b) - Competition Act 1998: Overview

Structure of the Competition Act 1998

45-141 This section will analyse the provisions in Pt I of the Competition Act 1998, which contains two prohibitions, the Ch.I and II prohibitions, which are modelled upon arts 101 and 102 TFEU, respectively. The Act is a complex and technical piece of legislation. It is presently divided into the following parts:

- Pt I—Competition;
- Pt IV—Supplemental and transitional.

45-142 In addition, there are presently 11 Schedules to the Act (five others have been repealed in their entirety), containing much important detail, for example on exclusions from the Ch.I and II prohibitions, procedural matters, regulators and transitional provisions. The Act has been amended on several occasions, with additional parts, sections and schedules being inserted, certain parts, sections and schedules being amended and others being repealed. In particular, Pts II (“Inspections under Articles 20, 21 and 22 of Regulation 1/2003 into suspected infringements of Articles 101 and 102 TFEU”)⁶¹⁹ and Pt IIA (“Inspections under Article 22(1) of Regulation 1/2003”) have been repealed in their entirety⁶²⁰ and Pt III (“Monopolies”, which amended various provisions of the Fair Trading Act 1973) has been repealed in substantial part. The most recent amendments took effect on 31 December 2020 to give effect to the UK’s withdrawal from the EU and the expiry of the implementation period contained in the Withdrawal Agreement 2020.⁶²¹

Part I of the Competition Act 1998

- 45-143 Part I of the Competition Act 1998 is presently divided into five Chapters, as follows:
- Ch.I—Agreements (ss.1 to 16);
 - Ch.II—Abuse of dominant position (ss.17 to 24);
 - Ch.III—Investigation and enforcement (ss.25 to 44);
 - Ch.IV—Appeals before the Competition Appeal Tribunal and proceedings and settlements relating to infringements of competition law (ss.45 to 49E);
 - Ch.V—Miscellaneous (ss.50 to 76).
- 45-144 Section 52 requires the CMA to publish guidance as to how it will apply the Act in practice. The CMA and the sectoral regulators must, when conducting investigations, comply with procedural rules adopted pursuant to s.51 and Sch.9.⁶²² Numerous statutory instruments have been adopted under the Act. Following the establishment of the CMA in 2013 as the successor to the OFT and Competition Commission (whose competition law functions it assumed on 1 April 2014 pursuant to Pt 3 of the Enterprise and Regulatory Reform Act 2013), pursuant to s.52 of the Act, the CMA published a number of new guidelines and also adopted certain guidelines previously adopted by the OFT and Competition Commission, which remained in force. It has subsequently published a number of new guidelines and revised others. These guidelines are an important, albeit non-binding, source when applying the provisions of the Competition Act 1998.⁶²³ Where the CMA has not published or adopted guidance on a particular subject, it may instead, subject to ss.60 and 60A, apply and follow guidance given by the European Commission.

Sections 60 and 60A: the “governing principles” clause

- 45-145 A key provision in the Competition Act 1998, as it was originally enacted, was s.60. Section 60 applied to both courts and tribunals (including the Competition Appeal Tribunal)⁶²⁴ and to competition authorities (i.e. the CMA and the sectoral regulators),⁶²⁵ when determining a question arising in relation to the application of Pt I of the Act, i.e. the Ch.I and II prohibitions, including investigation and enforcement by the CMA, appeals and claims for loss or damage before the Tribunal.⁶²⁶ Section 60 was repealed on 31 December 2020 and replaced by a new s.60A.⁶²⁷ In Lexon, the Tribunal applied s.60 in a judgment handed down after this date in an appeal against a CMA decision adopted before this date that found an infringement of the Ch.I prohibition.⁶²⁸

Section 60

45-146 The purpose of s.60 was the maintenance of consistency in the application of the [Competition Act 1998](#) and corresponding questions of substantive or procedural EU law that could be applied in the domestic context,⁶²⁹ including consistency with the case law of the Court of Justice and the General Court.⁶³⁰ It applied only to questions arising specifically under the Act, and not to general questions of English law, such as the general principles of administrative law, that may be relevant to an assessment of the CMA's conduct as a public authority in applying the Act.⁶³¹ It did not apply where there was a relevant difference between the UK and EU provisions concerned,⁶³² for example where the Act itself contained a provision which differed from a corresponding EU rule⁶³³ or where EU jurisprudence was inappropriate in the context of domestic competition law as it affected the market within the UK.

45-147 In *BetterCare*, the Competition Commission Appeal Tribunal (the predecessor to the Competition Appeal Tribunal) stated that s.60 required it to approach an issue of competition law in the manner in which it thought the EU court would approach it, as regards the principles and reasoning likely to be followed by it.⁶³⁴ Courts, tribunals and competition authorities were required to ensure that there was no inconsistency between the principles applied and the decision reached and the principles laid down by the TFEU and the Court of Justice's and the General Court's decisions that would be applicable in determining corresponding questions in EU law,⁶³⁵ whether as to the interpretation of EU law or civil liability for an infringement of EU law.⁶³⁶ Significantly, they were also required to have regard to any relevant decision or statement of the Commission.⁶³⁷ However, a Commission decision finding an infringement of arts 101 or 102 TFEU was, as a matter of EU law, binding upon a national court and the Tribunal, for example in a follow-on damages action.⁶³⁸

Section 60A

45-148 Section 60A provides as follows:

Section 60a

“60A— Certain principles etc. to be considered or applied from IP completion day

(1) This section applies when one of the following persons determines a question arising under this Part in relation to competition within the United Kingdom—

(a) a court or tribunal;

(b) the CMA;

(c) a person acting on behalf of the CMA in connection with a matter arising under this Part.

(2) The person must act (so far as is compatible with the provisions of this Part) with a view to securing that there is no inconsistency between—

(a) the principles that it applies, and the decision that it reaches, in determining the question, and

(b) the principles laid down by the Treaty on the Functioning of the European Union and the European Court before IP completion day, and any relevant decision made by that Court before IP completion day, so far as applicable immediately before IP completion day in determining any corresponding question arising in EU law,

subject to subsections (4) to (7).

(3) The person must, in addition, have regard to any relevant decision or statement of the European Commission made before IP completion day and not withdrawn.”

45-149 The CMA has published guidance on how it intends to apply s.60A.⁶³⁹ A “decision of the European Court or the European Commission” includes a decision on the interpretation of a provision of EU law and on the civil liability of an undertaking for harm caused by its infringement of EU law.⁶⁴⁰ The intention behind s.60A is that, in applying the provisions of the Competition Act 1998 following the UK’s withdrawal from the EU, in particular the Ch.I and II prohibitions, national courts, the Competition Appeal Tribunal, the CMA and sectoral regulators with power to apply these prohibitions should apply them in a manner that is consistent with the treatment of corresponding provision of arts 101 and 102 before 31 December 2020 in accordance with the EU court’s jurisprudence and the Commission’s decisional practice and guidance as at that date. They are not required to follow EU court judgments, or to have regard to Commission decisions or guidance, made on or after that date. However, in practice, it is expected that, whilst not bound to do so, courts, tribunals and the CMA and other regulatory authorities will have regard to subsequent

judgments of the EU courts and Commission guidance, if relevant to any matter before them,⁶⁴¹ in the absence of domestic case law or guidance.

- 45-150 The duty in [s.60A\(2\)](#) is subject to a number of exceptions. First, it does not apply to any principle of EU law and any relevant decision of the EU courts made before 31 December 2020 if the principle or decision is excluded from UK law on or after that date, other than if a principle or decision is excluded only by virtue of an exclusion or revocation in the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#).⁶⁴² Secondly, principles of EU law are to be taken in account as they had effect in EU law immediately before that date, without regard to the effect of principles laid down and decisions made by the EU court on or after that date.⁶⁴³ Thirdly, and importantly, pursuant to [s.60A\(7\)](#), it does not apply where the court, tribunal or CMA or other regulatory authority considers it appropriate not to do so in the light of one or more of the following:
- (a) differences between the [Ch.I](#) and [II](#) prohibitions and arts 101 and 102 immediately before 31 December 2020;
 - (b) differences between markets in the UK and markets in the EU;
 - (c) developments in forms of economic activity since the time when the principle of EU law or the EU court or European Commission was laid down or made;
 - (d) generally accepted principles of competition analysis or the generally accepted application of such principles;
 - (e) a principle laid down, or decision made, by the EU Court on or after 31 December 2020; and
 - (f) the particular circumstances under consideration.

- 45-151 The CMA is also not required to apply its duty in [s.60A\(2\)](#) where it is bound by a principle of a court or tribunal in England and Wales, Scotland or Northern Ireland that requires it not to secure that there is no inconsistency with EU law principles and decisions that pre-dated IP completion day.⁶⁴⁴ There is, therefore, considerable scope for the UK courts, the Competition Appeal Tribunal and the CMA and sector regulators to disregard principles of EU law applicable to arts 101 and 102 when applying the [Ch.I](#) and [II](#) prohibitions. This could, over time, lead to considerable divergence between UK and EU competition law, although where principles of and jurisprudence on EU competition law itself develop over time, they may (as permitted by [s.60A\(7\)\(e\)](#)) decide to follow the later, post-IP completion day jurisprudence of the EU courts. In [Generics \(UK\) Ltd v Competition and Markets Authority](#),⁶⁴⁵ the Tribunal considered the application of [s.60A](#) in a number of contexts, holding that: it was bound by a judgment of the Court of Justice given (on 30 January 2020)⁶⁴⁶ following a preliminary reference made by it, as none of the considerations in [s.60A\(7\)](#) were applicable⁶⁴⁷; it was bound by several related judgments of the General Court given before 31 December 2020⁶⁴⁸; whilst it was not bound by subsequent judgments of the Court of Justice (upholding the General Court's reasoning and dismissing the appeals) given after

that date,⁶⁴⁹ there were no grounds under s.60A(7)(e) for it to depart from the judgments of the General Court⁶⁵⁰; and it was also obliged, under s.60A(3), to have regard to a Commission decision adopted before that date in a case raising similar issues.⁶⁵¹

Footnotes

- 619 Regulation 1/2003 arts 20 and 21 concerned inspections by the Commission of business premises and other premises (in particular, domestic premises), respectively, in which the CMA could assist the Commission; art.22 concerned inspections by the CMA, at the request of a competition authority of another Member State (art.22(1)) or the Commission (art.22(2)).
- 620 Repealed by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.24.
- 621 See above, paras 45-002—45-005.
- 622 The present rules are contained in the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2012 (SI 2014/458), as amended by SI 2019/93.
- 623 The CMA's guidance is available on its website, at: <https://www.gov.uk/government/collections/cma-ca98-and-cartels-guidance> [Accessed 1 September 2021]. The CMA has also published informal guides for business, which are available on its website, at: <https://www.gov.uk/government/collections/competing-fairly-in-business-advice-for-small-businesses> [Accessed 1 September 2021].
- 624 Competition Act 1998 s.60(5), which provided that “court” included any tribunal, which included the Competition Appeal Tribunal.
- 625 Competition Act 1998 s.60(4). As to the sectoral regulators, see above, para.45-139.
- 626 Competition Act 1998 s.60(1).
- 627 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) regs 22 and 23.
- 628 *Lexon (UK) Ltd v Competition and Markets Authority* [2021] CAT 5 at [61].
- 629 Thus, in *Pernod-Ricard SA v Office of Fair Trading* [2004] CAT 10, the Tribunal applied s.60 to the procedural rights of a complainant during an investigation under the Competition Act 1998, as complainants had such rights in analogous investigations conducted by the Commission. However, in *Dorothy Gibson v Pride Mobility Scooters Ltd* [2017] CAT 9, the Tribunal refused to apply s.60 when considering the UK regime for collective proceedings (under s.47B of the Act) as there was no equivalent action under EU law. Similarly, in *Quarmby Construction Co Ltd v Office of Fair Trading* [2011] CAT 11, the Tribunal declined to apply s.60 to the CMA's fining powers under s.36 of the Act, as these were different to those of the Commission under Regulation 1/2003, so that the limitation period for imposing fines in art.25 of the Regulation should not be “read in” to s.36. By contrast, in *F.P. McCann Ltd v Competition and Markets Authority* [2020] CAT 28, the Tribunal did apply s.60 in interpreting s.36(8) of the Act, which imposes a maximum penalty of 10 per cent of an undertaking's worldwide turnover for an infringement of the Ch.I or II prohibitions, as this

- was “plainly modelled” on the equivalent maximum penalty contained originally in art.15(2) of Regulation 17/62 and now to be found in art.23(2) of Regulation 1/2003.
- 630 e.g. *Balmoral Tanks Ltd v Competition and Markets Authority* [2017] CAT 23 at [35].
- 631 *R (Gallaher Group Ltd) v The Competition and Markets Authority* [2018] UKSC 25, [2019] A.C. 96 at [22], per Lord Carnwath.
- 632 e.g. in *VIP Communications Ltd (In Administration) v Office of Communications* [2007] CAT 3 at [51], the Tribunal refused to apply s.60 to the Tribunal’s jurisdiction under Sch.8 to itself determine questions arising under Pt I of the Act, and observed that “it may not always be possible or appropriate to achieve absolute uniformity, particularly if the relevant statutory provisions are different”.
- 633 e.g. the application of the principle of legal professional privilege, in which s.30 applies a wider concept of privilege than has been applied in EU competition law by the Court of Justice, in *AM&S Europe v Commission* (155/79) [1982] E.C.R. 1575, EU:C:1982:157 and *AKZO Nobel Chemicals Ltd v Commission* (C-550/07P) [2010] E.C.R. I-8302, EU:C:2010:512.
- 634 *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 7 at [32].
- 635 Competition Act 1998 s.60(2).
- 636 Competition Act 1998 s.60(6).
- 637 Competition Act 1998 s.60(3). In *Dŵr Cymru Cyfyngedig v Albion Water Ltd* [2008] EWCA Civ 536, [2009] 2 All E.R. 279, the Court of Appeal held that the Competition Appeal Tribunal had been correct to refer to the test for establishing an abusive margin squeeze contrary to art.102 set out in the Commission Notice on the application of the competition rules to access agreements in the telecommunications sector [1988] O.J. C265/2 when considering whether a margin squeeze prohibited by the Ch.II prohibition had been committed.
- 638 See below, para.45-224.
- 639 CMA, Guidance on the functions of the CMA after the end of the Transition Period (CMA125, 1 December 2020), paras 4.18–4.24.
- 640 Competition Act 1998 s.60A(9).
- 641 cf. European Union (Withdrawal) Act 2018 s.6(1) and (2), in relation to the interpretation of retained EU law.
- 642 Competition Act 1998 s.60A(4) and (5).
- 643 Competition Act 1998 s.60A(8).
- 644 Competition Act 1998 s.60A(6).
- 645 [2021] CAT 9.
- 646 *Generics (UK) Ltd v Competition and Markets Authority* (C-307/18) EU:C:2020:52.
- 647 [2021] CAT 9 at [4].
- 648 e.g. *H. Lundbeck A/S v Commission* (T-472/13) EU:T:2016:449 and *Sun Pharmaceutical Industries Ltd v Commission* (T-460/13) EU:T:2016:453.
- 649 e.g. *H. Lundbeck A/S v Commission* (C-591/16P) EU:C:2021:243 and *Sun Pharmaceutical Industries Ltd, formerly Ranbaxy Laboratories Ltd* (C-586/16P) EU:C:2021:241.
- 650 [2021] CAT 9 at [129].

651 [2021] CAT 9 at [77]. The Commission decision in question was *Perindopril (Servier) (Case AT.39612)* (30 September 2016).

(c) - The Ch.I Prohibition: Agreements, Decisions and Concerted Practices

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(c) - The Ch.I Prohibition: Agreements, Decisions and Concerted Practices

Format of the Ch.I prohibition ⁶⁵²

45-152 Part I of the Competition Act 1998 contains a prohibition, known as the “Chapter I prohibition”, of anti-competitive agreements that is modelled upon art.101(1) TFEU. Section 3 and Schs 1–3 provide for a number of exclusions from the Ch.I prohibition.⁶⁵³ Sections 6 and 8 to 10A deal with exemptions from the Ch.I prohibition.⁶⁵⁴ The Ch.I prohibition must also be read subject to s.50, which provides for the exclusion, by order, of vertical and land agreements, although these exclusions have now been revoked.⁶⁵⁵ The OFT has published guidance, which has been adopted by the CMA, on the circumstances in which an agreement will or may be regarded as anti-competitive⁶⁵⁶ and also on vertical agreements⁶⁵⁷ and land agreements.⁶⁵⁸

Section 2(1): the prohibition

45-153 Section 2(1) provides as follows:

Section 2

Subject to s.3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.”

- 45-154 **Section 2(1)** applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK,⁶⁵⁹ which includes a part only of the UK.⁶⁶⁰ **Section 2(5)** and **(6)** of the Act provide that, unless the context otherwise requires, any reference in the Act to an agreement includes a reference to a decision and/or concerted practice. **Section 3** excludes from the Ch.I prohibition certain categories of agreements.⁶⁶¹

Section 2(2): illustrative list of prohibited agreements

- 45-155 **Section 2(2)** sets out an illustrative list of agreements that are prohibited under s.2(1):

Section 2

“Subsection (1) applies in particular to agreements, decisions or practices which—

- (a)** directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b)** limit or control production, markets, technical development or investment;
- (c)** share markets or sources of supply;
- (d)** apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e)** make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Effect on trade within the United Kingdom

- 45-156 The obvious point about this expression is that only that *trade within the United Kingdom* should be affected, not trade between the UK and another country. The Competition Appeal Tribunal has held that there is no need for the “effect on trade” within the UK to be appreciable,⁶⁶² although doubt has been cast on the correctness of this in two subsequent High Court judgments.⁶⁶³ Insofar as, before 31 December 2020, an agreement affected both trade between Member States and trade within the UK, it was subject both to art.101(1) and to the Ch.I prohibition.⁶⁶⁴

“Undertakings” and “associations of undertakings”

- 45-157 These expressions are interpreted in the same manner as they are interpreted in EU law: reference should be made to paras 45-022—45-026, above. The OFT has published guidance on when a public body may constitute an undertaking for the purposes of the Ch.I prohibition.⁶⁶⁵
- 45-158 In *BetterCare Group Ltd v Director General of Fair Trading*⁶⁶⁶ the Competition Commission Appeal Tribunal held that, when procuring residential and nursing care services for elderly people, a Northern Irish Health and Social Services Board, a statutory authority, was carrying on an economic activity and acting as an undertaking and therefore fell within the ambit of the *Competition Act 1998*. However, in the light of s.60,⁶⁶⁷ it is likely that this case would have been decided differently if it had been heard after the judgment of the Court of Justice in *FENIN*, in which it was held that the purchasing of medical equipment by state-funded public hospitals, which provided healthcare free of charge, was not an economic activity.⁶⁶⁸ In *UKRS Training Ltd v NSAR Ltd*,⁶⁶⁹ the Tribunal considered that the accreditation by NSAR of providers of safety training to the rail industry by a not-for-profit company limited by guarantee, whose members were companies active in the industry, was an economic activity and not the exercise of public powers or carrying out the function of the State, such that NSAR constituted an undertaking. In *Achilles Information Ltd v Network Rail Infrastructure Ltd*,⁶⁷⁰ the Tribunal held that the regulation of access to railway network infrastructure (including to ensure safety) was an essential part of, and indissociable from, Network Rail’s economic activity of the operation of railway infrastructure, such that schemes regulating access to the infrastructure fell within the scope of the Ch.I prohibition. In *Strident Publishing Ltd v Creative Scotland*⁶⁷¹ the Tribunal held that Creative Scotland, the principal public sector arts-funding body in Scotland, was not an undertaking, as the making of grants to support creative activity for public benefit (including, in that case, for publishing books) was the function of a public authority carried out under a statutory power, which Creative Scotland undertook with no financial gain or return obtained or expected, such that it was

not an activity that would be done by a private body on a commercial basis. The CMA has found that self-employed doctors providing private healthcare services were each an undertaking.⁶⁷²

- 45-159 In *Sel-Imperial Ltd v The British Standards Institute*,⁶⁷³ an “association of undertakings” was referred to as:

“... a representative or cooperative body or entity, usually with members, whose rules or decisions or recommendations are followed, whether as a matter of obligation or practice, by its members or those whom it represents.”

The OFT has published guidance on this matter.⁶⁷⁴

Agreements, decisions and concerted practices

- 45-160 These expressions are an exact replica of the provisions in art.101(1) TFEU: reference should be made to paras 45-027—45-031 above, as to their meaning in EU law, and to paras 45-146 and 45-147 (until IP completion day, 31 December 2020) and paras 45-148—45-151 (after that date) below, on the extent to which the competition authorities in the UK were or are obliged and/or able to follow the jurisprudence of the EU courts and the decisional practice of the European Commission in interpreting these expressions.

- 45-161 In its decision in *Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd* the OFT found that a single, overall agreement and/or concerted practice existed between Hasbro, a toy manufacturer, and two of its retailers, Argos and Littlewoods, to fix the resale prices of various toys; this decision was upheld on appeal to the Competition Appeal Tribunal⁶⁷⁵ and to the Court of Appeal.⁶⁷⁶ An important judgment of the Tribunal, exploring the application of the concept of a concerted practice to the practice of collusive tendering, is *Apex Asphalt and Paving Co Ltd v Office of Fair Trading*, which concluded that the OFT’s finding that there had been an infringement of the Ch.I prohibition was correct.⁶⁷⁷ In *Achilles Information Ltd v Network Rail Infrastructure Ltd* the Tribunal held that schemes by which Network Rail authorised third parties to access its railway network infrastructure were agreements or concerted practices, even though the terms of those schemes were imposed by Network Rail and were not freely negotiated by businesses participating in the schemes, as the third parties acquiesced in their provisions.⁶⁷⁸

Object or effect of preventing, restricting or distorting competition

- 45-162 The test to be applied in applying the Ch.I prohibition is to determine whether the “object or effect” of the agreement is to appreciably prevent, restrict or distort competition. The illustrative list in s.2(2) is obviously of assistance in determining the types of agreement that might be prohibited by the Ch.I prohibition. Considerable additional guidance is available in the jurisprudence of the EU courts on this: reference should be made to paras 45-032—45-042, above on this subject; and to the guidelines of the CMA referred to in para.45-144, above.
- 45-163 In *Institute of Independent Insurance Brokers v Director General of Fair Trading*⁶⁷⁹ the Competition Appeal Tribunal stated that the first step is normally to determine the object of the agreement; if it is not plain that the object is to restrict competition, it is necessary to then move on to consider the effects. In *Ping Europe Ltd v Competition and Markets Authority* the Court of Appeal held that an internet sales policy implemented by a manufacturer of golf clubs prohibiting authorised dealers from selling clubs on their websites caused a sufficient degree of harm to competition to be classified as an object restriction.⁶⁸⁰ In *The Racecourse Association v Office of Fair Trading*⁶⁸¹ the Tribunal annulled the OFT’s decision that the collective sale of media rights to a new entrant broadcaster by racecourses infringed the Ch.I prohibition, as collective selling was the only realistic way that both sellers and buyers of rights could negotiate a sale of rights and the OFT had failed to prove that the agreement had an appreciable effect on competition. In *Agents’ Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)*⁶⁸² the Court of Appeal upheld the Competition Appeal Tribunal’s judgment that obligations on estate agents that had jointly established a new online portal for property sales to list properties for sale only on that and one other site, to operate “bricks and mortar” offices and to promote only that portal did not, in their proper legal and economic context, have the object or effect of restricting competition; by contrast, they were pro-competitive by enabling the entry of a new portal into a market with two incumbent providers.
- 45-164 Even where an agreement has the object or effect of preventing, restricting or distorting competition, it will not infringe the Ch.I prohibition if it is objectively necessary for an agreement to be workable or to achieve its effect.⁶⁸³ The burden of demonstrating an objective justification falls on the party seeking to rely on the restriction. In *Achilles Information Ltd v Network Rail Infrastructure Ltd* the Tribunal held that Network Rail had failed to discharge this burden, as it could not demonstrate that requiring undertakings seeking access to its railway network infrastructure to use a single supplier of quality assurance services nominated by it was essential to ensure safety on the railway network, as there were ways in which safety could be assured with more than one provider of supplier assurance services.⁶⁸⁴

Establishing an effect on competition

- 45-165 Where an agreement does not have the object of restricting competition it is necessary to examine, within its legal and economic context, whether it might have the effect of doing so. In *Hendry v The World Professional Billiards and Snooker Association Ltd*⁶⁸⁵ the High Court held that rules of the WPBSA that restricted professional snooker players from taking part in tournaments other than those organised or sanctioned by it had the effect of restricting competition in the market for the organisation of snooker tournaments, by limiting the sources from which players could earn their livelihood. In *The Racecourse Association v Office of Fair Trading* the Competition Appeal Tribunal concluded that the OFT had failed to establish that the collective selling of the rights to broadcast horse-racing events had an anti-competitive effect⁶⁸⁶ and in *P&S Amusements Ltd v Valley House Leisure Ltd* the High Court considered that there was no possibility of establishing that a beer tie in a lease of a public house in Blackpool could do so.⁶⁸⁷ In *Achilles Information Ltd v Network Rail Infrastructure Ltd* the Tribunal found that although schemes regulating access to Network Rail's railway infrastructure, which required suppliers to use a single provider of quality assurance services nominated by Network Rail, did not have the object of restricting competition, they did have the effect of doing so, as their effect was to prevent market entry and reserve the market for such services to the exclusive provider nominated by Network Rail.⁶⁸⁸

Appreciable effect on competition

- 45-166 The Ch.I prohibition applies to an agreement only to the extent that any effect on competition in the UK is appreciable.⁶⁸⁹ An agreement that infringes the Ch.I prohibition by object will always constitute an appreciable restriction of competition.⁶⁹⁰ The CMA has regard to the Commission's Notice on Agreements of Minor Importance when considering whether there is an appreciable effect on competition for the purposes of applying the Ch.I prohibition.⁶⁹¹

Section 2(3): territorial scope

- 45-167 Section 2(3) provides as follows:

“Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.”

This gives effect to the judgment of the Court of Justice in the so-called *Wood Pulp* case,⁶⁹² that an agreement entered into outside the EU but implemented within it can be caught by art.101(1). The judgment stopped short of holding that any agreement that produces *an effect* within the EU could be subject to EU law: the Court specifically required *implementation* there. The UK has traditionally disfavoured the application of an effects doctrine in competition law matters, and has objected to assertions of an effects doctrine by the competition authorities in the United States. The insertion of s.2(3) in the Act was intended to bring UK law into line with the position under *Wood Pulp*, and was equally intended to demonstrate a refusal to go further and to adopt the effects doctrine.⁶⁹³

Section 2(4): voidness

- 45-168 Section 2(4), which mirrors art.101(2), provides as follows:

“Any agreement or decision which is prohibited by subsection (1) is void.”

This provision clearly has very serious consequences for agreements that infringe s.2(1) but do not benefit from a block exemption under s.6, a parallel exemption under s.10 (referred to, from 31 December 2020 as a “retained exemption”⁶⁹⁴) or satisfy the criteria for individual exemption set out in s.9. For many undertakings, the fact that their agreements may be unenforceable may be of much more significance than that they might be fined by the CMA. For example, should an exclusive purchasing obligation imposed by a supplier on a distributor be prohibited by s.2(1) and therefore be void and enforceable under s.2(4), this may fundamentally undermine the terms of the bargain agreed between the parties. Whilst it is no doubt true that judges will have a preference for enforcing agreements that have been voluntarily entered into and adhering to the maxim *pacta sunt servanda*, and that a dim view might be taken of an attempt to get out of a freely-negotiated contract on the basis of the “technicality” of infringing competition law,⁶⁹⁵ nevertheless where there clearly is an infringement, s.2(4) spells out quite clearly what the consequences will be.

- 45-169 The High Court said, in *A Nelson & Co Ltd v Guna SpA*, that an allegation that an agreement infringes art.101(1) is a serious one that needs, in litigation, to be pleaded in detail so that it may be defended but also so that it can be evaluated at an early stage by a court when deciding how far such an extensive and expensive claim should be allowed to go forward.⁶⁹⁶ As to the temporal quality of this voidness, in *Passmore v Morland Plc* the Court of Appeal held that an agreement that infringes art.101(1) (and thus is void under art.101(2)) may, through a change in circumstances, subsequently cease to do so, in which case the voidness would cease; conversely an agreement that originally did not infringe art.101(1) could subsequently do so and become void.⁶⁹⁷

Severance

- 45-170 Section 2(4) provides that “any agreement” which infringes s.2(1) is void. Courts in the UK have interpreted s.2(4) in the same way as the Court of Justice has interpreted art.101(2), through the “governing principles” clause in s.60,⁶⁹⁸ such that it may be possible—under the applicable national law of the contract⁶⁹⁹—to sever the offensive parts of the agreement, leaving the remainder enforceable. Following the UK’s exit from the EU, this will continue to be the case, through the application of the new s.60A on the “governing principles” to be applied from 31 December 2020. The question of whether, under the English law contractual doctrine of severance,⁷⁰⁰ infringing clauses of a contract can be severed from the remainder of it, such that the remainder is enforceable, has been considered in paras 45-119 and 45-120 above, in relation to art.101(2), to which reference should be made.

Void or illegal?

- 45-171 In *Gibbs Mew Plc v Gemmell*⁷⁰¹ the Court of Appeal concluded that an agreement that infringes art.101(1) is not only void and unenforceable, but also illegal.⁷⁰² This can have serious consequences: for example, under the English law principle of “ex turpi causa”,⁷⁰³ a party who has paid money to another under an illegal agreement cannot, under the principles of restitution, recover that money if it would be contrary to the public interest to enforce such a claim because it would be harmful to the integrity of the legal system to do so, which will depend on a number of factors and not simply that the agreement was for an illegal purpose,⁷⁰⁴ unless it can be shown that the parties were not “in pari delicto”.⁷⁰⁵ However, in *Crehan v Courage Ltd*⁷⁰⁶ the Court of Justice held that EU law precluded a national law which imposed an absolute bar on an action by one party to an agreement that infringes art.101(1) against another party to it: see above, para.45-123.
- 45-172 In *Sainsbury's Supermarkets Ltd v MasterCard Incorporated*⁷⁰⁷ the Competition Appeal Tribunal considered that although a separate subsidiary of the Sainsbury's group, a joint venture with a clearing bank that carried on a banking business, was a party to MasterCard's multilateral interchange fee arrangements (which infringed art.101(1) by effect), the claimant was not prevented from claiming damages from MasterCard for excessive fees paid by it as a supermarket retailer: there was no moral turpitude on the part of the banking subsidiary, which was a mere licensee of MasterCard's payments system and had thus infringed art.101(1) innocently,⁷⁰⁸ it was not part of the same undertaking as the claimant, its conduct was not attributable to the claimant and it did not bear “significant responsibility” for MasterCard's infringement, as it had “zero” ability to influence MasterCard's interchange fees.

Section 3 and Schs 1–4: exclusions

- 45-173 As initially enacted, [s.3\(1\)](#) provided that the Ch.I prohibition does not apply in any of the cases in which it is excluded by or as a result of the provisions of [Schs 1 to 4](#):
- (a) [Sch.1](#): mergers and concentrations;
 - (b) [Sch.2](#): competition scrutiny under other enactments;
 - (c) [Sch.3](#): planning obligations and other general exclusions;
 - (d) [Sch.4](#): professional rules.
- 45-174 Similarly, [s.19\(1\)](#) provides that the Ch.II prohibition does not apply to agreements within the scope of [Schs.1](#) and [3](#). Schedules [1 to 3](#) have since been amended, whilst [Sch.4](#) was repealed by [s.207 of the Enterprise Act 2002](#). Sections [3\(2\)–\(5\)](#) and [19\(2\)–\(4\)](#) make provision for the Secretary of State to amend [Schs 1](#) and [3](#) in certain circumstances, whether by adding additional exclusions or by amending or removing existing ones.⁷⁰⁹ Under [ss.3\(6\)](#) and [19\(4\)](#), paras [6](#) and [7](#) of [Sch.3](#) itself enable the Secretary of State to exclude agreements from the Ch.I or II prohibitions in certain circumstances.⁷¹⁰

Schedule 1: mergers and concentrations

- 45-175 Mergers and concentrations (the expression adopted in EU law) are, of course, of considerable interest to competition authorities, which will wish to have the opportunity to monitor transactions that might lead to a significant or substantial reduction of competition in the market place. Both the UK, in the form of the merger provisions in the [Enterprise Act 2002](#), and the EU, in the form of the EU Merger Regulation, possess specialised systems for the investigation of mergers.⁷¹¹ These provisions are beyond the scope of this chapter, and reference should be made to the specialist texts on them.
- ⁷¹²
- 45-176 Where undertakings merge, there will usually be a complex matrix of contractual documents, some of which give effect the merger itself (in the sense of one undertaking acquiring another undertaking or its assets, or two undertakings merging or forming a joint venture), and others of

which may not in themselves bring about the merger but may be necessary to give effect to the broader intentions of the parties. The intention of [Sch.1 to the Act](#), in general terms, is to provide that agreements that bring about a merger or concentration, and any “ancillary restrictions”, should be dealt with under the provisions of UK or EU merger control, and should not be subject to the [Ch.I](#) and [II](#) prohibitions. The provisions work slightly differently in relation to UK and EU merger control, and a few additional refinements should be noted. The CMA has published guidance on mergers and ancillary restrictions that explains the operation of [Sch.1 to the Act](#), including in relation to non-competition clauses, intellectual property and know-how licences, purchase and supply obligations and restrictions imposed in cases of joint ventures.⁷¹³

Schedule 1 Pt I: UK mergers

- 45-177 The [Ch.I](#) and [II](#) prohibitions do not apply to an agreement which, either on its own or when taken together with another agreement, will result in two or more enterprises ceasing to be distinct in the sense of [s.26 of the Enterprise Act 2002](#)⁷¹⁴; nor do these prohibitions apply to any provision “directly related and necessary to the implementation of the merger provisions”.⁷¹⁵ A power is given to the CMA to “clawback”—that is to say to withdraw the exclusion from the [Ch.I](#) prohibition—where it considers that an agreement, if not excluded, would infringe the [Ch.I](#) prohibition and that it is not a “protected” agreement.⁷¹⁶ A “protected” agreement is defined to include an agreement which is connected with a merger that: the CMA or the Secretary of State, as the case may be, has decided not to refer for a Phase I investigation; the CMA has decided, after a reference, constitutes a relevant merger situation or a special merger situation under the [Enterprise Act 2002](#); has caused two or more enterprises to cease to be distinct as a result of the acquisition of a controlling interest; or is a merger of two or more water enterprises under the [Water Industry Act 1991](#).⁷¹⁷

Schedule 1 Pt II: EU mergers

- 45-178 Part II ceased to apply with effect from 31 December 2020, as a result of the UK’s withdrawal from the EU,⁷¹⁸ other than in respect of a concentration for which the Commission had exclusive jurisdiction under art.92 of the Withdrawal Agreement 2020.⁷¹⁹ Prior to this date, mergers in relation to which the Commission had exclusive jurisdiction under the EU Merger Regulation were not subject to the [Ch.I](#) and [II](#) prohibitions.⁷²⁰ This reflected the Commission’s exclusive jurisdiction under art.21 of the EU Merger Regulation as a matter of EU law; there was no power of clawback in such a case, since this would have infringed the exclusive jurisdiction of the Commission. [Part II of Sch.1](#) did not mention ancillary restraints, but since a Commission clearance decision under the EU Merger Regulation is deemed to apply to obligations that

are directly related to and necessary for the implementation of a concentration,⁷²¹ national competition law cannot be applied to them.⁷²²

Schedule 2: competition scrutiny under other enactments

- 45-179 Several UK statutes made provision for certain matters to be subjected to “competition scrutiny” by an appropriate regulator and/or the Secretary of State prior to their approval. Following amendment, Sch.2 applies now only to agreements relating to Channel 3 (ITV) news provision and networking arrangements under the [Broadcasting Act 1990](#) or the [Communications Act 2003](#), as the case may be.⁷²³ Where agreements have been subjected to such scrutiny, they do not require separate assessment for compatibility with the Ch.I prohibition and are thus excluded from the Ch.I prohibition, but not from the Ch.II prohibition.

Schedule 3: “general exclusions”

- 45-180 Schedule 3 contains a number of “general exclusions”, in some cases from the Ch.I prohibition and in some from both the Ch.I and II prohibitions.

Schedule 3 para.1: planning obligations

- 45-181 This paragraph provides that the Ch.I prohibition does not apply to certain planning obligations as defined in [ss.106](#) or [299A of the Town and Country Planning Act 1990](#). There is no exclusion from the Ch.II prohibition.

Schedule 3 para.2: s.21(2) agreements

- 45-182 This provision was repealed with effect from 1 May 2007.⁷²⁴ It provided that the Ch.I prohibition did not apply to an agreement that had received directions under [s.21\(2\) of the Restrictive Trade Practices Act 1976](#) where those directions were still in force immediately before s.2 of the [Competition Act 1998](#) entered into force on 1 March 2000. These were agreements in relation to which the Secretary of State had absolved the OFT of its duty to take an agreement to the, now abolished, Restrictive Practices Court because the restrictions in the agreement were not of material significance. The exclusion ceased where a material variation was made to the agreement.⁷²⁵

The OFT had a power of “clawback”, that is to say to withdraw the exclusion, in specified circumstances.⁷²⁶ There was no exclusion from the Ch.II prohibition.

Schedule 3 para.3: EEA regulated markets

45-183 This paragraph was repealed on 31 December 2020, as a result of the UK’s withdrawal from the EU.⁷²⁷ Until that date, it provided that the Ch.I prohibition did not apply to an agreement for the constitution of an “EEA regulated market” to the extent to which the agreement related to any of the rules made, or guidance issued, by that market⁷²⁸; the exclusion extended further to other matters, such as a decision of an EEA regulated market.⁷²⁹ An EEA regulated market was a market which is listed by an EEA State other than the UK pursuant to art.16 of Council Directive 93/22 on investment services in the securities field and operated without any requirement that a person should have a physical presence in the EEA State from which any trading facilities were provided or any trading floor that the market may have had.⁷³⁰

Schedule 3 para.4: services of general economic interest

45-184 This paragraph provides that neither the Ch.I prohibition, nor the Ch.II prohibition, shall apply to an undertaking:

“... entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.”

45-185 This provision mirrors, albeit not in precisely the same language, art.106(2) TFEU.⁷³¹ It can be very important where, for example, an undertaking is required by a public authority to provide an economic service in the general public interest, such as the provision of a “universal service” (for example, the daily delivery of letters to all addresses at a uniform tariff) or a “public service” (for example, the operation of an air transport service to a remote region). An obligation to provide such services may be viable only on the basis of a pricing policy that might otherwise amount to an infringement of the competition rules or by granting the operator exclusive rights that exclude competitors. In such circumstances the exclusion in this paragraph may be available to the undertaking concerned, but only in relation to the particular tasks entrusted to it and only to the extent that the application of the competition rules would prevent it providing the service under economically acceptable conditions. The CMA has published guidance on this provision.⁷³²

45-186 In *Royal Mail Plc v Office of Communications*⁷³³ the Competition Appeal Tribunal rejected a claim that an abusive differential pricing scheme for the local delivery of bulk mail was both objectively justified and necessary to protect the universal postal service, which was a service of general economic interest: the scheme had been devised to prevent competition in the end-to-end delivery of bulk mail (a service outside the universal service obligation) and thus protect Royal Mail's overall revenues and profitability, not to protect the universal service and Royal Mail had not demonstrated that the pricing scheme was necessary and proportionate to protect the viability of the universal service.

Schedule 3 para.5: compliance with legal requirements

45-187 This paragraph provides that neither the Ch.I prohibition, nor the Ch.II prohibition, shall apply to an agreement or to conduct which is required in order to comply with a legal requirement under an enactment or that is imposed by the UK/EU Withdrawal Agreement 2020 or the EEA EFTA Separation Agreement.⁷³⁴ An example of the way this exclusion operates arose in *Vodafone*⁷³⁵ in which that mobile phone operator was required under the terms of its licence under the Telecommunications Act 1984 to print the prices to be charged by retailers on its "pre-pay mobile phone vouchers": this behaviour therefore could not infringe the Ch.I prohibition by virtue of this exclusion. In *VIP Communications Ltd (in administration) v Office of Communications*⁷³⁶ the Competition Appeal Tribunal upheld a decision by OFCOM that T-Mobile had not, by virtue of Sch.3 para.5, unlawfully refused to supply telecommunications services to VIP as its use of T-Mobile's services would have been unlawful.

Schedule 3 para.6: avoidance of conflict with international obligations

45-188 This paragraph provides that the Secretary of State may make an order that neither the Ch.I prohibition, nor the Ch.II prohibition, shall apply to an agreement, category of agreements or conduct where this is necessary to avoid a conflict between the Competition Act 1998 and an international obligation of the UK. International arrangements in relation to civil aviation may be treated as "obligations" for this purpose.⁷³⁷ At the time of writing, no such orders have been made under this paragraph.

Schedule 3 para.7: public policy

45-189

This paragraph provides that the Secretary of State may by order exclude the application of the Ch.I prohibition, and the Ch.II prohibition, to an agreement, category of agreements or conduct where there are “exceptional and compelling reasons of public policy” for doing so. This provision has been very rarely invoked. Orders have been made in relation to agreements or conduct concerning the defence equipment industry in relation to surface warships,

738

U complex weapons

739

U and nuclear submarines,

740

U which is not otherwise excluded or exempted from the Act. In 2012, the Secretary of State made regulations under s.71(3) and Sch.3 para.7 to exclude, on public policy grounds, from the Ch.I prohibition arrangements between undertakings in the petroleum industry concerning the supply of fuel in an emergency caused by a significant disruption in the normal supply of fuel.

741

U During the Covid-19 pandemic, the Secretary of State made several Orders between 2020 and 2022 to exclude, on public policy grounds, from the Ch.I prohibition, certain agreements concerning the supply of groceries,

742

U health services in England

743

U and Wales,

744

U ferry services to the Isle of Wight,

745

U and milk and other dairy products

746

U ; unless revoked earlier, these Orders were revoked on 29 July 2021.

747

U Although each such Order permitted certain collaboration between competitors, none permitted price-fixing or the sharing of information on prices or costs. To benefit from the exclusion an agreement was required to be notified to the Secretary of State, who maintained a public register of notified agreements.

748

U An Order, excluding both the Chs I and II prohibitions, permits the FA Premier League to extend its existing contracts for the sale of domestic broadcasting rights to specified broadcasters without a formal tender process for the 2022/2023 to 2024/2025 seasons, in order to ensure financial support to the football pyramid following the pandemic.

⁷⁴⁹

U A further Order excluded, for a short period, the application of the Chs I and II prohibitions to purchasing agreements between a manufacturer and distributors of carbon dioxide in order to prevent disruptions in supply.

⁷⁵⁰

U

Schedule 3 para.8: coal and steel

45-190 This paragraph provides that neither the [Ch.I](#) prohibition, nor the [Ch.II](#) prohibition, apply to matters within the exclusive jurisdiction of the European Commission under the European Coal and Steel Community Treaty: however, these exclusions ceased to have effect when that Treaty expired on 23 July 2002.⁷⁵¹

Schedule 3 paras 9 and 10: agricultural products

45-191 Paragraph 9 provides that the [Ch.I](#) prohibition does not apply to agreements relating to the production of and trade in agricultural products⁷⁵²: this reflects their exclusion from art.101(1) TFEU under the provisions of the EU Common Agricultural Policy.⁷⁵³ The CMA has a power of clawback.⁷⁵⁴ There is no exclusion from the [Ch.II](#) prohibition (just as there is no exclusion from art.102). Following the UK's withdrawal from the EU, amendments have been made to para.9 to reflect the new regulatory regime for agriculture in the UK and will apply to agreements concerning "agricultural products" between members of a "recognised producer organisation" or a "recognised association of producer organisations" under the [Agriculture Act 2020](#).⁷⁵⁵ These amendments will also insert a new para.10, which will exclude from the [Ch.I](#) prohibition agreements between members of a "recognised interbranch organisation", provided that such agreements are notified to the CMA and it has, or has been deemed to have, decided that it is appropriate for the exclusion to apply.⁷⁵⁶ As at 13 August 2021 these amendments have not come into force.

Schedule 4: professional rules

- 45-192 Schedule 4 provided that “professional rules” regulating certain professional services and the persons providing, or wishing to provide, those services, may be excluded from the Ch.I prohibition. However, s.207 of the Enterprise Act 2002 repealed Sch.4 with effect from 1 April 2003 and since that date professional rules have been subject to the Ch.I prohibition. By virtue of the “governing principles” in s.60 the Ch.I prohibition has been and, by virtue of s.60A (from 31 December 2020) will continue to be, interpreted in the same way as the Court of Justice has interpreted art.101(1) TFEU: professional rules which have a restrictive effect on competition may nevertheless fall outside art.101(1) insofar as they are objectively necessary for the proper practice of a profession.⁷⁵⁷ The OFT has published guidance on how the Ch.I prohibition applies to professional bodies.⁷⁵⁸ In *Socrates Training Ltd v Law Society of England and Wales*,⁷⁵⁹ the Competition Appeal Tribunal held that rules of The Law Society requiring conveyancing solicitors accredited by it to obtain mortgage fraud and anti-money laundering training exclusively from The Law Society infringed both the Ch.I and II prohibitions.

Section 50: vertical and land agreements

- 45-193 As mentioned at para.45-152, above, s.50 makes provision for the exclusion or exemption of vertical and land agreements from the Ch.I, but not the Ch.II, prohibition. Vertical agreements were excluded from the Ch.I prohibition until 1 May 2005, but that exclusion was then repealed.⁷⁶⁰ The OFT has published guidance, which has been adopted by the CMA, on how it applies the Ch.I prohibition to vertical agreements.⁷⁶¹
- 45-194 Certain land agreements, for example containing covenants and conditions for the sake of good estate management, were excluded from the Ch.I prohibition as a result of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004⁷⁶²; however, that exclusion has also been repealed and the Ch.I prohibition has consequently applied to all land agreements since 6 April 2011.⁷⁶³ The CMA has published guidance, which has been adopted by the CMA, on how the Ch.I prohibition applies to property agreements.⁷⁶⁴ In *SIA “Maxima Latvija”*,⁷⁶⁵ the Court of Justice held that restrictions contained in shopping centre lease agreements that prevented the landlord from leasing units to competitors of an anchor tenant did not have the object of restricting competition, but could have an appreciable negative effect on competition if they excluded competing retailers from the local retail market, which would be more likely if there were no or few alternative sites from which they could trade. In *Martin Retail Group Ltd v Crawley BC*⁷⁶⁶ the Central London County Court held that a restrictive covenant in a lease of retail premises

that implemented a “letting scheme” under which the landlord restricted the use of individual shops on a parade so as to ensure a range of shops was void and unenforceable under s.2(4) of the Competition Act 1998, as it did not satisfy the conditions for individual exemption under s.9.

Section 9: exemption criteria

- 45-195 The criteria for exemption from the Ch.I prohibition are set out in s.9(1). The wording is similar to, though not identical to, art.101(3).⁷⁶⁷ Unlike art.101(3), s.9(1) expressly applies to improvements in the production or distribution of goods *and* services. Section 9(1) provides as follows:

Section 9

“This section applies to any agreement which—

(a) contributes to—

- (i)** improving production or distribution, or
- (ii)** promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit; and

(b) does not—

- (i)** impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
- (ii)** afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.”

- 45-196 The burden of proving that the cumulative conditions set out in s.9(1) are satisfied falls on the undertaking or undertakings claiming the benefit of exemption.⁷⁶⁸ This includes evidence that consumers receive a fair share of any benefits arising from the agreement.⁷⁶⁹ In applying s.9(1) the CMA, national courts and the Competition Appeal Tribunal will have regard to the Commission’s Guidelines on the Application of art.101(3) TFEU.⁷⁷⁰ During the Covid-19 pandemic, the CMA published guidance on when cooperation between businesses in the manufacture and supply of essential goods and services would satisfy the conditions for exemption under s.9(1).⁷⁷¹ In *Achilles Information Ltd v Network Rail Infrastructure Ltd* a scheme requiring undertakings seeking access to Network Rail’s railway infrastructure to use exclusively a provider of supplier assurance

services specified by it did not satisfy the conditions for exemption under s.9(1), as any claimed safety benefits of the scheme were not linked to the sole-supplier requirement (but would be attained in any effective and efficient regime of supplier assurance) and any economic benefits to Network Rail (in the form of lower administrative costs) of having a sole supplier were limited, such that the agreement did not have benefits for the purposes of s.9(1)(a).⁷⁷²

Sections 4 and 5: individual exemption

45-197 Sections 4 and 5 provided for the OFT to grant individual exemption to agreements that were notified to it and which satisfied the criteria of s.9 of the Act. However, these provisions were repealed by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004,⁷⁷³ which brought the position in the UK into conformity with the principles of Regulation 1/2003.⁷⁷⁴ From this date, parties to an agreement must themselves determine whether their agreement satisfies the criteria for exemption under s.9 or the conditions of a block exemption (under ss.6–8)⁷⁷⁵ or a parallel (or retained) exemption (under s.10).⁷⁷⁶ The OFT has published guidance, since adopted by the CMA, on how it may offer informal advice or guidance in cases that are novel or involve unresolved questions, and on how parties and their advisers should “self-assess” their agreements for compliance with the Ch.I and II prohibitions.⁷⁷⁷

Sections 6–8: block exemption

45-198 Provision is made in ss.6–8 for the Secretary of State to make block exemptions. A block exemption for public transport ticketing schemes that allow bus operators to collaborate in providing multi-operator tickets that passengers can use on the services of more than one operator took effect on 1 March 2001.⁷⁷⁸

U As EU block exemptions are applicable in domestic law by virtue of the provisions of s.10 on “parallel exemptions” (or, from 31 December 2020, on “retained exemptions”),⁷⁷⁹

U it is unlikely that further block exemptions will be made under ss.6–8 until existing retained block exemptions expire.⁷⁸⁰



45-198A A new Vertical Agreements Block Exemption Order (“VABEO”)

781

U came into force on 1 June 2022 to replace the Retained Vertical Agreements Block Exemption Regulation, which expired on 31 May 2022.

782

U The CMA has published guidance on the application of the VABEO.

783

U The VABEO applies to vertical agreements, i.e. agreements and concerted practices between two or more undertakings each of which operates for the purposes of the agreement at a different level of the supply chain relating to the conditions under which the parties may purchase, sell or resell goods and services.

784

U The block exemption is available only if the market shares of the seller (on the market on which it sells the goods or services) and the buyer (on the market on which it buys the goods or services) do not exceed 30%.

785

U The block exemption does not apply to a vertical agreement that contains a “hardcore” restriction of competition.

786

U The block exemption is automatically cancelled if either the market share thresholds are exceeded or the agreement contains a hardcore restriction.

787

U The VABEO also specifies a number of “excluded” restrictions which cannot benefit from the block exemption.

788

U The CMA has powers to require a party to a vertical agreement to provide to it information relating to the agreement

789

U and may, by notice in writing, cancel the block exemption in respect of a particular agreement.

790

U A one year transitional agreement applies to pre-existing vertical agreements (as at 1 June 2022) that do not satisfy the conditions for exemption, but did satisfy the conditions for exemption under the Retained Vertical Agreements Block Exemption Regulation, within which it will be treated as meeting the requirements for exemption under the VABEO.

791

-  The VABEO will expire on 1 June 2028.

792



Section 10: parallel (or retained) exemption

45-199 As originally enacted, and until “IP completion day” (31 December 2020), [s.10](#) provided for “parallel exemption”. Before this date, an agreement automatically benefitted from a “parallel exemption” from the [Ch.I](#) prohibition if it was exempt from art.101(1) by virtue of an EU individual or block exemption, or would have been exempt under a block exemption if the agreement would have affected trade between Member States.⁷⁹³ The same benefits were also available for individual and block exemptions obtained under the EEA Agreement.⁷⁹⁴ A controversial aspect of [s.10](#) is that the CMA has power, in certain circumstances, to impose conditions or obligations subject to which a parallel (or retained) exemption is to take effect, to vary it in other ways, or even cancel it.⁷⁹⁵

45-200 Following the UK’s withdrawal from the EU, from 31 December 2020 a “parallel exemption” is referred to as a “retained exemption”⁷⁹⁶

 and an EU block exemption regulation is referred to as a “retained block exemption regulation”; an agreement will benefit from a retained exemption if it satisfies the conditions for exemption contained in a retained block exemption regulation.

797

 There are presently six retained block exemption regulations,

798

 which will continue to have effect in domestic law as retained exemptions until their expiry date, concerning: transport by rail, road and inland waterway

799

 ; liner shipping consortia

800

 ; vertical agreements in the motor vehicle sector

801

U; research and development agreements
802

U; specialisation agreements
803

U; and technology transfer agreements.
804

U The retained block exemption regulation for vertical agreements
805

U expired on 31 May 2022 and has been replaced by a new block exemption order made under s.6.
806

U The Secretary of State has a power to vary or revoke a retained block exemption regulation and the CMA may recommend the Secretary of State to do so.
807

U The [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) made a number of amendments to the retained block exemption regulations, from 31 December 2020, to reflect that they apply to the Ch.I prohibition (and not art 101(1) TFEU) and within the UK (and not the EU).
808

U Practitioners will therefore, in seeking to apply a retained block exemption, need ensure that they refer to the text of the retained block exemption regulation, and not that of the equivalent EU regulation.
809

Footnotes

652 s.2(8) of the Act specifically provides that the prohibition imposed by [s.2\(1\)](#) is to be called “the Chapter I prohibition”.

653 See below, paras [45-175—45-191](#).

654 See below, paras [45-195—45-200](#).

655 See below, paras [45-193—45-194](#).

656 OFT Agreements and concerted practices (OFT401, December 2004).

657 OFT, Vertical agreements (OFT419, December 2004).

658 OFT, Land Agreements, The application of competition law following the revocation of the Land Agreements Exclusion Order (OFT1280a, March 2011).

659 [Competition Act 1998 s.2\(3\)](#). The “United Kingdom” for this purpose means Great Britain (England, Wales, Scotland and the subsidiary islands, excluding the Isle of Man and the Channel Islands) and Northern Ireland: see OFT401 para.2.27. Jersey and Guernsey

have their own competition legislation (the Competition Law (Jersey) Law 2005 and the Competition (Guernsey) Ordinance 2012, respectively), which contain prohibitions on anti-competitive agreements and concerted practices, and the abuse of a dominant position that are similar to the Ch.I and II prohibitions, and authorities, the Jersey Competition Regulatory Authority and the Guernsey Competition & Regulatory Authority.

660 *Competition Act 1998 s.2(7)*.

661 See below, paras 45-173—45-194.

662 *Aberdeen Journals Ltd v Office of Fair Trading [2003] CAT 11* at [459]—[462].

663 *P&S Amusements Ltd v Valley House Leisure Ltd [2006] EWHC 1510 (Ch), [2006] U.K.C.L.R. 876; Pirtek (UK) Ltd v Joinplace Ltd [2010] EWHC 1641 (Ch), [2010] U.K.C.L.R. 1297*.

664 As a result of the United Kingdom's withdrawal from the EU, art.101(1) remained applicable to such agreements until 31 December 2020, but does not apply thereafter: see above, para.45-004—45-005.

665 OFT, Public bodies and competition law (OFT1389, December 2011).

666 *[2002] CAT 7, [2002] Comp. A.R. 299*.

667 See above, paras 45-146—45-147.

668 *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission (C-205/03P) [2006] E.C.R. I-6295, EU:C:2006:453*. See above, para.45-022.

669 *[2017] CAT 14*. See also *The Institute of Independent Insurance Brokers v Director General of Fair Trading [2001] CAT 4*, in which the General Insurance Standards Council, a self-regulatory body established by the insurance industry was held to be an undertaking.

670 *[2019] CAT 20* at [100]—[103]; appeal dismissed on this point in *Network Rail Infrastructure Ltd v Achilles Information Ltd [2020] EWCA Civ 323, [2020] 4 C.M.L.R. 21* at [54]—[60], rejecting Network Rail's submission that it was acting in a non-economic regulatory function.

671 *[2020] CAT 11* at [42]—[52].

672 CMA, Privately funded ophthalmology services (Case 50782-1) (1 July 2020).

673 *[2010] EWHC 854 (Ch)* at [36].

674 OFT, Trade associations, professions and self-regulating bodies (OFT408, December 2004).

675 *Argos Ltd v Office of Fair Trading [2004] CAT 24, [2005] Comp. A.R. 588*.

676 *Argos Ltd v Office of Fair Trading [2006] EWCA Civ 1318, [2006] U.K.C.L.R. 1135*; see, similarly, the so-called *Football Shirts* case, *JJB Sports Plc v Office of Fair Trading*, which is also the subject of the Court of Appeal judgment in *[2006] EWCA Civ 1318*.

677 *[2005] CAT 4, [2005] Comp. A.R. 507*; see similarly *Makers UK Ltd v Office of Fair Trading [2007] CAT 11, [2007] Comp A.R. 699*.

678 *Achilles Information Ltd v Network Rail Infrastructure Ltd [2019] CAT 20* at [99]; appeal dismissed on this point in *Network Rail Infrastructure Ltd v Achilles Information Ltd [2020] EWCA Civ 323, [2020] 4 C.M.L.R. 21* at [64]—[67], rejecting Network Rail's argument that the sole supplier requirement was imposed unilaterally by it and therefore did not constitute an agreement.

679 *[2001] CAT 4, [2001] Comp. A.R. 62*.

- 680 *Ping Europe Ltd v Competition and Markets Authority* [2020] EWCA Civ 13, [2020] 4 All E.R. 276, upholding the Competition Appeal Tribunal's judgment [2018] CAT 13.
- 681 [2005] CAT 29.
- 682 [2019] EWCA Civ 24, [2019] 4 C.M.L.R. 24, upholding the Competition Appeal Tribunal's judgment [2017] CAT 15.
- 683 *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20 at [155], citing *MasterCard Inc v Commission* (C-382/12P) EU:C:2014:2201 at [89]–[91].
- 684 *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20 at [226]–[255].
- 685 [2002] E.C.C. 9 (Ch).
- 686 [2005] CAT 29, [2005] Comp. A.R. 99.
- 687 [2006] EWHC 1510 (Ch), [2006] U.K.C.L.R. 867.
- 688 *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20 at [107]–[120] (finding no restriction of competition by object) and [141]–[154] (finding an appreciable restriction of competition by effect); appeal dismissed on this point in *Network Rail Infrastructure Ltd v Achilles Information Ltd* [2020] EWCA Civ 323, [2020] 4 C.M.L.R. 21 at [93]–[101].
- 689 See above, paras 45-040—45-045.
- 690 *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch) at [149]–[150].
- 691 See OFT401 para.2.18; on the Commission's De Minimis Notice, see above, para.45-041.
- 692 *A. Åhlström Oy v Commission (Wood Pulp I) (Cases 114/85, etc.)* [1988] E.C.R. 5193, EU:C:1988:447.
- 693 See Lord Simon of Highbury, HL Deb 13 November 1997, col.261; the General Court followed the *Wood Pulp* judgment in *Gencor v Commission (T-102/96)* [1999] E.C.R. II-753, EU:T:1999:65, while also considering whether the effects (in that case of a concentration that would have taken place in South Africa) would have been sufficiently immediate, substantial and foreseeable within the EU to justify jurisdiction in terms of public international law.
- 694 See below, paras 45-199—45-200.
- 695 See, e.g. *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] E.M.L.R. 229 as an example of a case in which the Court appears to have taken an unsympathetic approach to a plea based on art.101(2).
- 696 [2011] EWHC 1202 (Comm), [2011] E.C.C. 23 at [53].
- 697 [1993] 3 All E.R. 1005, [1999] 1 C.M.L.R. 1129 (CA) at [25]–[32] (decided under art.101(2)).
- 698 See above, paras 45-146—45-147.
- 699 On the applicable law, see Vol.I, Ch.33.
- 700 See Vol.I, paras 18-252 et seq.
- 701 [1998] Eu.L.R. 588 (CA).
- 702 On the doctrine of illegality, see Vol.I, Ch.18.
- 703 On the principle of "ex turpi causa", see Vol.I, paras 18-019—18-021 and 18-057—18-062.
- 704 *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 at [120]–[121] per Lord Toulson, giving the majority judgment.

- 705 See Mitchell, Mitchell and Watterson (eds), Goff and Jones: *The Law of Restitution*, 9th edn (2016), Chs 25 (considering when the illegality of an agreement will not prevent a claim for recovery) and 35 (considering the defence of illegality).
- 706 (*C-453/99 [2001] E.C.R. I-6297, EU:C:2001:465*.
- 707 [*2016] CAT 11* at [290]–[419]. This finding was not appealed by MasterCard: see [2018] EWCA Civ 1536, [2019] 1 All E.R. 903 at [42].
- 708 It is therefore conceivable that the position might be different where the infringement of competition law by the claimant is either a “by object” infringement and/or whether it was committed negligently, recklessly or intentionally.
- 709 This order-making power is subject to s.71 which requires an affirmative resolution of each House of Parliament.
- 710 See below, paras 45-188 (avoidance of conflict with international obligations) and 45-189 (public policy).
- 711 See above, para.45-002 on the impact of Brexit on the application of the EU Merger Regulation in the UK during the implementation period under the Withdrawal Agreement 2020 and paras 45-067—45-068 following the expiry of that period on 31 December 2020.
- 712 On the UK system of merger control, see Whish and Bailey, *Competition Law*, 10th edn (2021), Ch.22; Parr, Finbow and Hughes, *UK Merger Control: Law and Practice*, 3rd edn (2016). On the EU system of merger control, see Whish and Bailey, Ch.21; Bailey and John, Bellamy & Child, *European Union Law of Competition*, 8th edn (2018), Ch.8; Lindsay and Berridge, *The EU Merger Regulation: Substantive Issues*, 5th edn (2017).
- 713 CMA, Mergers: Guidance on the CMA’s jurisdiction and procedure (CMA2 revised, December 2020), Annex C.
- 714 *Competition Act 1998 Sch.1* paras 1(1) (concerning the Ch.I prohibition) and 2(1)(a) (concerning the Ch.II prohibition).
- 715 *Competition Act 1998 Sch.1* paras 1(2) (concerning the Ch.I prohibition) and 2(1)(b) (concerning the Ch.II prohibition). This mirrors the concept of “ancillary restraints” applied to such provisions under EU law: see above, paras 45-066—45-067.
- 716 *Competition Act 1998 Sch.1* para.4. There is no power for the CMA to withdraw the exclusion from the Ch.II prohibition.
- 717 *Competition Act 1998 Sch.1* para.5.
- 718 The *Competition (Amendment etc.) (EU Exit) Regulations 2019* (SI 2019/93) reg.28.
- 719 The *Competition (Amendment etc.) (EU Exit) Regulations 2019* (SI 2019/93) Sch.4 para.17A. On art.92 of the Withdrawal Agreement 2020, see above para.45-004.
- 720 *Competition Act 1998 Sch.1* para.6.
- 721 EU Merger Regulation arts 6(1)(b), 8(1) and 8(2). See Commission Notice on restrictions directly related and necessary to concentrations [2005] O.J. C56/24. See above, para.45-067.
- 722 EU Merger Regulation art.21(2) and (3).
- 723 *Competition Act 1998 Sch.2*, paras 4 (in respect of arrangements for Channel 3 news provision approved under the *Broadcasting Act 1990* s.194A) and 5 (in respect of networking arrangements approved under the *Communications Act 2003* s.291 or the *Broadcasting Act 1990* Sch.4).

- 724 The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004/1261) reg.4 and Sch.1.
- 725 Competition Act 1998 Sch.3 para.2(2).
- 726 Competition Act 1998 Sch.3 para.2(3)–(9).
- 727 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.29(2).
- 728 Competition Act 1998 Sch.3 para.3(1).
- 729 Competition Act 1998 Sch.3 para.3(2)–(4).
- 730 Competition Act 1998 Sch.3 para.3(5).
- 731 See Bailey and John (eds), Bellamy and Child, European Union Law of Competition, 8th edn (2018), paras 11.047–11.063.
- 732 CMA, Services of general economic interest exclusion (OFT421, December 2004).
- 733 [2019] CAT 27 at [667]–[719]; appeal on other grounds dismissed, *Royal Mail Plc v Office of Communications* [2021] EWCA Civ 669, [2021] Bus.L.R. 1045.
- 734 “Legal requirement” is defined in Competition Act 1998 Sch.3 para.5(3). Following the UK’s withdrawal from the EU, para.5(3) was amended to revoke para.5(3)(b) and (c), which excluded from the Ch.I and II prohibitions agreements made to comply with legal requirements imposed by or under EU law, the EEA Agreement or the law of another Member State: the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.29(3).
- 735 OFTEL Decision (5 April 2002).
- 736 [2009] CAT 28.
- 737 Competition Act 1998 Sch.3 para.6(1).
- ①738 The Competition Act 1998 (Public Policy Exclusion) Order 2006 (SI 2006/605), excluding from the Ch.I prohibition agreements relating to the maintenance and repair of surface warships of the Royal Navy.
- ①739 The Competition Act 1998 (Public Policy Exclusion) Order 2007 (SI 2007/1896), revoked on 30 December 2011.
- ①740 The Competition Act 1998 (Public Policy Exclusion) Order 2008 (SI 2008/1820), excluding from the Ch.I prohibition the joint purchasing of goods or services by undertakings collaborating in certain activities related to Britain’s nuclear submarine fleet.
- ①741 The Competition Act 1998 (Public Policy Exclusion) Order 2012 (SI 2012/710). The Ch.I prohibition does not apply to any “qualifying protocol” between the Secretary of State and designated persons that concerns the distribution of fuel in the event of a significant disruption of supply. The “Downstream Oil Protocol” (which has not been published) was activated on 26 September 2021 to enable the fuel industry to share information in order to optimise supply: Department for Business, Energy and Industrial Strategy press release, Statement following meeting between the Business Secretary and fuel industry (26 September 2021).
- ①742

The [Competition Act 1998 \(Groceries\) \(Coronavirus\) \(Public Policy Exclusion\) Order 2020 \(SI 2020/369\)](#). This Order was revoked on 8 October 2020 by the [Competition Act 1998 \(Coronavirus\) \(Public Policy Exclusions\) \(Amendment and Revocation\) Order 2020 \(SI 2020/933\)](#) art.4. A further exclusion order was subsequently made, the [Competition Act 1998 \(Groceries\) \(Public Policy Exclusion\) Order 2020 \(SI 2020/1568\)](#), which expired on 31 March 2021.

- ①743 The [Competition Act 1998 \(Health Services for Patients in England\) \(Coronavirus\) \(Public Policy Exclusion\) Order 2020 \(SI 2020/368\)](#), as amended by [SI 2020/933](#). A further Order was applicable between 7 December 2021 (with retrospective effect from 9 March 2022, when it entered into force) and 31 March 2022: The [Competition Act 1998 \(Health Services for Patients in England\) \(Coronavirus\) \(Public Policy Exclusion\) Order 2022 \(SI 2022/124\)](#).
- ①744 The [Competition Act 1998 \(Health Services for Patients in Wales\) \(Coronavirus\) \(Public Policy Exclusion\) Order 2020 \(SI 2020/435\)](#), as amended by [SI 2020/933](#).
- ①745 The [Competition Act 1998 \(Solent Maritime Crossings\) \(Coronavirus\) \(Public Policy Exclusion\) Order 2020 \(SI 2020/370\)](#), as amended by [SI 2020/933](#).
- ①746 The [Competition Act 1998 \(Dairy Produce\) \(Coronavirus\) \(Public Policy Exclusion\) Order 2020 \(SI 2020/481\)](#). The exclusion granted by this Order expired on 1 August 2020 and the Order was revoked on 8 October 2020 by [SI 2020/933](#) art.3.
- ①747 The [Competition Act 1998 \(Coronavirus\) \(Public Policy Exclusions\) \(Revocations\) Order 2021 \(SI 2021/773\)](#), revoking [SI 2020/368](#), [SI 2020/370](#), [SI 2020/435](#) and [SI 2020/1568](#).
- ①748 The public register is available at: <https://www.gov.uk/guidance/competition-law-exclusion-orders-relating-to-coronavirus-covid-19>.
- ①749 The [Competition Act 1998 \(Football Broadcasting Rights\) \(Public Policy Exclusion\) Order 2021 \(SI 2021/1148\)](#). The Order applies retrospectively to agreements entered into and conduct since 13 May 2021. On 12 October 2021, the Department for Digital, Culture, Media & Sport and the FA Premier League entered into a Memorandum of Understanding concerning this exclusion, under which the FA Premier League will make available funding of at least £1.6 billion to the football pyramid; available at: <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-department-for-digital-culture-media-sport-dcms-and-the-premier-league>.
- ①750 The [Competition Act 1998 \(Carbon Dioxide\) \(Public Policy Exclusion\) Order 2021 \(SI 2021/1169\)](#). The Order applied, retrospectively, from 30 September 2021 and expired on 31 January 2022. It permitted the parties to share information about costs, prices, expected purchase volumes, customers and contract length terms.
- 751 Competition Act 1998 Sch.3 para.8(2), (4).

- 752 Competition Act 1998 Sch.3 para.9(1).
- 753 See Bailey and John (eds), Bellamy & Child, European Union Law of Competition, 8th edn (2018), paras 12.171–12.182.
- 754 Competition Act 1998 Sch.3 para.9(3)–(8).
- 755 Agriculture Act 2020 Sch.2 para.2.
- 756 Agriculture Act 2020 Sch.2 para.3.
- 757 See above, para.45-036 and *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (C-309/99) [2002] E.C.R. I-1577, EU:C:2002:98*.
- 758 OFT, Trade associations, professions and self-regulating bodies (OFT 408, December 2004).
[2017] CAT 10.
- 760 See the Competition Act 1998 and Other Enactments (Amendment) Regulations Order 2004 (SI 2004/1261).
- 761 OFT, Vertical agreements (OFT419, December 2014).
- 762 SI 2004/1260.
- 763 See the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010 (SI 2010/1709).
- 764 OFT, Land Agreements (OFT1280a, March 2011).
- 765 SIA “Maxima Latvija” v Konkurrencies padome (C-345/14) EU:C:2015:784.
[2014] L. & T.R. 17.
- 767 See above, para.45-048.
- 768 Competition Act 1998 s.9(2).
- 769 Agents’ Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman) [2017] CAT 15 at [275].
- 770 See OFT401, para.5.5 and Competition Act 1998 s.60A(3).
- 771 CMA, CMA approach to business cooperation in response to COVID-19 (CMA118, 25 March 2020).
- 772 Achilles Information Ltd v Network Rail Infrastructure Ltd [2019] CAT 20 at [260]–[275]. The Tribunal also held, at [277]–[279], that the two conditions in s.9(1)(b)(i) and (ii) were not satisfied. An appeal on this point was dismissed in *Network Rail Infrastructure Ltd v Achilles Information Ltd [2020] EWCA Civ 323, [2020] 4 C.M.L.R. 21* at [119]–[124].
- 773 SI 2004/1261.
- 774 See above, para.45-006.
- 775 See below, para.45-198.
- 776 See below, paras 45-199—45-200.
- 777 OFT, Modernisation (OFT442, December 2004).
- 778 The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001/319), as amended by SI 2005/3347, SI 2011/227 and SI 2016/126; the Order will expire on 1 March 2026. See also CMA, Public transport ticketing schemes block exemption guidance (CMA53, September 2016). On 18 February 2022, the Department for Business, Energy and Industrial Strategy announced the results of a review of the block exemption, finding that it broadly achieves its purpose, its objectives remained

appropriate and consumers received a fair share of the benefits of integrated ticketing schemes: see BEIS, Public transport ticketing scheme block exemption, Post Implementation Review (10 February 2022), available at: https://www.legislation.gov.uk/uksi/2001/319/pdfs/uksiod_20010319_en.pdf.

①779 See below, paras 45–199—45–200.

①780 See below, para.45–200.

①781 The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022/516).

①782 See below, para.45–200.

①783 CMA Guidance, Vertical Agreements Block Exemption Order (CMA166, 12 July 2022).

①784 SI 2022/516 art.3(2). This includes certain non-reciprocal distribution agreements between actual or potential competitors: art.3(5). See CMA VABEO Guidance, paras 6.3–6.12 (in respect of the definition of a vertical agreement), 6.13–6.29 (in respect of non-reciprocal distribution agreements between competitors and “dual distribution” arrangements, under which a supplier distributes goods or services by using both third party distributors and its own direct sales channel) and 6.30–6.36 (concerning the distribution of goods through online platforms, operated by providers of “online intermediation services”).

①785 SI 2022/516 art.6(1). Market shares should be calculated by the value of market sales or purchases in the preceding calendar year, although where this data is not available, other data (such as market sales or purchase volumes) may be used: art.7(1). The block exemption will continue to apply if a party’s market share rises above 30 per cent (but below 35 per cent) for up to two calendar years, or for one calendar year if it rises above 35 per cent, but these periods may not be combined to exceed a period of two calendar years: art.7(2)–(4). See CMA VABEO Guidance, Pt 7.

①786 SI 2022/516 art.8. The VABEO specifies six “hardcore” restrictions: resale price maintenance (art.8(2)(a); see CMA VABEO Guidance, paras 8.10–8.25); geographical area and customer group restrictions that apply in situations where the supplier operates an exclusive distribution system (art.8(2)(b) and 8(3)), selective distribution system (art.8(2)(c) and 8(4)) or neither an exclusive nor a selective distribution system (art.8(2)(d) and 8(5)), including restrictions on online sales and advertising that prevent the effective use of the internet, and restrictions on “passive sales” to customers outside the allocated geographic area or customer group (art.8(6)) (see CMA VABEO Guidance, paras 8.26–8.77); restrictions on the sale of spare parts by an original equipment manufacturer to end users, independent repairers, wholesalers and service providers (art.8(2)(e); see CMA VABEO Guidance, para.8.78); and wide most favoured nation (MFN) clauses or parity obligations that ensure

that the prices or other terms and conditions of sale on an indirect sales channel (such as an online platform, an online intermediation service or an offline sales channel) are no worse than those offered by the seller on another sales channel ([art.8\(2\)\(f\)](#) and 8(7)); see CMA VABEO Guidance, paras 8.79–8.90). In exceptional circumstances, a hardcore restriction may either fall outside of the scope of the Ch.I prohibition or fulfil the conditions for exemption under [s.9\(1\)](#): see CMA VABEO Guidance, paras 8.4–8.9.

①787 [SI 2022/516 art.9](#).

①788 [SI 2022/516 art.10](#). The VABEO specifies three “excluded restrictions”: non-compete obligations that are indefinite or exceed five years, including an obligation on the buyer to purchase more than 80 per cent of its requirements from the supplier ([art.10\(2\)\(a\)](#); see CMA VABEO Guidance, paras 9.4–9.6); post-term non-compete obligations ([art.10\(2\)\(b\)](#); see CMA VABEO Guidance, para.9.7); and sales of competing goods in a selective distribution system ([art.10\(2\)\(c\)](#); see CMA VABEO Guidance, para.9.8). If an excluded restriction is not severable from the agreement, the block exemption is cancelled for the entire agreement, but where it is severable, the block exemption is cancelled only in respect of that restriction: [art.11](#).

①789 [SI 2022/516 art.12\(1\)](#); see CMA VABEO Guidance, Pt 11. If information is not provided without reasonable excuse for the failure to do so, the CMA may by written notice cancel the block exemption in respect of the vertical agreement or agreements to which its request relates: [art.12\(2\)](#).

①790 [SI 2022/516 arts 12 and 13](#). See CMA VABEO Guidance, Pt 13.

①791 [SI 2022/516 art.15](#). See CMA VABEO Guidance, para.12.2.

①792 [SI 2022/516 art.16](#). See CMA VABEO Guidance, para.12.1.

793 Competition Act 1998 s.10(1)–(3); subs.(1) and (2) were repealed on 31 December 2020, by the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\) reg.3\(4\)](#).

794 Competition Act 1998 s.10(11).

795 Competition Act 1998 s.10(5)–(8).

①796 Competition Act 1998 s.10(3), as amended by the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\) reg.3\(5\)](#).

①797 Competition Act 1998 s.10(A1), inserted by the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\) reg.3\(3\)](#).

①798 Competition Act 1998 s.10(12), inserted by the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\) reg.3\(9\)](#).

①799

Council Regulation (EC) 169/2009 applying rules of competition to transport by rail, road and inland waterway: [Competition Act 1998 s.10\(12\)\(a\)](#).

- ①800 Commission Regulation (EC) 906/2009 on the application of Article 81(3) EC to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia): [Competition Act 1998 s.10\(12\)\(b\)](#). This Regulation will expire on 25 April 2024. On 24 August 2022, the CMA announced that it was conducting an assessment of this Regulation in order to make a recommendation to the Secretary of State on whether to replace or vary it when it expires: see <https://www.gov.uk/cma-cases/liner-shipping-consortia-block-exemption-regulation>.
- ①801 Commission Regulation (EU) 461/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector: [Competition Act 1998 s.10\(12\)\(d\)](#). This Regulation will expire on 31 May 2023. See above, para.45-088. On 21 July 2022, the CMA published for consultation its proposed recommendations to the Secretary of State to replace the retained block exemption regulation with a new Motor Vehicle Block Exemption Order: see UK competition law: Motor Vehicle Block Exemption Regulation (Consultation Document) (CMA169con, 21 July 2022).
- ①802 Commission Regulation (EU) 1217/2010 on the application of Article 101(3) TFEU to certain categories of research and development agreements: [Competition Act 1998 s.10\(12\)\(e\)](#). This Regulation will expire on 31 December 2022. See above, para.45-063. On 28 June 2022, the CMA published its recommendation to the Secretary of State to replace the retained block exemption regulation with a new Research & Development Block Exemption Order: see UK competition law: The retained Horizontal Block Exemption Regulations – R&D and specialisation agreements (CMA's Recommendation) (CMA160con, 28 June 2022).
- ①803 Commission Regulation (EU) 1218/2010 on the application of Article 101(3) TFEU to certain categories of specialisation agreements: [Competition Act 1998 s.10\(12\)\(f\)](#). This Regulation will expire on 31 December 2022. See above, para.45-062. On 28 June 2022, the CMA published its recommendation to the Secretary of State to replace the retained block exemption regulation with a new Specialisation Block Exemption Order: see UK competition law: The retained Horizontal Block Exemption Regulations – R&D and specialisation agreements (CMA's Recommendation) (CMA160con, 28 June 2022).
- ①804 Commission Regulation (EU) 316/2014 on the application of Article 101(3) TFEU to categories of technology transfer agreements: [Competition Act 1998 s.10\(12\)\(f\)](#). This Regulation will expire on 30 April 2026. See above, para.45-099.
- ①805 Commission Regulation (EU) 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices: [Competition Act 1998 s.10\(12\)\(c\)](#). See above, paras 45-088—45-095.
- ①806

See above para.45-198A.

- ⑧07 Competition Act 1998 s.10A, as inserted by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.4.
- ⑧08 SI 2019/93 reg.63 and Sch.3 paras 3 (transport by rail, road and inland waterway), 4 (liner shipping consortia), 5 (vertical agreements), 6 (motor vehicle distribution), 7 (research and development agreements), 8 (specialisation agreements) and 9 (technology transfer agreements).

(d) - The Ch.II Prohibition: Abuse of a Dominant Position

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(d) - The Ch.II Prohibition: Abuse of a Dominant Position

Format of the Ch.II prohibition

- 45-201 The [Competition Act 1998](#) controls anti-competitive agreements entered into by dominant undertakings by means of a prohibition modelled upon art.102 TFEU. [Section 18](#) contains the prohibition of the abuse of a dominant position, which is known as the “[Chapter II](#) prohibition”. [Section 19](#) and [Schs 1 and 3](#) provide for some exclusions from the [Ch.II](#) prohibition, although these are less extensive than in the case of the [Ch.I](#) prohibition. An agreement that infringes the [Ch.I](#) prohibition may also infringe the [Ch.II](#) prohibition if entered into by a dominant undertaking. In *Achilles Information Ltd v Network Rail Infrastructure Ltd* a requirement by Network Rail that undertakings seeking access to its railway network infrastructure use only a provider of supplier assurance services nominated by it was found by the Competition Appeal Tribunal to infringe the [Ch.I](#) prohibition⁸⁰⁹ and (on the assumption that Network Rail was dominant) *prima facie* also infringed the [Ch.II](#) prohibition as it had a significant foreclosure effect on the supply of supplier assurance services in the Great Britain railway sector and the sole provider requirement was not objectively justified.⁸¹⁰

Section 18(1): the prohibition

- 45-202 [Section 18\(4\)](#) specifically provides that the prohibition imposed by [s.18\(1\)](#) is to be called “the [Chapter II](#) prohibition”. [Section 18\(1\)](#) provides as follows:

Section 18

“(1) Subject to s.19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.”

Section 18(2): illustrative list of abusive conduct

45-203 Section 18(2) sets out an illustrative list of conduct that could be prohibited under s.18(1):

Section 18

“(2) Conduct may, in particular, constitute such an abuse if it consists in—
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.”

Effect on trade within the United Kingdom and territorial scope

45-204 As in the case of s.2(1),⁸¹¹ the obvious point about s.18(1) is that there is no requirement that trade between Member States may be affected, only that *trade within the United Kingdom* should be affected⁸¹²; it is not necessary for the effect on trade within the UK to be appreciable.⁸¹³ Section 18(3) provides that:

“... ‘dominant position’ means a dominant position within the United Kingdom; and the ‘United Kingdom’ means the United Kingdom or any part of it.”

- 45-205 The relevant market within which an abuse is committed may therefore be very local, for example Aberdeen or the circulation area of a newspaper,⁸¹⁴ the operating network of a bus company in Cardiff,⁸¹⁵ or the Stevenage and Knebworth area of north Hertfordshire.⁸¹⁶ The Act does not have a provision in relation to s.18 that resembles s.2(3),⁸¹⁷ so that it is not clear what the territorial scope of the Ch.II prohibition is where the abuse is “committed” outside the UK, but has effects within it.

“Undertaking”

- 45-206 This expression is interpreted in the same manner as it is in EU law and in relation to the Ch.I prohibition: see above, paras 45-022 and 45-157 and 45-158.

Abuse of a dominant position

- 45-207 The meaning of “abuse of a dominant position” has been discussed in relation to art.102 at paras 45-100—45-113, above, to which reference should be made. In the UK, the OFT has published guidelines, subsequently adopted by the CMA, on market definition,⁸¹⁸ the assessment of market power⁸¹⁹ and the abuse of a dominant position⁸²⁰ which, in addition to the judgments of the Competition Appeal Tribunal and the EU courts, and s.60 of the Act (for conduct before 31 December 2020) and s.60A (for conduct after that date), are of assistance in interpreting the provisions of the Ch.II prohibition.⁸²¹
- 45-208 In *Chester City Council v Arriva Plc*⁸²² it was held that it was for the claimant to adduce evidence that the defendant had a dominant position, which it had not done, leading to its claim being dismissed. In *Speed Medical Examination Services Ltd v Secretary of State for Justice*⁸²³ the administrator of an online portal for the provision of medical reports in personal injury claims did not abuse a dominant position, as, even though it charged fees, it was a regulator, acting in the public interest, to implement a policy of the Secretary of State in accordance with the Civil Procedure Rules.
- 45-209 The Competition Appeal Tribunal has held that a refusal to supply crematorium services,⁸²⁴ charging an excessive price for the bulk carriage of water⁸²⁵ and offering very large discounts

to customers for specific products where a dominant firm faced competition⁸²⁶ were abusive. In *Royal Mail Plc v Office of Communications* the Tribunal dismissed an appeal against a decision by OFCOM that Royal Mail had abused a dominant position by announcing the introduction of differential prices charged to bulk mail operators for access to its final delivery service, even though the new prices were in fact never implemented, as the new pricing structure was intended to disadvantage the only bulk mail competitor that also intended to operate its own local delivery network in competition with Royal Mail.⁸²⁷ In *Arriva The Shires Ltd v London Luton Airport Operations Ltd*⁸²⁸ the High Court held that the Airport had infringed the Ch.II prohibition by, without objective justification, granting a coach operator the exclusive concession to operate an express coach service from the Airport to Central London in return for a share of the service's revenues, so as to distort competition between coach operators on that route. In *National Grid Plc v Gas and Electricity Markets Authority* both the Tribunal and the Court of Appeal dismissed appeals against OFGEM's finding that long-term contracts between National Grid and gas suppliers that rented meters from it were abusive, as they prevented the suppliers from replacing legacy meters with cheaper or more advanced meters from other suppliers.⁸²⁹ The Court of Appeal rejected an argument that the contracts were an aspect of normal competition intended to recover the sunk costs of installing the meters, given their anti-competitive foreclosure effects.⁸³⁰

- 45-209A Where alleged foreclosure effects are due to the conduct of a third party, and not the dominant supplier, the Ch.II prohibition will not be infringed. Thus, in *Churchill Gowns Ltd v Ede & Ravenscroft Ltd*, the Tribunal held that whilst a supplier of academic dress with a market share of between 70 per cent and 80 per cent held a dominant position in the supply of graduation services to universities, it did not abuse that position by entering into agreements with universities under which it was appointed as a university's "official" or "exclusive" supplier of academic dress to students for graduation ceremonies, as these appointments did not prevent students from hiring their academic dress from other suppliers and it was rational for universities to appoint, through a tender process, and to thereafter promote to its students, an "official" or "exclusive" provider in return for commission payments and other benefits; accordingly, the appointed supplier did not have any exclusivity in the supply of academic dress to graduands, its promotion to students by a university was not due its agreement with the supplier and the agreements did not foreclose rivals from supplying academic dress directly to students.

831



Voidness

45-210

The Act does not refer explicitly to the voidness of an agreement that infringes the Ch.II prohibition. In *English Welsh and Scottish Railway Ltd v E.ON UK Plc* certain provisions in a contract that infringed the Ch.II prohibition were held to be void and unenforceable.⁸³²

Section 19 and Schs 1 and 3: exclusions

- 45-211 As in the case of the Ch.I prohibition, there are a number of exclusions from the Ch.II prohibition for mergers and concentrations (s.19(1)(a) and Sch.1)⁸³³ and a number of general exclusions (s.19(1)(b) and Sch.3),⁸³⁴ which are similar, but not identical, to the corresponding exclusions applicable to the Ch.I prohibition.

Section 50: vertical and land agreements

- 45-212 The exclusions for vertical and land agreements were only from the Ch.I prohibition, and not from the Ch.II prohibition.⁸³⁵

Sections 20–24: notification

- 45-213 The provisions in the Competition Act 1998 on notification for guidance and a decision were repealed by the Competition Act and Other Enactments (Amendment) Regulations 2004.⁸³⁶ From 1 May 2004, undertakings that are or may be dominant in a relevant market must “self-assess” whether their conduct is compatible with the Ch.II prohibition, as under the Ch.I prohibition.⁸³⁷

Footnotes

809 See above, para.45-165.

810 *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20 at [292]–[314]; appeal dismissed on this point in *Network Rail Infrastructure Ltd v Achilles Information Ltd* [2020] EWCA Civ 323, [2020] 4 C.M.L.R. 21 at [127]–[151].

811 See above, para.45-156.

812 On the meaning of the United Kingdom, see above, para.45-154.

813 See above, para.45-156.

814 *Aberdeen Journals Ltd v The Office of Fair Trading* [2003] CAT 11.

- 815 *2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19.
- 816 *M.E. Burgess, J.J. Burgess and S.J. Burgess (trading as J.J. Burgess & Sons) v Office of Fair Trading* [2005] CAT 25.
- 817 See above, para.45-167.
- 818 OFT, Market definition (OFT403, December 2004).
- 819 OFT, Assessment of market power (OFT415, December 2004).
- 820 OFT, Abuse of a dominant position (OFT402, December 2004).
- 821 On the duty of UK courts, tribunals and competition authorities to have regard to the jurisprudence of the EU courts and the European Commission's decisions in applying the Ch.II prohibition, see below, paras 45-146—45-147 (until 31 December 2020) and 45-148—45-151 (after 31 December 2020).
- 822 [2007] EWHC 1373 (Ch), [2007] U.K.C.L.R. 1582.
- 823 [2015] EWHC 3585 (Admin), [2016] E.C.C. 13 at [61]–[68].
- 824 *M.E. Burgess, J.J. Burgess and S.J. Burgess (trading as J.J. Burgess & Sons) v Office of Fair Trading* [2005] CAT 25.
- 825 *Albion Water Ltd v Water Services Regulatory Authority* [2008] CAT 31, upheld on appeal *Dŵr Cymru Cyfngedig v Water Services Regulatory Authority* [2010] EWCA Civ 536.
- 826 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* Unreported 15 January 2002 (Competition Commission Appeal Tribunal).
- 827 [2019] CAT 27, appeal dismissed, *Royal Mail Plc v Office of Communications* [2021] EWCA Civ 669, [2021] Bus.L.R. 1045.
- 828 [2014] EWHC 64 (Ch), [2014] U.K.C.L.R. 313.
- 829 [2009] CAT 14, upheld on appeal [2010] EWCA Civ 114. OFGEM had imposed a fine of £41.6 million, which the Tribunal reduced to £30 million and the Court of Appeal to £15 million, as OFGEM had been involved in the regulatory process that led the making of the impugned agreements.
- 830 [2010] EWCA Civ 114, [2010] U.K.C.L.R. 386 at [36]–[43].
- 831 [2022] CAT 34.
- 832 [2007] EWHC 599 (Comm), [2007] U.K.C.L.R. 1653 at [30]. As these clauses could not be severed, as without them the contract would have been of a fundamentally different nature, the contract as whole was void and unenforceable: see above, para.45-120.
- 833 See above, paras 45-177—45-178.
- 834 See above, paras 45-180—45-191.
- 835 See above, paras 45-193—45-194.
- 836 SI 2004/1261.
- 837 See above, para.45-197.

(e) - Competition Act 1998: Investigation and Enforcement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(e) - Competition Act 1998: Investigation and Enforcement

Role of the CMA

- 45-214 The CMA has wide powers to obtain information and to adopt decisions to find and require the termination of infringements and to impose fines.
 838
-  The CMA has published guidance on how it will apply its powers to enforce the Ch.I and II prohibitions.⁸³⁹

Power to investigate

- 45-215 Until 31 December 2020 the CMA had the power to investigate suspected infringements of both the Ch.I and II prohibitions and arts 101 and 102 TFEU.⁸⁴⁰ As a result of the UK's withdrawal from the EU, from that date the CMA no longer has the power to investigate suspected infringements of arts 101 and 102 and was required to discontinue any investigation that it was conducting under these provisions immediately before this date.⁸⁴¹ The CMA's powers of investigation include the power to request information,⁸⁴² to enter business premises without a warrant⁸⁴³ or, in certain circumstances, business or domestic premises with a warrant,⁸⁴⁴ and to require a person connected with an undertaking whose activities are being investigated to answer questions.⁸⁴⁵ However, it is not able to require a person to produce or disclose a privileged communication⁸⁴⁶ and it may not ask for explanations that might elicit admissions of an infringement of the competition rules.

Decisions following an investigation

- 45-216 If, as a result of an investigation, the CMA proposes to make a decision that there has been an infringement of the Ch.I or II prohibitions it must give written notice to the person or persons affected and give an opportunity for representations to be made.⁸⁴⁷ When adopting a decision that there has been an infringement, the CMA may make directions requiring the infringing agreement to be terminated or amended, or conduct to cease or be modified⁸⁴⁸; directions have been issued by the CMA (or its predecessor, the OFT) in several cases,⁸⁴⁹
- U** as well as by OFGEM⁸⁵⁰ and the ORR.⁸⁵¹ If there is a default in complying with a direction, the CMA may apply to the court for an appropriate order.⁸⁵² Instead of adopting an infringement decision, the CMA may accept legally binding commitments as to an undertaking's future conduct that address its competition concerns.⁸⁵³

Interim measures

- 45-217 The CMA is given power to adopt interim measures where there is a case of urgency, pending a final decision, either to protect a particular person or category of persons from significant damage, or to protect the public interest,⁸⁵⁴ although these have been used rarely.⁸⁵⁵
- U** In *The London Metal Exchange v Office of Fair Trading (Costs)*,⁸⁵⁶ the Competition Appeal Tribunal observed that the CMA's power is similar to the court's power to adopt an urgent interim injunction, such that it should be circumspect about solely relying on uncorroborated evidence provided by a complainant that is not contained in a response to a notice given under s.26 of the Act. The CMA can also accept interim undertakings in lieu of adopting interim measures.⁸⁵⁷

Penalties

- 45-218 An important feature of the Competition Act 1998 is the power for the CMA to impose substantial penalties for an intentional or negligent infringement of the Ch.I and/or II prohibitions.⁸⁵⁸ There

is limited immunity from fines for “small agreements” in respect of the Ch.I prohibition⁸⁵⁹ and “conduct of minor significance” in respect of the Ch.II prohibition.⁸⁶⁰ Penalties may not exceed 10 per cent of an undertaking’s worldwide turnover.⁸⁶¹ Pursuant to s.38, the CMA has published guidance on its likely approach to the imposition of fines, which has been approved by the Secretary of State.⁸⁶² In *F.P. McCann Ltd v Competition and Markets Authority*⁸⁶³ the Tribunal reviewed in detail the step-by-step process by which a fine is determined by the CMA. The CMA (and its predecessor, the OFT) has granted, and will grant, leniency from the fines it would otherwise impose on companies who “blow the whistle” on a cartel in which it has participated, by informing the CMA of the unlawful conduct and provide it with all relevant information in their possession.⁸⁶⁴ The CMA will also grant a reduction to those undertakings that are prepared to admit that they have breached competition law and enter into a “settlement agreement”, thereby streamlining its investigation procedures.⁸⁶⁵

- 45-219 The Competition Appeal Tribunal has a full “merits” jurisdiction to assess the level of penalty that is appropriate in all the circumstances.⁸⁶⁶ Whilst a further appeal on penalty may be made to the Court of Appeal, it is unlikely to be successful unless the Tribunal has erred in principle or the penalty is clearly disproportionate or discriminatory.⁸⁶⁷ The Tribunal has stated that it may have regard to the CMA’s guidance on the level of a penalty and will take into account the severity and duration of any infringement as well as any mitigating factors,⁸⁶⁸ and may take a “broad brush”⁸⁶⁹ or “in the round”⁸⁷⁰ approach by considering the case as a whole. The Tribunal reduced the fines imposed in *Napp*⁸⁷¹ and *Aberdeen Journals*⁸⁷² to a limited extent. Much larger reductions have been made in some subsequent cases⁸⁷³ and in *Generics (UK) Ltd v Competition and Markets Authority*,⁸⁷⁴ which concerned “pay for delay” agreements in the pharmaceutical sector, the Tribunal, in addition to reducing the penalties on all appellants for infringing art.101(1) and the Ch.I prohibition, also annulled the imposition of a penalty on GlaxoSmithKline for infringing art.102 and the Ch.II prohibition, as there was uncertainty as to the definition of the relevant market on which it was found to be dominant and the abuse overlapped substantially with the infringement of art.101(1) and the Ch.I prohibition.

Crown application

- 45-220 Section 73 specifically provides that the Competition Act 1998 binds the Crown, although the Crown is not criminally liable, is not liable to a penalty, and nothing affects Her Majesty in her private capacity. In Independent Schools⁸⁷⁵ the Secretary of State for Defence was considered to be acting as an undertaking, as he was the person responsible for the governance of the fee-paying Royal Hospital School, but no penalty could be imposed on him, as a Minister of the Crown.

Offences under the Competition Act 1998

- 45-221 Not only does the [Competition Act 1998](#) provide for the imposition of penalties for infringing the competition rules; it also provides for a number of offences where there is a failure on the part of any person to comply with a requirement in relation to investigations. These offences are set out in [ss.42–44 of the Act](#). It is important to appreciate that these offences can entail serious consequences for individuals as well as legal persons and that the penalty, for example for destroying or falsifying documents, can include, on conviction on indictment, a term of up to two years' imprisonment and/or an unlimited fine.⁸⁷⁶

Company director disqualification

- 45-222 The [Company Directors Disqualification Act 1986](#) provides for the possibility of company directors being disqualified from office for a period of up to 15 years where they knew, or ought to have known, that their company has infringed UK or (before 31 December 2020) EU competition law.⁸⁷⁷ The CMA has published guidance on the situations in which it will apply to the court for a competition disqualification order or, instead, accept a competition disqualification undertaking from a director.⁸⁷⁸ In *Competition and Markets Authority v Martin*⁸⁷⁹ a former director of an estate agent was disqualified for seven years for being aware of his employees' participation in a price-fixing cartel and failing to take steps to prevent or end his company's involvement in the cartel. A disqualified director may receive permission from the court to continue acting as a director of a specific company where there is a need for him to continue acting as a director of that company and the public will remain protected against a repetition of the director's misconduct; such permission will be subject to significant conditions.⁸⁸⁰

Damages actions

- 45-223 Third parties can bring an action, for breach of statutory duty,⁸⁸¹ for an injunction and/or damages where they suffer harm as a result of an infringement of arts 101 and 102 TFEU⁸⁸² and/or the [Ch.I](#) or [II](#) prohibitions. A detailed description of claims for damages for losses caused by infringements of UK or EU competition is beyond the scope of this chapter and reference should be made to specialist works.

⁸⁸³

U As an alternative to litigation, businesses that have infringed competition law can submit a voluntary redress scheme to the CMA for approval.⁸⁸⁴

45-224 Claims may be brought either in the High Court for breach of statutory duty

885

U or the Competition Appeal Tribunal.

886

U Collective claims for damages may be brought in the Tribunal, whether on an “opt-in” or “opt-out” basis, which must authorise such claims by making a “collective proceedings order”.⁸⁸⁷

887

U Claims must be commenced within the applicable limitation period

888

U; these are complex and depend on whether proceedings are commenced in the High Court or the Tribunal, when the proceedings were brought and when the infringement occurred.⁸⁸⁹

889

U In the case of a deliberately concealed unlawful cartel, time begins to run when a reasonable person could have had a reasonable belief that there had been a cartel, which could be when there is a public statement by a competition authority, or press reports, that it had issued a statement of objections to undertakings being investigated by it, even if at this point it does not have all information required to succeed in its claim.⁸⁹⁰

890

U Claims may be based upon a prior finding of infringement by the Commission

891

U or CMA (which are known as “follow-on” claims) or allege that an infringement has occurred, which the claimant must prove (which are known as “standalone” claims); alternatively, a claim may be a “hybrid” claim, combining elements of both “follow-on” and “standalone” claims. In a “follow-on” claim, the decision of the Commission or the CMA is binding on the parties once they become final,⁸⁹²

892

U as are findings of fact made by the CMA.⁸⁹³

893

U Equally, judgments of the General Court and the Court of Justice are also binding and have the force of res judicata, provided that they have become definitive and the court’s findings are an essential part of its judgment and concern the same legal and factual context as being considered in the national proceedings.

894

U Both direct and indirect purchasers may bring claims. In 2014, the Antitrust Damages Directive was adopted to harmonise national rules on the recovery of damages for loss caused by infringements of competition law,

895

U which were implemented in the UK by the [Claims in respect of Loss or Damage arising from Competition Infringements \(Competition Act 1998 and Other Enactments \(Amendment\)\) Regulations 2017](#).

896

U Whilst national law must ensure that persons affected by a breach of EU competition law have an effective remedy that is equivalent to that available for a breach of domestic competition law, this does not require the creation of new legal remedies.

897

U

45-225 In all cases, the claim must be properly pleaded and particularised, including the facts necessary to found the claim,

U

898

U and the claimant must prove both that the infringement has caused it loss and damage and the quantum of that loss.

899

U A claimant is not entitled to a restitutive remedy, such as an account of profits, only to compensatory damages.

900

U

In *Courage Ltd v Crehan*

901

U the Court of Justice confirmed that one contracting party to an anti-competitive agreement may claim damages from the other, where that party bears significant responsibility for the infringement of competition law, for example due to possessing significantly greater bargaining power.

45-225A The defendant may seek to raise a defence that the claimant has suffered no loss, or less loss than it has claimed, due to having “passed-on” some or all of any overcharge to its suppliers

U

and/or customers. In *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and Mastercard Incorporated* the Supreme Court held that this reflects the compensatory principle and is to avoid double-recovery in respect of the same overcharge by both direct and indirect purchasers.

902

U Whilst the defendant has the burden of proving that the claimant has mitigated its loss through “pass-on”, the claimant must then show how it has dealt with the recovery of its costs,

903

U although it is not required to prove the precise amount of loss that has been mitigated by being passed-on.

904

U In *Merchant Interchange Fee Umbrella Proceedings*, the Tribunal set out guidance on the evidence that the parties must adduce in order to resolve questions of pass-on, in particular where there are claims by both direct and indirect purchasers in respect of the same overcharge.

905

U A defence based on “pass-on” or some other form of mitigation, such as the claimant “offsetting” a cartel overcharge by reducing the price of other inputs, must be both particularized and have an evidential underpinning; it may not be hypothetical or theoretical and will be struck out if it does not have a realistic prospect of success.

906

U In *Allianz Global Investors GmbH v Barclays Bank Plc*, the Court of Appeal struck out a defence that the claimant funds could not sue for losses caused by a cartel on the basis that they had “passed-on” or otherwise mitigated some or all of their losses to investors that had redeemed or withdrawn their investments at a lower net asset value than would otherwise have been the case; as the investors had no independent claims for diminution in the value of their investments as a result of the cartel, the funds could not have passed-on or avoided any loss to them.

907



45-226

U There have been numerous claims for damages brought in both the High Court and the Competition Appeal Tribunal, including several collective claims, with several reaching final judgment and an award of damages

908

U and other settling, either before judgment or after judgment on liability.

909

U In *BritNed v ABB* the Court of Appeal confirmed that the correct and only measure for damages for an infringement of UK or EU competition law is compensatory, to reflect the

claimant's losses caused by the infringement; there is no basis for either punitive damages or a restitutionary remedy; thus, in a claim for losses caused by a cartel, the claimant may recover the difference between the (cartelised) price paid and the price that would have been charged absent the cartel.

910

U In opt-out collective proceedings, the Tribunal, having determined the aggregate level of damages, may make an order as to how those are to be distributed, including by way of an account credit for some or all affected consumers.

911

U

Footnotes

838 See Whish and Bailey, Competition Law, 10th edn (2021), pp.409–446.

839 CMA, Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8v.3.0, 4 November 2020).

840 [Competition Act 1998 s.25](#).

841 See above, para.45-004.

842 [Competition Act 1998 s.26](#).

843 [Competition Act 1998 s.27](#).

844 [Competition Act 1998 s.28](#) (entry of business premises) and [s.28A](#) (entry of domestic premises).

845 [Competition Act 1998 s.26A](#). The persons to whom [s.26A](#) applies are individuals who are current or former directors, officers, managers, or employees of, or who were otherwise working for, the undertaking. The person is not entitled to refuse to answer questions, even if this may incriminate him or the undertaking. However, any statement made by him may not, other than in limited circumstances, be used in evidence against him in any criminal prosecution: [s.30A](#).

846 [Competition Act 1998 s.30](#).

847 [Competition Act 1998 s.31](#).

848 [Competition Act 1998 ss.32 and 33](#).

849 See, e.g. Directions given to Napp Pharmaceutical Holdings Ltd (4 May 2001) (directions relating to future pricing and termination of existing supply contracts), upheld on appeal, *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading [2002] CAT 1, [2002] Comp. A.R. 13* at [553]–[562]; Lladró Comercial (31 March 2003) paras 117–118 (directions to amend agreements to remove vertical price-fixing clauses); Mobility scooters supplied by Pride Mobility Products Ltd (27 March 2014) paras 4.1–4.3 (directions to inform retailers that Pride no longer prohibited them from advertising online at below the

recommended retail price); Online sales ban in the golf equipment sector (24 August 2017), paras 5.3–5.11 (directions to Ping Europe to modify and reissue its terms and conditions to remove a prohibition on online sales), suspended by consent pending appeal (CAT Order of 25 October 2017) and appeal dismissed, save as to reduction in penalty, in *Ping Europe Ltd v Competition and Markets Authority* [2018] CAT 13, further appeal dismissed [2020] EWCA Civ 13, [2020] 4 All E.R. 276. In Genzyme (27 March 2003) paras 390–396, the OFT gave directions to Genzyme to revise its pricing to eliminate abusive bundling and margin-squeeze; the Competition Appeal Tribunal granted interim relief in *Genzyme Ltd v Office of Fair Trading* [2003] CAT 8 and subsequently upheld Genzyme's appeal in relation to bundling, but not margin-squeeze [2004] CAT 4, leading to it issuing directions to Genzyme, pursuant to Sch.8 para.3(2), to refrain from repeating its margin squeeze infringement or measures having an equivalent effect [2005] CAT 32. In Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK (7 December 2016), paras 7.1–7.5, the CMA gave directions to each of Pfizer and Flynn Pharma to apply new prices for phenytoin sodium capsules that would not be excessive; an application for interim relief was refused in *Flynn Pharma Ltd v Competition and Markets Authority* [2017] CAT 1 and an appeal against the CMA's decision on abuse was upheld in *Flynn Pharma Ltd and Pfizer Inc v Competition and Markets Authority* [2018] CAT 11 and, following further appeals by Flynn (which was rejected) and the CMA (which was only partially upheld), *Competition and Markets Authority v Flynn Pharma Ltd and Pfizer Inc* [2020] EWCA Civ 339, [2020] 4 All E.R. 934, the matter was remitted to the CMA for further consideration. On 21 July 2022, the CMA issued a further decision finding that Pfizer and Flynn had infringed the Ch.II prohibition by charging unfair prices: see CMA press release, £70 million in fines for pharma firms that overcharged NHS (21 July 2022).

- 850 850 *National Grid* (21 February 2008) paras 6.1–6.4 (directions to put an end to the infringement and refrain from conduct having the same or equivalent effect to the behaviour found to be abusive), directions suspended by consent, *National Grid Plc v Gas and Electricity Markets Authority* Unreported 14 March 2008 (Competition Appeal Tribunal), appeal dismissed, save as to reduction in penalty [2009] CAT 14 and further appeal dismissed, save as to a further reduction in penalty [2010] EWCA Civ 114, [2010] U.K.C.L.R. 386.
- 851 851 English Welsh and Scottish Railway Ltd (19 December 2006) paras D2–D5 (directions to remove or modify specified contract terms that had the effect of excluding competitors from the relevant market). An appeal by a contractual counterparty challenging the directions was subsequently withdrawn: *E.ON UK Plc v Office of Rail Regulation* (CAT Order, 7 January 2008).
- 852 852 Competition Act 1998 s.34.
- 853 853 Competition Act 1998 ss.31A–31E and Sch.6A. The CMA has published guidance on the commitments procedure: CMA8v.3.0, paras 10.15–10.29. In accepting commitments, the CMA must take into account any objections raised by third parties as to their potential impact on their activities and on competition generally: *Skyscanner Ltd v Competition and Markets Authority* [2014] CAT 16.
- 854 854 Competition Act 1998 s.35. The CMA has published guidance on when it will make interim measures: see CMA8, section 8.

- 855 See Direction given to London Metal Exchange (27 February 2006; withdrawn on 15 May 2006); Atlantic Joint Business Agreement, Interim measures directions (17 September 2020, extended on 4 April 2022).
- 856 *[2006] CAT 19* at [136]–[142].
- 857 See CMA press release, CMA to investigate the supply of bipolar drug (6 October 2020).
- 858 **Competition Act 1998 s.36.**
- 859 **Competition Act 1998 ss.36(4)** and **39**. An agreement will be a “small agreement” if the combined turnover of all parties is below £20 million: The **Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000** (SI 2000/262) reg.3. The CMA may withdraw this immunity: **s.39(4)**.
- 860 **Competition Act 1998 ss.36(5)** and **40**. Conduct is of “minor significance” if the dominant undertaking’s turnover is below £50 million: **SI 2000/262 reg.4**. The CMA may withdraw this immunity: **s.40(4)**.
- 861 **Competition Act 1998 s.36(8)** and the **Competition Act 1998 (Determination of Turnover for Penalties) Order 2000** (SI 2000/309) as amended by **SI 2004/1259**.
- 862 CMA, CMA’s Guidance as to the appropriate amount of a penalty (CMA73, April 2018). In *F.P. McCann Ltd v Competition and Markets Authority [2020] CAT 28* at [77]–[105], the Tribunal rejected an argument that the CMA’s Guidance was ultra vires.
- 863 *[2020] CAT 28*.
- 864 CMA73 paras 3.1–3.24. See also OFT Applications for leniency and no-action in cartel cases (OFT1495, last updated September 2020). Leniency is only available for serious infringements of the **Ch.I** prohibition, i.e. price-fixing, bid-rigging (collusive tendering), market-sharing (through output restrictions, quotas, and market-sharing or market-dividing) and resale price maintenance.
- 865 CMA8v.3.0, section 14. It will be a condition of a settlement agreement that the settling undertaking will not appeal the CMA’s infringement decision to the Competition Appeal Tribunal; where an undertaking nevertheless does so, the Tribunal may withdraw the settlement discount, thereby increasing the fine imposed by the CMA: *Roland (UK) Ltd v Competition and Markets Authority [2021] CAT 8* at [136]–[144].
- 866 **Competition Act 1998 Sch.8 para.3(2)**. See e.g. *Kier Group Plc v Office of Fair Trading [2011] CAT 3* at [76]–[77], *G.F. Tomlinson Group Ltd v Office of Fair Trading [2011] CAT 7* at [72]; *Balmoral Tanks Ltd v Competition and Markets Authority [2017] CAT 23* at [134]–[135].
- 867 *Interclass Holdings Ltd v Office of Fair Trading [2012] EWCA Civ 1056, [2012] U.K.C.L.R. 304* at [59].
- 868 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading [2002] CAT 1* at [502]–[538].
- 869 *Argos Ltd and Littlewoods Ltd v Office of Fair Trading, JJB Sports Plc v Office of Fair Trading [2006] EWCA Civ 1318, [2006] U.K.C.L.R. 1135* at [163].
- 870 *Ping Europe Ltd v Competition and Markets Authority [2020] EWCA Civ 13, [2020] 4 All E.R. 276* at [126].
- 871 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading [2002] CAT 1*.

- 872 *Aberdeen Journals Ltd v Office of Fair Trading [2003] CAT 11.*
- 873 See e.g. the *Construction Bid-rigging* cases, which primarily concerned cover pricing and in which the total fines were reduced significantly from £129.2 million to £63.9 million in numerous appeals: *Kier Group Plc v Office of Fair Trading [2011] CAT 3*; *Durkan Holdings Ltd v Office of Fair Trading [2011] CAT 6*; *G.F. Tomlinson Building Ltd v Office of Fair Trading [2011] CAT 7*; *Barrett Estate Services Ltd v Office of Fair Trading [2011] CAT 9*; *Crest Nicholson Plc v Office of Fair Trading [2011] CAT 10*. In *Interclass Holdings Ltd v Office of Fair Trading [2012] EWCA Civ 1056*, [2012] U.K.C.L.R. 304, a fine was further reduced by the Court of Appeal. In the *Construction Recruitment Cartel* cases, the total fines of the appealing parties were reduced from £39.3 million to £7.9 million: *Eden Brown Ltd v Office of Fair Trading [2011] CAT 8.*
- 874 [2021] CAT 9.
- 875 Independent schools: exchange of information on future fees (20 November 2006).
- 876 Competition Act 1998 ss.42–44.
- 877 Company Directors Disqualification Act 1986 ss.9A–9E (inserted by Enterprise Act 2002 s.204). With effect from 31 December 2020, a company’s infringement of arts 101 and/or 102 TFEU ceased to be grounds for a director’s disqualification: the *Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) reg.60* and Sch.1 para.1. However, where an undertaking has infringed arts 101 or 102 before 31 December 2020, the CMA may continue to rely on this conduct in any application for a director disqualification order heard or made after that date: Sch.4 para.36. See also CMA125, paras 4.28–4.30.
- 878 CMA, Guidance on Competition Disqualification Orders (CMA102, February 2019).
- 879 [2020] EWHC 1751 (Ch), [2020] 2 B.C.L.C. 424.
- 880 Company Directors Disqualification Act 1986 s.17. See *Stamatis v Competition and Markets Authority [2019] EWHC 3318 (Ch)*; *Davies v Competition and Markets Authority Unreported 23 November 2020 (B&PC, Manchester)*; *Sherling v Competition and Markets Authority Unreported 22 July 2021 (Ch D)*. Such permission may, subject to conditions, be granted on an interim basis, pending the hearing of the director’s application for permission: *Sherling v Competition and Markets Authority Unreported 13 May 2021 (Ch D)* and *Sherling v Competition and Markets Authority Unreported 26 May 2021 (High Court of Northern Ireland)*.
- 881 See above, para.45–125.
- 882 In relation to infringements committed on or before 31 December 2020: see above, paras 45–004—45–005.
- ⑧883 e.g. Brealey and George (eds), *Competition Litigation, UK Practice and Procedure*, 2nd edn (2019); Bailey and John (eds) *Bellamy & Child, European Union Law of Competition* 8th edn (2018), Ch.16; Whish and Bailey, *Competition Law*, 10th edn (2021), Ch.8.
- 884 Competition Act 1998 s.49C and the *Competition Act 1998 (Redress Scheme) Regulations 2015 (SI 2015/1587)*. The CMA has published guidance on voluntary redress schemes: Guidance on the approval of voluntary redress schemes for infringements of competition law (CMA40, August 2015). Voluntary redress schemes may include redress for infringements of EU competition law committed before 31 December 2020 and subject to a Commission

decision: the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/93\)](#) Sch.4 para.14.

- ⑧85 [*Iiyama \(UK\) Ltd v Samsung Electronics Co Ltd \(The LCD Appeals and The CRT Appeal\) \[2018\] EWCA Civ 220, \[2018\] 4 C.M.L.R. 23*](#) at [46]. Claims will usually be commenced in the Chancery Division, but may also be brought in the Commercial Court of the Queen's Bench Division. The Business and Property Courts maintain a specialist Competition List for such claims in the Chancery Division. Where a claim is commenced in the Queen's Bench Division (other than the Commercial or Admiralty Courts), a district registry of the High Court or the County Court and a party's statement of case raises an issue relating to the application of arts 101 or 102 TFEU and/or the Ch.I or II prohibitions, it must be transferred to the Chancery Division of the High Court: [CPR r.30.8](#). Cases commenced in the High Court may be transferred to the Competition Appeal Tribunal: [Enterprise Act 2002 s.16](#) and the [Section 16 Enterprise Act 2002 Regulations 2015 \(SI 2015/1643\)](#).

- ⑧86 [Competition Act 1998 s.47A](#). Cases commenced in the Tribunal may be transferred to the High Court: [CAT Rules 2015 r.71](#).

- ⑧87 [Competition Act 1998 ss.47B–47D](#). Under an “opt-in” collective claim, claimants must make a positive choice to join the claim; by contrast, under an “opt-out” collective claim, all members of the class of persons said to have suffered loss are subject to the claim, unless they expressly opt out. Provision is made for collective proceedings to be subject to collective settlements: [ss.49A](#) and [49B](#). In [*Merricks v Mastercard \[2020\] UKSC 51, \[2021\] 3 All E.R. 285*](#), the Supreme Court held, by a majority, that, for the Competition Appeal Tribunal to make a collective proceedings order, the proposed class representative must show that there is a triable issue that the proposed claimant group has suffered at least some loss, that the claims are “suitable” to be brought in collective proceedings (as compared to individual claims being brought) and that these are “suitable” for an aggregate award of damages, which may be the case even where there are difficulties with incomplete data and interpreting that data, as the Tribunal must do its best to quantify damages using the available evidence under the “broad axe” principle, and without requiring the proposed method for the distribution of damage to take account of an individual assessment of the loss suffered by each class member. The Tribunal subsequently made a Collective Proceedings Order on an “opt-out” basis, although it excluded a claim for compound interest: [*Merricks v Mastercard Inc \(CPO Application\) \[2021\] CAT 28*](#). In [*Lloyd v Google LLC \[2021\] UKSC 50*](#), the Supreme Court made further observations on the collective proceedings regime under [s.47B](#), at [29]–[32]. The Tribunal has since made collective proceedings orders in respect of a number of other claims; whilst these have largely been approved on an “opt-out” basis, in [*UK Trucks Claim Ltd v Stellantis NV; Road Haulage Association Ltd v MAN SE \[2022\] CAT 25*](#), which concerned proposed collective claims on behalf of businesses that operated trucks, the Tribunal approved an opt-in claim and rejected an alternative proposed opt-out claim, in part because an opt-in claim would be more practicable and allow for more data to be collected to analyse the price effects of a cartel between truck manufacturers. In [*Michael O'Higgins FX Class Representative Ltd*](#)

v Barclays Bank Plc; Evans v Barclays Bank Plc [2022] CAT 16, a majority of the Tribunal considered that competing proposed applications were not suitable for certification on an opt-out basis, but gave the proposed class representatives permission to amend their applications for certification on an opt-in basis. In *BT Group Plc v Le Patourel [2022] EWCA Civ 593*, the Court of Appeal confirmed that, for a CPO to be made, the issues must be “common” (at [31]–[32]), there is no preference in law for opt-in or opt-out proceedings and the decision as to which type of proceeding to order is one for the Tribunal to make (at [60]–[68]) and the test for whether claims are “suitable” for an aggregate award of damages is “multifactorial” (at [81]–[83]). In *London & South Eastern Railway Ltd v Gutman [2022] EWCA Civ 1077*, it held that issues of liability, as well as of quantum, may be considered on an aggregate, group-wide basis (at [33]–[39]) and gave guidance on the methodology that the class representative must provide setting out how the issues identified in the proposed collective claim will be determined (at [52]–[79]).

⑧888 See generally Vol.I, Ch.31.

⑧889 See Brealey and George (eds), *Competition Litigation, UK Practice and Procedure*, 2nd edn (2019), Ch.4.

⑧890 *Gemalto Holding BV v Infineon Technologies AG [2022] EWCA Civ 782* (public announcement by the Commission that it had issued a statement of objections caused limitation to run); *Granville Technology Group Ltd (In Liquidation) v Infineon Technologies AG [2020] EWHC 415 (Comm)* (publicly available information, including press reports, about US Department of Justice and Commission investigations into a global cartel and provisions made by one company in respect of a possible fine were sufficient for time to start running). However, time did not start to run from this point against the liquidator of an insolvent company that had ceased trading before this point, as a reasonably competent liquidator would not have been on notice of such matters: *OT Computers Ltd (In Liquidation) v Infineon Technologies AG [2021] EWCA Civ 501*. In *Glasgow City Council and West Dunbartonshire Council v VFS Financial Services Ltd [2022] CSIH 1*, the Inner House of the Court of Session held, in applying provisions of the *Prescription and Limitation (Scotland) Act 1973*, that the pursuer local authorities could not have been aware of a cartel between truck manufacturers until the Commission announced a settlement decision, as the pursuers’ employees were not aware of, and could not reasonably have been expected to be aware of, earlier press coverage concerning an OFT investigation and Commission unannounced inspections, and a Commission press release concerning its issuing of a statement of objections.

⑧891 In relation to an infringement committed before 31 December 2020, see above, 45-004—45-005.

⑧892 **Competition Act 1998 s.58A(2).** An infringement decision becomes final once any appeal against it has become final: *s.58A(3)*. The Tribunal is not bound by a preliminary finding

made by the Commission in a commitments decision made under art.9 of Regulation 1/2003, as that did not involve a finding of infringement: *Dune Group Ltd v Mastercard Inc; Dune Shoes Ireland Ltd v Visa Europe Ltd [2021] CAT 35* at [70].

⑧93 Competition Act 1998 s.58.

⑧94 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC, Mastercard Incorporated [2020] UKSC 24, [2020] 4 All E.R. 807; Secretary of State for Health v Servier Laboratories [2020] UKSC 44, [2020] 3 W.L.R. 1207*. In *Dune Group Ltd v Mastercard Inc; Dune Shoes Ireland Ltd v Visa Europe Ltd [2021] CAT 35*, the Tribunal granted the claimants summary judgment in respect of parts of their claims as the counterfactuals (for that part of the claim period before interchange fees were regulated by the EU Interchange Fee Regulation 2015/751) advanced by the Visa defendants were inconsistent with earlier judgments of the Court of Appeal and Supreme Court in other proceedings dealing the same issues, which themselves applied a judgment of the Court of Justice upholding a finding of infringement made by the Commission (at [30]–[33]). However, summary judgment was refused in respect of those part of the claims based on the period after that Regulation came into effect, in which a different counterfactuals (not considered in the earlier proceedings) may have applied (at [35]–[53]) or to claims in which no prior finding of infringement had been made by either the Commission or the English courts in earlier proceedings (at [54]–[89]).

⑧95 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] O.J. L349/1.

⑧96 SI 2017/385. See above, para.45-124.

⑧97 *Allianz Global Investors GmbH v Barclays Bank Plc [2022] EWCA Civ 353*. Accordingly, as neither a company's shareholders, a trust's beneficiaries or a partnership's partners have an individual right under domestic law to sue for damages in respect of losses suffered by the company, trust or partnership, they did not do so in respect of losses suffered as a result of a breach of EU competition law: at [68]–[72].

⑧98 *Forrest Fresh Foods Ltd v Coca-Cola European Partners Great Britain Ltd [2021] CAT 29* at [26]–[28] (claim under the Ch.II prohibition struck out for lack of particularity). In *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc; Evans v Barclays Bank Plc [2022] CAT 16*, a majority of the Tribunal considered that, notwithstanding deficiencies in the pleadings of both proposed collective claims, it would not strike them out as the applications involved novel and difficult questions.

⑧99 See e.g. in a follow-on claim, *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd [2011] EWCA Civ 2, [2011] U.K.C.L.R. 303*, in which the Court of Appeal upheld the Competition Appeal Tribunal's dismissal of the claim (*[2009] CAT 36*)

on the ground that the claimant had not shown that the defendant's abuse of a dominant position had caused it loss by depriving it of the opportunity to win a contract, the ORR's infringement decision having made no such finding of fact for the purposes of s.58 of the Act. In *BritNed Developments Ltd v ABB AB and ABB Ltd [2018] EWHC 2616 (Ch), [2019] Bus. L.R. 718* the High Court rejected a claim for lost profits in circumstances where it was alleged that, had the cartel not taken place, the claimant would have purchased a higher capacity cable than it did and so would have earned greater profits: the evidence showed that, in the counterfactual, the claimant would still have purchased the same cable and so had suffered no loss; this was upheld on appeal *[2019] EWCA Civ 1840, [2020] Bus. L.R. 1073*.

⑨00 *Devenish Nutrition Ltd v Sanofi-Aventis SA [2008] EWCA Civ 1086, [2009] Ch. 390.*

⑨01 (*C-453/99*) *[2001] E.C.R. I-6297, EU:C:2001:465*. See above, para.45-123.

⑨02 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and Mastercard Incorporated [2020] UKSC 24, [2020] 4 All E.R. 807* at [196]–[197]. A passing-on defence must be properly pleaded on the basis of an identified factual basis and cannot be based on a broad economic or business theory, such that there is a proximate causative link between the overcharge and the sums passed-on to customers or recovered through a reduction in other input costs from suppliers: *Royal Mail Group Ltd and BT Group Plc v DAF Trucks Ltd [2021] CAT 10* at [33]–[43].

⑨03 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and Mastercard Incorporated [2020] UKSC 24, [2020] 4 All E.R. 807* at [211]–[216].

⑨04 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and Mastercard Incorporated [2020] UKSC 24, [2020] 4 All E.R. 807* at [216]–[226]; thus, the sum passed-on can be determined using the “broad axe” principle, if precision cannot reasonably and proportionately be achieved using the available evidence. However, this does not mean that a mitigation defence, including one based on “pass on” of the overcharge, does not need to be properly pleaded, as such a defence may not make it too difficult for the claimant to exercise its enforceable right to damages: *NTN Corp v Stellantis NV [2022] EWCA Civ 16* at [28]–[30] and [45]–[49].

⑨05 *[2022] CAT 31.*

⑨06 *NTN Corp v Stellantis NV [2022] EWCA Civ 16* at [33], [70]–[72] and [82]. See also *Royal Mail Group Ltd v DAF Trucks Ltd [2021] CAT 10*. In *Secretary of State for Health v Servier Laboratories Ltd [2022] EWHC 369 (Ch)*, a defence that the claimants, public health authorities, had failed to mitigate their losses by encouraging doctors to prescribe other, cheaper medicines, failed, as the defendants had actively encouraged doctors to prescribe their medicine and the authorities had taken reasonable steps to promote more cost-effective prescribing.

- ⑨07 *Allianz Global Investors GmbH v Barclays Bank Plc [2022] EWCA Civ 353.*
- ⑨08 e.g. *2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19* (damages for loss of profits, and exemplary damages, awarded in “follow-on” claim for breach of the Ch.II prohibition, although claims under other heads of loss were rejected); *Albion Water Ltd v Dŵr Cymru Cyfyngedig [2013] CAT 6* (damages awarded for lost profits caused by the loss of an opportunity to supply customers as a result of the defendant’s breach of the Ch.II prohibition); *BritNed Development Ltd v ABB AB and ABB Ltd [2018] EWHC 3142 (Ch)* (damages awarded for overcharge in prices paid due to cartel, which were reduced slightly on appeal to reflect the compensatory principle *[2019] EWCA Civ 1840, [2020] Bus. L.R. 1073*).
- ⑨09 e.g. *Socrates Training Ltd v Law Society of England and Wales [2017] CAT 10* (“stand-alone” claim settled after judgment finding breach of the Ch.II prohibition) and *Achilles Information Ltd v Network Rail Infrastructure Ltd [2022] CAT 9* (claimant awarded damages in respect of both past losses caused by its unlawful exclusion from the market caused by Network Rail’s infringement of the Chs I and II prohibitions (see *Achilles Information Ltd v Network Rail Infrastructure Ltd [2019] CAT 20* and above, paras 45-165, 45-196 and 45-201) and future losses that it would incur as a result of that exclusion until, following its re-entry into the market, its business would return to the level it would have achieved absent the infringement).
- ⑨10 *BritNed Development Ltd v ABB AB and ABB Ltd [2019] EWCA Civ 1840.*
- ⑨11 *BT Group Plc v Le Patourel [2022] EWCA Civ 593* at [88]–[100].

(f) - Enterprise Act 2002: Cartel Offence

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(f) - Enterprise Act 2002: Cartel Offence

Cartel offence

45-227

U The Enterprise Act 2002 introduced a new criminal offence, the “cartel offence”, which, on conviction on indictment, can result in the imposition of a term of imprisonment of up to five years and/or an unlimited fine.⁹¹² As originally enacted, an individual was guilty of an offence if he or she dishonestly agreed with one or more other persons that at least two undertakings will implement in the UK arrangements for one or more of the following cartel activities: direct and indirect price fixing; limitation of supply or production; market sharing; or bid-rigging.⁹¹³

U The law was amended by the Enterprise and Regulatory Reform Act 2013, which removed, with effect from 25 April 2013, the requirement of dishonesty from the offence, for offences committed on or after that date. The CMA has been given specific powers of investigation and prosecution in criminal cases⁹¹⁴ and has, in accordance with s.190A, published guidance on how it intends to exercise them.⁹¹⁵ Individuals may be granted immunity from prosecution where they, or their employers, have provided information about cartels to the CMA.⁹¹⁶

Footnotes

912 Enterprise Act 2002 s.190(1)(a). The maximum penalty on summary conviction is six months’ imprisonment and/or a fine not exceeding the statutory maximum (presently an unlimited fine): s.190(1)(b).

- ⑨13 Enterprise Act 2002 s.188. A number of circumstances in which the offence is not committed are set out in [s.188A](#) and [s.188B](#) contains a number of defences. Dishonesty is to be determined in accordance with the Supreme Court's judgment in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club) [2017] UKSC 67, [2018] A.C. 391*, i.e. by determining, as a matter of fact, the actual state of the defendant's knowledge or belief as to the facts and whether his or her conduct was honest or dishonest by applying the objective standards of ordinary reasonable, decent people: *Barton and Booth v R [2020] EWCA Crim 575, [2020] 3 W.L.R. 1333*. For a detailed consideration of the criminal cartel offence, see Whish and Bailey, Competition Law, 10th edn (2021), pp.446–457.
- 914 Enterprise Act 2002 ss.192–202.
- 915 CMA, Cartel Offence Prosecution Guidance (CMA9, March 2014). In England and Wales and Northern Ireland, a prosecution may only be brought by or with the consent of the CMA or by the Serious Fraud Office: [Enterprise Act 2002 s.190\(2\)\(b\)](#). In Scotland, a prosecution may be brought by the Crown Office and Procurator Fiscal Office, with which the CMA will co-operate: Memorandum of understanding between the CMA and the Crown Office, Scotland (July 2014).
- 916 Enterprise Act 2002 s.190(4); see OFT, Quick Guide to Cartels and Leniency for Individuals (OFT1495i, July 2013) and OFT1495.

(g) - Enterprise Act 2002: Market Investigations

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(g) - Enterprise Act 2002: Market Investigations

Market investigation references

45-228

The market investigation regime contained in the [Enterprise Act 2002](#) entered into force on 20 June 2003 and replaced the monopoly provisions of the [Fair Trading Act 1973](#). It provides an alternative mechanism whereby agreements, in particular networks of agreements, might be scrutinised by the CMA. However, it is intended that the market investigation provisions will be used relatively infrequently for this purpose, since the [Competition Act 1998](#) is the main legal instrument for controlling agreements which result, or are likely to result, in an anti-competitive outcome. The making and determination of market investigation references will be briefly described below; reference should be made to specialised works for further detail.

917



Making of a reference

45-229

Under [Pt4 of the Enterprise Act 2002](#) the CMA or, in exceptional cases where the CMA has decided not to make a reference, the Secretary of State may initiate a market investigation reference when there are reasonable grounds for suspecting that one or more “features” of a market prevent, restrict or distort competition in the supply or acquisition of goods or services in the whole or part of the UK.⁹¹⁸ The investigation will be conducted, within a prescribed period, by a group of members of the CMA Panel, appointed by the Chair of that Panel. The CMA may also accept undertakings

in lieu of a market reference.⁹¹⁹ The Act defines “features” of a market to include the structure of the market or any characteristic thereof; the conduct of persons supplying or acquiring goods or services who operate in that market; and the conduct of those persons’ customers.⁹²⁰ A reference may be made in relation to more than one market in the UK for goods or services.⁹²¹ The OFT and Competition Commission published guidance, which has been adopted by the CMA, that explains how it will exercise its discretion to make market investigation references,⁹²² in particular where competition problems arise that are industry-wide and are not capable of being adequately addressed under the [Competition Act 1998](#). This may be the case in sectors of the economy that are oligopolistic in market structure—that is to say a market in which a few firms account for a substantial proportion of the market—and there is a diminution of competition which is not obviously attributable to an agreement or concerted practice subject to the [Ch.I](#) prohibition, nor to an abuse of a sole or collective dominant position contrary to the [Ch.II](#) prohibition. A reference might also be appropriate to deal with the foreclosure of a market due to the operation of parallel networks of agreements.

Determination of a reference

- 45-230 Once a reference has been made, the CMA inquiry group conducting the investigation must investigate and then decide whether any feature of the market or combination thereof prevents, restricts or distorts competition in the market or markets that have been referred to it.⁹²³ The CMA has adopted guidance published by the Competition Commission on its procedures during market investigation references and the way in which it intends to exercise its powers.⁹²⁴ If the CMA inquiry group considers there is an adverse effect on competition, it must decide what action, if any, that either the CMA or anyone else should take to remedy the adverse effect on competition or any detrimental effect on customers it has identified.⁹²⁵ When considering remedial action, the CMA must have regard to the need to obtain as comprehensive a solution as is reasonable and practical to the adverse effect on competition and any detrimental effect on customers⁹²⁶ as well as any “relevant customer benefits”, as defined in the Act.⁹²⁷

- 45-231 The CMA has a number of remedial powers available to it, whether by accepting undertakings or making a final order,⁹²⁸

U including, significantly, the power to make an order prohibiting the making or enforcement of an agreement or requiring any party to terminate the agreement, or requiring the division of a business.

⁹²⁹

U In October 2008, the Competition Commission adopted an Order that limited to 24 months exclusivity periods in agreements for the supply of liquified petroleum gas to domestic premises.
930

U In August 2010, following a market investigation in the supply of groceries, the Competition Commission adopted an Order requiring certain supermarkets to release specified restrictive covenants and to not enforce specified exclusivity agreements that prevented the use of land for the sale of groceries, and prohibiting them from entering into restrictive covenants and exclusivity agreements to that effect.

931

U In June 2019, following a market investigation into the supply of investment consultancy and fiduciary management services, the CMA adopted an Order that, in some circumstances, prevented pension scheme trustees from entering into contracts for the supply of such services or increasing the assets under management by an existing supplier unless they have first carried out a competitive tendering exercise.

932



Footnotes

① See Whish and Bailey, Competition Law, 10th edn (2021), Ch.11.

918 Enterprise Act 2002 ss.131–133.

919 Enterprise Act 2002 ss.154-156.

920 Enterprise Act 2002 s.131(2). *Conduct* includes any failure to act (whether or not intentional) or any unintentional conduct: s.131(3).

921 Enterprise Act 2002 s.131(2A).

922 OFT Market investigation references: Guidance about the making of references under Pt 4 of the Enterprise Act (OFT511, March 2014); Competition Commission, Guidelines for market investigations: Their role, procedures, assessment and remedies (CC3 (revised), April 2013. The CMA has also published further guidance, Market Studies and Market Investigations: Supplemental guidance on the CMA's approach (CMA3, revised July 2017).

923 Enterprise Act 2002 s.134(1)–(3).

924 Competition Commission, Market investigations guidelines (CC3, April 2013).

925 Enterprise Act 2002 s.134(4).

926 Enterprise Act 2002 s.134(6).

927 Enterprise Act 2002 s.134(7)–(8).

② Enterprise Act 2002 ss.158–162.

- ①929 Enterprise Act 2002 Sch.8 paras 1 and 13. The full remedial powers of the CMA are set out in Sch.8.
- ①930 Domestic Bulk Liquefied Petroleum Gas Market Investigation Order 2008. On 24 May 2022, the CMA announced that a supplier of LPG was required to release customers from repeat exclusivity contracts that could only be ended by a customer (if it wished to change supplier) paying a break fee: see CMA press release, CMA action frees hundreds of homes from unlawful gas contracts (24 May 2022).
- ①931 The Groceries Market Investigation (Controlled Land) Order 2010.
- ①932 Investment Consultancy and Fiduciary Management Market Investigation Order 2019.

(h) - The Competition and Markets Authority

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(h) - The Competition and Markets Authority

The Competition and Markets Authority

45-232 The CMA was established on 1 October 2013 under the [Enterprise and Regulatory Reform Act 2013](#)
933

U and on 1 April 2014 it assumed the competition law functions of both the Office of Fair Trading and the Competition Commission, both of which were then abolished. The CMA has a statutory duty to promote competition for the benefit of consumers,
934

U and in doing so must have regard to the “Strategic Steer” published by the Department for Business, Energy & Industrial Strategy.
935

U The CMA is responsible for investigating suspected infringements of the [Ch.I](#) and [II](#) prohibitions under the [Competition Act 1998](#),
936

U for which purpose the CMA Rules apply, for investigating and prosecuting for the criminal cartel offence,
937

U and conducting investigations under the mergers and markets provisions of the [Enterprise Act 2002](#). Until 31 December 2020, it also had jurisdiction to investigate suspected infringements of arts 101 and 102 TFEU.

938

U The CMA may intervene in cases between private parties brought in the Competition Appeal Tribunal.

939

U The CMA also has a number of other competition functions under specific legislation, as well as regulatory functions in respect of various regulated industries and wide responsibilities under consumer law. On 7 April 2021, the CMA established, on a non-statutory basis, a “Digital Markets Unit” to oversee the conduct of operators of large digital platforms; this will in due course be placed on a statutory basis, with new powers to regulate such undertakings, including by imposing codes of conduct.

940

U In May 2022, the UK Government published its response to a consultation held on its legislative proposals for a new pro-competition regime for digital markets and the establishment of the Digital Markets Unit; new legislation will be adopted to regulate the conduct of firms with substantial and entrenched market power that are designated as having “strategic market status”.

941

U The CMA has also established the Office of the Internal Market (“OIM”), which has, from 21 September 2022, carried out its advisory, monitoring and reporting functions under the [UK Internal Market Act 2020](#) in support of the effective operation of the UK internal market.

942

U The CMA will have advisory and reporting functions under [Pt 4 of the Subsidy Control Act 2022](#) in relation to subsidies granted by UK public authorities, including providing non-binding reports on proposed subsidies that have been referred to it by a public authority on a mandatory or voluntary basis.

943

U The CMA has published numerous guidance documents on its various competition law functions, which are available on its website.

944



Footnotes

①933 Enterprise and Regulatory Reform Act 2013 s.25 and Sch.4; see Whish and Bailey, Competition Law, 10th edn (2021), pp.66–72.

①934 Enterprise and Regulatory Reform Act 2013 s.25(3).

- ①935 Department for Business, Energy & Industrial Strategy, The Government's Strategic Steer to the Competition and Markets Authority (July 2019).
- ①936 The sector regulators have concurrent jurisdiction to investigate suspected infringements of the Ch.I and II prohibitions: see above, para.[45-139](#).
- ①937 In England and Wales, the CMA shares with the Serious Fraud Office jurisdiction to prosecute the criminal cartel offence.
- ①938 See above, paras [45-009](#) and [45-115](#).
- ①939 [Competition Appeal Tribunal Rules 2015 r.50\(2\)](#). In *Epic Games Inc v Alphabet Inc* the CMA has been given permission to submit written observations: Order of 25 May 2022.
- ①940 See DBEIS, DCMS and CMA press release, New watchdog to boost online competition launches (7 April 2021) and Digital Markets Unit (non-statutory)—Terms of Reference (7 April 2021), available at: <https://www.gov.uk/government/publications/non-statutory-digital-markets-unit-terms-of-reference/digital-markets-unit-non-statutory-terms-of-reference>. The CMA has also established, with the Office for Communications, the Financial Conduct Authority and the Information Commissioner's Office, the Digital Regulation Cooperation Forum to coordinate their approaches to regulating digital services; see <https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum>.
- ①941 Departments for Digital, Culture, Media and Sport and Business, Energy and Industrial Strategy, Government response to the consultation on a new pro-competition regime for digital markets (CP 657, 6 May 2022).
- ①942 The CMA has published guidance on how it will exercise its functions under the UK Internal Market Act 2020: see Guidance on the Operation of the CMA's UK Internal Market Functions (OIM1, 21 September 2021). The OIM has its own website, at: <https://www.gov.uk/government/organisations/office-for-the-internal-market>.
- ①943 [Subsidy Control Act 2022](#). The CMA must establish, under [s.68](#), a Subsidy Control Unit to provide independent, non-binding reports on subsidies that are referred to it on either a mandatory ([s.52](#)) or voluntary ([s.56](#)) basis. The CMA's report must evaluate the public authority's assessment of whether the subsidy complies with the requirements of [Chs 1 and 2 of Pt 2 of the Act](#) (which set out the principles against which subsidies shall be assessed and prohibit certain subsidies) and any effects of the proposed subsidy on competition and investment in the United Kingdom: [s.59](#). The Secretary of State may also refer an awarded subsidy to the CMA for report by it in certain circumstances: [s.60](#). The CMA has obligations to review and report on the effectiveness of the Act: [s.65](#). The CMA has published draft

guidance on its role under the Act: see CMA, Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit (Consultation Document) (CMA161con, 11 July 2022).

- ⑨44 See <https://www.gov.uk/government/organisations/competition-and-markets-authority>.

End of Document

© 2022 SWEET & MAXWELL

(i) - The Competition Appeal Tribunal

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 45 - Restrictive Agreements and Competition

Section 3. - United Kingdom Competition Law

(i) - The Competition Appeal Tribunal

The Competition Appeal Tribunal

45-233

U The Competition Appeal Tribunal was established on 1 April 2003 by [s.12 of the Enterprise Act 2002](#), and inherited the functions of the Competition Commission Appeal Tribunal, which had been established under the [Competition Act 1998](#) to hear appeals under that Act.

945

U It is headed by a President and has two panels of members, one of chairmen and the other of ordinary members. The President must be a judge and the other chairmen must be either judges or senior lawyers, whilst the ordinary members have a range of business, public sector, academic and professional backgrounds.

946

U It has jurisdiction to hear appeals on the merits of decisions of the CMA and regulators under the [Competition Act 1998](#)

947

U; claims for damages for losses caused by infringements of either UK or EU competition law, whether “follow-on”, “standalone” or “hybrid” claims and including “opt-in” and “opt-out” collective claims

948

U; and applications for the review of decisions of the CMA and the Secretary of State in merger and market investigations under the [Enterprise Act 2002](#).

949

U Although based in London, it has also sat in Belfast (as a Tribunal in Northern Ireland), Cardiff (as a Tribunal in England and Wales) and Edinburgh (as a Tribunal in Scotland). The [Competition Appeal Tribunal Rules 2015](#)

950

U set out the procedure to be followed in proceedings before the Tribunal.

951

U In England and Wales appeals on points of law from the Tribunal may be made, with permission, to the Court of Appeal.

952

U On 20 April 2022, the UK Government published its response to a call for evidence for a post-implementation review of the [Competition Appeal Tribunal Rules 2015](#), as a result of which it intends to extend the Tribunal's jurisdiction to grant declaratory relief in cases brought under [s.47A of the Competition Act 1998](#).

953

U

Footnotes

①945 Enterprise Act 2002 s.21 and Sch.5.

①946 Enterprise Act 2002 s.12 and Sch.2.

①947 Competition Act 1998 ss.[46](#) and [47](#).

①948 Competition Act 1998 ss.[47A](#) and [47B](#). See above, paras [45-223—45-226](#).

①949 Enterprise Act 2002 s.120 (in respect of mergers) and s.[179](#) (in respect of market investigations).

①950 SI 2015/1648.

①951 The Tribunal has also published guidance on its procedures: Competition Appeal Tribunal Guide to Proceedings (2015), which is available on its website, <https://www.catribunal.org.uk>.

①952 Competition Act 1998 s.[49](#) and Enterprise Act 2002 ss.120(6) and s.[179\(6\)](#). Permission to appeal may be granted by either the Tribunal (under [CAT Rules 2015, rr.107 and 108](#)) or the

Court of Appeal (under [CPR Pt 52](#)). In Scotland, an appeal lies to the Court of Session and in Northern Ireland to the Court of Appeal of Northern Ireland.

- ⑨53 Department for Business, Energy & Industrial Strategy, Post-implementation review of the Competition Appeal Tribunal (CAT) Rules 2015 and Government Response to the Call for Evidence (20 April 2022), available at: https://www.legislation.gov.uk/uksi/2015/1648/pdfs/uksiod_20151648_en_001.pdf.