

Section 1. - In General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 4 - Capacity of Parties

Chapter 11 - Personal Incapacity

Section 1. - In General

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Contractual incapacity

11-001 The incapacity of one or more of the contracting parties may defeat an otherwise valid contract. Prima facie, however, the law presumes that everyone has a capacity to contract; so that, where exemption from liability to fulfil an obligation is claimed by reason of want of capacity, this fact must be strictly established on the part of the person who claims the exemption. In English law, three classes of individuals are subject to some degree of personal contractual incapacity.¹ These are minors,² persons lacking the requisite mental capacity³ and drunken persons.⁴ Abnormal weakness of mind short of such mental incapacity as prevents a person from having the ability to understand the nature of the transaction, or immaturity of reason in one who has attained full age, or the mere absence of skill upon the subject of the particular contract, affords in itself no ground for relief at law or in equity,⁵ although in certain cases, undue influence⁶ or unconscionable dealing by the other party⁷ or (perhaps) inequality of bargaining power may permit the transaction to be set aside as inequitable.⁸ Moreover, illiteracy and unfamiliarity with the English language are not to be equated with disabilities like mental incapacity or drunkenness. According to Millett LJ in *Barclays Bank Plc v Schwartz*,⁹ although all four conditions are disabilities which may prevent the sufferer from possessing a full understanding of a transaction into which he enters:

“... mental incapacity and drunkenness [may] not only deprive the sufferer of understanding the transaction, but also deprive him of the awareness that he [does] not understand it”,

which is not the case as regards an illiterate person or a person unfamiliar with English. Again, however, such a person may in an appropriate case claim that the transaction be set aside as a harsh and unconscionable bargain.¹⁰

Consumer protection and vulnerable consumers

- 11-002 Modern consumer protection legislation sometimes requires a court to take into account the limited understanding of consumers of the contracts which they enter with traders in determining whether a consumer is to be protected.

Unfair commercial practices: “mental infirmity” or impairment of judgment of consumer

- 11-003 Under the [Consumer Protection from Unfair Trading Regulations 2008](#), unfair commercial practices by a trader towards a consumer are prohibited if they fall under a general test of unfairness, if they constitute a “misleading action”, “misleading omission” or are “aggressive”, or if they are contained in a legislative list.¹¹ Under the general test, a court must consider, inter alia, whether a business’s commercial practice “materially distorts or is likely to materially distort the economic behaviour of the average consumer”.¹² While in general the average consumer is understood to be “reasonably well informed, reasonably observant and circumspect”,¹³ it is also provided that:

“In determining the effect of a commercial practice on the average consumer—

(a)where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product¹⁴ because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b)where the practice is likely to materially distort the economic behaviour only of that group,

a reference to the average consumer shall be read as referring to the average member of that group.”¹⁵

This definition is also relevant to the commission of a misleading statement or omission.¹⁶ Moreover, an “aggressive commercial practice” is defined as one which “significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in

relation to the product concerned through the use of harassment, coercion or undue influence” and “thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise”.¹⁷ For this purpose in determining whether the trader uses “harassment, coercion or undue influence”, a court must take into account whether the trader exploited:

“... any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment, of which the trader [was] aware, to influence the consumer’s decision with regard to the product.”¹⁸

Under the [Consumer Protection from Unfair Trading Regulations 2008](#) as originally made, the commission of an unfair commercial by a trader had no effect on the validity of any contract concluded by the trader with the consumer,¹⁹ but in 2014 the [2008 Regulations](#) were amended so as to create new rights of redress for consumers in respect of misleading statements and aggressive commercial practices,²⁰ a right “to unwind” the contract, a right to a “discount”, and a right to damages.²¹ These rights are discussed in [Ch.40](#) of Vol.II of the present work.²²

Unfair contract terms: consumer’s degree of understanding relevant to fairness of term

- 11-004 If a trader takes advantage of the lack of full understanding of the terms of a contract which he concludes with a consumer, this circumstance would be relevant to the issue of the fairness of these terms under the [Consumer Rights Act 2015 Pt 2](#).²³ Moreover, where a trader knows or can foresee that the “average consumer” with whom he is contracting is a member of a group whose understanding of the contract terms which the trader uses is likely to be reduced, this would be relevant to the “plainness and intelligibility” of those terms for the purposes of the law governing unfair terms in consumer contracts.²⁴

Footnotes

- 1 At common law, a married woman could not in general enter into a contract on her own account either with her husband or with a third party, but successive statutes from 1857 to 1949 progressively removed this incapacity (although an agreement between spouses may be held not to be a contract on the ground of a lack of intention to create legal relations: above, paras [4-240—4-242](#)). However, some uncertainty remains as to the liability of a wife in respect of a contract concluded with her husband before marriage, this turning on whether or not the [Law Reform \(Married Women and Tortfeasors\) Act 1935 s.1\(c\)](#) reversed the effect of the decision in *Butler v Butler (1885) 14 Q.B.D. 831* (affirmed on a different point ([1885](#))

16 Q.B.D. 374). It is submitted that the broader reading of the 1935 Act so as to remove from the law this last vestige of the peculiar treatment of married women's contracting is the more likely given "society's recognition of the equality of the sexes": *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180, 188*, per Lord Browne-Wilkinson (though this observation was made in another context).

- 2 See below, paras 11-005 et seq.
- 3 See below, paras 11-075 et seq.
- 4 See below, paras 11-106—11-107.
- 5 *Osmond v Fitzroy (1731) 3 P. Wms. 129; Lewis v Pead (1789) 1 Ves. Jr. 19* and see *Barton (1987) 103 L.Q.R. 118*.
- 6 See above, paras 10-072 et seq.
- 7 See above, paras 10-161 et seq.
- 8 See above, para.10-181.
- 9 *The Times*, 2 August 1995; *Hambros Bank Ltd v British Historic Buildings Trust [1995] N.P.C. 179*.
- 10 Above, para.10-161.
- 11 The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) ("2008 Regulations (SI 2008/1277)") regs 3, 5–7, and Sch.1 as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). On these regulations generally, see Vol.II, paras 40-166 et seq.
- 12 2008 Regulations (SI 2008/1277) reg.3(3)(b).
- 13 2008 Regulations (SI 2008/1277) reg.2(2).
- 14 "Product" is defined by the 2008 Regulations: see reg.2(1) and Vol.II, para.40-177.
- 15 2008 Regulations (SI 2008/1277) reg.2(5), though reg.2(6) adds that "[p]aragraph (5) is without prejudice to the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally".
- 16 2008 Regulations (SI 2008/1277) regs 5 and 6.
- 17 2008 Regulations (SI 2008/1277) reg.7(1)(a).
- 18 2008 Regulations (SI 2008/1277) reg.7(2)(c).
- 19 2008 Regulations (SI 2008/1277) reg.29 (as originally enacted) provided that "an agreement shall not be void or unenforceable by reason only of a breach of these regulations".
- 20 The Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.3 inserting new Pt 4A into the 2008 Regulations. These changes were brought into force as from 1 October 2014.
- 21 2008 Regulations (SI 2008/1277) regs 27E, et seq. (as inserted by SI 2014/870).
- 22 Vol.II, paras 40-181 et seq.
- 23 Pt 2 of the 2015 Act governs contracts made on or after 1 October 2015, replacing earlier controls contained in the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083). See Vol.II, paras 40-223 et seq. and especially at paras 40-274 and 40-311.
- 24 See Vol.II, paras 40-428—40-429.

(a) - Generally

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Chapter 11 - Personal Incapacity

Section 2. - Minors²⁵

(a) - Generally

Definition of minors

- 11-005 The age of capacity for the purposes of the law of contract (as for most other legal purposes) which was 21 at common law, was reduced to 18 by [s.1 of the Family Law Reform Act 1969](#). [Section 9 of the same Act](#) also abolished the common law rule under which a person attained his majority on the day preceding the relevant anniversary of the birth.²⁶ Under this section a person is deemed to attain the age of 18 at the commencement of the 18th anniversary of his birthday. The Act also declares that a person who is not of full age may be described as a “minor” instead of an “infant”.²⁷

Very young children

- 11-006 The cases at common law concerning the capacity of a minor to make contracts generally concern older children.²⁸ However, it has been doubted whether a very young child has the mental capacity to enter a contract, even where the contract is of a type which would normally be held valid, though voidable at common law. In [R. v Oldham Metropolitan BC Ex p. Garlick](#),²⁹ Scott LJ observed that:

“If a minor is to enter into a contract with the limited efficacy that the law allows, the minor must at least be old enough to understand the nature of the transaction and, if the transaction involves obligations on the minor of a continuing nature, the nature of those obligations.”³⁰

Thus, while he considered that a child well under the age of 10 years could purchase sweets, a four-year-old could not contract for the occupation of residential premises.³¹ This approach to the position of very young children can be related to that taken by the common law and by the [Mental Capacity Act 2005](#)³² to mental capacity in adults, where the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction.³³

General rule: contracts voidable at minor's option

11-007 Apart from contracts for necessaries and contracts of apprenticeship, education and service, the general rule at common law is that a minor's contracts are voidable at his option, i.e. not binding on the minor but binding on the other party.³⁴ Of these voidable contracts there are two classes:

- (a) contracts which are binding on the minor unless he repudiates them during minority, or within a reasonable time of attaining his majority³⁵;
- (b) contracts which are not binding on him unless and until he ratifies them after attaining his majority.³⁶

Prior to the passing of the [Minors' Contracts Act 1987](#), the second of these classes was partially governed by the [Infants Relief Act 1874](#), which also introduced a fourth category of minors' contracts, namely those declared by s.1 to be "absolutely void". By [s.1 of the 1987 Act](#), however, both these changes were abolished and the position returned to the common law.³⁷

Contracts binding on a minor

11-008 The main qualification on the general rule that contracts are voidable at the minor's option is found in relation to contracts for necessaries, which bind the minor, though this does not mean that the minor is bound by the price of goods or services as stipulated.³⁸ There is, however, in the cases, a diversity of meanings given to the word "necessaries". In one sense, the term is confined to necessary goods and services supplied to the minor.³⁹ In another, it extends to contracts for the minor's benefit and in particular to contracts of apprenticeship, education and service.⁴⁰ It has long been customary for a distinction to be drawn between these two classes of contract and it remains convenient for the purposes of exposition, but it is doubtful whether any practical importance still attaches to it. To these common law examples must be added the special treatment of settlement or compromise agreements made by a child and approved by the court under [CPR r.21.10](#).⁴¹

Deeds

- 11-009 In general a minor is bound by a deed to the same extent that he would be bound if the promise contained in the deed were parol. He is, therefore, liable on a deed which contains a promise to pay for necessaries.⁴²

Footnotes

25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the **Minors' Contracts Act 1987**, on which see below, paras 11-051, 11-061—11-064.

26 *Re Shurey, Savory v Shurey [1918] 1 Ch. 263.*

27 S.12.

28 At common law the age of majority was 21 years: see above, para.11-005.

29 [1993] 1 F.L.R. 645. The decision of the Court of Appeal was affirmed by the House of Lords: [1993] A.C. 509.

30 [1993] 1 F.L.R. 645, 662.

31 [1993] 1 F.L.R. 645. The context of these observations was the challenge by two four-year-old boys of a local authority's refusal to accept their application for accommodation under the **Housing Act 1985 s.62**.

32 ss.2 and 7.

33 See below, paras 11-089—11-093.

34 This passage was relied on as an accurate statement of the law in *Proform Sports Management Ltd v Proactive Sports Management Ltd [2006] EWHC 2903 (Ch), [2007] Bus. L.R. 93* at [34]. In many old cases certain types of minors' contracts were often said to be "void" but normally where the word "void" was used, "voidable" was intended: *Williams v Moor (1843) 11 M. & W. 256, 263–264*. As will be seen, settlement and compromise agreements are specially treated by CPR r.21.10, on which see below, para.11-035.

35 See below, paras 11-036 et seq.

36 See below, paras 11-049 et seq.

37 See below, para.11-051.

38 See below, para.11-010.

- 39 *Wharton v Mackenzie* (1844) 5 Q.B. 606; *Peters v Fleming* (1840) 6 M. & W. 42, 46; *Cowern v Nield* [1912] 2 K.B. 419, 422.
- 40 *Walter v Everard* [1891] 2 Q.B. 369; *Roberts v Gray* [1913] 1 K.B. 520, 525, 528, 529; *Shears v Mendeloff* (1914) 30 T.L.R. 342.
- 41 Below, para.11-035.
- 42 *Walter v Everard* [1891] 2 Q.B. 369. As to the effect of a disposition of property by deed, see below, paras 11-072—11-074.

(i) - Liability for Necessaries

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(b) - Contracts Binding on a Minor

(i) - Liability for Necessaries

Liability for necessities

- 11-010 Executed contracts for “necessary” goods and services were binding on a minor at common law,⁴³ though this does not mean that the minor will be liable for the price of the goods or services as stipulated.⁴⁴ The common law was partially codified in relation to the sale and delivery of necessary goods by the [Sale of Goods Act 1893](#), this provision now being contained in the [Sale of Goods Act 1979](#).⁴⁵ Less clear is the position of executory contracts for necessities.⁴⁶ The meaning of “necessaries” is an extended one for this purpose, by no means being confined to “necessities” in the ordinary sense.

Meaning of necessities

- 11-011 Such things as relate immediately to the person of the minor, as his necessary food, drink, clothing, lodging and medicine, are clearly necessities for which he is liable. But the term is not confined to such matters only as are positively essential to the minor’s personal subsistence or support; it is also employed to denote articles purchased for real use, so long as they are not merely ornamental, or are used as matters of comfort or convenience only, and it is a relative term to be construed

with reference to the minor's age and what the older cases term the minor's station in life.⁴⁷ The burden of showing that the goods supplied are necessities is always on the supplier:

"Having shewn that the goods were suitable to the condition in life of the infant, he [the tradesman] must then go on to show that they were suitable to his actual requirements at the time of the sale and delivery."⁴⁸

Thus the fact that the minor was already sufficiently supplied with the goods in question will defeat any claim against him⁴⁹ even though this fact was unknown to the supplier.⁵⁰

Contracts for necessities must be beneficial

- 11-012 It has been held that even a contract for necessities will not be binding on the minor if it contains harsh and oppressive terms so that the contract, taken as a whole, cannot be said to be for the minor's benefit.⁵¹ So, for instance, in *Flower v London & North Western Ry Co*⁵² it was held that a contract of carriage (though clearly a necessary in the circumstances) was void as against the minor because it contained a clause exempting the defendants from liability for injury to the minor even if caused by negligence. However, it is submitted that any judgment of the overall beneficial (or conversely prejudicial) effect of a minor's contract for necessities should be viewed after the application of any relevant legislation governing the fairness of terms. So, for example, since 1977 a contract term purporting to exclude a business liability for personal injuries and death caused by negligence is ineffective in law⁵³; and many other types of terms in consumer contracts may be held "not binding" on a minor/consumer as unfair.⁵⁴

Liability for goods "sold and delivered"

- 11-013 Section 3 of the Sale of Goods Act 1979 (replacing s.2 of the 1893 Act) provides that where necessities are sold and delivered to a minor he must pay a reasonable price for them.⁵⁵ "Necessaries" are defined by s.3(3) as goods suitable to the condition in life of the minor and to his actual requirements at the time of the sale and delivery. There are two difficult points arising out of the impact of this section on the common law which have not yet been resolved. First, it is uncertain whether a minor can be held liable on an executory contract for the purchase of necessities; and, secondly, where such a contract is executed by the delivery of the goods to the minor, it is uncertain whether the goods must be necessary for the minor at the time of sale as well as at the time of delivery.

Executory contracts for necessary goods

- 11-014 **U** Section 3 of the Sale of Goods Act 1979 deals only with the case of necessary goods *sold and delivered*; it does not in terms deal with the case of necessities sold but not delivered to a minor, and such a case may, therefore, still be governed by the common law. But even at common law it is uncertain whether a minor can be liable on an executory contract for the purchase of necessary goods.⁵⁶ Whether a minor is so liable may depend on the view taken of the basis of the minor's liability, though this seems to restate the problem rather than to solve it.⁵⁷ On the one hand it is argued that the minor is liable on such a contract quite apart from the Act, for a contract for necessities is one which, despite his lack of age, a minor may make.⁵⁸ This may be supported by more recent authority which has recognised that a minor may give a valid consent, notably, to medical treatment,⁵⁹

U and by analogy with decisions which have held a minor liable on an executory contract for education and training⁶⁰: the reason why an older minor's contracts are not binding on him is a matter of legal policy rather than because he cannot consent.⁶¹ On the other hand it is said that a minor's obligation to pay for goods supplied to him is not contractual at all but is restitutionary, based on unjust enrichment.⁶² Delivery would, therefore, be necessary, for without it the minor could not be said to be unjustly enriched at the seller's expense. The supporters of this view buttress their argument by pointing to the fact that the minor is bound to pay only a reasonable price for the goods, rather than the contractual price.⁶³ This, they say, does not suggest a consensual liability.⁶⁴ Moreover, if s.3 of the Sale of Goods Act 1979 were treated as superseding the common law, this would suggest that a minor would not be liable except where the goods were "sold and delivered".⁶⁵

Goods necessary when delivered, but not when sold, and vice versa

- 11-015 The second problem is, to some extent, tied up with the first. At common law there seems to be no doubt that the crucial question was always whether the goods were necessary when delivered⁶⁶ and it was immaterial whether or not they were necessary when the contract was made. This again would seem to support the theory that the minor's liability is based on unjust enrichment rather than being contractual, for if it were contractual it would be hard to see why a change of circumstances between the time of sale and the time of delivery should affect the liability of the minor. But whatever the position may have been at common law it is possible that s.3 of the Sale of Goods

Act resolved both questions. In *Nash v Inman*⁶⁷ the Court of Appeal appears to have treated this section as completely superseding the common law on the liability of a minor for necessary goods, and the wording of the section appears to support the view that the goods must be necessary both when sold and when delivered. If this is indeed the effect of the section it can hardly be supposed that a minor could today be held liable on a purely executory contract.⁶⁸

Necessary services

11-016 Services as well as goods may be necessaries.⁶⁹ So, for example, a contract for legal⁷⁰ or medical services⁷¹ may be a contract for necessities.⁷² It has also been held that a contract by a widow (who was a minor) to pay for her husband's funeral was binding as for a necessary.⁷³ Unlike the uncertain position in respect of contracts to supply necessary goods, it is clear that executory contracts for necessary services may be enforced against a minor, at least in the context of apprenticeship or contracts for education. Thus, a minor's promise to pay part of the premium for his apprenticeship on gaining his majority has been enforced⁷⁴ and his (reasonable) restrictive covenant against competing with his master after service is concluded has been enforced by injunction after gaining his majority.⁷⁵ In *Roberts v Gray*, the Court of Appeal held a minor who had entered a contract to go on a tour with a professional billiard player liable in damages for failing to proceed with the tour.⁷⁶ The court considered that once it had been decided that a contract is one for necessities not qualified by unreasonable terms, then it was binding on the minor, so as to allow the other contracting party all such remedies as were appropriate on breach.⁷⁷ The reasoning of these decisions runs counter to that which argues for a non-contractual basis of a minor's liability for necessities.⁷⁸ The question whether the services must be necessary only when rendered or whether they must also be necessary when ordered seems never to have been considered.

Fact and law

11-017 Whether the particular goods or services are necessities was for many years treated as a question of fact in each case, subject to there being some evidence on which they might properly be so found.⁷⁹ Today, however, it would seem that, while it is still a pure question of fact whether the minor is already well supplied with the goods or services in question, it is a question of mixed fact and law or a matter of evaluating the facts whether the goods or services can be treated as necessities in themselves.⁸⁰

Contracts for both necessities and non-necessaries

- 11-018 If a minor buys a quantity of goods, some of which may be necessities, but a substantial number of which cannot be necessities, it has been said that the minor will not be liable at all if the contract is one entire contract.⁸¹ On the other hand the courts have sometimes allowed a claimant to recover for necessities while disallowing a claim for non-necessaries without adverting to the question whether the contract was an entire contract.⁸² Since the minor is not bound to pay the contract price but only a reasonable price, there seems no reason why this course should not always be followed.⁸³

Examples

- 11-019 The following have been held to be necessities (although it must be remembered that the usages of society change and articles which once were necessities may no longer be held to be so and vice versa): engagement and wedding rings,⁸⁴ regimental uniform (for an enlisted soldier),⁸⁵ presents for a fiancée,⁸⁶ a racing bicycle for a youth earning (in 1898) 21s. a week,⁸⁷ the hire of horses⁸⁸ and for work done for them,⁸⁹ and the hire of a car to fetch luggage from a station six miles away.⁹⁰ On the other hand, the following have been held not to be necessities: 11 fancy waistcoats for a Cambridge undergraduate already sufficiently supplied with clothing,⁹¹ expensive dinners with fruit and confectionery for another undergraduate,⁹² jewelled solitaire sleeve-links for the son of a deceased baronet,⁹³ a large quantity of tobacco for an army officer,⁹⁴ lessons in flying for a law student,⁹⁵ a vanity-bag worth (in 1936) £20, 10s bought by the son of an ex-cabinet minister for his fiancée,⁹⁶ a hunter for an impecunious cavalry officer,⁹⁷ a collection of snuff-boxes and curios⁹⁸ and a second-hand sports car.⁹⁹ Finally, a claim for breach of contract by a supplier of game software against a minor on the basis that the supply was for a necessary service has been found to be not made out to summary judgment standard, even though “in one sense computer games might be regarded as necessary for a certain age group”.¹⁰⁰

Trading contracts

- 11-020 A minor’s trading contracts are not contracts for necessities.¹⁰¹ While there is no precise definition of a trading contract for this purpose, it has been held that a minor will not be liable in contract upon an agreement for services performed for him to enable him to carry on his trade,¹⁰² or for

goods supplied to him for the purposes of his trade,¹⁰³ or where he fails to deliver goods to a purchaser who has paid for them.¹⁰⁴ However, if the contract can be considered to be one by which the minor gains proficiency in a certain trade (as in a contract of service or apprenticeship) it will be binding on him if, viewed as a whole, it is for his benefit.¹⁰⁵

- 11-021 Where a minor's contract is a "trading contract" the minor cannot be adjudicated bankrupt on this basis for he is not a debtor at law,¹⁰⁶ though he may be liable for (and be made bankrupt on account of) an enforceable debt such as a tax debt.¹⁰⁷ It has even been held that a minor is not liable in unjust enrichment for the recovery of the price of goods sold by him but not delivered,¹⁰⁸ although the court possesses a discretion to order the minor to transfer money, or property representing it, to the other contracting party under s.3(1) of the Minors' Contracts Act 1987.¹⁰⁹

Necessaries for wife or children

- 11-022 There have been some extensions of the doctrine of minors' necessities. Necessaries for a minor's wife are necessities for him,¹¹⁰ though he is not liable on contracts made by his wife unless he has authorised them.¹¹¹ Either spouse is bound by a contract to pay for the funeral of the other where he or she dies leaving no sufficient estate.¹¹²

Loans for necessities

- 11-023 A minor cannot be made liable on a loan advanced to enable him to purchase necessities.¹¹³ If, however, the loan is actually expended on necessities, the lender can recover the amount spent on them under the equitable principle of subrogation laid down in *Marlow v Pitfield*.¹¹⁴ A person who purchased necessities for a minor at his request was held at common law to be entitled to sue the minor for money paid to his use.¹¹⁵ It would seem that today such an action could be maintained either by treating the purchaser as a lender and entitled to invoke the principle of subrogation, or by treating the purchaser as the minor's agent.¹¹⁶ Any security given in respect of a loan is unenforceable even though the money was required for necessities¹¹⁷ and an account stated is voidable despite the fact that some of the items in the account consist of necessities.¹¹⁸ A bill of exchange or promissory note is void both as against the minor and any third person although given in payment of necessities.¹¹⁹ But the person who supplied the necessities can, of course, disregard the account stated or the security and sue for a reasonable price.¹²⁰

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the [Minors' Contracts Act 1987](#), on which see below, paras [11-051](#), [11-061—11-064](#).
- 43 *Peter v Fleming* (1840) 6 M. & W. 42; *Ryder v Wombwell* (1868) L.R. 4 Ex. 32. See below, para.[11-014](#) as to the position of executory contracts for necessities.
- 44 Below, para.[11-013](#).
- 45 s.2 (now Sale of Goods Act 1979 s.3). cf. Mental Capacity Act 2005 s.7, below, paras [11-096](#) —[11-097](#).
- 46 See below, para.[11-014](#).
- 47 *Peters v Flemming* (1840) 6 M. & W. 42; *Ryder v Wombwell* (1869) L.R. 4 Ex. 32; *Nash v Inman* [1908] 2 K.B. 1.
- 48 *Nash v Inman* [1908] 2 K.B. 1, 5, per Cozens-Hardy MR, *Maddox v Miller* (1813) 1 M. & s.738; *Harrison v Fane* (1840) 1 M. & G. 550; *Brooker v Scott* (1843) 11 M. & W. 67; *Ryder v Wombwell* (1869) L.R. 4 Ex. 32. As was noted in *Take-Two Interactive Software Inc v James* [2020] EWHC 179 (Pat), [2020] E.C.D.R.14 at [32], the dictum of Cozens-Hardy MR (and in particular its reference to suitability of goods to a minors "actual requirements at the time") may be limited to the context of sale of goods (as distinct, notably, from contracts for services) as the latter part of its wording echoes the [Sale of Goods Act 1893](#) s.2 (a wording which was retained by the [Sale of Goods Act 1979](#) s.3(3)). cf. the unified treatment of the definition of necessary goods and services under the [Mental Capacity Act 2005](#) s.7(2), which provides that "'Necessary' means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied", on which see below, para.[11-097](#).
- 49 *Barnes & Co v Toye* (1884) 13 Q.B.D. 410; *Johnstone v Marks* (1887) 19 Q.B.D. 509; *Nash v Inman* [1908] 2 K.B. 1.
- 50 *Barnes & Co v Toye* (1884) 13 Q.B.D. 410; *Johnstone v Marks* (1887) 19 Q.B.D. 509. See also *Bainbridge v Pickering* (1780) 2 Wm. Bl. 1325; *Brayshaw v Eaton* (1839) 7 Scott 183; *Foster v Redgrave* (1867) L.R. 4 Ex. 35n.
- 51 *Fawcett v Smethurst* (1914) 84 L.J. K.B. 473.
- 52 [1894] 2 Q.B. 65. See also *Buckpitt v Oates* [1968] 1 All E.R. 1145, 1147–1148.
- 53 Unfair Contract Terms Act 1977 s.2(1) or (as regards contracts made on or after 1 October 2015) the Consumer Rights Act 2015 s.65, depending on whether the minor is a "consumer".
- 54 Consumer Rights Act 2015 Pt 2: see Vol.II, paras [40-243](#) et seq.

- 55 Unlike many of the provisions in the *Sale of Goods Act 1979*, s.3 applies whether or not the buyer is a “consumer” within the meaning of the *Consumer Rights Act 2015*; see further Vol.II, paras 40-474—40-475.
- 56 *Miles* (1927) 43 *L.Q.R.* 389.
- 57 Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 24-14—24-27.
- 58 *Nash v Inman* [1908] 2 *K.B.* 1, 12.
- 59 *Gillick v West Norfolk Area Health Authority* [1986] *A.C.* 112, 169 (minors under 16); the *Family Law Reform Act 1969* s.8 provides that a minor over the age of 16 can consent to medical treatment and see Clerk & Lindsell on *Torts*, 23rd edn (2020, updated to 2022), paras 9-63—9-64 and 9-66 and cf. *R. v D.* [1984] *A.C.* 778, 806 (consent to kidnapping).
- 60 *Roberts v Gray* [1913] 1 *K.B.* 520; *Hamilton v Bennett* (1930) 94 *J.P.N.* 136; *Doyle v White City Stadium Ltd* [1935] 1 *K.B.* 110. See below, para.11-032.
- 61 Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.12-010.
- 62 *Nash v Inman* [1908] 2 *K.B.* 1, 8; *Elkington & Co Ltd v Amery* [1936] 2 *All E.R.* 86, 88; Birks, *An Introduction to the Law of Restitution* (1985), p.436. cf. *Re Rhodes* (1890) 44 *Ch. D.* 94, 105 and *Re J.* [1909] 1 *Ch.* 574, 577, and below, para.11-096 (mental incapacity).
- 63 *Sale of Goods Act 1979* s.3(2) and see Birks at p.436.
- 64 *Pontypridd Union v Drew* [1927] 1 *K.B.* 214, 220.
- 65 See below, para.11-015.
- 66 *Winfield* (1942) 58 *L.Q.R.* 82.
- 67 [1908] 2 *K.B.* 1, 7, 9.
- 68 It is, however, arguable that the words of s.3 of the *Sale of Goods Act* “at the time of the sale and delivery” appear to contemplate one time only. See also Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.12-010. If a minor is liable on an executory contract it would have to be decided whether the goods must be necessary when sold, or at the time when they ought to have been delivered, or perhaps even when the minor refuses to take delivery.
- 69 In *Take-Two Interactive Software Inc v James* [2020] *EWHC* 179 (Pat), [2020] *E.C.D.R.* 14 at [32] it was said that the test of necessary services may differ from that applicable to necessary goods: cf. above, para.11-014 (note).
- 70 *Helps v Clayton* (1864) 17 *C.B.(N.S.)* 553; *De Stacpoole v De Stacpoole* (1887) 37 *Ch. D.* 139; *Re Jones (An Infant)* (1883) 48 *L.T.* 188.
- 71 *Huggins v Wiseman* (1690) *Carth.* 110. But quaere whether this is still so having regard to the National Health Service.
- 72 cf. the position as regards a person lacking mental capacity for necessary goods and services under the *Mental Capacity Act 2005* s.7, below, para.11-097.
- 73 *Chapple v Cooper* (1844) 13 *M. & W.* 252.
- 74 *Walter v Everard* [1891] 2 *Q.B.* 369.
- 75 *Gadd v Thompson* [1911] 1 *K.B.* 304.
- 76 [1913] 1 *K.B.* 520. cf. *Mathews* (1982) 33 *N.Ir.L.Q.* 150, 154—155.
- 77 [1913] 1 *K.B.* 520, 530.
- 78 cf. above, para.11-014.

- 79 *Ryder v Wombwell* (1868) *L.R.* 3 *Ex.* 90.
- 80 cf. *Benmax v Austin Motor Co Ltd* [1955] *A.C.* 370.
- 81 *Stocks v Wilson* [1913] 2 *K.B.* 235, 241–242. As to entire contracts, see below, paras 24-026 et seq.
- 82 See, e.g. *Ryder v Wombwell* (1868) *L.R.* 3 *Ex.* 90.
- 83 Certainly this would be the right course if the minor's liability is based on unjust enrichment; see above, para.11-014.
- 84 *Elkington & Co Ltd v Amery* [1936] 2 *All E.R.* 86.
- 85 *Coates v Wilson* (1804) 5 *Esp.* 152.
- 86 *Jenner v Walker* (1868) 19 *L.T.* 398; cf. *Hewlings v Graham* (1901) 70 *L.J. Ch.* 568; *Elkington & Co Ltd v Amery* [1936] 2 *All E.R.* 86.
- 87 *Clyde Cycle Co v Hargreaves* (1898) 78 *L.T.* 296.
- 88 *Hart v Prater* (1837) 1 *Jur.* 623; cf. *Harrison v Fane* (1840) 1 *M. & G.* 550.
- 89 *Clowes v Brook* (1739) 2 *Str.* 1101.
- 90 *Fawcett v Smethurst* (1914) 84 *L.J. K.B.* 473.
- 91 *Nash v Inman* [1908] 2 *K.B.* 1.
- 92 *Wharton v Mackenzie* (1844) 5 *Q.B.* 606.
- 93 *Ryder v Wombwell* (1869) *L.R.* 4 *Ex.* 32.
- 94 *Bryant v Richardson* (1866) *L.R.* 3 *Ex.* 93.
- 95 *Hamilton v Bennett* (1930) 94 *J.P.N.* 136.
- 96 *Elkington & Co Ltd v Amery* [1936] 2 *All E.R.* 86.
- 97 *Re Mead* [1916] 2 *I.R.* 285.
- 98 *Stocks v Wilson* [1913] 2 *K.B.* 235.
- 99 *Coull v Kolbuc* (1969) 68 *W.W.R.* 76 (*Alberta District Ct*).
- 100 *Take-Two Interactive Software Inc v James* [2020] *EWHC* 179 (*Pat*), [2020] *E.C.D.R.* 14 at [32] per Falk J (summary judgment was granted on other grounds).
- 101 *Lowe v Griffith* (1835) 1 *Scott* 458.
- 102 *Re Jones Ex p. Jones* (1881) 18 *Ch. D.* 109.
- 103 *Mercantile Union Guarantee Corp Ltd v Ball* [1937] 2 *K.B.* 498. But where a minor used goods (supplied to him in his trade) for household purposes he was held liable: *Turberville v Whitehouse* (1823) 1 *Car. & P.* 94.
- 104 *Cowern v Nield* [1912] 2 *K.B.* 419.
- 105 *Roberts v Gray* [1913] 1 *K.B.* 520; *Doyle v White City Stadium Ltd* [1935] 1 *K.B.* 110. cf. *Shears v Mendeloff* (1914) 30 *T.L.R.* 342; below, paras 11-024—11-034.
- 106 *Re Jones Ex p. Jones* (1881) 18 *Ch. D.* 109, 120; *Re Davenport* [1963] 1 *W.L.R.* 817.
- 107 *Re A Debtor (No.564 of 1949)* [1950] *Ch.* 282; *Re Davenport* [1963] 1 *W.L.R.* 817, 819; and see Fletcher, *The Law of Insolvency*, 5th edn (2017), para.5-014.
- 108 *Cowern v Nield* [1912] 2 *K.B.* 419. This decision is supported by Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 34-15—34-16 on the basis that as a matter of policy minors should only have to repay the value of benefits which they still have at the time of the claim.
- 109 See below, paras 11-061—11-064.

- 110 *Rainsford v Fenwick* (1671) *Cart. 215*; *Turner v Trisby* (1718) *1 Str. 168*.
- 111 The wife's "agency of necessity" was abolished by s.41 of the Matrimonial Proceedings and Property Act 1970: see below, para.21-055.
- 112 *Chapple v Cooper* (1844) *13 M. & W. 252*. It was doubted whether a minor would be bound by a contract to pay for the funeral of a parent or other relative: (1844) 13 M. & W. 252 at 260. The common law rule that a husband is always bound to pay for his wife's funeral no longer obtains: *Rees v Hughes* [1946] *K.B. 517*.
- 113 *Darby v Boucher* (1694) *1 Salk. 279*.
- 114 (1719) *1 P. Wms. 558*; *Re National Permanent Benefit Building Society* (1869) *L.R. 5 Ch. App. 309, 313*; *Martin v Gale* (1876) *4 Ch. D. 428*; *Lewis v Alleyne* (1888) *4 T.L.R. 560*; *Orakpo v Manson Investments Ltd* [1978] *A.C. 95*; Birks, An Introduction to the Law of Restitution (1985), p.398. For a similar principle in a different context, see *The Mogileff* (1921) *6 L.I.L. Rep. 528*; *The Airport (No.5)* [1967] *2 Lloyd's Rep. 162*.
- 115 *Ellis v Ellis* (1689) *Comb. 482*; *Earle v Peale* (1712) *10 Mod. 66*.
- 116 See below, para.11-065.
- 117 *Martin v Gale* (1876) *4 Ch. D. 428*.
- 118 *Williams v Moor* (1843) *11 M. & W. 256*. At common law, an account stated may be ratified by the minor on reaching majority: (1843) *11 M. & W. 256* at 266. The Infants Relief Act 1874 s.1, which made void all accounts stated with infants, was repealed by the Minors' Contracts Act 1987 s.1.
- 119 *Re Soltykoff Ex p. Margrett* [1891] *1 Q.B. 413*; cf. Bills of Exchange Act 1882 s.22(2).
- 120 [1891] *1 Q.B. 413*; *Walter v Everard* [1891] *2 Q.B. 369*.

(ii) - Apprenticeship, Employment and Other Beneficial Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 4 - Capacity of Parties

Chapter 11 - Personal Incapacity

Section 2. - Minors ²⁵

(b) - Contracts Binding on a Minor

(ii) - Apprenticeship, Employment and Other Beneficial Contracts

Beneficial contracts

11-024 Since it is of obvious advantage to a minor that he should be able to fit himself for his future trade or profession and to obtain a livelihood, he may enter into contracts of apprenticeship, employment, education and instruction, provided that these are beneficial to him. As was said by Kay LJ in *Clements v London & North Western Ry Co*¹²¹:

“It has been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If it is so, the court before which the question comes will not allow the infant to repudiate it.”

Contracts of apprenticeship at common law

11-025

At common law, a minor may bind himself apprentice to an employer, and after the employer's death to his executors provided that they carry on the same trade in the same place.¹²² The validity of such a contract depends on whether the contract is as a whole, beneficial to the minor at the time when it is entered into.¹²³ If the contract of apprenticeship imposes onerous terms¹²⁴ such as a penalty clause,¹²⁵ or a provision that his wages are to depend on the will of his employer,¹²⁶ or if it places the minor virtually in a position of entire subservience to his employer,¹²⁷ it will be unenforceable. The question of fairness will depend upon whether the clause was common to employment contracts at the time, or accorded with the current conditions of trade, so that the employer was reasonably justified in imposing it in protection to himself.¹²⁸

Formal requirements

- 11-026 Before the [Apprentices Act 1814](#) a deed was necessary to create a valid contract of apprenticeship; and under such a deed the apprentice promised faithfully to serve his employer, and the employer promised to provide proper instruction for the apprentice and to pay him wages. However, the [1814 Act](#) reduced the formality to a requirement that the apprenticeship contract must be in writing¹²⁹ and in 2004 even this requirement was abolished.¹³⁰

Minor's apprenticeship covenants

- 11-027 Although a minor may by contract bind himself apprentice, during the period of apprenticeship no action is maintainable against him on his covenant to serve in such a contract,¹³¹ nor can an injunction be obtained to enforce a negative covenant in the contract.¹³² Accordingly, at one time it was customary for the minor's father or mother to execute the contract so as to covenant for his due performance of the agreement.¹³³ After his apprenticeship has ceased, however, a restrictive covenant in such a contract may be enforced provided that the contract as a whole is for the minor's benefit.¹³⁴

Rescission of contracts of apprenticeship

- 11-028 It has been held that a minor cannot validly agree to rescind a binding contract of apprenticeship unless its rescission would be beneficial and this will not normally be so, since if the contract is beneficial to him its dissolution cannot normally be beneficial.¹³⁵ In a later case this rule was held to mean that a master cannot terminate a contract of apprenticeship made with a minor on the

ground of the latter's breach of his covenants to serve, etc. since the minor cannot by breaking his covenants do indirectly what he may not do directly.¹³⁶ However, in the same case it was noted that earlier authorities on the relationship of master and apprentice dated from a time when the master possessed real and considerable powers of domestic chastisement,¹³⁷ and that (in 1922) these powers no longer existed and that this social change justified an exception to be made to the master's inability to terminate for breach where:

“... there is habitual and systematic conduct, arising out of the character of the apprentice, which renders it impossible that the work of service and of teaching should continue.”¹³⁸

Statutory “apprenticeship agreements”

- 11-029 The [Apprenticeships, Skills, Children and Learning Act 2009](#) recognised a new form of apprenticeship founded on an “apprenticeship agreement”, and set out rules governing, inter alia, its form and certification.¹³⁹ In 2015, the [2009 Act](#) was amended so as to distinguish between “approved English apprenticeships”¹⁴⁰ and “Welsh apprenticeships”.¹⁴¹ Under the [2009 Act](#) as so amended, both “approved English apprenticeships” and “Welsh apprenticeships” are to be treated as “contracts of service” and are not to be treated as “contracts of apprenticeship” for “the purposes of any enactment or rule of law”.¹⁴² It is submitted, therefore, that both “approved English apprenticeships” and “Welsh apprenticeships” concluded by a minor would be subject to the rules explained below governing contracts of employment rather than those governing contracts of apprenticeship, though the two sets of rules are closely related.

Contracts of employment

- 11-030 A contract of employment entered into by a minor is dealt with by the law in the same manner as a contract of apprenticeship. A contract of employment may be binding even if the minor gives up certain rights available under the general law, at least if he gets something equally advantageous in return,¹⁴³ and an agreement to submit disputes to arbitration may also be binding if it forms part of a binding contract of employment.¹⁴⁴ But a contract containing a term by which his work and wages depend on the will of his employer¹⁴⁵ or by which, in consideration of special terms, he contracts to waive all claims for compensation for accident¹⁴⁶ is not binding on him. There are many statutory restrictions on the employment of minors under which it is in general unlawful to employ a person under the age of 14, and the employment of persons between 13 and compulsory

school age is subject to many restrictions.¹⁴⁷ An agreement in breach of these provisions would presumably be unenforceable against the minor.

Covenants in restraint of trade

11-031 If a minor enters into a contract of employment or apprenticeship containing a covenant restraining his freedom to compete after the termination of the contract, it must first be decided whether this provision would have been valid against an adult.¹⁴⁸ But a covenant of this kind may not bind a minor even where it would have bound an adult.¹⁴⁹ Whether, if the covenant is unenforceable, it invalidates the whole contract of employment or apprenticeship may be a difficult question. It seems that in deciding this question regard must be had to the covenant only in so far as it would have been valid against an adult. If, therefore, the covenant is severable according to the ordinary principles governing severance,¹⁵⁰ the question is whether the enforceable part of the covenant (and not the whole covenant) is so unfair or oppressive as to render the whole contract not beneficial.¹⁵¹ It seems to follow that if the whole covenant is unenforceable quite apart from the defence of minority it should be disregarded altogether in deciding whether the remainder of the contract is beneficial to the minor. Where, on the other hand, the covenant is itself valid and does not render the whole contract not beneficial, it may be enforced against the minor by injunction in the usual way.¹⁵²

Education

11-032 At common law a minor could bind himself by a contract for instruction and education, on the same ground as other contracts for necessaries. Having regard to modern statutory provisions for compulsory and free schooling it is doubtful if it could still be regarded as necessary for a minor to contract for ordinary schooling below the school-leaving age except perhaps in very special circumstances.¹⁵³ But a minor can doubtless still bind himself with regard to other forms of education or instruction, and a minor has been held liable under a contract for singing lessons to be paid for by commission on his earnings as a singer.¹⁵⁴ That the contract is executory appears to be immaterial.¹⁵⁵ On the other hand, not every form of instruction or education is appropriate to the status and position of a particular minor, and a contract for unnecessary education is no more binding than a contract for unnecessary goods.¹⁵⁶

Other beneficial contracts

- 11-033 The principle that contracts beneficial to a minor are binding on him is not confined to contracts for necessaries and contracts of employment, apprenticeship or education in a strict sense.¹⁵⁷ It extends also to other contracts which in a broad sense may be treated as analogous to contracts of service, apprenticeship or education.¹⁵⁸ So, for instance, a contract by a minor (who was a professional boxer) with the British Boxing Board of Control whereby he agreed to adhere to the rules of the Board was held binding on him because he could not have earned his living as a boxer without entering into the agreement.¹⁵⁹ Similarly, it has been held that an agreement between a minor and a publisher for the publication of the minor's biography which was to be written by a "ghost writer" was binding on the minor.¹⁶⁰ So also, a contract between a group of underage musicians (known as "The Kinks") whereby they appointed a company as their manager and agent was held binding as analogous to a contract of employment.¹⁶¹ On the other hand, it has been held that a contract by which a footballer aged 15 engaged a person to act as his executive agent and representative in all matters relating to his work as a professional footballer was not analogous to contracts of employment, apprenticeship or education as the agent did not provide any training (which was provided by the professional club where he played) nor did it undertake any matters essential to his livelihood.¹⁶² And there is no general principle to the effect that *any* contract beneficial to a minor is binding on him.¹⁶³ So a minor's trading contracts are not binding on him, even if beneficial.¹⁶⁴

Benefit

- 11-034 Where the contract contains terms, some of which are beneficial to the minor and others not, the question is whether, taken as a whole, it is to his advantage. If it is, he is bound.¹⁶⁵ One stipulation may be so unfair to the minor that it affects the validity of the whole contract¹⁶⁶; but if the agreement as a whole is for his benefit, in principle he cannot pick and choose and adopt those terms while rejecting those terms which are not beneficial or not clearly beneficial.¹⁶⁷ However, as in the case of contracts for necessities, the question of the beneficial (or prejudicial) effect of a contract of employment should be judged after the application of any legal control on the effectiveness on any apparently prejudicial terms.¹⁶⁸

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the **Minors' Contracts Act 1987**, on which see below, paras 11-051, 11-061—11-064.
- 121 [1894] 2 Q.B. 482, 491.
- 122 *Cooper v Simmons* (1862) 7 H. & N. 707.
- 123 *De Francesco v Barnum* (1890) 45 Ch. D. 430; *Dillingham v Harrison* [1917] W.N. 305; *Mackinlay v Bathurst* (1919) 36 T.L.R. 31; *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch. 71; *Aylesbury Football Club* (1997) Ltd v *Watford Association Football Club Ltd* Unreported 12 June 2000, HC.
- 124 *Meakin v Morris* (1884) 12 Q.B.D. 352; *De Francesco v Barnum* (1890) 45 Ch. D. 430.
- 125 *De Francesco v Barnum* (1890) 45 Ch. D. 430, 439. See below paras 29-203 et seq. for the law governing the invalidity of penalty clauses.
- 126 *R. v Lord* (1850) 12 Q.B. 757; *Corn v Matthews* [1893] 1 Q.B. 310; *Meakin v Morris* (1884) 12 Q.B.D. 352; cf. *Green v Thompson* [1899] 2 Q.B. 1.
- 127 *De Francesco v Barnum* (1890) 45 Ch. D. 430.
- 128 *Leslie v Fitzpatrick* (1877) 3 Q.B.D. 229, 232.
- 129 Apprentices Act 1814 s.2; *McDonald v John Twiname Ltd* [1953] 2 Q.B. 304 at 313.
- 130 Statute Law (Repeals) Act 2004 s.1, Sch.1 Pt 8.
- 131 *De Francesco v Barnum* (1889) 43 Ch. D. 165, 171, where it was noted that the master might correct him in service or complain to a justice of the peace to have the apprentice punished under the statute 5 Eliz. c.4. This power was abolished by the **Family Law Reform Act 1969** s.11.
- 132 (1889) 43 Ch. D. 165.
- 133 Where a child is being "looked after" by a local authority within the meaning of the **Children Act 1989** s.22, or is a person qualifying for advice and assistance within the meaning of s.24(2), the authority may undertake any obligation by way of guarantee under any deed of apprenticeship or articles of clerkship which he enters into: s.22F, Sch.2 para.18(1).
- 134 *Cornwall v Hawkins* (1872) 41 L.J. Ch. 435; *Fellows v Wood* (1888) 59 L.T. 513; *Evans v Ware* [1892] 3 Ch. 502; *Gadd v Thompson* [1911] 1 K.B. 304; cf. *Brown v Harper* (1893) 68 L.T. 488.
- 135 *R. v Great Wigston (Inhabitants)* (1824) 3 B. & C. 484.
- 136 *Waterman v Fryer* [1922] 1 K.B. 499.
- 137 [1922] 1 K.B. 499, 506.
- 138 [1922] 1 K.B. 499, 507, per Shearman J citing *Learoyd v Brook* [1891] 1 Q.B. 431 as an example. cf. *McDonald v John Twiname Ltd* [1953] 2 Q.B. 304, 311 (conduct of apprentice falling short of these "extreme examples").
- 139 Apprenticeships, Skills, Children and Learning Act 2009 Pt 1 (as enacted). The provisions on the "prescribed form" were contained in s.32(2)(b) and this form was later designated

as being either “a written statement of particulars of employment” given to the employee/apprentice or “a document in writing in the form of a letter of engagement” as foreseen by the [Employment Rights Act 1996](#): the [Apprenticeships \(Form of Apprenticeship Agreement\) Regulations 2012 \(SI 2012/844\) reg.2](#), referring to the [Employment Rights Act 1996](#) ss.2 and [7A](#) respectively (with the exceptions specified by the Regulations). In 2015, s.32 was amended so as to apply only to “Welsh apprenticeships”, as explained in the following text and notes.

- 140 [Apprenticeships, Skills, Children and Learning Act 2009](#), esp. Ch.A1 as inserted by the [Deregulation Act 2015](#) Sch.1 para.1 and as amended by the [Technical and Further Education Act 2017](#).
- 141 [Apprenticeships, Skills, Children and Learning Act 2009](#) ss.2, [7–12](#), [18–22](#), [28–36](#) (as amended).
- 142 [Apprenticeships, Skills, Children and Learning Act 2009](#) s.A5 (approved English apprenticeships) and s.35 (Welsh apprenticeships).
- 143 [Clements v L. & N.W. Ry \[1894\] 2 Q.B. 482](#).
- 144 [Slade v Metrodent Ltd \[1953\] 2 Q.B. 112](#).
- 145 [R. v Lord \(1848\) 12 Q.B. 757](#).
- 146 [Flower v London & N.W. Ry Co \[1894\] 2 Q.B. 65](#); [Butterfield v Sibbitt \[1950\] 4 D.L.R. 302](#); [Buckpitt v Oates \[1968\] 1 All E.R. 1145](#). Such a term would since 1977 not be effective where liability in the employer is for negligence: [Unfair Contract Terms Act 1977](#) s.2(1).
- 147 See [Children and Young Persons Act 1933](#) s.18 (as amended), s.30(1)(a) (“child” to be defined as someone who is not over “compulsory school age” under [Education Act 1996](#) s.8). For the purposes of the [1933 Act](#), the “employment” of children is not restricted to children who are employed under a contract of service and extends to those working under contracts for services: [Bebbington v Palmer \(t/a Sturry News\) \(EAT, 23 February 2010\)](#) at [42]–[43]).
- 148 See below, paras 18–123 et seq.
- 149 [Sir W.C. Leng & Co Ltd v Andrews \[1909\] 1 Ch. 763](#); [Gadd v Thompson \[1911\] 1 K.B. 304](#); [Express Dairy Co v Jackson \(1930\) 99 L.J. K.B. 181, 183](#).
- 150 See below, paras 18–252 et seq.
- 151 [Bromley v Smith \[1909\] 2 K.B. 235](#).
- 152 [Gadd v Thompson \[1911\] 1 K.B. 304](#) (minor apprentice).
- 153 cf. [Practice Direction \(Minor: School Fees\) \[1980\] 1 W.L.R. 1441](#); [Practice Direction \(Minor: Payment of School Fees\) \[1983\] 1 W.L.R. 800](#); [Sherdley v Sherdley \[1988\] A.C. 213, 225](#).
- 154 [Mackinlay v Bathurst \(1919\) 36 T.L.R. 31](#).
- 155 cf. above, para.11–016.
- 156 [Hamilton v Bennett \(1930\) 94 J.P.N. 136](#).
- 157 This paragraph in the 28th edition of the present work was quoted as an accurate statement of the law in [Proform Sports Management Ltd v Proactive Sports Management Ltd \[2006\] EWHC 2903 \(Ch\), \[2007\] Bus. L.R. 93](#) at [35].
- 158 [Roberts v Gray \[1913\] 1 K.B. 525](#).
- 159 [Doyle v White City Stadium Ltd \[1935\] 1 K.B. 110](#).

- 160 *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch. 71.
- 161 *Denmark Productions Ltd v Boscobel Productions Ltd* (1967) 111 S.J. 715 reversed on other grounds [1969] 1 Q.B. 699; cf. *Shears v Mendeloff* (1914) 30 T.L.R. 342 where the contract contained oppressive terms and was void.
- 162 *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch), [2007] Bus. L.R. 93 at [35]–[41].
- 163 *Martin v Gale* (1876) 4 Ch. D. 428, 431; *Mercantile Union Guarantee Corp Ltd v Ball* [1937] 2 K.B. 498; *Bojczuk v Gregorczewicz* [1961] S.A.S.R. 128; *Sellin v Scott* (1901) 1 S.R.(N.S.W.) Eq. 64; but cf. *Slade v Metrodent Ltd* [1953] 2 Q.B. 112, 115.
- 164 *Cowern v Nield* [1912] 2 K.B. 419, above, para.11-020.
- 165 *De Francesco v Barnum* (1890) 45 Ch. D. 430, 439; *Clements v London & N.W. Ry* [1894] 2 Q.B. 482; *Roberts v Gray* [1913] 1 K.B. 520; *Doyle v White City Stadium Ltd* [1935] 1 K.B. 110; *IRC v Mills* [1975] A.C. 38, 53.
- 166 *R. v Lord* (1848) 12 Q.B. 757; *Meakin v Morris* (1884) 12 Q.B.D. 352; *Corn v Matthews* [1893] 1 Q.B. 310; *Flower v London & N.W. Ry Co* [1894] 2 Q.B. 65; *Stephens v Dudbridge Ironworks Co* [1904] 2 K.B. 225; *Express Dairy Co v Jackson* (1930) 99 L.J. K.B. 181.
- 167 *Slade v Metrodent Ltd* [1935] 2 Q.B. 112.
- 168 Above, para.11-012.

(iii) - Settlements or Compromises Approved by the Court

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Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 4 - Capacity of Parties

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(b) - Contracts Binding on a Minor

(iii) - Settlements or Compromises Approved by the Court

CPR r.21.10

¹¹⁻⁰³⁵ Rule 21.10(1) of the Civil Procedure Rules (CPR) provides that:



“Where a claim is made—

- (a)by or on behalf of a child or protected party; or
- (b)against a child or protected party,

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.”

This requirement of approval has been held to apply to the settlement of a claim made on behalf of a child even before any proceedings were begun.

¹⁶⁹

U It is clearly the main purpose of r.21.10 to protect the interests of children and other “protected parties” (i.e. persons under a mental incapacity¹⁷⁰), but it also provides “a means by which a defendant may obtain a valid discharge from a child or protected party’s claim”.¹⁷¹ As a result, it

has been held that r.21.10 carves out a special exception to the general rules governing the validity of contracts made by children and “protected parties” so as to require court approval even where the agreement would otherwise be binding on them.¹⁷² Conversely, any settlement or compromise approved by the court under r.21.10 is binding on the child even where it would not otherwise bind him under the general law governing minors’ contracts. The court’s discretion under r.21.10 extends to the approval of a settlement or compromise retrospectively, that is, in circumstances where the parties did not obtain the court’s approval for a settlement made in the course of earlier proceedings.¹⁷³ The court’s discretion as to approval has been described as “unfettered”,¹⁷⁴ but the court will take into account that the purpose of the requirement of approval is to ensure the protection of the minor and to ensure that his best interests are served, while taking into account the interests of the other party to the settlement or compromise (for example, as regards any prejudice caused by delay) and the interests of good administration of justice more generally, notably, the “certainty of outcome and finality of judgments”.¹⁷⁵ While it was said (under the former procedural rules which made similar provision¹⁷⁶) that the court has no power to compel a compromise against the opinion of the minor’s advisers,¹⁷⁷ it has been held that this does not apply where the compromise was made by the incapable person himself in circumstances where the only objection to the enforceability of the compromise is that the approval of the court is required.¹⁷⁸

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors’ contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors’ Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission’s Report on Minors’ Contracts (1984) Law Com. No.134 led to the *Minors’ Contracts Act 1987*, on which see below, paras 11-051, 11-061—11-064.
- ①169 *Dietz v Lennig Chemicals Ltd [1969] 1 A.C. 170; Drinkall v Whitwood [2003] EWCA Civ 1547, [2004] 1 W.L.R. 462; Dunhill v Burgin [2014] UKSC 18, [2014] 1 W.L.R. 933* at [23]. On the interaction between the requirement of court approval in r.21.10(1) and the rules governing Pt 36 offers to settle see *Wormald v Ahmed [2021] EWHC 973 (QB), [2021] 1 W.L.R. 3560* esp. at [60]–[64].
- 170 See below, paras 11-092 and 11-098.
- 171 Civil Procedure 2015 (2015), Section A, r.21.10.1, Introduction.
- 172 *Dietz v Lennig Chemicals Ltd [1969] 1 A.C. 170* (rejecting counsel’s argument that a settlement was binding without the court’s approval as being for the benefit of the child); *Dunhill v Burgin [2014] UKSC 18, [2014] 1 W.L.R. 933* at [30] in the context of mental incapacity on which see below para.11-098.

- 173 *Masterman-Lister v Brutton & Co (Nos 1 & 2) [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511* at [31] (Kennedy LJ); *Bailey v Warren [2006] EWCA Civ 51, [2006] C.P. Rep. 26* at [180].
- 174 *Bailey v Warren [2006] EWCA Civ 51, [2006] C.P. Rep. 26* at [180] per Ward LJ (in the context of a possible retroactive approval of a settlement by a mentally incapable person), referring to *Masterman-Lister v Brutton & Co (Nos 1 & 2) [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511* at [31] (Kennedy LJ).
- 175 *Bailey v Warren [2006] EWCA Civ 51, [2006] C.P. Rep. 26* at [182]–[184] per Ward LJ and cf. at [95]–[96] (Hallett LJ) and [140]–[144] (Arden LJ). cf. *Rhodes v Swithenbank (1889) 22 Q.B.D. 577*; *Mattei v Vautro (1898) 78 L.T. 682* where it was said (under earlier rules) that a compromise will not be sanctioned, although made in good faith, if not for the minor's benefit.
- 176 RSC Ord.80 rr.10, 11; CCR Ord.10 r.10.
- 177 *Re Birchall (1880) 16 Ch. D. 41*; *Norman v Strains (1880) 6 P.D. 219*. See also *Re Taylor's Application [1972] 2 Q.B. 369*.
- 178 *Bailey v Warren [2006] EWCA Civ 51, [2006] C.P. Rep. 26* at [94], [139] and [168].

(c) - Contracts Binding on a Minor Unless Repudiated

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Section 2. - Minors²⁵

(c) - Contracts Binding on a Minor Unless Repudiated

Contracts for an interest of a permanent nature

- 11-036 Where a minor enters into a contract which involves the acquisition of an interest in property of a permanent nature, with continuing obligations attached to it, he may avoid it at his option either before, or within a reasonable time after, attaining his majority.¹⁷⁹ But until he does so avoid it, he is bound to carry out the obligations as they become due; and if he waits until attaining his majority before avoiding the contract, he must then act promptly and clearly, or he will be bound by the contract for its full term. The reason for this was explained by Parke B. in *North Western Ry Co v M'Michael*,¹⁸⁰ a case where a minor was sued for a call on railway shares. The learned Baron, after referring to various cases¹⁸¹ in which it had been held that minor shareholders in railway companies were liable for calls on their shares whilst they were minors, continued:

“They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature ... and with certain obligations attached to it, which they were bound to discharge, and having been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate, or instance, to pay rent in the case of a lease rendering rent ... unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so.”¹⁸²

- 11-037 Despite this explanation there does not seem to be any general principle to the effect that *any* contract conferring an interest in a subject matter of a permanent nature is valid until repudiated.¹⁸³ There appear to be four types of case which fall within this category though it is not clear whether these are exhaustive. These are contracts to lease or purchase land, marriage settlements, contracts to subscribe for or to purchase shares, and partnerships. On the other hand, a contract of hire or of hire-purchase entered into by a minor as hirer is either valid (if for necessaries) or unenforceable against the minor without a need for repudiation.¹⁸⁴

Benefit

- 11-038 There is old authority for the view that the underlying principle is one of benefit to the minor—that is, if the contract were beneficial to the minor, he could not avoid it at all,¹⁸⁵ whereas if it were not beneficial, he was not bound at all.¹⁸⁶ But since the mid-nineteenth century it has been established that even if the contract is not beneficial, the minor is bound if he takes possession of the property, but only until he disclaims within the time stated.¹⁸⁷

Contracts to lease or purchase land

- 11-039 At common law a lease to a minor was voidable only,¹⁸⁸ but even during his minority he was liable for accrued rent, if he had gone into occupation.¹⁸⁹ If he continued in occupation after attaining his majority he was liable for rent which had accrued prior to that date.¹⁹⁰ He was entitled to repudiate the lease either during his minority or within a reasonable time of attaining full age.¹⁹¹ It seems that a contract by a minor to purchase freehold land is also in this category, i.e. the contract is binding unless and until repudiated by the minor,¹⁹² at all events where there are outstanding obligations on the minor after completion. If there are no such obligations outstanding the question is really academic for even if the minor can repudiate the contract after completion he cannot recover the purchase price.¹⁹³

Conveyances to minors

- 11-040 Since 1926, a minor has not been able to acquire or hold any legal estate,¹⁹⁴ nor has a minor been able to be a tenant for life or exercise the powers of a tenant for life.¹⁹⁵ A conveyance or lease to a minor has taken effect only as an agreement for valuable consideration to execute a settlement in

his favour, and in the meantime to hold the land in trust for him.¹⁹⁶ The 1925 property legislation did not, however, affect a minor's beneficial interest, or prevent his holding an equitable interest in settled land.¹⁹⁷ However, this position was altered by the [Trusts of Land and Appointment of Trustees Act 1996](#) as the latter repealed the provisions of the earlier legislation regarding the effect of conveyance or lease to a minor,¹⁹⁸ and instead provided that after its commencement a conveyance of a legal estate to a minor takes effect as a declaration of trust and that, where immediately before its commencement a conveyance is operating as an agreement to execute a settlement in favour of a minor, the agreement ceases to have effect and subsequently operates instead as a declaration that the land is held in trust for the minor.¹⁹⁹ In effect, therefore, the common law rule with regard to leases to minors is preserved. Equity will not allow a minor who has had the benefit of the statutory trusts to affirm them upon his majority and afterwards to say that he is not liable upon their obligations.²⁰⁰

Minor housed as “homeless person”

11-041 Where a local authority, in exercise of its statutory duty to house a homeless person aged between 16 and 17 under the [Housing Act 1996](#), granted a tenancy to such a minor on its standard form for legal tenancies made with adult tenants, the Court of Appeal held that this grant took effect as an equitable tenancy under the [Trusts of Land and Appointment of Trustees Act 1996](#), thereby constituting the local authority trustee of the legal estate of the lease for the benefit of the tenant.²⁰¹ The tenant had argued that the local authority could not terminate the tenancy by notice under one of its clauses as “it could not lawfully destroy the subject matter of the trust by serving notice to quit” and the Court of Appeal agreed,²⁰² holding that the effect of the [1996 Act](#) meant that, in the absence of any other trustee, the local authority:

“... was in the uncomfortable position of being both lessor and trustee, and in the former capacity of being not merely a party to the breach of trust, but the instigator of the breach of trust. In these particular circumstances ... service of notice to quit only on the minor beneficiary of the trust was not sufficient to terminate the tenancy that was being held by the [local authority] on her behalf.”²⁰³

In recognising the practical difficulties to which this decision may be thought to give rise, Waller LJ suggested that local authorities could fulfil their duties under the [Housing Act 1996](#) and their social services functions by agreeing with minors aged 16 to 17 years licences to occupy their dwellings rather than tenancies or by granting leases until the end of minority.²⁰⁴

Minors as successors to secured or statutory tenants

- 11-042 In *Kingston upon Thames RBC v Prince*²⁰⁵ the question arose whether a minor who was otherwise qualified to succeed to a secure periodic tenancy under the provisions of the **Housing Act 1985** could do so despite her minority. The Court of Appeal held that such a minor could so succeed.²⁰⁶ According to Hale J:

“... a minor is quite capable of becoming a tenant, albeit in equity ... If there is nothing to stop a local authority granting a tenancy effective in equity to a minor in appropriate circumstances there can be no insuperable technical objection to Parliament rendering that equitable tenancy secure. If Parliament had wanted to limit these provisions to adults it could easily have done so: but it did not.”²⁰⁷

The Court of Appeal therefore ordered that the minor be declared to be the secure tenant of the property in question until she reached the age of majority and the legal estate in relation to the said equitable tenancy be held on trust by the minor’s mother until that time. Hale J further observed that where a tenancy was for a term certain, an otherwise qualified minor could succeed the deceased tenant as a secured tenant under the **1985 Act** here:

“... the deceased’s estate will continue to hold the legal estate on trust for the minor until she reaches the age of 18 when she can call for a conveyance of the legal estate.”²⁰⁸

Hale J also noted with approval that “it has been established for some time, apparently uncontroversially, that a minor can succeed to a statutory tenancy under the Rent Acts”.²⁰⁹

Marriage settlements

- 11-043 Further instances of contracts which are binding on a minor unless repudiated are to be found in marriage settlements and agreements for marriage settlements. They can be avoided by the minor within a reasonable time of coming of age.²¹⁰ But he must accept or reject them in their entirety. He cannot take the benefit and refuse to accept a burden.²¹¹ If he elects to avoid the settlement, any interest taken by the minor in property brought into the settlement by the other party may be taken away to make up to the beneficiaries the loss which they have sustained because of the avoidance.²¹²

Shareholder underage

- 11-044 A minor may be a shareholder in a company regulated by the [Companies Clauses Consolidation Act 1845](#),²¹³ or by the [Companies Act 1985](#), or in any corporation formed under a statute which authorises, either expressly or by implication, the membership of minors, or which by its nature does not prohibit their membership.²¹⁴ A contract by a minor to subscribe for shares in the company may be repudiated either while he is underage or within a reasonable time of attaining full age,²¹⁵ but until he does so he is liable for calls made even while he is underage.²¹⁶ If he wishes to avoid the contract after coming of age he must do so promptly or he will be bound by acquiescence.²¹⁷

Purchase of shares

- 11-045 If a minor purchases shares in the market and thereafter becomes registered as a shareholder there are two contracts whose validity may come into question, viz that between the minor and the company, and that between the minor and the vendor. In the nineteenth century there were a number of decisions concerning the validity of a transfer of partly paid-up shares to a minor, and the liability of the transferor to pay calls or to contribute in a winding up.²¹⁸ In these cases it was held that the transferor generally remained liable for calls notwithstanding that the minor had been registered as a shareholder. But although it was said in these cases that a transfer of shares to a minor was voidable none of them actually raised any question as to the validity of the contracts made between the minor on the one hand and the vendor or the company on the other. So far as the contract with the company is concerned the question is largely academic for the only liability likely to be enforceable against the shareholders is the obligation to pay calls, and partly paid-up shares are rarely met with today. But if the question were raised it would seem that the position must be the same as in the case of shares applied for by the minor and allotted to him by the company itself, i.e. the contract would be binding unless and until repudiated.²¹⁹ As to the contract between the minor and the vendor of the shares it is uncertain whether the contract is unenforceable against the minor, or whether it is voidable in the sense that it is binding until repudiated. It is submitted that such a contract would be unenforceable against the minor, but any price paid by him would be irrecoverable unless there was a total failure of consideration.²²⁰

Partnerships

- 11-046

A minor who becomes a member of a partnership is, as between himself and his partners, bound by the contract unless and until he repudiates it.²²¹ He does not become liable to partnership creditors for debts or liabilities incurred while he is a minor,²²² but if he repudiates the partnership agreement while still a minor or within a reasonable time of coming of age, his co-partners may insist on all partnership debts being paid and liabilities being met before the minor can draw any profits or capital from the firm.²²³ It seems that the creditors may also avail themselves of this right of the minor's partners in appropriate proceedings.²²⁴ Furthermore, even if the minor repudiates before attaining his majority he may still become liable for partnership debts subsequently incurred on the holding-out principle, by which a person who holds himself out as being a partner is bound to those who deal with the firm upon the faith of that supposed partnership.²²⁵

Effect of avoidance

11-047 In all contracts of this class, namely, contracts involving the acquisition of an interest in property of a permanent nature with continuing obligations attached to it, the effect of avoidance by the minor is that he escapes from liability to perform obligations which have not accrued at the time of avoidance. He has, however, to meet obligations which have already accrued²²⁶; moreover, he can recover nothing which he has paid under the contract unless there has been a total failure of consideration.²²⁷ So, where a minor paid a premium to the defendant on taking a lease from him, and entered upon and used and enjoyed the premises for a short period before he came of age, he could not recover the premium.²²⁸ And where a minor applied for and was allotted shares in a company and paid the amounts due on allotment and on the first call, it was held that upon subsequently repudiating while still underage she could not recover back what she had paid, for although she had received no dividends she had received "the very consideration for which she bargained".²²⁹ The requirement of total failure of consideration has been criticised on the basis that:

"... [t]he policy justification for allowing minors out of contracts—that the minor's consent should not count because one needs to protect the young against foolishness and poor judgment—should surely be fully carried over to restitution of an unjust enrichment."²³⁰

Instead, it is argued, the minor's ability to avoid the contract should be subject to restitutio in integrum being possible, with the result that:

"A minor who cannot restore the status quo ante should be unable to avoid the contract; but if he has restored the status quo, then he should be able to avoid the contract and recover benefits conferred thereunder."²³¹

Time of avoidance

- 11-048 As earlier explained, in this category of contract a minor may avoid a contract within a reasonable time after attaining his majority, as well as during his minority. What is a reasonable time after attaining majority will depend upon the circumstances of each particular case.²³² A minor cannot plead ignorance of his right to repudiate as an excuse for his failure to exercise that right within a reasonable time²³³ nor even that the property had not yet come into possession, so that there was nothing certain on which the repudiation could operate.²³⁴

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the *Minors' Contracts Act 1987*, on which see below, paras 11-051, 11-061—11-064.
- 179 Presumably the minor could not affirm and then repudiate the transaction, even if he acted within a reasonable time. cf. the principle stated in para.11-039, below.
- 180 *(1850) 5 Ex. 114*, 123, 124, 127, 128.
- 181 *Cork and Bandon Ry v Cazenove (1847) 10 Q.B. 935*; *Leeds & Thirsk Ry Co v Fearnley (1849) 4 Ex. 26*.
- 182 *(1850) 5 Ex. 114*, 123–124.
- 183 The discussion in this paragraph was cited by the court in the context of an application for summary judgment in *Take-Two Interactive Software Inc v James [2020] EWHC 179 (Pat), [2020] E.C.D.R. 14* at [28]–[30], where Falk J was not prepared to accept without argument either that a contract of license of a computer game to a minor conferred an interest in that minor of a permanent nature, or that, for this purpose, it did not need to fall within one of the established categories noted in the text.
- 184 See *Mercantile Union Guarantee Corp v Ball [1937] 2 K.B. 498*. For criticism see Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-027.
- 185 *Maddon v White (1787) 2 Term Rep. 159*.
- 186 *Ketsey's Case (1614) Cro. Jac. 320*; *Brownlow 120 (Kirton v Elliott 2 Bulst. 69)*.

- 187 *North Western Ry Co v M'Michael* (1850) 5 Ex. 114, 128.
- 188 *Davies v Beynon-Harris* (1931) 47 T.L.R. 424.
- 189 *Blake v Concannon* (1870) 4 Ir. Rep. C.L. 323; *Kelly v Coote* (1856) 5 Ir. C.L.R. 469.
- 190 *Blake v Concannon* (1870) 4 Ir. Rep. C.L.
- 191 *Holmes v Blogg* (1818) 8 Taunt. 508.
- 192 *Thurston v Nottingham Permanent Benefit Building Society* [1902] 1 Ch. 1, 9, affirmed [1903] A.C. 6; *Whittingham v Murdy* (1889) 60 L.T. 956.
- 193 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452, a case dealing with the purchase of shares.
- 194 Law of Property Act 1925 s.1(6).
- 195 Settled Land Act 1925 ss.19, 20.
- 196 Law of Property Act 1925 s.19; Settled Land Act 1925 s.27(1); *Kingston upon Thames BC v Prince* [1999] 1 F.L.R. 593.
- 197 Law of Property Act 1925 s.19; Settled Land Act 1925 ss.26, 27.
- 198 Trusts of Land and Appointment of Trustees Act 1996 s.25(2), Sch.4 repealing Law of Property Act 1925 s.19; Settled Land Act 1925 s.27.
- 199 Trusts of Land and Appointment of Trustees Act 1996 s.2, Sch.1 para.1(1), (3). The Act came into force on 1 January 1997: *Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996* (SI 1996/2974).
- 200 *Davies v Beynon-Harris* (1931) 47 T.R.R. 424.
- 201 *Alexander-David v Hammersmith and Fulham LBC* [2009] EWCA Civ 259, [2010] 2 Ch. 272.
- 202 *Alexander-David v Hammersmith and Fulham LBC* [2009] EWCA Civ 259 at [31].
- 203 *Alexander-David v Hammersmith and Fulham LBC* [2009] EWCA Civ 259 at [35], per Waller LJ (with whom Scott Baker and Sullivan LJJ agreed).
- 204 [2009] EWCA Civ 259 at [37] and [38].
- 205 [1999] 1 F.L.R. 593.
- 206 [1999] 1 F.L.R. 593, 600 so interpreting Housing Act 1985 s.89.
- 207 [1999] 1 F.L.R. 593, 601.
- 208 [1999] 1 F.L.R. 593, 600, so interpreting Housing Act 1985 s.90. See also *Alexander-David v Hammersmith and Fulham LBC* [2009] EWCA Civ 259 at [22].
- 209 [1999] 1 F.L.R. 593, 596, citing *Portman Registrars v Mohammed Latif* [1987] 6 C.L. 217 (Willesden County Court).
- 210 *Burnaby v Equitable Revisionary Interest Society* (1885) 28 Ch. D. 416; *Cooper v Cooper* (1888) 13 App. Cas. 88; *Duncan v Dixon* (1890) 44 Ch. D. 211; *Edwards v Carter* [1893] A.C. 360. *Kingsman v Kingsman* (1880) 6 Q.B.D. 122, which appears to suggest that such a contract is void rather than voidable, can no longer be relied on.
- 211 *Codrington v Codrington* (1875) L.R. 7 H.L. 854; *Hamilton v Hamilton* [1892] 1 Ch. 396. cf. *Re Vardon's Trusts* (1885) 31 Ch. D. 275 as to which see *Re Hargrove* [1915] 1 Ch. 398.
- 212 *Hamilton v Hamilton* [1892] 1 Ch. 396; *Carter v Silber* [1891] 3 Ch. 553.
- 213 s.79.
- 214 *Seymour v Royal Naval School* [1910] 1 Ch. 806, 813.

- 215 *Newry and Enniskillen Ry Co v Coombe* (1849) 3 Ex. 565; *North Western Ry Co v M'Michael* (1850) 5 Ex. 114; *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch. 589; *Re Alexandra Park Co* (1868) L.R. 6 Eq. 512.
- 216 *Leeds & Thirsk Ry v Fearnley* (1849) 4 Ex. 26; *Birkenhead, etc., Ry v Pilcher* (1850) 5 Ex. 121; *North Western Ry Co v M'Michael* (1850) 5 Ex. 114; *Dublin and Wicklow Ry v Black* (1852) 8 Ex. 181. Unless perhaps he has derived no advantage from the shares and is still a minor: *Newry and Enniskillen Ry Co v Coombe* (1849) 3 Ex. 565.
- 217 *Cork and Bandon Ry Co v Cazenove* (1847) 10 Q.B. 935; *Dublin and Wicklow Ry Co v Black* (1852) 8 Ex. 181.
- 218 *Gooch's Case* (1872) L.R. 8 Ch. App. 266; *Capper's Case* (1868) L.R. 3 Ch. App. 458; *Merry v Nickalls* (1872) L.R. 7 Ch. App. 733; *Lumsden's Case* (1868) L.R. 4 Ch. App. 31; *Curtis's Case* (1868) L.R. 6 Eq. 455; *Re Crenver and Wheal Abraham United Mining Co* (1872) L.R. 8 Ch. App. 45.
- 219 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452, a case of allotment and not purchase in the market; and see *Capper's Case* (1868) L.R. 3 Ch. App. 458, 461.
- 220 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452, 458. cf. *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch. 589. For criticisms of this position, see below, para.11-047 and cf. below, paras 32-049 et seq. on recovery of money paid under a mistake of law.
- 221 *Goode v Harrison* (1821) 5 B. Ald. 147. Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-022, n.87 suggests that the same rules appear to apply to the relations between persons who become members of a limited liability partnership if one or more of them is a minor, noting that ss.4 and 5 of the Limited Liability Partnerships Act 2000 make no mention of minority. Such a minor's liability to contribute to the assets of the partnership would seem to be governed by the rules governing a minor who subscribes for shares in a company: above, para.11-045.
- 222 *Lovell & Christmas v Beauchamp* [1894] A.C. 607.
- 223 [1894] A.C. 607.
- 224 [1894] A.C. 607, 611.
- 225 *Goode v Harrison* (1821) 5 B. Ald. 147, 157; see below, paras 21-063 et seq.
- 226 *Cork & Bandon Ry Co v Cazenove* (1847) 10 Q.B. 935. cf. *North Western Ry Co v M'Michael* (1850) 5 Ex. 114, 125; *Newry and Enniskillen Ry Co v Coombe* (1849) 3 Ex. 565.
- 227 See Burrows, The Law of Restitution, 3rd edn (2012), pp.312–314 (who describes this position as the “unsatisfactory but predominant view in the authorities”): for criticisms, see below.
- 228 *Holmes v Blogg* (1818) 8 Taunt. 508; cf. *Re Burrows* (1856) 8 De G.M. & G. 254.
- 229 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452. Insofar as *Hamilton v Vaughan-Sherrin Engineering Co* [1894] 3 Ch. 589 decides to the contrary, it must be taken to have been overruled. cf. below, paras 32-049 et seq. on recovery of payments made under a mistake of law.
- 230 Burrows, The Law of Restitution, 3rd edn (2012), pp.312–314; Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), paras 24-21 et seq.

- 231 Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.24-21; Burrows, *The Law of Restitution*, 3rd edn (2012), p.313.
- 232 See *Carter v Silber [1892] 2 Ch. 278*, affirmed sub nom. *Edwards v Carter [1893] A.C. 360*; *Carnell v Harrison [1916] 1 Ch. 328* (disapproving *Re Jones [1893] 2 Ch. 461*).
- 233 *Carnell v Harrison [1916] 1 Ch. 328*.
- 234 *Edwards v Carter [1893] A.C. 360*.

(d) - Contracts Unenforceable Against a Minor Unless Ratified

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(d) - Contracts Unenforceable Against a Minor Unless Ratified

Contracts not binding until ratified

- 11-049 The largest class of minor's contracts are enforceable by the minor, but are not binding upon him unless he expressly ratifies them upon coming of age.²³⁵ For this purpose:

“... in order to be a ratification there must be a recognition, by the debtor after he attained his majority, of the debt as a debt binding upon him.”²³⁶

It is in this sense that general propositions as to minors' incapacity should be understood. Indeed, were it otherwise, the minor's incapacity, instead of being an advantage to him might in many cases turn greatly to his disadvantage.²³⁷ The class includes all contracts other than those for necessaries, beneficial contracts of employment and contracts for the acquisition of a permanent interest in property which are valid unless expressly avoided.²³⁸ Thus, a minor may sue but may not be sued upon an account stated²³⁹ or upon a contract for the sale of goods (other than necessaries) or any other simple contract. It was also held, for example (before the abolition of actions for breach of promise of marriage), that a minor could sue an adult for breach of promise of marriage,²⁴⁰ although the adult could not sue the minor on such a promise.²⁴¹ And a minor can maintain an action for money had and received against an attorney for damages recovered by his next friend in an action brought on his behalf.²⁴² A minor cannot, however, obtain specific performance of a contract because the remedy would not be mutual,²⁴³ at any rate not unless he has himself performed his side of the agreement.²⁴⁴

Examples

- 11-050 The general rule that a minor's contracts are not binding on him unless ratified on attaining his majority has the consequence that a minor is not, at common law, liable on a warranty of goods or chattels sold by him²⁴⁵ even where the warranty is fraudulent.²⁴⁶ Nor is he liable on the custom of the realm as an innkeeper.²⁴⁷ He is not bound by an agreement to refer a dispute to arbitration²⁴⁸; nor by the recitals in a deed made during infancy²⁴⁹; nor by a release of a legal claim²⁵⁰; nor by a contract of guarantee.²⁵¹

Ratification after full age

- 11-051 At common law, the general rule in this class of contract is that if, on attaining his majority, a minor ratifies a contract made by him during his minority, it will bind him although there may be no consideration for the new promise.²⁵² Formerly, this rule was replaced by [s.2 of the Infants Relief Act 1874](#) which provided that debts contracted during infancy were made incapable of becoming binding by ratification by the minor on majority, unless new consideration for such ratification was provided.²⁵³ This provision was itself repealed in 1987,²⁵⁴ returning the law relating to ratification to the position at common law. Ratification after reaching majority may be express or implied from the former minor's conduct.²⁵⁵

Footnotes

- ²⁵ The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the [Minors' Contracts Act 1987](#), on which see below, paras [11-051](#), [11-061—11-064](#).
- ²³⁵ But see below, para. [11-052](#) in relation to third parties and minor's incapacity.
- ²³⁶ *Rowe v Hopwood (1868–1869) L.R. 4 Q.B. 1, 3*, per Cockburn CJ (decided under the [Statute of Frauds \(Amendment\) Act 1828 s.5](#)).

- 237 *Warwick v Bruce* (1813) 2 M. & s.205; *Shannon v Bradstreet* (1803) 1 Sch. & Lcf. 52, 58; *Re Smith's Trusts* (1890) 25 L.R. Ir. 439, 443.
- 238 See above, paras 11-010, 11-036. See also above, para.11-035 as regards settlement or compromises approved by the court.
- 239 *Williams v Moor* (1843) 11 M. & W. 256.
- 240 *Holt v Ward* (1732) 2 Str. 937, 939.
- 241 *Hale v Ruthven* (1869) 20 L.T. 404.
- 242 *Collins v Brook* (1860) 5 Hurl. & N. 700.
- 243 *Flight v Bolland* (1828) 4 Russ. 298. By the same token, specific performance cannot be obtained against an adult who is co-defendant with a minor: *Lumley v Ravenscroft* [1895] 1 Q.B. 683, commented on in *Basma v Weekes* [1950] A.C. 441, 456.
- 244 See below, para.30-065.
- 245 *Howlett v Haswell* (1814) 4 Camp. 118.
- 246 *Green v Greenbank* (1816) 2 Marsh. 485.
- 247 *Williams v Harrison* (1691) Carth. 160; 1 Roll.Abr. Action sur Case, D (3).
- 248 Unless it forms one term of an otherwise beneficial contract of service, etc.: *Slade v Metrodent Ltd* [1953] 2 Q.B. 112.
- 249 *Milner v Lord Harewood* (1810) 18 Ves. Jr. 259, 274; *Field v Moore* (1854) 7 De G.M. & G. 691.
- 250 *Overton v Banister* (1844) 3 Hare 503; *Mattei v Vautro* (1898) 78 L.T. 682. But see CPR r.21.10(2), above, para.11-035, which enables the court to sanction a compromise by a minor even where no proceedings are otherwise contemplated, on which see *Drinkall v Whitwoord* [2003] EWCA Civ 1547, [2004] 1 W.L.R. 462 applying *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170.
- 251 *Re Davenport* [1963] 1 W.L.R. 817.
- 252 *Southerton v Whitlock* (1725) 2 Str. 690; *Williams v Moor* (1843) 11 M. & W. 256, 298.
- 253 See for its effect the 25th edition of the present work, paras 569–570.
- 254 *Minors' Contracts Act 1987* s.1.
- 255 cf. *Brown v Harper* (1893) 68 L.T. 488.

(e) - Third Parties and Incapacity

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Section 2. - Minors²⁵

(e) - Third Parties and Incapacity

Third parties

- 11-052 In general, lack of capacity of a minor is a personal privilege and does not prevent the other party being bound. However, there are circumstances where a third party has taken advantage of the invalidity of a minor's contract. Thus, for example, in one case an impresario employed an infant who had entered an unreasonable deed of apprenticeship with the plaintiff. The latter's action against the impresario for enticement was rejected by the court as the contract of apprenticeship was invalid as between its parties.²⁵⁶ Similarly, where a minor has entered a contract which is not binding on him then a third party who induces him to enter another contract in circumstances which (putting aside the issue of minority) would constitute breach of contract is not liable in the tort of inducing breach of contract.²⁵⁷ Another example used to be found in the liability of the guarantor of an infant's debts. By [s.1 of the Infants Relief Act 1874](#), a loan to an infant was made absolutely void and there was authority that this meant that any guarantors of the loan were not bound by their guarantee.²⁵⁸ However, [s.2 of the Minors' Contracts Act 1987](#) expressly²⁵⁹ provides that where a guarantee is given in respect of an obligation of a party to a contract made after its commencement and that obligation is unenforceable against him (or he repudiates the contract) on the grounds of minority, then the guarantee is not unenforceable for that reason alone.²⁶⁰ The extent to which a minor may give title to property, which may have consequences for third parties, is discussed below.²⁶¹

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the [Minors' Contracts Act 1987](#), on which see below, paras [11-051](#), [11-061—11-064](#).
- 256 *De Francesco v Barnum* (1890) 45 Ch. D. 430, 438 and 443.
- 257 *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch), [2007] Bus. L.R. 93 at [33].
- 258 *Coutts & Co v Browne-Lecky* [1947] K.B. 104.
- 259 As s.1 of the Minors' Contracts Act 1987 repeals s.1 of the 1874 Act, it would otherwise have been arguable that a guarantor of an unenforceable (as opposed to a void) loan should be liable.
- 260 See also s.113(7) of the [Consumer Credit Act 1974](#), as amended by the [Minors' Contracts Act 1987](#) s.4.
- 261 See below, paras [11-072—11-074](#).

(f) - Liability of Minor in Tort and Contract

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(f) - Liability of Minor in Tort and Contract

Liability for tort

- 11-053 In principle, minors are liable for the torts which they commit,²⁶² though the incidence of liability in tort may be affected by their age.²⁶³ However, if the claim in tort arises out of a contract upon which the minor is not liable, the claimant may not treat the breach of that contract as a tort and sue accordingly:

“If one delivers goods to an infant on a contract, knowing him to be a minor, he shall not be charged for them in trover or conversion.”²⁶⁴

Therefore, where a minor, having hired a horse, injured it by riding it too hard, it was held that he was not liable in an action for the tort,²⁶⁵ and where a minor obtained a loan by falsely misrepresenting his age he could not be made liable in damages for deceit.²⁶⁶ In *Fawcett v Smethurst*²⁶⁷ a minor hired a car to fetch his bag from the station six miles away. He met a friend with whom he drove on further. The car caught fire and was damaged on the extra journey without the negligence of the minor. It was held that he was not liable in tort, as the extra journey did not take his actions outside the scope of the contract, nor in contract, as the hiring did not render him liable for loss arising without fault on his part. Although the hiring itself might have been necessary, the contract would not have been binding on him had its effect been to render him liable without fault.

Torts independent of the contract

- 11-054 On the other hand, if the tort may properly be considered as arising independently of the contract or outside its ambit altogether, the minor can be made liable. So a minor who hired a mare “merely for a ride” and was warned at the hiring that she was unfit for jumping, having lent her to a friend who killed her by that act, was held to be guilty of a bare trespass, not within the object of the hiring, and to be consequently liable.²⁶⁸ A minor who embezzled money belonging to his employer was held liable in an action for money had and received because he would have been liable in trover²⁶⁹; and one who hired a microphone and improperly parted with it to a friend was held liable in an action of detinue.²⁷⁰ It is generally assumed that a minor who buys non-necessary goods cannot be sued in conversion even where he fails to pay the price and keeps the goods.²⁷¹ But it has been held that an underage bailee who refuses to return goods delivered to him by the bailor may be sued in detinue,²⁷² and that non-necessary goods sold to a minor can be recovered, when he refuses to pay for them, though the minor is not liable to damages for conversion.²⁷³ It is more likely, however, that a court will exercise its discretion under s.3 of the Minors’ Contracts Act 1987 to require a minor to transfer to the claimant any property acquired by the defendant under the contract, or any property representing it.²⁷⁴

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors’ contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors’ Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission’s Report on Minors’ Contracts (1984) Law Com. No.134 led to the [Minors’ Contracts Act 1987](#), on which see below, paras 11-051, 11-061—11-064.
- 262 *Bristow v Eastman* (1794) 1 Esp. 172; *Defries v Davis* (1835) 1 Scott 594. cf. above, para.3-054.
- 263 e.g. in the tort of negligence the standard of care varies according to the age of a child defendant: *McHale v Watson* [1966] A.L.R. 513; *Mullin v Richards* [1998] 1 W.L.R. 1304 and cf. *Gough v Thorne* [1966] 3 All E.R. 398 (defence of contributory negligence).
- 264 *Manby v Scott* (1659) 1 Sid. 109, 129; cf. *R. v McDonald* (1885) 15 Q.B.D. 323, 327.
- 265 *Jennings v Rundall* (1799) 8 Term R. 335.
- 266 *Johnson v Pye* (1664) 1 Sid. 258; *Stikeman v Dawson* (1847) 1 De G. & Sm. 90; *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607, 612.

- 267 *(1915) 84 L.J. K.B. 473.*
- 268 *Burnard v Haggis* (1863) 14 C.B.(N.S.) 45. See also *Walley v Holt* (1876) 35 L.T. 631.
- 269 *Bristow v Eastman* (1794) 1 Esp. 172; *Re Seager* (1889) 60 L.T. 665. cf. *Cowern v Nield* [1912] 2 K.B. 419.
- 270 *Ballett v Mingay* [1943] K.B. 281. In *Take-Two Interactive Software Inc v James* [2020] EWHC 179 (Pat), [2020] E.C.D.R. 14 a minor had entered a contract allowing him to use a computer game (the contract being treated as for the provision of services and a license to use copyright material). It was held in the context of an application for summary judgment that while a claim against him for breach of the contract terms of the license in selling “cheat” software to other players might fail on the ground of his minority, he could nevertheless be liable for infringement of copyright and in the tort of inducing breach of contract as “the rules governing whether contracts are binding on a minor ... have no application to the tort of inducing breach of contract or in relation to the copyright infringement claim”: per Falk J at [33].
- 271 *Atiyah* (1959) 22 M.L.R. 273, 281. The view that the minor is not liable is supported by the generally accepted opinion that property in non-necessary goods may pass to the minor: *Stocks v Wilson* [1913] 2 K.B. 235, 246 and see Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-032. cf. *Minors' Contracts Act 1987* s.3(1) which refers to “property acquired” by the minor and to the power of the court to order him to “transfer” such property.
- 272 *Mills v Graham* (1804) 1 B. & P.N.R. 140 (minor refusing to return skins delivered for finishing). Detinue was abolished by s.2(1) of the Torts (Interference with Goods) Act 1977, and replaced by liability in conversion. See also *R. v McDonald* (1885) 15 Q.B.D. 323; *Robinson's Motor Vehicles Ltd v Graham* [1956] N.Z.L.R. 545.
- 273 *Re Henderson* (1916) 12 Tas. L.R. 40; cf. *Hall v Wells* [1962] Tas. S.R. 122, 128–129.
- 274 See below, paras 11-061 et seq.

(g) - Liability of Minor to Make Restitution

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(g) - Liability of Minor to Make Restitution

Generally

- 11-055 In general a minor cannot be sued on his contracts, but this rule leaves open the question whether he may be made to make restitution to the other party for benefits conferred on him under the contract. Such benefits may consist of the receipt of money, goods, interests in land or services. Common law, equity and statute have different answers to this question of a minor's liability in restitution.²⁷⁵

At common law

- 11-056 The common law rule is that a minor is not liable to restore benefits conferred on him under a contract which is unenforceable against him, even if the contract results from his fraudulent misrepresentation of majority.²⁷⁶ Despite this rule, however, three possible routes may exist to recovery. The first route is for the other contracting party to rely on an independent tort which the minor has committed, for example, conversion or deceit, damages for which may compensate him for the loss which he has suffered by the minor's retention of the benefit, even though this may not always be the same as the minor's gain.²⁷⁷ The second route is for the other contracting party to find such an independent tort, "waive" it and sue for any money had and received in respect of property conferred on the minor.²⁷⁸ The third possible route to recovery at common law would be to claim restitution of money paid under an unenforceable contract to a minor based on a total

failure of consideration, but this route has been rejected by the courts.²⁷⁹ It has, however, been argued that, for the purposes of a claim at common law against a minor based on unjust enrichment, a distinction should be drawn between the repayment of benefits which they still have at the time of the claim (which should be recoverable) and claims for the value of benefits which are gone at the time of the claim (which should not be).²⁸⁰ Similar considerations apply to the denial of claims for the value of non-necessary goods and services supplied to a minor who has failed to pay the contractual price; for holding a minor even to a reasonable price would undermine his protection. Thus in *Lemprière v Lange*, for example, a lease which a minor had taken was set aside and possession by him given up, but the court refused to award a sum to the lessor as damages for use and occupation of the land on the ground that the two remedies were incompatible.²⁸¹

In equity

11-057 It is no answer at law to a plea of incapacity based on lack of age that the defendant at the time of entering into the contract fraudulently represented himself to be of full age, and that the other party believing this representation and on the faith of it contracted with him²⁸² nor did these facts before the Judicature Act form the subject of a good replication on equitable grounds to a plea of infancy.²⁸³ But in certain cases equity will grant relief against the minor, not on the ground of enforcing the contract, or recovering the debt, but of an equitable liability resulting from the fraud. He will be compelled to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud.²⁸⁴ This obligation is, however, strictly limited in extent.

Restoration of gains²⁸⁵

11-058 If a minor has obtained property by fraudulently misrepresenting his age,²⁸⁶ he can be compelled to restore it; if he has obtained money, he can be compelled to refund it.²⁸⁷ This remedy is an equitable one and arises quite independently of the contract.²⁸⁸ It lasts, however, only so long as the minor retains the property or money or, perhaps, the proceeds of the property or money. If he has sold the goods or spent the money, he cannot be compelled through a personal judgment to pay an equivalent sum out of his present or future resources, for this would be nothing but enforcing an unenforceable contract²⁸⁹; “[r]estitution stopped where repayment began”.²⁹⁰ In *Stocks v Wilson*,²⁹¹ however, a minor who had obtained non-necessary goods by fraudulently misrepresenting his age was held bound to account for the proceeds of their sale. This decision was criticised, although not expressly overruled by the Court of Appeal in *R. Leslie Ltd v Sheill*.²⁹² Sir Frederick Pollock²⁹³ considered the decision to be correct on the principle of following the

property (i.e. as represented by the money) and not otherwise. His view is supported by other textbook writers²⁹⁴ and it is suggested that a fraudulent misrepresentation of full age by a minor will allow the person deceived to trace his property in equity by an action in rem similar to that possessed by a beneficiary in respect of trust property.²⁹⁵

“Bankruptcy debt”

- 11-059 Under the [Insolvency Act 1986 s.382](#), a *bankruptcy debt* means any debt or liability to which a bankrupt is subject either at the commencement of the bankruptcy or to which he may become subject after the bankruptcy by reason of any obligation incurred before the commencement of the bankruptcy and for this purpose “liability” includes “a liability to pay money, ... any liability in contract ... and any liability arising out of an obligation to make restitution”.²⁹⁶ Thus, while a person who has loaned money to a minor may not prove this as a debt in the latter’s bankruptcy, there being no enforceable liability against the minor,²⁹⁷ if that person was induced to make the loan by the minor’s fraudulent misrepresentation of age, then any equitable liability in the minor arising from the fraud may be proved as a “bankruptcy debt”.²⁹⁸

Release from obligations

- 11-060 A party who has been induced to enter into an obligation or to perform some act in law by the fraudulent misrepresentation of a minor that he is of full age will be released from that obligation and restored, where possible, to his former position. In [Clarke v Cobley](#)²⁹⁹ the defendant, a minor, by such a misrepresentation, induced the plaintiff to accept a bond for the amount of two promissory notes drawn by the defendant’s wife before her marriage. The plaintiff accordingly gave up the notes. When the plaintiff discovered the fact of the defendant’s incapacity he filed a bill after the defendant had attained majority, praying that the defendant might be ordered to execute a fresh bond, or to pay the money secured, or deliver back the notes to him. The court ordered this last and also that the defendant should not plead limitation to any action brought upon them or set up any other plea open to him when the bond was executed, but refused to decree payment of the money, holding that the court could do no more than see that the parties were restored to the same situation in which they were at the date of the bond. And where a minor obtained a lease by fraudulently misrepresenting that he was of full age, the court set it aside and ordered him to give up possession and to pay his costs.³⁰⁰

Minors' Contracts Act 1987 s.3

- 11-061 The most important means by which a minor may be ordered to make restitution of benefits obtained under a contract unenforceable against him is found in [s.3 of the Minors' Contracts Act 1987](#), which provides that:

“... the court may, if it is just and equitable to do so, require the defendant [minor] to transfer to the plaintiff [other contracting party] any property acquired by the defendant under the contract, or any property representing it.”

This provision gives a considerable discretion to the court to order restitution of property acquired by a minor under a contract, unless it is one for necessaries and therefore binding on him.³⁰¹ It is wider than the equitable remedy already described which is only available where fraud on the part of the minor is established.³⁰²

“Property”

- 11-062 Only property acquired by a minor under the contract is included: thus any property acquired by way of inducement to enter the contract falls outside the section. “Property” itself is not defined by the Act. Clearly, it includes chattels and it is submitted that it should be taken to include interests in land to the extent that a minor is permitted by law to hold them.³⁰³ More difficult is the question whether “property” includes money. Although there is some authority in the context of the equitable relief against fraud for recovery of money representing the proceeds of sale of goods transferred,³⁰⁴ this was subject to criticism.³⁰⁵ The better view, it is submitted, is that money should be included within the statutory definition of property.³⁰⁶ The concern to prevent indirect enforcement of a minor’s contract which led to the refusal of recovery of monies in equity as at common law may be fully taken into account as a factor in the discretion which [s.3](#) confers.

“Any property representing it”

- 11-063 This phrase gives the court power to order the transfer, not only of property acquired by a minor, but also the product of its exchange, and, assuming money is included within the provision,³⁰⁷ its proceeds on sale.³⁰⁸ This will give rise to a process of statutory tracing, for which cases at common law and in equity may, though in different contexts, serve as illustrations.³⁰⁹ However, it has been

suggested that certain difficulties encountered in these cases, for example the identification of the exchange product of proceeds in a mixed fund, may go to the discretion of the court to make an award under s.3.³¹⁰ For example, if a minor has sold non-necessary goods acquired under a contract of sale and placed the money in a bank account together with other monies, the court should hesitate to apply the rules as to tracing of money through accounts in equity which were constructed for and are appropriate to the context of trustees or fiduciaries.³¹¹ In the minor's context, the effect of the award should not be, or even, perhaps, risk being, the payment out of his present or future resources of a sum equivalent to that owed under a contractual obligation.

Discretion

- 11-064 It is submitted that a court should look in deciding whether to make an order under s.3 at the general fairness of the contract which the minor has made. In particular, if the other contracting party took advantage of the minor's inexperience or tricked him, then the latter should not be held liable to restore property acquired. Clearly, the question whether a minor appears or does not appear to be of full capacity, even in the absence of misrepresentation as to full age, will be relevant to the exercise of the discretion. The most important issue in this exercise will be the balance between the need to preserve the minor's protection which is the basis of his contractual incapacity and the interests of the other contracting party in recovery of benefits conferred by him on the minor.

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the *Minors' Contracts Act 1987*, on which see below, paras 11-051, 11-061—11-064.
- 275 See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 34-11, et seq.; Burrows, *The Law of Restitution*, 3rd edn (2012), pp.700–702.
- 276 *Johnson v Pye (1664) 1 Sid. 258*; *Liverpool Adelphi Loan Association v Fairhurst (1854) 9 Ex. 422*.
- 277 See above, paras 11-053—11-054.
- 278 *Bristow v Eastman (1794) 1 Esp. 172* and see Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 34-16—34-17.

- 279 *Cowern v Nield* [1912] 2 K.B. 491; *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607. cf. *Thavorn v Bank of Credit & Commerce International SA* [1985] 1 Lloyd's Rep. 259 (where it was held that a minor was not liable to make restitution for monies received under a mistake of fact).
- 280 Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), paras 34-16—34-17.
- 281 (1789) 12 Ch. D. 675 and see below, para.11-060.
- 282 *Johnson v Pye* (1664) 1 Sid. 258; *Liverpool Adelphi Loan Association v Fairhurst* (1854) 9 Ex. 422, 430; *Inman v Inman* (1873) L.R. 15 Eq. 260; *Levene v Brougham* (1909) 25 T.L.R. 265 (no estoppel).
- 283 *Bartlett v Wells* (1862) 1 B. & S. 836; *De Roo v Foster* (1862) 12 C.B.(N.S.) 272.
- 284 See *Atiyah* (1959) 22 M.L.R. 273.
- 285 See generally Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), paras 34-18—34-29; Virgo, The Principles of the Law of Restitution (2015), pp. 727–730 and below, Ch.32.
- 286 The representation must be explicit and not inferential: *Stikeman v Dawson* (1847) 1 De G. & Sm. 90; *Maclean v Dummett* (1869) 22 L.T. 710; *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109, 120–121. See also *Nelson v Stocker* (1859) 4 De G. & J. 458.
- 287 *Stocks v Wilson* [1913] 2 K.B. 235.
- 288 *Re King Ex p. Unity Joint Stock Mutual Banking Association* (1858) 3 De G. & J. 63; *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109; *Stocks v Wilson* [1913] 2 K.B. 235.
- 289 *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607, 618.
- 290 [1914] 3 K.B. 607, 618, per Lord Sumner.
- 291 [1913] 2 K.B. 235, 247.
- 292 [1914] 3 K.B. 607.
- 293 Pollock, Principles of Contract, 13th edn (1950), p.64.
- 294 Beatson, Burrows and Cartwright, Anson's Law of Contract, 30th edn (2016), pp.263–264; Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-047. cf. Burrows, The Law of Restitution, 3rd edn (2012), pp.701–702.
- 295 cf. Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), para.34-29 who argue for a distinction between allowing recovery where the minor still has the value received at the time of the claim and denying it where he does not; *Atiyah* (1959) 22 M.L.R. 273. See below, paras 32-176 et seq.
- 296 Insolvency Act 1986 s.382(4).
- 297 *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109 (decided under the old law). For the position as to loans for necessaries, see above, para.11-023.
- 298 *Re King Ex p. Unity Joint-Stock Mutual Banking Association* (1858) 3 De G. & J. 63; *Stocks v Wilson* [1913] 2 K.B. 235, 246 and see above, paras 11-057—11-058.
- 299 (1789) 2 Cox. 173 (fraud must be presumed though not appearing specifically in the report).
- 300 *Lemprière v Lange* (1879) 12 Ch. D. 675. A claim by the lessor for damages for use and occupation was held inconsistent with this relief and dismissed. See also *Cory v Gertcken* (1816) 2 Madd. 40; *Overton v Banister* (1844) 3 Hare 503; *Woolf v Woolf* [1899] 1 Ch. 343.
- 301 See above, paras 11-010 et seq.

- 302 See above, para.[11-057](#). In support of the view that the discretion in [s.3 of the 1987 Act](#) does not require fraud in the minor see Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-042 referring to Law Commission Report (1984) No.134, para.4.21.
- 303 See above, para.[11-040](#).
- 304 *Stocks v Wilson [1913] 2 K.B. 235*.
- 305 *R. Leslie Ltd v Sheill [1914] 3 K.B. 607*.
- 306 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-042.
- 307 See above, para.[11-062](#).
- 308 It has been suggested that the courts should take a wider view of [s.3\(1\)](#), and be prepared to exercise their statutory discretion to allow claims against minors whose overall wealth is still swollen by value received by the claimant: Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), para.34-31.
- 309 See below, paras [32-176](#) et seq.
- 310 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-043.
- 311 Goff and Jones, Law of Restitution, 7th edn (2007) at pp.88 et seq.

(h) - Agency and Membership of Societies

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(h) - Agency and Membership of Societies

Minor as principal

- 11-065 A minor cannot execute a valid power of attorney,³¹² but he is bound by a contract made by his agent with his authority, where the circumstances are such that he would have been bound if he had himself made the contract.³¹³ A minor may validly appoint an agent where he earns his living in a manner which necessitates this.³¹⁴ And it seems that if a minor authorises an agent to purchase necessaries for him, and the agent pays for them, the minor can be compelled to reimburse the agent.³¹⁵

Minor as agent

- 11-066 A minor can act as agent or as the donee of a power of attorney³¹⁶ but is not personally liable on the contracts entered into on behalf of his principal.³¹⁷

Membership of societies

- 11-067

Subject to certain conditions, a minor may become an associate of a friendly society,³¹⁸ or a member of a registered co-operative or community benefit society,³¹⁹ a trade union,³²⁰ or a building society.³²¹

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the **Minors' Contracts Act 1987**, on which see below, paras 11-051, 11-061—11-064.
- 312 *Zouch v Parsons* (1765) 3 Burr. 1794; *Olliver v Woodroffe* (1839) 4 M. & W. 650; *Doe d. Thomas v Roberts* (1847) 16 M. & W. 778, 780. An act done by an agent under a void power of attorney is itself void.
- 313 See below, para.21-041; *Megarry* (1953) 69 L.Q.R. 446; *Webb* (1955) 18 M.L.R. 461. cf. *Shepherd v Cartwright* [1953] Ch. 728, 755, and see *G.(A.) v G.(T.)* [1970] 3 All E.R. 546, 549.
- 314 *Denmark Productions Ltd v Boscobel Productions Ltd* (1967) 111 S.J. 715.
- 315 See above, para.11-023.
- 316 *Watkins v Vince* (1818) 2 Stark. 368; *Re D'Angibau* (1880) 15 Ch. D. 228, 246.
- 317 *Smally v Smally* (1700) 1 Eq. Cas. Abr. 283.
- 318 Friendly Societies Act 1992 s.119A(1)(a).
- 319 Co-operative and Community Benefit Societies Act 2014 s.31 (though with restrictions on the powers of minors under 16 years). The **2014 Act** provides that societies registered for the purposes of the **2014 Act** consist of those registered under its own provisions (which provide for the registration of co-operative societies and community benefit societies) and of societies already registered under the Industrial and Provident Societies Act 1965 s.20: ss.1 and 2.
- 320 Explicit provision to this effect was formerly found in the Trade Union Act Amendment Act 1876 s.9 but this Act was repealed by the **Industrial Relations Act 1971** and the right of a minor to be a member of a trade union seems now to depend on inference.
- 321 Building Societies Act 1986 Sch.2 para.5(3) (as amended by the **Building Societies Act 1997** s.2(2)(b)) (also providing for restrictions on their powers as members).

(i) - Liability of Parent or Guardian

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(i) - Liability of Parent or Guardian

Parent not liable for minor's debts

- 11-068 A parent may be ordered to provide financial relief for the benefit of his or her child,³²² but apart from agency³²³ or personal contract, he is no more liable to pay a debt contracted by the child with a third party (even for necessaries) than a mere stranger would be.³²⁴ The same principles apply in the case of a guardian and ward.

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the **Minors' Contracts Act 1987**, on which see below, paras 11-051, 11-061—11-064.
- 322 Children Act 1989 s.15(1), Sch.1 para.1. See also Social Security Administration Act 1992 ss.105–106.
- 323 e.g. where a parent expressly or impliedly authorises the minor to contract on his behalf or where his wife or some other person, such as his servant, has authority to pledge his

- credit: *Cooper v Phillips* (1831) 4 Car. & P. 581; *Bazeley v Forder* (1868) L.R. 3 Q.B. 559; *Collins v Cory* (1901) 17 T.L.R. 242. cf. *Fluck v Tollemache* (1823) 1 Car. & P. 5; *Urmston v Newcomen* (1836) 4 Ad. & El. 899; *Ruttinger v Temple* (1863) 4 B. & s.491.
- 324 *Fluck v Tollemache* (1823) 1 Car. & P. 5; *Shelton v Springett* (1851) 11 C.B. 452; *Mortimore v Wright* (1840) 6 M. & W. 482. cf. *Hesketh v Gowing* (1804) 5 Esp. 131; *Gore v Hawsey* (1862) 3 F. & F. 509 (illegitimate children recognised by father); *Greenspan v Slate* (1953) 97 A. 2d. 390 (parent liable for cost of emergency medical treatment to child though he had refused to authorise it).

(j) - Procedure in Actions

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(j) - Procedure in Actions

Procedure

11-069 Formerly, under the [Rules of the Supreme Court](#) and the [County Court Rules](#), a minor sued by his next friend and defended by his guardian ad litem.³²⁵ However, since the coming into effect of the [Civil Procedure Rules in 1998](#), proceedings involving minors (termed by these rules, “children”) are governed by a uniform set of rules³²⁶ under which “a child must have a litigation friend to conduct proceedings on his behalf” unless the court otherwise orders, and the former distinction between next friends and guardians ad litem is therefore no longer drawn.³²⁷ Under these rules, special provision is made for the assessment of costs of proceedings where the claimant is a child and where money is ordered to be paid to him or for his benefit or where money is ordered to be paid by him or on his behalf.³²⁸ As earlier noted, the [CPR](#) makes special provision for the approval by the court of settlements or compromises made by a minor.³²⁹

Joint obligations

11-070 Where one of two joint contracting parties is a minor whose promise is voidable or unenforceable against him, there is no need to join him as a party to the action and the action may be maintained against the adult only; but if both are sued and the minor relies on his lack of capacity, a claimant may still recover against the adult defendant.³³⁰ Moreover, in contrast with the position at common law,³³¹ since 1987 where a contract is entered by a minor and the latter’s obligations are guaranteed

by an adult, the unenforceability of those obligations against the minor shall not alone render the guarantee unenforceable.³³²

Defence of minority

- 11-071 Under the [Civil Procedure Rules](#), where a defendant denies an allegation in the claimant's particulars of claim, he must state his reasons for doing so³³³ and so a child who intends to rely on a defence of minority to a claim for the enforcement of a contract should make this clear in the defence which he files.

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the [Minors' Contracts Act 1987](#), on which see below, paras [11-051](#), [11-061—11-064](#).
- 325 RSC Ord.80 rr.1 and 2; CCR Ord.10 r.1.
- 326 CPR Pt 21 which also governs litigation involving "protected parties", i.e. "a party, or an intended party, who lacks capacity to conduct the proceedings". cf. below, para.[11-098](#). See also Practice Direction 21: Children and Protected Parties.
- 327 CPR r.21.2(2).
- 328 CPR r.46.4.
- 329 CPR r.21.10, above para.[11-035](#).
- 330 See, e.g. *Burgess v Merrill* (1812) 4 *Taunt.* 468; *Gillow v Lillie* (1835) 1 *Scott* 597; *Lovell & Christmas v Beauchamp* [1894] A.C. 607; *Wauthier v Wilson* (1912) 28 *T.L.R.* 239. See below, paras [19-008—19-010](#).
- 331 *Coutts v Browne-Lecky* [1947] K.B. 104.
- 332 Minors' Contract Act 1987 s.2 and see Vol.II, paras [47-040—47-041](#).
- 333 CPR r.16.5.

(k) - Disposition of Property by Minors

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(k) - Disposition of Property by Minors

Disposition of property by delivery

- 11-072 A minor can clearly dispose of property under a contract which is binding on him, but there are also cases in which a minor can effectively dispose of property belonging to him under a contract which is not binding on him. So, for instance, it has been held that a gift of a chattel by a minor is irrevocable after delivery.³³⁴ And money paid by a minor under a contract which is voidable or unenforceable against him cannot be recovered by him unless there is a total failure of consideration,³³⁵ although if the minor paid it under a mistake as to the voidable nature or unenforceability of the contract, he may be able to recover it on the basis of this mistake of law.³³⁶

Disposition of property by grant

- 11-073 A disposition of property not accompanied by delivery is, in general, ineffective against a minor.³³⁷ So, for instance, an assignment of an interest in a trust fund by way of security (at least if it is intended to secure an unenforceable obligation) is, it seems, ineffective to pass any interest as against a grantor who is a minor.³³⁸ And a mortgage granted by a minor to secure an unenforceable loan is itself unenforceable.³³⁹ On the other hand, in *Chaplin v Leslie Frewin (Publishers) Ltd*,³⁴⁰ it was held that a contract whereby a minor assigned the copyright in a written work to a publisher was effective to pass the copyright and that even if the contract was voidable the minor could not revoke the contract so as to restore the copyright to himself.³⁴¹

Dispositions relating to land

- 11-074 A minor cannot grant a legal estate in land. But a minor may convey an equitable interest in land, whether by way of outright sale or by way of lease only. So long as the transfer is executory only it seems that the minor would not be bound by it,³⁴² but the position may be different after the grantee has gone into possession.

Footnotes

- 25 The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the *Minors' Contracts Act 1987*, on which see below, paras 11-051, 11-061—11-064.
- 334 *Taylor v Johnston* (1882) 19 Ch. D. 603, 608 and see *Pearce v Brain* [1929] 2 K.B. 310 (where it was held that a minor who delivers a chattel belonging to him under a contract "absolutely void" under s.1 of the Infants' Relief Act 1874 cannot recover it unless there has been a total failure of consideration). cf. Halsbury's Laws of England, 5th edn, Vol.52 (2020), para.211 referring to *Manby v Scott* (1663) 1 Mod. Rep. 124, 137 (Ex Ch) and see *G.(A.) v G.(T.)* [1970] 3 All E.R. 546, 549.
- 335 *Wilson v Kearse* (1800) Peake Add. Cas. 196; *Corpe v Overton* (1833) 10 Bing. 252, 259; *Re Burrows* (1856) 8 De G.M. & G. 254, 256; *Valentini v Canali* (1889) 24 Q.B.D. 166; *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452.
- 336 cf. *Kleinwort Benson v Lincoln City Council* [1998] 3 W.L.R. 1095, on which see below, paras 32-049 et seq.
- 337 *Zouch v Parsons* (1765) 3 Burr. 1794, 1807, 1808; *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1772 at [22], [25]–[26].
- 338 *Inman v Inman* (1873) 15 Eq. 260. See also *Martin v Gale* (1876) 4 Ch. D. 428.
- 339 *Nottingham Permanent Benefit Building Society v Thurston* [1903] A.C. 6, which was decided under the Infants' Relief Act 1874 and held that a mortgage to secure a void loan was itself void.
- 340 [1966] Ch. 71. There are dicta in this case (at 94) which appear to suggest that a minor can never, by repudiating a voidable contract, recover property which has passed to the other party. This may be true (at least if there is no total failure of consideration) where the contract

is voidable in the normal sense of the word, but it is doubtful if this is correct where the contract is void as against the minor, rather than voidable. cf. at 96.

- 341 cf. *Fisher v Brooker [2009] UKHL 41, [2009] 1 W.L.R. 1764* at [26], Baroness Hale of Richmond commenting that “the effect of even a contractual assignment of copyright by a minor is, to say the least, controversial” and explaining the majority decision in *Chaplin v Leslie Frewin (Publishers) Ltd* as resting on the proposition that “at least if copyright were effectively assigned as part of a beneficial contract to supply services, then it was binding upon the infant and could not be avoided”.
- 342 *Zouch v Parsons (1765) 3 Burr. 1794.*

(i) - The Requirement of Knowledge of a Party's Mental Incapacity

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Section 3. - Persons Lacking Mental Capacity

(a) - The Rule in Imperial Loan Co Ltd v Stone³⁴³

(i) - The Requirement of Knowledge of a Party's Mental Incapacity

Background

11-075 The older English treatment of the validity of contracts made by lunatics³⁴⁴ was uncertain: Bracton followed Roman law in holding that such contracts were void,³⁴⁵ but later writers and courts qualified this position by holding that “no man could be allowed to stultify himself, and avoid his acts, on the ground of his being non compos mentis.”³⁴⁶ However, putting aside the special treatment of a mentally incapable person’s liability for necessaries,³⁴⁷ the modern general approach was set out fairly clearly in *Molton v Camroux* in 1848–1849, Pollock C.B. stating that:

“... unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shewn that the defendant was not of capacity to contract, and the plaintiff knew it.”³⁴⁸

On appeal, the Exchequer Chamber agreed with this rule, considering that a contract made by a person of unsound mind, but who appeared to be of sound mind, is valid as long as the incompetence was not known to the other party.³⁴⁹

Imperial Loan Co Ltd v Stone

- 11-076 This position was confirmed by the Court of Appeal in what became the leading English authority, *Imperial Loan Co Ltd v Stone*,³⁵⁰ where Lord Esher MR said:

“When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.”

The Court of Appeal in *Imperial Loan Co Ltd* therefore held that in general a contract made by a mentally incapable person is valid unless he or she establishes both that he was mentally incapable at the time and that the other party was aware of this, the burden of proof on both issues lying on the person so claiming.³⁵¹ It will be seen that the common law position governing mental incapacity therefore differs very considerably from the position governing minors' incapacity, where the general rule is that a contract made by a minor is voidable at his or her option, without any requirement of knowledge of the minor's lack of age by the other contracting party.³⁵² This difference is sometimes explained on the basis that mental incapacity is harder to detect than minority because it is a matter of medical opinion rather than an objectively verifiable fact,³⁵³ but a minor's age may be equally undetectable as a person's mental incapacity where the other contracting party deals at a distance, by post, email or the internet.

No special equitable ground of avoidance based on “unfairness”

- 11-077 Moreover, in *Hart v O'Connor*³⁵⁴ the Privy Council rejected the New Zealand Court of Appeal's view that references in *Imperial Loan Co Ltd* and other authorities to a contract made by a mentally incapable person as being voidable on the ground of “unfairness” reflected a distinct ground of equitable relief special to the context,³⁵⁵ holding that they instead referred to cases where “the conscience of the plaintiff was in some way affected”, that is to cases of:

“... actual fraud (which the courts of common law would equally have remedied) or constructive fraud, i.e. conduct which falls below the standards demanded by equity, traditionally considered under its more common manifestations of undue influence, abuse of confidence, unconscionable bargains and frauds on a power.”³⁵⁶

As a result:

“... the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of ‘unfairness’ unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane.”³⁵⁷

These more widely applicable doctrines have been discussed earlier.³⁵⁸

Footnotes

- 343 So described by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] per Baroness Hale.
- 344 The terminology used by English lawyers to refer to persons suffering from a mental incapacity has changed significantly, earlier cases referring to “lunatics”, cases decided while the **Mental Health Act 1983** was in force referring to “patients”, and more recent cases (especially after the passing of the **Mental Capacity Act 2005**) referring to the mental incapacity, or lack of mental capacity, of a person in relation to a particular transaction: see below, para.11-089.
- 345 Bracton, *De legibus*, Lib. 3, tit. 19 §8, p. 100.
- 346 *Molton v Camroux* (1848) 2 Ex. 487 at 500 per Pollock C.B., affd (1849) 4 Ex. 17 and see Holdsworth, *History of English Law*, Vol.VIII, pp.52–53; *Hart v O'Connor* [1985] A.C. 1000 at 1018–1019.
- 347 See below, para.11-096. *Manby v Trott* (1662) 1 Sid. 109, 112; *Baxter v Earl of Portsmouth* (1826) 5 B. & C. 170; *Re Rhodes* (1890) 44 Ch. D. 94. This distinct law was accepted by Pollock C.B. in *Molton v Camroux* (1848) 2 Ex. 487 at 501.
- 348 *Molton v Camroux* (1848) 2 Ex. 487 at 501 per Pollock C.B.
- 349 *Molton v Camroux* (1849) 4 Ex. 17 esp. at 18–19; followed by *Beavan v M'Donnell* (1854) 9 Ex. 309. Earlier cases include *Niell v Morely* (1804) 9 Ves. Jr. 478; *Browne v Joddrell* (1827) Mood. & M. 105.
- 350 [1892] 1 Q.B. 599, 601.
- 351 *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599 at 601 (Lord Esher MR); 603 (Lopes LJ); *Goudy* (1901) 17 L.Q.R. 147, *Wilson* (1902) 19 L.Q.R. 21.
- 352 Above, paras 11-007, 11-049 et seq. A minor is in principle not liable in the tort of deceit for fraudulently misrepresenting his or her age: above, para.11-053. The main exception to the general position is found in relation to the minor’s liability for necessaries: above, paras 11-010 et seq.

- 353 Burrows, *The Law of Restitution*, 3rd edn (2012), pp.315–316.
- 354 *Hart v O'Connor [1985] A.C. 1000*.
- 355 *Archer v Cutler [1980] 1 N.Z.L.R. 386* discussed (and not followed) by the PC in *Hart v O'Connor [1985] A.C. 1000* at 1016–1028. The earlier English dicta are found in *Molton v Camroux (1848) 2 Ex. 487* at 502–503, *(1849) 4 Ex. 17* at 19; *Imperial Loan Co Ltd [1892] 1 Q.B. 599* at 603; *York Glass Co Ltd v Jubb [1925] All E.R. 285* at 289, 292 and 295. Lord Brightman's view of the authorities expressed in *Hart v O'Connor* was criticised by *Hudson (1986) Conv. 178*.
- 356 *Hart v O'Connor [1985] A.C. 1000* at 1024 per Lord Brightman, PC. This rejection of the wider doctrine is criticised by *Hudson (1986) Conv. 178*.
- 357 *Hart v O'Connor [1985] A.C. 1000, 1027*, per Lord Brightman, PC.
- 358 Above, paras 10-072 et seq. and 10-161 et seq.

(ii) - Constructive Knowledge of a Party's Mental Incapacity

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(a) - The Rule in *Imperial Loan Co Ltd v Stone*³⁴³

(ii) - Constructive Knowledge of a Party's Mental Incapacity

The Supreme Court's view in *Dunhill v Burgin*

- 11-078 In *Imperial Loan Co Ltd* the Court of Appeal expressed the rule allowing a mentally incapable person to avoid a contract as subject to a condition that the other party *knew* of the incapacity³⁵⁹ and this is the way in which the rule was expressed by earlier editions of the present work,³⁶⁰ and by other works on English contract law.³⁶¹ However, in 2014 in *Dunhill v Burgin*, Baroness Hale of Richmond, with whom the other members of the Supreme Court agreed,³⁶² expressed the rule in *Imperial Loan Co Ltd v Stone*³⁶³ in distinctly different terms from the way in which it was expressed both in the judgments of the Court of Appeal in *Imperial Loan Co Ltd* itself, and more generally, observing that it is now generally accepted that a person may avoid a contract which he or she has concluded without the requisite mental capacity where the other party to the contract either knew or *ought to have known* of this incapacity (the latter being referred to for convenience in the present discussion as constructive knowledge).³⁶⁴ This observation was made in the context of holding that a settlement of a claim by a mentally incapable person is valid only with the approval of the court, this result being held to follow from the terms of the *CPR*.³⁶⁵ Given this interpretation of the *CPR*, the Supreme Court held that the normal rule applicable to contracts made by a mentally incapable person which it had described does not apply to settlements of claims and, therefore, did not apply to the case before it.³⁶⁶ This means that the Supreme Court's observations on the content of the normal rule applicable to contracts generally were expressly obiter. They have, nevertheless, been accepted by the High Court as an accurate statement of English law.³⁶⁷

Comments

- 11-079 However, with the greatest respect to the learned justices of the Supreme Court, the extension of the availability of avoidance of contracts made by a person incapable of doing so to situations where the other party merely ought to have known of the incapacity should not be seen as generally accepted, since it finds little direct support in the English authorities or in the principle of the objective theory of contract, to which Baroness Hale related the reformulation.

³⁶⁸

Moreover, given this relative lack of support in the authorities and the very considerable practical differences which this extension could involve, it is submitted that such an extension of the situations in which contracts are invalid on grounds of mental incapacity should be made by the Supreme Court only after a full consideration of the authorities (English and otherwise) after argument by counsel, taking into account, to the extent to which it is appropriate for it to do so, the competing considerations of policy. For this extension may be a very significant one in practice, since it could be seen as requiring the courts to work out the circumstances in which a contracting party (and especially those providing goods or services in the course of a business) should have known of the other party's mental capacity so as to be fixed by this species of constructive knowledge. That this might not be straightforward may be supported by reference to the considerable litigation which followed the House of Lords' decision in *Barclays Bank Plc v O'Brien*³⁶⁹ which held that a bank/creditor could be fixed with constructive knowledge of the rights of a surety (typically a wife) against a principal debtor (typically her husband or his company). For, as this case-law suggests, a test of constructive knowledge could lead to certain types of factual circumstance putting a would-be contracting party on notice of the possibility of the other's mental incapacity, notice which that other party could then avoid only by investigation or third party advice.³⁷⁰ It is submitted, therefore, that the most that can be said is that earlier authorities support the proposition that a party may be fixed with knowledge of another party's mental incapacity where that incapacity is apparent. These points will be supported in the following paragraphs.

Earlier authority supporting extension to constructive notice

- 11-080 While the judgments of the Court of Appeal in *Imperial Loan Co Ltd* do not themselves support the view that constructive knowledge is enough to allow a mentally incapable person to avoid a contract,³⁷¹ there is some support for this view in other cases prior to *Dunhill v Burgin*.³⁷²

Mental incapacity apparent

- 11-081 In *Molton v Camroux*,³⁷³ which was itself approved in *Imperial Loan Co Ltd*,³⁷⁴ Pollock C.B's judgment in the Court of Exchequer requiring knowledge in the other contracting party and, Patteson J's judgment affirming it in the Exchequer Chamber, were both expressed as being restricted to cases where the mental incapacity of the party was not apparent.³⁷⁵ The reservation of the requirement of knowledge of mental incapacity by the other party to the situation where the incapacity was not ostensible also formed part of Lord Brightman's exposition of the modern law in *Hart v O'Connor*.³⁷⁶ This qualification suggests that where a person's mental incapacity *is* apparent, then he or she can avoid any contract made without establishing that the other contracting party actually *knew* of the incapacity. Moreover, for this purpose the apparent nature of the mental incapacity could be judged according to the standard of the reasonable person in the position of the other contracting party, rather than his or her actual apprehension (and so knowledge) of the incapacity.³⁷⁷ If this was all that was intended by Baroness Hale in *Dunhill v Burgin* in recognising that avoidance of a contract for mental incapacity extends to cases where the other party ought to have known of the incapacity, then this view is supported by these earlier dicta and is, moreover, clearly limited in its extent. On the other hand, this interpretation of Baroness Hale's formulation would restrict its significance considerably, for, as earlier suggested, such a test could extend the availability of avoidance of a contract concluded by a mentally incapable person to situations where, owing to the circumstances of the parties or surrounding the conclusion of the contract, the other party was put on notice of the possibility of that incapacity and did not take such steps as to avoid being fixed with constructive knowledge.³⁷⁸ Such circumstances might not be restricted to cases of apparent mental incapacity.

York Glass Co Ltd v Jubb

- 11-082 That mental incapacity in a contracting party can lead to avoidance of the contract where the other party ought to have known of that incapacity appears to find its explicit origin in *York Glass Co Ltd v Jubb*.³⁷⁹ There, the receiver of a company had sold the company's buildings and machinery to the defendant, who was later held to have been mentally incapable of contracting at the time. The defendant claimed that at common law he could avoid the contract on the ground that the plaintiff knew of his incapacity or, in the alternative, that he could do so in equity on the ground that the plaintiff knew "or ought to have known" of his incapacity, and that the sale had been made at an overvalue, in the absence of proper advice, and in the absence of equality between the parties.³⁸⁰ As regards the first basis of claim, Sir Ernest Pollock MR (with whom Warrington and Sargent LJJ agreed, while delivering their own judgments³⁸¹) held that a contract made by a person who is apparently sane is valid unless his or her mental incapacity was known to the other

contracting party, following *Molton v Camroux* and *Imperial Loan Co Ltd*.³⁸² For this purpose, he identified the underlying reason for this position, that is that “it would imperil contracts if a party was afterwards entitled to say that he was a lunatic”,³⁸³ quoting Lord Cranworth L.C. in *Elliott v Ince* to similar effect.³⁸⁴ As regards the alternative basis of defence, Sir Ernest Pollock MR upheld the decision of the trial judge that the price agreed was not excessive, that the defendant did have the benefit of advice and that there was no reasonable degree of inequality and that, therefore, the terms of the contract entered were fair.³⁸⁵ It will be seen, therefore, that the defendant’s reliance on what the plaintiff ought to have known as to his mental incapacity formed part of this wider basis for avoidance of the contract, supposedly in equity: as earlier noted, however, such a wider equitable basis of avoidance for mental incapacity was firmly rejected by the Privy Council in *Hart v O’Connor*.³⁸⁶ Warrington LJ agreed with Sir Ernest Pollock MR, but he expressed himself differently, glossing the position set out by Lord Esher in *Imperial Loan Co Ltd* by adding

“... the slight corollary that if circumstances are proved which are such that any reasonable man would have inferred from these circumstances that the man was insane, then the man who contracts with him, although he may, without swearing by the card, say he did not know, would be taken to know that the man who was of unsound mind.”³⁸⁷

Warrington LJ noted, though, that this position had been accepted by the defendant’s counsel,³⁸⁸ and that the judge below had decided that the plaintiff had no suspicion of the defendant’s incapacity and that no appeal had been made on this issue.³⁸⁹ Warrington LJ then held that the alleged distinct equitable defence also failed on the facts for the reasons set out by the judge below.³⁹⁰ Sargent LJ agreed, though without referring to Warrington LJ’s gloss of the rule in *Imperial Loan Co Ltd*. In his view, the defence of lunacy at common law did not apply on the facts as the plaintiff had not known of the lack of incapacity, holding that there was in this respect no difference between the courts of common law and equity.³⁹¹ He expressly reserved the question whether lack of fairness of a contract made by a lunatic could lead to its avoidance in the absence of such knowledge.³⁹² The most that can be said, therefore, is that the parties in *York Glass Co Ltd* had agreed that constructive knowledge of a party’s mental incapacity would be enough for the latter to avoid the contract, and that Warrington LJ was content to accept this view of the law; on the other hand, as pleaded, this gloss formed part of the alleged distinct and (possibly) equitable wider ground of avoidance on the basis of unfairness rejected by the Privy Council in *Hart v O’Connor*.³⁹³

Hart v O’Connor

In the proceedings in *Hart v O'Connor* before the New Zealand courts the plaintiff had claimed that the defendant had known or ought reasonably to have known of his mental incapacity, and while the defendant had denied these claims, he did not dissent from this formulation of the rule in *Imperial Loan Co Ltd* in the proceedings before the Privy Council.³⁹⁴ As the New Zealand court at trial had rejected this claim on the facts and as this decision was subject to appeal neither before the New Zealand Court of Appeal nor the Privy Council,³⁹⁵ the issue before these courts was instead whether a contract concluded by a mentally incapable person could be avoided on a distinct and wider ground of unfairness as had been recognised by the New Zealand Court of Appeal in *Archer v Cutler*.³⁹⁶ In holding that no such distinct ground exists in law, the Privy Council therefore did not have occasion directly to consider the nature (actual or constructive) of the knowledge of mental incapacity required by the established law in *Imperial Loan Co Ltd*, but it nevertheless expressed this law in language which refers exclusively to knowledge rather than adding that this includes what the other party ought to have known.³⁹⁷ The most that can be said is that Lord Brightman did not dissent from the view expressed in the Australian case of *Tremills v Benton* that the rule would extent to cases where a party *suspected* rather than actually knew that the other did not possess the requisite mental capacity³⁹⁸ and that, as earlier noted, Lord Brightman restricted the rule that a contract made by a mentally incapable person is valid unless the other party knew of this incapacity to the situation where the first person was “ostensibly sane”.³⁹⁹

Earlier authorities in the context of settlement of claims

- 11-084 As earlier noted, the Supreme Court in *Dunhill v Burgin* was directly concerned with the question whether a settlement of a claim concluded when the claimant's mental incapacity was unknown to the defendant required the approval of the court to be valid or whether it could be valid under the general law governing contracts in *Imperial Loan Co Ltd*.⁴⁰⁰ When the Court of Appeal in *Masterman-Lister v Brutton & Co (Nos 1 & 2)* first considered the question of mental capacity in this procedural context, the judges expressed the general rule in *Imperial Loan Co Ltd* (which they held inapplicable) in terms of the party's knowledge of a person's mental incapacity.⁴⁰¹ This remained true in the later Court of Appeal decision in *Bailey v Warren* of two of its members,⁴⁰² but Arden LJ expressed the rule differently, noting that:

“... [t]he position in relation to the compromise of a claim may therefore be different from the usual position in relation to a contract made by a person who is not known to be a patient. In such a case, the contract is enforceable unless the other party was aware or ought to have been aware that the person was a patient. In that event, the contract is voidable: *Imperial Loan Co Ltd v Stone*. ”⁴⁰³

Arden LJ did not, however, provide any further authority beyond *Imperial Loan Co Ltd* nor arguments in support of the proposition that the general rule governing contracts extends to cases of constructive knowledge; nor should this be surprising given that the content of this test was not in issue before the court as the claimant had not suggested that the defendant had known or ought to have known of his mental incapacity.⁴⁰⁴ However, Arden LJ's view that the claimant did not have the mental capacity to conclude the settlement meant that the question whether general contract law applies to compromises of claims by a mentally incapable claimant became central, and on this question she held (and Ward LJ agreed⁴⁰⁵) that it did not, as the CPR required such settlements to be approved by the court.⁴⁰⁶ This view of the majority in *Bailey v Warren* was then accepted by the Supreme Court in *Dunhill v Burgin*, which rejected the argument foreshadowed in *Masterman-Lister* that the CPR could not change the substantive law of contract in this way.⁴⁰⁷ It is understandable, therefore, that Baroness Hale in *Dunhill v Burgin* should have followed Arden LJ in *Bailey v Warren* (if without direct citation) in describing the general contract law rule so as to include constructive notice.⁴⁰⁸

Wider authority

11-085 The Privy Council in *Hart v O'Connor* noted that the rule in *Imperial Loan Co Ltd* had been adopted by the High Court of Australia in 1904,⁴⁰⁹ but more recent Australian authority is conflicting as the leading authority in the High Court of Australia, *Gibbons v Wright*, appears generally to require knowledge of a party's mental capacity, but also refers to English authority prior to *Molton v Camroux*⁴¹⁰ which suggested that constructive knowledge might suffice.⁴¹¹ As a result, some Australian courts allow that constructive knowledge is enough,⁴¹² while others have held that actual knowledge is required.⁴¹³ Canadian common law courts have taken a different approach, accepting that contracts entered by a mentally incapable person are voidable even where the other party has no notice (actual or constructive) of the incapacity as long as their terms are unfair,⁴¹⁴ a position similar to the New Zealand cases not followed by the Privy Council in *Hart v O'Connor*.⁴¹⁵ The position in Scots law is often put forward as providing a striking contrast with the English law requiring (actual) knowledge of mental incapacity, as it holds that a contract made by a person incapable of doing so is "null and void", following in this respect the Scottish institutional writers, who themselves followed Roman law.⁴¹⁶ This stark position therefore rests on civil law authorities and on a very subjective view of contract, and finds no support in the modern English authorities.

Relevance of the objective theory of contract?

11-086

In *Dunhill v Burgin* Baroness Hale appeared to adopt the argument of counsel for the defendant (there, the party seeking to uphold the settlement on the basis that the normal rule of contract law applied to its validity) that the extension of the rule in *Imperial Loan Co Ltd* to constructive notice is “consistent with the objective theory of contract, that a party is bound, not by what he actually intended, but by what objectively he was understood to intend.”

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U This idea, it would seem, finds its source in a passage of Bowstead & Reynolds on Agency
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U which was cited to the Supreme Court in relation to the question of effect of a principal’s incapacity on a contract of agency, an issue which the Supreme Court did not find it necessary to determine.

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U It is, of course, the case that English law generally adopts an objective test to the existence of agreement, with the effect that an apparent intention to be bound may suffice, so that, notably, an alleged offeror (A) may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention.

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U The objective approach does therefore appear to give some analogous support to a position according to which a person who ostensibly has mental capacity to make a contract should be bound by it. However, as explained above,

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U the state of mind of the offeree may also be relevant. So, if B actually and reasonably believes that A has the requisite intention, then the objective test is satisfied, but if B knows that, in spite of the objective appearance, A does not have the requisite intention, A is not bound as the objective test needs to be qualified in this situation.

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U However, with respect, it is submitted that the approach of English law to offer and acceptance does not provide a helpful analogy with the law governing the effect on contracts of a party’s mental incapacity. While the law governing offer and acceptance is generally concerned to facilitate commerce by protecting the reasonable reliance of parties on what others say or do even if they do not actually so intend, the question whether a person has the mental capacity to agree to the particular contract with another party is not generally one on which it is reasonable for that party to take a view, in the absence of knowledge or at least suspicion of the incapacity, or circumstances which make the incapacity apparent. Perhaps a closer analogy would be with the law of unilateral mistake which is also seen as reflecting the objective approach to contract, where a mistake as to the terms of a contract, if known to the other party, may affect the validity of the contract.

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U However, as explained above, there is no clear authority that a contract is void for mistake where A's mistake ought to have been known by to a reasonable person in B's position.

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U A further possible analogy could be drawn with the approach of the courts to the knowledge of a unilateral mistake for the purposes of rectification, where actual knowledge is held to include cases where a party wilfully shuts its eyes to the obvious, or wilfully and recklessly fails to make such enquiries as an honest and reasonable man would make.

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U Overall, however, the objective theory of contract does not provide clear support for the proposition that constructive knowledge of a person's mental incapacity should be sufficient to avoid a contract.

Competing considerations of policy

11-087 In *Dunhill v Burgin* Baroness Hale noted that much had been made in argument before the Supreme Court of the competing policy arguments in favour or against the validity of settlements of claims made by persons incapable of doing so where the other party to the settlement did not know (and ought not to have known) of the incapacity.⁴²⁶ In Baroness Hale's view, “[p]olicy arguments do not answer legal questions”, but she then saw the relevant policy underlying the CPR as being the protection of children and the mentally incapable “not only from themselves but also from their legal advisers”.⁴²⁷ It is submitted that a future court considering the general law governing the conditions for the avoidance of contracts by persons who were incapable of concluding them, should take into account the competing policies pursued by the law of mental capacity to contract. In this respect, the need to protect a person mentally lacking the capacity to enter a contract should be balanced against the practical need for commerce to take place without traders and others requiring to consider the mental incapacity of their contracting parties where it is not apparent.⁴²⁸

Summary

11-088 There is good support in the authorities for the proposition that the general rule according to which a contract may be avoided for mental incapacity only where the other party knew of a person's mental incapacity is restricted to the situation where that incapacity was not apparent.⁴²⁹ Secondly, it may be that a suspicion rather than actual knowledge of the other party's mental incapacity is enough for this purpose.⁴³⁰ Beyond this, the general judicial statements which accept that a contract may be avoided where the other party ought to have known of the mental incapacity are not supported by binding authority: the dicta of Warrington LJ to this effect in *York Glass*

Co Ltd were based on a concession by counsel and their wider authority is further undermined by their link in that case to the alleged equitable doctrine rejected in *Hart v O'Connor*⁴³¹; the dicta of Arden LJ in *Bailey v Warren* were clearly obiter, as, on her view of the case, the general law governing mental capacity and contracts was not in issue on the facts, which concerned the validity of a settlement of a claim.⁴³² The same can be said of Baroness Hale's own acceptance of this position in *Dunhill v Burgin*: the Supreme Court was not concerned to determine the limits of the test applicable to contracts generally, but rather whether this test applied to settlements of claims.⁴³³ By contrast, in *Molton v Camroux*, *Imperial Loan Co Ltd* and *Hart v O'Connor* the law is stated in a way which requires knowledge and not merely constructive knowledge of the other's mental incapacity.⁴³⁴ Thirdly, the objective principle of contract does not give convincing support for the acceptance of constructive as well as actual knowledge.⁴³⁵ Given this state of the authorities, the practical significance of such an extension of the established law prior to *Dunhill v Burgin*, and the competing considerations of policy which are in play, it is submitted that English law should not be seen as allowing the avoidance of a contract by a person mentally incapable of concluding it unless this incapacity was apparent to or known by the other contracting party.

Footnotes

- 343 So described by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] per Baroness Hale.
- 359 Above, para.11-076.
- 360 See the 31st edition (2012), para.8-070.
- 361 Notably, Beatson, Burrows and Cartwright, Anson's Law of Contract, 29th edn (2010), p.247; Peel (ed.), Treitel on The Law of Contract, 13th edn (2011), para.12-055; McKendrick, Contract Law, 9th edn (2011), p.291; Goff and Jones, The Law of Unjust Enrichment, 8th edn (2012), para.24-09 (observing that the rule is "arguably harsh"); Burrows, A Restatement of the English Law of Unjust Enrichment (2012), p.85. cf. Watts, Bowstead & Reynolds on Agency, 20th edn (2010), para.2-009 and n.28 (referring to the situation where a party "knew, or ought to have known, of the incapacity", without citation of explicit authority justifying "ought to have known").
- 362 [2014] UKSC 18, [2014] 1 W.L.R. 933. Lord Kerr, Lord Dyson, Lord Wilson and Lord Reed agreed without further comment.
- 363 [2014] UKSC 18 at [1].
- 364 [2014] UKSC 18 at [1] and [25]. The Supreme Court did not specify the source of its formulation of the rule so as to include cases where the other party ought to have known of the incapacity, but it may have come from Bowstead & Reynolds on Agency, 20th edn (2010) by Watts, para.2-009, which takes this position and which was cited by the defendant's counsel in relation to the question of the effect of a principal's incapacity on a contract of agency, a question on which the Supreme Court did not find it necessary to form a view: [2014] UKSC 18 at [31].

- 365 CPR r.21.10(1). On this decision, see below, para.[11-098](#).
- 366 *[2014] UKSC 18* at [25]–[30].
- 367 *Josife v Summertrot Holdings Ltd [2014] EWHC 996 (Ch), (2014) B.P.I.R. 1250* at [19] and [20] (Norris J) (holding that the correct test was to consider whether it would have been obvious to the other party that the person lacked capacity and holding that there was no real prospect of showing that that it would have been); *Mackay v Wesley [2020] EWHC 1215 (Ch)* at [125]–[128].
- 368 For comments on Baroness Hale's reformulation of the test see Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-056 (*Imperial Loan Co Ltd*) and other decisions require actual knowledge, describing Baroness Hale's comment as obiter dictum and noting the decision on the position of a compromise made in the absence of a "litigation friend"); Beatson, Burrows and Cartwright, Anson's Law of Contract, 31st edn (2020), p.262 at n.194 (stating the rule as being that the other party needs to have been aware of the incapacity, though noting Baroness Hale's view that constructive knowledge is sufficient); Burrows, A Restatement of the English Law of Contract 2nd edn (2020), s.43(3) (stating the rule as being that "a contract is voidable where an individual enters into it while lacking mental capacity ... provided the other party knew of that lack of mental capacity ..." and commenting (at p.226) on Baroness Hale's obiter dictum that "caution may here be needed so as not to water down what has traditionally been a clear and certain test to one of mere negligence (which would seem insufficient)"). cf. *Varney 37 L.S. (2017) 494 esp. at 511–515* (arguing for acceptance of constructive knowledge of mental incapacity as sufficient to invalidate the contract as this better takes into account social factors, such as the protection of human dignity).
- 369 *[1994] 1 A.C. 180* discussed above at paras [10-141](#) et seq.
- 370 cf. above, paras [10-149](#) et seq. This view of the possible significance of constructive notice is given some support by its treatment by Canadian courts which have accepted it as an element of invalidity of contracts on the ground of mental incapacity (on which see below, para.[11-085](#)). So, in *Hardman v Falk [1955] B.C.J. No.199* especially [2] and [9] the court considered whether the surrounding circumstances should put a contracting party on enquiry as to her lack of capacity; and in *Lingard v Thomas (1984) 46 Nfld. & P.E.I.R. 245, 135 A.P.R. 245 (Newfoundland SC Tr. Div.)* at [20]–[22], the court adopted the explanation of constructive notice in the context of fraud on a person's creditors in *Re Gomersall (1875) 1 Ch. D. 137, 146* (once put on enquiry, a wilful shutting of eyes to knowledge or means of knowledge), following *McNab v Imperial Trust Co [1935] 4 D.L.R. 570* at [11]–[13].
- 371 *Imperial Loan Co Ltd v Stone [1892] 1 Q.B. 599*, above para.[11-076](#).
- 372 *[2014] UKSC 18*.
- 373 *(1848) 2 Ex. 487, (1849) 4 Ex. 17*.
- 374 *Imperial Loan Co Ltd v Stone [1892] 1 Q.B. 599* at 602 (Fry LJ); *Hart v O'Connor [1985] A.C. 1000* at 1019; above, paras 11-075—11-076.
- 375 *(1848) 2 Ex. 487* at 503, *(1849) 4 Ex. 17* at 19 respectively. Patteson J also referred *(1849) 4 Ex. 17* at 19 to cases in the Ecclesiastical Courts relating to contracts of marriage where "the other contracting party must have known, or have had the greatest reason to believe, that the unsound state of mind existed".

376 *Hart v O'Connor* [1985] A.C. 1000, 1027, above, para.11-077.

377 cf. *Watts* (2015) C.L.J. 140 at 143 which tentatively supports the view that where A's lack of capacity would be apparent to B where contracting face to face, B should not be better off by having dealt by post, email or internet, even though in these circumstances the incapacity would not be apparent to the reasonable person in B's position.

378 cf. above, para.11-079.

379 [1925] All E.R. 285, (1925) 42 T.L.R. 1. cf. *Broughton v Snook* [1938] 1 All E.R. 411, 417 where the HC gave *Imperial Loan Co Ltd* as authority for the test that the other party knew or ought to have known of a person's mental incapacity, without further support and obiter (as the court decided on the basis of unconscionable conduct in the other party).

380 [1925] All E.R. 285 at 287.

381 [1925] All E.R. 285 at 291 and 295 respectively.

382 [1925] All E.R. 285 at 288–289.

383 [1925] All E.R. 285 at 289.

384 (1857) 7 De G.M. & G. 475 at 487, 26 L.J. Ch. 821 at 824 referring to *Molton v Camroux* as "a decision of necessity, and a contrary doctrine would render all ordinary dealings between man and man unsafe. How is a shopkeeper who sells his goods to know whether a customer is or is not of sound mind?".

385 [1925] All E.R. 285 at 290.

386 [1985] A.C. 1000 at 1024–1026, above, para.11-077.

387 [1925] All E.R. 285 at 292.

388 [1925] All E.R. 285 at 292.

389 [1925] All E.R. 285 at 293.

390 [1925] All E.R. 285 at 293.

391 [1925] All E.R. 285 at 296.

392 [1925] All E.R. 285 at 295.

393 [1985] A.C. 1000 at 1024–1026, above, para.11-077.

394 [1985] A.C. 1000, 1003.

395 [1985] A.C. 1000, 1016.

396 [1980] 1 N.Z.L.R. 386.

397 See, notably, [1985] A.C. 1000, 1019–1020, 1022–1023. This is particularly striking in Lord Brightman's treatment of *York Glass Co Ltd v Jubb* [1925] All E.R. 285 where he makes no reference to the gloss of the rule in *Imperial Loan Co Ltd* which Warrington LJ ([1925] All E.R. 285 at 292) had there accepted: [1985] A.C. 1000 at 1022–1024.

398 *Tremills v Benton* (1892) 18 V.L.R. 607 (SC Vict.) at 621–622 per Holroyd J; *Hart v O'Connor* [1985] A.C. 1000 at 1026.

399 [1985] A.C. 1000, 1013 (original claim); 1027 (before PC).

400 [2014] UKSC 18 and see above, para.11-078 and below para.11-098.

401 *Masterman-Lister v Bruton & Co (Nos 1 & 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [57] per Chadwick LJ, with whom Potter LJ at [55] agreed; Kennedy LJ did not refer to the test under the general law.

- 402 [2006] EWCA Civ 51, [2006] C.P. Rep. 26 at [102] (Hallett LJ) and at [155] (Ward LJ) respectively. Hallett LJ dissented from the view of the majority of the Court of Appeal as to the question whether the claimant's mental capacity should relate just to the compromise or more broadly to the ability to start proceedings: [2006] EWCA Civ 51, [2006] C.P. Rep. 26 at [90], [120]–[124] and [178].
- 403 [2006] EWCA Civ 51 at [109] (emphasis added).
- 404 [2006] EWCA Civ 51 at [130].
- 405 [2006] EWCA Civ 51 at [161]–[162]. The Court of Appeal held, however, that the settlement should be given the approval by the court under CPR r.21.10.
- 406 [2006] EWCA Civ 51 at [129].
- 407 [2014] UKSC 18 at [24]–[30].
- 408 [2014] UKSC 18 at [25].
- 409 [1985] A.C. 1000 at 1022–1023; *McLaughlin v Daily Telegraph Newspaper Co Ltd (No.2) (1904)* 1 C.L.R. 243, 272–274, where the HC Aus. held that this law did not apply to a power of attorney made by a person of unsound mind which was void, a decision from which the PC refused special leave to appeal on the basis that there was no reason to doubt that the judgment of the HC had been right: [1904] 1 C.L.R. 479 at 482.
- 410 (1848) 2 Ex. 487, (1849) 4 Ex. 17, above, para.11-075.
- 411 (1954) 91 C.L.R. 423 especially at 441 quoting *Dane v Viscountess Kirkwall (1838)* 8 C. & P. 679 at 670 (“or at least proof of ‘the greatest reason to believe’ that the lunacy existed”).
- 412 *Ashton v Melbourne Money Pty Ltd (1992)* A.N.Z. Conv.R. 95 at 99; *Collins by her next friend Poletti v May [2000]* WASC 29 (SC West. Aus.). See to the same effect Australian Law Commission, Equality, Capacity and Disability in Commonwealth Law ALRC Report 124 (2014), para.11.6; The Laws of Australia Encyclopedia (Westlaw updated to 2020), para.7.3.790 citing *Tremills v Benton (1892)* 18 V.L.R. 607; *York Glass Co Ltd v Jubb [1925] All E.R. 285*, (1925) 42 T.L.R. 1. as well as *Imperial Loan Co Ltd v Stone [1892]* 1 Q.B. 599; Carter, Contract Law in Australia, 7th edn (2018), para.15-38 citing *Molton v Camroux (1848)* 2 Ex. 487 at 501, (1849) 4 Ex. 17; *Broughton v Snook [1938]* 1 All E.R. 411 and *Gibbons v Wright (1954)* 91 C.L.R. 423.
- 413 *Public Trustee (WA) v Brumar Nominees Pty Ltd [2012]* WASC 161 at [90]–[96] (SC West. Aus.) following *Giles v Rooney (1996)* 23 M.V.R. 510, 513 and 514 (SC West. Aus.). *Public Trustee (WA) v Brumar Nominees Pty Ltd* was relied on by counsel in the English HC in *Josife v Summer trot Holdings Ltd [2014]* EWHC 996 (Ch) at [18], but the HC took the SC’s view in *Dunhill v Burgin* as the statement of the law for the purposes of its own decision: [2014] EWHC 996 (Ch) at [19].
- 414 *Fyckes v Chisholm (1911)* 3 O.W.N. 21 at [8]–[10]; *Hardman v Falk [1955]* B.C.J. No.199 especially [9]; *Lingard v Thomas (1984)* 46 Nfld. & P.E.I.R. 245, 135 A.P.R. 245 (Newfoundland SC Tr. Div.) at [20]–[22]; Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), para.24-09. See also Waddams, Law of Contracts, 7th edn (2017) Ch.19.
- 415 Above, para.11-077. The position in New Zealand is much affected by the statutory provision for the care of persons lacking mental capacity. As a result, where the court appoints a person (the “manager”) to manage the affairs of a person lacking mental competence, the latter no longer has the capacity to exercise the power vested and any contract so made is voidable

by that person or by the manager (though the court also has a power to adjust): Burrows, Finn and Todd, Law of Contract in New Zealand, 6th edn (2018), para.14.3.1; Protection of Personal and Property Rights Act 1988 s.53. As regards the common law position governing the invalidity of a contract for mental incapacity, the test is stated as probably requiring that the other party “knew or should have known of the other’s lack of capacity”: Burrows, Finn and Todd, Law of Contract in New Zealand, para.14.3.1 at pp.552–555; *Scott v Wise [1986] 2 N.Z.L.R. 484* (contract); *Dark v Boock [1991] 1 N.Z.L.R. 496* (gift).

- 416 *John Loudon & Co v Elder's Curator bonis [1923] S.L.T. 226* at 228 (Outer House Ct. Sess.), specifically rejecting *Imperial Loan Co Ltd v Stone* (which had been argued on the basis that the contract is voidable only if the other party was or ought to have been aware of the other’s insanity). For the Roman law see Gaius Inst. III.106; D. 44.7.1.12.

④17 [2014] UKSC 18 at [25].

④18 Watts, Bowstead & Reynolds on Agency, 20th edn (2010), para.2-009, stating that “the principle that transactions other than gifts cannot be set aside unless the person with whom the transaction was entered into knew, or ought to have known, of the incapacity” is “consistent with the higher level general principle that intention in the formation of contracts and other transactions is judged objectively”. The passage remains substantially in the 22nd edition (2020, updated 2021), para.2-009. See also *Watts (2015) C.L.J. 140* at 142.

④19 [2014] UKSC 18 at [31].

④20 Above, para.4-003. The objective approach also has important implications for the construction of contracts: below, para.15-049.

④21 Above, paras 4-004—4-006.

④22 Above, paras 4-004—4-006, which notes that English law gives no clear answer to the case where B does not know, but ought to have known, that A does not have the requisite intention.

④23 *Smith v Hughes (1870)–(1871) L.R. 6 Q.B. 597; Hartog v Colin and Shields [1939] 3 All E.R. 566.*

④24 Above, paras 5-022 et seq. discussing, inter alia, *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd [1983] Com L.R. 158, CA; O.T. Africa Line Ltd v Vickers Plc [1996] 1 Lloyd's Rep. 700, 703* (Mance J). Moreover, in *Longley v PPB Entertainment Ltd [2022] EWHC 977 (QB)* at [94] Ellenbogen J (after a review of the authorities) followed (obiter) the CA of Singapore in *Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2, [2006] 1 LRC 37*, and so considered that for unilateral mistake “actual knowledge by B of A’s relevant mistake is required and that a consideration of that which the reasonable person in B’s position ought to have known is merely one means by which to ascertain, on the balance of probabilities, whether B in fact possessed the requisite actual knowledge”.

- ④425 *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] B.L.R. 135, above, para.5-072 but see also at para.5-078.
- 426 [2014] UKSC 18 at [32].
- 427 [2014] UKSC 18 at [33].
- 428 cf. the dicta of Sir Ernest Pollock MR in *York Glass Co Ltd v Jubb* [1925] All E.R. 285 at 289 and Lord Cranworth L.C. in *Elliott v Ince* (1857) 26 L.J. Ch. 821 at 824, quoted above, para.11-082.
- 429 Above, para.11-081.
- 430 Above, para.11-083.
- 431 Above, para.11-082.
- 432 Above, para.11-084.
- 433 Above, para.11-078.
- 434 Above, paras 11-075—11-076, 11-083.
- 435 Above, para.11-086.

(iii) - The Nature of Mental Capacity and Establishing Incapacity

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(a) - The Rule in Imperial Loan Co Ltd v Stone³⁴³

(iii) - The Nature of Mental Capacity and Establishing Incapacity

Nature of understanding required

- 11-089 At common law, the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction.⁴³⁶ There is no fixed standard of mental capacity which is requisite for all transactions.⁴³⁷ What is required in relation to each particular matter or piece of business transacted, is that the party in question should have the capacity to understand⁴³⁸ the general nature of what he is doing.⁴³⁹ So, as was observed in *Re Beaney* in the context of the capacity to make a will:

“The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction.”⁴⁴⁰

Relevance of advice?

- 11-090

In *Fehily v Atkinson* it was said in the context of a person's capacity to understand an individual voluntary arrangement under Pt VIII of the [Insolvency Act 1986](#), that the assessment of a person's mental capacity in relation to a transaction should take into account relevant information, advice or assistance which that person needed to understand the transaction, rather than such advice or assistance that were in fact available to that person for this purpose.⁴⁴¹

"Few people have the capacity to manage all their affairs unaided, and whether they are capable of managing their property and affairs depends on whether they are capable of considering, and acting upon appropriate advice. In a case where a person needs advice to enable them to understand the transaction, the question is whether they have: (1) the insight and understanding to realise that they need advice; (2) the ability to find an appropriate adviser and instruct them with sufficient clarity to get the advice; and (3) to understand and make decisions based on that advice."⁴⁴²

However, in *Dunhill v Burgin* the Supreme Court considered that general statements of this kind were of little assistance in the context before it (that is, settlements of claims) and it also rejected an approach which would have allowed the actual receipt by a person of good advice, bad advice or no advice at all to be determinant of that person's capacity.⁴⁴³

Evidence of lack of capacity

- 11-091 As earlier noted, at common law, the burden of proof as to a lack of mental capacity to make a contract lies on the person alleging it.⁴⁴⁴ If the party possessed the requisite mental capacity when the contract was made, evidence of previous or subsequent mental incapacity is not material,⁴⁴⁵ but in a doubtful case it might create a suspicion that he was mentally incapable at the time of making the contract.⁴⁴⁶ The mere existence of a delusion in the mind of a person making a contract is not conclusive of his inability to understand it, even though the delusion is connected with the subject matter of the contract.⁴⁴⁷

Decisions as to a person's mental capacity under the Mental Capacity Act 2005

- 11-092 The Court of Protection which was set up under the [Mental Capacity Act 2005](#) with a comprehensive jurisdiction over the health, welfare and financial affairs of people who lack capacity⁴⁴⁸ has the power to make declarations as to a person's capacity in relation to specified decisions or matters and on the lawfulness of any act done or to be done in relation to such

a person⁴⁴⁹ and it may either itself make decisions on behalf of a person lacking capacity in relation to a matter concerning that person's personal welfare or his property and affairs⁴⁵⁰ or appoint another person (a "deputy") to make decisions on that person's behalf in relation to such a matter.⁴⁵¹ For this purpose, it is provided that a person:

"... lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain"⁴⁵²

and that:

"... a person is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means)."⁴⁵³

In coming to their decisions, both the Court of Protection and any deputee which it appoints must follow statutory principles set out by the Act and give effect to the best interests of the person affected by the lack of capacity.⁴⁵⁴

Relationship of common law and statutory tests of mental capacity

- 11-093 While the test for mental capacity provided by the [Mental Capacity Act 2005](#) does not apply on its terms to the question of capacity to contract⁴⁵⁵ (which is still determined by the common law), the Code of Practice made under the [2005 Act](#) states that:

"... the Act's new definition of capacity is in line with the existing common law tests ... When cases come before the court [involving the issue of contractual capacity], judges can adopt the new definition if they think it appropriate."⁴⁵⁶

Similarly, in *Dunhill v Burgin* Baroness Hale explained that:

"The general approach of the common law, now confirmed in the [Mental Capacity Act 2005](#), is that capacity is to be judged in relation to the decision or activity in question and not globally."⁴⁵⁷

However, this does not mean that judges are free to adopt the new statutory test in contexts governed by the common law,⁴⁵⁸ not least as the test of capacity in the Act is expressed as being “for the purposes of the Act”⁴⁵⁹ and its purposes do not include the conclusion of contracts.⁴⁶⁰ Rather, according to Munby J:

“... [w]hat is being said [in the Code of Practice] is that judges sitting elsewhere than in the Court of Protection and deciding cases where what is in issue is, for example, capacity to make a will, capacity to make a gift, capacity to enter into a contract, capacity to litigate or capacity to enter into marriage, can adopt the new definition if it is appropriate—appropriate, that is, having regard to the existing principles of the common law.”⁴⁶¹

Footnotes

- 343 So described by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] per Baroness Hale.
- 436 *Manches v Trimborn* (1946) 115 L.J. K.B. 305; cf. *In the Estate of Park* [1954] P. 112 and see *Fridman* (1963) 79 L.Q.R. 502, 518–519; *Re Beaney* [1978] 1 W.L.R. 770.
- 437 *Gibbons v Wright* (1954) 91 C.L.R. 423.
- 438 What is required is an ability to understand, rather than actual understanding, though if a person did understand a transaction, they obviously had the capacity to do so: *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus. L.R. 695 at [81] and [85], referring to *Manches v Trimborn* (1946) 115 L.J. K.B. 305 and *Re Smith (deceased)* [2015] 4 All E.R. 329 at [27]. See also *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [58].
- 439 *In the Estate of Park* [1954] P. 112; *Bennett v Bennett* [1969] 1 W.L.R. 430; *Mason v Mason* [1972] Fam. 302 (consent to decree of divorce). cf. *Clarke v Prus* [1995] N.P.C. 41 in relation to gifts; *Gibbons v Wright* (1954) 91 C.L.R. 423 at 427; *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [58]. In *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus. L.R. 695 at [87]–[103], which concerned the capacity to conclude an individual voluntary arrangement (IVA) under Pt VIII of the Insolvency Act 1986, the reference to understanding “the general nature of what he is doing” stated in the text was held to be accurate, although in so holding Stephen Jourdan QC considered that what is required is “the capacity to absorb, retain, understand, process and weigh information about the key features and effects of the contract, and the alternatives to it, if explained in broad terms and simple language”: at [102]. cf. the test of capacity under ss.2 and 3 of the Mental Capacity Act 2005, below, para.11-092.
- 440 *Re Beaney* [1978] 1 W.L.R. 770, 774 per Mr Martin Nourse QC; *A County Council v MS* (2014) 17 C.C.L. Rep. 229, [2014] W.T.L.R. 931 at [64]–[72]. On the application of this test to the context of the capacity to litigate, see below, para.11-098.

- 441 *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus. L.R. 695 at [86]. cf. the significance of legal advice in helping a person to make decisions for the purposes of the Mental Capacity Act 2005: *PBM v TGT* [2019] EWCOP 6 at [32] (pre-nuptial agreement).
- 442 *Fehily v Atkinson* [2016] EWHC 3069 (Ch) at [82] per Stephen Jourdan QC referring to *Masterman-Lister v Brutton & Co (Nos 1 & 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [18] (which itself refers to *White v Fell Unreported 12 November 1987* (Boreham J)) and [75].
- 443 *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [17] and see below, para.11-098 on *Dunhill v Burgin* itself.
- 444 *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599, 601 and 603, above, para.11-076.
- 445 *Hall v Warren* (1804) 9 Ves. Jr. 605.
- 446 *M'Adam v Walker* (1813) 1 Dow. 148, 177, HL.
- 447 *Jenkins v Morris* (1880) 14 Ch. D. 674.
- 448 Mental Capacity Act 2005 ss.15–19; Pt 2.
- 449 Mental Capacity Act 2005 s.15.
- 450 2005 Act ss.16(1) and (2)(a), 17 and 18.
- 451 2005 Act s.16(2)(b). On “deputies” see further ss.16–21.
- 452 2005 Act s.2(1).
- 453 Mental Capacity Act s.3(1).
- 454 ss.1, 4, 16(3) and 20(6).
- 455 See above, para.11-089. The statutory test does apply to the statutory liability of a person lacking capacity for necessaries: below, para.11-097. Moreover, the test has been applied to the questions whether a person has the capacity to marry and to enter a pre-nuptial agreement: *Mundell v (Name 1)* [2019] EWCOP 50, [2019] 4 W.L.R. 139 at [9]–[17], [27] and [31]; *PBM v TGT* [2019] EWCOP 6, [2019] C.O.P.L.R. 427 at [28]–[30] and [32].
- 456 Mental Capacity Act, Code of Practice (2007) 4.32 and 4.33.
- 457 [2014] UKSC 18, [2014] 1 W.L.R. 933 at [13].
- 458 *Kicks v Leigh (a.k.a. Re Smith (Deceased))* [2014] EWHC 3926 (Ch), [2015] 4 All E.R. 329 at [37]–[67] reviewing earlier authorities including *Scammell v Farmer* [2008] EWHC 1100 (Ch), [2008] W.T.L.R. 1261, *Local Authority X v MM (an adult)* [2007] EWHC 2003 (Fam), [2009] 1 F.L.R. 443; *Sutton v Sutton* [2009] EWHC 2576 (Ch.) [2010] W.T.L.R. 115; *Fisher v Diffley* [2013] EWHC 4567 (Ch), [2014] W.T.L.R. 757.
- 459 Mental Capacity Act 2005 s.1(1).
- 460 *Kicks v Leigh* [2014] EWHC 3926 (Ch) at [64] (in relation to the making of a gift).
- 461 *Local Authority X v MM (an adult)* [2007] EWHC 2003 (Fam), [2009] 1 F.L.R. 443 at [79]–[80], per Munby J; *Saulle v Nouvet* [2007] EWHC 2902 (QB), [2008] LS Law Medical 201 at [15]–[16]. cf. *A County Council v MS* (2014) 17 C.C.L. Rep. 229, [2014] W.T.L.R. 931 at [64]–[72] (capacity to make gift for the purposes of the Mental Capacity Act 2005).

(iv) - The Effect of Mental Incapacity Where Operative

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(iv) - The Effect of Mental Incapacity Where Operative

Contract voidable

- 11-094 Where a mentally incapable person concludes a contract and the other party knows of this incapacity, the contract is voidable at his or her option rather than being void.⁴⁶² It has been said that the mentally incapable person's right of rescission is subject to the usual bars (lapse of time, affirmation, third party rights and restitutio in integrum being impossible) familiar from the context of rescission for misrepresentation,⁴⁶³ though it should be added that an act of affirmation (as a declaration of intention⁴⁶⁴) would itself require the person allegedly affirming to have possessed the requisite mental capacity to do so at the time. Where a person is entitled to and does rescind a contract on the ground of mental incapacity, then it would appear that any property or money transferred under it is recoverable without the need for any total failure of consideration, this marking a further distinction in the law's treatment of mental incapacity and minority.⁴⁶⁵

Ratification

11-095

It would appear that a person who lacked mental capacity at the time of making a contract (so as to render it voidable in principle) may nevertheless be bound by it if he ratifies it subsequently after recovery or during an interval where he possesses the capacity to do so.⁴⁶⁶

Footnotes

- 343 So described by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] per Baroness Hale.
- 462 *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599, 602–603; *Manches v Trimborn* (1946) 115 L.J. K.B. 305; *Gibbons v Wright* (1954) 91 C.L.R. 423 (HC Aus.) at 449; *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1], [25]. In *Sutton v Sutton* [2009] EWHC 2576 (Ch), [2010] W.T.L.R. 115 at [46] it was acknowledged that there is real doubt as to whether mental incapacity renders a gift void or voidable (not deciding the issue) and cf. *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus. L.R. 695 at [118]–[127] where it was said, obiter, that the approach to the effect of mental incapacity on a contract applies to an individual voluntary arrangement (IVA) made under Pt VIII of the Insolvency Act 1986, distinguishing the position as regards voluntary dispositions which are rendered void by mental incapacity. In *Daily Telegraph v McLaughlin* [1904] A.C. 776, 779 the PC held that it was clear law that a power of attorney made by a mentally incapable person was void and so a deed executed under it was also void.
- 463 Burrows, The Law of Restitution, 3rd edn (2011), p.316. On these bars in the context of rescission for misrepresentation see above, paras 9-140 et seq.
- 464 Above, paras 9-141—9-142.
- 465 Burrows, The Law of Restitution, 3rd edn (2011), p.316; Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), paras 24-10—24-11. This would appear from the approach of the PC in *Hart v O'Connor* [1985] A.C. 1000, though it held that the contract was not voidable as the party receiving the property (there land) was not aware of the other's mental incapacity.
- 466 *Matthews v Baxter* (1873) L.R. 8 Ex. 132 (drunken person). The possibility of ratification was accepted by Andrew Smith J in *Crédit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), [2015] Bus. L.R. D5 at [187].

(b) - Liability for Necessaries

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(b) - Liability for Necessaries

Liability for necessities: the old law

- 11-096 At common law, a lunatic was held liable for necessities on the basis of an “implied contract” with their supplier although it was realised that this was a “most unfortunate expression, because there cannot be a contract by a lunatic”.⁴⁶⁷ The liability was restricted to the situation where the person who supplies the necessities acted with the intention of claiming payment rather than by way of gift⁴⁶⁸ and was later sometimes explained by the need to reverse the incapable person’s unjustified enrichment rather than by implied contract.⁴⁶⁹ This position at common law was amended by s.2 of the Sale of Goods Act 1893⁴⁷⁰ (subsequently s.3 of the Sale of Goods Act 1979) which provided that:

“... where necessities are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them.”⁴⁷¹

And further that:

“... ‘necessaries’ means goods suitable to the condition in life of such a person, and to his actual requirements at the time of the sale and delivery.”

While s.3 of the 1979 Act (unlike the common law governing necessitous intervention⁴⁷²) did not in terms subject the liability of a mentally incapable person for necessary goods to a condition

that they were supplied with the intention of claiming payment rather than by way of gift, this restriction can be seen implicitly in its requirement that the goods be “sold”. In common with the liability of minors for necessities,⁴⁷³ it is unclear whether this provision *defined* the liability of mentally incapable persons for necessary goods or whether it left open the possibility of liability arising at common law beyond its terms: it certainly left aside their liability for necessary *services* which remained governed by the common law. If s.3 were to define liability in respect of necessary goods, then liability would arise only when goods actually sold and delivered were necessary at the time of sale and delivery and not therefore to executory contracts for necessities (as the goods would not be “sold and delivered”) nor to contracts for goods necessary when sold but not necessary when delivered.⁴⁷⁴ On the other hand, it has been said that s.3 did not preclude liability of a mentally incapable person arising for necessary goods under a contract which would be valid under the general common law rules on the ground that his mentally incapacity was unknown to the other contracting party.⁴⁷⁵ And this must be right as otherwise where the other party does not know of his incapacity the mentally incapable person could be liable to the contract price for non-necessary goods but only a reasonable sum for necessary ones. Moreover, in some cases, a person’s mental incapacity may be so severe that it cannot be said that “necessaries are sold and delivered” to him and yet in these circumstances it has been argued that the common law rules governing necessitous intervention should still apply.⁴⁷⁶ Finally, it is submitted that, unlike the more arguable position as regards the liability of minors for necessities,⁴⁷⁷ the liability for necessities under s.3 of a person who lacks the mental capacity to make a contract for necessary goods should not be seen as arising from contract but rather on the basis of the principle of unjust enrichment.

Liability for necessities: the new law

- 11-097 However, as from 1 October 2007, s.7 of the Mental Capacity Act 2005 removed the reference to mentally incapable persons from s.3 of the Sale of Goods Act and itself instead provided that:

“If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.”⁴⁷⁸

And that for this purpose *necessary* means “suitable to a person’s condition in life and to his actual requirements at the time when the goods or services are supplied”.⁴⁷⁹ As has been noted, the 2005 Act provides an explanation of “lack of capacity” for this purpose,⁴⁸⁰ a test which can be seen to be broadly consistent with the test previously applied by the courts,⁴⁸¹ but the shift of statutory locus of the provisions regarding necessary goods (and its addition of necessary services) into the 2005 Act brings with it the application of important new general principles governing mental capacity.⁴⁸² In *Aster Healthcare Ltd v Shafi* the High Court held that the definition of “necessaries” in s.7(2) relates only to the nature of the services themselves and:

“... the word ‘requirements’ does not extend to the recipient’s subjective wishes, however reasonable, as to the location at which those necessary services are to be provided.”⁴⁸³

Moreover, the High Court considered that s.7 enacted the common law rule and was therefore:

“... designed to cure the hardship that would otherwise arise where a supplier who intended the person under a mental incapacity to pay for necessary goods or services would be unable to recover payment from him under a contract, if there was one. There is no need to show that there was any purported contract between them.”⁴⁸⁴

While s.7 may apply where a third party has made the arrangements for the provision of the necessary goods or services by a supplier, it cannot apply if it was not intended by the supplier that the person making those arrangements, or someone else, should pay for them.⁴⁸⁵ As a result, s.7 does not apply where the services supplied to the mentally incapable person were provided by the service provider under an arrangement with a local authority exercising its statutory duty under the National Assistance Act 1948.⁴⁸⁶ Finally, it is clear that the changes introduced by s.7 of the 2005 Act do not alter the general common law position which remains that a person lacking the capacity to enter a contract is liable on the contract (including for necessities) unless the other party knew of this incapacity.⁴⁸⁷

Footnotes

467 *Re Rhodes* (1890) 44 Ch. D. 94, 105 Cotton LJ. The liability of a lunatic for necessities was established much earlier: *Manby v Trott* (1662) 1 Sid. 109, 112; *Baxter v Earl of Portsmouth* (1826) 5 B. & C. 170.

468 (1890) 44 Ch. D. 94, 107.

469 *Re Rhodes* (1890) 44 Ch. D. 94; *Re J. [1909] Ch. 574* (expressed in terms of “implied contract”). cf. above, para.11-014 (liability of minors for necessities). For a discussion of the legal basis of the liability of incapable persons for necessities at common law in the context of minors see Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 24-15 —24-19. The estate of a husband who is mentally disordered is also liable at common law for necessities supplied to his wife: *Read v Legard* (1851) 6 Exch. 636.

470 s.2.

471 *Sale of Goods Act 1979* s.3(2) (as enacted).

472 Below, paras 32-146 et seq.

473 Above, paras 11-010 et seq.

474 cf. above, paras 11-013—11-015 concerning minors’ liability.

- 475 Peel (ed.), Treitel on The Law of Contract, 13th edn (2011), p.558.
- 476 Treitel, The Law of Contract, 11th edn (2003) at p.558 referring to *Re Rhodes (1890) 44 Ch. D. 94*.
- 477 Above, para.11-014.
- 478 Mental Capacity Act 2005 s.7(1) (which came into force on 1 October 2007 ([Mental Capacity Act \(Commencement No.2\) Order 2007 \(SI 2007/1897\) art.2\(1\)\(d\)](#))). It is to be noticed that s.7(1) did not retain the phrase “sold and delivered” from s.3 of the 1979 Act and this avoids the difficulty that they appear to assume that the person was capable of *some* element of consent in order to be liable for necessities: cf. *Mathews (1982) 33 N. Ir. L.Q. 148*.
- 479 Mental Capacity Act s.7(2). The Mental Capacity Act 2005 Code of Practice para.6.58 (made under [s.42 of the 2005 Act](#) and to be taken into account in deciding questions which arise under it) explains that: “The aim is to make sure that people can enjoy a similar standard of living and way of life to those they had before lacking capacity”.
- 480 Above, para.11-092.
- 481 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.12-054.
- 482 Mental Capacity Act 2005 s.1.
- 483 [2014] EWHC 77 (QB), [2014] P.T.S.R. 888 at [54]. Permission to appeal on the application of s.7 of the 2005 Act was refused and the provider of the services’ appeal regarding the existence of the local authority’s duty under the 1948 Act was rejected: [2014] EWCA Civ 1350, [2014] P.T.S.R. 1507 (note).
- 484 [2014] EWHC 77 (QB) at [55] per Andrews J.
- 485 [2014] EWHC 77 (QB) at [55].
- 486 [2014] EWHC 77 (QB) at [59].
- 487 This is apparent from the Parliamentary passage of the Mental Capacity Act 2005 where an amendment was proposed (and then withdrawn) which would have altered this position so as to render a contract unenforceable in certain circumstances where it was made with a person lacking capacity even though the other party was unaware of this incapacity: Hansard, HL Vol.670, cols 1469–1472. On the requirement of knowledge see above, paras 11-075—11-088.

(c) - Settlement or Compromise of Claims

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(c) - Settlement or Compromise of Claims

Dunhill v Burgin

11-098

In *Dunhill v Burgin* the claimant had claimed damages from the defendant vehicle driver in respect of a serious road accident and had settled her claim on the advice of her lawyers at a level which was later accepted as reflecting a gross undervaluation of her claim.⁴⁸⁸ The claimant therefore brought further proceedings by her litigation friend seeking a declaration that she had not had the mental capacity to conclude the earlier settlement. For this purpose, the Supreme Court (Baroness Hale of Richmond, with whom Lords Kerr, Dyson, Wilson and Reed agreed), held that the proper test of mental capacity under CPR Pt 21 was and is⁴⁸⁹ whether the party, or person intending to bring proceedings, had capacity to conduct proceedings.⁴⁹⁰ The Supreme Court further held that the relevant “proceedings” for this purpose were the proceedings which she might have brought had her lawyers given her different advice, rather than the proceedings which she had actually brought on the advice of her legal representatives (where the relevant decision related to whether or not to accept the sum offered).⁴⁹¹ Given that the parties had agreed that the claimant did not have capacity under this test,⁴⁹² the Supreme Court then held that the effect of this incapacity on the validity of the settlement was determined by the CPR, according to which any step taken by a person lacking mental capacity before he or she has a litigation friend “shall be of no effect, unless the court otherwise orders”.⁴⁹³ Moreover, CPR r.21.10(1) specifically provides that:

“... [w]here a claim is made—

(a)by or on behalf of a child or protected party; or
(b)against a child or protected party,
no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim, by, on behalf of, or against a child or protected party without the approval of the court.”⁴⁹⁴

The Supreme Court held that this means that a settlement made by a mentally incapable person (the “protected party”) is not valid without the approval of the court, with the effect that in these circumstances the normal rule of contract law in *Imperial Loan Co Ltd v Stone*,⁴⁹⁵ according to which a contract made by a mentally incapable person is valid unless the other party knew or ought to have known of the incapacity, does not apply.

⁴⁹⁶

 The reason for this special rule is that “the court needs, for the purpose of protecting his interests, full control over any settlement compromising his claim”.⁴⁹⁷

Footnotes

488 [2014] UKSC 18, [2014] 1 W.L.R. 933 at [4].

489 The current provision is found in CPR r.21.1(2)(c), which assimilates the test under the CPR to the test under the *Mental Capacity Act 2005*. The SC found that the CPR provision applicable at the time of the earlier proceedings provided substantially the same test.

490 [2014] UKSC 18 at [13]–[14] following *Masterman-Lister v Bruton & Co (Nos 1 & 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 and *Bailey v Warren* [2006] EWCA Civ 51, [2006] C.P. Rep. 26.

491 [2014] UKSC 18 at [7], [14]–[15], [18].

492 [2014] UKSC 18 at [18].

493 CPR r.21.3(4).

494 The version of CPR r.21.10 in force at the time of the earlier claim and of the settlement referred to “patient” instead of “protected party”, reflecting the terminology then current under Pt VII of the *Mental Health Act 1983*. The change to “protected party” was made by SI 2007/2204 (L20) when the *Mental Capacity Act 2005* came into force: [2014] UKSC 18 at [12] and [14].

495 [1892] 1 Q.B. 599.

496 [2014] UKSC 18 at [21], [25]–[30] following *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170 in the context of a claim by a minor. On the general rule in *Imperial Loan Co Ltd v Stone* and the SC’s formulation of it, see above, paras 11-075—11-076 and 11-078—11-088 respectively. On the interaction between the requirement of court approval in r.21.10(1) and

the rules governing Pt 36 offers to settle see *Wormald v Ahmed [2021] EWHC 973 (QB), [2021] 1 W.L.R. 3560* esp. at [60]–[64].

- 497 *Dietz v Lennig Chemicals Ltd [1969] 1 A.C. 170, 189* per Lord Pearson quoted with approval *Burgin v Dunhill [2014] UKSC 18* at [28].
-

(d) - Property and Affairs Under the Control of the Court

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(d) - Property and Affairs Under the Control of the Court

Background

11-099 Under the [Lunacy and Mental Treatment Acts 1890 to 1930](#) a person might be found to be of unsound mind by inquisition, and if so found was held to be incapable of making a valid disposition of property by deed even during a lucid interval,⁴⁹⁸ though whether the validity of ordinary contracts was similarly affected was not clear. The reason for this rule was that the statutory purpose of protecting and administering the property of a person of unsound mind would be frustrated if he remained capable of disposing of it by contract.

Position under the Mental Capacity Act 2005

11-100 The Lunacy and Mental Treatment Acts were repealed⁴⁹⁹ and the relevant provisions are now found in the [Mental Capacity Act 2005](#). This Act establishes the Court of Protection and gives it the power, inter alia, to make decisions or appoint deputies to make decisions “if a person (“P”) lacks capacity in relation to a matter or matters ... concerning P’s property or affairs”.⁵⁰⁰ The powers in relation to P’s property and affairs extend to the control and management of P’s property, the disposition of P’s property or the acquisition of property in P’s name or on P’s behalf, and the carrying out of any contract entered into by P.⁵⁰¹ The question remains, however, whether a person who has been found by the Court of Protection to lack capacity in relation to a matter or matters concerning his property or affairs and whose property is therefore the subject of its powers of management (or the powers of management of a deputee which it has appointed) can execute a

valid deed or enter into a valid contract in relation to those same matters despite his lack of capacity. There is no direct authority on this point, though it has been argued that he cannot do so at least as regards contracts which potentially may interfere with the court's or court appointed deputee's control over the property.⁵⁰² For this purpose, a court could see an analogy with the decision of the Supreme Court in *Burgin v Dunhill* in relation to the court's power under the CPR to approve settlements or compromises of claims by a person lacking capacity.⁵⁰³ As earlier explained, in that case the Supreme Court held that the CPR's express provision that no settlement or compromise made by an incapable person can be valid without the approval of the court disapplies the general rules of contract law applicable to mental incapacity.⁵⁰⁴ This exception was explained by reference to the court's need to have full control over any settlement of a claim by an incapable person in the interests of protecting the latter's interests.⁵⁰⁵ A similar argument could be made in relation to the situation where the Court of Protection had decided under the Mental Capacity Act 2005 that a matter or matters concerning a person's property or affairs should be subject to its own or a deputee's decision-making on the ground of that person's mental incapacity, with the result that in this situation the normal rules governing the validity of that person's contracts would not apply.

Footnotes

- 498 *Re Walker* [1905] 1 Ch. 160; *Re Marshall* [1920] 1 Ch. 284. cf. *In the Estate of Walker* (1912) 28 T.L.R. 466 (disposition by will).
- 499 Mental Health Act 1959 Sch.8.
- 500 Mental Capacity Act 2005 s.16(1)(b), (2) and see further ss.15, 16 and 18, 45 and 64(1).
- 501 Mental Capacity Act 2005 s.16(1)(b); s.18(1)(a), (b), (c) and (f).
- 502 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020) at paras 12-057—12-058.
- 503 [2014] UKSC 18, [2014] 1 W.L.R. 933, above para.11-098.
- 504 [2014] UKSC 18, [2014] 1 W.L.R. 933 at [21], [25]–[30], above para.11-098.
- 505 *Burgin v Dunhill* [2014] UKSC 18 at [28] quoting *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170, 189 per Lord Pearson.

(e) - Other Matters

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(e) - Other Matters

Deeds

- 11-101 A deed executed by a person who lacks mental capacity for some purposes may still be valid if he is capable of understanding the effect of the deed at the time of its execution.⁵⁰⁶ Thus deeds executed during a lucid interval are valid.⁵⁰⁷ Where a deed executed by a mentally incapable person gives effect to an agreement supported by consideration, then the general rule in *Imperial Loan Co Ltd* applies so as to subject its avoidance to knowledge of the incapacity in the other party.⁵⁰⁸ As with contracts in general, a deed made with such a person may be set aside on equitable grounds, such as relief against unconscionability.⁵⁰⁹ On the other hand, where property is transferred by a deed without any consideration, the gift is voidable irrespective of the donee's knowledge.⁵¹⁰

Effect of principal's lack of capacity upon agency

- 11-102 It has been said that at common law the insanity of a principal terminates the authority of an agent to act on the ground that where the principal "can no longer act for himself, the agent whom he has appointed can no longer act for him".⁵¹¹
- It is submitted that (with the important exception of lasting powers of attorney

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U) where a principal develops a lack of capacity in respect of a particular translation which he has entrusted to an agent, then the agent's actual authority to make such a transaction is also terminated.

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U However, the agent's apparent authority may continue beyond such a time, and the agent may himself be liable for breach of an implied warranty of authority.

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U However, this view of the authorities is not taken by more recent editions of Bowstead & Reynolds on Agency, which instead holds that the general rules governing the validity of contracts made by an incapable person apply here too, with the result that:

“... mental incapacity in a principal will not preclude his conferring actual authority on an agent when the agent had no reason to know of the incapacity,

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U and such authority will endure until the agent becomes aware of the incapacity (or the agency otherwise terminates upon general principles) ... The same principles should apply to the existence of apparent authority, the incapacity of the principal not preventing any representation made by him to the third party as to the agent's authority from being effective, unless the third party is aware of the incapacity.”

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U

According to the Supreme Court in *Dunhill v Burgin*, the authorities are in a state of some confusion on these points and, given that the issue did not arise for its decision, did not express any opinion on the state of the law.

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U Subsequently, the Court of Appeal has expressed considerable sympathy for the view that it is potentially unfair for the supervening incapacity of a principal (a litigant/client) to have the effect of automatically terminating the authority of their agent (a solicitor), exposing that agent to the risk of liability for breach of warranty of authority.

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U However, the Court of Appeal did not need to re-examine the authorities on this point as the issue before it concerned the narrower point whether the incapacity frustrated the conditional fee agreement (CFA) between the litigant and their solicitor,

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U holding that it did not as any instructions could be given by a litigation friend or a receiver/deputy after a delay for their appointment.

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Powers of attorney

- 11-103 In general, an instrument creating a power of attorney must be executed by deed.⁵²¹ Unlike the general effect of mental incapacity on a contract (which renders it voidable rather than void⁵²²), an instrument purporting to create a power of attorney executed by a mentally incapable person has been said to be void at common law rather than voidable with the effect that any instrument made under the purported exercise of that power is also void.⁵²³ However, the **Powers of Attorney Act 1971** provides protection to a person who has dealt with a donee of a power of attorney without knowledge that it has been revoked, rendering any transaction between them “in favour of that person, as valid as if the power had then been in existence”.⁵²⁴

Special rules apply to “lasting powers of attorney” as noted immediately below.⁵²⁵

Lasting powers of attorney

- 11-104 The **Mental Capacity Act 2005 Act** made new provision for “lasting powers of attorney” which replaced the “enduring powers of attorney” provided for by the **Enduring Powers of Attorney Act 1985**.⁵²⁶ Under the provisions in the 2005 Act, a “lasting power of attorney” can include a power of attorney under which the donor confers on the donee authority to make decisions about the donor’s property and affairs or specified matters concerning his property or affairs “and which includes authority to make such decisions in circumstances where [the donor] no longer has capacity”.⁵²⁷ At the time of the execution of the instrument conferring the lasting power of attorney, the donor must be adult and have “the capacity to execute it”.⁵²⁸ On the other hand, the donor may revoke the power “at any time when he has capacity to do so”.⁵²⁹

Legal estate vested in person lacking capacity

- 11-105 By s.22(1) of the **Law of Property Act 1925** (as amended by the **Mental Capacity Act 2005**⁵³⁰), where a legal estate in land (whether settled or not) is vested in a person lacking capacity within

the meaning of the **2005 Act** to convey or create a legal estate, a deputy appointed for him by the Court of Protection or (if no deputy is appointed for him) any person authorised in that behalf shall, under an order of the Court of Protection, or of the court, or under any statutory power, make or concur in making all requisite dispositions for conveying or creating a legal estate in his name and on his behalf. And by **s.22(2) of the 1925 Act**, if land subject to a trust of land is vested in a person who lacks capacity within the meaning of the **2005 Act** to exercise his functions as trustee, a new trustee shall be appointed in the place of that person, or he shall be otherwise discharged from the trust, before the legal estate is dealt with by the trustees.⁵³¹

Footnotes

- 506 *Ball v Mannin* (1829) 3 *Bli. N.S.* 1, 22; *Elliott v Ince* (1857) 7 *De G.M. & G.* 475; *Re Beaney* [1978] 1 *W.L.R.* 770. But see above, para.11-099.
- 507 *Hall v Warren* (1804) 9 *Ves. Jr.* 605; *Selby v Jackson* (1844) 6 *Beav.* 192; *Birkin v Wing* (1890) 63 *L.T.* 80; *Re Beaney* [1978] 1 *W.L.R.* 770. cf. *Daily Telegraph Newspaper Co Ltd v McLaughain* [1904] A.C. 776.
- 508 *Gibbons v Wright* (1954) 91 *C.L.R.* 423, 444 and see above, paras 11-075 et seq.
- 509 See above, paras 10-161 et seq.
- 510 *Ernst v Elliott* (1857) 7 *De G.M. & G.* 475 at 487, 26 *L.J. Ch.* 821 at 824; *Sutton v Sutton* [2009] EWHC 2576 (Ch), [2010] W.T.L.R. 115 at [40]. On the effect of mental incapacity on powers of attorney see *Daily Telegraph Newspaper Co Ltd v McLaughain* [1904] A.C. 776 and below, para.11-103.
- 511 *Drew v Nunn* (1879) 4 *Q.B.D.* 661, 666–667. See also *McLaughlin v Daily Telegraph Newspaper Co Ltd* (No.2) (1904) 1 *C.L.R.* 243 (HC Aus.), [1904] 1 *C.L.R.* 479 at 482 (PC refusing special leave to appeal).
- 512 Below, para.11-104.
- 513 cf. below, para.21-041.
- 514 *Drew v Nunn* (1879) 4 *Q.B.D.* 661; *Yonge v Toynbee* [1910] 1 *K.B.* 215. See below, para.21-063.
- 515 On the general test at common law see above, paras 11-078—11-088. Watts, Bowstead & Reynolds on Agency, 22nd edn (2020, updated 2021), para.2-009 text at n.29 accepts the formulation that the other party “knew, or ought to have known, of the incapacity”.
- 516 Watts, Bowstead & Reynolds on Agency, 22nd edn (2020, updated 2021), para.2-009 (citations omitted); n.28 notes that this passage did not appear in the 13th to 19th editions, “but is consistent with such material as there was on the subject in all editions before the

13th". See further *Watts* [2015] *C.L.J.* 140 and *Varney* (2020) *J.B.L.* 382, who argues (at 383) that the general rule in *Imperial Loan Co Ltd* "should apply to agency agreements, but that this rule should be interpreted broadly to include not only actual knowledge, but also constructive knowledge based on the circumstances of the transaction".

⑤17 [2014] *UKSC 18*, [2014] *1 W.L.R.* 933 at [31]. See also *Hudson* (1959) 37 *Canadian Bar Rev.* 497.

⑤18 *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] *EWCA Civ 18*, [2015] *1 Costs L.R.* 119 at [36]–[37].

⑤19 [2015] *EWCA Civ 18* at [37].

⑤20 [2015] *EWCA Civ 18* at [38]–[39].

521 Powers of Attorney Act 1971 s.1.

522 Above, para.11-094.

523 *Daily Telegraph v McLaughlin* [1904] *A.C.* 776, 780 (*P.C.*) referring to *Elliot v Ince* (1857) 7 *De G.M. & G.* 475.

⑤24 Powers of Attorney Act 1971 s.5(2) and see *Watts*, *Bowstead & Reynolds on Agency*, 22nd edn (2020, updated 2021), para.2-009.

525 Below, para.11-104.

526 Mental Capacity Act 2005 ss.9–14 (in force on 1 October 2007).

527 Mental Capacity Act 2005 s.9(1).

528 s.9(2)(c).

529 s.13(2) and see *TB v KJP* [2016] *EWCP 6*, [2016] *W.T.L.R.* 687.

530 2005 Act Sch.6 para.4(2)(c).

531 2005 Act Sch.6 para.4(2)(c).

Section 4. - Drunken Persons

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Section 4. - Drunken Persons

Effect of drunkenness

11-106

U

In *Pitt v Smith*⁵³² in 1811, Lord Ellenborough held that a person in a state of complete intoxication has “no agreeing mind”; and later, in an action for work and labour, held that proof that the plaintiff was drunk when he signed what the defendant insisted was an agreement, dispensed with the necessity of producing it, the instrument being a nullity.⁵³³ It would appear that the test of incapacity by reason of drunkenness is the same as that for persons lacking mental capacity, viz whether the person alleged to be incapable was so drunk as not to understand what he was doing, and whether the other party knew of his condition.⁵³⁴ Moreover, given this close relationship between avoidance of a contract on the ground of mental incapacity and on the ground of intoxication, if the former extends to cases where the other party *ought to have known* of the incapacity, as stated by the Supreme Court in *Burgin v Dunhill*,⁵³⁵ then this extension of the rule should apply equally to cases of intoxication. Where these conditions are satisfied, then the effect of drunkenness in a contracting party is that the contract is voidable at his option, and can accordingly be ratified when he is sober.⁵³⁶ But other authorities suggest that equity has a wider jurisdiction to set aside an unfair or unconscionable transaction entered into by a person affected by drink.⁵³⁷ It would seem that a similar approach would be taken to a contract made under the influence of intoxicating substances other than alcohol, notably drugs.⁵³⁸ In *Barclays Bank Plc v Schwartz*,⁵³⁹ Millett LJ accepted that the reason for drunkenness of a party to a contract affecting its validity is that like mental incapacity it deprives a person not only of a full understanding of a transaction, but also of the awareness that he does not understand it.

Liability for necessary goods

- 11-107 For necessities sold and delivered, the liability of a drunken person is, by s.3 of the Sale of Goods Act 1979,⁵⁴⁰ similar to that of a minor.

Footnotes

532 (1811) 3 Camp. 33.

533 *Fenton v Holloway* (1815) 1 Stark. 126.

534 *Gore v Gibson* (1845) 13 M. & W. 623; *Molton v Camroux* (1848) 2 Ex. 487 at 501, (1849) 4 Ex. 17; *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599; *Hart v O'Connor* [1985] A.C. 1000; *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412, 425 and see above, para.11-075.

535 [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] and [25] on which see above, paras 11-078—11-088 where this view is considered.

536 *Matthews v Baxter* (1873) L.R. 8 Ex. 132.

537 *Cory v Cory* (1747) 1 Ves. Sen. 19; *Cooke v Clayworth* (1811) 18 Ves. Jr. 12; *Butler v Mulvihill* (1823) 1 Bli. 137; *Wiltshire v Marshall* (1866) 14 L.T.(N.S.) 396; *Blomley v Ryan* (1956) 99 C.L.R. 362. cf. *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412, 425. This question is related to the wider question whether or not English law accepts a wide doctrine of “unconscionability”, on which see above, paras 10-161 et seq.

538 *Irvani v Irvani* [2000] Lloyd's Rep. 412.

539 *The Times*, 2 August 1995.

540 See above, paras 11-010 et seq.

(a) - Kinds of Corporations

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Section 1. - Corporations

(a) - Kinds of Corporations

D. D. Prentice; supplement by Peter Watts

Kinds of corporations

- 12-001 Corporations, which are legal personae just as much as are individuals,¹ are either sole or aggregate. They may also be classified as ecclesiastical and lay, or as statutory and non-statutory. Lay corporations may be either trading or non-trading.² Statute creates distinctions between various types of corporation for various purposes.³

Corporations sole and aggregate

- 12-002 A corporation sole consists of a single person and their successors in office, such as the Crown, an archbishop, bishop or parson, the Treasury Solicitor,⁴ or the Public Trustee.⁵ It would seem that the benefit⁶ and burden⁷ of contracts made with a corporation sole pass, on the death of the holder of the office, to their successor in office; and contracts purportedly made with the corporation during a vacancy in the office take effect on the vacancy being filled, subject to a right of disclaimer by the successor in office.⁸ A corporation aggregate is a legal person composed of individual members, but with a continuous identity distinct from that of the members composing it.⁹

U It follows that it can hold property in its own right, that its rights and liabilities are unaffected by changes in its membership and that, generally speaking, its property but not that of its members is available to satisfy its liabilities.

Companies Act 2006

12-003 The [Companies Act 1985](#) has been replaced by the [Companies Act 2006](#) the provisions of which were brought into effect in stages. Five commencement orders were made,¹⁰ the final implementation being 1 October 2009.¹¹ [Section 1297 of the 2006 Act](#) is a continuity of law provision. This section provides that where the [2006 Act](#) re-enacts a provision repealed (with or without modification) by the Act, the repeal and re-enactment does not affect the continuity of the law. Also, and very importantly, where there are references in articles of association, resolutions and contracts referring to a provision in the [1985 Act](#) which is replicated in the [2006 Act](#), the provisions of the [2006 Act](#) will be applicable (even if there have been verbal changes) unless it is intended that a change should be effected by the [2006 Act](#).

Footnotes

1 [Re Sheffield, etc. Building Society \(1889\) 22 Q.B.D. 470, 476.](#)

2 There is also the European Economic Interest Grouping (EEIG) which is an entity distinct from its members: see the [European Economic Interest Grouping Regulations 1989 \(SI 1989/638\) \[1985\] O.J. L199/1](#).

3 e.g. [Insolvency Act 1986 s.A2](#) and [Sch.ZA1](#), inserted by [Corporate Insolvency and Governance Act 2020 s.1](#), exempts certain types of financial institutions from the moratorium introduced by the [2020 Act](#).

4 [Treasury Solicitor Act 1876 s.1](#).

5 [Public Trustee Act 1906 s.1](#).

6 [Law of Property Act 1925 ss.180\(1\) and 205\(1\)\(xx\)](#), reversing the common law rule in [Howley v Knight \(1849\) 14 Q.B. 240, 255](#).

7 See Co.Litt. 144b, n.2.

8 [Law of Property Act 1925 s.180\(3\)](#).

9 As to the juristic nature of corporations, see [Wolff \(1938\) 54 L.Q.R. 494](#); [Hart \(1954\) 70 L.Q.R. 37](#); Davies, Worthington and Hare, [Gower's Principles of Modern Company Law](#), 11th edn (2021), Chs 1 and 2; [Rayner \(Mincing Lane\) Ltd v DTI \[1990\] 2 A.C. 418](#); [Adams v Cape Industries Plc \[1990\] Ch. 433](#).

- 10 Companies Act 2006 (Commencement No.1, Transitional Provisions and Savings) Order 2006 (SI 2006/3428 (c.132)); Companies Act 2006 (Commencement No.2, Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007/1093 (c.49)); Companies Act 2006 (Commencement No.3, Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007/2194 (c.84)); Companies Act 2006 (Commencement No.4 and Commencement No.3 (Amendment)) Order 2007 (SI 2007/2607 (c.101)); Companies Act 2006 (Commencement No.5, Transitional Provisions and Savings) Order 2007 (SI 2007/3495 (c.150)).
- 11 For the implementation programme see The Companies Act 2006: Updating you; updating your clients (BERR, 2008).

(b) - Corporations in General

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Section 1. - Corporations

(b) - Corporations in General

Corporation created by charter

12-004 A corporation created by charter can, unless prevented by some statute regulating its proceedings,¹² contract and deal with its property in the same way as an individual.¹³

U Contracts made by it outside the terms of its charter are valid, but by making them the corporation renders itself liable to the revocation of its charter.¹⁴ But a member may obtain an injunction to restrain a chartered company from acting on regulations which would materially change the character of the company and which could not have been contemplated at the date of its incorporation.¹⁵ But they cannot restrain the corporation, acting on the wishes of a majority of its members, from applying to the Crown for an alteration of the charter.¹⁶

Corporation created by statute

12-005 The powers of a corporation, whether sole or aggregate, created by statute are confined to those given expressly or by reasonable inference by the statute concerned.¹⁷

U If the subject-matter of a contract made by such a corporation is outside the scope of its constitution as defined by the statute, the contract will be ultra vires and void, as a general principle.
18

U Sometimes, however, a statutory control on the corporation's activities may not restrict its capacity but simply make non-conforming conduct illegal.

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U The general principle applies to all statutory corporations unless otherwise provided.

20

U In relation to companies registered under the Companies Act 2006, the ultra vires rule has been abrogated by [s.39 of the Act](#),

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U the overall purpose of this provision being to guarantee security of transactions between companies and persons with whom they deal. Ultra vires will still have relevance as regards directors' authority to bind the company.

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U

Corporations regulated by legislation

12-006 Certain corporations, although not created by statute, are regulated by legislation. Thus, the powers of ecclesiastical corporations, sole and aggregate, are limited by particular statutory provisions²³; and most charitable corporations
24

U are subject to the control of the Charity Commissioners under the [Charities Act 1993](#).

Footnotes

12 See *Att-Gen v Manchester Corp [1906] 1 Ch. 643*.

13 *Sutton's Hospital Case (1612) 10 Co. Rep. 23a; Baroness Wenlock v River Dee Co (1887) 36 Ch. D. 674, 685n; R. v Bonanza Creek Gold Mining Co Ltd [1916] 1 A.C. 566, 583–584; Institution of Mechanical Engineers v Cane [1961] A.C. 696, 724–725; Pharmaceutical Society of Great Britain v Dickson [1970] A.C. 403; SR Projects Ltd v Rampersad, Liquidator*

of the Hindu Credit Union Co-operative Society [2022] UKPC 24 at [28]. See the Companies Act 2006 s.1043 Pt 33, Chs 1 and 2.

14 See the Companies Act 2006 s.1043 Pt 33, Chs 1 and 2 and see *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 1 Ch. 354, 374–376; reversed on other grounds [1912] A.C. 52. cf. *Att-Gen, New Brunswick v St John* [1948] 3 D.L.R. 693.

15 *Jenkin v Pharmaceutical Society of Great Britain* [1921] 1 Ch. 392. A similar action lies if the alteration is in restraint of trade.

16 *Gray v Trinity College, Dublin* [1910] 1 Ir. R. 370.

①17 For local authorities see *Hazell v Hammersmith and Fulham London BC* [1992] A.C. 1.

①18 *Ashbury Ry Carriage and Iron Co v Riche* (1875) L.R. 7 H.L. 653.

①19 See *SR Projects Ltd v Rampersad* [2022] UKPC 24 (a controversial majority ruling).

①20 *Baroness Wenlock v River Dee Co* (1885) 10 App. Cas. 354. The doctrine of ultra vires is discussed further below, paras 12-020 et seq. As to the application of this principle to overseas companies, see Dicey and Morris on the Conflict of Laws, 15th edn (2017), 30R–020; *Janred Properties Ltd v Ente National Per Il Turismo (No.2)* [1986] 1 F.T.L.R. 246.

①21 Below, paras 12-027 et seq.

①22 See paras 12-031—12-033.

23 Ecclesiastical Leasing Acts 1842 and 1858; Ecclesiastical Leases Acts 1861, 1862 and 1865.

①24 On the nature of charitable companies see *Liverpool and District Hospital for Diseases of the Heart v Att-Gen* [1981] Ch. 193; and *Lehtimaki v Cooper* [2020] UKSC 33, [2022] A.C. 155.

(c) - Attribution of Acts to a Company

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(c) - Attribution of Acts to a Company

- 12-007 It is a trite observation that a company can only act through the instrumentality of individuals to, for example, enter into contracts. The question arises as to which individuals will bind the company so that it is liable under a contract. The answer to this question is provided by the rules of attribution whereby the acts of certain individuals are attributed to the company. The principles of attribution were analysed by Lord Hoffmann in *Meridian Global Funds Management Ltd v Securities Commission*.

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U First, there are the company's primary rules of attribution which are to be found normally in the company's constitution (the articles and memorandum of association) and which will determine who or which organ of the company can enter into transactions on behalf of the company.

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U The primary rules of attribution may also be provided by the rules of company law, for example, the principle that the unanimous decision of all the shareholders of a solvent company, even though given informally, constitutes a decision of the company.

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U Coupled with the company's primary rules of attribution are general rules of attribution, namely, the principles of agency and vicarious liability.

28

U There will be situations, however, where the primary and secondary rules of attribution do not provide an answer and in these situations the court will have to determine who, if anyone, for the

particular matter under consideration is intended to count as the person whose acts are attributed to the company.

29



Company's name

- 12-008 The [Business Names Act 1985](#) was repealed by the [Companies Act 2006](#)³⁰ and replaced by Pt 41³¹ of that Act. [Part 41](#) applies to a “person” carrying on business in the United Kingdom.³² [Chapter 1 of Pt 41](#) contains prohibitions on the use of sensitive names, broadly names that suggest a connection with a government department or which are subject to statutory regulations. Individuals and partnerships are required to set out details as to their names where they are trading under a “business name”.³³ Such disclosure is also required in “business documents”.³⁴ Failure to make such disclosure can have criminal consequences³⁵ and can affect the company’s right to enforce any contract.³⁶ There are no longer display rules of names by corporate bodies. The Secretary of State may make regulations requiring every company to display its name in a specified way, to include its name in specified documents, and to provide its name in the course of business.³⁷ [Section 83](#) deals with the civil consequences of failure to comply with the name disclosure regulations. Failure to comply affects the right of the company to bring proceedings arising out of any contract with respect to which the company was in breach of the name regulations, there is, however, no personal liability imposed on the directors in this situation.³⁸

Abolition of old rule requiring seal: other formalities

- 12-009 The contracts of a corporation sole were never required to be made under seal.³⁹ But the old common law rule was that a corporation aggregate could contract only under seal.⁴⁰ The scope of this rule had been greatly restricted by numerous statutory, common law and equitable exceptions; it did not apply to companies incorporated under the [Companies Act](#)⁴¹ and it was finally abolished altogether by the [Corporate Bodies Contracts Act 1960](#). For companies registered under the [2006 Act](#), s.43 is the key provision. [Section 43\(1\)](#) provides that companies can enter into contracts either by deed or through a person acting under the company’s authority, express or implied. In addition, [s.43\(2\)](#) provides that any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of a company. Thus, for contracts that have to be in writing and signed but do not need to be in deed form, as

under s.2(3) of the Law of Property (Miscellaneous Provisions) Act 1989, it will be sufficient if the written document is signed by or on behalf of the company by someone who has authority to do so.

42



Deeds

- 12-010 **U** Section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989, which defines what constitutes a deed, applies to companies. How a deed is to be executed by a company is set out in ss.44–47 of the 2006 Act.

43

U Section 44(1)(a) provides that a document (including a contract) can be executed by a company by affixing the company's common seal or, as provided for in s.44(1)(b), by a "signature in accordance with the following provisions" in the section. These provisions permit a document to be executed by "two authorised signatories"

44

U and for this purpose every director of the company and, where the company has one, the secretary are authorised persons.

45

U A deed or other formal document can also be validly executed by a director in the presence of a witness who attests the signature: s.44(3)(b). This is remarkably generous to outside parties, since the witness need not have any connection to the company, leaving the company exposed to the conduct of a single director. To be binding on the company the document must be "executed by the company"

46

U which requires that it be apparent from the face of the document that it is being "executed by the company" and not merely by someone acting as agent for the company.

47

U Where otherwise there is a requirement that something must be done "personally", a conclusion the courts resist having to reach,

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U this can usually be done by a company by complying with s.44.

49

U For the different tests for the validity of specialties as compared to simple contracts, both at common law and under the 2006 Act, see para.12-040, below.

Footnotes

- ①25 [1995] 2 A.C. 500, PC. See also *Bank of India v Morris* [2005] EWCA Civ 693, [2005] 2 B.C.L.C. 328; *Bilta (UK) Ltd v Nazir (No.2)* [2015] UKSC 23, [2016] A.C. 1. The principles of attribution are developed more fully in paras 18-229 et seq.
- ①26 See, e.g. art.70 of Table A Companies (Tables A–F) Regulations 1985 (SI 1984/805), Companies (Model Articles) Regulations 2008 (SI 2008/3229) reg.3.
- ①27 *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch. 258.
- ①28 See *New Zealand Guardian Trust Co Ltd v Brooks* [1995] 1 W.L.R. 96.
- ①29 See, e.g. *Julien v Evolving Technologies and Enterprise Development Co Ltd* [2018] UKPC 2, noted Watts (2018) 134 L.Q.R. 350.
- 30 Sch.16.
- 31 This is excluded from those parts of the Act deemed to constitute “the Companies Act” as it applies to business names in general: see *Companies Act 2006* s.2.
32 s.1192(1).
- 33 s.1200.
- 34 s.1202.
- 35 s.1205.
- 36 s.1206.
- 37 s.82.
- 38 *Companies Act 1985* s.349(4) has not been replicated.
39 Bl. Comm. Vol.I, at 475.
- 40 *Yarborough v Bank of England* (1812) 16 East 6; *Ludlow Corp v Charlton* (1840) 6 M. & W. 815; *A.R. Wright & Son Ltd v Romford BC* [1957] 1 Q.B. 431.
- 41 See now s.43 of the 2006 Act.
- ①42 See *Mars Capital Finance Ltd v Hussain* [2021] EWHC 2416 (Ch) at [106], a tentative ruling because the point did not need to be decided, and a dictum in *Williams v Redcard Ltd* [2010] EWHC 1078 (Ch) at [12] had suggested that companies entering into contracts caught by s.2(3) of the Law of Property (Miscellaneous Provisions) Act 1989 need to meet

the requirements for execution in s.44. The dictum in *Redcard*, it is suggested, is not correct. For more detailed discussion, see para.[7-046](#), above.

④3 See *Lovett v Carson Country Homes Ltd [2009] EWHC 1143 (Ch), [2009] 2 B.C.L.C. 196.*

④4 s.44(2)(a).

④5 All public companies must have a secretary; a private company does not need to have one but may do so: [s.270](#) and [s.271](#). A document can also be validly executed by a director in the presence of a witness who attests the signature: [s.44\(3\)\(b\)](#).

④6 s.44(4).

④7 *Williams v Redcard Ltd [2011] EWCA Civ 466, [2011] 2 B.C.L.C. 350* at [18] (appellants' submissions).

④8 See *Northwood Solihull Ltd v Fearn [2022] EWCA Civ 40, [2022] 1 W.L.R. 1661.*

④9 *City & County Properties Ltd v Plowden Investments Ltd [2007] L. & T.R. 15.* See also *Hilmi Associates Ltd v 20 Pembridge Villas Freehold Ltd [2010] EWCA Civ 314, [2010] 1 W.L.R. 2750.*

(d) - Registered Companies

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 4 - Capacity of Parties

Chapter 12 - Corporations and Unincorporated Associations

Section 1. - Corporations

(d) - Registered Companies ⁵⁰

Registered companies

- 12-011 This section is principally concerned with companies registered under the Companies Acts, but many of the principles herein discussed also apply to corporations created by particular private or public Acts.

Footnotes

- 50** This is not a summary of company law, but only of the law applicable to the contracts of companies.

(i) - Contracts between Companies and Third Parties

Chitty on Contracts 34th Ed.

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(d) - Registered Companies ⁵⁰

(i) - Contracts between Companies and Third Parties

Pre-incorporation contracts

12-012 Contracts entered into before a company is registered can, *prima facie*, bind or confer rights only on the actual makers of the contract and not the company,⁵¹ the reason for this being that a company could not be bound by a contract entered into when it was non-existent.⁵² At common law such contracts could even be completely null and void if the persons purporting to sign on behalf of the company were not the real principals.⁵³ However, the courts are strongly disposed to give effect to pre-incorporation contracts and, acting on the maxim *ut res magis valeat quam pereat*, the agent more likely than not will be personally bound on the contract particularly where both parties were aware at the time of contracting of the non-existence of the company.⁵⁴ It must be emphasised, however, that at common law there was no general rule that a person acting for a non-existent principal would be automatically bound by the contract; in the final analysis the agent's liability turns on the intention of the parties.

⁵⁵

U The common law was significantly modified by the need to implement art.7 of the First Directive on Company Law which deals with pre-incorporation contracts.⁵⁶ Article 7 was first implemented by s.9(2) of the European Communities Act 1972, was consolidated into s.36(4) of the Companies Act 1985 and became s.36C of the 1985 Act⁵⁷ and is now restated in s.51 of

the 2006 Act. What is stated in the text with respect to ss.36(4) and 36C is equally applicable to s.51. Commenting on s.36(4), Oliver LJ in *Phonogram Ltd v Lane*⁵⁸ stated that it swept away the “subtle distinctions” of the common law so that:

“[W]here a person purports to contract on behalf of a company not yet formed, then however he expresses his signature he himself is personally liable on the contract.”⁵⁹

Phonogram Ltd v Lane was the first case⁶⁰ to interpret s.36(4), and the Court of Appeal rejected attempts to construe narrowly the effect of the section. In particular, it rejected the argument that the phrase “subject to any agreement to the contrary” should be interpreted to relieve a person of liability where they sign the contract as agent, in that this could be taken as evincing an agreement that the person acting for the company was not to be personally liable.⁶¹ A person acting for an unformed company could only avoid liability under s.36C where there was an “express agreement”⁶² that they were not to be liable. In *Royal Mail Estates Ltd v Maple Teesdale*⁶³ it was argued that such an “agreement to the contrary” could arise in one of two ways. The first was that a contrary agreement exists where there is a “contractual provision which … is inconsistent with a consequence which flows (or consequences which flow) from the section 36C effect”. The second is that there is “only a contrary agreement … if there is found to be an agreement between the parties by which they intended to exclude the section 36C effect”.⁶⁴ In *Royal Mail Estates Ltd v Maple Teesdale* the defendants had signed a contract on behalf of an unincorporated company. The reason why the s.36C issue arose was that the contract contained a term that the benefit of the contract “is personal to the Buyer and is not capable of being assigned by the Buyer other than being novated …”. It was argued that this constituted an “agreement to the contrary” and accordingly fell within the terms of s.36C, in other words the first method for showing a contrary agreement was applicable. This was rejected by the court which adopted the second approach set out above, namely that there had to be an explicit agreement in order to exclude the operation of s.36C. Section 51 creates a deemed contract which confers mutual obligations and rights, that is, it not only confers obligations on the agent who acted for the non-existent company but also confers a right of enforcement against the other party to the contract provided it is a situation where the ordinary principles of the common law of agency would entitle the agent to enforce the contract against the third party.⁶⁵ In determining who is the “agent” for the purpose of the section it is the person who purported to make the contract for the company and there is no need to establish from the totality of the negotiations that the purported agent was the moving mind and will of the whole transaction.⁶⁶ Where a person contracts on behalf of a company which has been struck off the register, and later forms a new company, the section does not apply as the new company was not in contemplation when the contract was entered into.⁶⁷

12-013 Section 51 does not affect the company itself, and it remains the law that a company is not entitled to the benefits of, or bound by the liabilities in, a contract entered into before it was incorporated. But in some circumstances a company may acquire rights or incur liabilities at law or

equity in respect of a transaction originally entered into before the incorporation of the company. Broadly speaking, for a company to be so liable it must enter into a new contract after it has been incorporated, but it is arguable (as will be seen later) that a company can be liable in other circumstances.

At law

- 12-014 A company cannot ratify or adopt a contract made ostensibly on its behalf before its incorporation, since a person cannot by a subsequent ratification make themselves liable as a principal where they were not in existence at the time of the original contract.⁶⁸ A pre-incorporation contract delivered as a deed in escrow is not binding as delivery “is an essential condition for the effectiveness of a deed” and “requires unequivocal words or conduct signifying an intention to be bound”.⁶⁹ A deed delivered to a non-existent party could not satisfy this condition as to delivery and constitutes: “nothing more than a statement of intention, recallable at will, and could not therefore be said to have been delivered”.⁷⁰ Before a company is bound it must enter into a new contract. If promoters purport to enter into a contract on behalf of a company before its incorporation, the facts may show that a new contract is made with the company after its incorporation on the terms of the old. But the circumstances relied on for this purpose must be necessarily referable to, or must necessarily imply, a new contract between the company and the other contracting party.⁷¹ This is a question of fact.⁷² Where the company’s conduct is attributable to its mistaken belief that it was bound by the original contract⁷³ or is attributable to the performance by the company of a contract between it and, for example the promoters,⁷⁴ it will be difficult, if not impossible, to show that the company’s conduct is necessarily referable to a new contract with the other contracting party. In *Rover International Ltd v Cannon Film Sales Ltd*⁷⁵ Harman J rejected the argument that the doctrine of estoppel by convention could operate to preclude the company from claiming that it was not bound by a pre-incorporation contract if both parties to the contract had, after the company’s incorporation, acted as though it were bound.⁷⁶ He reasoned that where estoppel by convention operates it must relate to an “assumption of agreed facts … (existing) before the contract or dealing is made or agreed” and as the company did not exist at the time the contract was entered into there was accordingly no basis on which the estoppel could operate. Admittedly, in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd*⁷⁷ the facts on which the estoppel was based existed at the time the purported contract was entered into, but it is submitted that it is an unnecessarily narrow reading of the estoppel doctrine to confine it to facts that existed at the time the contract was entered into. There is, however, no reason in principle why the estoppel should not date from the time the company is incorporated. The estoppel point was not pursued on appeal in the *Rover International* case,⁷⁸ but the court allowed a quantum meruit claim with respect to services rendered by the company after it had been incorporated. Where the company, after its incorporation, has taken possession of property belonging to the other contracting party

in pursuance to the agreement,⁷⁹ or has agreed to modify the terms of the original contract,⁸⁰ it will be easier to infer the making of a new contract.

In equity

12-015 Equity also will not assist (in the sense of enforcing a contract) a person who has entered into a contract for the benefit of a corporation which, at the time of the making of the contract, did not exist, and it will not, it would seem, enforce such contracts unless they are enforceable at law.⁸¹ It is true that there are certain late nineteenth-century decisions in which courts of equity did enforce such contracts on the ground that the company had “adopted” the promoters’ contract⁸²; but the distinction between ratification and adoption was never clear⁸³ and they can no longer be relied upon.⁸⁴ Another attempt to enforce pre-incorporation contracts against companies sought to utilise the device of the trust; thus where a promoter had contracted with third parties that a company not yet in existence should pay the third parties £2,000 in consideration for certain services by the third parties, and the promoter was in a position to sue the company for that remuneration, the promoter was held to be a trustee for the third parties of their right of action, and the third parties, being cestuis que trustent, could sue the company.⁸⁵ But the courts are increasingly reluctant to imply a trust in such circumstances,⁸⁶ and, in any event, as later decisions show, the promoter will not have any right of action to hold in trust for the benefit of a third party unless the company, *after its incorporation*, makes a contract with them.⁸⁷

Pre-incorporation benefits

12-016 A company is under no liability, either at law or in equity, to pay for benefits rendered to it prior to its incorporation.⁸⁸ So, for instance, a company is not bound to reimburse a promoter in respect of the expense of incorporation⁸⁹ unless after it has been formed it enters into a binding contract to do so. Similarly, a company is not bound by any agreement made by its promoters that it will, when formed, pay something to a third party who has agreed not to oppose the formation of the company in consideration of such a payment.⁹⁰ There are some nineteenth-century cases concerning the incorporation of railway companies by private Acts of Parliament which suggest that the court will not allow such a company to exercise its statutory powers without performing undertakings contained in a contract made by the promoters with a third party, in consideration of which that party agreed not to oppose the formation of the company.⁹¹ But equity will not interfere even to this extent unless the original contract would have been intra vires of the company if originally made by the company.⁹²

Post-incorporation benefits

- 12-017 It may be that a company will benefit in a tangible way from acts arising under a pre-incorporation contract which does not give rise to any contractual claim by the other party to the contract. With the recognition of unjust enrichment as a ground for granting restitutive remedies,⁹³ there are now a range of doctrines that can be invoked by the party providing the tangible benefit to obtain restitution for the benefit conferred. Where property or money has been transferred to a company pursuant to a pre-incorporation contract, the property or money may be recovered on the basis that the transfer or payment was made under a mistake of fact.⁹⁴ Alternatively, recovery may be available on the grounds of failure of consideration in the sense that the plaintiff has not received any part of the consideration bargained for under the purported contract.⁹⁵ In *Westdeutsche Landesbank Girozentrale v Islington LBC*⁹⁶ it was held that there was a general principle that moneys, paid under an ultra vires contract that was void ab initio, were recoverable on the grounds of total failure of consideration, or on equitable principles entitling a transferor to recover property that in equity belonged to him. Since a pre-incorporation contract is, like an ultra vires contract, void, these principles could also be applied to moneys paid to a company pursuant to a pre-incorporation contract.⁹⁷ Where benefits are conferred on a company on the basis of a pre-incorporation contract, the party providing the benefit will be entitled to a quantum meruit.⁹⁸
- 12-018 It is submitted that money in the hands of a company can be “traced” no less when it has come into the company’s hands as the result of a pre-incorporation contract than when it has done so as the result of an ultra vires contract,⁹⁹ and that the ordinary rules of equity also apply where a company has stood by and allowed another to expend money on its property in the mistaken belief, based on a pre-incorporation contract and known to the company, that they have some interest in that property.¹⁰⁰

Public companies: trading certificate

- 12-019 A company which is registered as a public company shall not do business or exercise its borrowing powers unless it obtains a certificate from the registrar of companies.¹⁰¹ Broadly speaking, the registrar is obliged to issue such a certificate once they have been satisfied that the company possesses the necessary allotted minimum share capital.¹⁰² Failure to obtain a certificate can give rise to criminal and civil consequences. In particular, if a public company trades without a certificate and fails to obtain one within 21 days from being called upon to do so, the directors of the company shall be jointly and severally liable to indemnify the other party to the transaction in

respect of any loss or damage suffered by them by reason of the failure of the company to comply with those obligations.¹⁰³

Ultra vires contracts¹⁰⁴

12-020

A company which owes its corporate existence to statute has not the inherent common law powers of chartered corporations.¹⁰⁵ Indeed, it has only capacity to enter into contracts authorised by the objects clause in its memorandum of association, or, in the case of companies not registered under the *Companies Act 2006*, by the terms of its special Act. Thus, it was held in *Ashbury Ry Carriage & Iron Co v Riche*¹⁰⁶ that any contract outside the scope of the objects clause is ultra vires of the company and void, even if the whole body of shareholders in the company assent to it.¹⁰⁷ A member of a company¹⁰⁸ is entitled to an injunction to restrain the company and its directors¹⁰⁹ from entering into an ultra vires contract or otherwise acting outside the powers of the company, e.g. criminally.¹¹⁰ Although ss.35–36C of the *Companies Act 1985* (originally s.9(1) of the *European Communities Act 1972*) greatly reduced the importance of the ultra vires doctrine, the provisions did not completely abrogate the effect of the doctrine, and there were some situations (although these were rare) where the common law doctrine had relevance. More importantly, as stated earlier, some knowledge of the common law is needed in order to understand fully the statutory modifications of the ultra vires doctrine. Accordingly, the common law position is discussed in the next six paragraphs, and the *Companies Act 2006* is then considered.¹¹¹ At this point it must be emphasised that the development of the ultra vires doctrine since the *Riche* decision also witnessed judicial attempts, on the whole successful, to attenuate the doctrine so that a person dealing with a company will not be prejudiced by the latter's lack of capacity except in exceptional circumstances.

¹¹²

Scope of the rule

12-021

The phrase ultra vires “should be restricted to those cases where the transaction is beyond the capacity of the company and therefore wholly void”.

¹¹³

U The question whether the making of a particular contract is or is not ultra vires of the company depends upon the terms of the company's memorandum of association (or sometimes on the terms of provisions in the company's incorporating statute), which, prior to the [Companies Act 2006](#), had to state the company's objects.

114

U Explaining the rule Lord Wrenbury

115

U said:

“The purpose, I apprehend, is twofold. The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that anyone who shall deal with the company shall know without reasonable doubt whether the contractual relationship into which he contemplates entering with the company is one relating to a matter within its corporate objects.”

As was stated by Browne-Wilkinson LJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corp*

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U:

“The question whether a transaction is outside the capacity of the company depends solely upon whether, on the true construction of its memorandum of association, the transaction is capable of falling within the objects of the company.”

At common law the doctrine operates whether or not the third party knew the contents of the company's objects clause.

117

U However, an argument can still be made that where the question whether capacity has been exceeded turns solely on matters of fact not known, or reasonably discoverable, to the outside party a contract may then arise.

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U In a number of cases it was held that where a company exercised a power which it undoubtedly possessed but for a *purpose* which was ultra vires, and this purpose was known to the party dealing with the company, the contract would be ultra vires in the sense of being outside the capacity of the company and hence void.

119

U However, in the *Rolled Steel* decision the Court of Appeal considered that these cases should be treated as cases dealing with an abuse of the company's powers, not with corporate capacity,

with the result that the transactions in these cases would be enforceable against the company unless the party dealing with it had notice (actual or constructive) that the transaction was in excess of or an abuse of the company's powers.

¹²⁰

U Normally a transaction falling within a company's objects clause will be within the vires of a company. However, in certain situations a provision in the objects clause may not be capable as existing as an object and may be merely an ancillary power; for example, the power to borrow.

¹²¹

U Formerly parties dealing with companies were deemed to have notice of companies' memoranda of association

¹²²

U but this rule has now been abrogated.

¹²³

U

What contracts are ultra vires

12-022 It has been repeatedly asserted that the ultra vires doctrine must be reasonably applied, and that any contract made by a company which may fairly be regarded as incidental to or consequential upon those things which are authorised by the memorandum is not, unless expressly prohibited, to be held ultra vires.¹²⁴ This depends on the circumstances of each case. Thus a trading corporation has implied power to borrow money either upon security or otherwise,¹²⁵ to sell its property,¹²⁶ to purchase the subject matter of its business,¹²⁷ or to compromise claims made by or against it.¹²⁸ Wide powers given by general words in the memorandum of association may be construed as only ancillary to the company's main objects¹²⁹; but this rule of construction may be excluded by the wording of the memorandum.¹³⁰ Not all the activities stated in a company's objects clause are necessarily objects in the strict sense, and "some of them may only be capable of existing as, or on their true construction are, ancillary powers".¹³¹ Thus, for example, (as was stated earlier) a provision in a company's objects clause relating to borrowing will normally be treated as a power and not an independent object.¹³² The courts have strained to interpret objects clauses liberally so as to validate transactions. In *Re New Finance & Mortgage Co Ltd*¹³³ the operation of a petrol station was held to fall within the terms of an objects clause authorising the company to carry on the business of "merchants generally". Goulding J, in the course of his judgment opined that the company's entire "objects clause is too loosely drawn to be of any real value to subscribers or persons dealing with the company".¹³⁴

Opinion of the directors

- 12-023 Whether a contract is ultra vires or not depends in principle on whether the memorandum does in fact authorise the transaction in question, and not on whether the directors think that it does.¹³⁵ But where a memorandum states that the company can carry on any business which, in the opinion of the board of directors, can be advantageously carried on in connection with, or as ancillary to, its authorised business, the position is different. In such circumstances the bona fide opinion of the directors that a business can be advantageously carried on in connection with, or as ancillary to, the company's principal business will suffice to render the former business intra vires.¹³⁶ The memorandum of a company may contain a statement that the powers of the company, or a particular power, must be exercised for "purposes of the company". Normally the court will construe this as being a limitation on the powers of the directors and *not* as a "condition limiting the company's corporate capacity".¹³⁷

No ratification or estoppel

- 12-024 An ultra vires contract was not capable of ratification by a company¹³⁸; nor can the company be estopped by deed¹³⁹ or otherwise¹⁴⁰ from showing that they had no power to do that which they profess to have done.¹⁴¹

Effect of ultra vires borrowing

- 12-025 A loan contracted by persons on behalf of a company which has no power to borrow does not create an indebtedness on the part of the company either at law or in equity.
U¹⁴²

U Securities deposited by the company to secure such a loan can be recovered by it from the lender.

¹⁴³

U It has been famously held that the money borrowed cannot be recovered from the company upon an implied promise to repay, as money had and received by the company to the use of the lender.

¹⁴⁴

U It is now doubtful, however, whether this is good law.

145

U And if any part of the money which has been borrowed has been applied in discharging the company's debts, the lender is entitled to have that part of the loan treated as valid.

146

U However, the lender is not subrogated to any securities or priorities enjoyed by the creditors who are paid by means of their money, the reason for this being that the ultra vires unsecured creditors should not be put in a better position than the company's unsecured creditors.

147

U Money which is in the company's hands as the result of an ultra vires loan is treated as money belonging to the purported lender. So long therefore as that money is identifiable or traceable the lender is entitled to recover it or to a charge on the fund of which it forms part.

148



Recovery of property of money under ultra vires transaction

12-026 Where money or property is transferred under an ultra vires contract it can be recovered on the ground that since the contract was wholly void there was a failure of basis.

U

149

U However, this right or recovery would not be available if the defendant could invoke the defence of change of position, that is, the recipient of the money had so changed their position that it would be inequitable to compel them to make restitution or to make restitution in full.

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Sections 39–42

12-027 Article 9 of the First Directive on Company Law ¹⁵¹ requires member states to introduce legislation abrogating the doctrine of ultra vires so as to ensure security of transactions between companies and those with whom they contract. This aspect of the Directive was first implemented by s.9(1)

of the European Communities Act 1972¹⁵² which became s.35 of the 1985 Act. Section 35 was amended by s.108 of the Companies Act 1989 which inserted ss.35–35B into the 1985 Act.¹⁵³ The relevant provisions of the Companies Act 2006 are ss.39–42. These provisions also deal with the interrelationship of ultra vires and directors' authority.¹⁵⁴

Objects

- 12-028 Fundamental changes were introduced to the doctrine of ultra vires and the role of objects clauses in a company's constitution by the **Companies Act 2006**. Section 8 of the 2006 Act provides that a company's memorandum must merely state that the subscribers¹⁵⁵ to it wish to form a company under the Act, agree to become members, and in the case of a company with a share capital, to take at least one share each.¹⁵⁶ Thus the memorandum no longer contains an objects clause. A company's objects (if any) will be contained in a company's articles of association. Section 31(1) of the 2006 Act provides that “[u]nless a company's articles specifically restrict the objects of the company, its objects are unrestricted”. Provisions in the memorandum of pre-2006 Act companies (which would include objects) are now treated as provisions in the company's articles other than provisions required to be in the memorandum by s.8 of the 2006 Act.¹⁵⁷ Where a company amends its articles to add, remove or alter its objects, notice must be given to the registrar and the amendment is not effective until it is registered by the registrar.¹⁵⁸ The company's constitution binds the company and its members “to the same extent as if there were covenants on the part of the company and of each member to observe” its provisions.¹⁵⁹ Section 171 of the 2006 Act imposes on the directors a statutory duty to act in accordance with the company's constitution¹⁶⁰ (which would cover any objects) and the shareholders have standing to enforce such a duty.¹⁶¹

Corporate capacity

- 12-029 In reforming the doctrine of ultra vires so as to ensure security of transactions between companies and those with whom they deal, it is necessary to ensure that the validity of the transaction cannot be called into question on the grounds of the company's want of capacity. This is clearly done by s.39 of the 2006 Act which provides that the “validity of an act done by a company” shall not be called into question by reason of anything in the company's constitution. Any contract can be enforced by or against the company even though it is not authorised by the company's constitution. Since a company's objects clause both confers capacity and restricts it, this means that the restriction, implicit by stating objects in the articles, does not affect the validity of any act entered into by the company. It is important to note that the section refers to an “act” of the company, a word that is of

the widest import. The common law rule that a company could not ratify an ultra vires transaction has been jettisoned as ratification of such a transaction is now a matter of internal management given that the objects (if any) are now contained in the articles. Where a contract can be avoided because of a conflict of interest of a director who is a party to the contract, the European Court of Justice has held that this does not constitute a breach of art.9(1) of the First Directive.¹⁶² This deals with “abuse” of authority rather than “want” of authority.¹⁶³

Ultra vires and directors’ duties

- 12-030 It is a breach of duty for directors to enter into an ultra vires transaction since as fiduciaries they must keep within the limit of their powers arising from the limit on their principal’s capacity.¹⁶⁴ The reform of ultra vires so as to ensure security of transactions, does not require that a director’s duty to the company to act within its objects should in any way be modified. [Section 171\(a\)](#) provides that a director must act in accordance with the company’s constitution.
- 12-031 An agent only has authority to act for the benefit of their principal unless the parties otherwise agree.
U
¹⁶⁵

U The same rule applies to directors. As was stated by Lord Nicholls in *Criterion Properties Plc v Stratford UK Properties Ltd*¹⁶⁶:

“If a company (A) enters into an agreement with B under which B acquires benefits from A, A’s ability to recover these benefits from B depends essentially on whether the agreement is binding on A. If the directors of A were acting for an improper purpose when they entered into the agreement, A’s ability to have the agreement set aside depends upon the application of familiar principles of agency and company law. If, applying these principles, the agreement is found to be valid and is therefore not set aside, questions of ‘knowing receipt’ by B do not arise. So far as B is concerned there can be no question of A’s assets having been misapplied. B acquired the assets from A, the legal and beneficial owner of the assets, under a valid agreement made between him and A. If, however, the agreement is set aside, B will be accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the same assets in question, A will have the personal claim against B for unjust enrichment, subject always to the defence of change of position. B’s personal accountability will not be dependent upon proof of fault or ‘unconscionable’ conduct on his part. B’s accountability, in this regard, will be ‘strict’.”

Ultra vires and directors' authority

12-032

U The authority of directors entering into contracts binding on a company is also constrained by the ultra vires doctrine since directors either individually or collectively could not possess any greater authority than their principal. If the doctrine of ultra vires is to be successfully abrogated it is also necessary to deal with this aspect of the problem. [Section 40\(1\)](#) provides that in “favour of a person dealing with a company in good faith” the power of the board shall be deemed to be free of any limitation flowing from the company’s constitution; the same applies to the power of the directors to authorise others to act on behalf of the company.

167

U Section 40 restates [ss.35A](#) and [35B](#) of the 1985 Act and decisions dealing with these sections are equally applicable to [s.40](#). Critical to the operation of this provision are the concepts of “dealing with” and “good faith”. Both are defined in [s.40\(2\)](#). [Section 40\(2\)\(a\)](#) provides that a person deals with a company if they are a party to any act or transaction to which the company is a party. This would cover not only commercial transactions but also transactions which are gratuitous.

168

U In *Smith v Henniker-Major & Co*

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U a director, at an inquorate board meeting, purported to assign to themself an asset of the company (a cause of action against the company’s solicitors). This raised two issues: (a) was the failure to hold a quorate meeting a “limitation under the company’s constitution” within [s.35A\(1\)](#) ([s.40\(1\)](#)); and (b) was a director a “person” protected by [s.35A](#) ([s.40](#)). As regards issue (a), Robert Walker LJ considered that the question was what was the “irreducible minimum, if [s.35A](#) ([s.40](#)) is to be engaged”.

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U In determining whether or not [s.35A\(1\)](#) ([s.40\(1\)](#)) applied it was necessary to distinguish “between a nullity (or non-event) and a procedural regularity”

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U the section only applying to the latter situation. On the facts Robert Walker LJ held that the defect in the case, namely the inquorate board meeting, was a procedural irregularity and therefore fell within [s.35A](#) ([s.40](#)) as being a limitation under the company’s constitution. Carnwath LJ considered the distinction between nullity and procedural irregularity to be unhelpful. He considered that the proper approach would be to determine if the act in question was carried out by someone appearing to be acting on behalf of the company,

172

U and in the case he held that this test had been satisfied. As regards issue (b), the majority (Schiemann and Carnwath LJ) held that, at least on the facts of the case where the director was acting for the company, a director could not benefit from s.35A (now s.40 of the 2006 Act). It is, however, difficult to see how s.40 can give any efficacy to the proceedings of an inquorate board, since the section is addressed to the actions of boards. The actions of an inquorate board are not the actions of a board. Moreover, if the action in question in *Henniker-Major* had been approved by a quorate board, the action would not have been contrary to the constitution.

173

U In *EIC Services Ltd v Phipps*

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U the Court of Appeal held that in the case of a bonus issue of shares, which is an internal corporate arrangement with no alteration in the assets or liabilities of the company, a shareholder could not be held as dealing with the company within the terms of s.35A (s.40).

12-033

U The definition of “good faith” is more tortious and indirect. Section 40(2)(b)(iii) provides that a person shall not be treated as acting in bad faith by reason of their knowing that the act or transaction is “beyond the powers of the directors under the company’s constitution”. This is not a definition of “good faith” but rather the singling out of a particular act as not constituting “bad faith”. The reason for this is to be found in art.9(2) of the First Directive. This provides that the:

“... limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.”

This Article only deals with restrictions on the scope of an agent’s or organ’s

175

U authority and not with the abuse of authority. Although the provision does not contain any “good faith” limitation it is clear from the debates on the implementation of the Directive that it was not designed to protect persons who were acting in bad faith,

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U for example, entering into a transaction which they knew the directors were entering into not in the interests of the company but in their own interests.

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U This position has been implicitly adopted by the Court of Justice of the EU.

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U Thus ([s.40\(2\)\(b\)\(iii\)](#)) attempts to steer between actions which are in excess of authority as opposed to acts which constitute an abuse of authority—the dividing line between these situations will often be wafer thin in that a failure by directors to observe the limitations of a company's objects clause may often be indicative of a failure to act in the interests of the company. Good faith should not be interpreted as “reasonableness”

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U and failure to understand a company's objects should not be taken as evidence of bad faith,

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U but the more implausible the interpretation the easier it will be for the company to show an absence of good faith.

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U There is a presumption that a person has dealt with the company in good faith and the onus is on the company to prove the contrary.

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U

Limitations on director's authority and shareholder rights

12-034

U As we have already seen when discussing corporate capacity,¹⁸³ a member of a company has the right to compel the company to observe the company's articles and memorandum of association. If this right were not curtailed then, similarly with the abrogation of the ultra vires doctrine, it would be possible for shareholders by asserting this right to enforce indirectly limitations on the powers of directors against third parties. To prevent this from happening, [s.40\(4\)](#) provides that no proceedings by a member shall lie to enjoin a company from entering into a transaction in fulfilment of a legal obligation arising out of a previous act of the company and this would cover legal obligations arising because of [s.40](#)

184

U; a member still retains the right to bring proceedings to restrain an action which is beyond the powers of the directors.¹⁸⁵

Constructive notice

12-035

As previously stated,¹⁸⁶ it was a principle of company law that a person dealing with a company was deemed to have constructive notice of the company's public documents and, while there was some uncertainty as to what exactly fell within the category of public document for this purpose, it undoubtedly covered the company's memorandum and articles of association.¹⁸⁷ It is obviously a necessary corollary to the abrogation of the doctrine of ultra vires that this doctrine be also substantially repealed. This has been achieved by s.40(2) which provides that a person dealing with a company is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so.

Ultra vires contracts involving directors

- 12-036 It is not felt proper that a director should benefit from s.40 in the case of contracts in which the director was personally involved. Where a director of the company or of its holding company or any person connected with such a director is a party to a transaction which exceeds any limitation on the powers of the directors, such transaction is voidable.¹⁸⁸ Also, irrespective of whether it is avoided, the director will be obliged to account to the company for any profit or to indemnify it for any loss.¹⁸⁹ Where a person (not a person connected with a director) who is a party to a contract along with a director to whom this provision applies, such person may petition the court to have the contract affirmed, severed or set aside on such terms as the court thinks fit.¹⁹⁰

Charitable companies

- 12-037 Sections 39 and 40¹⁹¹ do not apply to the acts of a company which is a charity except in favour of a person: (i) who gives full consideration in money or money's worth; (ii) does not know that the act is not permitted by the company or that it is beyond the powers of the directors; or (iii) does not know that at the time the relevant act was done that the company was a charity.¹⁹² In any proceedings the burden of proving that the person knew that the company was a charity or knew that the act was not permitted by the company's constitution or was beyond the powers of the directors lies on the person asserting that fact.¹⁹³ There is added protection for persons who acquire an interest in or over property acquired from a charitable company.¹⁹⁴

Other applications of ultra vires principle

12-038



The ultra vires doctrine has sometimes been invoked to explain the invalidity of certain types of contracts entered into by companies, though in truth these appear to have little to do with the contractual capacity of companies. For example, prior to the [Companies Act 1981](#), a contract by a company to purchase its own shares was void,

¹⁹⁵

U and a contract by a company to provide financial assistance in connection with the purchase of its own shares was illegal and unenforceable.

¹⁹⁶

U Again, a contract entered into by a company will not be binding on it if its directors have not been acting bona fide in the interests of the company in making the contract and this is known to the other party to the contract.

¹⁹⁷

U But cases of this kind do not appear to involve questions of capacity and are explicable on other grounds

¹⁹⁸

U (e.g. illegality or agency) which do not properly fall within the scope of this chapter.

Ratification of unauthorised act of officer

¹²⁻⁰³⁹ If a contract is beyond the powers of the officer of the company by whom it was effected, it may be ratified by the company so as to become binding upon it.

U

U This also applies to a contract which is outside a company's objects as the objects are now in the articles and the shareholders would be ratifying a breach of the articles, something which is a matter of internal management.²⁰⁰ In addition, there may be acquiescence in the act of the directors (if any) so that the company is estopped from objecting to its validity.²⁰¹ The test of acquiescence in such cases is whether the shareholders had notice of the way in which the affairs of the company were being conducted and were content not to oppose those acts which they knew were being done.²⁰² So, where everything that is done by the directors is known to and acquiesced in by a sole beneficial shareholder,²⁰³ or by all shareholders with a right to attend and vote at a general meeting,²⁰⁴ the company will be bound by the directors' acts whatever the company's constitution may say unless those acts are illegal. Where a corporation actually takes the benefit of a contract made in an irregular manner, the adoption will amount to ratification.²⁰⁵

Royal British Bank v Turquand

12-040 Where a director enters into a contract on behalf of a company, the company may be bound either by the ordinary rules of agency or by virtue of the rule in *Royal British Bank v Turquand*.
U 206

U The latter rule, often called “the indoor management rule”, has come to have a role within the general law of agency as applied to companies.
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U But in its origins, it is a rule that is attached to the execution of deeds, “specialties”, by a corporation. *Turquand* itself is authority that where a deed is sealed with the corporation’s genuine seal, and is witnessed by signatories who are persons authorised by the articles to attest to the seal, the document will bind the corporation to its terms even if the document itself was not authorised, unless the covenantee knew or ought to have known of that fact.
208

U In such circumstances, the covenantee is not also required to show that it dealt with someone with actual or apparent authority to bind the corporation. For companies, the distinction between specialties and ordinary contracts is, in modified form, carried through into [s.43\(1\) of the 2006 Act](#). [Section 44](#) goes on to provide for the execution of deeds and other formal documents without needing to use a seal. For simple contracts, on the other hand, the starting point is that the promisee must show that it dealt with someone acting on the company’s behalf who had actual or apparent authority to bind the company.
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U Only then will the indoor management rule commence to operate, in order to protect a promisee who can establish only apparent authority from failure by the relevant agents to comply with procedural requirements. Formerly notice of the memorandum and articles of association was imputed to every person having dealings with the company,
210

U but this rule is effectively abrogated by [s.40\(2\) of the 2006 Act](#).
211

U The section has thus made no longer applicable cases holding (for example) that where directors have, by the articles, a power to borrow only up to a certain amount, any loan beyond that amount will be beyond the authority of the directors and therefore not binding on the company.
212



12-041 The rule in *Turquand's* case,

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U did not apply where the circumstances were such as to put the third party on inquiry,

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U as for example, where a bank negligently paid the cheques of a company signed by only one director,

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U or where the company's cheques were paid into a director's private account

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U; these decisions appear to be unaffected by s.40 of the 2006 Act because they do not depend on any limitations on the powers of the directors to bind the company arising from the company's constitution.

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U Another restriction on the operation of the rule at common law was that it could not apply to protect a third party who contracted with the company if, in some different capacity, e.g. as a director, they also acted on behalf of the company in making the contract.

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U These cases would now need to be interpreted in the light of s.41 of the 2006 Act which applies to a contract where the parties include a "director" irrespective of the capacity in which they enter into it.

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U

The rule cannot itself confer apparent authority

12-042 The rule in *Turquand's* case was often treated as an application of estoppel and it followed that

U an outsider who had not in fact examined the company's public documents, and who could not establish a deed under the foregoing rules, could not assert the existence of apparent authority merely because of some provision in those documents. This aspect of the rule is unaffected by ss.39–40 of the 2006 Act. On the other hand, this in no way prevents an outsider from setting up an apparent authority on ordinary principles of agency where the company holds a person out as having authority otherwise than by provisions in its articles. Thus if a company's constitution

provides that the powers, or certain of the powers, of the board of directors may be delegated to a managing director, and one director acts as a managing director to the knowledge of the board, then even though they have never been formally appointed as such, an outsider is entitled to assume that the director has in fact the authority which a managing director would normally have.²²⁰ Where, however, the director enters into some transaction which would not normally be within the powers of a managing director and there is no holding out so as to make s.40 of the 2006 Act applicable, it may be that an outsider cannot rely on any apparent authority unless they have examined the articles, and the articles themselves show that a properly appointed managing director would have such authority.²²¹

12-043 In *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd*,

U ²²²

U where the authorities on this difficult question were reviewed by the Court of Appeal, Diplock LJ stated the following four conditions which must be satisfied to entitle a contractor to enforce a contract entered into on behalf of a company by an agent without actual authority.

“It must be shown: (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (2) that such representation was made by a person or persons who had ‘actual’ authority

²²³

U to manage the business of the company either generally or in respect of those matters to which the contract relates; (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied on it; and (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.”

²²⁴

U

It is important to note that Principle (4) has been abrogated by ss.39–40 of the 2006 Act.

Section 161 of the Companies Act²²⁵

12-044

U

In some circumstances [s.161 of the 2006 Act](#) may also apply. That section provides that the “acts of a person acting as a director are valid notwithstanding that it is afterwards discovered”: (a) “that there was a defect in his appointment”; (b) “that he was disqualified from holding office”; (c) “that he had ceased to hold office”; and (d) “that he was not entitled to vote on the matter”.

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 Thus this section would appear, for example, to cover underage directors.

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 As stated in Buckley

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“Endangering accuracy for the sake of brevity, it may be said that the effect of this section is that, as between the company and persons having no notice to the contrary, directors, etc., de facto are as good as directors, etc., de iure.”

In some ways the section is wider than the rule in *Turquand's* case

229

 in that it may be relied upon not only by outsiders, but also by directors of the company and by the company itself; on the other hand, unlike the rule in *Turquand's* case, [s.161](#) will not apply unless there has been an “appointment”, albeit a defective appointment, but does not apply where there is no appointment or those purporting to make an appointment had no power to make it.

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 Neither the rule nor the section can be called in aid by a third party who knew or should have known of the defect.

231



Forgeries

12-045 It has been said that the rule in *Turquand's* case²³² does not apply where the document upon which it is sought to make the company responsible is a forgery.²³³ But the three cases in which this question has arisen can all be explained on the ground either that the forged document was not put forward as genuine by an official acting within their actual or apparent authority, or that the outsider was put on inquiry.²³⁴ This was the view taken by the High Court of Australia in *Northside Developments Pty Ltd v Registrar-General*²³⁵ where the court stated that a company would be bound by a “forgery” where it was “estopped from denying the authority of the persons

affixing the genuine seal and writing the genuine signature to it".²³⁶ In *Lovett v Carson Country Homes Ltd*²³⁷ a guarantee and a debenture were signed by a director who was also the company's secretary and this director also added the signature of another director without having any authority to do so. The court held that the company was bound, as the director who had actually signed the guarantee and debenture had ostensible authority to warrant that all the formalities relating to the approval and execution of the guarantee and debenture had been duly complied with.²³⁸ In the course of his judgment the judge stated²³⁹:

“No doubt a forged corporate document is a nullity in the sense that no one has actual authority on the part of a company to issue a forged document. But as the exception of estoppel shows, that does not mean that the forged document can in no circumstances have any effect whatsoever: just because circumstances can arise whereby the company may be estopped from disputing its validity. But once one accepts that, then, in my opinion, that immediately opens up the prospect that such a document cannot be sidelined as a nullity for all purposes in the case of apparent authority.”

It is submitted therefore that where a document is made by an officer of a company who has apparent authority to do so, the rule can be applied and the company may be bound by the document even though the officer forged it for some purpose of their own.

Registration of charges²⁴⁰

- 12-046 A contract entered into by a company before 6 April 2013 which involved a charge on its assets often required registration with the registrar of companies under Pt 25 of the Companies Act 2006.²⁴¹ Charges created since that date may require registration under the Companies Act 2006 Pt 25 Ch.A1.²⁴² When a company creates a charge,²⁴³ particulars of it and a certified copy of any charge instrument²⁴⁴ must be delivered for registration within 21 days of the creation of the charge, unless the charge is exempt from registration either under the Companies Act 2006 itself²⁴⁵ or other legislation.²⁴⁶ The new regime permits registration of charges online. The registrar must register the documents if they are delivered by either the company or by any person interested in the charge²⁴⁷ (typically, the secured creditor) within 21 days of the charge being created. Both the particulars and the charge document are placed on the register. If the documents are not delivered within the period, the charge will be void against a liquidator or administrator of the company and against any creditor of the company.²⁴⁸ There is provision for late registration by permission of the court. Where a company acquires property that is already subject to a charge, the charge may also be registered but there is no sanction for non-registration.²⁴⁹ There is also provision for entries showing that the debt for which the charge was given has been satisfied or that part of the

property has been released.²⁵⁰ The provisions of the [2006 Act](#) apply to companies registered in the United Kingdom.²⁵¹

Effect of winding up on company's contracts

12-047 A compulsory winding up automatically brings the powers of a director (and any delegate from the board) to an end



U and publication of the winding-up order discharges all persons employed by the company, giving them a right to damages for wrongful dismissal.

[252](#)

U The liquidator may waive the dismissal brought about by publication of the winding-up order, and where they do so the old contract of employment continues.

[253](#)

U Where the winding up is voluntary the powers of the directors likewise cease, except that the company in general meeting or the liquidator may sanction their continuance

[254](#)

U; the passing of a resolution for voluntary winding up may, but does not necessarily, terminate general contracts of employment with the company so as to give the company's employees a right to damages for wrongful dismissal.

[255](#)

U It may do so where the circumstances are such that the employee knows that the company cannot continue to fulfil its obligations,

[256](#)

U or where, on the facts, the company has ceased to carry on business and there is no implied term in the contract of employment that the contract is subject to the continuance of business by the company.

[258](#)

U Where an order is made by the court under [s.900 of the Companies Act 2006](#) for the amalgamation of two companies, a contract of employment between a worker and the transferor company does not automatically become a contract of employment between the worker and the transferee company.

[259](#)



Winding up not a repudiation

- 12-048 On the other hand, the winding up of a company is not by itself a repudiation of the contractual obligations of the company unless the personality of the company goes to the root of the contract,²⁶⁰ though there are statutory provisions for the disclaimer of leases or other onerous or unprofitable contracts.²⁶¹ The liquidator has certain statutory powers to deal with the company's property some of which can only be exercised with the sanction of the court, the liquidation committee, or, in the case of a members' voluntary winding up, the members.²⁶² Where a liquidator, appointed by the court, performs a contract of the company without disclaimer or where they purport to make a new contract on its behalf, they act as agent for the company²⁶³ and there is no presumption that they do so in a personal capacity.²⁶⁴

Dispositions of property in winding up

- 12-049 In a winding up by the court any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of members of the company, made after the commencement of the winding up, is, unless the court otherwise orders, void.²⁶⁵ The court has a wide discretion in this respect which will be exercised having regard to what is fair and just in all the circumstances, particular attention being paid to the question of good faith and the principle that a company's free assets should be distributed pro rata among the company's unsecured creditors.

²⁶⁶

- U** The court will readily validate transactions entered into bona fide in the course of trade and completed before the date of the winding-up order²⁶⁷; but the court will not validate the payment of a debt by the company to a debtor who has notice of the presentation of a winding-up petition²⁶⁸ unless it is a "necessary part of a transaction which as a whole is beneficial to the general body of unsecured creditors".²⁶⁹ The court will also normally validate the sale of an asset at its full market value as this does not dissipate the company's assets.²⁷⁰ Further, the court can only validate a disposition of property; a contract for the sale of goods by a company is not a disposition of property which can be validated by the court unless the property in the goods has passed to the purchaser.²⁷¹

Appointment of a receiver or manager ²⁷²

12-050 An administrative receiver is a receiver appointed under a floating charge where the charge holder has a charge or charges over all or substantially all of a company's assets.

²⁷³

U Under the Enterprise Act 2002 s.250 the holder of a floating charge created after a date appointed by the Secretary of State, 15 September 2003, ceased to be able to appoint an administrative receiver, but could only appoint an administrator.

²⁷⁴

U Holders of a floating charge created before this date will be able to appoint an administrative receiver provided of course they satisfy the terms of s.29(2).

²⁷⁵

U The appointment of a receiver and manager by the court operates to discharge the company's employees.

²⁷⁶

U But the appointment of a receiver and manager out of court by debenture holders, so that they become an agent of the company, does not normally operate to discharge the company's employees.

²⁷⁷

U At common law such an appointment will, however, operate to discharge the company's employees if the appointment is accompanied by a sale of the company's business,

²⁷⁸

U or if the appointment is accompanied by or followed by a new agreement with the company's employees,

²⁷⁹

U and probably only if the new contract is inconsistent with the old,

²⁸⁰

U or if the company's employees occupy positions which would be inconsistent with the position of the receiver.

²⁸¹

U Section 44(1)(a) of the Insolvency Act 1986 makes an administrative receiver of the assets of a company the company's agent unless and until the company goes into liquidation, a device that is primarily designed to avoid the security holder who appointed them from being treated as a

mortgagee in possession. An administrative receiver is also made personally liable on any contract entered into by them.

²⁸²

 Such liability can be excluded and often is. The [1986 Act](#) also makes an administrative receiver personally liable “on any contract of employment adopted by him in carrying out” his functions, but that he is not to be “taken to have adopted a contract of employment by anything done or omitted to be done within 14 days after his appointment”.

²⁸³

 Initially, there was considerable uncertainty as to what this section means and, in particular, whether mere acquiescence in the continuation of contracts of employment can constitute an adoption.

²⁸⁴

 However, in *Powdrill v Watson*

²⁸⁵

 the House of Lords held that a receiver will be taken to have adopted a contract of employment where he treats the continued contract as giving rise to a separate liability in the receivership. The House also decided that the receiver could not reject some of the terms of the contract but accept others, but that his liability could be limited to liabilities arising during the period when he was in office.

²⁸⁶



- 12-051 The appointment of a receiver does not amount to a repudiation of the trading contracts of the company, except in special circumstances.²⁸⁷ It is often claimed that the receiver is in a better position than the company in that they need not observe existing contracts and, in addition, such contracts cannot be specifically enforced against them.²⁸⁸ To permit contracts to be enforced against the company, or to require the receiver to comply with them would reverse the order of priorities in that it would oblige the receiver to prefer the interests of unsecured creditors over the interests of the security holder that appointed them. It is for this reason that the receiver is in a better position than the company as regards the obligation to observe existing contracts.²⁸⁹ Where a receiver and manager, appointed by the court, orders goods for the purpose of the business of the company, the inference is that they pledge their personal credit for the goods, looking for indemnity to the assets of the company; they are therefore not necessarily the agent of the company²⁹⁰ though they may be in particular circumstances.²⁹¹ The same is true of receivers appointed out of court where although an agent of the company they are personally liable in contracts they enter into unless the contract states otherwise.²⁹² The authority of a receiver is terminated by the winding up of the company whether it is voluntary²⁹³ or by the court.²⁹⁴ Although the authority of a receiver to act on behalf of the company is *prima facie* terminated by a winding-up order, this does not

mean that a receiver appointed by debenture holders can no longer sell or convey property charged to the debenture holders, in respect of which a power of sale exists.²⁹⁵ They can still exercise the in rem rights that their appointor has against the company's property.

Receivers and the tort of inducing a breach of contract

- 12-052 The question has arisen in a number of cases as to whether a receiver who does not observe a contract which the company has entered into before their appointment can be liable for the tort of inducing a breach of contract.

²⁹⁶

U It has been held that a receiver cannot be held so liable in that the receiver as agent of the company is the alter ego of the company, the other party to the contract, and accordingly no possible action could lie against a person for procuring themselves to induce a breach of contract.

²⁹⁷

U

Administrators

- 12-053 The [Enterprise Act 2002](#)²⁹⁸ replaces the administration procedure set out in [Pt II of the Insolvency Act 1986](#). This procedure like its predecessor imposes significant constraints on the right of a person to enforce a transaction against a company in administration.²⁹⁹ Specialist texts should be consulted with respect to these provisions.

Footnotes

- 50 This is not a summary of company law, but only of the law applicable to the contracts of companies.
- 51 *Kelner v Baxter (1866) L.R. 2 C.P. 174; Scott v Lord Ebury (1867) L.R. 2 C.P. 255; Wilson & Co v Baker, Lees & Co (1901) 17 T.L.R. 473; King v David Allen & Sons Billposting Ltd [1916] 2 A.C. 54; Gross (1971) 87 L.Q.R. 367.*
- 52 See Law Commission, Privity of Contract: Contracts for the Benefit of Third Parties (Report No.242), paras 8.9–8.16.

- 53 *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 Q.B. 45; *Black v Smallwood* (1965-66) 117 C.L.R. 52. See also below, para.21-032.
- 54 *Kelner v Baxter* (1866) L.R. 2 C.P. 174.
- 55 *Hawkes Bay Milk Corp v Watson* [1974] 2 N.Z.L.R. 236. Note also the possible liability of the putative agent for breach of warranty of authority: see Bowstead and Reynolds on Agency, 22nd edn (2021), Art.105.
- 56 First Directive 68/151 art.7 provides that: “If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefore, unless otherwise agreed”.
- 57 This was inserted by s.130(4) of the Companies Act 1989.
- 58 [1982] 1 Q.B. 938, 946 (Oliver LJ).
- 59 [1982] 1 Q.B. 938, 944, per Lord Denning MR.
- 60 For other cases dealing with s.36(4) of the 1985 Act see: *Rover International Ltd v Cannon Film Sales Ltd* [1987] B.C.L.C. 540 (the subsection, as would be the case with s.51, does not affect foreign companies); *Oshkosh B'Gosh Inc v Dan Marbel Ltd* [1989] B.C.L.C. 507; *Cotronic (UK) Ltd v Dezonie* [1991] B.C.L.C. 721; *Badgerhill Properties Ltd v Cottrell* [1991] B.C.L.C. 805.
- 61 e.g. as in *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 Q.B. 45. See generally *Prentice* (1973) 89 L.Q.R. 518, 530–533.
- 62 *Phonogram Ltd v Lane* [1982] 1 Q.B. 938, 940.
- 63 [2015] EWHC 1890 (Ch).
- 64 [2015] EWHC 1890 (Ch) at [51].
- 65 *Braymist Ltd v Wise Finance Co Ltd* [2002] EWCA Civ 127, [2002] Ch. 273.
- 66 [2002] EWCA Civ 127.
- 67 *Cotronic (UK) Ltd v Dezonie* [1991] B.C.L.C. 721.
- 68 *Kelner v Baxter* (1866) L.R. 2 C.P. 174; *Melhado v Porto Alegre Ry* (1874) L.R. 9 C.P. 503; *North Sydney Investment & Tramway Co v Higgins* [1899] A.C. 263; *Scott v Lord Ebury* (1867) L.R. 2 C.P. 255, 267.
- 69 *Rolle Family & Co Ltd v Rolle* [2017] UKPC 35, [2018] A.C. 205 at [8].
- 70 *Rolle Family & Co Ltd v Rolle* [2017] UKPC 35, [2018] A.C. 205 at [8].
- 71 *Natal Land & Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] A.C. 120.
- 72 *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch. D. 156.
- 73 *Re Northumberland Avenue Hotel Co* (1886) 33 Ch. D. 16; *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co* [1901] 1 Ch. 196, 203.
- 74 *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch. D. 156, 164–168.
- 75 [1987] B.C.L.C. 540; [1989] 1 W.L.R. 912, CA. For other proceedings involving the parties see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 W.L.R. 670 where Hoffmann J stated that it “would be a blot on English jurisprudence if this contract, acted on by both sides, had now to be held null and void” (at 679).

- 76 This argument was advanced in the 25th edition of this text, p.334.
- 77 *[1982] Q.B. 84.*
- 78 *[1989] 1 W.L.R. 912*; noted (1989) 105 L.Q.R. 179 (*Beatson*). For other aspects of this case see below, para.12-017.
- 79 See *Natal Land & Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] A.C. 120.
- 80 *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch. D. 156, 166.
- 81 In some nineteenth-century cases there are dicta that persons who perform services for an unformed company will have a claim in equity for payment on the grounds that it is “inequitable for a man not to pay for services of which he has taken the benefit”, per James LJ, *Re Empress Engineering Co* (1880) 16 Ch. D. 125, 130. See also *Hereford South Wales Waggon & Engineering Co* (1876) 2 Ch. D. 621. These dicta are of doubtful authority: no case actually turns on their application; they are often cited in the context of a company having purportedly “adopted” the contract, a phrase used with no great clarity; they are scarcely compatible with subsequent authority and were rejected in *Re English and Colonial Produce Co Ltd* [1906] 2 Ch. 435, 442.
- 82 *Spiller v Paris Skating Rink Co* (1878) 7 Ch. D. 368. The question of “adoption” was often bound up with the problem of part performance in connection with the Statute of Frauds (see above, paras 7-051—7-060) and it was sometimes suggested that part performance was itself a ground of liability in equity even in the absence of a binding contract (see *Wilson v West Hartlepool Ry* (1865) 2 De G.J. & S. 475) but it is clear today that this is not so: *Hunt v Wimbledon Local Board* (1878) 4 C.P.D. 48, 61.
- 83 *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234, 249–250.
- 84 *Re Empress Engineering Co* (1880) 16 Ch. D. 125, 130; *Natal Land, etc., Co v Pauline Colliery Syndicate* [1904] A.C. 120.
- 85 *Touche v Metropolitan Ry Warehousing Co* (1871) L.R. 6 Ch. App. 671 (it is important to note that the court found that there was a trust of the company’s promise to the promoter, although how the trust was actually constituted is not clear from the facts).
- 86 *Re Empress Engineering Co* (1880) 16 Ch. D. 125; and see below, paras 22-067—22-068.
- 87 *Re National Motor Mail Coach Co, Clinton’s Claim* [1908] 2 Ch. 515.
- 88 *Re English & Colonial Produce Co Ltd* [1906] 2 Ch. 435, disapproving dicta in *Re Hereford & South Wales Waggon, etc., Co* (1876) 2 Ch. D. 621; see also *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch. D. 156, 166.
- 89 *Re Hereford & South Wales Waggon, etc., Co* (1876) 2 Ch. D. 621.
- 90 *Earl of Lindsey v Great Northern Ry* (1853) 10 Hare 664; *Earl of Shrewsbury v North Staffordshire Ry* (1865) L.R. 1 Eq. 593.
- 91 *Earl of Shrewsbury v North Staffordshire Ry* (1865) L.R. 1 Eq. 593. These cases, decided before the consequences of the entity doctrine were fully appreciated, were considered to have been seriously “shaken” by the development of this doctrine: see Hodges, *A Law of Railways*, 7th edn (1888), pp.141–152. There is much substance to this view which is not significantly undermined by a more relaxed doctrine of privity, as to hold the company bound would for all intents and purposes sweep away the learning on pre-incorporation contracts, something which is scarcely likely to happen. The promoters who gave the assurance may,

- of course, be liable if there is deceit or, perhaps, for negligent misrepresentation or breach of warranty of authority.
- 92 *Earl of Shrewsbury v North Staffordshire Ry* (1865) *L.R. 1 Eq. 593*. See *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] *A.C. 669*. The effect (if any) of s.51 of the Companies Act 2006 on this type of case is uncertain. For the categories of company covered by s.51, see s.1 and Pt 33 of the 2006 Act.
- 93 See Ch.32.
- 94 *Rover International Ltd v Cannon Film Sales Ltd* [1989] *1 W.L.R. 912*. See Burrows, The Law of Restitution, 3rd edn (2011); Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), paras 3-42—3-44.
- 95 *Rover International Ltd v Cannon Sales Ltd* [1989] *1 W.L.R. 912*; Burrows, at pp.393–396.
- 96 See above, *Earl of Shrewsbury v North Staffordshire Ry* (1865) *L.R. 1 Eq. 593*; see also *Kleinwort Benson Ltd v The South Tyneside MBC* [1994] *4 All E.R. 972*.
- 97 Moneys paid on behalf of a company before it has been formed could not be recoverable by the company, the company has lost nothing. See *Rover International Ltd v Cannon Film Sales Ltd* [1989] *1 W.L.R. 912*.
- 98 *Rover International Ltd v Cannon Film Sales Ltd* [1989] *1 W.L.R. 912*; *Cotronic (UK) Ltd v Dezonie* [1991] *B.C.L.C. 721*. In the latter case, the court held that s.34 of the 1985 Act did not preclude recovery.
- 99 See below, para.12-026.
- 100 See *Hunt v Wimbledon Local Board* (1878) *4 C.P.D. 48, 61*. The same rules will apply where it is the company has expended the money on another's property.
- 101 Companies Act 2006 s.761.
- 102 s.761(2).
- 103 s.767.
- 104 The provisions dealt with in this paragraph, ss.35–36C of the 1985 Act, have been replaced by ss.39–40 of the 2006 Act. This is particularly relevant to paras 12-027—12-034. Also of relevance is, inter alia, s.31 of the 2006 Act which provides that a company's objects are unrestricted unless the company's articles specifically restrict the objects. Under the 2006 Act, a company's memorandum cannot contain a statement of its objects (s.8). If a company has objects they will have to be in its articles (s.31). See para.12-028 for a more extended treatment. However, a knowledge of the 1985 Act is necessary for an understanding of the current position.
- 105 See above, para.12-004.
- 106 (1875) *L.R. 7 H.L. 653*; and see *Att-Gen v Great Eastern Ry* (1880) *5 App. Cas. 473*; *Wenlock (Baroness) v River Dee Co* (1885) *10 App. Cas. 354*; *L.C.C. v Att-Gen* [1902] *A.C. 165*; *Att-Gen v Mersey Ry* [1907] *1 Ch. 81*; [1907] *A.C. 415*; *Re Jon Beauforte (London) Ltd* [1953] *Ch. 131*; *Parke v Daily News Ltd* [1962] *Ch. 927*.
- 107 “An ultra vires agreement cannot become intra vires by means of estoppel, lapse of time, ratification, acquiescence, or delay”: *York Corp v Henry Leetham & Sons Ltd* [1924] *1 Ch. 557, 573*; see also para.12-024.
- 108 But not, in general, a creditor: *Mills v Northern Ry of Buenos Aires Co* (1870) *L.R. 5 Ch. App. 621*; *Cross v Imperial Continental Gas Association* [1923] *2 Ch. 553*; *Lawrence v W.*

- Somerset Mineral Ry Co [1918] 2 Ch. 250*; contrast *Maunsell v Midland G.W. (Ireland) Ry (1863) 1 Hem. & M. 130*. See also *Charles Roberts & Co Ltd v British Railways Board [1965] 1 W.L.R. 396* (action for declaration by business competitor of a nationalised industry); and as to relator actions, see *Att-Gen v Crayford UDC [1962] Ch. 575*.
- 109 *Hoole v G.W. Ry (1867) L.R. 3 Ch. App. 262*. The right to restrain prospective ultra vires acts is based on the contract constituted by s.33 of the Companies Act 2006. A shareholder's standing to complain of past ultra vires acts gives rise to more complex problems: see *Smith v Croft (No.2) [1988] Ch. 114*.
- 110 See Buckley, The Companies Acts, 15th edn (2000), para.35-190.
- 111 Proposals for the reform of the ultra vires doctrine were put forward in a DTI consultative document: Reform of the Ultra Vires Rule: A Consultative Report (1986). These were partly implemented by ss.108–109 of the Companies Act 1989.
- ①112 See too *SR Projects Ltd v Rampersad [2022] UKPC 24*.
- ①113 *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] 1 Ch. 246, 303*, per Browne-Wilkinson LJ (see also Slade LJ 297). The phrase should not therefore be used to refer to situations where directors abuse or exceed their authority or where the transaction is illegal: see *SR Projects Ltd v Rampersad [2022] UKPC 24*.
- ①114 Companies Act 1985 s.2(1)(c). It has been said that a wider construction ought to be given to the memorandum of association of a commercial company than to the statute creating a company with special powers: *Att-Gen v Mersey Ry [1907] 1 Ch. 81, 106* (reversed [1907] A.C. 415), but see *Charles Roberts & Co Ltd v British Railways Board [1965] 1 W.L.R. 396*, at 400. See para.12-028 on the current position with respect to objects clauses.
- ①115 *Cotman v Brougham [1918] A.C. 514, 522; Hazell v Hammersmith and Fulham LBC [1992] 2 A.C. 1, 36–37; Westdeutsche [1996] A.C. 669*.
- ①116 [1986] Ch. 246, 306.
- ①117 [1986] Ch. 246, 304. See also *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480, 504*; *SR Projects Ltd v Rampersad [2022] UKPC 24* at [26].
- ①118 See *Re Marseilles Extension Railway Co, Ex p. Credit Foncier and Mobilier of England (1871) L.R. 7 Ch. App. 161*; *Re David Payne & Co Ltd [1904] 2 Ch. 608*; *Re Denham & Co (1883) 25 Ch. D. 752*; *Moxham v Grant [1900] 1 Q.B. 88*. cf. *Fountaine v Carmarthen Railway Co (1868) L.R. 5 Eq. 316*; *Chapleo v Brunswick Permanent Building Society (1881) 6 Q.B.D. 696* (where, however, it was suggested there was a duty of inquiry that had not been met by the outside party).
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See, e.g. *Re Lee, Behrens & Co* [1932] 2 Ch. 46; *Re Jon Beauforte (London) Ltd* [1953] Ch. 131. cf. Insolvency Act 1986 s.238(5); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669.

- ①120 Where the third party has knowledge the contract would appear to be void ([1986] 1 Ch. 246, 306–307); *Jyske Bank (Gibraltar) Ltd v Spgeldmaes* Unreported 29 July 1999, CA. Quaere if the contract is enforceable by the company and therefore only voidable.
- ①121 *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch. 246, 305. For criticism of the reasoning in this case on this issue, see Bowstead and Reynolds on Agency, 22nd edn (2021), para.2-011.
- ①122 [1986] Ch. 246; *Ernest v Nicholls* (1857) 6 H.L. Cas. 401. Copies of all a company's public documents are available for inspection: Companies Act 2006 s.1085.
- ①123 See below, para.12-035.
- 124 *Att-Gen v Great Eastern Ry* (1880) 5 App. Cas. 473, 478; *Peel v L. & N.W. Ry* [1907] 1 Ch. 5; *S. Pearson & Sons Ltd v Dublin & S.E. Ry* [1909] A.C. 217, 220; *Dundee Harbour Trustees v Nicol* [1915] A.C. 550; *Municipal Mutual Insurance Ltd v Pontefract Corp* (1917) 116 L.T. 671; *Evans v Brunner, Mond & Co* [1921] 1 Ch. 359; *Deuchar v Gas Light & Coke Co* [1925] A.C. 691; *Wimbledon & Putney Commons Conservators v Tueley* [1931] 1 Ch. 190; *City of Winnipeg v C.P.R. Co* [1953] A.C. 618.
- 125 *General Auction Estate & Monetary Co v Smith* [1891] 3 Ch. 432.
- 126 *Re Kingsbury Collieries Ltd and Moore's Contract* [1907] 2 Ch. 259; *Re Thomas (William) & Co Ltd* [1915] 1 Ch. 325.
- 127 *Leifchild's Case* (1865) L.R. 1 Eq. 231.
- 128 *Dixon v Evans* (1872) L.R. 5 H.L. 606; *Bath's Case* (1878) 8 Ch. D. 334.
- 129 *Re German Date Coffee Co* (1882) 20 Ch. D. 169, 188. This case dealt with a petition to wind up a company on the grounds that its substratum had disappeared, a doctrine which although having a strong resemblance to that of ultra vires is not the same: *Cotman v Brougham* [1918] A.C. 514; *Re Tivoli Freeholds* [1972] V.R. 445.
- 130 *Cotman v Brougham* [1918] A.C. 514; *Anglo-Overseas Agencies Ltd v Green* [1961] 1 Q.B. 1.
- 131 *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch. 246, 305.
- 132 [1986] Ch. 246. Normally it will not be possible to elevate this power into an object by a provision in a company's objects clause requiring all the objects to be interpreted independently of each other, although in other situations the courts have given full effect to such a clause: see *Cotman v Brougham* [1918] A.C. 514.
- 133 [1975] 1 Ch. 420. See also *Newstead v Frost* [1980] 1 W.L.R. 135.
- 134 *Re New Finance & Mortgage Co Ltd* [1975] Ch. 420, 425.
- 135 *Tinkler v Wandsworth D.B.W.* (1858) 2 De G. & J. 261, 274 (directors cannot confer power on a statutory company by asserting that something falls within the spirit of the Act).

- 136 *Bell Houses Ltd v City Wall Properties Ltd* [1966] 2 Q.B. 656. Although the statement to this effect in *Bell* was technically obiter, the Court of Appeal found the contract to be intra vires, it is generally considered to be correct: see *American Home Assurance Co v Tjmonde Properties Ltd* [1986] B.C.L.C. 181, NZCA.
- 137 *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch. 246, 295.
- 138 *Ashbury Railway Carriage & Iron Co v Riche* (1875) L.R. 7 H.L. 653; see below, para.12-029.
- 139 *Ex p. Watson* (1888) 21 Q.B.D. 301.
- 140 *Great N.W. Central Ry v Charlebois* [1899] A.C. 114; *York Corp v Henry Leetham & Sons Ltd* [1924] 1 Ch. 557; see also *International Sales and Agencies Ltd v Marcus* [1982] 3 All E.R. 551, below; cf. *Islington Vestry v Hornsey UDC* [1900] 1 Ch. 695.
- 141 For the present statutory provision see below, paras 12-027 et seq.
- ①142 *Baroness Wenlock v River Dee Co* (1885) 10 App. Cas. 354; see generally *Vann* (1978) 52 A.L.J. 490.
- ①143 *Cunliffe Brooks & Co v Blackburn Benefit Building Society* (1882) 22 Ch. D. 61; (1884) 9 App. Cas. 857.
- ①144 *Sinclair v Brougham* [1914] A.C. 398. See below, para.12-026.
- ①145 Related aspects of *Sinclair v Brougham* were departed from in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 709–714, which has also cast a shadow over this aspect of the case.
- ①146 *Re Cork and Youghal Ry* (1869) L.R. 4 Ch. App. 748; *Cunliffe Brooks & Co v Blackburn Benefit Building Society* (1882) 22 Ch. D. 61; *B. Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 K.B. 48; *Re Airedale Co-operative Worsted Manufacturing Society Ltd* [1933] Ch. 639. The onus is on the person claiming the money to establish the necessary factual connection: see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669.
- ①147 *Re Wrexham Mold and Connah's Quay Ry* [1899] 1 Ch. 440; Goff and Jones, *The Law of Restitution*, 6th edn (2002), pp.127, 162–163 (not in more recent editions). On the limits of subrogation where the contract is illegal see *Orakpo v Manson Investments Ltd* [1978] A.C. 95.
- ①148 *Sinclair v Brougham* [1914] A.C. 398, where the principle of *Re Hallett's Estate* (1880) 13 Ch. D. 696 as to the tracing and identification of blended money was explained and the method adopted in *Re Guardian Permanent Benefit Building Society (Crace Calvert's Case)* (1882) 23 Ch. D. 440 was criticised. See also *Re Diplock* [1948] Ch. 465, 518–519 (affirmed sub nom. *Ministry of Health v Simpson* [1951] A.C. 251). For other consequences of an ultra vires transaction see Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), pp.744–745, 880–883.
- ①149

See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), Ch.13. Title to money or property can be transferred under an ultra vires contract: see *Ayres v South Australian Banking Corp (1871) L.R. 3 P.C. 548*; *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669, 689–690*.

①150 *Lipkin Gorman v Karpnale [1991] 2 A.C. 548*; see also below, paras 32-199 et seq.

151 First Directive 68/151 on Company Law [1968] O.J. L65/7.

152 See *Prentice (1973) 89 L.Q.R. 518*; *Collier and Sealy (1973) C.L.J. 1*.

153 These provisions were brought into effect on 4 February 1991. These reforms were based in part on a consultative report, Reform of the Ultra Vires Rule (DTI, 1986); see also “Modern Company Law—The Strategic Framework”, Company Law Review Steering Committee (February 1999), Ch.5.3.

154 See s.40.

155 These are persons who subscribe their name to the memorandum: s.7.

156 s.8(1).

157 s.28.

158 s.31(2)(c). Charitable companies will still have to restrict their objects under charities legislation: s.31(4).

159 s.33(1) which replaces s.14 of the 1985 Act. There is, of course, no reference in s.33 to articles or memorandum but rather to the company’s constitution which is defined in s.17 of the 2006 Act.

160 This was also the position at common law: see below, para.12-030.

161 Pt 11 (Derivative claims).

162 *Co-operative Rabobank Vechten Plassgebied BA v Minderland (C-104/96) EU:C:1997:610, [1998] 2 B.C.L.C. 507*.

163 See below, para.12-032.

164 *Re Faure Electric Accumulator Co (1888) 40 Ch. D. 141*; *Ferguson v Wilson (1866) L.R. 2 Ch. 77*; *Northern Counties Securities Ltd v Jackson & Steeple Ltd [1974] 1 W.L.R. 1133*; Bowstead and Reynolds on Agency, 21st edn (2018), paras 8-033, 8-036, 8-038.

①165 Bowstead and Reynolds on Agency, 22nd edn (2021), para.3-011, art.23 cited with approval in *Hopkins v TL Dallas Group Ltd [2004] EWHC 1379 (Ch), [2005] 1 B.C.L.C. 543*.

166 [2004] UKHL 28, [2004] 1 W.L.R. 1846 at [4].

①167 Note that this covers all limitations flowing from the company’s constitution. Limitations on the directors’ powers flowing from a resolution of any meeting or a class meeting of shareholders or any agreement of the members are covered: see s.40(3). On this type of constitutional limitation see, e.g. *Cane v Jones [1980] 1 W.L.R. 1451*.

①168 As, e.g. in *Parke v Daily News Ltd [1962] Ch. 927*; *Simmonds v Heffer [1983] B.C.L.C. 298*.

①169 [2002] EWCA Civ 762, [2002] 2 B.C.L.C. 655. For the first instance judgment of Rimer J see [2002] B.C.C. 544.

- ①170 [2002] EWCA Civ 762 at [41].
- ①171 [2002] EWCA Civ 762 at [41].
- ①172 [2002] EWCA Civ 762 at [108].
- ①173 See further, Bowstead and Reynolds on Agency, 22nd edn (2021), para.8-037.
- ①174 [2004] EWCA Civ 1069, [2005] 1 All E.R. 325.
- ①175 The concept of organ does not fit neatly into English company law but would at least include the board and the shareholders in general meeting including, it is submitted, a class meeting of shareholders.
- ①176 See Stein, Harmonization of European Company Law (1970), p.294.
- ①177 See, e.g. *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch. 246.
- ①178 *Co-operative Rabobank Vecht en Plassengebied BA v Minderhoud* (C-104/96 EU:C:1997:610, [1998] 1 W.L.R. 1025).
- ①179 *Barclays Bank Ltd v TOSG Trustfund* [1984] B.C.L.C. 1, 18 (“reasonableness is not a necessary ingredient of good faith”, per Nourse J at first instance); cf. Bills of Exchange Act 1882 s.90; Paget’s Law of Banking, 15th edn (2018), para.27-13. See also *International Sales and Agencies Ltd v Marcus* [1982] 3 All E.R. 551, 559.
- ①180 For example, if the person dealing with the company reads but misinterprets the articles: see *Re Introductions Ltd* [1970] Ch. 199.
- ①181 See, e.g. the bank in *Re Introductions Ltd* [1970] Ch. 199; *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA (Civ) 237, [2008] 1 B.C.L.C. 508 at [47].
- ①182 s.40(2)(b)(ii).
- 183 See para.12-020.
- ①184 It remains a breach of duty for directors to enter into a transaction which is not authorised by the company’s constitution: see the Companies Act 2006 s.171. See *Ceredigion Recycling & Furniture Team v Pope* [2022] EWCA Civ 22 at [47].
- 185 s.40(4).
- 186 See para.12-021.
- 187 *Irvine v Union Bank of Australia* (1877) 2 App. Cas. 399, PC; *Re London and New York Investment Corp* [1895] 2 Ch. 860.

- 188 s.41(1), (2). See also s.41(4) (bars to the avoidance of the contract). See also below, para.12-056.
- 189 s.41(3). Quaere if the liability under this subsection can be waived by the company. Other parties to the transaction can also be liable in the same way as directors but they are provided with a defence in s.41(4).
- 190 s.41(6). The company may also make an application.
- 191 The Charities Act 1993 Sch.6 para.20 has been repealed: see Sch.16 to the 2006 Act.
- 192 s.42.
- 193 s.42(3). Any affirmation of a transaction with a charity to which s.41 applies requires the written consent of the Charity Commissioners (s.42(4)).
- 194 s.42(2).
- 195 This was the old rule in *Trevor v Whitworth (1887) 12 App. Cas. 409*. Companies may now purchase their own shares provided certain statutory pre-conditions are satisfied: see Pt 18, Chs 1 and 4 of the 2006 Act; see also *Precision Dippings Ltd v Precision Dippings Marketing Ltd [1986] Ch. 447* (the transaction in that case would have been more appropriately classified as illegal rather than ultra vires).
- 196 *Victor Battery Co v Curry's Ltd [1946] Ch. 242*; *South Western Mineral Water Co Ltd v Ashmore [1967] 1 W.L.R. 1110*; *Armour Hick Northern Ltd v Whitehouse [1980] 1 W.L.R. 1520* interpreting the Companies Act 1948 s.54. On financial assistance by a company in the purchase of its own shares see now Pt 18 Ch.2 of the 2006 Act.
- 197 See *Re R.W. Roith Ltd [1967] 1 W.L.R. 432*. An agent (and this includes a director) only has authority to act for the benefit of their principal unless the parties otherwise agree: see *Criterion Properties Plc v Stratford UK Properties Ltd [2004] 1 W.L.R. 1846*. Where the contract is with a third party who has no notice of the director's want of good faith, the contract will be enforceable: *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246* (see also para.12-031).
- 198 See e.g. *Charterbridge Corp Ltd v Lloyds Bank [1970] Ch. 62*; *Heald v O'Connor [1971] 1 W.L.R. 497*.
- 199 *Reuter v Electric Telegraph Co (1856) 6 El. & Bl. 341, 348*; *Allard v Bourne (1863) 15 C.B. (N.S.) 468*; *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246* clearly distinguishes the issues of corporate capacity and directors' duties. But an attempt to confer authority on directors with respect to future transactions would be treated as an attempt to alter the articles of association for which a special resolution (or informal unanimous assent) would be necessary: *Grant v UK Switchbank Ry (1888) 40 Ch. D. 135*.
- 200 s.39; see above, para.12-028.
- 201 *Re Magdalena Steam Navigation Co (1860) John. 690*.

- 202 *Evans v Smallcombe* (1868) *L.R.* 3 *H.L.* 249, 256; and see *Phosphate of Lime Co Ltd v Green* (1871) *L.R.* 7 *C.P.* 43; *London Financial Association v Kelk* (1884) 26 *Ch. D.* 107; *Re Bailey Hay & Co Ltd* [1971] 1 *W.L.R.* 1357.
- 203 *Personal Service Laundry Ltd v National Bank Ltd* [1964] *I.R.* 49; *Walton v Bank of Nova Scotia* (1965) 52 *D.L.R.* (2d) 506.
- 204 *Re Duomatic Ltd* [1969] 2 *Ch.* 365.
- 205 *Smith v Hull Glass Co* (1852) 11 *C.B.* 897; *Re Bonelli's Telegraph Co, Collie's Claim* (1871) *L.R.* 12 *Eq.* 246, 259.
- ②06 (1856) 6 *El. & Bl.* 327. See generally, *Campbell* (1959-60) 75 *L.Q.R.* 469, 76 *L.Q.R.* 115.
- ②07 *Freeman & Lockyer v Buckhurst Park Properties Mangal Ltd* [1964] 2 *Q.B.* 480; *Nock* (1966) *Conv.(N.S.)* 123, 163.
- ②08 For discussion, see Watts, “Deeds and the Principles of Authority in Agency Law” (2002) 2 *O.U.C.L.J.* 93.
- ②09 See *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2019] *UKPC* 30, [2020] 2 *All E.R.* 294 at [64]–[65].
- ②10 See *Fountaine v Carmarthen Ry* (1868) *L.R.* 5 *Eq.* 316; *Crampton v Varnay Ry* (1872) *L.R.* 7 *Ch. App.* 562, 568; *Mahony v East Holyford Mining Co* (1875) *L.R.* 7 *H.L.* 869, 893; *County of Gloucester Bank v Rudry Merthyr Steam & House Coal Colliery Co* [1895] 1 *Ch.* 629.
- ②11 Replacing s.35B of the 1985 Act.
- ②12 *Irvine v Union Bank of Australia* (1877) 2 *App. Cas.* 366. A case which arguably was decided on a wrong application of the *Turquand* rule. In that case, Sir Barnes Pollock considered that the resolution authorising the director to borrow above the stipulated limit would have had to be registered under the *Companies Act 1862* s.53, so that a person dealing with the company would have had notice of it. This in fact was not so, and the ordinary resolution increasing the directors' borrowing powers did not have to be registered.
- ②13 (1856) 6 *El. & Bl.* 327.
- ②14 *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2019] *UKPC* 30, [2020] 2 *All E.R.* 294. cf. *Harbour Fund III LP v Kazakhstan Kagazy Plc* [2021] *EWHC* 1128 (*Comm*) at [117].
- ②15 *B. Liggett (Liverpool) Ltd v Barclays Ltd* [1928] 1 *K.B.* 48; cf. *South London Greyhound Racecourses Ltd v Wake* [1931] 1 *Ch.* 496; *Houghton & Co v Nothard, Lowe & Wills* [1927] 1 *K.B.* 246, affirmed [1928] *A.C.* 1.
- ②16

A.L. Underwood Ltd v Bank of Liverpool & Martins [1924] 1 K.B. 775. Such a transaction may also not fall within the usual or apparent authority of a director: see *Acute Property Developments Ltd v Apostolou [2013] EWHC 200 (Ch)*.

②17 *International Sales and Agencies Ltd v Marcus [1982] 3 All E.R. 551*.

②18 *Morris v Kanssen [1946] A.C. 459*; *Smith v Henniker Mayor & Co [2002] EWCA Civ 762, [2002] 2 B.C.L.C. 655*. cf. *Hely-Hutchinson v Brayhead Ltd [1968] 1 Q.B. 549*, affirmed on different grounds, 573; see also *John v Rees [1970] Ch. 345*.

②19 Above, para.12-036.

220 *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480*. All the earlier authorities must now be read in the light of this case, see, e.g. *Biggerstaff v Rowatt's Wharf Ltd [1896] 2 Ch. 93*; *Dey v Pullinger Engineering Co [1921] 1 K.B. 77*; *Houghton & Co v Nothard, Lowe & Wills Ltd [1927] 1 K.B. 246*; *Kreditbank Cassel GmbH v Schenkers Ltd [1927] 1 K.B. 826*; *British Thomson-Houston Co Ltd v Federated European Bank Ltd [1932] 2 K.B. 176*; *South London Greyhound Racecourses Ltd v Wake [1931] 1 Ch. 496*; *Rama Corp v Proved Tin & General Investments Ltd [1952] 2 Q.B. 147*; *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd [1983] 2 Lloyd's Rep. 9*; *Rhodian River Shipping Co SA v Halla Maritime Corp [1984] 1 Lloyd's Rep. 373*. See also below, paras 21-063—21-067.

221 In the *Freeman and Lockyer [1964] 2 Q.B. 480* case this was held to be the correct explanation of the *Houghton [1927] 1 K.B. 246* case, the *Schenkers [1927] 1 K.B. 826* case, and the *Rama [1952] 2 Q.B. 147* case. As a matter of principle it is difficult to see how mere knowledge of the articles could operate to confer an apparent authority on a director: see *Houghton & Co v Nothard Lowe & Wills Ltd [1927] 1 K.B. 246, 266*.

②22 *[1964] 2 Q.B. 480*. See also *Hely-Hutchinson v Brayhead Ltd [1968] 1 Q.B. 549*. As to the authority of: (1) a company's secretary, see *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971] 2 Q.B. 711*; (2) the individual director, see Bowstead and Reynolds on Agency, 22nd edn (2021), para.3-030. There is controversy as to whether being chairman of the board confers authority on the holder of this position greater than that of the ordinary director, perhaps equivalent to a managing director. Although there is some authority that it does (*British Thomson-Houston Co Ltd v Federated European Bank [1932] 2 K.B. 176*; *Clay Hill Brick Co Ltd v Rawlings [1938] 4 All E.R. 100*; *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc [2008] EWCA Civ 1091; [2008] 2 Lloyd's Rep. 619* at [27]), it is difficult to appreciate why being appointed chairman should confer this additional authority; see generally Davies and Worthington, Gower's Principles of Modern Company Law, 11th edn (2021) at para.8-022. A chairman might be expected, however to have apparent authority to report what was decided in board meetings, as with the company secretary: see *British Thomson-Houston Co Ltd v Federated European Bank [1932] 2 K.B. 176*, 182; *First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] B.C.L.C. 1409*, 1422; *Kelly v Fraser [2012] UKPC 25, [2013] A.C. 450* at [13].

②223 There was, however, a difference of opinion in the Court of Appeal on this point. Pearson LJ took the view that a director acting as the alter ego of a company may hold *himself* out qua agent as having the necessary authority: [1964] 2 Q.B. 480, 499, citing Greer LJ in the *British Thomson-Houston case* [1932] 2 K.B. 176, 182, although the judgment of Greer LJ provides scant support for this proposition. The *British Thomson-Houston* case was cited with approval by Browne-Wilkinson LJ in *Egyptian International Foreign Trading Co v Soplex Wholesale Supplies Ltd and P.S. Refson & Co Ltd* [1985] 2 Lloyd's Rep. 36, 43, but Kerr LJ in the latter case, “as at present advised”, considered that an agent’s assurance as to his authority could not vest him with wider authority than he already possessed (at 46). For dicta which support Kerr LJ see *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep. 1, 37 and 67–68, [1986] A.C. 717, 733–735, 749. See also Diplock LJ in *Freeman*: a “contractor cannot rely on the agent’s own representation as to his actual authority” (at 505).

②224 [1964] 2 Q.B. 480, 504–505.

225 Section 161 replaces s.285 of the 1985 Act.

②226 s.161 overrides s.160 (“appointment of directors of public company to be voted on individually”).

②227 They would be disqualified (s.157 and s.161(1)(b)) or cease to act (s.159 and s.161(1)(c)).

②228 Buckley, On the Companies Acts, para.358.

②229 (1856) 6 El. & Bl. 327.

②230 *Morris v Kanssen* [1946] A.C. 459, 471; *New Falmouth Resorts Ltd v International Hotels Jamaica Ltd* [2013] UKPC 11 at [25].

②231 *Kanssen v Rialto (West End) Ltd* [1944] Ch. 346; affirmed sub nom. *Morris v Kanssen* [1946] A.C. 459.

232 See above, Buckley, On the Companies Acts, para.358.

233 *Ruben v Great Fingall Consolidated Co* [1906] A.C. 439, 443; *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 K.B. 826, 844; *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch. 496. In *Lovett v Carson Country Homes Ltd* [2009] 2 B.C.L.C. 196 at [89] the court considered that *South London Greyhound Racecourses v Wake* was a “decision which to my mind is very hard to sustain”.

234 See *Campbell* (1960) 76 L.Q.R. 115, 130 et seq.

235 (1990) 64 A.L.J.R. 427.

236 (1990) 64 A.L.J.R. 427, 443. See also *Lonsdale Nominee Pty Ltd v Southern Cross Airlines Ltd* (1993) 10 A.C.S.R. 739. Where there is a forgery in the strict sense of the word, i.e. the name of a person is falsely appended to a document, then this would obviously not be binding on the company.

- 237 [2009] EWHC 1143 (Ch), [2009] 2 B.C.L.C. 196.
- 238 [2009] EWHC 1143 (Ch) at [96].
- 239 [2009] EWHC 1143 (Ch) at [90]; see also Buckley, On the Companies Acts, para.358.
- 240 For details, see Beale, Bridge, Gullifer and Lomnicka, The Law of Security and Title-based Finance, 3rd edn (2018), Ch.10.
- 241 On the registration of charges created before 6 April 2013 see Beale, et al., The Law of Security and Title-based Finance (2018), para.10.02.
- 242 Companies Act 2006 ss.859A–859Q, as inserted by the Companies Act 2006 (Amendment of Part 25) Regulations 2013 (SI 2013/600) with effect from 6 April 2013. On the registration of charges created before 6 April 2013, see Beale, et al., The Law of Security and Title-based Finance (2018), para.10.02.
- 243 Including mortgages: Companies Act 2006 s.859A(7)(a). It should be noted that this includes many charges that may also be registrable in a specialist asset register such as for mortgages over land, ships and aircraft.
- 244 Companies Act 2006 s.859A(3).
- 245 Companies Act 2006 s.859A(6)(a) (charges on cash deposits taken as security for leases of land) and (b) (charges created by members of Lloyd's).
- 246 Companies Act 2006 s.859A(6)(c): the principal exceptions are for financial collateral and for charges over aircraft objects (i.e. airframes, aircraft engines, or helicopters) that are international interests.
- 247 Companies Act 2006 s.859A(2).
- 248 Companies Act 2006 s.859H.
- 249 Companies Act 2006 s.859C.
- 250 Companies Act 2006 s.859L.
- 251 Companies Act 2006 s.859A(7). Compare Companies Act 1985 s.395.
- ②252 *Re Oriental Inland Steam Co* (1874) 9 Ch. App. 557, 560; *Fowler v Broad's Patent Night Light Co* [1893] 1 Ch. 724; *Gosling v Gaskell* [1897] A.C. 575, 587; *Measures Brothers v Measures* [1910] 2 Ch. 248, 256; *Pacific and General Insurance Co Ltd v Hazell* [1997] L.R.L.R. 65. In the case of a voluntary winding up, see Insolvency Act 1986 ss.91(2), 103. On the effect of winding up on the powers and office of directors, see Keay and Walton, Insolvency Law: Corporate and Personal, 4th edn (2017), p.278.
- ②253 *Re General Rolling Stock Co, Chapman's Case* (1866) L.R. 1 Eq. 346; *Ex p. Maclure* (1870) L.R. 5 Ch. 737; *Re R.S. Newman Ltd* [1916] 2 Ch. 309; *Re Oriental Bank Corp, MacDowall's Case* (1886) 32 Ch. D. 366. An employee's right to damages is not affected by the fact that they may, as a shareholder, have supported the resolution for voluntary winding up: *Fowler v Commercial Timber Co* [1930] 2 K.B. 1. See Vol.II, paras 42-183—42-184.
- ②254 *Re English Joint Stock Bank Ex p. Harding* (1867) 3 Eq. 341.
- ②255 Insolvency Act 1986 ss.91(2), 103.
- ②256

Midland Counties District Bank Ltd v Attwood [1905] 1 Ch. 357; Fox Bros (Clothes) Ltd v Bryant [1979] I.C.R. 64; see also Vol.II, para.42-186.

257 *Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 K.B. 592.*

258 *[1918] 1 K.B. 592; Fowler v Commercial Timber Co [1930] 2 K.B. 1, 6.*

259 *Nokes v Doncaster Amalgamated Collieries Ltd [1940] A.C. 1014* (this was decided under a statutory provision which s.900 restates).

260 *British Waggon Co v Lea (1880) 5 Q.B.D. 149*; cf. *Tolhurst v Associated Portland Cement Manufacturers Ltd [1903] A.C. 414*, commented on in *Nokes v Doncaster Amalgamated Collieries Ltd [1940] A.C. 1014, 1019–1020*; and see paras 22-056—22-058.

261 See Insolvency Act 1986 s.178. This is a change from the old law: see *Re Hans Place Ltd [1993] B.C.L.C. 768*; *Re Morrish (1882) 22 Ch. D. 410*; *Re A.B.C. Coupler and Engineering Co Ltd (No.3) [1970] 1 W.L.R. 702*; *Warnford Investments Ltd v Duckworth [1979] Ch. 127*; *Re A.E. Realisations (1986) Ltd [1987] B.C.L.C. 486*. Such disclaimer does not release a guarantor of the rents from their guarantee: *Hindcastle Ltd v Barbara Attenborough Associates Ltd [1997] A.C. 70*. See also *Re Park Air Services Plc [2000] 2 A.C. 172*.

262 Insolvency Act 1986 ss.165–167; see *Bateman v Ball (1887) 56 L.J. Q.B. 291*; *Hire Purchase Furnishing Co v Richens (1887) 20 Q.B.D. 387*.

263 *Re Anglo-Moravian Co (1875) 1 Ch. D. 130*.

264 *Stead Hazel & Co v Cooper [1933] 1 K.B. 840*. Representative language was not used in this case although it is always prudent for a liquidator to contract clearly in a representative capacity.

265 Insolvency Act 1986 s.127; *Mond v Hammond Suddards [1996] 2 B.C.L.C. 470*; *Hollicourt (Contractors) Ltd v Bank of Ireland [2001] Ch. 555*; *Re Tain Construction Ltd [2003] 2 B.C.L.C. 374*; *Wilson v SMC Properties [2015] EWHC 870 (Ch)*.

266 *Re Steane's (Bournemouth) Ltd [1950] 1 All E.R. 21*; *Re T.W. Construction Ltd [1954] 1 W.L.R. 540*; *Re Clifton Place Garage Ltd [1970] Ch. 477*; *Re Operator Control Cabs Ltd [1970] 3 All E.R. 657n*; *Re Argentum Reductions (UK) [1975] 1 W.L.R. 186*; *Re Gray's Inn Construction Co Ltd [1890] 1 W.L.R. 711*; *Re Tramway Building and Construction Co Ltd [1987] B.C.L.C. 632*; *Re Webb Electric Ltd [1988] B.C.L.C. 382*; *Denney v John Hudson & Co Ltd [1992] B.C.L.C. 901*; *Dingley v Nisa Retail Ltd [2019] EWHC 1383 (Ch)*. cf. *Express Electrical Distributors Ltd v Beavis [2016] EWCA Civ 765, [2016] 1 W.L.R. 4783*.

267 *Re Wiltshire Iron Co (1868) L.R. 3 Ch. App. 443*; *Re Park Ward & Co [1926] Ch. 828*; *Re French's (Wine Bar) Ltd [1987] B.C.L.C. 437*.

268 *Re Civil Service & General Store Ltd (1887) 57 L.J. Ch. 119*; cf. *Re T.W. Construction Ltd [1954] 1 W.L.R. 540*.

269 *Re Gray's Inn Construction Co Ltd [1980] 1 W.L.R. 711, 719*. See also *Denney v John Hudson & Co Ltd [1992] B.C.L.C. 901*.

270 *[1992] B.C.L.C. 901*. In the case of a solvent company, the court will validate a disposition under the Companies Act 2006 s.127 provided that an intelligent and honest board of

directors could reasonably take the view that the arrangements were in the best interests of the company. Only where bad faith or other exceptional circumstances are proved will the court decline to act under s.127; *Re Burton and Deakin Ltd* [1977] 1 W.L.R. 390.

- 271 *Re Oriental Bank Corp Ex p. Guillemin* (1883) 28 Ch. D. 634; *Re Wiltshire Iron Co* (1868) L.R. 3 Ch. App. 443.
- 272 For the definition of receiver see **Insolvency Act 1986** s.29. In particular note the definition of administrative receiver a term first introduced by the **Insolvency Act 1986**: see also **s.251 of the 1986 Act**.
- 273 **Insolvency Act 1986** s.29(2).
- 274 This introduced ss.72A–72H into the **Insolvency Act 1986**. The prohibition affected floating charges created after 15 September 2003 (SI 2003/2093).
- 275 There are also a number of exemptions to the prohibition on appointing an administrative receiver: see **Insolvency Act 1986** ss.72C–72H.
- 276 *Reid v Explosives Co* (1887) 19 Q.B.D. 264 (note, however, the reservations of Fry LJ); *Re Mack Trucks (Britain) Ltd* [1967] 1 W.L.R. 780; *Griffiths v Secretary of State for Social Services* [1974] Q.B. 468. This principle has not been followed in Australia: see *Spidad Holding v Popovic* (1995) 19 A.C.S.R. 108.
- 277 *Griffiths v Secretary of State for Social Services* [1974] Q.B. 468; *Deaway Trading Ltd v Calverley* [1973] I.C.R. 546; see Vol.II, paras 42-183—42-184.
- 278 *Re Foster Clark Ltd's Indenture Trusts* [1946] 1 W.L.R. 125. The position has now been substantially modified by the **Transfer of Undertakings (Protection of Employment) Regulations 1981** (SI 1981/1794). See Vol.II, paras 42-184 et seq.
- 279 *Re Mack Trucks (Britain) Ltd* [1967] 1 W.L.R. 780.
- 280 *Griffiths v Secretary of State for Social Services* [1974] Q.B. 468, 486.
- 281 *Griffiths v Secretary of State for Social Services* [1974] Q.B. 468; see Freedland, *The Contract of Employment* (1975), p.339.
- 282 s.44(1)(b). On the nature of the administrative receiver's liability see *Re Atlantic Computer Systems Plc (No.1)* [1992] Ch. 505, 526.
- 283 s.44(1)(b), (2). This was designed to overcome the decision in *Nicoll v Cutts* [1985] B.C.L.C. 322.
- 284 Stewart, *Administrative Receivers and Administrators*, pp.96–99.

②85 [1995] 2 A.C. 394.

②86 In the lower courts it was held that the receiver who adopted the contract would be liable for all outstanding liabilities: see [1995] 2 A.C. 394 where the judgment of Lightman J is reported. Because of the threat of liability this resulted in receivers, and more importantly administrators who are similarly liable under s.19 of the 1986 Act, in terminating contracts of employment, s.44 and s.19 of the Act have been modified by the Insolvency Act 1994 so that receivers and administrators will only be liable for services on a contract of employment rendered during the administration or receivership after the adoption of the contract of employment (referred to as “qualifying liabilities”).

287 *Airlines Airspaces Ltd v Handley Page Ltd* [1970] Ch. 193. cf. *Rother Iron Works Ltd v Canterbury Precision Engineers* [1974] Q.B. 1; *George Barker (Transport) Ltd v Eynon* [1974] 1 W.L.R. 462.

288 See, however, *Ash & Newman Ltd v Creative Devices Research Ltd* [1991] B.C.L.C. 403 where an injunction was granted to protect a pre-emption right of the plaintiff but the facts were exceptional in that the injunction did not prejudice the interests of the security holder.

289 *Hill (Edwin) & Partners v First National Finance Corp Plc* [1989] B.C.L.C. 89; *Astor Chemicals Ltd v Synthetic Technology Ltd* [1990] B.C.L.C. 1, 11.

290 *Burt, Boulton & Hayward v Bull* [1895] 1 Q.B. 276, 279. On the right of a court appointed receiver to be remunerated see *Mellor v Mellor* [1993] B.C.L.C. 30.

291 *Lawson v Hosemaster Co Ltd* [1966] 1 W.L.R. 1300.

292 Insolvency Act 1986 s.44(1)(b).

293 *Thomas v Todd* [1926] 2 K.B. 571.

294 *Gosling v Gaskell* [1897] A.C. 575; *Re S. Brown & Co Ltd* [1940] Ch. 961; see also *Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd* [1980] 2 All E.R. 655, 658.

295 *Sowman v David Samuel Trust Ltd* [1978] 1 W.L.R. 22.

②296 The authorities are collected in *Welsh Development Agency v Export Finance Co Ltd* [1992] B.C.L.C. 148. See also *OBG Ltd v Allan* [2007] UKHL 21, [2008] A.C. 1.

②297 See Bowstead and Reynolds on Agency, 22nd edn (2021), para.9-121.

298 A new Sch.B1 is inserted by s.248 into the 1986 Act; see Sch.16.

299 See, e.g. paras 42–45 of Sch.B1.

(ii) - Contracts between Companies and Promoters or Directors

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 4 - Capacity of Parties

Chapter 12 - Corporations and Unincorporated Associations

Section 1. - Corporations

(d) - Registered Companies ⁵⁰

(ii) - Contracts between Companies and Promoters or Directors

Promoters

12-054 Promoters are the persons who procure the formation of a company and its “flotation”. ³⁰⁰ The term “promoter” is not a legal term but depends upon the function being carried out with respect to the formation of the company. A promoter stands in a fiduciary relationship to the company both before and after its formation. ³⁰¹ While, therefore, a promoter may make a profit out of the sale of their property to the company, ³⁰² that profit must be disclosed to an independent board of directors or to the shareholders ³⁰³; they may not take a secret commission from a person selling to the company, ³⁰⁴ and if they do so, the company may rescind the contract ³⁰⁵ or claim to recover the secret profit from the promoter, ³⁰⁶ or (at any rate in some cases) sue them for damages. ³⁰⁷ Where promoters acquired property before they began to promote the company and thereafter sold it to the company without disclosing that they were the vendors, it was held that rescission was the only right open to the company, as the promoters were not at the time of their purchase in a fiduciary position to the company. ³⁰⁸ If disclosure is relied on, it must be a genuine disclosure, that is to say, either a disclosure to a board of directors independent of the promoters, ³⁰⁹ or a communication to all the shareholders, ³¹⁰ or a plain indication in the prospectus that the board of directors are acting for the promoters. ³¹¹

Directors

- 12-055 Directors owe fiduciary obligations to the company and may not make any secret profit by virtue of their office.³¹² But directors are in a more responsible position than promoters and neither they nor companies in which they are interested³¹³ can make an enforceable contract with the company, unless so authorised by the articles of association.³¹⁴ Such authorisation is in practice almost universally included in the articles of association, but even where it is given the interested director has a statutory obligation to disclose their interest fully.³¹⁵ In the absence of the necessary authority in the articles, or in the event of a failure to disclose an interest where there is such authority, the contracts will be voidable by the company.³¹⁶ It may be affirmed by the shareholders in general meeting³¹⁷ or (probably) by an independent board of directors,³¹⁸ or alternatively the company may rescind the contract if restitutio in integrum is still possible. The company cannot, however, claim both to affirm the contract and an account of profits unless actual fraud or breach of trust can be proved, as, for example, where a director has sold to the company property which they already held as trustee (expressly or constructively) for the company.³¹⁹ Where the director is guilty merely of non-disclosure, having, for example, acquired their interest in the property which they sold to the company before they became a director, the company may either affirm the sale and pay the price agreed or rescind the transaction altogether, but, unless the transaction falls within s.190 of the Companies Act 2006,³²⁰ it cannot claim to affirm and yet to recover the profit made by the director.³²¹

Companies Acts and directors' contracts

- 12-056 The Companies Acts contain extensive provisions designed to regulate transactions between directors and their companies, the overall purpose of these provisions being to prevent overreaching by directors and to compel disclosure to the members of the details of the transactions. Some types of transaction must be disclosed and approved in advance (e.g. loans,³²² payments made in connection with the loss of office),³²³ while others merely have to be disclosed (e.g. emoluments).³²⁴ These provisions are much too technical and extensive to be dealt with here and specialist texts on Company Law should be referred to. Of greater significance with respect to contracts between directors and their companies is s.177 of the Companies Act 2006,³²⁵ which requires a director who has a direct or indirect interest in a proposed contract or arrangement with their company to make disclosure of their interest in the way set out in the section. Directors are also obliged to disclose interests in an existing transaction or arrangement.³²⁶ There are also special provisions dealing with contracts which include as one of the parties a director of the company and with respect to that contract the board exceeds limitations on its powers under the

company's constitution.³²⁷ Such contracts are (subject to limitations) made voidable at the option of the company.³²⁸

Managing directors

- 12-057 The appointment of a managing director does not necessarily constitute a contract between the holder of that office and the company and in the absence of a contract they are removable according to the regulations in the company's constitution.³²⁹ Even where a person is appointed as a managing director pursuant to a contract to that effect the company can lawfully terminate the appointment at any time in accordance with the company's constitution if the appointment is not made for a specific term, though reasonable notice may be required in this event. A person appointed managing director cannot, in the absence of an agreement to that effect, claim to be entitled to continue as such so long as they remain a director.³³⁰

Contract for term of years

- 12-058 A managing director may, however, be employed in that capacity by a company under a contract for a term of years,³³¹ and if so their appointment cannot be lawfully revoked by the company before the expiration of that time by removing them from their directorship in accordance with the articles of association or [s.168 of the 2006 Act](#).³³² Although the company's power to remove a director under [s.168](#) cannot be taken away by contract,³³³ the exercise of the power may be a breach of contract because a managing director who is removed from their position as a director will necessarily lose their post as managing director,³³⁴ and the company will then be in breach of any contract to employ them as such. Even if remuneration is attached to the office and there is a contract, the contract may exceptionally (particularly where it is an informal parol agreement) be treated as being subject to the provisions of the company's constitution. In this event removal of the managing director in accordance with the company's constitution will not be a breach of contract.³³⁵

Improper appointment

- 12-059 If a managing director is improperly appointed, fees received by them as such may be recovered from them by the company.³³⁶

Footnotes

- 50 This is not a summary of company law, but only of the law applicable to the contracts of companies.
- 300 Flotation in this sense does not require that the company's securities be offered to the public; *Gifford v Willoughby's Mashonaland Expedition Co* (1899) 16 T.L.R. 24; *Torva Exploring Syndicate v Kelly* [1900] A.C. 612. On liability with respect to defective prospectuses: see Financial Services And Markets Act 2000 s.90; above, para.9-107.
- 301 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218; *Emma Silver Mining Co v Lewis* (1879) 4 C.P.D. 396; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392, 428; *Gluckstein v Barnes* [1900] A.C. 240.
- 302 *Omnium Electric Palaces Ltd v Baines* [1914] 1 Ch. 332.
- 303 *Gluckstein v Barnes* [1900] A.C. 240; *Re Leeds & Hanley Theatres of Varieties Ltd* [1902] 2 Ch. 809; *Jubilee Cotton Mills Ltd v Lewis* [1924] A.C. 958.
- 304 *Lydney & Wigpool Iron Co v Bird* (1886) 33 Ch. D. 85.
- 305 See above, *Thomas v Todd* [1926] 2 K.B. 571.
- 306 See above, *Thomas v Todd* [1926] 2 K.B. 571.
- 307 *Re Leeds & Hanley Theatres of Varieties Ltd* [1902] 2 Ch. 809; *Jacobus Marler Estates v Marler* (1913) L.J.P.C. 167n.
- 308 *Ladywell Mining Co v Brookes* (1887) 35 Ch. D. 400; cf. *Burland v Earle* [1902] A.C. 83. For statutory liability with respect to a defective prospectus see Financial Services and Markets Act 2000 ss.84, 85 and 150.
- 309 *Gluckstein v Barnes* [1900] A.C. 240; *Burland v Earle* [1902] A.C. 83, above.
- 310 *Salomon v Salomon & Co* [1897] A.C. 22; *Att-Gen for Canada v Standard Trust Co of New York* [1911] A.C. 498.
- 311 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392.
- 312 *Imperial Mercantile Credit Association v Coleman* (1873) L.R. 6 H.L. 189; *Parker v McKenna* (1874) L.R. 10 Ch. App. 96; *Kaye v Croydon Tramways Co* [1898] 1 Ch. 358; *Tiessen v Henderson* [1899] 1 Ch. 861; *Clarkson v Davies* [1923] A.C. 100; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All E.R. 378, [1967] 2 A.C. 134n; *Industrial Development Consultants Ltd v Cooley* [1972] 1 W.L.R. 443. See now Pt 10 of the 2006 Act which contains a codification of the major directors' duties.
- 313 *Flanagan v Great Western Ry* (1868) L.R. 7 Eq. 116; *Transvaal Lands Co v New Belgium Land Co* [1914] 2 Ch. 488.
- 314 *Costa Rica Railroad Co v Forwood* [1901] 1 Ch. 746; *Re Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch. 139; see now s.177 of the 2006 Act.
- 315 s.182. This section replaces s.317 of the Companies Act 1985. Failure to comply with s.317 did not render the contract void or voidable: *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549; *Guinness Plc v Saunders* [1990] 2 A.C. 663. It would also appear that breach of s.317 did not vest in the company any right of action for damages for breach of statutory duty:

- Castlereagh Motels Ltd v Davies-Roe* (1966) 67 S.R. (N.S.W.) 279; see also *Lee Panavision Ltd v Lee Lighting Ltd* [1992] B.C.L.C. 575; *Runciman v Walter Runciman Plc* [1992] B.C.L.C. 1084. The same would apply to s.182.
- 316 *Transvaal Lands Company v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch. 488.
- 317 *North West Transportation Co v Beatty* (1887) 12 App. Cas. 589. However, *Beatty* has been substantially modified by s.239 of the 2006 Act so that a shareholders' vote affirming the transaction must be passed by an independent majority of shareholders thus disregarding the votes of the director or anyone connected with him. For the definition of connected persons see s.252 of the 2006 Act.
- 318 *Queensland Mines Ltd v Hudson* (1978) 52 A.L.J.R. 399, PC; noted (1979) 42 M.L.R. 711. It is important to note that in this case the shareholders were all aware of the director's conduct: see *Cane v Jones* [1980] 1 W.L.R. 1451 and above, para.12-039.
- 319 *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch. 809.
- 320 Where the transaction is a substantial property transaction as defined in s.190 of the Companies Act 2006, and that section is not complied with, the director must account for any gain and are liable to indemnify the company for all losses (s.195); see *Joint Receivers and Managers of Niltan Carson Ltd v Hawthorne* [1988] B.C.L.C. 298; *Duckwari Plc v Offerventure Ltd (No.2)* [1999] Ch. 253.
- 321 *Re Cape Breton Co* (1884) 26 Ch. D. 221; 29 Ch. D. 795; *Burland v Earle* [1902] A.C. 83.
- 322 s.197. Loans may also be subsequently affirmed within a reasonable period of time: s.214. The long standing prohibition on company loans to directors was abrogated by the 2006 Act.
- 323 ss.215–219. See Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties (Law Commission, Consultation Paper No.153).
- 324 s.318.
- 325 See also *Thomas v Todd* [1926] 2 K.B. 571.
- 326 ss.182–186. This is extended to a shadow director: s.187.
- 327 s.41. The purpose of this provision is to deny to directors the full protection of ss.39 and 40. See above, para.12-034.
- 328 s.41.
- 329 An appointment without remuneration will normally mean that there is no contract: *Foster v Foster* [1916] 1 Ch. 532.
- 330 *Foster v Foster* [1916] 1 Ch. 532.
- 331 Service contract is defined in s.227 of the 2006 Act and it must be open for inspection by members: ss.228–229. These provisions apply to shadow directors: s.230.
- 332 *Southern Foundries Ltd v Shirlaw* [1940] A.C. 701; *Shindler v Northern Raincoat Co Ltd* [1960] 1 W.L.R. 1038; *Cumbrian Newspapers Group Ltd v Cumberland and Westmoreland Newspaper and Printing Co Ltd* [1987] Ch. 1.
- 333 See, however, *Bushell v Faith* [1970] A.C. 1099.
- 334 *Re Alexander's Timber Co* (1901) 70 L.J. Ch. 767; *Bluett v Stutchbury's Ltd* (1908) 24 T.L.R. 469.

- 335 *Read v Astoria Garage (Streatham) Ltd [1952] Ch. 637*; contrast *Shindler v Northern Raincoat Co Ltd [1960] 1 W.L.R. 1038*. This gives rise to difficult conceptual problems: see *Trebilcock (1967) 31 Conv.(N.S.) 95*; *Carrier Australia Ltd v Hunt (1935) 61 C.L.R. 534*.
- 336 *Brown & Green v Hays (1920) 36 T.L.R. 330*; *Kerr v Marine Products (1928) 44 T.L.R. 292*; cf. *Craven Ellis v Canons Ltd [1936] 2 K.B. 403*.

(iii) - Contracts between Companies and their Members

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Purchase and allotment

- 12-060 The contract between a company and a shareholder may be made in a number of ways. By [s.112 of the Companies Act 2006](#), the subscribers to the memorandum of association are deemed to have agreed to become members of the company.³³⁷ The phrase “agrees to become a member” in [s.112](#) does not require a binding contract and this requirement is satisfied where the name of a person is entered in the register of members with their consent.³³⁸ However, in most cases,³³⁹ the contract between the shareholder and the company will either be preceded by a purchase of shares from a third party or will be made by application to the company followed by allotment. In the former case the contract is probably made by the application of the prospective shareholder to be entered in the register followed by their being so entered. In the latter case the contract is constituted by an application to take shares, accepted by the company by a notification that shares have been allotted.³⁴⁰ Notice of allotment must be given within a reasonable time or the application lapses.³⁴¹ It was held in *Houldsworth v City of Glasgow Bank*³⁴² that a person who had applied for and been allotted shares in a company could not, while he remained a member of the company, sue the company for damages for breach of his contract of membership,³⁴³ or for damages for fraudulently inducing them to enter into it.³⁴⁴ The only remedy used to be that of rescission of the contract and rectification of the register of members. The position has now been altered by [s.655 of the 2006 Act](#),³⁴⁵ which provides that being a member does not preclude an action for damages. Rescission of a contract of subscription will normally be ordered

if the claimant succeeds in showing that they have been induced to take the shares by a material misrepresentation of fact on the part of the company. A misrepresentation made by a person acting on behalf of the company within the scope of their authority³⁴⁶ or contained in a document which is, to the knowledge of the company, the basis of the contract to take shares,³⁴⁷ is a good ground for rescission.³⁴⁸ In most cases the representations complained of are contained in a prospectus issued by the company, and inasmuch as the offer to take shares is an offer to take them on the terms of the prospectus, the materiality of the statements contained in the prospectus will in most cases be beyond dispute.³⁴⁹ If the shareholder does not rescind the contract and take steps to have the register rectified within a reasonable time,³⁵⁰ and in any event before the commencement of the winding up of the company,³⁵¹ they lose their right of rescission; but this rule does not apply to a shareholder whose shares have been forfeited by the company and who has done nothing to affirm the contract, for they have ceased to be a shareholder and has become a debtor to the company.³⁵²

Effect of articles

12-061

- U** The terms of the contract of membership of a company are contained in the memorandum and articles of association. Where a company prior to the *2006 Act* had to possess articles and a memorandum the articles were subordinate to the memorandum and, in the case of inconsistency between them, the memorandum prevails. Provisions in the memorandum of such companies are now treated as provisions in its articles.³⁵³ No provision is made in the *2006 Act* for dealing with the unlikely event that a conflict might arise but the courts would probably follow the old law, so that any provision in the articles derived from the memorandum would prevail.³⁵⁴ The extent to which the articles of association form an enforceable contract between the company and its individual members is determined by *s.33 of the Companies Act 2006* which provides that the:

“... provisions of a company’s constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions.”

³⁵⁵

In *Hickman v Kent or Romney Marsh Sheep-Breeders' Association*,³⁵⁶ Astbury J made an elaborate examination of the cases, some of which decided that the articles of association created no contract between the company and its members and others that a company was entitled as against its members to enforce and restrain breaches of its regulations; he concluded “[i]t is difficult to

reconcile these two classes of decisions and the judicial opinions therein expressed”, but he went on to formulate the following rules:

- (1) No article can constitute a contract between the company and a third person.³⁵⁷
- (2) No right purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, a solicitor,³⁵⁸ promoter³⁵⁹ or director,³⁶⁰ can be enforced against the company.
- (3) Articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

The articles also constitute a contract between the members inter se.³⁶¹

Footnotes

- 50 This is not a summary of company law, but only of the law applicable to the contracts of companies.
- 337 *Companies Act 2006* s.112 makes it clear that the subscribers to the memorandum become members on registration of the company even if the company fails to enter their names in the register of members.
- 338 *Re Nuneaton Borough Association Football Club Ltd [1989] B.C.L.C. 454*. This was decided under s.22 of the 1985 Act which s.112 restates.
- 339 cf. *Mackley's Case (1875) 1 Ch. D. 247*.
- 340 For the statutory rules relating to allotment and the effects of irregular allotment, see *Companies Act 1985* ss.82–86 repealed in part by *Financial Services Act 1986* Sch.17, settling the law left uncertain in *Jubilee Cotton Mills Ltd v Lewis [1924] A.C. 958; Re James Burton & Son Ltd [1927] 2 Ch. 132*.
- 341 *Ramsgate Victoria Hotel Co v Montefiore (1866) L.R. 1 Ex. 109*.
- 342 (1880) 5 App. Cas. 317; *Soden v British and Commonwealth Holdings Plc [1997] 2 B.C.L.C. 501*.
- 343 *Re Addlestone Linoleum Co (1887) 37 Ch. D. 191*.
- 344 *Western Bank of Scotland v Addie (1867) L.R. 1 Sc. & Div. 145; Houldsworth v City of Glasgow Bank (1880) 5 App. Cas. 317*.
- 345 This was first introduced as s.111A of the 1985 Act by s.131 of the *Companies Act 1989*.
- 346 *Lydney v Anglo-Italian Hemp Spinning Co [1896] 1 Ch. 178*; cf. *Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch. 392*.
- 347 *Karberg's Case [1892] 3 Ch. 1; Collins v Associated Greyhound Racecourses [1930] 1 Ch. 1*.
- 348 See above, Ch.9.
- 349 See *Karberg's Case [1892] 3 Ch. 1; Mair v Rio Grande Rubber Estates [1913] A.C. 853; Re Pacaya Rubber & Produce Co [1914] 1 Ch. 542*.
- 350 *First National Reinsurance Co v Greenfield [1921] 2 K.B. 260*.

- 351 *Oakes v Turquand* (1867) *L.R.* 2 *H.L.* 325; *Reese River Silver Mining Co v Smith* (1869) *L.R.* 4 *H.L.* 64.
- 352 *Aaron's Reefs v Twiss* [1896] *A.C.* 273.
- 353 s.28.
- 354 *Ashbury v Watson* (1885) 30 *Ch. D.* 376; *Rayfield v Hands* [1960] *Ch. 1*.
- ⑥355 This replicates the effect s.14 of the 1985 Act, there having been inconsequential linguistic amendments.
- 356 [1915] 1 *Ch.* 881, 900; approved *Beattie v Beattie Ltd* [1938] *Ch.* 708. See also *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] *B.C.L.C.* 11 (the contract constituted by the articles does not import the requirement that there be parity of treatment of shareholders of the same class); *Bratton Seymour Service Co Ltd v Oxborough* [1992] *B.C.L.C.* 693.
- 357 *Melhado v Porto Alegre Ry* (1874) *L.R.* 9 *C.P.* 503; *Re Greene* [1949] *Ch.* 333.
- 358 *Eley v Positive Life Assurance Co* (1876) 1 *Ex. D.* 88; cf. *Cumbrian Newspapers Group Ltd v Cumberland and Westmoreland Herald Newspaper & Printing Co Ltd* [1987] *Ch. 1*, 16.
- 359 *Pritchard's Case* (1873) *L.R.* 8 *Ch.* 956.
- 360 *Browne v La Trinidad* (1887) 37 *Ch. D.* 1; *Beattie v Beattie Ltd* [1938] *Ch.* 708; contrast *Rayfield v Hands* [1960] *Ch. 1*, on which see *Gower* (1958) 21 *M.L.R.* 401, 465.
- 361 *Rayfields v Hands* [1960] *Ch. 1*. See also *Re Royal Institution of Chartered Surveyors' Application* [1985] *I.C.R.* 330, 345–347 (relationship between members of a body corporate incorporated by Royal Charter). It has been argued that a member also has the right to compel a company to observe all of the provisions in the company's articles of association, a proposition which if accurate would provide a means for enforcing indirectly outsider rights. Although some cases recognise such a right, it has not constituted the basis of any decision and its status remains very uncertain. See generally, *Wedderburn* [1957] *C.L.J.* 194; [1958] *C.L.J.* 93.

(iv) - Contracts between Companies and their Auditors

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Appointment and removal of auditors

12-062 Public companies must appoint auditors.³⁶² However, if the directors reasonably resolve that no such appointment is needed on the ground that audited accounts are unlikely to be required then auditors need not be appointed.³⁶³ The appointment of auditors is made by the members.³⁶⁴ Although the first auditors may be appointed by the directors,³⁶⁵ auditors are normally elected at the general meeting at which the company's accounts are considered³⁶⁶ and the terms of the auditor's remuneration will normally be determined by the members of the company.³⁶⁷ The auditor's term of office must run from the conclusion of that meeting to the conclusion of the next such meeting,³⁶⁸ and although an auditor may resign they must follow certain stipulated procedures.³⁶⁹ By virtue of the [Companies Act 2006 s.510](#), a company may by ordinary resolution remove its auditor from office, before the expiration of their term of office, any such removal is without prejudice to any claim for damages for breach of contract.³⁷⁰

Rules of co-operative societies

12-063



The rules of a society registered under the [Co-operative and Community Benefit Societies Act 2014](#) (or under the Industrial and Provident Societies Acts replaced by that Act) bind the members of such a society to the same extent as the articles of association bind the shareholders.

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Footnotes

- 50 This is not a summary of company law, but only of the law applicable to the contracts of companies.
- 362 s.489(1).
- 363 s.489(1).
- 364 s.489(1). In certain restricted circumstances, the directors can appoint auditors: see [s.489\(3\)](#).
- 365 s.489(3).
- 366 s.489(4).
- 367 s.492.
- 368 s.495.
- 369 ss.516–618.
- 370 The Act contains other procedural provisions relating to the removal of an auditor: see [ss.510–513 of the Act](#).
- ③371 See [Co-operative and Community Benefit Societies Act 2014 s.15](#). See too *Biddulph & District Agricultural Society v Agricultural Wholesale Society [1925] Ch. 769, [1927] A.C. 76*.

(a) - Generally

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(a) - Generally

Liability of unincorporated associations

12-064 An unincorporated association is not a legal person and therefore cannot sue or be sued

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U unless such a course is authorised by express or implied statutory provisions as in the case of a trade union

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U and a trustee savings bank.

374

U Nor can a contract be made so as to bind all persons who from time to time become members of such an association.

375

U But a contract purportedly made by or with an unincorporated association is not necessarily a nullity.

376

U If the person or persons who actually made the contract had no authority to contract on behalf of the members they may be held to have contracted personally.

377

U On the other hand, if they had the authority, express or implied, of all or some of the members of the association to contract on their behalf, the contract can be enforced by or against those members as co-principals to the contract by the ordinary rules of agency.

378



Representative action

12-065 By the rules of agency, therefore, a large number of members of an association may, in principle if rarely in practice, find themselves parties to a contract. It may be impracticable in such a case to join all the members as plaintiffs or defendants, and therefore recourse must be had to the device of a representative action. [Order 15 r.12, of the Rules of the Supreme Court](#) (which is preserved by the [Civil Procedure Rules Sch.1](#)) provides that where there are numerous persons having the same interest in any proceedings,

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U the proceedings may be begun and, unless the court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them. The attitude of the courts is to interpret the open textured language of [Ord.15 r.12](#), in a liberal manner. Its language, according to Megarry VC, is wide and permissive and the rule should be used as “a flexible tool of convenience in the administration of justice”.

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Requirements for representative action

12-066 In [Prudential Assurance Co Ltd v Newman Industries Ltd](#)³⁸¹ Vinelott J reviewed the authorities relating to representative actions and formulated the following principles with respect to the bringing of such actions.

Not if it would confer new right of action

12-067 First, a representative action may not be brought if the effect of so doing is:

“... to confer a right of action on a member of the class represented who would not otherwise have been able to assert such a right in separate proceedings, or to bar a defence which might otherwise be available to the defendant, in such separate proceedings.”³⁸²

From this Vinelott J reasoned that the plaintiff in a representative action will normally be only entitled to declaratory relief, although he may join with the representative action a claim for personal damages. Although this is the normal rule, in exceptional circumstances the court may grant damages in favour of the plaintiff in an action commenced in representative form.³⁸³ Also, it may be that the contractual arrangements between the parties make it appropriate that there be an action in representative form.³⁸⁴ An action of libel cannot be instituted under the rule where some of the members of the association might not have authorised the publication of the alleged libel, or might be out of the country.³⁸⁵ Similarly, it was refused where an order was sought against the members at the date of the proceedings and the members had changed since the cause of action had arisen,³⁸⁶ and, in an action for breach of a contract for the carriage of goods by sea, where the shippers in a general ship held different bills of lading and different defences might have been raised against them.³⁸⁷

Not to enforce a personal liability

- 12-068 Nor can representative proceedings under this rule be used in an action in which a personal liability, such as a judgment for money due or for damages, is sought to be enforced against the individual members of the association.³⁸⁸ In *Lord Churchill v Whetnall*,³⁸⁹ where three subscribers to a fund brought an action for misrepresentation in the circular inviting subscriptions to the fund on behalf of themselves and the other 200 subscribers, it was held that there could be no representative action to establish the right of numerous persons to recover damages, each in his own several right, where the only right claimed was the right to recover such damages: before a subscriber could recover he would have to show that he had been induced by the representation and this could only be done in separate proceedings.³⁹⁰ But where the association is possessed of funds in the hands of trustees, a plaintiff may sue proper persons as representatives of the association for a declaration of his right against the property belonging to the association, and, by adding the trustees as defendants, may obtain an order charging the funds which are in their hands and of which they are the legal owners.³⁹¹

Common interest

- 12-069 The *Prudential Assurance* case also required that there must be an “interest” shared by all members: “there must be a common ingredient in the cause of action of each member of the class”.³⁹² This to a large extent is nothing more than a rephrasing of the first requirement.

For benefit of class

- 12-070 The third, and related requirement, is that it is for the benefit of the class that the representative action be brought.³⁹³ This, among other things, will require that all evidence relating to the claim is adduced to avoid any unfairness to members of the class who will be bound by the outcome of the litigation.

Relation of unincorporated association to its members

- 12-071 Inasmuch as unincorporated associations are generally not legal persons, but mere collective names for all their members, a contract made by one member with some person or persons on behalf of the association is a contract by a man with himself and others; and as no person can be both covenantor and covenantee upon a contract, it must be construed as a contract between the member and the other members.³⁹⁴ If that contract is broken the injured member can sue and recover damages from those who have broken it,³⁹⁵ though they cannot sue the association except where statutory authorisation for such a course can be found. But they may be faced with the difficulty that the wrongful act was committed by an agent of the association on behalf of its members, including himself. In that case it is possible that they may be unable to recover from their fellow members, whose responsibility, in the circumstances, will be no greater than their own. But the other members, in order to rely on such a defence, must show that the agent was really acting on behalf of the injured member; and, at any rate where the injury is a wrongful expulsion in breach of the rules, that will not be so.³⁹⁶

Footnotes

①372

- London Association for Protection of Trade v Greenlands Ltd* [1916] 2 A.C. 15, 20, 38; *Steele v Gourley* (1886) 3 T.L.R. 118, 119; affirmed (1887) 3 T.L.R. 772. See, generally, Ford, Unincorporated Non-Profit Associations (1959); Stewart, Campbell and Baughen, The Law of Unincorporated Associations (2011); *Keeler* (1971) 34 M.L.R. 615.
- ①373 *Trade Union and Labour Relations (Consolidation) Act 1992* s.10; *British Association of Advisers and Lecturers in Physical Education v National Union of Teachers* [1986] I.R.L.R. 497, CA; *E.E.T.P.U. v Times Newspapers Ltd* [1980] Q.B. 585.
- ①374 *Knight and Searle v Dove* [1964] 2 Q.B. 631. See *Wedderburn* (1965) 28 M.L.R. 62.
- ①375 See *Walker v Sur* [1914] 2 K.B. 930; *Jarrott v Ackerley* (1915) 85 L.J. Ch. 135.
- ①376 The Regulatory Reform (Removal of 20 Member Limit in Partnership, etc.) Order 2002 (SI 2002/3203) removed the size limits on partnerships imposed by s.716 of the 1985 Act. No size limitation on partnerships has been imposed by the 2006 Act.
- ①377 *Bradley Egg Farm v Clifford* [1943] 2 All E.R. 378; *Davies v Barnes Webster & Sons Ltd* [2011] EWHC 2560 (Ch).
- ①378 See below, Ch.21.
- ①379 *Barker v Allanson* [1937] 1 K.B. 463; *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 A.C. 15, 39; *Janson v Property Insurance Co* (1913) 30 T.L.R. 49.
- ①380 *John v Rees* [1970] Ch. 345, 370.
- 381 [1981] Ch. 229; *CBS/SONY Hong Kong Ltd v Television Broadcasts Ltd* [1987] F.S.R. 262.
- 382 [1981] Ch. 229, 254.
- 383 *EMI Records Ltd v Riley* [1981] 1 W.L.R. 923.
- 384 *Irish Shipping Ltd v Commercial Union Assurance Co Plc* [1991] 2 Q.B. 206 (action in representative form against the lead underwriter of an insurance contract).
- 385 *Mercantile Marine Service Association v Toms* [1916] 2 K.B. 243; *E.E.T.P.U. v Times Newspapers Ltd* [1980] Q.B. 585.
- 386 *Barker v Allanson* [1937] 1 K.B. 463; *Roche v Sherrington* [1982] 2 All E.R. 426; cf. *Campbell v Thompson* [1953] 1 Q.B. 445. There is no reason why a representative action should not be instituted against those persons who were members when the cause of action arose, but in this event no order could be made affecting the assets of the association.
- 387 *Markt & Co v Knight S.S. Co* [1910] 2 K.B. 1021.
- 388 *Walker v Sur* [1914] 2 K.B. 930; *Hardie and Lane v Chiltern* [1928] 1 K.B. 663. See, however, *Morrison S.S. Co Ltd v Greystoke Castle (Cargo Owners)* [1947] A.C. 265. It may also be noted that the new Ord.15 r.12 is in wider terms than the old Ord.16 r.9, and it is perhaps arguable that the cases denying the use of this procedure in an action for damages

- should not now be followed. But see *Prudential Assurance* [1981] Ch. 229, 244; *Roche v Sherrington* [1982] 2 All E.R. 426.
- 389 (1918) 87 L.J. Ch. 524; *Wing v Burn* (1928) 44 T.L.R. 258; *Markt & Co v Knight S.S. Co* [1910] 2 K.B. 1021, 1035.
- 390 See *Prudential Assurance* [1981] Ch. 229, 251.
- 391 *Wood v McCarthy* [1893] 1 Q.B. 775; *Taff Vale Ry v Amalgamated Society of Railway Servants* [1901] A.C. 426, 443; *Linaker v Pilcher* (1901) 17 T.L.R. 256; *Ideal Films v Richards* [1927] 1 K.B. 374, 381.
- 392 *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch. 229, 255. Vinelott J cited *Markt & Co v Knight S.S. Co* [1910] 2 K.B. 1021 and *Lord Churchill v Whetnall* (1918) 87 L.J. Ch. 524 as two cases where this requirement was not satisfied.
- 393 *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch. 229, 255.
- 394 Law of Property Act 1925 s.82. See also *John v Matthews* [1970] 2 Q.B. 443; *Reel v Holder* [1981] 1 W.L.R. 1226.
- 395 See *Abbott v Sullivan* [1952] 1 K.B. 189, 193, 219; *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 341.
- 396 *Bonsor v Musicians' Union* [1956] A.C. 104, 148–149, 153.

(b) - Clubs

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(b) - Clubs ³⁹⁷

Kinds of clubs

- 12-072 The principal bodies with regard to which these questions arise are clubs and trade unions. Clubs are unincorporated associations and may be formed for any purpose for which associations may be lawfully constituted. There are two principal types of club: members' clubs and proprietary clubs.³⁹⁸

Footnotes

- 397 See Josling and Alexander, *The Law of Clubs*, 6th edn (1987), Ashton & Reid *On Clubs And Associations*, 2nd edn (2016).
- 398 The [Friendly Societies Act 1974 s.7\(1\)\(d\)](#) recognised the “working men’s clubs” but this definition is not repeated in the [Friendly Societies Act 1992](#). However, the social and philanthropic purposes that could be carried out by working men’s clubs as defined in [1974 Act](#) could be carried out by a body registered as a Friendly Society under the [1992 Act](#): see Sch.2 Pt D as amplified by [s.7\(2\)\(b\)](#) and [s.10 of the 1992 Act](#).

(i) - Members' Clubs

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(i) - Members' Clubs

Members' liability

12-073 The question whether contracts purporting to have been made on behalf of an association bind all the members or only some (e.g. the committee) is one which turns on the facts and the general law of agency.

³⁹⁹

U Thus, no member of a members' club is liable for the debts of the club except to the extent that they have expressly or impliedly authorised some official of the club to pledge their personal credit.

⁴⁰⁰

U Clubs are not partnerships

⁴⁰¹

U and the:

“... law, which was at one time uncertain, is now settled, that no member of a club is liable to a creditor except, so far as he has assented to the contract in respect of which such liability has arisen.”

⁴⁰²

U

Unless the rules expressly so provide,

403

U the committee of a club has no authority to pledge the credit of the members by borrowing on debentures,

404

U or by ordering work to be done for or goods to be supplied to the club

405

U; but a member may make themselves liable by ratifying the order.

406

U Members of the committee of a club are liable in respect of contracts made by them on behalf of the club,

407

U but not in respect of contracts made by officials of the club which they have not themselves authorised.

408

U Where one committee member has paid out money under a contract on which another committee member also could have been sued, the former has a right of contribution against the latter in respect of such payment,

409

U but they have no right of indemnity against the members of the club.

410

U

Relation of club to its members

- 12-074 The relations between the members of a club are governed by a contract between the members which may be express or implied and which is usually found in the rules of the club⁴¹¹; membership of a club may also confer proprietary rights on members which will be of significance where the club is being dissolved.⁴¹² In *Lee v Showmen's Guild of Great Britain*⁴¹³ Denning LJ said:

“It was once said by Sir George Jessel MR that the courts only intervened in these cases to protect rights of property: see *Rigby v Connol*⁴¹⁴; and other judges have often said the same thing: see, for instance, *Cookson v Harewood*.⁴¹⁵ But Fletcher Moulton LJ denied that there was any such limitation on the power of the courts: see *Osborne v Amalgamated Society of Railway Servants*⁴¹⁶; and it has now become clear that he was right: see the cornporters’ case, *Abbott v Sullivan*.⁴¹⁷ That case shows that the power of this court to intervene is founded on its jurisdiction to protect rights of contract.

⁴¹⁸

U If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is *ultra vires*. It will also grant an injunction to prevent his expulsion, if that is necessary to protect a proprietary right of his; or to protect him in his right to earn his livelihood: see *Amalgamated Society of Carpenters, etc. v Braithwaite*⁴¹⁹; but it will not grant an injunction to give a member the right to enter a social club, unless there are proprietary rights attached to it, because it is too personal to be specifically enforced: see *Baird v Wells*.⁴²⁰ That is, I think, the only relevance of rights of property in this connection. It goes to the form of remedy, not to the right.”

But the absence of property rights may, in certain circumstances, be some evidence that the members did not intend that their club membership should create legal relations between them.⁴²¹ As a result of the contractual nature of the rules the court will interfere to prevent them being altered,⁴²² unless they are altered in accordance with a procedure prescribed therein⁴²³ or with the consent of every member.

Expulsion of members

- 12-075 The court will not restrain the exercise by a club of a power, contained in its rules, to expel members unless it is shown that what has been done is, in fact, contrary to the rules or has been done in bad faith⁴²⁴ or, at least where some sort of inquiry is contemplated, where the rules of natural justice have been infringed.⁴²⁵ It has been said that to give one reason for expelling a member and to act upon another is evidence of bad faith.⁴²⁶ In a case of expulsion it was held that the issues were whether the rules of the club had been observed, whether the committee had given the member a fair hearing and whether it had acted in good faith.⁴²⁷ Every member of the committee must be summoned to the meeting or the proceedings may be invalidated.⁴²⁸ Notice must be given to the member of the charge made against them and they must have a proper opportunity of being heard in their own defence⁴²⁹; a rule purporting to deprive them of this right would probably be invalid as contrary to public policy.⁴³⁰ If a decision of a committee, based on the opinion of the

committee, is challenged, the court will only interfere if there was no evidence upon which to base the opinion, in which case it will declare the decision ultra vires. The club cannot oust the jurisdiction of the courts by making the committee the final arbiter on questions of law; and the construction of the rules is always a question of law.⁴³¹

Election

12-076 Generally speaking, a person who is refused membership of an unincorporated association has no ground for legal redress.

⁴³²

U It has, however, been suggested that if the grounds for such refusal are unlawful as being in restraint of trade, redress may be available.

⁴³³

U But refusal to admit a person to membership of a *social* club could hardly be in restraint of trade.

⁴³⁴

U A refusal to admit a person to membership of a club on the grounds of colour, race or ethnic or national origins may constitute a breach of the [Equality Act 2010](#).

⁴³⁵

U

Re-election

12-077 Where the rules of an unincorporated association provide for re-election at stated intervals by the committee, the committee (somewhat surprisingly in the light of the rules relating to expulsion) is not bound to give a member notice of any objection to their re-election,⁴³⁶ and provided that they act neither arbitrarily nor capriciously but in the honest exercise of their discretion, which in the absence of evidence to the contrary will be presumed, their decision cannot be questioned.⁴³⁷

Resignation

12-078

A member of a club may unilaterally resign their membership even in the absence of any provision in the club's rules, and such resignation may be inferred from long-continued non-payment of dues.⁴³⁸

Officers' mess

- 12-079 For goods supplied to an officers' mess neither an individual member of the mess⁴³⁹ nor the commanding officer⁴⁴⁰ can be made liable without evidence that they authorise their credit to be pledged and that they were the person to whom the seller gave credit.

Footnotes

397 See Josling and Alexander, *The Law of Clubs*, 6th edn (1987), Ashton & Reid On Clubs And Associations, 2nd edn (2016).

①399 See below, Ch.21: *Lascelles v Rathbun* (1919) 35 T.L.R. 347; *Shore v Ministry of Works* [1950] 2 All E.R. 228; *Prole v Allen* [1950] 1 All E.R. 476; cf. *Moshenan v Segar* [1917] 2 K.B. 325 dealing with proprietary clubs.

②400 *Steele v Gourley* (1887) 3 T.L.R. 772; *Wise v Perpetual Trustee Co* [1903] A.C. 139.

③401 *Wise v Perceptual Trustee Co* [1903] A.C. 139.

④402 *Re St James' Club* (1852) 2 De G.M. & G. 383, 387.

⑤403 *Cockerell v Aucompte* (1857) 2 C.B.(N.S.) 440.

⑥404 *Re St James' Club* (1852) 2 De G.M. & G. 383.

⑦405 *Fleming v Hector* (1836) 2 M. & W. 172; *Hawke v Cole* (1890) 62 L.T. 658; *Draper v Earl Manvers* (1892) 9 T.L.R. 73.

⑧406 *Delauney v Strickland* (1818) 2 Stark. 416.

⑨407 *Lee v Bissett* (1856) 4 W.R. 233; *Re London Marine Insurance Association* (1869) L.R. 8 Eq. 176; *Duke of Queensbury v Cullen* (1787) 1 Bro. P.C. 396.

⑩408 *Todd v Emly* (1841) 7 M. & W. 427; 8 M. & W. 505.

④09 *Earl of Mountcashell v Barber* (1853) 14 C.B. 53.

④10 *Wise v Perpetual Trustee Co* [1903] A.C. 139.

411 *Harington v Sendall* [1903] 1 Ch. 921; *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329. On the liability of a club or its officers to its members in tort: see *Robertson v Ridley* [1988] 2 All E.R. 474.

412 *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch. 51.

413 [1952] 2 Q.B. 329, 341–342.

414 (1880) 14 Ch. D. 482, 487.

415 [1932] 2 K.B. 478, 481, 488.

416 [1911] 1 Ch. 540, 562.

417 [1952] 1 K.B. 189.

④18 See, however, *Nagle v Feilden* [1966] 2 Q.B. 633, a difficult case, which suggests that in the case of associations which control entry to a trade or profession (such as the Jockey Club, the Stock Exchange or the Inns of Court) the court's power to grant redress is not confined to cases of contract. See also *R. v Jockey Club Ex p. RAM Racecourses Ltd* [1993] 2 All E.R. 225, 247–248. cf. *Goring v British Actors Equity Association* [1987] I.R.L.R. 122, 127–128.

419 [1922] 2 A.C. 440.

420 (1890) 44 Ch. D. 661, 675–676. But a right to vote may be protected by injunction: *Woodford v Smith* [1970] 1 W.L.R. 806.

421 See *Rigby v Connol* (1880) 14 Ch. D. 482, 487 (this was based on the discredited theory that court intervention in the affairs of an association was only justified to protect rights of property).

422 *Harington v Sendall* [1903] 1 Ch. 921.

423 *Thellusson v Viscount Valentia* [1907] 2 Ch. 1.

424 *Hopkinson v Marquis of Exeter* (1867) L.R. 5 Eq. 63; *Richardson-Gardner v Fremantle* (1870) 24 L.T. 81; *Dawkins v Antrobus* (1879) 17 Ch. D. 615; *Lambert v Addison* (1882) 46 L.T. 20. See *Lloyd* (1952) 15 M.L.R. 413.

425 *Russell v Duke of Norfolk* [1949] 1 All E.R. 109; *Lawlor v Union of Post Office Workers* [1965] Ch. 712. cf. *Gaiman v National Association of Mental Health* [1971] Ch. 317.

426 *D'Arcy v Adamson* (1913) 29 T.L.R. 367.

427 *Lamberton v Thorpe* (1929) 141 L.T. 638, following *Maclean v Workers' Union* [1929] 1 Ch. 602.

428 *Young v Ladies' Imperial Club Ltd* [1920] 2 K.B. 523.

429 *Labouchere v Earl Wharncliffe* (1879) 13 Ch. D. 346; *Fisher v Keane* (1878) 11 Ch. D. 353; *Gray v Allison* (1909) 25 T.L.R. 531.

430 *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 342; *Faramus v Film Artistes' Federation* [1964] A.C. 925, 941; *John v Rees* [1970] Ch. 345; *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch. 591.

431 *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; followed in *Barker v Jones* [1954] 1 W.L.R. 1005.

- ④432 *Faramus v Film Artistes' Association* [1964] A.C. 925, 947.
- ④433 *Nagle v Feilden* [1966] 2 Q.B. 633; *Reg v Disciplinary Committee of The Jockey Club* [1993] 1 W.L.R. 909, 933; *Bunbury v Lautro Ltd* [1996] C.L.C. 1273.
- ④434 [1996] C.L.C. 1273, 644, 653.
- ④435 The law on this is complicated and it is necessary to refer to specialist texts: see Hepple, Equality: the Legal Framework, 2nd edn (2014).
- 436 *Cassel v Inglis* [1916] 2 Ch. 211.
- 437 *Weinberger v Inglis* [1919] A.C. 606; cf. *Nagle v Fielden* [1966] 2 Q.B. 633.
- 438 *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch. 51.
- 439 *Hawke v Cole* (1890) 62 L.T. 658.
- 440 *Lascelles v Rathbun* (1919) 35 T.L.R. 347.

(ii) - Proprietary Clubs

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(ii) - Proprietary Clubs

Proprietary clubs

- 12-080 In a proprietary club the property and funds of the club belong to the proprietor who regulates the use of the property by the members in return for their subscriptions. The management is generally in the hands of a committee of members. Although it was formerly thought that the only remedy of a member of a proprietary club which had itself no property was against the proprietor,⁴⁴¹ it is now clear that this is not so.⁴⁴² But since members have no right of property in the case of a proprietary club, one who has been expelled by the committee cannot obtain relief by way of injunction, even though the proceedings were irregular, but will be left to obtain it in damages.⁴⁴³

Footnotes

397 See Josling and Alexander, *The Law of Clubs*, 6th edn (1987), Ashton & Reid On Clubs And Associations, 2nd edn (2016).

441 *Lyttleton v Blackburne* (1875) 45 L.J. Ch. 219; *Baird v Wells* (1890) 44 Ch. D. 661.

442 *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329.

- 443 *Baird v Wells (1890) 44 Ch. D. 661*. cf. *Millennium Productions Ltd v Winter Garden Theatre (London) Ltd [1946] W.N. 151*; reversed sub nom. *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd [1948] A.C. 173*.

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(c) - Trade Unions

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(c) - Trade Unions

Contractual capacity of trade unions

- 12-081 The law relating to the contractual capacity of trade unions has undergone some remarkable vicissitudes since the beginning of this century. Under the nineteenth-century statutes governing trade unions there was no express provision for incorporation, but the *Taff Vale* case,⁴⁴⁴ which held that registered unions could be sued in their own name, resulted in a limited contractual capacity being conferred upon them.⁴⁴⁵ Legislation on trade unions in the twentieth century has tended to confer some type of “corporate” status on trade unions.⁴⁴⁶ The present position is to be found in [s.10 of the Trade Union and Labour Relations \(Consolidation\) Act 1992](#) which provides that a trade union is not nor is it to be treated as a “body corporate”.⁴⁴⁷ However, despite this statutory denial of corporate status a trade union, so far as the capacity to enter into contracts is concerned, is treated as if it were a body corporate since it is expressly provided that a trade union is capable of entering into contracts⁴⁴⁸ and that it can sue or be sued in its own name.⁴⁴⁹ Any judgment or order made against a trade union is enforceable against any property held in trust⁴⁵⁰ for it is as though it were a body corporate.⁴⁵¹ The agreements of a trade union are not void or voidable because they may be in restraint of trade.⁴⁵² Thus for most practical purposes in connection with contracts with third parties the position of a trade union has been equated with that of a body corporate.

Contracts between trade unions and their members

12-082

The relationship between a member of a trade union and the union itself is contractual, and the terms of the contract are to be found in the rules of the union.⁴⁵³ A member of a trade union has in general the right to take proceedings to enforce compliance with the union's own rules in relation to matters such as election of officers and other internal regulations.⁴⁵⁴ In general the court has no power to declare provisions of a trade union's rules to be void as unreasonable any more than it has with the provisions of any other contract.⁴⁵⁵ However, in *Edwards v SOGAT*⁴⁵⁶ the Court of Appeal, prior to the 1974 Act, struck down a union rule permitting capricious and arbitrary expulsion of a member, apparently on the ground that such a rule is contrary to public policy in so far as it permits such expulsion.⁴⁵⁷ Section 46 of the Trade Union and Labour Relations (Consolidation) Act 1992 imposes a statutory duty on a trade union to ensure that its officers⁴⁵⁸ are elected by secret ballot.⁴⁵⁹ Re-elections for such offices must take place at intervals of not more than five years.⁴⁶⁰

Expulsion and exclusion from a trade union

- 12-083 Prior to the Industrial Relations Act 1971, the courts had protected members of a union against unlawful expulsion where it could be shown that the union had violated the procedure laid down in its own rules, and was thus in breach of its contract with its member. It was originally thought that the only remedy was by injunction but it was eventually held by the House of Lords that damages could also be awarded against the union.⁴⁶¹ It was also well established that a union, like any other domestic tribunal, must in general observe the rules of natural justice,⁴⁶² and it also seemed that the rules of the union could not validly exclude the rules of natural justice.⁴⁶³ Where the rules of natural justice applied, a trade union, like the committee of a club,⁴⁶⁴ was required to give a man notice of the charge against them and a reasonable opportunity of meeting it.⁴⁶⁵ A trade union could not in any case oust the jurisdiction of the court and could not be made the final arbiter on questions of law⁴⁶⁶; and if it acted without evidence, the courts would interfere.⁴⁶⁷ But the courts did not claim to act as courts of appeal from domestic tribunals and would not disturb a decision which was on a matter of opinion only.⁴⁶⁸

Refusal of membership

- 12-084 No attempt to protect a worker from arbitrary or unreasonable refusal of membership could (it is thought) have succeeded at common law since no contractual relation could, ex hypothesi, be established between a would-be member and the union.⁴⁶⁹

Statutory protection of member's rights

- 12-085 Of greater importance than the common law in protecting a trade union member's rights are the statutory protections accorded to trade union members to prevent them from being excluded, expelled or disciplined on grounds that the statute treats as being unjustifiable.⁴⁷⁰

Footnotes

444 [1901] A.C. 426.

445 See the 23rd edition of this work, paras 520–524.

446 See, for example, s.2 of the Trade Union and Labour Relations Act 1974 (now repealed).

447 s.10(1) and (2).

448 s.10(1)(a).

449 s.10(1)(b).

450 s.12(1) provides that all the property of a trade union must be vested in trustees to be held on trust for it.

451 s.12(2).

452 s.11.

453 *Bonsor v Musicians' Union* [1956] A.C. 104.

454 See *Taylor v N.U.M. (Derbyshire Area)* [1985] B.C.L.C. 237 (on right of members to sue with respect to ultra vires disbursements of union assets).

455 *Faramus v Film Artistes' Federation* [1964] A.C. 925, 943.

456 [1971] Ch. 354.

457 See generally, Rideout, Principles of Labour Law, 5th edn (1989), pp.395–432.

458 These are defined in s.4(2).

459 The voting procedures are set out in ss.47–52.

460 s.46(1)(b).

461 *Bonsor v Musicians' Union* [1956] A.C. 104. On the availability of an interlocutory injunction, see *Porter v N.U.J.* [1980] 1 I.R.L.R. 404.

462 *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; Kidner, Trade Union Law, 2nd edn (1983), Ch.3.

463 *Russell v Duke of Norfolk* [1949] 1 All E.R. 109; *Lawler v Union of Post Office Workers* [1965] Ch. 712; *Taylor v National Union of Seamen* [1967] 1 W.L.R. 532; *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; *Faramus v Film Artistes' Federation* [1964] A.C. 925, see Harvey on Industrial Relations and Employment Law, Division M, 14.

464 See above, para.12-075.

465 *Annamunthodo v Oilfield Workers' Trade Union* [1961] A.C. 945; *Breen v Amalgamated Engineering Union* [1971] 2 Q.B. 175.

- 466 *Luby v Warwickshire Miners' Association* [1912] 2 Ch. 371; *Burn v National Amalgamated Labourers' Union* [1920] 2 Ch. 364; *Leigh v National Union of Railwaymen* [1970] Ch. 326; and see *Australian Workers' Union v Brown* (1948) 77 C.L.R. 601; *White v Kuzych* [1951] A.C. 585.
- 467 *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 340.
- 468 [1952] 2 Q.B. 329.
- 469 In *Nagle v Feilden* [1966] 2 Q.B. 633, it was suggested that in some circumstances the court's power to intervene might extend beyond cases of contract, but in so far as this decision was based on the invalidity of an unreasonable restraint of trade it could have no application anyhow to a trade union by reason of s.3 of the Trade Union Act 1871, now replaced by s.11 of the Trade Union and Labour Relations (Consolidation) Act 1992. Indeed the wording of s.11 is more clearly calculated to exclude the argument suggested in *Nagle v Feilden*. See *Greig v Insole* [1978] 1 W.L.R. 302, 363; *Goring v Bristol Actors' Equity Association* [1987] I.R.L.R. 122, 127–128.
- 470 The major statutory protections are to be found in Ch.V of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended by ss.15 and 16 of the Trade Union Reform and Employment Rights Act 1993; ss.174–177 of the 1992 Act were replaced by s.14 of the 1993 Act.

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Chapter 13 - The Crown and Public Authorities

Section 1. - Introduction

P. P. Mitchell

The influence of public law concepts

- 13-001 The position of government contracts in English law is somewhat ambiguous. In contrast to many Continental jurisdictions, government contracts in English law do not have their own special category as a part of public law.¹ But, although government contracts are dealt with under the general principles of private law, the private law principles are frequently supplemented, modified or disapplied in response to the peculiar circumstances of governmental transactions. Often these alterations to the private law principles are either inspired by, or involve the direct borrowing, of public and constitutional law concepts. The result is a body of law which, although part of private law, has been strongly influenced by ideas more familiar to public lawyers.²

The European Union

- 13-002 An express power to enter contracts is conferred on the European Union by art.335 of the Consolidated Version of the Treaty on the Functioning of the European Union, which provides³:

“In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable or immovable property and be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented

by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.”

The broad terms in which the Union is thus granted capacity effectively excludes the application to the European Union of doctrines limiting the contractual capacity of English public authorities. The Treaty also provides that “The contractual liability of the Union shall be governed by the law applicable to the contract in question”.⁴

- 13-003 The provisions of the Treaty were made directly applicable in English law by the [European Communities Act 1972 s.2\(1\)](#). Under the legislative provisions governing Brexit the [1972 Act](#) is repealed.⁵ However, the [European Union \(Withdrawal\) Act 2018 s.4](#)⁶ provides that “rights” and “powers” created by [European Communities Act 1972 s.2\(1\)](#) shall “continue on and after IP completion day to be recognised and available in domestic law”. On the face of it, this would include the powers conferred on the European Commission by art.335. It seems, however, to be unlikely that this result is intended, and the point seems to be one on which it would be appropriate to make regulations to remedy a “deficiency in retained EU law” under [European Union \(Withdrawal\) Act s.8\(2\)](#).

Alternative remedies

- 13-004 Although contracts made by government do not engage a special contractual regime, the involvement of government gives the potential for other bases of liability not normally open to private contracting parties. The three most obvious possibilities are judicial review, breach of human rights⁷ and breach of the procurement regulations.⁸ The possibilities of contractual issues being subjected to judicial review and the impact of the [Human Rights Act 1998](#) were discussed in [Ch.3](#).⁹ A detailed treatment of the procurement regulations is beyond the scope of this chapter but Pt 6¹⁰ of the chapter contains an outline of the requirements and a discussion of the effect of a breach of the public procurement regulations on any contract that may have been made. It should be noted that each of these potential alternatives is independent of contractual liability, and does not require a contract to have been concluded. Thus, breach of human rights focuses on whether the claimant’s protected right has been invaded unjustifiably. The public procurement regulations set out a highly detailed, prescriptive series of obligations relating to the entire contracting process, breach of which may incur liability to any potential contracting party. Judicial review focuses on the improper exercise of power by a public authority; where the authority has failed to make good a legitimate expectation it has created, the factual basis for judicial review may be very similar to the factual basis for a claim for breach of contract.¹¹ But the remedies available for a successful application for judicial review are very different to those available in a successful action for breach

of contract. Furthermore, the availability of judicial review in relation to commercial contracts is controversial.¹²

Footnotes

- 1 Street, Governmental Liability (1953), p.81; Kahn-Freund and Wedderburn, foreword to Turpin, Government Contracts (1972), p.9, attributing the lack of a separate category to the “quirks of our legal history”; *Auby [2007] P.L. 40*. On public law see A Davies, The Public Law of Government Contracts (2008).
- 2 J. Mitchell, The Contracts of Public Authorities (1954), particularly Ch.1. For an illustration of the limits of the public law influence see *Krebs v NHS Commissioning Board [2014] EWCA Civ 1540* at [31].
- 3 [2012] O.J. C326/01.
- 4 [2012] O.J. C326/01, art.340. On identifying the applicable law, see below Ch.33.
- 5 See above, paras 1-016 et seq.
- 6 As amended by European Union (Withdrawal Agreement) Act 2020 s.25(3)(a).
- 7 Human Rights Act 1998.
- 8 See below, para.13-057.
- 9 See above, paras 3-089 et seq.
- 10 See below, paras 13-057—13-060.
- 11 e.g. *R. v North and East Devon Health Authority Ex p. Coughlan [2001] Q.B. 213* (authority promising tetraplegic patient a home for life if she would move from existing hospital accommodation).
- 12 *Hampshire CC v Supportways Community Services Ltd [2006] EWCA Civ 1035*; *Arrowsmith (1990) 106 L.Q.R. 277*; *Freedland [1994] P.L. 86, 95–102*; *Bailey [2007] P.L. 444*.

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Chapter 13 - The Crown and Public Authorities

Section 2. - Crown Contracts ¹³

Capacity

- 13-005 The Crown has an inherent, common law capacity to make contracts.¹⁴ No statutory authority is needed. Whilst this contracting power can be seen as part of the prerogatives of the Crown—largely because it requires no Parliamentary approval¹⁵—it is probably more accurate to see it as part of the Crown's capacity to do whatever is not prohibited by law.¹⁶ It follows that statutory provisions conferring contracting powers on Ministers are not strictly necessary; such statutory sections are best explained in terms of the constitutional convention that a programme of expenditure should have prior statutory authorisation.¹⁷

Footnotes

13 Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.

14 Turpin, *Government Contracts* (1972), p.19; *Daintith* (1979) 32 C.L.P. 41, 42; *Freedland* [1994] P.L. 86, 91–92; *Harris* (1992) 108 L.Q.R. 626, 627, (2007) 123 L.Q.R. 225; *Davies* (2006) 122 L.Q.R. 98, 102.

15 *Daintith* (1979) 32 C.L.P. 41, 42; *Freedland* [1994] P.L. 86, 91–92.

16 *Harris* (1992) 108 L.Q.R. 626, (2007) 123 L.Q.R. 225, 226; see also Freedland's later view that, at least in relation to the Private Finance Initiative, government does not see itself as exercising a prerogative power when making contracts: [1998] P.L. 288, 292–294.

17 Turpin, *Government Contracts* (1972), p.19; *Daintith* (1979) 32 C.L.P. 41, 44–45.

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(a) - Parliamentary Control Over Crown Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 4 - Capacity of Parties

Chapter 13 - The Crown and Public Authorities

Section 2. - Crown Contracts ¹³

(a) - Parliamentary Control Over Crown Contracts

Express limitations

- 13-006 Where Parliament has limited the Crown's right to contract, any purported contract made outside those limits is void.¹⁸ For instance, a statute might require specific legislative approval for contracts over a certain duration,¹⁹ or prescribe a method for recruitment to the Civil Service, or for the disposal of government property.²⁰ Failure to obtain approval, or to follow the prescribed method will be fatal to the validity of the contract.

Implied limitation

- 13-007 Whilst the Crown has an inherent capacity to make contracts, it has been settled, since the Revolutionary Settlement of 1688, that the Crown does not have control over public money.²¹ Expenditure is controlled by Parliament; and Parliament exercises that control through the Appropriation Acts, which set out the amounts and purposes for which expenditure is authorised.²² This fundamental constitutional principle may affect a contracting party's ability to recover payment under a contract with the Crown: if no appropriation covers the payment, no money can be paid over to the claimant. Thus, in *R. v Churchward*,²³ where the relevant parliamentary appropriation expressly excluded any payment being made to the claimant,²⁴ no payment was recoverable. On the facts of the case payment had only been promised "out of moneys to be

provided by parliament”, but Shee J went on to say that, if this condition had not been expressed, such a condition:

“... must on account of the notorious inability of the crown to contract unconditionally for such money payments in consideration of such services, have been implied in favour of the crown.”²⁵

Two of the other three judges did not deal with the point, and Cockburn CJ indicated that he would not have implied such a condition precedent to payment. *Churchward*’s case is, therefore, in itself, ambiguous in relation to the implied condition advanced by Shee J.²⁶ But, in a series of later judgments Viscount Haldane emphasised the importance of legislative control over expenditure,²⁷ culminating in his speech in the House of Lords in *Att-Gen v Great Southern and Western Railway Co of Ireland*.²⁸ There, in a speech with which Lords Dunedin and Carson agreed, he emphatically endorsed the analysis of Shee J in *Churchward*’s case, saying that:

“However clear it may be that before the Revolutionary Settlement the Crown could be taken to contract personally, it is equally clear that since that Settlement its ordinary contracts only mean that it will pay out of funds which Parliament may or may not supply.”²⁹

It is, therefore, clear, that whilst the absence of a Parliamentary appropriation will not make a contract void, such an appropriation is a condition precedent of liability to pay.³⁰ The appropriation need not refer specifically to the particular contract—general terms suffice.³¹

Footnotes

- 13 Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.
- 18 *Secretary of State for Justice v Betts UKEAT/284/16, [2017] I.C.R. 1130*; *New South Wales v Bardolph* (1934) 52 C.L.R. 455, 496, per Rich J.
- 19 *Commercial Cable Co v Government of Newfoundland* [1916] 2 A.C. 610.
- 20 *Secretary of State for Justice v Betts UKEAT/284/16, [2017] I.C.R. 1130*; *Cugden Rutile (No.2) Pty Ltd v Chalk* [1975] A.C. 520.
- 21 Bill of Rights 1688 art.4.
- 22 e.g. *Supply and Appropriation (Main Estimates) Act 2015*.
- 23 (1865) L.R. 1 Q.B. 173.
- 24 *R. v Churchward* (1865) L.R. 1 Q.B. 173, 183.
- 25 *R. v Churchward* (1865) L.R. 1 Q.B. 173, 209. The contractual provision seems not to have been unusual—cf. *Taylor v Brewer* (1813) 1 M. & S. 290, 291, where Lord Ellenborough CJ

drew attention to the practice of “several departments of Government” that promised to pay only what should be deemed right.

- 26 *Sawer* (1946) 62 *L.Q.R.* 23, 24; *Street* (1948) 11 *M.L.R.* 129, 131; Williams, *Crown Proceedings* (1948), p.10; *Street* (1949–1950) 8 *University of Toronto Law Journal* 32, 33–34; *Street*, *Governmental Liability* (1953), pp.85–87.
- 27 *Commercial Cable Co v Government of Newfoundland* [1916] 2 *A.C.* 610; *Mackay v Att-Gen for British Columbia* [1922] 1 *A.C.* 457; *Auckland Harbour Board v The King* [1924] *A.C.* 318.
- 28 [1925] *A.C.* 754.
- 29 *Att-Gen v Great Southern and Western Railway Co of Ireland* [1925] *A.C.* 754, 773.
- 30 See also *New South Wales v Bardolph* (1934) 52 *C.L.R.* 455. The judgment of Dixon J contains a particularly helpful exposition of Viscount Haldane’s views (see especially at 514). McTiernan J described Shee J in *Churchward* as stating: “the effect on the contract of [the Crown’s] incapacity ... the exigency of binding constitutional practice fashions the promise of the Crown into a promise to pay out of moneys lawfully available under parliamentary appropriation”.
- 31 *New South Wales v Bardolph* (1934) 52 *C.L.R.* 455, 467–474, per Evatt J; *Street*, *Governmental Liability* (1953), p.90, commenting that the opposite rule would be “disastrous”; *Harris* (2007) 123 *L.Q.R.* 225, 229.

(b) - Fettering of Discretion

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Section 2. - Crown Contracts ¹³

(b) - Fettering of Discretion

Construction of Crown's obligations so as to avoid fettering

- 13-008 Virtually every contractual promise restricts a promisor's future freedom of action. Under ordinary circumstances there is no policy objection to this, but where the promisor is the Crown, such restrictions have the potential to inhibit the Crown in its performance of duties or exercise of powers in the public interest. In order to avert this undesirable consequence, the courts avoid interpreting the Crown's contractual promises in a way that would constrain the performance of its functions.³² Thus, in *Commissioners of Crown Lands v Page*³³ a tenant of Crown premises sought to have a covenant for quiet enjoyment implied into the lease; this covenant was breached, the tenant alleged, when the premises were requisitioned by the Minister of Works, acting under statutory powers. The Court of Appeal unanimously held that any implied term would not extend "to prevent the future exercise by the Crown of powers and duties imposed upon it in its executive capacity by statute".³⁴ Devlin LJ held that, even if the covenant for quiet enjoyment had been express, he would have read it as, by necessary implication, excluding "those measures affecting the nation as a whole which the Crown takes for the public good".³⁵
- 13-009 It does not follow from the reasoning in *Page*'s case that the Crown is free to disregard its own contractual obligations with impunity. On the contrary, it is crucial that the situation involves an interpretation of contractual obligations that would inhibit the Crown from exercising its statutory powers in pursuance of the public interest. The Crown, like other parties, is subject to the general rule that a contracting party should neither disable himself from performance, nor prevent the other party from performing the contractual obligations³⁶; but where performance has been disrupted

by the passage of legislation, or the performance of some executive function, the disruption is not regarded as being a case of self-disablement or prevention by the Crown. Instead, the contract is seen as frustrated³⁷; the fact that the frustrating event emanated from the Crown is regarded as irrelevant.³⁸

Express terms fettering the Crown's discretion: the *Amphitrite* rule

- 13-010 Where an express term, properly construed, commits the Crown to exercising its executive functions in a particular way, the position is more controversial. In *R. v Rederiaktiebolaget Amphitrite*³⁹ the claimant steamship company had sent its vessel, during the First World War, to a British port. It had done so only after being given a guarantee by the Crown that the vessel would not be detained. The vessel was detained by the Crown, and the claimants sought damages for breach of contract. Rowlatt J held that no damages were recoverable. He held that whilst the Crown was bound by commercial contracts it made, the facts of the case did not show such a contract. Rather, it was “an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future”.⁴⁰ This arrangement was not contractually enforceable because:

“... it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.”⁴¹

Doubts concerning the *Amphitrite* rule

- 13-010A Although the decision in *The Amphitrite* was applied by the Privy Council in *Buttigieg v Cross*,⁴² it has subsequently been treated with caution, and its scope remains uncertain. Thus, in *Commissioners of Crown Lands v Page*⁴³ the Court of Appeal refused the opportunity to endorse the principle,⁴⁴ and in *Robertson v Minister of Pensions*⁴⁵ Denning J suggested that the broad principle from the *Amphitrite* case was a dictum, the ratio of the decision being that the statement of the Crown was not binding, since there was no intention to create legal relations.⁴⁶ It is true that Rowlatt J said that the Crown's guarantee was “merely an expression of intention”,⁴⁷ but he continued, in the next sentence, to explain that his “main reason” for reaching that conclusion was that the government could not validly fetter its future executive action. It is therefore submitted that Denning J's reading of the *Amphitrite* case is unconvincing.⁴⁸ Denning J also suggested that

the defence of executive necessity was based on an implied term. But this is directly contrary to the facts of the *Amphitrite* case, where the defence succeeded despite an express undertaking to exercise powers in a particular way: no term relating to executive necessity could have been implied, since it would have contradicted the express terms. Commentators have drawn attention to the lack of authority cited in *The Amphitrite*, and argued that the case should not be followed⁴⁹; and the Court of Appeal of New South Wales, describing the Amphitrite rule as “Perhaps the most extreme and unqualified articulation of the Fettering Doctrine”, has favoured a different approach, in which specific performance and injunctions are denied, but damages are generally recoverable against the executive for breach of contract.⁵⁰

Basis of the *Amphitrite* rule

13-010B Whilst the language used in the *Amphitrite* case may perhaps have been too broad,⁵¹ its main support, and the best guide to interpreting its scope, is the analogous rule that statutory bodies have no power to fetter their own discretion.⁵² Of course, the Crown’s source of power is non-statutory,⁵³ but such reasoning by analogy was expressly endorsed by Devlin LJ in *Commissioners of Crown Lands v Page*,⁵⁴ and is also supported by the Privy Council’s decision in *Silly Creek Estate and Marina Co Ltd v Attorney General of Turks and Caicos Islands*.⁵⁵ There a dispute over a lease of Crown land had been resolved by a settlement agreement, the terms of which, it was contended, granted permission for development of the land by the lessee. The Privy Council held that the lessee’s argument suffered from “the basic and fatal misconception” of confusing the Governor’s statutory functions in land use planning with his “quite separate role in negotiating and agreeing the terms of a commercial lease on behalf of the Crown as landowner”.⁵⁶ If, however, the Governor had purported to grant development permission in the settlement agreement, that grant would have been unlawful as a fettering of his discretion. In support of this point the Privy Council cited leading cases on the fettering of a local authority’s discretion, in contrast with the decision at first instance, where Ramsay CJ had relied on *The Amphitrite*.⁵⁷ The principles are presented as being interchangeable. The advantage of this approach is that it allows the important policy justifications which have been worked out in relation to the non-fettering rule in its application to statutory bodies to inform the application of the *Amphitrite* principle.⁵⁸ In particular, it should be emphasised that neither the decision in *The Amphitrite*, nor the interpretation given to that decision in later cases, entitles the Crown to disregard its contractual obligations with impunity. On the contrary, *The Amphitrite* expressly affirmed that the Crown would be liable under commercial contracts in the ordinary way. The exception arose where “the welfare of the State” required that executive action “be determined by the needs of the community”.⁵⁹ In *The Amphitrite* itself this test was satisfied by wartime conditions.⁶⁰ In *Buttigieg v Cross* it was admitted that the requirements were met where the military authority in Malta had found it necessary to rule a club to be out of bounds to service personnel, despite having initiated the creation of that club, and having indicated that the club would remain open during the Second World War. Again, the

wartime context—and particularly the importance of maintaining military discipline in wartime—may go a long way towards explaining the decision, but it should be noted that neither court formulated the relevant principle in terms of war. Rather, the public interest in the defence of the realm provides a powerful example of the kind of overriding justification that justifies a court in releasing the Crown from what would otherwise have been a binding obligation.

Footnotes

- 13 Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.
- 32 *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274; *Molton Builders Ltd v City of Westminster London BC* (1975) 30 P. & C.R. 182 at 188.
- 33 [1960] 2 Q.B. 274.
- 34 *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274, 287.
- 35 *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274, 292. See also *Shebelle Enterprises Ltd v Hampstead Garden Suburb Trust Ltd* [2013] EWHC 948 (Ch), [2014] EWCA Civ 305, [2014] 2 P. & C.R. 6, where the approach of Devlin LJ in *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274 was applied to the interpretation of a covenant for quiet enjoyment which was alleged to be binding on the Trust.
- 36 *Board of Trade v Temperley S.S. Co Ltd* (1926) 26 Ll.L. Rep. 76; (1927) 27 Ll.L. Rep. 230.
- 37 *Reilly v The King* [1934] A.C. 176.
- 38 *William Cory & Son Ltd v London Corp* [1951] 2 K.B. 476, 487, per Harman LJ.
- 39 [1921] 3 K.B. 500.
- 40 *R. v Rederiaktiebolaget Amphitrite* [1921] 3 K.B. 500, 503.
- 41 *R. v Rederiaktiebolaget Amphitrite* [1921] 3 K.B. 500, 503.
- 42 Privy Council, 10 October 1946 (available at <http://www.bailii.org>).
- 43 [1960] 2 Q.B. 274.
- 44 See especially *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274, 293, per Devlin LJ (no need to consider whether the Crown could fetter its future executive action by express words, since it was “most unlikely” ever to attempt to do so).
- 45 [1949] 1 K.B. 227.
- 46 *Robertson v Minister of Pensions* [1949] 1 K.B. 227, 231.
- 47 *Amphitrite case* [1921] 3 K.B. 500, 503.
- 48 J. Mitchell, *The Contracts of Public Authorities* (1954), pp.30–31; Turpin, *Government Contracts* (1972), pp.21–22.
- 49 *Holdsworth* (1929) 45 L.Q.R. 162, 166; *Street* (1948) 11 M.L.R. 129, 131; Williams, *Crown Proceedings* (1948), pp.9–10.
- 50 *Searle v Commonwealth of Australia* [2019] NSWCA 127 at [101].

- 51 *A v Hayden (No.2) (1984) 59 A.L.J.R. 6, 8*: “The suggestion made by Rowlatt J in [The Amphitrite] that the government cannot by contract fetter its executive action in matters which concern the welfare of the State is too wide” (per Gibbs CJ).
- 52 J. Mitchell, *The Contracts of Public Authorities* (1954), p.57–65; Street, *Governmental Liability* (1953), pp.98–99; Turpin, *Government Contracts* (1972), p.22. See also *Re Solinas [2009] NIQB 43* at [26]–[27], where, in the context of an application for judicial review, the decision in the *Amphitrite case* was seen as exemplifying a general principle against fettering of powers, and was applied to actions by the Minister for Social Development (Northern Ireland).
- 53 See above, para.13-005.
- 54 [1960] 2 Q.B. 274, 292. See also *Harris (1992) 108 L.Q.R. 626, 644* (commenting on the courts’ playing down the importance of the source of authority in judicial review cases).
- 55 [2021] UKPC 9.
- 56 [2021] UKPC 9 at [46].
- 57 [2021] UKPC 9 at [57], citing *R. (Kilby) v Basildon DC [2007] EWCA Civ 479, [2007] H.L.R. 39* and *R. v Hammersmith and Fulham LBC, Ex p. Beddowes [1987] Q.B. 1050*. Ramsay CJ’s reliance on *The Amphitrite* is quoted at [2021] UKPC 9, [40].
- 58 *Davies (2006) 122 L.Q.R. 98*, especially 104–105. See also J. Mitchell, *The Contracts of Public Authorities* (1954), p.26 (suggesting that the same general principles underlie the rules applying to the Crown and to statutory bodies). The non-fettering rule as it applies to statutory bodies is explained below at 13-032—13-036.
- 59 *Amphitrite case [1921] 3 K.B. 500, 503*.
- 60 J. Mitchell, *The Contracts of Public Authorities* (1954), pp. 52–54.

(c) - Agency

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(c) - Agency

Agency in general

- 13-011 Contracts made by Crown servants in the course of their service, or by Crown agents within the scope of their authority bind the Crown. The right to contract on behalf of the Crown must be established by reference to statute or otherwise; merely being a Crown servant is not enough.⁶¹ Thus, in *Nixon v Att-Gen*⁶² the claimants proved that they had entered employment in the Civil Service on the basis of a minute issued by the Lords Commissioners of the Treasury and published in the Civil Service Year Book, which stated that civil servants would be “entitled” to superannuation payments calculated on a particular basis if certain conditions were met. The claimants satisfied those conditions, but, following their retirement, the Treasury Commissioners applied a less generous method of calculation to their superannuation payments. The House of Lords held that the minute did not bind the Crown, since the only authority conferred on the Treasury Commissioners was a discretion; they had no authority to make contracts promising that the discretion would be exercised in a particular way.⁶³

Whether servant or agent of the Crown

- 13-012 Since Crown contracts are subject to certain special rules, both substantive⁶⁴ and procedural,⁶⁵ it may be crucial to determine whether a contracting party is a servant or agent of the Crown. The starting point is the list of “authorised departments” published pursuant to the *Crown Proceedings*

Act 1947 s.17.⁶⁶ These departments may institute “civil proceedings by the Crown”,⁶⁷ and may be sued in “civil proceedings against the Crown”⁶⁸; it can therefore be assumed that they are Crown servants or agents.⁶⁹ However, the list is not exhaustive. For contracting parties not on the list a common law test must be applied which balances a range of factors. The main factor to consider is the degree of control which the Crown is entitled to exercise over the party who is alleged to have made the contract on its behalf.⁷⁰ If that party has wide powers, which can be exercised independently of the Crown, that will strongly suggest that the contracting party is not a Crown servant.⁷¹ Conversely, if the Crown has the right to exercise a close degree of control over the party’s activities, that will suggest that the contracting party is a Crown servant or agent (a right to control the appointment of board members or directors is insufficient⁷²). It may even be possible, where a contracting party exercises several functions, to distinguish between functions in respect of which the Crown is entitled to exercise control, and those in respect of which it is not. The contracting party would be a Crown servant for contracts relating to the former functions, but not for contracts relating to the latter.⁷³ It should emphasised that, in ascertaining the degree of control, the statutory provisions setting out the contracting party’s rights and duties are “highly important”⁷⁴; whether, as a matter of fact, the Crown exerted its right of control is irrelevant.⁷⁵ It also seems that the statutory definition of rights and duties prevails over other statutory indications. Thus, in *Hills (Patents) Ltd v University College Hospital Board of Governors*⁷⁶ the question was whether the defendants occupied hospital premises as agents for the Minister of Health. Despite the statement in the **National Health Service Act 1946 s.13** that hospital boards managed hospitals “on behalf of” the Minister, it was held that the Board’s statutory duties to manage, control and maintain the hospital, and appoint its staff, meant that the board occupied as a principal, not as the Minister’s agent. A second factor to consider in determining whether a contracting party is a servant or agent of the Crown is whether the contracting party is performing a function linked to an existing Crown prerogative. Thus, for instance, in *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property*⁷⁷ both Lord Tucker and Lord Asquith were influenced in their decision that the Custodian of Hungarian Property was a Crown servant by the fact that his functions were linked to the Crown prerogative to wage war.⁷⁸ Similarly, in *Gilbert v The Corp of Trinity House*⁷⁹ it was held that the defendants’ remoteness from the scope of the Crown’s prerogative powers indicated that they were not Crown servants. It is submitted that the relationship between the contracting party’s functions and the Crown’s prerogative powers deserves only little weight. As has been powerfully pointed out, to emphasise the importance of the prerogative powers is, in effect, to confine the sphere of potential Crown servants to activities which, historically, were seen as the Crown’s responsibility: it freezes the law in a condition which will inevitably fail to reflect contemporary understandings of the Crown’s role.⁸⁰ Other relevant factors suggesting that a party is not a Crown servant are financial independence,⁸¹ liability of property to be levied,⁸² and incorporation.⁸³

Contracts not expressly authorised

- 13-013 Although Lord Denning put forward the view that all contracts should bind the Crown where government officers or departments took it upon themselves to assume authority,⁸⁴ that view was rejected by dicta in the House of Lords,⁸⁵ and criticised persuasively in the literature.⁸⁶ The better view, it is submitted, is that the general principles of the law of agency apply to the Crown: hence, where there is no actual express authority for entering the contract, the analysis should proceed to consider whether there is actual implied authority (such as usual authority), or, failing that, ostensible (or apparent) authority.⁸⁷

Actual implied authority and usual authority

- 13-014 Implied authority, being “inferred from the conduct of the parties and the circumstances of the case”,⁸⁸ will sometimes be a highly fact-sensitive question. The doctrine of usual authority, however, recognises that there are certain stereotypical situations in which an agency relationship with a conventional scope of authority is taken to have arisen without the parties expressly saying so. This “usual authority” is typically found where an agent occupies a position which involves the conduct of a particular trade or business, or where an agent’s occupation involves certain ways of acting (for instance, as a solicitor, or auctioneer). In such situations, the agent has authority to do whatever is usually done in such circumstances.⁸⁹ The doctrine has been recognised as applicable to finance ministers, in respect of whom an assessment must be made of their role in their particular State, and the particular transaction entered.⁹⁰ When applying the doctrine of usual authority to Crown contracts, it has long been recognised that any statutory restrictions on the scope of authority are crucial. As the Privy Council observed in *Att-Gen for Ceylon v Silva*, holding the Crown bound by a contract entered in excess of a statutorily defined authority would, in effect, be:

“... to hold that public officers had dispensing powers because they then could by unauthorized acts nullify or extend the provisions of the [statute].”⁹¹

The Court of Appeal’s analysis in *Law Debenture Trust Corp Plc v Ukraine*

⁹²

U provides a valuable explanation of why, as a matter of orthodox agency principles, such statutory (and other) restrictions on authority are decisive, and also illustrates how questions of usual authority should be analysed in Crown contracts. Ukraine, acting through its Minister of Finance (who was acting on the instructions of the Cabinet of Ministers of Ukraine) had issued

Eurobond notes, which had been subscribed by the Russian Ministry of Finance. The date for payment passed, but Ukraine denied liability arguing, *inter alia*, that the Minister had lacked authority to issue the notes. The Court of Appeal held that “usual authority” was best seen as a species of implied actual authority,⁹³ and turned on what could be inferred from the conduct of the principal and agent.⁹⁴ It followed that, where the scope of authority had been expressly limited, as it had been on the facts of the case by legislation, it was impossible to invoke some broader “usual” authority for the transaction. In such circumstances, the only viable argument for the transaction being authorised was that it had been made under ostensible authority.

Ostensible authority

- 13-015 In order to establish ostensible authority it must be shown that the principal, or someone authorised to act for them, represented to a third party that the agent has authority, and the third party acted on that representation; a representation by the agent as to the extent of their own authority is insufficient.⁹⁵ In *Att-Gen for Ceylon v Silva*⁹⁶ the Privy Council indicated that the requirement of a representation by either the principal or someone authorised to act for them limited the potential application of ostensible authority to the Crown:

“No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the Crown when in fact no such right exists.”⁹⁷

Such a special power will be rare, although not impossible to find.⁹⁸ Ostensible authority will not be found where the third party knows, or could be expected to know, that such authority conflicts with a constitutional restriction.⁹⁹ Although ostensible authority is a form of estoppel,¹⁰⁰ it is treated as an exception to the general principle that estoppel cannot be relied upon to rehabilitate a transaction entered in excess of powers.¹⁰¹

Personal liability of agents

- 13-016 Where a Crown servant or agent has entered a contract as agent, they cannot be held liable for a breach of that contract.¹⁰² Nor will a declaration be issued against them.¹⁰³ Only if it is found that they contracted personally, on their own behalf, will they be made liable.¹⁰⁴ This rule accords with the general position in the law of agency,¹⁰⁵ but the courts have also consistently made it clear that they are very reluctant to conclude that an individual Crown agent has contracted personally. The concern is that exposure to personal liability:

“... would, in all probability, prevent any proper and prudent person from accepting a public situation at the hazard of such peril to himself.”¹⁰⁶

Thus, for instance, in *Dunn v Macdonald*¹⁰⁷ Lopes LJ contrasted the position of public and ordinary agents, saying that for the former to be personally liable, “something special which would be evidence of an intention to be personally liable”¹⁰⁸ was needed. Similarly, in *Graham v His Majesty's Commissioners of Public Works and Buildings*¹⁰⁹ Ridley J stated that even where an agent had:

“... put his own name in the contract without saying that he was agent for the Crown, yet, if you could gather from the surrounding circumstances of the case that he did in fact contract as agent for the Crown, and in that capacity only, he would not be liable upon the contract.”¹¹⁰

There is no reported instance in the last two hundred years of an individual Crown agent being held personally liable.¹¹¹ Where the agent is incorporated, on the other hand, the concern about exposing individuals to personal liability has no application, and the courts have been willing to find that the agent in fact contracted on its own behalf.¹¹²

Warranty of authority

13-017 Individual Crown agents cannot be sued for a breach of warranty of authority.¹¹³ This departure from the general rules of agency¹¹⁴ is justified by the same concern about exposure to personal liability which informs the courts' approach to the personal liability of Crown agents on contracts.¹¹⁵ It is submitted that, as with the approach to personal liability under the contract, the concern about exposure to personal liability can have no application to incorporated servants or agents; and that, therefore, a breach of warranty of authority by such an incorporated servant or agent should be actionable.

Footnotes

13 Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.

61 *Nixon v Att-Gen [1931] A.C. 184; Att-Gen for Ceylon v Silva [1953] A.C. 461.*

62 *[1931] A.C. 184.*

63 [1931] A.C. 184 at 193.

64 See above, paras 13-006—13-010.

65 Particularly under the Crown Proceedings Act 1947. For further discussion see below, paras 13-018—13-022.

66 CPR Practice Direction 66, Annex 2.

67 Crown Proceedings Act 1947 s.17(2).

68 Crown Proceedings Act 1947 s.17(3).

69 *Griffith* (1951–1952) 9 *University of Toronto Law Journal* 169, 169; *Treitel* [1957] P.L. 321, 328.

70 *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] A.C. 584; *Intraline Resources Sdn Bhd v Owners of the Ship or Vessel “Hua Tian Long”* [2010] HKCFI 361 at [50]–[52]; *Treitel* [1957] P.L. 321, 327 (describing this criterion as “entitled, if not to exclusive recognition, at any rate to pre-eminence”).

71 *Metropolitan Meat Industry Board v Sheedy* [1927] A.C. 899.

72 *Tamlan v Hannaford* [1950] 1 K.B. 18; *Royal Brompton & Harefield Hospitals Charity v Roupell* [2018] EWHC 1873 (Ch), [2019] 1 P. & C.R. 10.

73 *Intraline Resources Sdn Bhd v Owners of the Ship or Vessel “Hua Tian Long”* [2010] HKCFI 361 at [52].

74 *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] A.C. 584, 616, per Lord Reid.

75 [1954] A.C. 584, 617.

76 [1956] 1 Q.B. 90.

77 [1954] A.C. 584.

78 *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] A.C. 584, 628, per Lord Tucker, 632, per Lord Asquith. See also *BBC v Johns (Inspector of Taxes)* [1965] 1 Ch. 32 (broadcasting outside province of government).

79 (1886) 17 Q.B.D. 795. The test of whether the body in question is an “emanation” of the Crown, used in this case, has subsequently been disapproved: *Tamlan v Hannaford* [1950] 1 K.B. 18; *BBC v Johns (Inspector of Taxes)* [1965] 1 Ch. 32.

80 Friedmann (1948) 22 A.L.J. 7; Friedmann (1950) 24 A.L.J. 275; *Griffith* (1951–1952) 9 *University of Toronto Law Journal* 169.

81 *Metropolitan Meat Industry Board v Sheedy* [1927] A.C. 899.

82 *Tamlan v Hannaford* [1950] 1 K.B. 18. Crown property cannot be levied: Crown Proceedings Act 1947 s.25(4).

83 *Tamlan v Hannaford* [1950] 1 K.B. 18; *Hills (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 Q.B. 90; cf. *Metropolitan Meat Industry Board v Sheedy* [1927] A.C. 899, 905: “[t]hat they were not incorporated does not matter.” For a powerful argument that incorporation should be decisive against being a Crown servant or agent see *Friedmann* (1948) 22 A.L.J. 7; (1950) 24 A.L.J. 275.

84 *Robertson v Minister of Pensions* [1949] 1 K.B. 227; *Falmouth Boat Construction Co Ltd v Howell* [1950] 2 K.B. 16.

85 *Howell v Falmouth Boat Construction Co Ltd* [1951] A.C. 837.

86 *Treitel* [1957] P.L. 321, 335–337.

87 See Ch.21 of this work for the general principles of agency. For an illustrative example of the principles of usual and ostensible authority being applied to a transaction entered by a government minister, see *Law Debenture Trust Corp Plc v Ukraine* [2018] EWCA Civ 2026, [2019] Q.B. 1121.

88 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549, 583.

89 See further below, para.21-050.

90 *Law Debenture Trust Corp Plc v Ukraine* [2017] EWHC 655 (Comm), [2017] Q.B. 1249 at [160]. This point was not challenged on appeal: [2018] EWCA Civ 2026 at [82].

91 *Att-Gen for Ceylon v Silva* [1953] A.C. 461, 481.

92 [2018] EWCA Civ 2026, [2019] 2 W.L.R. 655. An appeal to the Supreme Court is ongoing.

93 [2018] EWCA Civ 2026 at [79].

94 [2018] EWCA Civ 2026 at [80], quoting with approval from *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549.

95 See below, para.21-063.

96 [1953] A.C. 461.

97 *Att-Gen for Ceylon v Silva* [1953] A.C. 461, 479. See also Bowstead and Reynolds on Agency, 21st edn (2017), para.8-042; para.8-044 of the 17th edn (containing the text now in para.8-042) was quoted with approval in *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198 at [124].

98 *Treitel* [1957] P.L. 321, 338 n.4 suggests that it might exist where the holding out was done by the “directing mind” of the relevant government department. cf. Turpin, Government Contracts (1972), p.35, where it is suggested that the “special power” would exist wherever an officer had actual authority to do the act that he was holding out the agent as having authority to do. In *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198 it was held that the Mongolian Ministry of Justice had such a power in respect of the Minister of Finance’s authority to sign a guarantee. (This aspect of the decision was not challenged on appeal: [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [6].) See also *Law Debenture Trust Corp Plc v Ukraine* [2018] EWCA Civ 2026, [2019] Q.B. 1121 (ostensible authority of Minister of Finance of Ukraine to issue Eurobond debt notes).

99 *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397 at [451]; *Law Debenture Trust Corp Plc v Ukraine* [2018] EWCA Civ 2026, [2019] Q.B. 1121 at [111].

100 *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198 at [124].

101 For the general principle see below, para.13-052.

102 *Macbeath v Haldimand* (1786) 1 T.R. 172; *Unwin v Wolseley* (1787) 1 T.R. 674; *Rice v Chute* (1801) 1 East 579; *Palmer v Hutchinson* (1881) 6 App. Cas. 619.

103 *Hosier Brothers v Earl of Derby* [1918] 2 K.B. 671.

- 104 *Macbeath v Haldimand* (1786) 1 T.R. 172; *Prosser v Allen* (1819) Gow. 117; *Gidley v Lord Palmerston* (1822) 3 Brod. & Bing. 275; *Dunn v Macdonald* [1897] 1 Q.B. 555; *Commercial Cable Co v Government of Newfoundland* [1916] 2 A.C. 610.
- 105 See below, para.21-092.
- 106 *Gidley v Lord Palmerston* (1822) 3 Brod. & Bing. 275, 286, per Dallas CJ. See also *Macbeath v Haldimand* (1786) 1 T.R. 172, 181–182, per Ashhurst J; *Unwin v Wolseley* (1787) 1 T.R. 674, 678, per Ashurst J.
- 107 [1897] 1 Q.B. 555.
- 108 *Dunn v Macdonald* [1897] 1 Q.B. 555, 557.
- 109 [1901] 2 K.B. 781.
- 110 *Graham v His Majesty's Commissioners of Public Works and Buildings* [1901] 2 K.B. 781, 788. cf. *Auty v Hutchinson* (1848) 6 C.B. 266.
- 111 cf. *Rice v Everitt* (1801) 1 East 583n, which turned on its own unusual facts. In *Samuel Bros, Ltd v Whetherly* [1907] 1 K.B. 709, [1908] 1 K.B. 104 the personal liability of the commanding officer of a volunteer corps was imposed under statutory regulations (Regulations for the Volunteer Force 1901 reg.407).
- 112 e.g. *Graham v His Majesty's Commissioners of Public Works and Buildings* [1901] 2 K.B. 781 (Ridley J); *International Railway Co v Niagara Parks Commission* [1941] A.C. 328.
- 113 *Dunn v Macdonald* [1897] 1 Q.B. 401, 555; *The Prometheus* (1949) 82 Ll.L. Rep. 859. For criticism of *Dunn v Macdonald*, and suggestions that the decision is best explained on other grounds see Williams, Crown Proceedings (1948), p.3; Street, Governmental Liability (1953), p.93.
- 114 See below, paras 21-109—21-117.
- 115 See previous paragraph.

(d) - Crown Proceedings Act 1947

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Section 2. - Crown Contracts ¹³

(d) - Crown Proceedings Act 1947

Purpose of the Act

- 13-018 Before 1947 the Crown could not be sued on its contracts by bringing an ordinary action for breach of contract or debt. Litigants had to use the petition of right procedure, as amended by the [Petitions of Right Act 1860](#). This procedure, even as amended, was “antiquated and cumbersome”,¹¹⁶ and it came to be seen as an anachronistic defect in the law. [Section 1 of the Crown Proceedings Act 1947](#) abolished the need to bring a petition of right to enforce a contractual claim in most cases. It provided that:

“Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty’s fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.”

The Act also repealed the [Petitions of Right Act 1860](#).¹¹⁷ However, it did not entirely remove a role for the petition of right. The Act has no application to proceedings “by or against … his Majesty in His private capacity”¹¹⁸; nor does it apply to proceedings:

“... against the Crown ... in respect of any alleged liability of the Crown arising otherwise than in respect of his Majesty’s Government in the United Kingdom.”¹¹⁹

Contractual liability coming under either of these heads can only be enforced using the petition of right procedure. And, since the [1947 Act](#) repealed the [Petitions of Right Act 1860](#) for all purposes, the petition must be in its pre-1860 form.¹²⁰ This “most peculiar thing”,¹²¹ as Glanville Williams described it, was, apparently, intended.¹²²

Remedies against the Crown

- 13-019 The [Crown Proceedings Act 1947](#) introduced new rules relating to the availability of remedies. Section 21(1) provided as follows:

“In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that—

(a)where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b)in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.”

By removing the possibility of an injunction or an order for specific performance the subsection reduced the rights enjoyed by claimants. Before 1947 various government departments had been subject to awards of specific performance or injunctions in relation to contractual performance,¹²³ with courts commenting that the defendant’s status did not call for any special treatment.¹²⁴ The same approach could be seen where statutes expressly provided that, in relation to Crown contracts, certain ministers could “sue and be sued”¹²⁵; and there was also support for the idea that the mere fact of incorporation indicated that a department could be sued in the ordinary way.¹²⁶ The [1947 Act](#) repealed those statutory provisions stating that departments could sue and be sued, but that left open the question whether incorporated departments could still be sued in the ordinary way,

thereby circumventing the limitation on remedies contained in s.21(1). Commentators disagreed, and the point has never been settled.¹²⁷ It is submitted, however, that the repeal of the statutory provisions expressly authorising departments to be sued showed a legislative intention that s.21(1) should be definitive. Furthermore, it would be undesirable as a matter of policy to allow the statutory definition of the position in s.21(1) to be undermined where the government department is incorporated. Most government departments are now incorporated, and holding that they fall outside s.21(1) would come close to nullifying the subsection's effect; there is, moreover, no reason to make incorporated departments subject to more extensive remedies than unincorporated departments, since incorporation is merely undertaken for administrative convenience.¹²⁸

Interim remedies

- 13-020 Where parties have applied for interim relief against the Crown, the language of s.21(1) has proved difficult to apply. Although parts of the subsection seem to confer a broad discretion (for instance, "power ... to give such appropriate relief as the case may require"), it has been held that since a declaration is, in its nature, final, no interim declaration can be made against the Crown.¹²⁹ Whatever the merits of that analysis,¹³⁰ it is submitted that it has now been superseded by the Civil Procedure Rules, which expressly provide for interim declarations to be granted.¹³¹ Since interim declarations are now available in "proceedings between subjects" they must, applying the language of s.21(1), also be available in proceedings against the Crown.

Specific remedies against Crown servants

- 13-021 Where a contract has been made by a Crown servant in the course of service or by a Crown agent acting within his authority, the servant or agent is not personally liable on the contract.¹³² Hence, the question of specific remedies against such a servant or agent does not arise. However, a contracting party might seek to prevent a breach of contract by the Crown by bringing proceedings in tort against the servant or agent responsible for the contractual performance. For instance, it might be alleged that the servant or agent's threatened acts will amount to the tort of inducing breach of contract by the Crown.¹³³ In such a situation, Crown Proceedings Act s.21(2) would become relevant. That subsection states that:

"The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

The subsection has been described as “somewhat obscure”¹³⁴ and “of Delphic opaqueness”.¹³⁵ One obscurity concerns its scope. Its language refers only to proceedings against an “officer” of the Crown and it is not clear whether corporate entities are included. The *Crown Proceedings Act* states that:

“‘Officer’ in relation to the Crown, includes any servant of His Majesty, and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown and a member of the Scottish Executive.”¹³⁶

The language of the statutory definition is inclusive, rather than limiting, but it was said in *British Medical Association v Greater Glasgow Health Board*¹³⁷ that a hospital board admitted to be exercising functions on behalf of the Minister of Health¹³⁸ could not have been argued to be an officer of the Crown for the purposes of s.21(2).¹³⁹ No reasons were given for this assertion, and it is respectfully submitted that it is difficult to support: a legal person is perfectly capable of being a servant or agent of the Crown,¹⁴⁰ and nothing in the *Crown Proceedings Act* definition of “officer” indicates that a narrow approach is needed. Furthermore, the effectiveness of s.21(2) would be seriously undermined if it only prevented the circumvention of s.21(1) in relation to actions against a limited class of representatives of the Crown. It is therefore submitted that the assertion in the *British Medical Association* case was mistaken, and that the decision of the House of Lords can be supported only on the ground that the special legislation creating hospital boards expressly provided for those boards to be liable as principals.¹⁴¹

Injunctions against Crown servants

- 13-022 A second obscurity in s.21(2) relates to its effect. The immediate aim of the subsection may simply have been to reverse two earlier authorities, which had been doubted by commentators.¹⁴² But the more difficult question is whether the subsection, in effect, prevents any injunction being granted against a Crown servant in respect of activities in the course of service. In *M v Home Office*¹⁴³ it was held that s.21(2) did not have that effect; rather, it only prevented injunctions from being granted against Crown servants in a representative capacity (such as being the superior of a Crown servant who had actually committed a tort). The House of Lords supported this narrow reading by reference to the position before the *Crown Proceedings Act* came into force: before 1947 specific remedies had been available against individual servants who had committed torts.¹⁴⁴ The subsection, in their view, was intended to apply only to situations where no cause of action had previously been available; as they put it:

“... it is only in those situations where prior to the Act no injunctive relief could be obtained that section 21 prevents an injunction being granted.”¹⁴⁵

This interpretation of s.21(2), particularly the reliance on the position before 1947, has been questioned, however. In *Davidson v Scottish Ministers*,¹⁴⁶ without expressing a concluded view, Lord Rodger put forward the following analysis:

“There are, however, no words in subsection (2) which refer to the position before the passing of the 1947 Act. If, as seems likely, Lord Woolf was thinking of the closing words of the subsection, I would respectfully prefer to interpret them as referring to the hypothetical situation where the claimant or pursuer has brought proceedings against the Crown rather than against an officer of the Crown. The purpose of the subsection seems to be to prevent the claimant or pursuer from circumventing the ban on an injunction, interdict or order for specific performance against the Crown in subsection (1)(a) by seeking a similar remedy against an officer of the Crown.”¹⁴⁷

Lord Mance shared Lord Rodger’s doubts about whether s.21(2) referred to the position prior to the 1947 Act. “However”, he continued:

“... even without that phrase, the purpose of subsection (2) can hardly have been to remove or preclude a right on the part of a claimant to injunctive relief against an officer of the Crown threatening to commit a tortious act against the claimant.”¹⁴⁸

The matter has not been settled.¹⁴⁹ It is submitted that, of the two competing interpretations, Lord Rodger’s view is the more persuasive. It avoids a strained reading of the statutory language, and, perhaps more importantly, it recognises that the 1947 legislation responded to deep-rooted dissatisfaction with the complexity and anachronisms of the existing law by redefining the relationship between the Crown and litigants. Lord Mance’s objection to Lord Rodger’s interpretation is, it is submitted, not convincing. There is no inherent reason why the subsection should not have removed a right to an injunction which existed prior to the Act; on the contrary, the Act expressly repealed statutory provisions that had provided for certain government departments to “sue and be sued” to the same extent as private parties.

Footnotes

¹³ Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.

¹¹⁶ *Davidson v Scottish Ministers [2005] UKHL 74, 2006 S.C.(H.L.) 41* at [8].

¹¹⁷ Crown Proceedings Act 1947 s.39 and Sch.2. Both s.39 and Sch.2 were themselves repealed by Statute Law Revision Act 1950 s.1, but that did not have the effect of reinstating the

- provisions that had been repealed by the 1947 Act (see proviso to Statute Law Revision Act 1950 s.1).
- 118 Crown Proceedings Act 1947 s.40(1).
- 119 Crown Proceedings Act 1947 s.40(2)(b). The certificate of a Secretary of State to this effect is conclusive: s.40(3); *Trawnik v Lennox* [1985] 1 W.L.R. 532.
- 120 *Franklin v Att-Gen* [1974] 1 Q.B. 185; Street (1948) 11 M.L.R. 129, 132–133.
- 121 Williams, Crown Proceedings (1948), p.8.
- 122 Williams, Crown Proceedings (1948), p.8, n.24, states that the situation “was pointed out to those responsible for the measure when it was a Bill before Parliament”. It was, in fact, Williams himself who had done so, writing a letter to Lord Chorley which Chorley forwarded to the Lord Chancellor (*Jacob* [1992] P.L. 452, 481–482).
- 123 *Rankin v Huskisson* (1830) 4 Sim. 13 (injunction against Commissioners of Woods and Forests); *Thorn v Commissioners of Her Majesty's Works and Public Buildings* (1863) 32 Beav. 490; *Corbett v Commissioners of Her Majesty's Works and Public Buildings* (1868) 18 L.T. 548.
- 124 See, for instance, *Thorn v Commissioners of Her Majesty's Works and Public Buildings* (1863) 32 Beav. 490, 493: “a public Government board cannot be treated in any different manner from that in which a private individual would be dealt with.”.
- 125 Williams, Crown Proceedings (1948), p.4. e.g. *Minister of Supply v British Thomson-Houston Co Ltd* [1943] 1 K.B. 478.
- 126 *Graham v His Majesty's Commissioners of Public Works and Buildings* [1901] 2 K.B. 781, per Phillimore J; *Roper v The Commissioners of his Majesty's Public Works and Buildings* [1915] 1 K.B. 45.
- 127 Street (1948) 11 M.L.R. 129, 132; Williams, Crown Proceedings (1948), p.6; Street, Governmental Liability (1953), p.94.
- 128 The Cabinet Manual (2011) 3.28; *Ministers of the Crown Act* 1975 s.2(1), which describes the power to make a Secretary of State a corporation sole as “incidental, consequential [or] supplemental” to any changes in the departments of Secretaries of State, and provides that the power is exercisable by the Queen making an Order in Council. For the practical benefits of incorporation, see above, para.12-002.
- 129 *Underhill v Ministry of Food* [1950] 1 All E.R. 591; *International General Electric Co of New York Ltd v Commissioners of Customs and Excise* [1962] 1 Ch. 784.
- 130 For criticism see *Wade* (1991) 107 L.Q.R. 4, 8.
- 131 CPR r.25.1; see *Intertrade Wholesale Ltd v Revenue and Customs Commissioners* [2018] EWHC 3476 (QB) at [64].
- 132 See above, para.13-016.
- 133 See generally, Clerk & Lindsell on Torts, 23rd edn (2020), Ch.23.
- 134 Williams, Crown Proceedings (1948), p.136.
- 135 *Davidson v Scottish Ministers* [2005] UKHL 74, (2006) S.C.(H.L.) 41 at [8], per Lord Nicholls.
- 136 Crown Proceedings Act 1947 s.38(2).
- 137 [1989] 1 A.C. 1211.

- 138 *British Medical Association v Greater Glasgow Health Board [1989] 1 A.C. 1211* at 1225. Quaere whether the admission was correct: in *Hills (Patents) Ltd v University College Hospital Board of Governors [1956] 1 Q.B. 90* it was held that, although the statute stated that the defendants carried out their functions “on behalf of” the Minister of Health, their independence from ministerial control showed that they actually occupied hospital premises as principals, not as agents of the Minister.
- 139 *British Medical Association v Greater Glasgow Health Board [1989] 1 A.C. 1211, 1226.*
- 140 *BBC v Johns (Inspector of Taxes) [1965] 1 Ch. 32* at 79, where Diplock LJ comments that it “has been increasingly the tendency over the last hundred years” that Crown agents are “fictitious persons—corporations”; Williams, Crown Proceedings (1948), p.117.
- 141 *British Medical Association v Greater Glasgow Health Board [1989] 1 A.C. 1211, 1226–1227; National Health Service (Scotland) Act 1978 s.2(8).*
- 142 *Street (1948) 11 M.L.R. 129, 138;* Williams, Crown Proceedings (1948), p.136; both authors refer to *Rankin v Huskisson (1830) 4 Sim. 13* and *Ellis v Earl Grey (1833) 6 Sim. 214.*
- 143 *[1994] 1 A.C. 377.*
- 144 *Raleigh v Goschen [1898] 1 Ch. 73;* *Hutton v Secretary of State for War (1926) 43 T.L.R. 106.* Actions against such individual servants were not caught by the general pre-1947 rule that the Crown was not liable in tort, because it was said that since the Crown could do no wrong, it could never authorise the commission of a tort (see *M v Home Office [1994] 1 A.C. 377, 410.*)
- 145 *M v Home Office [1994] 1 A.C. 377, 413.*
- 146 *[2005] UKHL 74, 2006 S.C.(H.L.) 41.*
- 147 *Davidson v Scottish Ministers (2006) S.C.(H.L.) 41* at [93]. See also *British Medical Association v Greater Glasgow Health Board [1989] 1 A.C. 1211* at 1226.
- 148 *Davidson v Scottish Ministers (2006) S.C.(H.L.) 41* at [102].
- 149 In *Davidson v Scottish Ministers (2006) S.C.(H.L.)* it was anticipated that the matter would be settled when their Lordships heard the then pending appeal in *Beggs v Scottish Ministers* (see e.g. per Lord Mance at [103]). However, when the appeal in *Beggs* was heard, the appellant abandoned the points he had raised in relation to s.21. See *Beggs v Scottish Ministers [2007] UKHL 3, [2007] 1 W.L.R. 455* at [28], per Lord Rodger and [51], per Lord Mance.

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The position in outline

- 13-023 Public authorities, as the creations of statute, have the capacity to enter contracts only to the extent that their statutory powers permit. Any contract entered outside those powers (*ultra vires*) is void; similarly, a contractual promise outside the statutory powers is unenforceable.¹⁵⁰ Hence, it has been said that “the *ultra vires* concept of corporate capacity is inextricably linked to nullity: they are two sides of the same coin”.¹⁵¹ To determine whether a contract or contractual obligation is *intra vires* the public authority, three tests must be satisfied. First, the contract or obligation must be within the scope of the authority’s statutory powers. Second, it must not unduly fetter the authority’s discretion. Third, the authority’s entering into the contract or obligation must have been as a result of a proper exercise of its powers. If a contract or contractual obligation is found to be *ultra vires*, the consequences will depend on a variety of factors. It may be possible to identify an alternative contract, arising from the parties’ conduct, which it was within the statutory body’s powers to make. If no such contract can be identified, no contractual remedies are available, and the parties must have recourse either to claims in unjust enrichment or under the [Human Rights Act 1998](#). There is, however, one important exception to these principles, which arises when a local authority has certified, pursuant to the [Local Government \(Contracts\) Act 1997](#), that the contract is within its powers. In such situations, the contract takes effect as if the authority had the power to enter into it.

Footnotes

- 150 For discussion of whether the ultra vires term can be severed from the contract, leaving the remainder of the contractual terms enforceable see *Re Staines UDC's Agreement; Triggs v Staines UDC [1969] 1 Ch. 10* and paras 18-252 et seq.
- 151 *Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2012] Q.B. 549* at [135] (Etherton LJ).

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(i) - Express Powers

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(a) - The Scope of Statutory Powers

(i) - Express Powers

Construction of statutory language

- 13-024 In ascertaining whether the contract or promise in question is within the scope of the authority's statutory powers, the statute must be construed. There is no typical form of words for the conferment of powers to contract, and the range of bodies on whom such powers are conferred has led to an equally diverse array of statutory language. No special rules of construction apply¹⁵² — the aim is to identify a “reasonable” interpretation of the words.¹⁵³ Where the power is said to be contained in a rate-levying provision, that provision “must not be strained to cover purposes which are not fairly within it”.¹⁵⁴

Examples of express powers to contract

- 13-025 The power to contract may be narrowly set out, as it is in the [Police Act 1996 s.25\(1\)](#), which limits the power to charge for policing to “special police services” provided “at the request of any person”. As the Court of Appeal has observed, this subsection envisages a contract between the parties, in the sense that a request must have been accepted by the chief constable.¹⁵⁵ However, the power may also be expressed more broadly, and need not refer specifically to contracts. For instance, [s.2 of the Local Government Act 2000](#) (which now applies only in Wales)¹⁵⁶ confers a

power on local authorities to do “anything which they consider is likely to achieve” the “promotion or improvement” of the “economic”, “social”, or “environmental well-being of their area”. In *Brent London BC v Risk Management Partners Ltd*¹⁵⁷ the Court of Appeal held that, although the section should be construed broadly, it did not authorise entering transactions solely for the purpose of improving the authority’s financial position; some “reasonably well defined outcome which [the authority] considers will promote or improve the well-being of its area” was required.¹⁵⁸ The [Localism Act 2011 s.1\(1\)](#) supersedes the broad power set out in the [Local Government Act 2000](#), by providing that “A local authority has power to do anything that individuals generally may do”.¹⁵⁹ The breadth of this statutory language is such that, where a contract falls under the Act, no recourse to implied powers of contracting will be required to justify it. However, the Act does not eliminate all restrictions on local authorities’ powers, since pre-existing restrictions are preserved, the power to charge for services is limited, and things may only be done for a commercial purpose if they could also be legitimately done for a non-commercial purpose under the general power.¹⁶⁰ The effect of the Act is, therefore, to alter the focus of legal analysis from whether an authority’s activity is permitted to whether there are any restrictions on it.¹⁶¹

Local Government (Contracts) Act 1997 s.1(1)

13-026 One particularly important statutory power is that conferred by [Local Government \(Contracts\) Act 1997 s.1\(1\)](#), which states that:

“Every statutory provision conferring or imposing a function on a local authority confers power on the local authority to enter into a contract with another person for the provision or making available of assets or services, or both, (whether or not together with goods) for the purposes of, or in connection with, the discharge of the function by the local authority.”

There is only limited authority on the interpretation of this section. It has been held that a contract of insurance would not come within its scope, since insurance is a contract providing for a financial indemnity, rather than “for the provision or making available of assets or services”.¹⁶² No definition of “function” is given in the Act. It almost certainly bears the same meaning as “function” in the [Local Government Act 1972 s.111](#), namely, any one of the “multiplicity of specific statutory activities the [authority] is expressly or impliedly under a duty to perform or has power to perform”.¹⁶³ The requirement that a contract be “for the purposes of, or in connection with the discharge” of a function is not elaborated on further in the Act, and it has not been considered in case law. However, it is submitted that the test authorises the same contracts as would be authorised under the test for implying a power to contract¹⁶⁴—namely, whether such a power is reasonably incidental to the relevant statutory purpose: in both tests the focus is on the nexus between the statutory power and the contract. The “reasonably incidental” test has received

extensive judicial consideration which, it is submitted, should be used to guide the application of the test set out in s.1(1) of the 1997 Act. It is also submitted that the very general terms of s.1(1) should not be taken to override specific statutory limitations on a local authority's power to contract.¹⁶⁵

Procedural irregularity

- 13-027 An authority's failure to follow its own procedures for entering a contract does not render the agreement ultra vires. As the Privy Council put it in *Central Tenders Board v White*:

“There is a difference between a case of procedural irregularity in the formation of a contract of a kind which a public body has power to enter, and a case of a public body purporting to conclude a contract of a kind which it has no power to make.”¹⁶⁶

In that case the authority had accepted a tender for a building project despite the tenderer failing to comply with the authority's instructions that all tenderers must state, on their form of tender, what the duration of the works would be. The authority was found not to have departed from its own procedures (since the procedures permitted non-conforming tenders to be considered), but the court went on to express the view that, assuming there had been a procedural irregularity on the facts, it would not have made the ensuing contract void. The court explained that any attempt to nullify a contract entered into following a procedural irregularity would have to be assessed in the light of:

“... the seriousness of the breach and the degree of any injustice and public inconvenience which may be caused by invalidating the act”,

as well as “any alternative remedies available to a person legitimately aggrieved by the conduct of the public body”.¹⁶⁷ The court observed that it would be “a serious denial of [a party's] rights” to invalidate a contract because of a procedural defect in the contractual process,¹⁶⁸ and indicated that:

“... it would be wrong for a court to [quash an administrative decision] in such a way as to nullify a contract made between a public body pursuant to a legal power and a person acting in good faith, except possibly on terms which adequately protect that person's interest.”¹⁶⁹

Where a tenderer had been unfairly disadvantaged by the authority's failure to follow its own procedures, the Privy Council envisaged that recourse could be had to an implied tender process contract, of the kind recognised in *Blackpool and Fylde Aero Club Ltd v Blackpool BC*.¹⁷⁰

Footnotes

- 152 *Att-Gen v London CC* [1901] 1 Ch. 781, 788; *Att-Gen v Manchester Corp* [1906] 1 Ch. 643, 653.
- 153 *Att-Gen v London CC* [1901] 1 Ch. 781, 788.
- 154 *Mexico Infrastructure Finance LLC v Corporation of Hamilton* [2019] UKPC 2 at [51].
- 155 *West Yorkshire Police Authority v Reading Festival Ltd* [2006] EWCA Civ 524, [2006] 1 W.L.R. 2005 at [21] and [50]. See further *Glasbrook Brothers Ltd v Glamorgan CC* [1925] A.C. 270; *Harris v Sheffield United Football Club Ltd* [1988] 1 Q.B. 77; *Leeds United Football Club Ltd v Chief Constable of West Yorkshire Police* [2013] EWCA Civ 115, [2014] Q.B. 168; *Ipswich Town Football Club Co Ltd v Chief Constable of Suffolk* [2017] EWCA Civ 1484, [2017] 4 W.L.R. 195 and discussion at para.6-062 above. The statutory provision may implicitly exclude a claim for unjust enrichment where no request for police services is shown: *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449, [2009] 1 W.L.R. 1580 at [51].
- 156 Localism Act 2011 Sch.1 para.3.
- 157 [2009] EWCA Civ 490, [2010] P.T.S.R. 349 (the appeal to the Supreme Court in *Brent LBC v Risk Management Partners Ltd* [2011] UKSC 7, [2011] 2 A.C. 34 was confined to the claim for damages for breach of the Public Contracts Regulations 2006). Under the Local Democracy, Economic Development and Construction Act 2009 s.34, which is (still) not yet in force, a local authority is empowered to enter mutual insurance arrangements of the kind that gave rise to the litigation in the *Brent* case; the wide powers conferred by Localism Act 2011 s.1 (discussed below) may have made this specific provision redundant.
- 158 [2009] EWCA Civ 490 at [180].
- 159 The statutory section came into force on 18 February 2012 (Localism Act 2011 (Commencement No.3) Order 2012 (SI 2012/411) art.2).
- 160 Localism Act 2011 ss.2, 3 and 4 respectively. On the interpretation of s.4 see *R. (Durham Co Ltd) v Revenue and Customs Commissioners* [2016] UKUT 417 (TCC), [2017] S.T.C. 264 and *Peters v Haringey LBC* [2018] EWHC 192 (Admin).
- 161 See further, *Layard* [2012] Env. Law Rev. 134; *Bowes and Stanton* [2014] P.L. 392.
- 162 *R. v Brent LBC Ex p. Risk Management Partners Ltd* [2008] EWHC 692 (Admin) at [102].
- 163 *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 722. This definition, given by the Divisional Court, was approved by the Court of Appeal ([1990] 2 Q.B. 697, 785) and the House of Lords ([1992] 2 A.C. 1, 29, per Lord Templeman, 45, per Lord Ackner).
- 164 See below, paras 13-028—13-031.
- 165 e.g. the limitations on borrowing imposed by Local Government Act 1972 Sch.13 Pt I (as interpreted in *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1).

- 166 [2015] UKPC 39, [2015] B.L.R. 727 at [19]; *Law Debenture Trust Corp Plc v Ukraine* [2017] EWHC 655 (Comm) at [134]. cf. the public procurement regulatory regime, outlined at para.13-057, below.
- 167 [2015] UKPC 39, [2015] B.L.R. 727 at [22].
- 168 [2015] UKPC 39, [2015] B.L.R. 727 at [25].
- 169 [2015] UKPC 39, [2015] B.L.R. 727 at [26].
- 170 [1990] 1 W.L.R. 1195. See above, paras 13-048 et seq.

(ii) - Implied Powers

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Part 4 - Capacity of Parties

Chapter 13 - The Crown and Public Authorities

Section 3. - Public Authorities

(a) - The Scope of Statutory Powers

(ii) - Implied Powers

General principle

13-028 The scope of statutory powers is not limited to the express language of the statute. As Lord Selborne L.C. explained in *Att-Gen v Great Eastern Railway Co*¹⁷¹ the ultra vires doctrine:

“... ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.”¹⁷²

Lord Blackburn, in the same case, added that:

“... those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.”¹⁷³

The emphasis on first identifying the main purpose, then deciding what is incidental to it, was echoed by Lord Selborne L.C. shortly afterwards¹⁷⁴ and remains good law. The principle of implied powers was subsequently recognised by statute¹⁷⁵ in the Local Government Act 1972 s.111(1):

“... subject to the provisions of this Act ... a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”

Where a public authority claims an implied power to charge, the test is narrower: rather than a reasonable implication, the power must be shown to arise by necessary implication.¹⁷⁶

Consistency with statutory provisions

- 13-029 An incidental power will only be implied if it is consistent with the express statutory provisions. Thus, where a statutory borrowing power was limited to a set amount “but not further or otherwise”, no additional borrowing power could be implied.¹⁷⁷ Similarly, if the statutory provisions were intended to provide an exhaustive enumeration of powers, there will be no room for a further, implied power. In *Hazell v Hammersmith and Fulham LBC*,¹⁷⁸ for instance, it was held that Local Government Act 1972 Sch.13 Pt 1 established “a comprehensive code which defines and limits the powers of a local authority with regard to its borrowing”¹⁷⁹; it followed that no further power to borrow could be implied. The same analysis has been applied to both housing¹⁸⁰ and planning¹⁸¹ legislation.

Incidental or ancillary power

- 13-030 Where there is room for a power to be implied, the power can only authorise activities that are incidental to, or ancillary to, the public authority’s functions. It is not enough that the contract is, in itself, profitable, useful or desirable.¹⁸² There must, in other words be “a sufficient nexus”¹⁸³ between the authority’s functions and the activity sought to be carried on. Thus, for instance, it is incidental to a local authority’s duty to manage its housing for it to introduce a parking scheme on one of its housing estates.¹⁸⁴ Similarly, printing and bookbinding work is incidental to a variety of local authority functions.¹⁸⁵ However, the necessary nexus would be broken if the authority undertook additional work, for a profit, beyond what was necessary for its own functions.¹⁸⁶ The activity would then no longer be truly subsidiary to the main statutory purpose; it would be a separate business.¹⁸⁷ Furthermore, where a statutory power permits a function to be carried on within a defined geographical area, an ancillary power to operate outside that area will be unlikely.¹⁸⁸ It is also unlikely that an activity will be regarded as ancillary to the statutory purpose if it is not (or cannot be) restricted to those individuals who participate in the expressly permitted

activity. Thus, for instance, in *Att-Gen v London CC*¹⁸⁹ the authority had express statutory powers to operate three tramway services, and claimed that it had implied power to operate a bus service between the termini of the three tramway lines. However, it was held that no such implied power existed because as a matter of fact the bus service was used by the general public, and as a matter of law the bus service could not be confined to tramway passengers.¹⁹⁰

Sufficient connection with statutory function

- 13-031 There must also be a sufficiently close connection between the express statutory function and the activity claimed to be incidental to it, such that the activity can be said directly to facilitate the performance of that function. It is not enough that the activity facilitates some intermediate function which, in turn, facilitates the statutory function.¹⁹¹ For instance, in *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames LBC*¹⁹² it was held that a local authority had acted ultra vires by charging developers for consultations with its planning officers before a formal planning application was made. The authority's statutory function was solely to adjudicate on planning applications; consultations with planning officers before the submission of a formal application were incidental to the performance of that statutory function, but to charge for those consultations was incidental only to the consultations, not the adjudication. Charging was, therefore, merely "incidental to the incidental",¹⁹³ and, therefore, too far removed from the duty to determine planning applications to be implicitly authorised by it. Similarly, it has been held that when a local authority enters a contract under *Local Government (Contracts) Act s.1(1)*,¹⁹⁴ it is not performing a "function"; the "function" is the task carried out or the result achieved by contractual performance. The contract is merely an incidental means of carrying out that function. It follows, therefore, that activities incidental to entering the contract cannot be justified under *Local Government Act 1972 s.111*; those activities are merely incidental to the incidental power of contracting.¹⁹⁵

Footnotes

171 (1880) 5 App. Cas. 473.

172 *Att-Gen v Great Eastern Ry Co* (1880) 5 App. Cas. 473, 478.

173 *Att-Gen v Great Eastern Ry Co* (1880) 5 App. Cas. 473, 481.

174 *Small v Smith* (1884) 10 App. Cas. 119, 129.

175 *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 722 DC, 785, CA, [1992] 2 A.C. 1, 29; *Akumah v Hackney LBC* [2005] UKHL 17, [2005] 1 W.L.R. 985, [24].

176 *Att-Gen v Wilts United Dairies Ltd* (1921) 37 T.L.R. 884, (1922) 38 T.L.R. 781; *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames LBC* [1992] 2 A.C. 48. Quaere whether

Local Government (Contracts) Act 1997 s.1(1) would apply to the situation in which a local authority levies charges to fund the performance of a specified function. It would be entering a contract for the provision of an “asset” in the form of the payment “in connection with” the discharge of the named function.

- 177 *Baroness Wenlock v River Dee Co* (1885) 10 App. Cas. 354.
178 [1990] 2 Q.B. 697, [1992] 2 A.C. 1.
179 *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1, 33. cf. *Re Northern Ireland Human Rights Commission* [2002] UKHL 25, [2002] NI 236.
180 *Crédit Suisse v Waltham Forest LBC* [1997] Q.B. 362; *Sutton LBC v Morgan Grenfell & Co Ltd* (1996) 29 H.L.R. 608; *R. (Kilby) v Basildon DC* [2006] EWHC 1892 (Admin), [2006] H.L.R. 46 at [2]–[16], [2007] EWCA Civ 479, [2007] H.L.R. 39, per Rix and Moses LJ.
181 *Bielecki v Suffolk Coastal CC* [2004] EWHC 3142 (QB).
182 *Att-Gen v London CC* [1901] 1 Ch. 781, 802, [1902] A.C. 165, 169; *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1, 31; *Brent LBC v Risk Management Partners Ltd* [2009] EWCA Civ 490, [2010] P.T.S.R. 349.
183 *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 723.
184 *Akumah v Hackney LBC* [2005] UKHL 17, [2005] 1 W.L.R. 985.
185 *Att-Gen v Smethwick Corp* [1932] Ch. 562.
186 *Att-Gen v Smethwick Corp* [1932] Ch. 562 at 566, per Eve J, 572, per Hanworth MR See also *Att-Gen v Fulham Corp* [1921] 1 Ch. 440; *Deuchar v Gas Light and Coke Co* [1925] A.C. 691.
187 *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 723.
188 *Att-Gen v Manchester Corp* [1906] 1 Ch. 643; *Trustees of the Harbour of Dundee v D. & J. Nicol* [1915] A.C. 550.
189 [1901] 1 Ch. 781, [1902] A.C. 165.
190 See, similarly *Att-Gen v Mersey Railway Co* [1907] A.C. 415, especially 418, per Lord James.
191 *Att-Gen v Manchester Corp* [1906] 1 Ch. 643; *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 724.
192 [1992] 2 A.C. 48.
193 *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames LBC* [1992] 2 A.C. 48, 75.
194 See above, para.13-026.
195 *Brent London LBC v Risk Management Partners Ltd* [2009] EWCA Civ 490, [2010] P.T.S.R. 349 at [61], [123].

(b) - Fettering of Discretion

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(b) - Fettering of Discretion

General principle

- 13-032 A contract or contractual obligation which unduly fetters the public authority's performance of its statutory functions will be ultra vires. The doctrine first emerged, and has also received the most attention, in cases concerning grants of servitudes.¹⁹⁶ The leading case is *R. v The Inhabitants of Leake*,¹⁹⁷ where the question was whether commissioners of drainage could have granted a public right of way over an earth bank adjacent to the drain. The Court of Exchequer held, by a majority, that the commissioners did have such power, since, on the evidence before them, the grant of a public right of way was not incompatible with the performance of their statutory duties. The compatibility test from the *Leake* case has been applied "again and again"¹⁹⁸ in later cases, but it should be noted that there is a potential difficulty with the decision. This is that the Court of Exchequer did not first consider whether, as a matter of statutory construction, the commissioners had the power, either express or implied, to grant a right of way.¹⁹⁹ As explained above, that is the current general approach to questions of ultra vires.²⁰⁰ The failure to consider the point is easily explicable: the decision in the *Leake* case predated by more than 40 years the House of Lords' decisions in *Att-Gen v Great Eastern Railway Co*²⁰¹ and *Small v Smith*,²⁰² which were to emphasise the statutory limitations on public authorities' powers.²⁰³ It follows, therefore, that whilst the *Leake* case articulates an important general principle of incompatibility, it does not set out a complete general test for ultra vires as the law now stands. Further, it must be noted that even in cases decided after *Att-Gen v Great Eastern Railway Co*,²⁰⁴ the courts continued to apply the principle from the *Leake* case as the exclusive test for ultra vires where the issue concerned a right of way.²⁰⁵ There is some authority to support the use of the incompatibility test as the sole

criterion of ultra vires in other situations,²⁰⁶ but this has been doubted,²⁰⁷ and it is submitted that the doubts are well founded. A more generous approach than normal to the question of vires may be justified in the case of public rights of way by the combination of the resulting benefit to the public at large,²⁰⁸ and the policy of maximising land use.²⁰⁹ But, since such an approach has the potential to authorise acts which are beyond the authority's express or implied statutory powers, its use should remain exceptional.

Application of the compatibility test

- 13-033 The compatibility test focuses on how the contract or contractual obligation in question affects the authority's performance of its statutory functions. The impact is judged in the first instance by setting the statutory powers and duties affected alongside the contractual undertaking.²¹⁰ The contractual term may be so wide-ranging,²¹¹ or the statutory functions affected so fundamental²¹² that it is clear that the authority's discretion has been unduly fettered.²¹³ However, it may be (and, perhaps, is more likely to be) necessary to prove the incompatibility by evidence. Such evidence need not demonstrate an immediate conflict between contractual performance and statutory functions,²¹⁴ but, on the other hand, the mere possibility of future incompatibility is not enough. Rather, an assessment must be made of the likelihood of incompatibility and of its potential severity.²¹⁵ Thus, although the doctrine is not limited to cases of servitudes,²¹⁶ it is not surprising that servitudes have provided the context in which it has been most frequently applied: the grant of a servitude in perpetuity creates an obvious permanent restriction on the authority's freedom of action. It is not finally settled whether the assessment should be made using only knowledge available at the time the contract was made, or whether all information available at the time of trial can be used.²¹⁷ It is submitted that the use of all available knowledge is preferable: the assessment of incompatibility is not based on what the parties ought to have contemplated, but on the actual effect of the contractual obligation; a more accurate and informed assessment of that effect can be made with knowledge of events occurring after the contract was formed.²¹⁸

Promises not to exercise powers

- 13-034 The more straightforward cases of incompatibility concern express undertakings not to exercise particular powers; in these cases the question is, simply, what impact that undertaking has. Thus, in *Ayr Harbour Trustees v Oswald*²¹⁹ the trustees acquired, by compulsory purchase, a part of the claimant's land fronting the harbour; they argued that an undertaking not to exercise any of their statutory powers to build on that land should be taken into account when assessing the compensation due to the claimant for damage to his remaining land. But the House of Lords held that the promise was ultra vires, since to enforce it would have effectively given the trustees power

to repeal their own statute,²²⁰ and prevent them or their successors from developing the harbour in future. Similarly, where a statute conferred a power on a railway company to acquire land for the building of “works … or other purposes”, a covenant by the company not to construct works on land acquired under that power was held to be ultra vires.²²¹ In both of these cases, it could be said that the promise disowned core parts of the authority’s powers: as was later said of the *Ayr Harbour* case, the trustees there were seeking to “renounce … a part of their statutory birthright”.²²² By contrast, there was held to be no fetter where an authority had acquired land for one particular statutory purpose and had covenanted not to use the land for any other purpose.²²³ Furthermore, if the promise is merely in relation to the renunciation of an ancillary power, it will not be held to be incompatible with the authority’s performance of its functions. Thus, in *Stourcliffe Estates Co Ltd v Corp of Bournemouth*²²⁴ an authority acquiring land for use as a public park had undertaken not to exercise its power to construct public toilets on the land. This promise, relating only to an ancillary power, was enforceable.²²⁵

Positive promises

- 13-035 Where the contractual obligation in question consists of a positive promise to act, the position is more complex. Such a promise may, in effect, equate to a promise not to perform a statutory duty—as, for instance, where magistrates with a duty to preserve the St Andrews golf links purported to grant an unlimited right of way over a road alongside the golf course. The grant was held to be ultra vires, since it deprived the magistrates of their power to regulate traffic along the road.²²⁶ Such cases can be dealt with on the same basis as express renunciations of statutory powers. Where the positive promise does not effectively renounce a power, however, but commits the authority to exercising a power in a particular way, analysis has proved more problematic. In *York Corp v Henry Leetham and Sons Ltd*²²⁷ the authority had the power to levy tolls on river users; it agreed with the defendants that rather than charging them per use of the river, it would accept a fixed annual payment in lieu. The contract was held ultra vires. In *Birkdale District Electric Supply Co Ltd v Corp of Southport*,²²⁸ by contrast, a promise by a statutory corporation not to charge more for electricity than was charged in the neighbouring borough for a period of five years was held to be intra vires. Both cases ostensibly involved a public body committing itself to a certain method of implementing its power to charge, and the differing results have proved difficult to reconcile. Suggested grounds of distinction have included that in the *York* case the authority was effectively renouncing its power to charge²²⁹; and that the authority in the *York* case was not profit-making. The latter point had potentially dual significance: first, there was an obligation to apply the tolls to the upkeep of the river, and the funds for that enterprise should be maximised²³⁰; second, the importance of commercial freedom was far less for a non-profit public body.²³¹ Whatever the merits of the distinction between the two cases,²³² which may be fact specific, the two decisions illustrate the difficulty of drawing a line between a valid exercise

of a discretion and an invalid fettering of that discretion; they also show how policy reasons may inform where that line is ultimately drawn.

Prioritisation of powers

- 13-036 Where an authority's undertaking has the effect of prioritising one of its powers at the expense of another, it is not seen as automatically engaging the rule against fettering. In *R. v Hammersmith and Fulham LBC Ex p. Beddowes*,²³³ for instance, an authority decided to carry out its duty to manage its housing by selling off part of a large complex of flats to a developer on terms that prohibited the council from letting the remainder of the flats in the complex to short-term tenants. These terms effectively committed any future council to selling the rest of the complex to developers. The Court of Appeal held that the restrictive covenants relating to short-term tenants were *intra vires* since they were reasonably made in pursuit of the statutory object of managing housing. Similarly, the grant of a long-term licence under statutory powers was held not to be subject to an implied term that the licence could be terminated if the authority wanted to use the land for some other statutory purpose.²³⁴ In both instances, the authority was seen as having made a valid choice as to which of its powers to prioritise.

Footnotes

- 196 *Southport District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 368, per Lord Sumner.
- 197 (*1833*) 5 B. & Ad. 469.
- 198 *British Transport Commission v Westmorland CC* [1956] 2 Q.B. 214, 227. For the House of Lords consideration of this case see [*1958*] A.C. 126.
- 199 The only observation on this question was made by Denman CJ, who commented that good roads were "extremely useful for the general purposes of the drainage, by facilitating the conveyance of persons and property" (*Leake (1833) 5 B. & Ad. 469, 487*). Quaere whether this would be sufficient to satisfy the current test to imply an ancillary power to grant a public right of way (see above, para.13-030).
- 200 Para.13-028.
- 201 (*1880*) 5 App. Cas. 473.
- 202 (*1884*) 10 App. Cas. 119.
- 203 These cases and *Ashbury Railway Carriage and Iron Co v Riche* (1875) L.R. 7 H.L. 653 were highlighted by Neill LJ in *Crédit Suisse v Allerdale BC* [1997] Q.B. 306, 337. See also *Baroness Wenlock v River Dee Co* (1885) 10 App. Cas. 354.
- 204 (*1880*) 5 App. Cas. 473.

- 205 *Grand Junction Canal Co v Petty* (1888) 21 Q.B.D. 273 (public right of way); *Re An Arbitration between E. Gonty and the Manchester, Sheffield and Lincolnshire Ry Co* [1896] 2 Q.B. 439 (private right of way); *Great Western Ry Co v Solihull Rural DC* (1902) 86 L.T. 852 (public right of way); *South Eastern Ry Co v Cooper* [1924] 1 Ch. 211 (private right of way); *British Transport Commission v Westmorland CC* [1956] 2 Q.B. 214, [1958] A.C. 126 (public right of way). cf. *Mulliner v Midland Ry Co* (1879) 11 Ch. D. 611 where Jessel MR took a narrower approach to construing the relevant statute in relation to the creation of a private right of way.
- 206 *Foster v London, Chatham and Dover Ry Co* [1894] 1 Q.B. 711.
- 207 *Trustees of the Harbour of Dundee v D. & J. Nicol* [1915] A.C. 550, 570–571, where Lord Parmoor stated that *Foster* [1894] 1 Q.B. 711 should be explained in terms of an implication from the express statutory powers.
- 208 *The Board of Works for the Greenwich District v Maudslay* (1870) L.R. 5 Q.B. 397, 401–402, per Cockburn CJ.
- 209 *British Transport Commission v Westmorland CC* [1958] A.C. 126, 142, per Viscount Simonds.
- 210 *Great Western Ry Co v Solihull Rural DC* (1902) 86 L.T. 852, 853, per Collins MR.
- 211 e.g. *Creyke v Corp of the Level of Hatfield Chase* (1896) 12 T.L.R. 383 (alleged unrestricted right to take water from a clough to warp adjoining land).
- 212 e.g. *Ayr Harbour Trustees v Oswald* (1883) 8 App. Cas. 623 (authority created to develop harbour undertaking not to exercise any powers to build on certain land); *Yarl's Wood Immigration Ltd v Bedfordshire Police Authority* [2008] EWHC 2207 (Comm), [2009] 1 All E.R. 886 at [80] giving the example of a promise by a police authority not to exercise its powers to enforce law and order within an immigration detention centre. There was no adverse comment on this example in the Court of Appeal [2009] EWCA Civ 1110, [2010] Q.B. 698. See further, Lord Sumner's comments on the *Ayr Harbour* case in *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 372.
- 213 *British Transport Commission v Westmorland CC* [1958] A.C. 126, 155, per Lord Radcliffe.
- 214 *Great Western Ry Co v Solihull Rural DC* (1902) 86 L.T. 852, 855, per Cozens-Hardy LJ.
- 215 *British Transport Commission v Westmorland CC* [1958] A.C. 126, especially 144, per Viscount Simonds.
- 216 *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 372, per Lord Sumner.
- 217 *British Transport Commission v Westmorland CC* [1958] A.C. 126, 145, per Viscount Simonds; cf. 152–153, per Lord Radcliffe and 160, per Lord Cohen, favouring all available knowledge.
- 218 cf. Turpin, Government Contracts (1972), p.24.
- 219 (1883) 8 App. Cas. 623.
- 220 *Ayr Harbour Trustees v Oswald* (1883) 8 App. Cas. 623, 639–640, per Lord Watson.
- 221 *Heywood's Conveyance; Re Cheshire Lines Committee v Liverpool Corp* [1938] 2 All E.R. 230. See also *Re Staines UDC's Agreement; Triggs v Staines UDC* [1969] 1 Ch. 10; *R. (Kilby) v Basildon DC* [2007] EWCA Civ 479, [2007] H.L.R. 39; *Camurat v Thurrock BC* [2014] EWHC 2482 (QB), [2015] E.L.R. 1 at [65]–[67].

- 222 *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 372. See also J. Mitchell, *The Contracts of Public Authorities* (1954), pp.60–61.
- 223 *Earl of Leicester v Wells-next-the-Sea UDC* [1973] 1 Ch. 110.
- 224 [1910] 2 Ch. 12.
- 225 See also *Blake v Hendon Corp* [1962] 1 Q.B. 283, 303.
- 226 *Paterson v Provost of St Andrews* (1881) 6 App. Cas. 833. See similarly *Att-Gen v Corp of Plymouth* (1845) 9 Beav. 67. cf. *South Eastern Railway Co v Cooper* [1924] 1 Ch. 211 (wide grant of right of way intra vires because expressly subject to grantor's by-laws).
- 227 [1924] 1 Ch. 557.
- 228 [1926] A.C. 355.
- 229 *Southport Corp v Birkdale District Electric Supply Co Ltd* [1925] Ch. 794, 820, per Warrington LJ. Such an analysis is echoed by the reasoning in *Al Fayed v Att-Gen for Scotland* [2004] S.T.C. 1703.
- 230 *Southport Corp v Birkdale District Electric Supply Co Ltd* [1925] Ch. 794, 822–823, per Sargent LJ; *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 366, per Earl of Birkenhead.
- 231 *William Cory & Son Ltd v London Corp* [1951] 2 K.B. 476, 485–486, per Lord Asquith.
- 232 The trial judge in the *Southport* case held that the *York* case was indistinguishable: *Southport Corp v Birkdale District Electric Supply Co Ltd* [1925] Ch. 63.
- 233 [1987] 1 Q.B. 1050; noted by *Tromans* [1987] C.L.J. 377.
- 234 *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 1 W.L.R. 204; the authority subsequently achieved its aims by exercising its statutory planning powers: *Dowty Boulton Paul Ltd v Wolverhampton Corp* (No.2) [1976] 1 Ch. 13.

(c) - Proper Exercise of Powers

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(c) - Proper Exercise of Powers

General principle

13-037 There is extensive authority in support of the requirement that an authority's power to contract must have been exercised properly, in accordance with its public law obligations.²³⁵ The same is true of any power to vary the contractual terms.²³⁶ Thus, for instance, a decision to enter a contract must comply with any relevant procedural requirements,²³⁷ and it must also be consistent with the general principles of public law governing the exercise of powers. These principles include the requirement to have regard only to relevant matters, the requirement not to exercise powers for a collateral purpose, and the requirement not to exercise powers irrationally. However, it must be noted that there is now also support (in dicta) for a narrower approach to this issue; under this narrower approach, a public authority's failure to exercise the power to enter a contract in accordance with its public law duties does not automatically result in the contract being ultra vires, but may require an assessment of the nature of the breach of duty and of the state of knowledge of the other contracting party. This section first considers the wider approach (i.e. that a failure to exercise the power correctly makes the resulting contract void) before turning to the alternative approach.

Relevant matters

13-038 The decision to enter, or to vary a contract, must be taken after having considered all relevant matters, and disregarding all irrelevant matters.²³⁸ Thus, in *Roberts v Hopwood*²³⁹ a local

authority's decision to fix a minimum wage for its employees was held to be ultra vires because, *inter alia*, its decision had been taken pursuant to the legally irrelevant consideration that it should act as a model employer, and in disregard of the relevant consideration that the cost of living had gone down.²⁴⁰ Similarly, in *London & South Eastern Railway v British Transport Police Authority*²⁴¹ the authority was held to have acted ultra vires when it decided to reduce the charges it made to certain train operators, because it had failed to consider whether it could levy correspondingly higher charges against other operators.²⁴²

Collateral purpose

- 13-039 The power to enter or to vary a contract must not be exercised in order to achieve a collateral, improper or extraneous purpose.²⁴³ If the power has been exercised for such a purpose, it is irrelevant that an authority, acting properly, might have made the same decision about how to exercise its powers.²⁴⁴ Thus, in *Crédit Suisse v Allerdale BC*²⁴⁵ an authority guaranteed the overdraft of a company as part of a scheme designed to evade borrowing restrictions imposed by central government; this was held to amount to the pursuit of an improper purpose, and the transaction was held to be ultra vires.²⁴⁶ Similarly, in *Hinckley and Bosworth BC v Shaw*²⁴⁷ the claimant council had agreed a redundancy package with the defendant, under which the defendant would receive a significantly enhanced salary for the final year of his employment, and—despite being given notice of the termination of his employment—would also receive a payment in lieu of notice of termination. Both the increase in salary and the payment in lieu of notice were made in order to increase the defendant's redundancy benefits. It was held that this contract, having been entered for an extraneous purpose, and not in order to fix the defendant's rate of pay, was ultra vires. By contrast, where a public body acknowledges that its powers to enter contracts do not extend to one preferred purpose, it may legitimately use such powers as it has to achieve the next best thing. For example, if a school wishing to provide transport for its students lacked the power to incur the capital expenditure of purchasing minibuses, it would not be ultra vires for the school to enter agreements to hire minibuses for the students as and when needed.²⁴⁸

Irrationality

- 13-040 A contract will be found to be ultra vires on the ground of irrationality where no reasonable authority would have entered that contract.²⁴⁹ It should be emphasised that “irrationality” cannot simply be equated with a contractual obligation to act reasonably: irrationality is a distinctive public law concept denoting that the authority acted as no reasonable authority would act, and it requires a court to assess different factors from those involved in a determination of whether a contractual obligation to act reasonably has been satisfied.²⁵⁰ Irrationality may be manifested

by the nature of the transaction itself, or by the terms of the agreement. An example of the former kind of irrationality is provided by *Hazell v Hammersmith and Fulham LBC*,²⁵¹ where an authority entered multiple complex financial transactions despite lacking officers with the training or experience to deal with such transactions, and without having taken any legal advice. It was held that the authority's actions had been irrational, and the contracts were, therefore, ultra vires.²⁵² A contract will also be ultra vires on the ground of irrationality where, despite being of a legitimate type, its individual terms are irrationally generous.²⁵³ Thus, in *Roberts v Hopwood*,²⁵⁴ a local authority's decision in 1922 to fix a minimum wage of £4 a week for all of its employees, and to disregard reductions in the cost of living, was seen as creating "no rational proportion" between the rates paid by the authority and a reasonable wage.²⁵⁵ Similarly, in *Re Magrath*²⁵⁶ an authority's decision to make additional payments to the county accountant in respect of work for which he had already received an increased salary was held to be "unreasonable in the highest degree".²⁵⁷ However, more recent cases have emphasised that the court will not be astute to allow a public authority to escape from commercial obligations by relying on its own irrationality, particularly where there are legitimate expectations in the other party to the contract and the contract concerns an essentially private law matter.²⁵⁸

An alternative approach to the proper exercise of powers requirement?

- 13-041 Dicta in the Court of Appeal's decision in *Charles Terence Estates Ltd v Cornwall CC*²⁵⁹ and in *School Facility Management Ltd v Governing Body of Christ the King College*²⁶⁰ may indicate that the courts are considering introducing a more flexible approach to situations where a public body has entered agreements pursuant to an improper exercise of its powers. In *Charles Terence Estates Ltd v Cornwall CC* Maurice Kay LJ indicated that it depended on the circumstances whether such transactions were enforceable against the public body.²⁶¹ Etherton LJ went further, stating that the validity of such transactions should be governed by the principle set out by Browne-Wilkinson J in *Rolled Steel Products (Holdings) Ltd v British Steel Corp*²⁶² for determining the validity of transactions entered by companies.²⁶³ Under that principle, the validity of transactions entered by a company in excess of its powers turns on whether the party with whom the transaction was entered "had notice that the transaction was in excess or abuse of the powers of the company". Both judges found support for their views in the dicta of Hobhouse LJ in *Credit Suisse v Allerdale BC*²⁶⁴; and they both disapproved the dicta of Neill LJ in the same case, which were to the effect that contracts entered into pursuant to an improper exercise of power were void.
- 13-042 The Court of Appeal was not, unfortunately, referred to leading authorities (discussed in the preceding paragraphs), where the issue was directly in point, such as *Hinckley and Bosworth BC v Shaw*²⁶⁵ and *London & South Eastern Railway Ltd v British Transport Police Authority*.²⁶⁶ This criticism could not, however, be made of the decision of Foxton J in *School Facility Management*

Ltd v Governing Body of Christ the King College,²⁶⁷ which is undoubtedly the most sophisticated and thorough judicial analysis of the issue yet undertaken. Foxton J concluded that the law should distinguish between contracts of a kind which the body lacked statutory capacity to enter (and which were therefore void), and contracts of a kind which the body did have capacity to enter, but which had been entered into in a way that breached the authority's public law obligations. In this latter category, the contract would be void only if the authority's powers had been abused, and the other contracting party had notice of this abuse.²⁶⁸

- 13-043 These dicta represent a very significant potential new direction of development. As Foxton J's judgment acknowledges, the new approach is not without its difficulties. It necessitates a fragmented approach to ultra vires, with different kinds of ultra vires acts being given diametrically opposed significance in private law. It also appears to apply only to situations in which a public authority is seeking to assert that its own acts have been ultra vires; while this might at first glance appear to be a justifiable restriction, it may well be a matter of pure chance which contracting party happens to be disadvantaged by the contractual performance and finds itself, therefore, taking the ultra vires point.²⁶⁹ Earlier judges (including Neill LJ and Hobhouse LJ in the *Crédit Suisse* case²⁷⁰) had also been concerned by the opportunity for public authorities to use the ultra vires doctrine to disavow their own actions, and these concerns prompted legislation in the form of the **Local Government (Contracts) Act 1997**, which provided a certification mechanism for contracting parties to eliminate the problems of ultra vires.²⁷¹ The **Act** was alert to the possibility that the manner in which a contract was entered by a public authority might make the transaction ultra vires, since in s.2(1) it describes the effect of certification as being that the contract takes effect "as if the local authority had power to enter into it (and had exercised that power properly in entering into it)". Although the contract in the *School Facility Management* case²⁷² was not made with a local authority, so the **1997 Act** procedure could not have been used, it is striking that a statutory mechanism existed which would have authorised precisely the kind of contract that the parties entered, but they chose not to use it.²⁷³ In any case, general assertions about the unfair application of ultra vires to contracting parties are far less persuasive now than they would have been prior to 1997. It should also be noted that, while the potential new approach takes inspiration from the approach to a company's powers set out in the *Rolled Steel* case, the ultra vires principle in its application to companies has now been abrogated by legislation²⁷⁴; applying the *Rolled Steel* approach to public authorities would not, therefore, unify the law's treatment of companies and public authorities.

Footnotes

- 235 *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697; *Crédit Suisse v Allerdale BC* [1995] 1 Lloyd's Rep. 315, [1997] Q.B. 306; *London & South Eastern Railway Ltd v British Transport Police Authority* [2009] EWHC 460 (Admin) at [47]–[48]. cf. the dicta in *Charles*

- Terence Estates Ltd v Cornwall CC* [2012] EWCA Civ 1439, [2013] 1 W.L.R. 466, followed in *Pro-Vision Systems (UK) Ltd v United Lincolnshire Hospital NHS Trust Unreported* 21 February 2014 (Judge Waksman QC) at [176].
- 236 *Wandsworth LBC v Winder* [1985] 1 A.C. 461.
- 237 e.g. *R. (Transport & General Workers Union) v Walsall MBC* [2001] EWHC 452 (Admin).
- 238 *Roberts v Hopwood* [1925] A.C. 578; *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] I.R.L.R. 786 (not irrelevant, on the facts, to consider employee's previous loyalty and service in fixing compensation for termination of employment—see in particular [21]); *London & South Eastern Railway Ltd v British Transport Police Authority* [2009] EWHC 460 (Admin).
- 239 [1925] A.C. 578.
- 240 [1925] A.C. 578, 600 (Lord Atkinson), 609 (Lord Sumner).
- 241 [2009] EWHC 460 (Admin).
- 242 [2009] EWHC 460 (Admin) at [46].
- 243 *Roberts v Hopwood* [1925] A.C. 578; *Credit Suisse v Allerdale BC* [1995] 1 Lloyd's Rep. 315; affirmed [1997] Q.B. 306; *Hinckley and Bosworth BC v Shaw* [2000] L.G.R. 9; *Eastbourne BC v Foster* [2001] EWCA Civ 1091, [2002] I.C.R. 234; *Tower Hamlets LBC v Wooster* [2009] I.R.L.R. 980 at [39]–[40].
- 244 *Hinckley and Bosworth BC v Shaw* [2000] L.G.R. 9 at 39–40.
- 245 [1995] 1 Lloyd's Rep. 315; affirmed [1997] Q.B. 306.
- 246 [1995] 1 Lloyd's Rep. 315, 343–347; affirmed [1997] Q.B. 306, 333–334. See also the dissenting judgment of Kerr LJ in *R. v Hammersmith and Fulham LBC Ex p. Beddowes* [1987] 1 Q.B. 1050.
- 247 [2000] L.G.R. 9.
- 248 *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), [2020] P.T.S.R. 1913 at [297].
- 249 The classic test for irrationality is set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223 at 229.
- 250 *R. (McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin) at [28]–[36], particularly at [31].
- 251 [1990] 2 Q.B. 697.
- 252 *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 729–730 (DC; the point was not dealt with by either the Court of Appeal or the HL).
- 253 *Newbold v Leicester City Council* [1999] I.C.R. 1182; *Eastbourne BC v Foster* [2001] EWCA Civ 1091, [2002] I.C.R. 234; *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] I.R.L.R. 786 (not irrationally generous on the facts); *Killen v Department of Regional Development* [2010] NIQB 127, [19].
- 254 [1925] A.C. 578.
- 255 [1925] A.C. 578, 600 (Lord Atkinson). See also at 613 (Lord Wrenbury).
- 256 [1934] 2 K.B. 415.
- 257 [1934] 2 K.B. 415, 425 (Scrutton LJ).
- 258 *Newbold v Leicester City Council* [1999] I.C.R. 1182; *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] I.R.L.R. 786 at [6]–[7].

- 259 [2012] EWCA Civ 1439, [2013] 1 W.L.R. 466. Followed in *Pro-Vision Systems (UK) Ltd v United Lincolnshire Hospital NHS Trust* Unreported 21 February 2014, Judge Waksman QC at [176].
- 260 [2020] EWHC 1118 (Comm).
- 261 [2012] EWCA Civ 1439 at [37].
- 262 [1986] Ch. 246, 302–303 and 304 (discussed in detail at paras 12-020—12-026).
- 263 [2012] EWCA Civ 1439 at [48]–[49].
- 264 [1997] Q.B. 306.
- 265 [2000] B.L.G.R. 9.
- 266 [2009] EWHC 460 (Admin).
- 267 [2020] EWHC 1118 (Comm). This aspect of the decision was not subject to appeal: *School Facility Management Ltd v Governing Body of Christ the King College* [2021] EWCA Civ 1053 at [1].
- 268 [2020] EWHC 1118 (Comm) at [159]–[162].
- 269 e.g. the “swaps” cases, such as *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, where movements in currency markets dictated which party would wish to have the agreement declared void.
- 270 *Credit Suisse v Allerdale BC* [1997] Q.B. 306, see above, para.13-039.
- 271 See further paras 13-047 et seq.
- 272 *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), [2020] P.T.S.R. 1913.
- 273 [2020] EWHC 1118 (Comm) at [28].
- 274 See para.12-027 above.

(d) - Alternative Contracts Formed by Conduct

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(d) - Alternative Contracts Formed by Conduct

Identification of alternative contract

- 13-044 Where a contract has been found to be ultra vires, it may be possible to infer a different, intra vires contract, from the dealings between the parties.²⁷⁵ Thus, in *Eastbourne BC v Foster* the parties were an employer and employee who had come to an arrangement in respect of the employee's early retirement which involved a "compromise agreement". Under this agreement, the employee would continue to work for only three days a week, but at his full salary, until the month of his 50th birthday. The employee worked for three days per week for the specified period, but the "compromise agreement" was held to be ultra vires on the grounds of irrational generosity and improper purpose.²⁷⁶ The Court of Appeal held that whilst the ultra vires contract must be disregarded, the conduct of the parties showed that a relationship of employment continued to exist between them, and the employee was entitled to claim for work done on a contractual basis. Unfortunately, the reasoning of the Court of Appeal is not free from difficulty. The Court relied on the decision in *Craven-Ellis v Canons Ltd*,²⁷⁷ which concerned a quantum meruit claim for the value of services conferred at the defendant's request, in which Greer LJ had been careful to point out that the claim was not contractual. The Court then went on to cite more recent judicial observations criticising the implied contract theory of the law of unjust enrichment. However, in the next paragraph of its judgment, Rix LJ, giving the only full judgment, stated that²⁷⁸:

"Whether the obligation imposed by law in such a case is normally described as contractual, quasi-contractual or restitutionary, may not matter for the purposes of this case, since in any event I would consider that where, as here, the relationship between the parties is best described as a relationship of employment the law must necessarily

impose a contractual solution. I do not think that this is inconsistent with the parallel existence of restitutionary remedies. Thus, in this case, it is possible to say that in contract Mr Foster was entitled to claim reasonable remuneration for the work he did, or in other words a quantum meruit, while in restitution he was both *prima facie* obliged to return the sums he received under the void compromise agreement and at the same time entitled to a defence of change of position.”

It is submitted that it was very unfortunate that the Court invoked the idea of a “quasi-contractual” obligation, since it is now widely accepted that “quasi-contract” is a misleading and unhelpful label.²⁷⁹ It is also regrettable that the Court regarded the quantum meruit remedy as “contractual”, since this blurred the fundamental distinction between claims for breach of contract, and claims in unjust enrichment. Furthermore, it seems to be rather artificial to regard the employee as having implicitly contracted to do work for a “reasonable remuneration” when in fact he had expressly agreed to do it for his full salary. The artificiality of the contractual analysis suggests that greater consideration should have been given to the possibility of analysing the situation purely in terms of unjust enrichment. This could have been done by regarding the services provided by the employee as having been performed on the understanding, subsequently shown to be incorrect, that a valid contractual obligation existed for remuneration. In other words, the situation could have been analysed in terms of failure of basis.²⁸⁰ This analysis has three advantages over the contractual analysis. First, it avoids the need to construct a parallel, implicit contract on different terms to the agreement actually made between the parties. Second, it is a more accurate reflection of what actually took place. Third, it has the advantage of simplicity, since it eliminates the need to investigate any potential relationship between claims in contract and for unjust enrichment.

Consequences of alternative contract analysis

- 13-045 The importance of the contractual analysis in *Eastbourne BC v Foster* can be seen in *Shrewsbury and Telford Hospital NHS Trust v Lairikyengbam*.²⁸¹ There the claimant had been employed by the defendant as a locum consultant cardiologist for a period of nearly three years. The regulations only permitted the employment of locum consultants for up to 12 months.²⁸² The Employment Appeal Tribunal held that the claimant’s employment as a locum consultant beyond the first 12 months had been ultra vires, but it went on to hold that a relationship of employment had, nevertheless, subsisted between the claimant and the defendant for the entire period of the defendant’s work. The Tribunal emphasised that there was no general prohibition on the trust that prevented it from employing the claimant, and that both parties regarded their relationship as one of employment.²⁸³ It followed, therefore, that the claimant was an employee for the purposes of the *Employment Rights Act 1996*, and was entitled to pursue a claim for unfair dismissal. In this situation, it can be seen that it was crucial whether the situation was analysed in terms of contract or unjust enrichment: the contractual analysis entitled the claimant to bring any claims open to an employee;

the unjust enrichment analysis would have entitled him to recover sums reflecting the value of the benefit that his services conferred on the defendant, but the claim would have rested on the failure of the basis of the transaction. In other words, on the unjust enrichment analysis there could have been no claim as an employee. It is possible that the decision in *Shrewsbury and Telford Hospital NHS Trust v Lairikyengbam*²⁸⁴ may be partially explained by a concern not to deprive claimants of their employment rights. However, it rests on an analytical foundation which is unconvincing.²⁸⁵

Footnotes

- 275 *Eastbourne BC v Foster* [2001] EWCA Civ 1091, [2002] I.C.R. 234; *Shrewsbury and Telford NHS Hospital Trust v Lairikyengbam* [2010] I.C.R. 66. On the formation of contracts by conduct, see above paras 4-008, 4-034—4-036.
- 276 See paras 13-039 and 13-040 for discussion of these grounds for holding contractual arrangements ultra vires.
- 277 [1936] 2 K.B. 403, cited in [2001] EWCA Civ 1091, [2002] I.C.R. 234 at [41].
- 278 [2001] EWCA Civ 1091, [2002] I.C.R. 234 at [43].
- 279 *Westdeutsche Landesbank Girozentrale v Islington BC* [1996] A.C. 669, 710 (Lord Browne-Wilkinson), 718 (Lord Slynn), 720 (Lord Woolf), 738 (Lord Lloyd). See further below, paras 32-005—32-008; Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 1-06—1-08. The pioneering work on this subject was undertaken by Peter Birks: see, for example, *Birks* (1984) 37 C.L.P. 1, and *An Introduction to the Law of Restitution* (1985).
- 280 See paras 32-063 et seq.
- 281 [2010] I.C.R. 66 (EAT).
- 282 National Health Service (Appointment of Consultants) Regulations 1996 (SI 1996/701) reg.5(1)(c).
- 283 [2010] I.C.R. 66 at [47].
- 284 [2010] I.C.R. 66 (EAT).
- 285 *Secretary of State for Justice v Betts* UKEAT/284/16, [2017] I.C.R. 1130 at [43], describing the reasoning as “difficult to follow”.

(e) - Ultra Vires and Human Rights

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(e) - Ultra Vires and Human Rights

Impact of human rights on ultra vires

- 13-046 In general, parties to transactions held to be ultra vires must have recourse to the law of unjust enrichment in order to recover any benefits conferred under such transactions.²⁸⁶ However, where a public body makes an ultra vires agreement conferring a right to property, the intended recipient of that property right may also have a remedy for breach of his human rights.²⁸⁷ According to European human rights jurisprudence, an ultra vires transaction purporting to confer a property right gives rise to a legitimate expectation of receiving that right; the legitimate expectation is, in itself, a possession for the purposes of art.1 Protocol No.1.²⁸⁸ The right expected to be conferred may be an interest in property,²⁸⁹ or it may relate to a component of the property, such as the existence of planning permission,²⁹⁰ or the absence of any public navigation right over a stretch of river.²⁹¹ What is recognised as a legitimate expectation for these purposes is not dependent on domestic law definitions or classifications.²⁹² Any interference with the right must be for a legitimate aim²⁹³ and proportionate.²⁹⁴ The mere fact that the public authority is reverting to its statutory mandate does not automatically satisfy the tests of justification and proportionality; some form of compensation may be required.²⁹⁵ The remedy for infringement of the right to property cannot require the defendant to confer the property interest which the claimant expected.²⁹⁶ If it takes the form of compensation, the European Court of Human Rights has held that the sum awarded should reflect the proportion of the initial consideration paid that can be attributed to the ultra vires element of the transaction.²⁹⁷ Such an award has been said to be based on unjust

enrichment²⁹⁸; as such, it is an exception to the usual requirement that restitution is only available for a total failure of basis.²⁹⁹

Footnotes

- 286 See generally, Ch.32 below, and Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), Chs 12–14.
- 287 art.1 Protocol No.1, European Convention for the Protection of Human Rights and Fundamental Freedoms; *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12, (2003) 5 E.H.R.L.R. 554.
- 288 *Pine Valley Developments Ltd v Ireland* (1991) 14 E.H.R.R. 319. cf. *Al Fayed v AG for Scotland* [2004] S.T.C. 1703 at [120], where it was conceded that a forward taxation agreement, under which the taxpayer paid a set sum per year, instead of being subject to assessment on actual transactions, created an expectation that engaged art.1. It is difficult to reconcile this concession with the requirement that there should be the expectation of a property right.
- 289 *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12, (2003) 5 E.H.R.L.R. 554.
- 290 *Pine Valley Developments Ltd v Ireland* (1991) 14 E.H.R.R. 319.
- 291 *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2004] 2 Lloyd's Rep. 55.
- 292 *Beyeler v Italy* (2001) 33 E.H.R.R. 1224 at [100]. cf. *Al Fayed v AG for Scotland* [2004] S.T.C. 1703 at [120], where counsel for the defender reserved the right to argue “if the case went further” that an expectation under an ultra vires agreement was a nullity and could not, therefore, give rise to a legitimate expectation. An appeal to the House of Lords was lodged on 31 January 2005, but was not pursued.
- 293 e.g. *Al Fayed v AG for Scotland* [2004] S.T.C. 1703; Eden [2005] B.T.R. 21 (forward taxation agreement repudiated in order to apply the taxation system equally to all taxpayers). *Pine Valley Developments Ltd v Ireland* (1991) 14 E.H.R.R. 319 (annulment of outline planning permission in order to protect the environment). Quaere, whether the aim of ceasing to act outside statutory powers should not automatically be regarded as a legitimate aim.
- 294 e.g. *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2004] 2 Lloyd's Rep. 55 (reinstatement of public navigation right carried out so as to cause minimal interference to riparian owner).
- 295 *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12; cf. *Pine Valley Developments Ltd v Ireland* (1991) 14 E.H.R.R. 319 (inherently risky nature of property development justified awarding no compensation where claimant deprived of planning permission).
- 296 *Rowland v Environment Agency* [2003] 1 Lloyd's Rep. 427 at [80] (Lightman J); expressly approved by the Court of Appeal [2003] EWCA Civ 1885, [2004] 2 Lloyd's Rep. 55 at [85] (Peter Gibson LJ) and [140] (Mance LJ).
- 297 *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12 at [47]–[50].
- 298 *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2004] 2 Lloyd's Rep. 55 at [88].

299 See below, para.32-063.

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(f) - Statutory Certification

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(f) - Statutory Certification

Local Government (Contracts) Act 1997

13-047 The Local Government (Contracts) Act 1997 introduces a new procedure of certification by local authorities.³⁰⁰ If a contract is certified, it takes effect “as if the local authority had power to enter into it (and had exercised that power properly in entering into it)”.³⁰¹ In other words, it will be no defence to an action on the certified contract that the authority lacked capacity to enter it. The certification requirements must be strictly observed,³⁰² including the time limits prescribed.³⁰³ The Act sets out a list of matters that the certificate must contain.³⁰⁴ Most importantly, the certificate must identify the power under which the local authority purports to act,³⁰⁵ and it must state that the contract is within s.4(3) or s.4(4) of the Act.³⁰⁶ Section 4(3) states that a contract falls within the subsection:

“... if it is entered into with another person for the provision or making available of services (whether or not together with assets or goods) for the purposes of, or in connection with, the discharge by the local authority of any of its functions ...”³⁰⁷

and it operates, or is intended to operate for at least five years.³⁰⁸ Contracts within s.4(4) essentially relate to the financing or insurance arrangements connected with contracts within s.4(3). It appears, therefore, that the certification process applies only to contracts for the provision of services for five years or more, and contracts ancillary to those contracts, although once a certificate has been issued, it cannot be invalidated “by reason that anything in the certificate is

inaccurate or untrue".³⁰⁹ It should be noted, however, that certification has no effect on either judicial review or audit review³¹⁰: a certified contract may still be held to be of no effect under either of these procedures.³¹¹

Footnotes

- 300 Local Government Contracts Act 1997 s.1(3). The new procedure also applies (with amendments) to contracts made by Welsh government authorities: the Government of Wales Act 2006 (Local Government (Contracts) Act 1997) (Modifications) Order 2007 (SI 2007/1182).
- 301 Local Government (Contracts) Act 1997 s.2(1).
- 302 Local Government (Contracts) Act 1997 s.2(2).
- 303 Local Government (Contracts) Act 1997 s.2(3) and s.2(5).
- 304 Local Government (Contracts) Act 1997 s.3.
- 305 Local Government (Contracts) Act 1997 s.3(2)(d).
- 306 Local Government (Contracts) Act 1997 s.3(2)(c).
- 307 Local Government (Contracts) Act 1997 s.4(3)(a).
- 308 Local Government (Contracts) Act 1997 s.4(3)(b).
- 309 Local Government (Contracts) Act 1997 s.4(1).
- 310 Local Government (Contracts) Act 1997 s.5.
- 311 See Local Government (Contracts) Act 1997 ss.6 and 7 for the consequences of such a finding.

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Section 4. - Tender Process Contracts

The nature of tender process contracts

- 13-048 Where a party initiates a process of competitive tendering and tenders are submitted, a contract may come into existence between the party and the tenderers that governs the manner in which the competition will be conducted. Such a contract may be based on an express undertaking by the party inviting tenders, but may also be implied.³¹² Thus, in *Blackpool and Fylde Aero Club Ltd v Blackpool BC*³¹³ the Council formally invited six parties to tender for a concession to operate pleasure flights from the local airport. The invitation to tender specified, amongst other things, the deadline for receipt of tenders and also stated that no late tenders would be considered. The claimants submitted a tender before the deadline, but as a result of a careless failure by Council staff to empty the post box at the town hall, it was treated as late and excluded from consideration. The Court of Appeal held that a contract should be implied between the parties; one of the terms of that contract was that if a conforming tender was submitted before the deadline, it would be “opened and considered in conjunction with all other conforming tenders or at least ... will be considered if others are”.³¹⁴ While in principle there seems nothing to prevent the implication of a similar contract where the party inviting tenders is a private body or person,³¹⁵ similar implied contracts are particularly likely to arise when the invitation is made by a public authority.

Footnotes

³¹² For an example of an (arguable) express contract see *Turning Point Ltd v Norfolk CC [2012] EWHC 2121 (TCC)*.

- 313 [1990] 1 W.L.R. 1195; noted by *Adams and Brownsword* (1991) 54 M.L.R. 281, *Davenport* (1991) 107 L.Q.R. 201. See also *Arrowsmith* (2004) 5 P.P.L.R. NA125.
- 314 *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195, 1202.
- 315 Though the public character of the defendant was relied on by the plaintiff as support for the existence of the contract as it had as a matter of public law a duty to comply with its standing orders (to consider tenders) and a fiduciary duty to ratepayers to act with reasonable prudence in managing its financial affairs: *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195, 1201; and Bingham LJ gave some weight to this: *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195, 1202. See further below, para.13-049.

(a) - Conditions for the Implication of a Tender Process Contract

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Section 4. - Tender Process Contracts

(a) - Conditions for the Implication of a Tender Process Contract

Legal conditions

- 13-049 A contract arising out of the tender process will only be implied where both the legal and the factual matrix permit. So far as the legal matrix is concerned, the implication of a tender process contract may be precluded by the existence of another legal mechanism regulating the relationship of the parties. Thus, for instance, in *St George Soccer Football Association Inc v Soccer NSW Ltd*,³¹⁶ the Supreme Court of New South Wales held that the implication of a tender process contract was precluded by the fact that the relationship between the parties was already governed by the constitution of the defendant. It is submitted that this decision reflects English law. The same principle applies where the tender process is subject to public procurement regulations.³¹⁷ If the regulations apply to the transaction, no tender process contract can be implied, since such a contract would be both “unnecessary and would, if implied, be inconsistent with the statutory scheme”.³¹⁸ Thus, for instance, a disappointed tenderer who failed to bring a claim under the regulations within the prescribed three-month time limit could not opt to take advantage of the longer limitation period applicable to contractual claims.³¹⁹ If, on the other hand, the transaction falls outside the scheme of the regulations, there is nothing to prevent the implication of a contract between the parties under which the authority promises to consider the tender in good faith.³²⁰

Factual conditions

- 13-050

Once any legal obstacles to the implication of a tender process contract have been dealt with, the factual matrix must be examined, in order to ascertain whether the implication of a contract is justified. The express dealings and discussions between the parties may exclude any such implication.

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U If a tender process contract has not been negated, a variety of factors must be assessed. In *Blackpool & Fylde Aero Club Ltd v Blackpool BC*

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U it was particularly emphasised that tenders had been solicited by the invitor,

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U there was a small number of invitees,

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U who were known to the invitor,

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U and the invitation set out a “clear, orderly and familiar” procedure.

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U Some weight was also given to the fact that the defendant was a local authority.

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U It seems that there is no need to identify a particular offer or acceptance in the facts (the Court of Appeal in the *Blackpool* case did not do so)

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U; but it is necessary to show an intention to create legal relations.

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U Subsequent English authorities have held that tender process contracts have come into existence in similarly formal contexts

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U; and there is Australian authority to support the view that no contract can be inferred where the tender process is highly informal.

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U Whether such a contract can only be implied where the party inviting tenders is a public body, is more controversial. As mentioned above, some weight seemed to be given to the defendant’s status as a public body in the *Blackpool* case, and a similar emphasis can be seen in some Commonwealth authorities.

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However, in *J & A Developments Ltd v Edina Manufacturing Ltd*

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the High Court of Northern Ireland held that the implication of tender process contracts was not limited to cases of public authorities.

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It is submitted that this is the better view: the fundamental question is whether a tender process contract can be inferred from the parties' conduct and is consistent with the surrounding legal and factual matrix; such an inference is perfectly possible where the party inviting tenders is not a public body.

Footnotes

316 [2005] NSWSC 1288.

317 Described in outline below at paras 13-057 et seq.

318 *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10 at [60]; see also *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch) at [212], *J Varney & Sons Waste Management Ltd v Hertfordshire CC* [2010] EWHC 1404 (QB) at [232]–[235]. The more ambivalent approach visible in *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con. L.R. 1, which seems to have been to deny an implied contract only where the tenderer had a valid claim under the Regulations (as opposed to the transaction merely coming within the Regulations) seems to have been abandoned.

319 *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10 at [58]–[59]; *Montpellier Estates Ltd v Leeds City Council* [2013] EWHC 166 (QB) at [465]–[467].

320 *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10 at [61]–[63].

321 *Greville v Venables* [2007] EWCA Civ 878 at [36]–[40], per Lloyd LJ; *Adferiad Recovery Ltd v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC).

322 [1990] 1 W.L.R. 1195.

323 *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1202, per Bingham LJ.

324 *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1203, per Stocker LJ.

325 *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1202, per Bingham LJ.

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Blackpool and Fylde Aero Club Ltd v Blackpool BC [1990] 1 W.L.R. 1195 at 1202, per Bingham LJ.

- ①327 *Blackpool and Fylde Aero Club Ltd v Blackpool BC [1990] 1 W.L.R. 1195* at 1202, per Bingham LJ; *Central Tenders Board v White [2015] UKPC 39, [2015] B.L.R. 727* at [28].

- ①328 See similarly the exposition by the Supreme Court of Western Australia in *Dockpride Pty Ltd v Subiaco Redevelopment Authority [2005] WASC 211* at [121], which acknowledged that, in the tender process context, “a contract may be made without the formalities of offer and acceptance”. cf. *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd [2006] NZCA 295* at [15], where the Court of Appeal of New Zealand asserted that offer and acceptance must be shown in order for a tender process contract to be created.

- ①329 *Blackpool & Fylde Aero Club Ltd v Blackpool BC [1990] 1 W.L.R. 1195* at 1202, per Bingham LJ and 1204, per Stocker LJ.

- ①330 *Fairclough Building Ltd v BC of Port Talbot (1992) 62 B.L.R. 82; Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (1999) 67 Con. L.R. 1*. See also *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd [2006] NZCA 295* at [16]: “the less formal the tender process, the less scope there is for implying any, or at least any onerous, obligations on the party calling for tenders”.

- ①331 e.g. *Hickinbotham Developments Pty Ltd v Woods [2005] SASC 215, (2005) 92 S.A.S.R. 52*.

- ①332 *Hickinbotham Developments Pty Ltd v Woods [2005] SASC 215, (2005) 92 S.A.S.R. 52* at 57. See also *Samuel (2004) 24 O.J.L.S. 335, 356–357*.

- ①333 *[2006] NIQB 85*.

- ①334 *J & A Developments Ltd v Edina Manufacturing Ltd [2006] NIQB 85* at [49]. See also *Adferiad Recovery Ltd v Aneurin Bevan University Health Board [2021] EWHC 3049 (TCC)* at [133], where a key feature of the facts in the *Blackpool* case was said to be “the public obligations of the council as a fiduciary”.

(b) - Contents of a Tender Process Contract

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(b) - Contents of a Tender Process Contract

The terms of tender process contracts

13-051

U The terms of a tender process contract are collected from the language used by the parties and supplemented by implication. Thus, for instance, an express undertaking by the invitor as to the grounds on which a tender would be disqualified would be part of the contract.

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U Similarly, the tender documents might incorporate an otherwise voluntary code of practice; that code will then form part of the contractual terms.

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U Where it is sought to imply terms, the courts have been cautious, and have tended to focus on questions relating to the procedure to be followed in the tendering competition. In *Blackpool & Fylde Aero Club Ltd v Blackpool BC*,

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U for instance, it was held that whilst there was an obligation to *consider* a conforming tender, there was no implied obligation about which tender should be accepted.

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U Nor, it was said, could there be an implied term that the invitor must accept one of the tenders that it received. The Court of Appeal also suggested that, on the facts of that case, a term could be implied not to consider late applications,

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U and not to make a decision before the deadline for receipt of applications had expired. Similarly, in *Fairclough Building Ltd v BC of Port Talbot*

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U it was held that the party inviting tenders could only exclude a conforming tender from consideration on reasonable grounds, such as a concern about the appearance of bias. On the other hand, there is no implied term that the competitive process must be free from apparent bias.

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U However, where the party inviting tenders is a public authority, there is some support for the view that more extensive terms may be implied. In *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*

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U it was said that:

“... it is now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly (see the *Blackpool* and *Fairclough* cases).”

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U

The judge indicated that such contractual obligations derived from the European-inspired statutory procurement Regulations. Those Regulations govern not merely the procedure for considering or excluding tenders, but also deal with the methods of evaluating bids and selecting a winner. It is submitted, however, that the decision in the *Harmon* case should not be seen as imposing implied terms as to methods of evaluation and selection; rather, it should be read in the light of its facts, which concerned procedural unfairness, and in the context of its approving reference to the *Blackpool* and *Fairclough* cases.

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U It is submitted that what the decision in the *Harmon* case establishes is that the requirements to consider conforming tenders and not to exclude them without reasonable cause are illustrations of a wider procedural principle to give equal opportunity to all bidders to make their case. Any wider interpretation would bring the *Harmon* decision into conflict with the Court of Appeal’s more recent decision in *JBW Group Ltd v Ministry of Justice*,

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U where it was held that importing principles from the regulations into the implied contract between the parties could not be justified in terms of the traditional tests for implication, such as business efficacy, and would, in effect, be impermissibly using principles of EU law to alter the way in which contractual terms were implied.

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U A broad general principle of procedural fairness may indeed only be applicable to tender processes initiated by public authorities, on the basis that higher standards of impartiality and fairness can be expected from state contractors. But, if the law is to reflect the “confident assumptions of commercial parties”,³⁴⁷

347

U as Bingham LJ suggested in the *Blackpool* case, there seems to be no good reason why such a general principle of procedural fairness should not apply to all parties.³⁴⁸

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Footnotes

- ①335 *Fairclough Building Ltd v Port Talbot BC* (1992) 62 B.L.R. 82 at 94, per Nolan LJ.
- ①336 *J & A Developments Ltd v Edina Manufacturing Ltd* [2006] NIQB 85.
- ①337 [1990] 1 W.L.R. 1195.
- ①338 *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1204, per Stocker LJ. In *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con. L.R. 1 at [210] Humphrey Lloyd QC commented that the *Blackpool* case “is perhaps no more than authority for the proposition that a contracting authority undertakes to consider all tenders received”.
- ①339 *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195, 1201, per Bingham LJ. For criticism see *Arrowsmith* (1994) 53 C.L.J. 104, 128, who argues that an authority should be free to accept late tenders “provided that all bidders are treated equally”. However, if all bidders are treated equally, that seems to be not so much an acceptance after the deadline as a moving of the deadline. Bingham LJ seemed to have in mind a situation where only one tender had been accepted late; that would be a clear case of inequality of treatment.
- ①340 (1992) 62 B.L.R. 82.
- ①341 *Pratt Contractors Ltd v Transit New Zealand* [2004] B.L.R. 143.
- ①342 (1999) 67 Con. L.R. 1.
- ①343

Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (1999) 67 Con. L.R. 1 at [216].

- ①344 The view expressed in the text is supported by *Adferiad Recovery Ltd v Aneurin Bevan University Health Board [2021] EWHC 3049 (TCC)* at [136].

- ①345 [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10.

- ①346 [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10 at [62]–[63]; *Adferiad Recovery Ltd v Aneurin Bevan University Health Board [2021] EWHC 3049 (TCC)*.

- ①347 *Blackpool & Fylde Aero Club Ltd v Blackpool BC [1990] 1 W.L.R. 1195* at 1201.

- ①348 *Arrowsmith (1994) 53 C.L.J. 104, 127* describes any bidder in a competitive tendering process as “generally expect[ing] only that they will be given a fair opportunity to obtain the contract by demonstrating that they are able to offer the best value”.

Section 5. - Estoppel

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Section 5. - Estoppel

General principles

- 13-052 Equitable estoppel may be successfully invoked against the Crown³⁴⁹ and public authorities,³⁵⁰ but not to the same extent that it is available against private parties. There are four restricting factors. First, estoppel cannot be used to uphold an ultra vires transaction. Second, it cannot be used to prevent the performance of a statutory duty. Third, estoppel must not prevent or hinder the exercise of statutory powers. Fourth, estoppel has no role in matters of public law; where the circumstances are such that they would give rise to an estoppel in private law, they must be dealt with in public law using the doctrine of legitimate expectation.

Estoppel and ultra vires

- 13-053 Estoppel cannot prevent an act from being challenged on the ground of ultra vires.³⁵¹ For example, in *Rhyl UDC v Rhyl Amusements Ltd*³⁵² the Council had granted a succession of leases over Council land to the defendants in circumstances which would otherwise have estopped the Council from denying that it had the capacity to do so. However, it was said that “a plea of estoppel cannot prevail as an answer to a claim that something done by a statutory body is ultra vires”,³⁵³ and the supposed leases were held invalid. The underlying rationale for this rule is that “a party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating”.³⁵⁴ A similar rule, based on the same rationale, prevents the enforcement of a promise by a public authority that a contract it is entering is within its powers.³⁵⁵ By contrast, a promise by a third party that a public authority is acting

within its powers when entering a contract is in principle enforceable. Where the third party is also a public authority, the promise will, it seems, only be enforceable if it would have been within the third party's powers to enter that contract.³⁵⁶

Estoppel and statutory duty

- 13-054 Estoppel cannot be used to prevent the performance of a statutory duty, provided that the duty is imposed by a statute "enacted for the benefit of a section of the public".³⁵⁷ In *Maritime Electric Co Ltd v General Dairies Ltd*³⁵⁸ an electricity supplier had undercharged one of its customers by mistake; the customer had relied on the supplier's statements as to the amounts due, and there was evidence that it had suffered detriment as a result of that reliance. However, it was held that no estoppel could be relied upon, because the supplier, in seeking payment of the full amount, was fulfilling its mandatory, unconditional statutory duty not to charge "a greater or less compensation for any service" than that fixed by statute.³⁵⁹ The Privy Council was careful to limit its reasoning to statutory duties "enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense".³⁶⁰ It is difficult to see what kinds of statutory duties would fail to satisfy this test, but their Lordships perhaps had in mind duties imposed under a private Act of Parliament.

Estoppel and the exercise of statutory powers

- 13-055 Estoppel cannot be used to prevent or hinder the exercise of statutory powers.³⁶¹ Thus, for instance, in *The Mayor, Aldermen and Burgesses of the Borough of Sunderland v Priestman*³⁶² it was held that a local authority could not be prevented from exercising its powers in relation to the upkeep of roads by any prior acts done as private contractors.³⁶³ So far as hindering the exercise of a power is concerned, it was held in *Southend-on-Sea Corp v Hodgson (Wickford) Ltd*³⁶⁴ that an estoppel which prevented the planning authority from adducing evidence in a dispute over the previous use of premises was not permissible.³⁶⁵ However, the Court of Appeal also stated that the principle governing the availability of estoppels against public bodies was analogous to the principle preventing an authority from fettering its discretion by contract.³⁶⁶ This indicates that not all estoppels will be held to hinder the authority's exercise of its statutory powers; rather, as with the fettering principle, an assessment must be made of the likely effect of upholding the estoppel. One situation where it would seem that an estoppel would not hinder the exercise of statutory powers is where an authority treats an application as validly made, despite it having some purely formal defect.³⁶⁷

Estoppel and public law

- 13-056 Where the facts of a case concern a matter of public law, estoppel has no role³⁶⁸; it cannot be asserted either by or against the public authority concerned.³⁶⁹ Any questions which would have related to estoppel, if the matter had been one of private law, must be dealt with in terms of legitimate expectation. This is not a mere matter of labelling³⁷⁰; in particular, any remedies in public law take into account the interests of the general public, whereas in private law they do not. What marks out an activity as relating to public law is difficult to define precisely. But it has been said that public law activities engage the public interest, and have an effect on members of the public who are not parties to the process to an extent that distinguishes them from private law matters, in which “interests only of those directly involved must be considered”.³⁷¹ The main instances of estoppels being denied on the basis that the matter relates to public law are in the area of planning control³⁷²; it has also been held that estoppel could not be relied upon in a dispute over the granting of moorings in a public harbour.³⁷³ The question of a Minister’s authority to issue a commercial guarantee has, by contrast, been held not to fall within public law; it is governed by the private law principles of agency.³⁷⁴

Footnotes

- 349 e.g. *Orient Steam Navigation Co Ltd v The Crown* (1925) 21 *Ll.L. Rep.* 301; Street, Governmental Liability (1953), pp.156–157.
- 350 e.g. *Crabb v Arun DC* [1976] Ch. 179.
- 351 *Fairtitle v Gilbert* (1787) 2 *T.R.* 169; *Minister of Agriculture and Fisheries v Hulkin Unreported* 1948, summarised in *Minister of Agriculture and Fisheries v Matthews* [1950] 1 *K.B.* 148, 153–154; *Minister of Agriculture and Fisheries v Matthews* [1950] 1 *K.B.* 148; *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 *W.L.R.* 465.
- 352 [1959] 1 *W.L.R.* 465.
- 353 *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 *W.L.R.* 465 at 474.
- 354 Halsbury’s Laws of England, 4th edn Vol.16 para.1596, approved in *Janred Properties Ltd v Ente Nazionale Italiano Per Il Turismo (The Italian State Tourist Office)* Unreported 14 July 1983 CA; *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), [2020] P.T.S.R. 1913 at [355]–[357].
- 355 *Eastbourne BC v Foster* [2002] I.C.R. 234 at [23]; *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), [2020] P.T.S.R. 1913 at [358].
- 356 *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), [2020] P.T.S.R. 1913 at [365].

- 357 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] A.C. 610 at 620. See also *R. v Blenkinsop* [1892] 1 Q.B. 43, 46, per Mathew J; but quaere whether, if the facts of that case arose today, the authority would not be regarded as having made a determination as to the rate, which it would be bound by (*Re 56 Denton Road, Twickenham* [1953] 1 Ch. 51).
- 358 [1937] A.C. 610.
- 359 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] A.C. 610, 616. Breach of this duty was punishable by fine.
- 360 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] A.C. 610, 620.
- 361 *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1962] 1 Q.B. 416.
- 362 [1927] 2 Ch. 107.
- 363 *The Mayor, Aldermen and Burgesses of the Borough of Sunderland v Priestman* [1927] 2 Ch. 107, 116. See similarly *Stockwell v Southgate Corp* [1936] 2 All E.R. 1343.
- 364 [1962] 1 Q.B. 416.
- 365 Since the case related to planning matters, it would not be dealt with today in terms of estoppel; rather, as a public law matter, it would be dealt with in terms of legitimate expectation. See below, para.13-056.
- 366 *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1962] 1 Q.B. 416, 424. For the principle that a statutory body cannot fetter its discretion by contract see above paras 13-032—13-036.
- 367 *Wells v Minister of Housing and Local Government* [1967] 1 W.L.R. 1000, 1007. Lord Denning MR may have been mistaken in his application of this proposition to the facts of the case: see *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348 at [30].
- 368 *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348.
- 369 *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2004] EWHC 1475 (QB), [2005] Env. L.R. 4 at [35].
- 370 *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348 at [34]; *R. (on the application of Wandsworth LBC) v Secretary of State for Transport Local Government and the Regions* [2003] EWHC 622 (Admin), [2004] 1 P. & C.R. 32 at [22].
- 371 *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348 at [6].
- 372 *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348; *South Bucks DC v Flanagan* [2002] EWCA Civ 690, [2002] 1 W.L.R. 2601; *R. (on the application of Wandsworth LBC) v Secretary of State for Transport Local Government and the Regions* [2003] EWHC 622 (Admin), [2004] 1 P. & C.R. 32; *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2004] EWHC 1475 (QB), [2005] Env. L.R. 4.
- 373 *Yarmouth (Isle of Wight) Harbour Commissioners v Harold Hayes (Yarmouth Isle of Wight) Ltd* [2004] EWHC 3375 (Ch), [2004] All E.R. (D) 66 (Dec).
- 374 *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198 especially at [97]–[102] (summarising counsel's submission that public law concepts should apply), and [123]–[127] (rejecting that submission). The question of authority was not challenged on appeal: *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [6].

(i) - EU-derived Regulations

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Section 6. - Public Procurement

(a) - Domestic Procurement Regimes

(i) - EU-derived Regulations

- 13-057 Prior to 2021, contracts made by the Crown and by public bodies were subject to fundamental principles of EU law enshrined in the Treaty of the European Union, such as freedom of movement of goods, freedom of establishment and freedom to provide services. Treaty provisions will remain part of domestic law after “IP completion day”.³⁷⁵ The EU also made special legislative provision to regulate the formation of such contracts in a series of Directives³⁷⁶ which have been implemented in the United Kingdom by statutory instruments.³⁷⁷ As “EU-derived domestic legislation”, these provisions will continue to have effect in domestic law on and after “IP completion day” (31 December 2020).³⁷⁸

Public Contracts Regulations 2015

- 13-058 Although there are significant differences between the regulations governing concessions contracts, utilities contracts and public contracts which are beyond the scope of this work, an overview of the Public Contracts Regulations is offered here to give a sense of the nature and coverage of this legislation.³⁷⁹ In broad outline, the Public Contracts Regulations require that most public contracts which exceed an estimated threshold value must be allocated pursuant to an open public competition. The guiding principle is that: “Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.”³⁸⁰ The process begins with the publication of a call for competition, in

the form of a “contract notice”.³⁸¹ The authority may choose whether to use an open procedure, a restricted procedure or an innovation partnership; in certain exceptional circumstances it may use a competitive procedure with negotiation or a competitive dialogue.³⁸² In an open procedure any interested operator may submit a tender in response to the contract notice.³⁸³ Under a restricted procedure and an innovation partnership, by contrast, the operator expresses an interest in participating, and provides the authority with the information it has requested in the contract notice so as to enable the authority to make a qualitative decision about whether to invite the operator to submit a tender.³⁸⁴ Applying objective and non-discriminatory criteria, the authority will then determine which operators who satisfy its criteria to participate shall be invited to proceed to tender.³⁸⁵ In all kinds of procedures, only those tenders which comply with the contract notice and other procurement documentation are eligible for the award of the contract. When deciding which tender should succeed:

“Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.”³⁸⁶

This, it should be emphasised, does not mean that the contract must be awarded to the lowest tender: the authority may legitimately consider factors such as quality, technical merit, accessibility and environmental characteristics.³⁸⁷ Once it has awarded a contract, the authority must publish a contract award notice within 30 days.³⁸⁸

Remedies for failure to follow the contract award procedure commenced after 20 December 2009³⁸⁹

- 13-059 Where a contracting authority fails to follow the prescribed procedure, damages can be awarded³⁹⁰; in addition, the new Regulations specify three detailed grounds on which a contract that has been entered into shall be held ineffective, including, for instance, that the authority failed to publish the required contract notice.³⁹¹ If one of those grounds is satisfied, the court must make a declaration of ineffectiveness,³⁹² unless “overriding reasons” of “general interest” require that the contract should continue,³⁹³ and it must also impose penalties.³⁹⁴ A declaration of ineffectiveness makes the contract “prospectively, but not retrospectively, ineffective as from the time when the declaration is made”.³⁹⁵ Wherever such a declaration is made, the court must also impose a fine, payable to the Minister for the Cabinet Office³⁹⁶; if a declaration is denied on the grounds of overriding general interest, either a financial penalty, a reduction in the duration of the contract, or both, must be ordered.³⁹⁷ In addition to these mandatory remedies, the Regulations also permit

the courts to make orders addressing the consequences of declarations of ineffectiveness, such as “issues of restitution and compensation”.³⁹⁸

Footnotes

- 375 European Union (Withdrawal) Act 2018 s.4, as amended. See further above, para.1-025.
- 376 The current Directives are Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ([2014] O.J. L94/1), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ([2014] O.J. L94/65), Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([2014] O.J. L94/243) and Directive 2007/66 amending Council Directives 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] O.J. L335/31.
- 377 Public Contracts Regulations 2015 (SI 2015/102), Concession Contracts Regulations 2016 (SI 2016/273) and Utilities Contracts Regulations 2016 (SI 2016/274) as amended by Public Procurement (Amendment, etc.) (EU Exit) Regulations 2020 (SI 2020/1319).
- 378 See generally above paras 1-016 et seq.; for the treatment of “EU-derived domestic legislation” see in particular para.1-023.
- 379 Full coverage of the procurement regime is offered in S. Arrowsmith, The Law of Public and Utilities Procurement, 3rd edn (2018) and A. Eyo and S. Clear (eds), Public Procurement Law and Practice (looseleaf).
- 380 Public Contracts Regulations 2015 (SI 2015/102) reg.18(1).
- 381 SI 2015/102 reg.26(8); reg.49.
- 382 SI 2015/102 reg.26.
- 383 SI 2015/102 reg.27.
- 384 SI 2015/102 reg.28; reg.31.
- 385 SI 2015/102 reg.65.
- 386 SI 2015/102 reg.67.
- 387 SI 2015/102 reg.67(2)–(7).
- 388 SI 2015/102 reg.50.
- 389 For remedies relating to contract award procedures commenced before this date see the 31st edition of this work at para.12-050.
- 390 Public Contracts Regulations 2015 (SI 2015/102) reg.98(2)(c) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.113(2)(c). See further *EnergySolutions EU Ltd v Nuclear Decommissioning Authority [2017] UKSC 34, [2017] 1 W.L.R. 1373*.
- 391 Public Contracts Regulations 2015 (SI 2015/102) reg.99 and Utilities Contracts Regulations 2016 (SI 2016/274) reg.114.

- 392 Public Contracts Regulations 2015 (SI 2015/102) reg.98(2)(a) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.113(2)(a).
- 393 Public Contracts Regulations 2015 (SI 2015/102) reg.100 and Utilities Contracts Regulations 2016 (SI 2016/274) reg.115.
- 394 Public Contracts Regulations 2015 (SI 2015/102) regs 98(2)(b) and 102; Utilities Contracts Regulations 2016 (SI 2016/274) regs 113(2)(b) and 117.
- 395 Public Contracts Regulations 2015 (SI 2015/102) reg.101 and Utilities Contracts Regulations 2016 (SI 2016/274) reg.116.
- 396 Public Contracts Regulations 2015 (SI 2015/102) reg.102(7) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.117(7).
- 397 Public Contracts Regulations 2015 (SI 2015/102) reg.102(3) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.117(3).
- 398 Public Contracts Regulations 2015 (SI 2015/102) reg.101(4) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.116(4).

(ii) - Domestic Legislation

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Volume I - General Principles

Part 4 - Capacity of Parties

Chapter 13 - The Crown and Public Authorities

Section 6. - Public Procurement

(a) - Domestic Procurement Regimes

(ii) - Domestic Legislation

- 13-060 Whilst there is no comprehensive domestic legislation dealing with public procurement, there are certain broad statutory obligations, especially in relation to public authorities, which may affect which contracts are entered, and on what terms. For instance, the [Local Government Act 1999](#) imposes a duty on local authorities to:

“... make arrangements to secure continuous improvement in the way in which [their] functions are exercised, having regard to a combination of economy, efficiency and value.”³⁹⁹

Similarly, the [Local Government Act 1988](#) requires local authorities to exercise procurement functions without regard to certain “non-commercial” matters.⁴⁰⁰ This latter obligation will be particularly significant where the contract in question is not governed by the European public procurement regime because, for instance, its value falls below the minimum specified threshold.

Footnotes

399 Local Government Act 1999 s.3(1).

400 Local Government Act 1988 s.17.

(b) - International Procurement Regimes

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Chapter 13 - The Crown and Public Authorities

Section 6. - Public Procurement

(b) - International Procurement Regimes

- 13-061 Various international agreements require the United Kingdom to open its markets to the industry of particular countries outside the European Union. Such agreements do not, typically, have direct effect in English law, and may be implemented by conferring on economic entities from those countries the same rights as would be available to them under the European procurement legislation. For example, the obligations of Member States under the World Trade Organization Agreement on Government Procurement will be satisfied by applying the Community Directives on procurement to economic operators from those countries.⁴⁰¹

Footnotes

- 401 Directive 2014/24 preamble para.(17); Directive 2014/25 preamble para.(27); World Trade Organization, Revised Agreement on Government Procurement art.IV.

Section 1. - Foreign States, Sovereigns, Ambassadors and International Organisations

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 4 - Capacity of Parties

Chapter 14 - Political Immunity and Incapacity

Section 1. - Foreign States, Sovereigns, Ambassadors and International Organisations

P. J. S. MacDonald Eggers

Foreign states and sovereigns: the common law rule

- 14-001 The rule at common law was that no independent foreign state or foreign sovereign could be sued in an English court without consent.¹ This immunity was derived from rules of public international law which had become part of English law.² The immunity extended both to direct actions against the state or sovereign and to indirect actions against its property. Formerly, foreign states were afforded immunity not only with regard to governmental activities but also with regard to their purely commercial activities.³ This absolute theory was abandoned by the courts in favour of the more restricted approach under which immunity did not apply either to an action, whether in rem⁴ or in personam,⁵ against a ship belonging to a sovereign state, or one of its organs, if the ship was being operated as an ordinary trading ship, nor indeed to actions in personam generally in relation to ordinary commercial activities⁶; but did extend to governmental acts, *acta iure imperii*, of the sovereign state.⁷

Common law and State Immunity Act 1978

- 14-002 The law of sovereign immunity was largely placed on a statutory basis by the [State Immunity Act 1978](#).⁸ The 1978 Act is not, however, a complete code and matters which are excluded from its

scope will be governed by the rules developed by the common law. Thus the [1978 Act](#) excludes proceedings relating to anything done by or in relation to the armed forces of a state while in the United Kingdom.⁹ Such cases are subject to immunity under the common law rules.¹⁰

Sovereign immunity and human rights

- 14-003 In *Holland v Lampen-Wolfe*¹¹ the House of Lords held that to accord sovereign immunity to the defendant did not deprive the claimant of a fundamental right of access to the English court under art.6 of the European Convention on Human Rights since the immunity of a state was an attribute of the state itself under international law which all other states are, by international law, obliged to accept. Lord Millett said that the doctrine of state immunity deprived the court of the ability to determine or adjudicate upon a certain type of dispute and where the doctrine applied, art.6 was not engaged, because the court had no jurisdiction to exercise in the first place.¹² By contrast, in a series of cases the European Court of Human Rights has either held or assumed that art.6 is engaged in such cases but that the application of the principles of state immunity was compatible with art.6 of the Convention.¹³ The court maintained that while a limitation on a right of access to a court must pursue a legitimate aim and must be proportionate, according immunity to a state in civil proceedings was designed to achieve the legitimate aim of complying with international law by promoting comity and good relations between states through mutual respect for the sovereignty of states. Immunity which reflected generally held rules of public international law did not amount to a disproportionate restriction on the right of access to a court since some such restrictions, including those generally accepted in international law, were inherent. But in *Cudak v Lithuania*¹⁴ the European Court of Human Rights decided that the art.6 rights of a Lithuanian secretary and switchboard operator in Lithuania had been violated by the Lithuanian courts' refusal to exercise jurisdiction over Poland in her claim for unfair dismissal: although immunity pursued a legitimate aim, the grant of immunity was disproportionate in the light of growing agreement that there was no immunity for employment claims by non-nationals. In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*¹⁵ the House of Lords assumed that art.6 of the Convention was engaged, as decided by the European Court of Human Rights in the above cases, but held that according to sovereign immunity to the state and its servants, agents, officials or functionaries in respect of civil claims arising out of alleged acts of torture committed in the state was not disproportionate as inconsistent with a peremptory norm of international law.¹⁶ Lord Bingham of Cornhill, however, had reservations as to whether art.6 was engaged at all, since the rule of international law is not that a state should not exercise over another state a jurisdiction which it has, but that save in cases recognised by international law, of which this case was not an example, a state has no jurisdiction over another state: it was therefore difficult to accept that a state had denied access to its court if it had no access to give.¹⁷ In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*,¹⁸ the Supreme Court, like the Court of Appeal below, preferred not to choose between the competing approaches, but noted that Lords Millett's and Bingham's views were compelling

or powerfully made. In this case, the Supreme Court held that ss.4(2)(b) and 16(1)(a) of the State Immunity Act 1978, to the extent that they were relied on in the claims before the Court, were incompatible with art.6 and, in the case of s.4(2)(b), art.14 of the Human Rights Convention, because they did not reflect a principle of international law.

State Immunity Act 1978

14-004

The Act



U applies both to cases where the question of the immunity of a foreign state arises directly in the proceedings as where the state is named as a defendant, and also to the common case of “indirect impleading”, as where an action between two other parties puts the title to the state’s goods in issue.

20

U The basic principle of the Act is that a foreign state is immune from the jurisdiction of the English courts

21

U whether or not it appears in the proceedings,

22

U and the issue of immunity must be decided as a preliminary issue before the substantive action can proceed.

23

U This immunity applies to any foreign or Commonwealth state, other than the United Kingdom, to the sovereign or other head of state in their public capacity and to the government or any department of that state.

24

U It also applies to a “separate entity”, such as a state corporation, not being a department of the state, where proceedings relate to something done by the separate entity in the exercise of sovereign authority and the state itself would have been immune.

25

U It will be for the courts to develop criteria for determining what constitutes a separate entity.

26

U This immunity extends to servants or agents of the separate entity.

27

U The immunity also extends to a corporate entity owned or controlled by the foreign state since it is only if such ownership or control exists that an entity can realistically be regarded as capable of doing something in the exercise of sovereign authority.

28



14-005 To the general principle of immunity there are several important and wide-ranging exceptions. The most important is that there is no immunity for a state's commercial transactions,

29

U thus confirming the judicial developments confining the common law rule to *acta iure imperii*. Although the meaning given to commercial transactions is to be widely interpreted,

30

U it may still be difficult to determine in any particular case the dividing line between commercial and governmental activity.

31

U The funds in the bank account of a state's London embassy have been considered not to be used for commercial purposes.

32

U If a state grants a lease of its premises to a privately owned company to which the state outsources consular activities such as the handling of passport and visa applications, the property is not being used for commercial purposes within the meaning of s.13(4) of the 1978 Act.

33

U There is no immunity for contractual obligations (whether arising out of a commercial transaction or not) to be performed in the United Kingdom

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U; or in the case of contracts of employment made or to be performed in the United Kingdom

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U; or as to claims for death, personal injury or damage to property caused by misconduct in the United Kingdom

36

U; or in proceedings relating to immovables in the United Kingdom

37

U or to an interest in other property by way of succession, gift or *bona vacantia*

38

- U**; or in the case of proceedings relating to various forms of intellectual property
³⁹
- U**; or the administration of estates or trusts, or insolvency, even though a state may claim an interest in the property
⁴⁰
- U**; or where a state is a member of a corporate or unincorporated body constituted under United Kingdom law or controlled from the United Kingdom
⁴¹
- U**; or in relation to various tax claims
⁴²
- U**; or as to claims arising from use of ships for commercial purposes
⁴³
- U** (again confirming an important common law development); or, finally, where the state has submitted to the jurisdiction of the English courts.
⁴⁴
- U** Such immunity may not be relied on by persons in proceedings provided for under the **International Criminal Court Act 2001** where that immunity arises by reason of a connection with a state party to the Statute of the International Criminal Court, done at Rome on 17 July 1998.
⁴⁵
- U**
- 14-006 The **1978 Act** also deals with a variety of procedural matters, such as service of process on a foreign state.
U
⁴⁶
- U** Power is given to restrict or extend the Act's immunities and privileges by Order in Council in relation to individual foreign states⁴⁷; and provision is also made for the recognition here of foreign judgments involving the United Kingdom as a foreign state.⁴⁸ A certificate from the Secretary of State is conclusive evidence on the question as to whether for the purposes of the Act any country is a state, is part of a federal state and as to the person or persons to be regarded as the head or government of a state.⁴⁹

Crown acts of state

- 14-007 In addition to the law relating to the immunity of foreign states or sovereigns, there are other circumstances in which an English court will decline to entertain proceedings involving sovereign states.⁵⁰ Under the “act of state” doctrine, the courts have no jurisdiction to investigate the propriety of an act of the Crown⁵¹ performed in the course of its relations with a foreign state⁵² and the concept of “act of state” may extend to cover acts authorised or ratified by the Crown in the exercise of sovereign power.⁵³ In *Mohammed v Ministry of Defence*,⁵⁴

U the Supreme Court explained the application of the doctrine which rendered Crown Acts of State as non-justiciable, namely that (1) the act should be an exercise of sovereign power, inherently governmental in nature; (2) the act should be done outside the United Kingdom; (3) the act should be done with the prior authority or subsequent ratification of the Crown; and (4) the act should be done in the conduct of the Crown’s relations with other states or their subjects. Furthermore, English courts have no jurisdiction, it appears, to investigate the propriety of the acts of a foreign sovereign state recognised by Her Majesty’s Government, where the act is performed on the territory of that state.⁵⁵ For the Crown Act of State doctrine to apply the conduct and/or policy in question do not have to be lawful under international law.⁵⁶ However, in principle an act can only be a Crown Act of State if it has been authorised (or ratified) by a government policy or decision which is a lawful exercise of the Crown’s powers as a matter of English domestic law.⁵⁷

Foreign acts of state

- 14-008 The principle of non-justiciability under the “act of state” doctrine may also extend to the acts of a foreign sovereign state performed on territory other than its own territory.⁵⁸

U Indeed, there is now established a general principle that “the courts will not adjudicate upon the transactions of foreign sovereign states” (i.e. non-commercial transactions or matters of a private law character)⁵⁹

U —a principle which calls in such cases for “judicial restraint or abstention”.⁶⁰

U In *Belhaj v Straw*,

61

U and in *Central Bank of Venezuela v Governor and Company of the Bank of England*,

62

U the Supreme Court analysed the Act of State doctrine in the context of its application to foreign sovereign nations and, in so doing, identified separate strands or rules of the doctrine: (1) a foreign state's legislation will normally be recognised and treated as valid, so far as it concerns acts within the foreign state's jurisdiction or territory; (2) a domestic court will not normally question the validity of any sovereign act of a foreign state's executive within the foreign state's jurisdiction or territory, at least in times of civil disorder; (3) it is inappropriate for the courts of the United Kingdom to resolve certain issues that will be non-justiciable (even if they occur outside the foreign state's jurisdiction) because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not to rule on it, for example the making war and peace, the making treaties and the annexation and cession of territory, and the legality of acts of a foreign government in the conduct of foreign affairs.

63

U The doctrine does not apply where the State whose own acts are said to be acts of state itself requests the court to adjudicate upon such acts.

64

U Further, the doctrine does not apply where there is no challenge to the validity or lawfulness of an act of a foreign state.

65

U This principle does not, however, preclude an English court from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred.

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U Thus, in appropriate circumstances, it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law on the grounds of public policy.

67

U Further, the principle does not mean that the court must shut its eyes to a breach of an established principle of international law committed by one state against another when the breach is plain, since in such cases the standards being applied to adjudicate on the issues are clear and manageable and do not call for the exercise of judicial self-restraint.

68

U Unlike sovereign immunity, the principle of non-justiciability under the "act of state" doctrine is not capable of being waived, because it is a matter going to the substantive jurisdiction of the Court.

69

U

The UK government's recognition of a foreign State

14-008A In *Mohamed v Breish*,

U 70

U the Court of Appeal explained the “one voice” principle (which is distinct from the Act of State doctrine), namely that where Her Majesty’s Government has recognised the existence of a foreign state, or a person or body as the government of a foreign state, the English Court is bound to treat the state as a sovereign state, and the government as the government of a sovereign state, in its determination of disputes before it. The Court does so because the recognition of foreign states and governments is constitutionally part of the function of Her Majesty’s Government as the executive branch of the state, and the Crown must speak with one voice in its executive and judicial functions in this aspect of international relations. In *Central Bank of Venezuela v Governor and Company of the Bank of England*,

71

U the Supreme Court held that a formal statement of recognition by HM Government is conclusive and that the language of “de jure” and “de facto” recognition no longer has a useful role to play. The Supreme Court added that it is not permissible to infer or imply that the UK government has recognised a State or an organ of a State for the purposes of determining the existing of an established ground of immunity or the application of the act of state doctrine.

Foreign heads of state, ambassadors and their staffs

14-009 The immunity from suit of foreign ambassadors and members of their staff is conferred by the Diplomatic Privileges Act 1964,

U 72

U which enacts as part of the law of the United Kingdom certain articles of the Vienna Convention on Diplomatic Relations (1961).

73

U These articles are set out in *Sch.1 to the Act*. Where a foreign sovereign or other head of a recognised state acts in their public capacity, effectively as the embodiment of the state, they are entitled to all the immunities which the state has under the *State Immunity Act 1978*.

74

U When acting in a private capacity, however, such a foreign sovereign or other head of a recognised state is entitled to the immunities, with certain appropriate modifications, which are conferred by the [Diplomatic Privileges Act 1964](#), since the [1978 Act](#) extends those immunities to such persons.

75



- 14-010 The immunity from suit of the chief representatives in the United Kingdom of countries of the Commonwealth and of the Republic of Ireland, and of members of their staffs, formerly depended on [s.1\(1\) of the Diplomatic Immunities \(Commonwealth Countries and Republic of Ireland\) Act 1952](#). But that subsection has been repealed⁷⁶ and such immunity now depends on the [Diplomatic Privileges Act 1964](#), i.e. on the Vienna Convention.⁷⁷

Categories of persons entitled to diplomatic immunity

- 14-011 The Convention divides persons entitled to diplomatic immunity into three categories⁷⁸: (1) “diplomatic agents”, namely, the head of the mission and members of their diplomatic staff⁷⁹; (2) “members of the administrative and technical staff”, e.g. persons employed in secretarial, clerical, communications and public relations duties; and (3) “members of the service staff”, namely, members of the staff of the mission in its domestic service.

Diplomatic agents

- 14-012 Diplomatic agents enjoy immunity from criminal, civil

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U and administrative jurisdiction and from execution, except in four cases: (a) an action relating to private immovable property situated in the United Kingdom (unless the property is held for the purposes of the mission,

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U and this does not include a diplomatic agents private residence)

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U; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator or beneficiary as a private person; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent outside their official functions

83

U; and (d) an action in respect of any criminal or unlawful conduct performed in a personal or private capacity, i.e. not in the capacity of a diplomat.

84

U A like immunity is conferred on the members of the family of a diplomatic agent forming part of their household.

85

U In *A Local Authority v AG*

86

U the Court held that there is no implied exception to diplomatic immunity, based on the **Human Rights Act 1998 s.3**, to protect children or vulnerable adults at risk within the diplomat's family forming part of their household. The **Diplomatic Privileges Act 1964** applies only to permanent diplomatic missions; the status of special or ad hoc missions is a matter for the common law.

87

U

Diplomatic premises

14-013 The actual premises of a diplomatic (or consular mission) are inviolable,

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U as is the private residence of a diplomatic agent,

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U despite the fact that a diplomatic agent may not enjoy immunity from suit in respect of it.

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U However, the inviolability of diplomatic premises only applies to ones which are currently so used

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U; and the **Diplomatic and Consular Premises Act 1987** gives the Secretary of State power to determine whether land has diplomatic or consular status.

92

U Similarly, the archives, documents and official correspondence of the mission are inviolable so that it is impermissible to use such documents in the domestic court of the host country, provided that the document in question constitutes or remains part of the mission's archive, documents or official correspondence, and its contents must not have become so widely disseminated in the public domain as to destroy any confidentiality or inviolability that could sensibly attach to it.

⁹³



Administrative, technical and service staff

14-014 The members of the administrative and technical staff of the mission, together with their families forming part of their respective households, and the members of the service staff of the mission, enjoy a like immunity, but with the important qualification that the immunity does not extend to acts performed outside the course of their duties. ⁹⁴

Period of immunity

14-015 Every person entitled to immunity from jurisdiction enjoys it from the moment they enter the United Kingdom to take up their post or, if they are already there, from the moment when their appointment is notified to the department of the Secretary of State concerned. ⁹⁵ In the former case it would not seem necessary, in addition, that their appointment be notified to, or accepted by, the department of the Secretary of State concerned. ⁹⁶ They can claim the immunity even if they only became entitled to it after the issue of the claim form. ⁹⁷ When their functions come to an end, their immunity normally ceases at the moment they leave the country, or on the expiry of a reasonable period in which to do so ⁹⁸; but it continues to subsist in the case of acts performed in the exercise of their functions. ⁹⁹ If a claim form is issued before immunity has ceased, then provided it has not been struck out, the proceedings may continue once the immunity has come to an end. ¹⁰⁰ If they die, the members of their family continue to enjoy the immunity to which they were entitled until the expiry of a reasonable period in which to leave the country. ¹⁰¹ The running of the Statute of Limitations is suspended during such time as the defendant enjoys diplomatic immunity. ¹⁰²

Certificate of entitlement

14-016

If in any proceedings any question arises whether or not any person is entitled to diplomatic immunity, a certificate issued by or under the authority of the Secretary of State stating any fact relating to the question is conclusive evidence of that fact.¹⁰³

British citizens

- 14-017 Diplomatic immunity is restricted if the person entitled to it is a British citizen, a British Dependent Territories citizen or a British Overseas citizen.¹⁰⁴ Diplomatic agents who are such citizens or are permanently resident in the United Kingdom only enjoy immunity from jurisdiction in respect of official acts performed in the exercise of their functions, except in so far as additional immunities may be granted by the receiving state.¹⁰⁵ Other members of the staff of the mission and private servants of members of the mission who are such citizens or are permanently resident in the United Kingdom enjoy immunities only to the extent admitted by the receiving state.¹⁰⁶ The “extent admitted by the receiving state” and the “additional immunities” here referred to mean such as may be specified by Order in Council.¹⁰⁷ Members of the family of diplomatic agents or of members of the administrative or technical staff, or members of the service staff of the mission, enjoy no immunity from jurisdiction if they are British, British Dependent Territories or British Overseas citizens or are permanently resident in the United Kingdom.¹⁰⁸

Consular immunity

- 14-018 The regulation of consular immunity so far as foreign consuls and their staffs are concerned is governed by the [Consular Relations Act 1968](#)¹⁰⁹ giving effect to certain articles of the Vienna Convention on Consular Relations 1963. In the case of civil proceedings, consular officers, who are defined as “any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions”,¹¹⁰ and consular employees, who are any persons “employed in the administrative or technical service of a consular post”,¹¹¹ shall not be amenable to the jurisdiction of the courts of this country in respect of acts performed in the exercise of consular functions.¹¹² This immunity shall not apply, in the case of a contractual action, where such officer or employee did not contract expressly or impliedly as an agent of their sending state or in the case of an action by a third party for damage arising from an accident in the United Kingdom caused by a vessel, vehicle or aircraft.¹¹³ Special provision is made for the fact that immunity from civil jurisdiction shall not be accorded to consular employees who carry on private gainful occupation in the United Kingdom.¹¹⁴ The position of officers from the Commonwealth and the Republic of Ireland who perform duties substantially similar to those performed by consular officers from foreign countries is governed by the [Consular Relations Act 1968](#)¹¹⁵ and Orders in Council made thereunder.

International organisations

- 14-019 The International Organisations Acts 1968¹¹⁶ and 1981, which replaced the International Organisations (Immunities and Privileges) Act 1950, empower the Crown by Order in Council to confer complete immunity from suit and legal process¹¹⁷ upon any international organisation of which the United Kingdom and any other Sovereign power are members,¹¹⁸ and to confer the like immunity from suit and legal process as is accorded to the head of a diplomatic mission upon representatives of the organisation or representatives of a member of any organs or committees of the organisation, and upon specified high officers of the organisation and persons employed by or serving on the organisation as experts or as persons engaged on missions for the organisation.¹¹⁹ Similar immunity extends to the members of the official staff of such representatives, provided they are recognised as holding a rank equivalent to that of diplomatic agent,¹²⁰ and to the members of the family forming part of the household of such representatives, high officers and members of their official staffs holding diplomatic rank.¹²¹ A limited immunity from suit extending only to things done or omitted to be done in the course of the performance of official duties is conferred upon specified subordinate officers and servants of the organisation¹²² and upon members of the administrative or technical service of the representative¹²³ and members of their families forming part of their households.¹²⁴ However, no such immunities may be conferred on any person as the representative of the United Kingdom or as a member of their staff.¹²⁵

Other persons entitled to immunity

- 14-020 Special provision is made in the Acts of 1968 and 1981 for conferring immunity on officers of specialised agencies of the United Nations,¹²⁶ and on other organisations of which the United Kingdom is not a member,¹²⁷ including international commodity organisations.¹²⁸ The Acts further provide for the grant of immunity from suit to the judges and registrars of any international tribunal and to parties to any proceedings before any such tribunal and to their agents, advisers or advocates and to any witnesses in or assessors for the purposes of any proceedings before any international tribunal,¹²⁹ and for the grant of similar immunity to the representatives of foreign states and their official staffs attending conferences in the United Kingdom.¹³⁰ (The Diplomatic Immunities (Conferences with Commonwealth Countries and the Republic of Ireland) Act 1961¹³¹ makes similar provision for representatives of the Commonwealth and of the Republic of Ireland and their official staff attending conferences in the United Kingdom.) Orders in Council have been made applying the Acts of 1950, 1968 and 1981 to a large number of organisations and (in most cases) to their representatives, officers, etc.¹³² Any Order in Council made under

the [1950 Act](#) in force at the time of the passage of the [1968 Act](#) shall continue to have effect, notwithstanding the repeal of the [1950 Act](#), until revoked or varied.¹³³ Special statutes, or Orders in Council made thereunder, confer immunity from suit on a number of international organisations and their representatives in the United Kingdom.¹³⁴ The immunities of major international organisations of which the United Kingdom is a member, such as the United Nations, and of persons employed by or connected with such organisations, are provided for in a variety of separate international agreements.¹³⁵ Since the United Kingdom's departure from the European Union, new arrangements have been made for the extension of immunities and privileges to the European Union, its staff members and family members pursuant to.¹³⁶

Waiver of immunity: common law

- 14-021 At common law, both sovereign¹³⁷ and diplomatic¹³⁸ immunity could be waived by or on behalf of the foreign state concerned. But the doctrine was confined within narrow limits. In the first place, there could be no waiver except with full knowledge of the right and with the authority of the foreign sovereign or ambassador.¹³⁹ Secondly, waiver had to take place at the time when the court was asked to exercise jurisdiction¹⁴⁰: it could not be inferred from a prior contract to submit to the jurisdiction of the court,¹⁴¹ nor from the agreement to submit to arbitration,¹⁴² nor even from an application to the court to set aside an arbitration award,¹⁴³ nor (semble) could it take place after judgment had been pronounced.¹⁴⁴

Submission to jurisdiction

- 14-022 The [State Immunity Act 1978](#) makes express provision for a state to submit to the jurisdiction of the court and thereby waive its state immunity, but such waiver does not exclude the assertion of absolute privilege

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U nor does submission to the adjudicative jurisdiction of the courts necessarily imply submission to the enforcement jurisdiction of the courts.

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U There are detailed rules as to what constitutes submission

¹⁴⁷

U but one of their main effects is to free the doctrine of waiver from its narrow common law limits. Submission may, under the Act, be by prior written agreement and is permitted after a dispute has arisen.

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U A state is also deemed to submit if it institutes the proceedings

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U or if it intervenes, or takes any step, in proceedings unless it does so in reasonable ignorance of facts entitling it to immunity and immunity is then claimed as soon as reasonably practicable.

150

U A state may legally waive immunity by making a unilateral assurance with the intention that it should be bound according to the terms of the said assurance, even if the assurance is not given as the result of an international negotiation or in exchange for a quid pro quo or is not acknowledged by another state.

151

U However, intervention merely to claim immunity or to assert an interest in property in circumstances where the state would have been entitled to immunity in any proceedings brought against it does not constitute submission.

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U A contractual waiver of immunity, without any submission to the jurisdiction of the court, is not a submission for the purposes of the Act

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U; nor is submission to be deduced from a choice of law clause.

154

U Submission extends to any appeal, but not to any counterclaim unless it arises out of the same legal relationship or facts as the claim.

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U The head of a state's diplomatic mission is deemed to have authority to submit on behalf of the state,

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U as is any person who entered into a contract on behalf of the state in respect of proceedings arising out of the contract.

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U Once submission to the jurisdiction is established, the waiver of state immunity is irrevocable.

158

U Submission to the jurisdiction is not submission to execution, though such process may be issued with the written consent of the state.

159



Waiver of diplomatic or consular immunity

- 14-023 The [Diplomatic Privileges Act 1964](#)

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U and the [Consular Relations Act 1968](#)¹⁶¹ provide that diplomatic and consular immunity may be waived by the sending state; and both Acts provide that a waiver by the head or acting head of the mission is deemed to be a waiver by that state.¹⁶² Waiver must always be express, except that the initiating of proceedings precludes the claimant from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim. The waiver of a diplomatic agent's immunity will not of itself operate to waive the immunity attaching to other persons, such as the diplomatic agent's family members.¹⁶³ But though waiver must be express, there is no requirement under the Acts (as there was at common law¹⁶⁴) that it must take place at the time when the court is asked to exercise jurisdiction. The better view, it is submitted, is that there is no such requirement since although waiver is not defined, the term in both Acts is derived from international conventions and should not, therefore, be given the narrow interpretation attributed to it at common law.¹⁶⁵ Unfortunately, however, it has been held that diplomatic immunity cannot be waived by contract inter partes but only by an undertaking or consent, given when the court is asked to exercise jurisdiction,¹⁶⁶ a regressive view which, it is submitted, should not be followed.¹⁶⁷ Waiver of immunity from jurisdiction in civil or administrative proceedings does not imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver is required.¹⁶⁸

Waiver of other statutory immunities

- 14-024 The possibility of waiver of the immunity is specifically provided for in Orders in Council made under the [International Organisations Act 1968](#),¹⁶⁹ and in the [Commonwealth Secretariat Act 1966](#),¹⁷⁰ and the [Arbitration \(International Investments Disputes\) Act 1966](#).¹⁷¹

Footnotes

- 1 *Duke of Brunswick v King of Hanover* (1844) 6 Beav. 1, (1848) 2 H.L.C. 1. The immunity is not available to a state before its own Courts: *Iraqi Civilians v Ministry of Defence (No.2)* [2016] UKSC 25, [2016] 1 W.L.R. 2001 at [11].
- 2 *The Christina* [1938] A.C. 485, 490; *Thai-Europe Tapioca Services Ltd v Government of Pakistan* [1975] 1 W.L.R. 1485. On the current position in public international law, see Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (International Court of Justice, 3 February 2012, available at <http://www.icj-cij.org>). As to the international law of diplomatic privilege being applied as part of the common law, see *Triquet v Bath* (1764) 3 Burr. 1478, 1480–1481.
- 3 *The Porto Alexandre* [1920] P. 30; *The Christina* [1938] A.C. 485, 490; *Kahan v Pakistan Federation* [1951] 2 K.B. 1003; *Baccus S.R.L. v Servicio Nacional del Trigo* [1957] 1 Q.B. 438.
- 4 *The Philippine Admiral* [1977] A.C. 373.
- 5 *I Congreso del Partido* [1983] 1 A.C. 244, 261.
- 6 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] Q.B. 529; *Hispano Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep. 277; *Planmount Ltd v Republic of Zaire* [1981] 1 All E.R. 1110; *I Congreso del Partido* [1983] 1 A.C. 244, 261–262; *Alcom Ltd v Republic of Columbia* [1984] A.C. 580, 598–599; *La Generale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27, [2013] 1 All E.R. 409.
- 7 *I Congreso del Partido* [1983] 1 A.C. 244, 262, 272, 276; *Sengupta v Republic of India* [1983] I.C.R. 221; *Littrell v Government of the United States (No.2)* [1995] 1 W.L.R. 82. For discussion of the changes, see *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch. 72, affirmed without reference to these points, [1990] 2 A.C. 418; *La Generale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27, [2013] 1 All E.R. 409.
- 8 See below, para.14-004.
- 9 Consular Relations Act 1968 (s.16(1)(a) of the 1978 Act).
- 10 *Littrell v Government of the United States (No.2)* [1995] 1 W.L.R. 82; *Holland v Lampen-Wolfe* [2000] 1 W.L.R. 1573. Since the 1978 Act is not retrospective (s.22(3)) it will only apply to matters which occurred after it entered into force (November 1978) but it is now most unlikely that matters which occurred before that date, which would be governed by the common law, will arise in practice. cf. *Planmount Ltd v Republic of Zaire* [1981] 1 All E.R. 1110; *Sengupta v Republic of India* [1983] I.C.R. 221. See also *Bat v Germany* [2011] EWHC 2029 (Admin), [2013] Q.B. 349, noted by Sanger (2013) 62 I.C.L.Q. 193.
- 11 [2000] 1 W.L.R. 1573. See also *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 A.C. 1163.
- 12 [2000] 1 W.L.R. 1573, 1588.
- 13 *Fogarty v United Kingdom* (2002) 34 E.H.R.R. 302; *Al-Adsani v United Kingdom* (2002) 34 E.H.R.R. 273, arising out of *Al-Adsani v Government of Kuwait*, *The Times*, 29 March 1995, 107 Int. L.R. 536; *McElhinney v Ireland* (2002) 34 E.H.R.R. 322, arising out of *McElhinney v Williams* [1996] 1 I.L.R.M. 276. See Kloth, Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights (2010); *Fox* (2001) 117 L.Q.R. 10; *Garnett* (2002) 118 L.Q.R. 367; *Voyiakis* (2003) 52 I.C.L.Q. 297; *Lloyd Jones* (2003) 52

- I.C.L.Q.* 463; *Yang* (2003) 74 *B.Y.I.L.* 333; *Garnett* (2005) 54 *I.C.L.Q.* 705; see also *Bat v Germany* [2011] *EWHC* 2029 (Admin), [2013] *Q.B.* 349; *Sanger* (2013) 62 *I.C.L.Q.* 193; *Reyes v Al-Malki* [2017] *UKSC* 61, [2017] 3 *W.L.R.* 923; *Sanger* [2014] *C.L.J.* 1. 14 (2010) 51 *E.H.R.R.* 15; see also *Sabah El Leil v France* [2010] *E.C.H.R.* 1055.
- 15 [2006] *UKHL* 26, [2007] 1 *A.C.* 270. The European Court of Human Rights came to the same conclusion: *Jones v United Kingdom* [2014] 59 *E.H.R.R.* 1, applying the decision of the International Court of Justice in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), 3 February 2012. cf. *Mahamdia v Algeria* (C-154/11) *EU:C:2012:491*, [2013] *I.C.R.* 1. See *Seymour* [2006] *C.L.J.* 479; *Ranganathan* [2015] *C.L.J.* 16. See *Belhaj v Straw* [2017] *UKSC* 3, [2017] 2 *W.L.R.* 456, [11(v)], [108]–[109] (Lord Mance), [258]–[268] (Lord Sumption); *Lysongo v Foreign and Commonwealth Office* [2018] *EWHC* 2955 (QB) at [34]–[35].
- 16 Although international law had established universal criminal jurisdiction in respect of torture, there is as yet no universal civil jurisdiction in respect of torture: [2006] *UKHL* 26 at [19]–[34].
- 17 [2006] *UKHL* 26 at [14]. See, to the same effect, Lord Hoffmann at [64] and *Holland v Lampen-Wolfe* [2000] 1 *W.L.R.* 1573, 1588, per Lord Millett. See also *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] *EWHC* 2239 (Comm), [2006] 1 *W.L.R.* 1420 (restriction on the right of a party to enforce a judgment against a central bank—see *State Immunity Act* 1978 s.14(4)); *Grovit v Nederlandsche Bank* [2005] *EWHC* 2944 (QB), [2006] 1 *W.L.R.* 3323 (according immunity to employees of immune central bank is legitimate and proportionate; affirmed on other grounds, [2007] *EWCA Civ* 712, [2008] 1 *W.L.R.* 51). cf. *Cudak v Lithuania* (2010) 51 *E.H.R.R.* 15. See also *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2015] *EWCA Civ* 835 at [49]–[52]. See also *Aziz v Aziz* [2007] *EWCA Civ* 712, [2008] 2 *All E.R.* 501. In *Lechouritou v Dimosio tis Omospondiakis Dimokratias tis Germanias* (C-282/05) *EU:C:2007:226*, [2007] *E.C.R.* I-1519 the European Court of Justice found it unnecessary to decide whether immunity was compatible with the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. In *Grovit v Nederlandsche Bank* it was held at first instance that immunity was compatible, but the point was not decided by the Court of Appeal. See also *Entico Corp Ltd v UNESCO* [2008] *EWHC* 531 (Comm), [2008] 1 *Lloyd's Rep.* 673 (immunity of international organisation).
- 18 [2015] *EWCA Civ* 33, [2015] *H.R.L.R.* 3 at [16], [2017] *UKSC* 62, [2017] 3 *W.L.R.* 957 at [30]. See also *Ogelegbanwei v President of the Federal Republic of Nigeria* [2016] *EWHC* 8 (QB) at [21]–[26]; *Al Attiya v Al Thani* [2016] *EWHC* 212 (QB) at [82]; *Reyes v Al-Malki* [2017] *UKSC* 61, [2017] 3 *W.L.R.* 923.
- 19 Implementing the 1972 European Convention on State Immunity: Cmnd.5081, though the Act is more extensive in scope. For discussion and references to relevant literature (which is copious) see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 10-002 et seq.; Cheshire, North and Fawcett, Private International Law, 14th edn (2008), pp.491–510; Fox, The Law of State Immunity, 3rd revised edn (2015). See also United Nations Convention on Jurisdictional Immunities of States and their Property (December

2004, not yet in force). For the text of the Convention see (2005) 44 *Int. Leg. Mat.* 803. Although not in force the Convention has been regarded as a strong indicator of international thinking on questions of sovereign immunity: see *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 W.L.R. 1420; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 A.C. 270; *Koo Golden East Mongolia v Bank of Nova Scotia* [2007] EWCA Civ 1443, [2008] Q.B. 717; *NML Capital v Argentina* [2011] UKSC 31, [2011] 2 A.C. 495; *Cudak v Lithuania* (2010) 51 E.H.R.R. 15; Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (International Court of Justice, 3 February 2012), available at <http://www.icj-cij.org>. For comment on the Convention, see *Denza* (2006) 55 I.C.L.Q. 395; *Fox* (2006) 55 I.C.L.Q. 399; *Gardiner* (2006) 55 I.C.L.Q. 407; *Hall* (2006) 55 I.C.L.Q. 411; *Dickinson* (2006) 55 I.C.L.Q. 427; *McGregor* (2006) 55 I.C.L.Q. 437.

- ②0 e.g. *The Parlement Belge* (1880) L.R. 5 P.D. 197; *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] A.C. 582. On the scope of the Act in respect of immunity from taxation, see *R. v IRC Ex p. Camacq Corp* [1990] 1 W.L.R. 191 and below, para.14-005. However, the concept of “indirect impleading” would not extend beyond proceedings relating to property: *Belhaj v Straw* [2014] EWCA Civ 1394, [2015] 2 W.L.R. 1105; *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) at [45]–[70]; *Belhaj v Straw* [2017] UKSC 3, [2017] 2 W.L.R. 456 at [33]–[47].

- ②1 The principle of immunity also precludes registration in England of a foreign judgment against a foreign state under the Administration of Justice Act 1920: see *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB). As to Civil Jurisdiction and Judgments Act 1982 s.31, see *NML Capital Ltd v Argentina* [2011] UKSC 31, [2011] 2 A.C. 495; *Estate of Michael Heiser v Islamic Republic of Iran* [2019] EWHC 2074 (QB). See also *LR Avionics Technologies Ltd v Federal Republic of Nigeria* [2016] EWHC 1761 (Comm), [2016] 4 W.L.R. 120.

- ②2 1978 Act s.1. See *United Arab Emirates v Abdelghafar* [1995] I.C.R. 65; *Malaysian Industrial Development Authority v Jeyasingham* [1998] I.C.R. 307; *Military Affairs Office of the Embassy of the State of Kuwait v Caramba-Coker* (EAT/1054/02/RN, 10 April 2003); *Koo Golden East Mongolia v Bank of Nova Scotia* [2007] EWCA Civ 1443, [2008] Q.B. 717; *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2009] 1 W.L.R. 665. The burden of proof is upon the party asserting that the state is subject to the jurisdiction of the English court: *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397.

- ②3 *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch. 72, 194–195, 252, affirmed without reference to this point, [1990] 2 A.C. 418; *A Co Ltd v Republic of X* [1990] 2 Lloyd's Rep. 520, 525; *Aziz v Republic of Yemen* [2005] EWCA Civ 754, [2005] I.C.R. 1391; *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2009] 1 W.L.R. 665. See also *Mauritius Tourism Promotion Authority v Wong Min*

(UKEAT/0186/08/LA 24 November 2008) (EAT). A claim to immunity should be heard in public: *Harb v King Fahd Bin Abdul Aziz* [2005] EWCA Civ 632, [2006] 1 W.L.R. 578. See also *Aziz v Aziz* [2007] EWCA Civ 712, [2008] 2 All E.R. 501.

- ②4 s.14. See *Propend Finance Pty Ltd v Sing, The Times*, 2 May 1997, 111 Int. L.R. 611; *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse* [1997] 4 All E.R. 108; *Al Attiya v Al Thani* [2016] EWHC 212 (QB) (former prime minister of Qatar). The immunity extends to servants or agents, officials and functionaries of a foreign state in respect of acts done by them as such in the foreign state: *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 A.C. 270; *Pocket Kings Ltd v Safenames Ltd* [2009] EWHC 2529 (Ch), [2010] Ch. 438 (Commonwealth of Kentucky, a constituent territory of the United States, not a “state” for the purposes of State Immunity Act 1978 s.14(1)); *R. (on the application of HRH Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616 (Sultanate of Pahang, Malaysia, not a “state” for the purposes of the State Immunity Act 1978 and Sultan of Pahang not a “Head of State” for those purposes); *Dynasty Company for Oil and Gas Trading Ltd v The Kurdistan Regional Government of Iraq* [2021] EWHC 952 (Comm), [2021] 2 Lloyd’s Rep. 275 at [120]–[124]. See also *Grovit v Nederlandsche Bank* [2005] EWHC 2944 (QB), [2006] 1 W.L.R. 3323; affirmed on other grounds, [2007] EWCA Civ 953, [2008] 1 W.L.R. 51. See also *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil* [2013] EWHC 3494 (Comm), [2013] 2 C.L.C. 835 at [44]–[65], [2015] EWCA Civ 835. As to members of a foreign royal family who were not part of the household of the sovereign or head of state, within the meaning of the State Immunity Act 1978 s.20(1)(b), see *Apex Global Management Ltd v Fi Call Ltd* [2013] EWCA Civ 642, [2014] 1 W.L.R. 492; see below para.14-009.

- ②5 s.14. See *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 W.L.R. 1147 (for further proceedings, see *Kuwait Airways Corp v Iraqi Airways Co* (No.2) [2001] 1 W.L.R. 430; *Kuwait Airways Corp v Iraqi Airways Co* [2003] EWHC 31 (Comm), [2003] 1 Lloyd’s Rep. 448); *Propend Finance Pty Ltd v Sing, The Times*, 2 May 1997, 111 Int. L.R. 611; *Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd* [2008] EWHC 612 (Comm), [2008] 2 Lloyd’s Rep. 90; *Wilhelm Finance Inc v Ente Administrador del Astillero Rio Santiago* [2009] EWHC 1074 (Comm), [2009] 1 C.L.C. 867; *Pocket Kings Ltd v Safenames Ltd* [2009] EWHC 2529 (Ch), [2010] Ch. 438; *R. (on the application of HRH Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616; *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm), [2016] 4 W.L.R. 2; see also *Koo Golden East Mongolia v Bank of Nova Scotia* [2007] EWCA Civ 1443, [2008] Q.B. 717; *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2011] FCAFC 52, (2011) 277 A.L.R. 67, affirmed [2012] HCA 33, (2012) 290 A.L.R. 681. For the position of a state’s central bank or other monetary authority, see *State Immunity Act 1978 s.14(3), (4)*; *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB); *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 W.L.R. 1420. For discussion of the meaning of “separate entity” see *La Generale des Carrières et des Mines v FG Hemispheres Associates*

LLC [2012] UKPC 27, [2013] 1 All E.R. 409. See also *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil [2013] EWHC 3494 (Comm), [2013] 2 C.L.C. 835* at [44]–[65], [2015] EWCA Civ 835.

②26 *Dynasty Company for Oil and Gas Trading Ltd v The Kurdistan Regional Government of Iraq [2021] EWHC 952 (Comm), [2021] 2 Lloyd's Rep. 275* at [45]–[58].

②27 *Dynasty Company for Oil and Gas Trading Ltd v The Kurdistan Regional Government of Iraq [2021] EWHC 952 (Comm), [2021] 2 Lloyd's Rep. 275* at [120]–[124].

②28 Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.10-09. See also *Re Rafidain Bank [1992] B.C.L.C. 301; Kuwait Airways Corp v Iraqi Airways Co [1995] 1 W.L.R. 1147* (for further proceedings, see *Kuwait Airways Corp v Iraqi Airways Co (No.2) [2001] 1 W.L.R. 430; Kuwait Airways Corp v Iraqi Airways Co [2003] EWHC 31 (Comm), [2003] 1 Lloyd's Rep. 448; Propend Finance Pty Ltd v Sing, The Times, 2 May 1997; 111 Int. L.R. 611; Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd [2008] EWHC 612, [2008] 2 Lloyd's Rep. 90; Wilhelm Finance Inc v Ente Administrador del Astillero Rio Santiago [2009] EWHC 1074 (Comm), [2009] 1 C.L.C. 867.*

②29 s.3(1)(a). In *NML Capital Ltd v Argentina [2011] UKSC 31, [2011] 2 A.C. 495* it was held (by a majority) that proceedings to enforce a foreign judgment entered in respect of a commercial transaction are not, of themselves, proceedings relating to a commercial transaction: the same principle applies in respect of proceedings to register a foreign judgment against a foreign state under *Administration of Justice Act 1920*, *AIC Capital Partners v Federal Government of Nigeria [2003] EWHC 1357 (QB)*, and to applications to enforce an arbitration award under Arbitration Act 1996 s.101, *Svenska Petroleum Exploration AB v Republic of Lithuania (No.2) [2006] EWCA Civ 1529, [2006] Q.B. 886*, applied in *Ministry of Trade of the Republic of Iraq v Tsavliris (International) Ltd [2008] EWHC 612 (Comm), [2008] 2 Lloyd's Rep. 90*. See further *ETI Euro Telecom International NV v Republic of Bolivia [2008] EWCA Civ 880, [2008] 1 W.L.R. 665; Continental Transfert Technique Ltd v Federal Government of Nigeria [2009] EWHC 2898 (Comm); Servaas Inc v Rafidain Bank [2011] EWCA Civ 1256, [2012] 1 All E.R. (Comm) 527, affirmed [2012] UKSC 40, [2013] 1 A.C. 595; La Generale des Carrières et des Mines v FG Hemisphere Associates LLC [2012] UKPC 27, [2013] 1 All E.R. 753; Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq [2015] EWCA Civ 835* at [39]–[48]; *Gold Reserve Inc v Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm), [2016] 1 W.L.R. 2829; LR Avionics Technologies Ltd v Federal Republic of Nigeria [2016] EWHC 1761 (Comm), [2016] 4 W.L.R. 120; London Steamship Owners Mutual Insurance Association Ltd v Spain [2021] EWCA Civ 1589, [2021] 1 W.L.R. 3434* at [36]; cf. *Kensington International Ltd v Congo [2005] EWHC 2684 (Comm), [2006] 2 B.C.L.C. 296.*

③0 *UK P&I Club NV v República Bolivariana DE Venezuela [2022] EWHC 1655 (Comm)* at [80].

- ③1 *I Congreso del Partido* [1983] 1 A.C. 244, where the House of Lords divided 3 : 2 on this issue. Section 3(3) of the 1978 Act defines a “commercial transaction” as any contract and any guarantee or indemnity in respect of such a transaction or other financial obligation, or any other transaction or activity into which a state enters (apart from a contract of employment between a state and an individual) otherwise than in the exercise of sovereign authority. It is the character or nature of the transaction, not its purpose, which is critical in characterising the transaction (*UK P&I Club NV v República Bolivariana DE Venezuela* [2022] EWHC 1655 (Comm) at [82]). On s.3(3), see *Alcom Ltd v Republic of Colombia* [1984] A.C. 580; *Amalgamated Metal Trading Ltd v Department of Trade and Industry, The Times*, 21 March 1989; *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 W.L.R. 1147 (for further proceedings, see *Kuwait Airways Corp v Iraqi Airways Co* (No.2) [2001] 1 W.L.R. 430; *Kuwait Airways Corp v Iraqi Airways Co* [2003] EWHC 31 (Comm), [2003] 1 Lloyd’s Rep. 448); *Central Bank of Yemen v Cardinal Finance Investment Corp* [2001] Lloyd’s Rep. Bank. 1; *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (No.2) [2006] EWCA Civ 1529, [2008] Q.B. 886; *Koo Golden East Mongolia v Bank of Nova Scotia* [2007] EWCA Civ 1529, [2008] Q.B. 717; *Orascom Telecom Holding SAE v Republic of Chad* [2008] EWHC 1841 (Comm), [2008] 2 Lloyd’s Rep. 396; *Servaas Inc v Rafidain Bank* [2011] EWCA Civ 1256, [2012] 1 All E.R. (Comm) 527, affirmed [2012] UKSC 40, [2013] 1 A.C. 595; *NML Capital v Argentina* [2011] UKSC 31, [2011] 2 A.C. 495; *La Generale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27, [2013] 1 All E.R. 753; see also *Littrell v Government of the United States* (No.2) [1995] 1 W.L.R. 82; *Holland v Lampen Wolfe* [2001] 1 W.L.R. 1573; *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2011] FCAFC 52, (2011) 277 A.L.R. 67, affirmed [2012] HCA 33, (2012) 290 A.L.R. 681; *European Union v Syrian Arab Republic* [2018] EWHC 1712 (Comm), [30]. See *Staker* (1995) 66 B.Y.I.L. 496; *Fox* (1996) 112 L.Q.R. 186.
- ③2 *Alcom Ltd v Republic of Columbia* [1984] A.C. 580. See also *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB); *Servaas Inc v Rafidain Bank* [2011] EWCA Civ 1256, [2012] 1 All E.R. (Comm) 527, affirmed [2012] UKSC 40, [2013] 1 A.C. 595.
- ③3 *LR Avionics Technologies Ltd v Federal Republic of Nigeria* [2016] EWHC 1761 (Comm), [2016] 4 W.L.R. 120.
- ③4 1978 Act s.3(1)(b), though note the limitation; s.3(2). See *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch. 72, 194–195, 222, 252, affirmed without reference to the point, [1990] 2 A.C. 418.
- ③5 s.4. This section does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Vienna Convention on Diplomatic Relations 1961 scheduled to the *Diplomatic Privileges Act 1964* or of the members of a consular post within the meaning of the Convention scheduled to the *State Immunity Act 1978* s.16(1)(a). See

Sengupta v Republic of India [1983] I.C.R. 221; *United Arab Emirates v Abdelghafar* [1995] I.C.R. 65; *Arab Republic of Egypt v Gamal-Eldin* [1996] I.C.R. 13; *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] I.C.R. 25; *Malaysian Industrial Development Authority v Jeyasingham* [1998] I.C.R. 307; *Government of the Kingdom of Saudi Arabia v Nasser* Unreported 14 November 2000, CA; *Garnett* (1997) 46 I.C.L.Q. 81; *Garnett* (2005) 54 I.C.L.Q. 705. And see *Fogarty v United Kingdom* (2002) 34 E.H.R.R. 302; *Al-Kadhimi v Government of Saudi Arabia* [2003] EWCA Civ 1689; *Aziz v Republic of Yemen* [2005] EWCA Civ 754, [2005] I.C.R. 1391; *Mauritius Tourism Promotion Authority v Wong Min* (UKEAT/0186/08/LA, 24 November 2008) (EAT); *United States of America v Nolan* [2009] I.R.L.R. 923; *Wokhuri v Kassam* [2012] EWHC 105 (Ch); *Abusabib v Taddese* [2013] I.C.R. 603; and see *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 33, [2015] H.R.L.R. 3, [2017] UKSC 62, [2017] 3 W.L.R. 957; *Reyes v Al-Malki* [2017] UKSC 61, [2017] 3 W.L.R. 923; *Webster v United States of America* [2019] 10 WLuk 500 at [91]–[98]. See *Sanger* [2014] C.L.J. 1.

- ③6 s.5; see *Military Affairs Office of The Embassy of the State of Kuwait v Caramba-Coker* (EAT/1054/02/RN, 10 April 2003); *Federal Republic of Nigeria v Ogbonna* [2012] 1 W.L.R. 139 (EAT); *Estate of Michael Heiser v Islamic Republic of Iran* [2019] EWHC 2074 (QB); *Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2022] EWHC 668 (QB), [2022] 1 W.L.R. 3311 at [76]. cf. *Heiser v Iran* [2012] EWHC 2938 (QB).

- ③7 As with proceedings for breach of covenants in a lease: *Intpro Properties (UK) Ltd v Sauvel* [1983] Q.B. 1019. cf. *Re B (A Child) (Care Proceedings: Diplomatic Immunity)* [2002] EWHC 1751 (Fam), [2003] Fam. 16.

- ③8 1978 Act s.6. See *Palmer v Ingram* [2009] EWCA Civ 947.

- ③9 s.7.

- ③10 s.6(3). See *Re Rafidain Bank* [1992] B.C.L.C. 301.

- ③11 s.8. See *MacLaine, Watson & Co Ltd v International Tin Council* [1989] Ch. 253, 282–283, affirmed on other grounds, [1990] 2 A.C. 418.

- ③12 s.11. See Business Rate Supplements Act 2009 s.21(5).

- ③13 s.10. See *Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd* [2008] EWHC 612 (Comm), [2008] 2 Lloyd's Rep. 90.

- ③14 s.2; see CPR r.6.44; see *A Co Ltd v Republic of X* [1990] 2 Lloyd's Rep. 520; *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 W.L.R. 1147 (for further proceedings, see *Kuwait Airways Corp v Iraqi Airways Co (No.2)* [2001] 1 W.L.R. 429; *Kuwait Airways Corp v Iraqi Airways Co* [2003] EWHC 31, (Comm), [2003] 1 Lloyd's Rep. 448); *Mills v Embassy of the United*

States of America Unreported 9 May 2000, CA; Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep. 571; Servaas Inc v Rafidain Bank [2011] EWCA Civ 1256, [2012] 1 All E.R. (Comm) 527, affirmed [2012] UKSC 40, [2013] 1 A.C. 595; NML Capital Ltd v Argentina [2011] UKSC 31, [2011] 2 A.C. 495; European Union v Syrian Arab Republic [2018] EWHC 1712 (Comm), [27]–[29]. On submission in arbitration proceedings, see s.9; Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2005] EWHC 9 (Comm), [2005] 1 Lloyd's Rep. 515; Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No.2) [2005] EWHC 2437 (Comm), [2006] 1 Lloyd's Rep. 181; affirmed [2006] EWCA Civ 1529, [2007] Q.B. 886; Donegal International Ltd v Zambia [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397; Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd [2008] EWHC 612 (Comm), [2008] 2 Lloyd's Rep. 90; London Steamship Owners Mutual Insurance Ltd v Spain [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep. 309, affirmed [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep. 33; Gold Reserve Inc v Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm), [2016] 1 W.L.R. 2829; LR Avionics Technologies Ltd v Federal Republic of Nigeria [2016] EWHC 1761 (Comm), [2016] 4 W.L.R. 120; London Steamship Owners Mutual Insurance Ltd v Spain [2020] EWHC 1582 (Comm), [2020] 1 W.L.R. 4943; London Steamship Owners Mutual Insurance Ltd v Spain [2020] EWHC 1920 (Comm), [2020] 1 W.L.R. 5279; [2021] EWCA Civ 1589, [2021] 1 W.L.R. 3434 at [60]–[69].

④5 International Criminal Court Act 2001 s.23(1). Where the person in question has an immunity by reason of a connection to a state which is not a party to the ICC Statute, proceedings may be taken against that person under the *2001 Act* where the International Criminal Court has obtained a waiver of the immunity in relation to a request for the person's surrender: s.23(2)–(3).

④6 ss.12–14; see *Alcom Ltd v Republic of Colombia* [1984] A.C. 580; *Westminster City Council v Government of the Islamic Republic of Iran* [1986] 1 W.L.R. 979; *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 W.L.R. 1147 (for further proceedings, see *Kuwait Airways Corp v Iraqi Airways Co* (No.2) [2001] 1 W.L.R. 429; *Kuwait Airways Corp v Iraqi Airways Co* [2003] EWHC 31, (Comm), [2003] 1 Lloyd's Rep. 448); *Crescent Oil and Shipping Services Ltd v Importang UEE* [1997] 3 All E.R. 428; *ABCI v De Banque Franco Tunisienne* [2003] EWCA Civ 205, [2003] 2 Lloyd's Rep. 146; *Wilhelm Finance Inc v Ente Administrador del Astillero Rio Santiago* [2009] EWHC 1074 (Comm), [2009] 1 C.L.C. 867; *NML Capital Ltd v Argentina* [2011] UKSC 31, [2011] 2 A.C. 495; *Mashate v Kaguta* [2011] EWHC 3111 (QB). And see *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep. 208, 213; *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm), [2009] Bus. L.R. 558; *Mid East Sales Ltd v United Engineering and Trading Co (PUT)* [2014] EWHC 1457 (Comm), [2014] 2 All E.R. (Comm) 623; *Embassy of Brazil v de Castro Cerqueira* [2014] 1 W.L.R. 3718 (EAT); *PCL v Y Regional Government of X* [2015] EWHC 68 (Comm), [2015] 1 Lloyd's Rep. 483; *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 W.L.R. 2829; *Certain Underwriters at*

Lloyd's London v Syrian Arab Republic [2018] EWHC 385 (Comm). As to whether the service requirements of s.12 are mandatory or may be dispensed with, see *General Dynamics United Kingdom Ltd v The State of Libya [2021] UKSC 22, [2021] 3 W.L.R. 231*. A “separate entity” as defined in s.14(1) is not entitled to be served with proceedings in accordance with s.12(1): *AELF MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV [2022] EWHC 544 (Comm)* at [22]–[36]. As to what constitutes an appearance in proceedings within the meaning of s.12(3), see *AELF MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV [2021] EWHC 3482 (Comm)*, [2022] 1 W.L.R. 2181 at [80]–[102].

47 s.15.

48 ss.18–19.

49 s.21(a). On the importance of the certificate, see *R. (on the application of Alamieyeseigha v Crown Prosecution Service [2005] EWHC 2704 (Admin); R. (on the application of HRH Sultan of Pahang) v Secretary of State for the Home Department [2011] EWCA Civ 616; Khurts Bat v The Investigating Judge of the German Federal Court [2011] EWHC 2029 (Admin), [2013] Q.B. 349; British Arab Commercial Bank Plc v National Transitional Council of the State of Libya [2011] EWHC 2274 (Comm); Democratic Republic of the Congo v FG Hemisphere Associates LLC [2011] HKFCA 747 (Hong Kong Court of Final Appeal); Apex Global Management Ltd v Fi Call Ltd [2013] EWCA Civ 642, [2014] 1 W.L.R. 492.*

50 See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 5-043—5-053.

51 The position of the Crown generally is discussed in Ch.13.

52 e.g. *Secretary of State in Council of India v Kamachee Boye Sahaba (1859) 8 Moo. P.C. 22, 75; Salaman v Secretary of State of India [1906] 1 K.B. 613.*

53 e.g. *Buron v Denman (1848) 2 Ex. 167; Nissan v Att-Gen [1970] A.C. 179; Mohammed v Ministry of Defence [2017] UKSC 1, [2017] 2 W.L.R. 287.*

54 [2017] UKSC 1, [2017] A.C. 649 at [69]–[70] (Baroness Hale), [81] (Lord Sumption). See also *Alseran v Ministry of Defence [2017] EWHC 3289 (QB)*, [38]–[39], [315].

55 *Duke of Brunswick v King of Hanover (1844) 6 Beav. 1, 57–58, (1848) 2 H.L.C. 1, 21–22, 26–27; Carr v Francis Times [1902] A.C. 176, 179–180; Johnstone v Pedlar [1921] 2 A.C. 262, 291; Empresa Exportadora de Acuzar v Industria Azucarera Nacional SA [1983] 2 Lloyd's Rep. 171, 194; Belhaj v Straw [2014] EWCA Civ 1394, [2015] 2 W.L.R. 1105 at [54]–[55], [127]–[133], [2017] UKSC 3, [2017] 2 W.L.R. 456.*

56 *Mohammed v Ministry of Defence [2017] UKSC 1, [2017] 2 W.L.R. 28, [37]; Alseran v Ministry of Defence [2017] EWHC 3289 (QB), [2018] 3 W.L.R. 95 at [54]–[61].*

57 *Alseran v Ministry of Defence [2017] EWHC 3289 (QB) at [62]–[76].*

58 *Belhaj v Straw [2014] EWCA Civ 1394, [2015] 2 W.L.R. 1105 at [127]–[133], [2017] UKSC 3, [2017] 2 W.L.R. 456 at [165] (Lord Neuberger), [237] (Lord Sumption); High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah [2016] EWHC 1465 (Ch), [2016] W.T.L.R. 1763 at [84]–[87]. cf. Yukos Capital Sarl v OJSC Rosneft Oil Co (No.2) [2012] EWCA Civ 855, [2013] 3 W.L.R. 1329 at [66].*

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High Commissioner for Pakistan v Prince Muffakham Jah [2019] EWHC 2551 (Ch), [2020] Ch. 421 at [306]–[314]; *Central Bank of Venezuela v Governor and Company of the Bank of England* [2021] UKSC 57, [2022] 2 W.L.R. 167 at [136].

- 60 *Buttes Gas and Oil Co v Hammer* (No.3) [1982] A.C. 888, 931; and see *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418; *Arab Monetary Fund v Hashim* (No.3) [1991] 2 A.C. 114; *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 W.L.R. 1147 (for further proceedings, see *Kuwait Airways Corp v Iraqi Airways Co* (No.2) [2001] 1 W.L.R. 430; *Kuwait Airways Corp v Iraqi Airways Co* [2003] EWHC 31 (Comm), [2003] 1 Lloyd's Rep. 448); *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep. 543, 572, affirmed on this point [1996] 1 Lloyd's Rep. 589; *Philipp Brothers v Republic of Sierra Leone* [1995] 1 Lloyd's Rep. 289; *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] Q.B. 282; *R. v Home Secretary Ex p. Launder* (No.2) [1998] Q.B. 994; *R. v Home Secretary Ex p. Johnson* [1999] Q.B. 1174; *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159; *Skrine & Co v Euromoney Publications Plc* [2002] I.L.Pr. 281, affirmed on other grounds, [2001] EWCA Civ 1479, [2002] E.M.L.R. 278; *Kuwait Airways Corp v Iraqi Airways Co* (Nos 4 and 5) [2002] UKHL 19, [2002] 2 A.C. 883; *R. (on the application of Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] U.K.H.R.R. 76; *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 116, [2006] Q.B. 70; *AY Bank Ltd v Bosnia and Herzegovina* [2006] EWHC 830 (Ch), [2006] 2 All E.R. (Comm) 463; *Tajik Aluminium Plant v Ermakov* [2006] EWHC 2374 (Comm). See also *R. v Christian* [2006] UKPC 47, [2007] 2 W.L.R. 120; *R. (on the application of Al Rawi) v Secretary of State for Foreign Affairs* [2006] EWHC 972 (Admin); *Mbasogo v Logo Ltd* [2006] EWCA Civ 1370, [2007] Q.B. 846; *Tasarruf Mevduati Sigorta Fonu v Demirel* [2006] EWHC 3354 (Ch), [2007] 1 Lloyd's Rep. 223; affirmed on other grounds [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508; *Total E & P Soudan SA v Edmonds* [2007] EWCA Civ 50, [2007] C.P. Rep. 20; *Korea National Insurance Corp v Allianz Global Corporate and Speciality AG* [2008] EWCA Civ 1355, [2008] 2 C.L.C. 837; *Empresa Nacional de Telecomunicaciones SA v Deutsche Bank AG* [2009] EWHC 2570 (Comm), [2010] 1 All E.R. (Comm) 649; *Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm), [2010] 1 Lloyd's Rep. 324; *Al Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [2011] 2 W.L.R. 225; *BTA Bank v Ablyazof* [2011] EWHC 202 (Comm); *Berezovsky v Abramovich* [2011] EWCA Civ 153, [2011] 1 C.L.C. 359; *Carey Group Plc v AIB Group (UK) Plc* [2011] EWHC 567 (Ch), [2011] 2 All E.R. (Comm) 461; *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1024 (Comm) at [243] et seq.; *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2011] EWHC 1461 (Comm), [2011] 2 Lloyd's Rep. 443 (generally affirmed by the Court of Appeal, [2012] EWCA Civ 855, [2014] Q.B. 458); *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 A.C. 208; *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, [2012] 3 W.L.R. 1087; *Altima Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 W.L.R. 1804; *Yukos Capital Sarl v OJC Rosneft Oil Co* (No.2) [2012] EWCA Civ 855, [2013] 3 W.L.R. 1329; *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] HKFCA 747 (Hong Kong Final Court of Appeal); *Chugai Pharmaceutical Co Ltd v UCB Pharma*

- SA [2017] EWHC 1216 (Pat), [2017] Bus. L.R. 1455.* See generally *McGoldrick (2010) 59 I.C.L.Q. 981.*
- ⑥1 *[2017] UKSC 3, [2017] 2 W.L.R. 456.* See further *R. (on the application of the Friends of the Earth Ltd) v Secretary of State for International Trade [2022] EWHC 568 (Admin), [2022] A.C.D. 61* at [125]–[130], [232] and [241].
- ⑥2 *[2021] UKSC 57, [2022] 2 W.L.R. 167* at [112]–[113] and [136]. At [140] the Supreme Court said that the second rule need not be limited to seizures of property.
- ⑥3 *[2017] UKSC 3* at [11(iii)], [35]–[45] (Lord Mance), [120]–[124] (Lord Neuberger), [234] (Lord Sumption). It was doubted that there is a fourth rule that the doctrine may be invoked where a ruling would embarrass the United Kingdom in its international dealings: at [11(iv)] (Lord Mance), [148]–[149] (Lord Neuberger), [240]–[241] (Lord Sumption). See *Reliance Industries Ltd v Union of India [2018] EWHC 822 (Comm), [2018] 1 Lloyd's Rep. 562* at [104]–[115]; *Ukraine v Law Debenture Trust Corp Plc [2018] EWCA Civ 2026, [2019] 2 W.L.R. 655; Central Bank of Venezuela v Governor and Company of the Bank of England [2021] UKSC 57, [2022] 2 W.L.R. 167* at [113(4)].
- ⑥4 *Federal Republic of Nigeria v JP Morgan Chase Bank NA [2022] EWHC 1447 (Comm)* at [196].
- ⑥5 *AAA v Unilever Plc [2017] EWHC 371 (QB)* at [35]–[62]; *[2018] EWCA Civ 1532.*
- ⑥6 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 A.C. 883; Republic of Ecuador v Occidental Exploration and Production Co [2005] EWCA Civ 116; AY Bank v Bosnia and Herzegovina [2006] EWHC 830 (Comm), [2006] 2 All E.R. (Comm) 463; Belhaj v Straw [2014] EWCA Civ 1394, [2015] 2 W.L.R. 1105* at [54]–[55], [81]–[93], *[2017] UKSC 3, [2017] 2 W.L.R. 456* at [11(v)], [85]–[107] (Lord Mance), [153]–[162] (Lord Neuberger), [249]–[280] (Lord Sumption); *Mohammed v Secretary of State for Defence [2015] EWCA Civ 843.* See also *Habib v Commonwealth of Australia (2010) 183 F.C.R. 62 (Fed Ct Aust.); Collins (2002) 51 I.C.L.Q. 485.*
- ⑥7 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19; Empresa Nacional de Telecomunicaciones SA v Deutsche Bank AG [2009] EWHC 2579 (Comm), [2010] 1 All E.R. (Comm) 649; Yukos Capital Sarl v OJSC Rosneft Oil Co [2011] EWHC 1461 (Comm), [2011] 2 Lloyd's Rep. 443* (generally affirmed by the Court of Appeal, *[2012] EWCA Civ 855, [2014] Q.B. 458*). See also *Republic of Ecuador v Occidental Exploration and Production Co [2005] EWCA Civ 116.*
- ⑥8 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19; Belhaj v Straw [2014] EWCA Civ 1394, [2015] 2 W.L.R. 1105* at [54]–[55], [81]–[93]; *[2017] UKSC 3, [2017] 2 W.L.R. 456* at [11(v)], [85]–[107] (Lord Mance), [153]–[162] (Lord Neuberger),

- [249]–[280] (Lord Sumption); *Ukraine v Law Debenture Trust Corp Plc [2018] EWCA Civ 2026, [2019] 2 W.L.R. 655* at [173]–[181]; *Central Bank of Venezuela v Governor and Company of the Bank of England [2021] UKSC 57, [2022] 2 W.L.R. 167* at [136].
- ⑥9 *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3) [2000] 1 A.C. 61, 90; High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah [2016] EWHC 1465 (Ch), [2016] W.T.L.R. 1763* at [89]–[90]. However, it might be waived by an express and specific submission to arbitration: *Reliance Industries Ltd v Union of India [2018] EWHC 822 (Comm)*, [2018] 1 Lloyd's Rep. 562 at [117]–[120], [128]–[131].
- ⑦0 [2020] EWCA Civ 637, [2020] 1 C.L.C. 858. In *Central Bank of Venezuela v Governor and Company of the Bank of England [2021] UKSC 57, [2022] 2 W.L.R. 167* at [96], the Supreme Court criticised the analysis undertaken by the Court of Appeal on the facts in *Mohamed v Breish* because it was inconsistent with the one voice principle.
- ⑦1 [2021] UKSC 57, [2022] 2 W.L.R. 167 at [69]–[79] and [96]–[100]. See further *Kuwait Investment Office v Hard [2022] EAT 51* at [47]–[52], [104]–[105] and [109]–[113].
- ⑦2 The 1964 Act has been amended, mainly in minor respects, by the Diplomatic and other Privileges Act 1971, the State Immunity Act 1978, the Diplomatic and Consular Premises Act 1987 and the Arms Control and Disarmament (Privileges and Immunities) Act 1988.
- ⑦3 The provisions of the Convention must be interpreted, not by applying domestic principles of statutory interpretation, but according to the generally accepted principles by which international conventions are to be interpreted as a matter of international law: *Basfar v Wong [2022] UKSC 20, [2022] 3 W.L.R. 208* at [16].
- ⑦4 State Immunity Act 1978 s.14; *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse [1997] 4 All E.R. 108*. On the immunity of a former head of state in the context of criminal liability, see *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3) [2000] 1 A.C. 147*; and see *R. (on the application of HRH Sultan of Pahang) v Secretary of State for the Home Department [2011] EWCA Civ 616, Harb v Aziz [2014] EWHC 1807 (Ch), [2014] 1 W.L.R. 4437, affirmed [2015] EWCA Civ 481, [2016] Ch. 308*. On heads of state, see generally, *Aziz v Aziz [2007] EWCA Civ 712, [2008] 2 All E.R. 501; Watts (1994) 224 Recueil des Cours, III, 9*. See also *Al Attiya v Al Thani [2016] EWHC 212 (QB)* (civil claim against former prime minister of Qatar).
- ⑦5 State Immunity Act 1978 s.20; *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse [1997] 4 All E.R. 108; R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3) [2000] 1 A.C. 147*. And see *Khurts Bat v Investigating Judge of the German Federal Court [2011] EWHC 2029 (Admin), [2013] Q.B. 349*. A person who had been head of state but who had abdicated as head of state is not entitled to immunity under s.20(1)(a), even though that person retains a special position

under the constitution of the state (*Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2022] EWHC 668 (QB), [2022] 1 W.L.R. 3311 at [56]–[58]). The immunities extend to members of the family of the foreign sovereign or other head of a recognised state who form part of their household and to their private servants: 1978 Act s.20(1)(b). On the meaning of members of the family of a head of state “forming part of his household”, see *Apex Global Management Ltd v Fi Call Ltd* [2013] EWCA Civ 642, [2014] 1 W.L.R. 492; *Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2022] EWHC 668 (QB), [2022] 1 W.L.R. 3311 at [62]–[64].

76 Diplomatic Privileges Act 1964 s.8(4) and Sch.2.

77 *Empson v Smith* [1966] 1 Q.B. 426; *Omerri v Uganda High Commission* [1973] I.T.R. 14; cf. *Sengupta v Republic of India* [1983] I.C.R. 221, 226.

78 Diplomatic Privileges Act 1964 Sch.1 art.1. As a matter of customary international law and the common law, a receiving state is obliged to secure, for the duration of a special or ad hoc mission, personal inviolability and immunity from criminal jurisdiction for the members of the mission accepted as such by the receiving state: see *Khurts Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), [2013] Q.B. 349; *R. (on the application of the Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin) at [116]–[120]; [2018] EWCA Civ 1719, [2019] 2 W.L.R. 578, [136] (special mission).

79 Under the *G7 Presidency (Immunities and Privileges) Order 2021* (SI 2021/521) extended the immunity of a head of mission under the 1964 Act to representatives of sovereign states at the G7 Summit or the G7 ministerial meetings in the United Kingdom in 2021.

80 Including a divorce petition: *Shaw v Shaw* [1979] Fam. 62. For the position in relation to proceedings under the *Child Abduction and Custody Act 1985*, see *P v P (Diplomatic Immunity: Jurisdiction)* [1998] 1 F.L.R. 1026. See also *Abusabib v Taddese* [2013] I.C.R. 603 (employment claims).

81 *Alcom Ltd v Republic of Colombia* [1984] A.C. 580.

82 *Intpro Properties (UK) Ltd v Sauvel* [1983] Q.B. 1019, 1032–1033.

83 Vienna Convention art.31. See *Wokuri v Kassam* [2012] EWHC 105 (Ch), [2013] Ch. 80; *Reyes v Al-Malki* [2017] UKSC 61, [2017] 3 W.L.R. 923. In *Basfar v Wong* [2022] UKSC 20, [2022] 3 W.L.R. 208 the majority of the Supreme Court held that the exception based on professional or commercial activity is not based on whether the relevant activity is contrary to international law or violates human rights (at [25]) and that any professional or commercial activity did not include activities incidental to the ordinary conduct of daily life in the receiving state, such as purchasing goods for personal consumption or purchasing medical, legal, educational or domestic services privately, to ensure that diplomatic agents and their families can live in the receiving state (at [34]), but exploiting a domestic worker by compelling her to work in circumstances of modern slavery is not comparable to an ordinary

employment relationship of a kind that is incidental to the daily life of a diplomat (and his family) in the receiving state (at [43]).

①84 *Fernando v Sathanthan [2021] EWHC 652 (Admin)* at [37]–[39].

①85 Vienna Convention art.37(1).

①86 *A Local Authority v AG [2020] EWFC 18, [2020] 3 W.L.R. 133* at [29]–[39]. Though note *A Local Authority v AG (No. 2) [2020] EWHC 1346 (Fam)*. See further *Barnet London BC v AG [2021] EWHC 1253 (Fam), [2021] Fam. 404*.

①87 *R. (on the application of the Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWHC 2010 (Admin); [2018] EWCA Civ 1719, [2019] 2 W.L.R. 578* at [12], [113]–[134], where it was held that the rule of customary international law was recognised and accepted as part of the common law.

①88 Vienna Convention art.22. See *Nigerian High Commission v Iheme [2021] 9 WLuk 144* at [50]–[52] (EAT).

①89 Vienna Convention art.30; cf. *Agbor v Metropolitan Police Commissioner [1969] 1 W.L.R. 703*.

①90 *Intpro Properties (UK) Ltd v Sauvel [1983] Q.B. 1019, 1033–1034*.

①91 *Westminster City Council v Government of the Islamic Republic of Iran [1986] 1 W.L.R. 979, 984–985*.

①92 *Belfast City Council v Meifang [2020] NICH 12* at [24]–[25].

①93 Vienna Convention art.24, 27(2); *R. (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs [2018] UKSC 3, [2018] 1 W.L.R. 973* at [20]–[21]; *Kuwait Investment Office v Hard [2022] EAT 51* at [27]–[30], [118].

94 Vienna Convention art.37(2), (3). See *Government of the Kingdom of Saudi Arabia v Nasser Unreported 14 November 2000, CA; Re B (A Child) (Care Proceedings: Diplomatic Immunity) [2002] EWHC 1751 (Fam), [2003] Fam. 16; A Local Authority v X [2018] EWHC 874 (Fam)*, [50]–[56].

95 Vienna Convention art.39(1) and s.2(2). The immunity applies while the diplomat was in post: *Reyes v Al-Malki [2017] UKSC 61, [2017] 3 W.L.R. 923*, [18]–[19], [48]–[49], [55].

96 *R. v Secretary of State for the Home Department Ex p. Bagga [1991] 1 Q.B. 485* in which the Court of Appeal, albeit in an immigration context, doubted the correctness of *R. v Governor of Pentonville Prison Ex p. Teja [1971] 2 Q.B. 274*; *R. v Lambeth Justices Ex p. Yusufu [1985] Crim. L.R. 510* and *R. v Governor of Pentonville Prison Ex p. Osman (No.2) [1989] C.O.D. 446* which appear to suggest that such notification and acceptance is necessary. *Ex*

- p. Bagga* was followed by the Court of Appeal in the context of the State Immunity Act 1978 s.16(1) in *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] I.C.R. 25. See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.10-070; *Jimenez v Inland Revenue Commissioners* [2004] S.T.C. 371; see also *Wokuri v Kassam* [2012] EWHC 105 (Ch). See also *Al Attiya v Al Thani* [2016] EWHC 212 (QB) at [48], [81].
- 97 *Ghosh v D'Rozario* [1963] 1 Q.B. 106.
- 98 *Re Regina and Palacios* (1984) 45 O.R. (2d) 269.
- 99 Vienna Convention art.39(2); *Propend Finance Pty Ltd v Sing, The Times*, 2 May 1997, 111 Int. L.R. 611. cf. *Musurus Bey v Gadban* [1894] 2 Q.B. 352; *Zoernsch v Waldock* [1964] 1 W.L.R. 675; *Wokuri v Kassam* [2012] EWHC 105 (Ch). See also *R. v Bow Street Magistrate Ex p. Pinochet Ugarte (No.3)* [2000] 1 A.C. 147, 255–257, 270; *Abusabib v Taddese* [2013] I.C.R. 603.
- 100 *Shaw v Shaw* [1979] Fam. 62.
- 101 Vienna Convention art.39(3).
- 102 *Musurus Bey v Gadban* [1894] 2 Q.B. 352.
- 103 Diplomatic Privileges Act 1964 s.4; and see *Engelke v Musmann* [1928] A.C. 433; *R. v Governor of Pentonville Prison Ex p. Teja* [1971] 2 Q.B. 274; *Khurts Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), [2013] Q.B. 349. cf. *Re P (Children Act: Diplomatic Immunity)* [1998] 1 F.L.R. 625, 626; *Apex Global Management Ltd v Fi Call Ltd* [2013] EWCA Civ 642, [2014] 1 W.L.R. 492; *Al Attiya v Al Thani* [2016] EWHC 212 (QB) at [37], [59], [83]; *R. (on the application of the Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin) at [174]; [2018] EWCA Civ 1719, [2019] 2 W.L.R. 578; *Mohamed v Breish* [2019] EWHC 306 (Comm). However, the entitlement to diplomatic immunity is dependent on the terms of the certificate: *A Local Authority v X* [2018] EWHC 874 (Fam) at [38]–[49].
- 104 See British Nationality Act 1981 s.51(3).
- 105 Vienna Convention art.38(1) and s.2(2) of the Act.
- 106 Vienna Convention art.38(2) and s.2(2) of the Act.
- 107 s.2(6).
- 108 Vienna Convention art.37 and s.2(2).
- 109 As amended by the Diplomatic and Other Privileges Act 1971 and the Diplomatic and Consular Premises Act 1987.
- 110 Consular Relations Act 1968 Sch.I art.1.
- 111 Sch.I art.1.
- 112 *Belfast City Council v Meifang* [2020] NICH 12 at [27]–[36].
- 113 Vienna Convention art.43.
- 114 Vienna Convention art.57.
- 115 s.12 as substituted by the Diplomatic and other Privileges Act 1971 s.4(1) and Sch.
- 116 As amended by the Diplomatic and other Privileges Act 1971 and International Organisations Act 2005.
- 117 Including winding up: *Re International Tin Council* [1989] Ch. 309. For further litigation involving the Tin Council and its immunities under the 1968 Act, see *J.H. Rayner (Mincing*

- Lane) Ltd v Department of Trade and Industry [1989] Ch. 72; affirmed [1990] 2 A.C. 418; Standard Chartered Bank v International Tin Council [1987] 1 W.L.R. 641; Shearson Lehman Bros Inc v Maclaine, Watson & Co Ltd [1988] 1 W.L.R. 16, HL; Maclaine, Watson & Co Ltd v International Tin Council [1989] Ch. 253; Maclaine, Watson & Co Ltd v International Tin Council (No.2) [1989] Ch. 286.* In *Mukoro v European Bank for Reconstruction and Development [1994] I.C.R. 897* it was held that immunity extended to proceedings in an industrial tribunal under the *Race Relations Act 1976* by an individual whose application for a post with the organisation had been rejected. The making of an Order in Council in relation to an organisation may lead to the conclusion that that organisation is thereby clothed with such legal personality as to be capable of entering into valid contracts: *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 A.C. 418*. As to the effect of the Secretary of State's certificate of entitlement issued under s.8 of the 1968 Act, see *Estrada v Al-Juffali (Secretary of State for Foreign and Commonwealth Affairs intervening) [2016] EWCA Civ 176, [2017] Fam. 35*. See Reinisch, Privileges and Immunities of International Organizations in Domestic Courts (2013).
- 118 International Organisations Act 1968 s.1(1), (2)(b) and Sch.1 Pt I para.1. The immunities conferred by s.1 may be extended to include representatives at conferences of the organisation in the United Kingdom: s.5A. On the compatibility of this immunity with art.6 of the European Convention on Human Rights, see *Entico Corp Ltd v UNESCO [2008] EWHC 531 (Comm), [2008] 1 Lloyd's Rep. 673; Waite and Kennedy v Germany (2000) 30 E.H.R.R. 261 (European Court of Human Rights)*.
- 119 s.1(2)(c), (3), and Sch.1 Pt II para.9.
- 120 s.1(4) and Sch.1 Pt IV para.20.
- 121 s.1(4) and Sch.1 Pt IV para.23.
- 122 s.1(2)(d) and Sch.1 Pt III para.14.
- 123 s.1(4) and Sch.1 Pt IV para.21.
- 124 s.1(4) and Sch.1 Pt IV para.23(4).
- 125 s.1(6)(b). This is subject to s.4 of the International Organisations Act 1981.
- 126 s.2(1).
- 127 s.4. In *Arab Monetary Fund v Hashim (No.3) [1991] 2 A.C. 114* (see *F.A. Mann (1991) 107 L.Q.R. 357; Marston (1991) C.L.J. 218*) it was held that an international organisation of which the United Kingdom was not a member and which had been given legal personality under the law of the United Arab Emirates, where its headquarters were situated, had capacity to sue in England even though no legal capacity had been conferred upon it by English law. Attribution of legal personality by the law of the Emirates created a corporation capable of being recognised in England. Although the organisation was not entitled to immunity under the English Acts, it has been held that it may be entitled to immunity, in respect of official acts, under customary international law, that such immunity may be recognised by the English courts and, further, that the immunity may extend to senior officials of the organisation: *Arab Monetary Fund v Hashim [1993] 1 Lloyd's Rep. 543, 573–574*. As to waiver of this immunity, see below, para.14-021.
- 128 s.4A (added to the 1968 Act by s.2 of the International Organisations Act 1981) and representatives at conferences organised by them in the United Kingdom: s.5A.

- 129 s.5.
- 130 s.6.
- 131 s.1, as amended by the [Diplomatic Privileges Act 1964](#) s.8(4) and Sch.2.
- 132 See Halsbury's Laws of England, 5th edn, Vol.61, paras 307–313. As to the Immunity of the International Maritime Organisation, see [SI 2002/1826](#).
- 133 [1968 Act](#) s.12(5).
- 134 See, e.g. [Commonwealth Secretariat Act 1966](#) s.1(2) and Sch., as amended by [International Organisations Act 2005](#) ss.1–3. Although immunity is conferred on the Commonwealth Secretariat (as to which, see [Jananyagam v Commonwealth Secretariat \[2007\] WL 919439 \(EAT\)](#)), that immunity does not extend to the Commonwealth Secretariat Arbitration Tribunal, decisions of which may be reviewed under the [Arbitration Act 1996](#): see [Mohsin v Commonwealth Secretariat \[2002\] EWHC 377 \(Comm\)](#). The [International Organisations Act 2005](#) also includes provisions relating to the Organisation for Security and Co-operation in Europe (s.4), the International Criminal Court (s.6; see also [International Criminal Court Act 2001](#) s.1(3) and Sch.1 para.1(2)), the European Court of Human Rights (s.7), and the International Tribunal for the Law of the Sea (s.8). See also [Arbitration \(International Investment Disputes\) Act 1966](#) s.4 and Sch.; [International Monetary Fund Act 1979](#) s.5(1); [Multilateral Investment Guarantee Agency Act 1988](#) s.3; [International Development Act 2002](#) s.12.
- 135 See Halsbury's Laws of England, 5th edn, Vol.61, paras 307–313. See also [J.H. Rayner \(Mincing Lane\) Ltd v Department of Trade and Industry \[1989\] Ch. 72, 203–205](#). See recently, e.g. the [Bank for International Settlements \(Immunities and Privileges\) Order 2021 \(SI 2021/533\)](#).
- 136 The [European Union and the European Atomic Energy Community \(Immunities and Privileges\) Order 2021 \(SI 2021/881\)](#). Prior to Brexit, the privileges and immunities of the EU and its officials were provided by art.343 of the Treaty on the Functioning of the European Union (TFEU).
- 137 [Duke of Brunswick v King of Hanover \(1844\) 6 Beav. 1, 37, 38; Sultan of Johore v Bendahar \[1952\] A.C. 318](#). By contrast, the principle of non-justiciability under the “act of state” doctrine is generally not capable of being waived by a state, because it is a matter going to the Court’s substantive jurisdiction, whereas sovereign immunity is no more than a procedural bar to the Court’s jurisdiction: [R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte \(No.3\) \[2000\] 1 A.C. 61, 90; High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah \[2016\] EWHC 1465 \(Ch\), \[2016\] W.T.L.R. 1763](#) at [89]–[90]. However, foreign act of state is capable of waiver by submission to arbitration, but it must be an express and specific waiver; the mere agreement by a state to submit a contractual dispute to arbitration does not mean that it thereby waives any right to object to the tribunal determining any and all act of state issues which might be raised in the course of any dispute under the contract: [Reliance Industries Ltd v Union of India \[2018\] EWHC 822 \(Comm\)](#), [2018] 1 Lloyd’s Rep. 562 at [117]–[120], [128]–[131].
- 138 [Taylor v Best \(1854\) 14 C.B. 487; Re Suarez \[1918\] 1 Ch. 176; Dickinson v Del Solar \[1930\] 1 K.B. 376; R. v A.B. \[1941\] 1 K.B. 454](#).

- 139 *Re Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch. 139; *Baccus S.R.L. v Servicio Nacional del Trigo* [1957] 1 Q.B. 438; *R. v Madan* [1961] 2 Q.B. 1.
- 140 *Mighell v Sultan of Johore* [1894] 1 Q.B. 149, 159, 161, 162–164; *Duff Development Co v Government of Kelantan* [1924] A.C. 797; *Kahan v Pakistan Federation* [1951] 2 K.B. 1003; *The Philippine Admiral* [1974] 2 Lloyd's Rep. 568, 586–587, affirmed [1977] A.C. 373.
- 141 *Kahan v Pakistan Federation* [1951] 2 K.B. 1003; *Baccus S.R.L. v Servicio Nacional del Trigo* [1957] 1 Q.B. 438.
- 142 *Duff Development Co v Government of Kelantan* [1924] A.C. 797.
- 143 [1924] A.C. 797.
- 144 *R. v Madan* [1961] 2 Q.B. 1.
- ① 145 *Fayed v Al Tajir* [1988] Q.B. 712.
- ① 146 State Immunity Act 1978 s.13(2); *Alcom Ltd v Republic of Colombia* [1983] A.C. 580; *NML Capital Ltd v Argentina* [2011] UKSC 31, [2011] 2 A.C. 495; *Boru Hatlari Ile Petrol Tasima AS v Tepe Insaat Sanayii AS* [2018] UKPC 31. By s.13(2)(a), relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property: *Belfast City Council v Meifang* [2020] NICH 12; *UK P&I Club NV v República Bolivariana DE Venezuela* [2022] EWHC 1655 (Comm). Where a state has agreed in writing to submit a dispute which has arisen or which may arise, to arbitration, the state cannot then claim immunity as respects proceedings in the courts of the United Kingdom which relate to the arbitration, unless there is a contrary provision in the agreement or the arbitration agreement is between states: State Immunity Act 1978 s.9: see *Ministry of Trade of the Republic of Iraq v Tsavlis Salvage (International) Ltd* [2008] EWHC 612 (Comm), [2008] 2 Lloyd's Rep. 90. Section 9 extends to proceedings for permission to enforce an arbitration award under Arbitration Act 1996 s.101, but probably does not extend to enforcement of an award against property of a state: s.13(2)(b). See *PAO Tatneft v Ukraine* [2020] EWHC 3161 (Comm), [2021] 1 W.L.R. 1123. See also *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (No.2) [2005] EWHC 2437 (Comm), [2006] 1 Lloyd's Rep. 181; affirmed [2006] EWCA Civ 1529, [2007] Q.B. 886; *Orascom Telecom Holding SAE v Republic of Chad* [2008] EWHC 1841 (Comm), [2008] 2 Lloyd's Rep. 396; *ETI Eurotelecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2008] 1 W.L.R. 665; *Servaas Inc v Rafidain Bank* [2011] EWCA Civ 1256, [2012] 1 All E.R. (Comm) 527, affirmed [2012] UKSC 40, [2013] 1 A.C. 595 (but property of a state which originates in a commercial transaction is immune from execution if the state has chosen the property to be used for sovereign purposes rather than commercial purposes; see s.13(4) of the Act); *NML Capital Ltd v Argentina* [2011] UKSC 31, [2011] 2 A.C. 495; *The High Commissioner for Pakistan in the United Kingdom v National Westminster Bank Plc* [2015] EWHC 55 (Ch) at [72]–[76]; *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 W.L.R. 2829; *LR Avionics Technologies Ltd v Federal Republic of Nigeria* [2016] EWHC 1761 (Comm), [2016] 4 W.L.R. 120 at [20]–[23]. See also *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), [2018] 2 Lloyd's Rep. 403 at [34]–[35], where it was held that the constraints under the Arbitration Act 1996 applicable to challenging an award do not

apply in respect of a claim for immunity under the 1978 Act. See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.10-051.

- ①147 s.2. This section is a complete statement of the circumstances in which a state submits for the purposes of the Act: *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No.2) [2005] EWHC 2437 (Comm), [2006] 1 Lloyd's Rep. 181; affirmed [2006] EWCA Civ 1529, [2007] Q.B. 886; NML Capital Ltd v Argentina [2011] UKSC 31, [2011] 2 A.C. 495.*
- ①148 s.2(2). See *A Co Ltd v Republic of X [1990] 2 Lloyd's Rep. 520; Ahmed v Government of the Kingdom of Saudi Arabia [1996] I.C.R. 25* (meaning of “written agreement”); *Propend Finance Pty Ltd v Sing, The Times, 2 May 1997; 111 Int. L.R. 611; Mills v Embassy of the United States of America Unreported 9 May 2000, CA; Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep. 571; Donegal International Ltd v Zambia [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397; Orascom Telecom Holding SAE v Republic of Chad [2008] EWHC 1841 (Comm), [2008] 2 Lloyd's Rep. 396; NML Capital Ltd v Argentina [2011] UKSC 31, [2011] 2 A.C. 495; London Steamship Owners Mutual Insurance Association Ltd v Spain [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep. 309, affirmed [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep. 33; and see *Thai-Liao Lignite (Thailand) Co Ltd v Laos [2013] EWHC 2466 (Comm), [2013] 2 All E.R. (Comm) 883; The High Commissioner for Pakistan in the United Kingdom v National Westminster Bank Plc [2015] EWHC 55 (Ch) at [72]–[76]; European Union v Syrian Arab Republic [2018] EWHC 1712 (Comm), [27]–[29]; Trafigura Pte Ltd v Government of the Republic of South Sudan [2020] EWHC 2044 (Comm) at [24].**
- ①149 s.2(3)(a).
- ①150 s.2(3)(b), (5). See *Kuwait Airways Corp v Iraqi Airways Co [1995] 1 Lloyd's Rep. 25, CA, reversed, in part, on other grounds, [1995] 1 W.L.R. 1147, HL* (for further proceedings, see *Kuwait Airways Corp v Iraqi Airways Co (No.2) [2001] 1 W.L.R. 429; Kuwait Airways Corp v Iraqi Airways Co [2003] EWHC 31 (Comm), [2003] 1 Lloyd's Rep. 448; London Branch of the Nigerian Universities Commission v Bastians [1995] I.C.R. 358; Arab Republic of Egypt v Gamal-Eldin [1996] I.C.R. 13; Malaysian Industrial Development Authority v Jeyasingham [1998] I.C.R. 307; Aziz v Republic of Yemen [2005] EWCA Civ 745, [2005] I.C.R. 1391; London Steamship Owners Mutual Insurance Ltd v Spain [2020] EWHC 1582 (Comm), [2020] 1 W.L.R. 4943; [2021] EWCA Civ 1589, [2021] 1 W.L.R. 3434.*
- ①151 *Re Al M (Assurances and Waiver) [2020] EWHC 67 (Fam), [2020] 1 W.L.R. 1858* at [58].
- ①152 s.2(3), (4).
- ①153

Svenska Petroleum Exploration AB v Republic of Lithuania (No.2) [2005] EWHC 2437 (Comm), [2006] 1 Lloyd's Rep. 181; affirmed [2006] EWCA Civ 1529, [2007] Q.B. 886; NML Capital Ltd v Argentina [2011] UKSC 31, [2011] 2 A.C. 495.

①154 s.2(2).

①155 s.2(6). See *Propend Finance Pty Ltd v Sing, The Times*, 2 May 1997, 111 Int. L.R. 611; cf. *Sultan of Johore v Bendahar* [1952] A.C. 318 (appeal); *High Commissioner for India v Ghosh* [1960] 1 Q.B. 134 (counterclaim).

①156 s.2(7). See *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] I.C.R. 25; *Arab Republic of Egypt v Gamal-Eldin* [1996] I.C.R. 13; *Propend Finance Pty Ltd v Sing, The Times*, 2 May 1997; 111 Int. L.R. 611; *Malaysian Industrial Development Authority v Jeyasingham* [1998] I.C.R. 307; cf. *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397 (authority of Minister). On the method of waiver or submission, see *Fayed v Al Tajir* [1988] Q.B. 712, 733, 736–737.

①157 s.2(7). See *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] I.C.R. 25.

①158 *The High Commissioner for Pakistan in the United Kingdom v National Westminster Bank Plc* [2015] EWHC 55 (Ch) at [74].

①159 s.13(3); cf. *Re Suarez* [1917] 2 Ch. 131; *Duff Development Co v Government of Kelantan* [1923] 1 Ch. 385, [1924] A.C. 797, 810, 821, 830. See also *Mitchell v Ibrahim Al-Dahli* [2005] EWCA Civ 720 (undertaking by foreign state not to appeal costs order made against it does not imply waiver of immunity should enforcement of the costs order be sought).

①160 Sch.1 art.32. The diplomat cannot waive immunity, only the government of the sending state can: *A Local Authority v AG* [2020] EWFC 18, [2020] 3 W.L.R. 133 at [29]. See further *Kuwait Investment Office v Hard* [2022] EAT 51 at [118.8]–[118.10].

161 Sch.1 art.45.

162 s.2(3); see *Propend Finance Pty Ltd v Sing, The Times*, 2 May 1997, 111 Int. L.R. 611; 1968 Act s.1(5).

163 *R. (Charles) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin), [2021] 1 W.L.R. 1394 at [98].

164 *Mighell v Sultan of Johore* [1894] 1 Q.B. 149; *Duff Development Co v Government of Kelantan* [1924] A.C. 797; *Kahan v Pakistan Federation* [1951] 2 K.B. 1003.

165 See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.10-074; *Cohn* (1958) 34 B.Y.I.L. 360; *F.A. Mann* (1991) 107 L.Q.R. 362.

166 *A Co Ltd v Republic of X* [1990] 2 Lloyd's Rep. 520, cogently criticised by *F.A. Mann* (1991) 107 L.Q.R. 362.

167 *F.A. Mann* (1991) 107 L.Q.R. 362.

- 168 Which waiver must also be given by an undertaking or consent given to the court when it is asked to exercise jurisdiction: *A Co Ltd v Republic of X [1990] 2 Lloyd's Rep. 520*.
- 169 See, e.g. *Standard Chartered Bank v International Tin Council [1987] 1 W.L.R. 641*. A senior official of an international organisation which is entitled to immunity under customary international law (see above, para.14-019 (note)) may also be entitled to immunity, as a matter of customary international law, from legal process in respect of official acts, but since the immunity is granted to the official for the benefit of the organisation, rather than for the individual official, then the immunity may be waived by the organisation, and, if it is so waived, there is no further bar to proceedings against the official: *Arab Monetary Fund v Hashim [1993] 1 Lloyd's Rep. 543, 574*.
- 170 s.1(2) and Sch. para.8.
- 171 Sch.1 arts 20, 21.

Section 2. - Alien Enemies

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 4 - Capacity of Parties

Chapter 14 - Political Immunity and Incapacity

Section 2. - Alien Enemies ¹⁷²

Who is an alien enemy?

- 14-025 At common law, the term *alien enemy* means any person irrespective of nationality who voluntarily¹⁷³ resides or who carries on business in any enemy or enemy-occupied country during a war in which the United Kingdom is engaged.¹⁷⁴ As will be seen,¹⁷⁵ an enemy subject who resides or carries on business in the United Kingdom or in a neutral or allied country is nearly always treated as an alien friend. Hence the test of enemy character at common law is a territorial and not a national one. It is an objective test and depends on facts, not on the prejudices, passions or patriotism of the individual concerned.¹⁷⁶ So during the Second World War a company incorporated in Holland and having its principal place of business in Rotterdam was held to be an alien enemy after the German occupation of Holland.¹⁷⁷

Companies

- 14-026 A company registered in an enemy or enemy-occupied country is an alien enemy,¹⁷⁸ unless the control of its affairs is shifted to a country not occupied by the enemy.¹⁷⁹ But a company registered in the United Kingdom and carrying on business here may acquire enemy character by reason of the hostile residence or activities of its agents or other persons in de facto control of its affairs.¹⁸⁰ Thus where during the First World War all the shares except one in an English company were held by Germans resident in Germany, and all its directors were Germans so resident, the company was treated as an alien enemy.¹⁸¹ In that case it was said that a company registered in the United

Kingdom but carrying on business in an enemy country is to be regarded as an alien enemy.¹⁸² But that proposition is too widely stated, for the contrary has since been held.¹⁸³

Trading with the Enemy Act 1939

- 14-027 The [Trading with the Enemy Act 1939](#)¹⁸⁴ contains a statutory definition of an “enemy”. But this definition is limited to the purposes of the Act and does not affect the common law rule with regard to the separate question of an alien enemy’s capacity to sue,¹⁸⁵ with which alone this section is concerned.

Alien enemy as claimant

- 14-028 An alien enemy cannot sue in the Queen’s courts or take up the position of an *actor* in British litigation¹⁸⁶ save under royal licence.¹⁸⁷ The fact that the action was commenced before the outbreak of war does not enable an alien enemy to continue their action during the war,¹⁸⁸ nor can they appeal against a judgment given against them before the war.¹⁸⁹ They cannot appear as claimant in an interpleader issue.¹⁹⁰ The royal licence necessary to cure the claimant’s incapacity to sue may be either express,¹⁹¹ or inferred from the fact of their presence here with the knowledge and tacit approval of the Crown, e.g. if they registered under the [Aliens Restriction Act 1914](#) and orders made thereunder.¹⁹² Such a licence can be revoked,¹⁹³ but it is not revoked merely by the internment of the alien,¹⁹⁴ at any rate if the internment was an act of general policy adopted for the safety of the realm and was not due to a hostile act or attitude on the alien’s part. The effect of a licence is to place the alien enemy under the protection of the Crown, with the result that in all respects except perhaps one¹⁹⁵ they are treated as an alien friend for procedural purposes.
- 14-029 The rule which debars an alien enemy from suing is an ancient rule of the common law which is based on public policy.¹⁹⁶ It is immaterial that Emergency Regulations made under the [Trading with the Enemy Act 1939](#) would prevent the claimant from transmitting abroad the sum recovered until the end of the war, because they might more easily raise a loan from neutral sources on the security of a judgment debt than they could on the security of a simple contract debt, and so help to furnish the enemy country with the sinews of war.¹⁹⁷

Exceptions

- 14-030 There are two or possibly three exceptions to the rule that proceedings may not be brought by an alien enemy without a licence.

(1) In *Rodriguez v Speyer Bros*¹⁹⁸ it was held by a bare majority of the House of Lords (against powerful dissent by Lords Atkinson and Sumner) that an alien enemy could be joined as co-plaintiff in an action by a firm of partners of which he was formerly a member to recover a pre-war debt due to the firm, on the somewhat specious grounds that the rule should not be applied if to do so would inflict hardship not on the enemy but on British or neutral partners.¹⁹⁹ Lord Wright has said that this decision must be limited to its special facts.²⁰⁰

(2) An alien enemy can be heard without a licence in the Prize Court if their claim is based on an international treaty or convention, but not otherwise.²⁰¹

(3) There is ancient authority for the proposition that an alien enemy can sue *en autre droit*, e.g. as executor or administrator of a deceased person.²⁰² It is, however, an open question whether this authority would be followed at the present day.²⁰³

Alien enemy as defendant

- 14-031 There is no rule of common law which prevents an alien enemy from being sued if service or substituted service can be effected.²⁰⁴ There may be difficulties about service,²⁰⁵ but in time of war it is usual for the rules as to substituted service to be relaxed under statutory authority.²⁰⁶ If they are sued, an alien enemy can appear and be heard in their defence and may take all such steps as may be deemed necessary for the proper presentation of their defence, and may appeal against any judgment given against them, for to hold otherwise would be contrary to natural justice.²⁰⁷ They may plead a set-off, but they may not counterclaim,²⁰⁸ nor take third party proceedings,²⁰⁹ nor execute a judgment for costs during the war,²¹⁰ because in doing any of these things they would become an *actor*. They may be made bankrupt²¹¹ and may prove in the bankruptcy of another,²¹² but if their proof is rejected they may not take proceedings or challenge the trustee's decision, for in doing so they would become an *actor*.²¹³

Limitation of actions

- 14-032

The [Limitation \(Enemies and War Prisoners\) Act 1945](#)²¹⁴ suspended the running of any period of limitation for the bringing of any action in which any person who would have been a necessary party was an enemy or was detained in enemy territory until they ceased to be so and for 12 months thereafter.

Illegal contracts with alien enemies

- 14-033 The rule which has been considered in this section, that an alien enemy has no persona standi in judicio, must be carefully distinguished from the rule that contracts involving trading or other intercourse with the enemy are illegal at common law as well as by statute. The two rules are often confused, but they differ fundamentally in that the former merely creates a procedural incapacity which lasts only so long as the war lasts, while the latter destroys the cause of action once and for all.²¹⁵ The latter rule has nothing to do with capacity, and is therefore considered elsewhere in this work.²¹⁶

Footnotes

- 172 The leading authorities on the procedural incapacity of alien enemies are the judgment of the full Court of Appeal in *Porter v Freudenberg* [1915] 1 K.B. 857; the dissenting judgment of Lord Sumner in *Rodriguez v Speyer Brothers* [1919] A.C. 59; and the judgment of Lord Wright in *Sovfracht (V/O) v Van Udens Scheepvaart en Agentuur Maatschappij (NV Gebr)* [1943] A.C. 203. See also McNair, Legal Effects of War, 4th edn (1966), Ch.3. The principles discussed in this section only apply when a technical state of war exists. See *Amin v Brown* [2005] EWHC 1670 (Ch), [2006] I.L.Pr. 5 where it was held that the procedural incapacity of an alien enemy only came into existence if a technical state of war existed between the United Kingdom and the relevant country and that there was no warrant for extending the disability to modern armed conflict which did not involve war in this sense. Accordingly, an Iraqi citizen resident in Iraq was entitled to proceed in the English court as claimant since the court was satisfied, on the basis of Ministerial statements, that Her Majesty's government's position was that there was not, and had not been, a state of war between the United Kingdom and Iraq. See also *Janson v Driefontaine Consolidated Mines* [1902] A.C. 484. Although the existence of hostilities is not uncommon, it is rare for a technical state of war to exist today: see *Amin v Brown* [2005] EWHC 1670, [2006] I.L.Pr. 5 at [28].
- 173 e.g. not as a prisoner of war: *Vandyke v Adams* [1942] Ch. 155, a case under the [Trading with the Enemy Act 1939](#). Contrast *Scotland v South African Territories Ltd* (1917) 33 T.L.R. 255.
- 174 *Porter v Freudenberg* [1915] 1 K.B. 857; *Sovfracht (V/O) v Van Udens* [1943] A.C. 203; cf. *The Hoop* (1799) 1 C.Rob. 196; *McConnell v Hector* (1802) 3 Bros & P. 113; *O'Mealey v*

- Wilson (1808) 1 Camp. 482; Roberts v Hardy (1815) 3 M. & S. 533; Janson v Driefontein Consolidated Mines [1902] A.C. 484, 505; Amin v Brown [2005] EWHC 1670 at [28].
- 175 Below, para.14-028.
- 176 Sovfracht (V/O) v Van Udens [1943] A.C. 203, 219.
- 177 Sovfracht (V/O) v Van Udens [1943] A.C. 203. Contrast *The Pamia* [1943] 1 All E.R. 269, where a Belgian company moved its head office from Antwerp to Pittsburgh shortly after the German occupation of Belgium and so was held not to be an alien enemy.
- 178 Janson v Driefontein Consolidated Mines [1902] A.C. 484; Sovfracht (V/O) v Van Udens [1943] A.C. 203.
- 179 *The Pamia* [1943] 1 All E.R. 269.
- 180 Daimler Co Ltd v Continental Tyre and Rubber Co Ltd [1916] 2 A.C. 307, 344. But it does not cease to be an English company and is therefore not immune from the Trading with the Enemy Act 1939: *Kuenigl v Donnersmarck* [1955] 1 Q.B. 515.
- 181 Daimler Co Ltd v Continental Tyre and Rubber Co Ltd [1916] 2 A.C. 307.
- 182 Daimler Co Ltd v Continental Tyre and Rubber Co Ltd [1916] 2 A.C. 307, 346.
- 183 *Re Hicks* [1917] 1 K.B. 48.
- 184 s.2, as amended by the Emergency Laws (Miscellaneous Provisions) Act 1953 s.2 and Sch.II para.3.
- 185 Sovfracht (V/O) v Van Udens [1943] A.C. 203, 219, approving the view of the Court of Appeal on this point.
- 186 Porter v Freudenberg [1915] 1 K.B. 857; Sovfracht (V/O) v Van Udens [1943] A.C. 203, 209.
- 187 Wells v Williams (1697) 1 Ld. Raym. 282; *The Hoop* (1799) 1 C.Rob. 196, 201.
- 188 See McNair at pp.84–86; *Le Bret v Papillon* (1804) 4 East 502; *Alcenius v Nigren* (1854) 1 El. & Bl. 217. See also *Geiringer v Swiss Bank Corp* [1940] 1 All E.R. 406; *Eichengruen v Mond* [1940] Ch. 785.
- 189 Porter v Freudenberg [1915] 1 K.B. 857, 884.
- 190 Geiringer v Swiss Bank Corp [1940] 1 All E.R. 406.
- 191 See, e.g. *Fibrosa v Fairbairn* [1943] A.C. 32, 35, 39–40, and comments thereon in Sovfracht v Van Udens [1943] A.C. 203, 208; *The Brighton* [1951] 2 Lloyd's Rep. 65.
- 192 Princess Thurn and Taxis v Moffitt [1915] 1 Ch. 58, approved in Porter v Freudenberg [1915] 1 K.B. 857, 874; *Vokl v Rotuna Hospital* [1914] 2 I.R. 549; cf. *Re Mary, Duchess of Sutherland* (1915) 31 T.L.R. 248, 394 (enemy national resident in a neutral country may sue). The Aliens Restriction Act 1914 was repealed by the Immigration Act 1971 s.34(1), Sch.6.
- 193 *Netz v Ede* [1946] Ch. 224.
- 194 Schaffenus v Goldberg [1916] 1 K.B. 284; cf. *Sparenburgh v Bannatyne* (1797) 1 Bos. & P. 163, where an enemy prisoner of war was allowed to sue.
- 195 They may be unable to apply for a writ of habeas corpus: *The Three Spanish Sailors* (1779) 2 Wm. Bl. 1324; *Ex p. Liebmann* [1916] 1 K.B. 268; *R. v Bottrill* [1947] K.B. 41; but see Sharpe, The Law of Habeas Corpus (1976), pp.112–114.
- 196 Porter v Freudenberg [1915] 1 K.B. 857, 880; Rodriguez v Speyer Bros [1919] A.C. 59, 66, 124; Sovfracht (V/O) v Van Udens [1943] A.C. 203, 213; Amin v Brown [2005] EWHC 1670 (Ch), [2006] I.L.Pr. 67. See also Wells v Williams (1697) 1 Ld. Raym. 282; *The Hoop* (1799) 1 C.Rob. 196, 201–202; *Antoine v Morshead* (1815) 6 Taunt. 237.

- 197 *Rodriguez v Speyer Bros* [1919] A.C. 59, 114; *Sovfracht (V/O) v Van Udens* [1943] A.C. 203, 212, 236, 252; *Amin v Brown* [2005] EWHC 1670 (Ch), [2006] I.L.Pr. 5.
- 198 *Rodriguez v Speyer Bros* [1919] A.C. 59.
- 199 [1919] A.C. 59, 71.
- 200 *Sovfracht (V/O) v Van Udens* [1943] A.C. 203, 233; cf. McNair at p.83, n.4: “The House of Lords have in the *Sovfracht* case substantially repaired the damage done by the majority speeches in *Rodriguez v Speyer Brothers*”.
- 201 *The Möwe* [1915] P. 1; *The Glenroy* [1943] P. 109.
- 202 *Brocks v Phillips* (1599) Cro. Eliz. 684; *Richfield v Udall* (1666) Cart. 191; *Villa v Dimock* (1693) Skin. 370.
- 203 See *Rodriguez v Speyer Bros* [1919] A.C. 59, 70, 102, 118, 137; and see McNair at p.86.
- 204 *Robinson & Co v Continental Insurance Co of Mannheim* [1915] 1 K.B. 155; *Porter v Freudenberg* [1915] 1 K.B. 857, 880 et seq.
- 205 These were discussed in *Porter v Freudenberg* [1915] 1 K.B. 857, 886–890, and *Churchill & Co v Lonberg* [1914] 3 All E.R. 137.
- 206 See, e.g. Legal Proceedings against Enemies Act 1915 (repealed in 1927); RSC Ord.9 r.14(b) (added in 1941 and repealed in 1964).
- 207 *Porter v Freudenberg* [1915] 1 K.B. 857, 883–884.
- 208 *Re Stahlwerk Becker A/G's Patent* [1917] 2 Ch. 272, 276.
- 209 *Halsey v Lowenfeld* [1916] 2 K.B. 707.
- 210 *Robinson & Co v Continental Insurance Co of Mannheim* [1915] 1 K.B. 155, 162.
- 211 *Re Hilckes* [1917] 1 K.B. 48.
- 212 *Ex p. Boussmaker* (1806) 13 Ves. Jr. 71.
- 213 *Re Wilson and Wilson Ex p. Marum* (1915) 84 L.J. K.B. 1893.
- 214 As amended. See *The Atlantic Scout* [1950] P. 266; Franks, Limitation of Actions (1959), App.II. For limitation generally, see below, Ch.31.
- 215 See *Schmitz v Van der Veen & Co* (1915) 84 L.J. K.B. 861, 864; *Rodriguez v Speyer Bros* [1919] A.C. 59, 122.
- 216 See below, paras 18-070, 18-210, 18-211.

Chapter 15 - Express Terms

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 15 - Express Terms

E. G. McKendrick

Generally

- 15-001 Assuming that a contract has been validly created, it is necessary to consider the extent of the obligations imposed on the parties by the contract. In order to do this, the exact terms of the contract must be identified and the incorporation of the terms into the contract established.¹ The court must also consider the extent to which it is entitled to have regard to extrinsic evidence when seeking to identify the terms of the contract.² There may be some doubt about the interpretation of the contract, and resort will then have to be made to the principles of construction which have been laid down by the courts.³ Once the express terms of the contract have been identified and their meaning ascertained, it may be necessary for the court to consider whether a term should be implied into the contract.⁴

Footnotes

1 See below, paras 15-005 et seq.

2 See below, paras 15-022 et seq.

3 See below, paras 15-047 et seq.

4 Implied terms are the subject matter of Ch.16.

(a) - Identification of Terms

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Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 15 - Express Terms

Section 1. - Identification of the Terms and Their Incorporation Into the Contract

(a) - Identification of Terms

Terms and representations

- 15-002 Not everything that is said or communicated prior to the conclusion of the contract is incorporated into the contract as a term. Some statements may be considered to be mere representations, intended to induce the other party to enter into the contract, but not imposing liability for breach of contract⁵ or may amount to no more than “mere puffs” such as a commendatory statement which is neither a term of the contract nor a statement of fact which has induced entry into the contract.⁶ Others may be considered to be contractual terms, for the breach of which an action for damages will lie.⁷

Distinguishing between a term and a representation

- 15-003 The question whether any particular statement is a mere representation or a contractual term is frequently a difficult one for the court. In reaching a conclusion the court will take into account the following considerations: the importance of the truth of the statement⁸; the time which elapsed between the making of the statement and the final manifestation of consensus⁹; whether the party making the statement was, vis-à-vis the other party, in a better position to ascertain the truth of the statement¹⁰; and whether the statement was subsequently omitted when the agreement was

embodied in a more formal contract in writing.¹¹ But none of these criteria is conclusive¹² and the true test would seem to be whether there is:

“... evidence of an intention by one or both parties that there should be contractual liability in respect of the accuracy of the statement.”¹³

Intention assessed objectively

- 15-004** The intention of the parties is to be ascertained objectively.¹⁴ In *Oscar Chess Ltd v Williams*¹⁵ a statement made to a motor dealer by a private vendor of a motor-car, based on a previous alteration of the car log-book by an unknown person, that the car was “a 1948 model”, whereas in fact it had been first registered in 1939, was held by the Court of Appeal to be a mere representation. But in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd*¹⁶ a statement made by a motor dealer to a private purchaser, based on a reading of the mileometer, that it had done only 20,000 miles, whereas in fact it had done approximately 100,000, was held to be a warranty. The *Oscar Chess* case was distinguished on the ground that the vendor “honestly believed and on reasonable grounds that [the statement] was true”, whereas the motor dealer in the latter case “stated a fact that should be within his own knowledge. He had jumped to a conclusion and stated it as a fact”.¹⁷ Such cases show that, in this area of contract law, the circumstances of each case must be individually considered to ascertain the intention of the parties and that the criteria stated above furnish no decisive tests in law:

“The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.”¹⁸

Footnotes

5 *Hopkins v Tanqueray* (1854) 15 C.B. 130; *Heilbut, Symons & Co v Buckleton* [1913] A.C. 30; *Routledge v McKay* [1954] 1 W.L.R. 615; *Oscar Chess Ltd v Williams* [1957] 1 W.L.R. 370. See also above, para.9-004.

6 *Dimmock v Hallett* (1866) L.R. 2 Ch. App. 21.

7 *Bannerman v White* (1861) 10 C.B.(N.S.) 844; *De Lassalle v Guildford* [1901] 2 K.B. 215; *Schawel v Reade* [1913] 2 I.R. 64; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623.

8 *Bannerman v White* (1861) 10 C.B.(N.S.) 844. cf. *Oscar Chess Ltd v Williams* [1957] 1 W.L.R. 370.

- 9 *Routledge v McKay* [1954] 1 W.L.R. 615. See also *Pasley v Freeman* (1789) 3 Term Rep. 51, 57; *Schawel v Read* [1913] 2 I.R. 64; *Mahon v Ainscough* [1952] 1 All E.R. 337; *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep. 611 at [10].
- 10 *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623; *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801. *Contrast Heilbut, Symons & Co v Buckleton* [1913] A.C. 30; *Gilchester Properties Ltd v Gomm* [1948] 1 All E.R. 493.
- 11 *Heilbut, Symons & Co v Buckleton* [1913] A.C. 30, 50; *Gilchester Properties Ltd v Gomm* [1948] 1 All E.R. 493. cf. *Miller v Cannon Hill Estates Ltd* [1931] 2 K.B. 113; *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep. 611 at [10].
- 12 *Heilbut, Symons & Co v Buckleton* [1913] A.C. 30, 50.
- 13 [1913] A.C. 30, 51 (and see 38, 42); *Pasley v Freeman* (1789) 3 T.R. 51, 57; *Oscar Chess Ltd v Williams* [1957] 1 W.L.R. 370, 374; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623, 629; *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801. See also *J.J. Savage & Sons Pty Ltd v Blackney* (1970) 119 C.L.R. 435.
- 14 *Inntrepreneur Pub Co v East Crown Ltd* [2002] 2 Lloyd's Rep. 611 at [10].
- 15 [1957] 1 W.L.R. 370. See also *Routledge v McKay* [1954] 1 W.L.R. 615; *Dawson v Yeoward* [1961] 1 Lloyd's Rep. 431. cf. *Turner v Anquetil* [1953] N.Z.L.R. 952; *Beale v Taylor* [1967] 1 W.L.R. 1193.
- 16 [1965] 1 W.L.R. 623.
- 17 [1965] 1 W.L.R. 623, 628, 629.
- 18 *Heilbut, Symons & Co v Buckleton* [1913] A.C. 30, 51.

(b) - Incorporation of Terms

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Chapter 15 - Express Terms

Section 1. - Identification of the Terms and Their Incorporation Into the Contract

(b) - Incorporation of Terms

Incorporation by signature

15-005

U Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not they have read them and whether or not they are ignorant of their precise legal effect.¹⁹ The document that has been signed must be a contractual document and not an administrative document, such as a time sheet or a statement of account which is intended simply to record the performance that has taken place under the contract.

20

U In deciding whether the document which has been signed is a contractual document intended to have contractual effect, the court will consider not only the nature and the purpose of the document, but also the circumstances surrounding its use by the parties and their understanding of its purpose at that time.²¹ The rule that a party is bound by their signature has been described as “an important principle of English law which underpins the whole of commercial life”²² such that “any erosion of it would have serious repercussions far beyond the business community”.²³

Exceptions

- 15-006 The rule that a party is bound by their signature is not, however, without exceptions. So, for example, if the signature is procured by a vitiating factor such as duress, undue influence or misrepresentation, the resulting contract may be set aside on that ground.

[24](#)

- U** Similarly, the defence of non est factum may be available to a party who signs a document but is unable through no fault of their own to have without explanation any real understanding of the document which they have signed, albeit the defence operates within narrow limits.

[25](#)

- U** There may be a further exception, although its limits are uncertain, where the signing party was:

“... under undue pressure or had no real opportunity to read and consider the contract before signing, such as an individual at an airport presented with a car rental agreement.”

[26](#)



Judicial doubts have, however, been expressed in relation to the existence of such an exception

[27](#)

- U** although in a number of cases the point has been left open.

[28](#)

- U** To the extent that it exists, it operates within extremely narrow limits.

[29](#)

- U** Thus the mere fact that the document contains terms which are “onerous or unusual” should not suffice to entitle a party to avoid being bound by their signature.

[30](#)

- U** The circumstances which may fall within the scope of this possible exception are cases where the term is not only onerous or unreasonable but it is clear and obvious to the other party to the transaction that the party who has signed the document has neither read nor understood it as a result of, for example, pressure of time.

[31](#)

- U** In such a case it is possible, although not inevitable, that a court may conclude that the party who has signed the document is not bound by their signature. It may also be the case that,

where the document which has been signed is one that seeks to incorporate a set of terms and conditions but does not itself contain these terms and conditions, a signature may not of itself suffice to incorporate a term or a condition in that document which is onerous or unusual, unless the document which was signed drew attention to the onerous or unusual term.

³²



Reasonable notice

- 15-007 A different problem may arise in proving the terms of the agreement where the contract document has not been signed and it is sought to show that the terms are contained or referred to in a notice or similar document i.e. in some ticket, receipt or standard form document. Frequently, the document is simply made available to a party before or at the time of making the contract, and the question will then arise whether the printed conditions which it contains or to which it refers have become terms of the contract.³³ The party to whom the document is supplied will probably not trouble to read it, and may even be ignorant that it contains any conditions at all. Yet such notices may embody clauses which purport to impose obligations on them or to exclude or restrict the liability of the person supplying the document.³⁴ Thus it becomes important to determine whether these clauses should be given contractual effect. This will depend upon the form of the notice, the time at which it is brought to the attention of the other party and whether reasonable steps have been taken to draw the notice to the attention of the other party.

Contractual document

- 15-008 Where the conditions are contained in a document, the document must be of a class which either the party receiving it knows, or which a reasonable person would expect, to contain contractual conditions. Thus a cheque book,³⁵ a time sheet,³⁶ a ticket for a deck chair,³⁷ a ticket handed to a person at a public bath house³⁸ and a parking ticket issued by an automatic machine³⁹ have been held to be cases:

“... where it would be quite reasonable that the party receiving it should assume that the writing contained no condition and should put it in his pocket unread.”⁴⁰

On the other hand, a railway⁴¹ or ship⁴² ticket, or a receipt for goods deposited⁴³ has been held to be a contractual document.

Time of notice

- 15-009 The conditions must be brought to the notice⁴⁴ of the party to be bound before or at the time when the contract is made. If they are not communicated to them until after the contract is concluded, they will be of no effect. In *Olley v Marlborough Court Ltd*⁴⁵ certain property of the claimant was stolen from his hotel bedroom owing to the negligence of the hotel management. On arrival at the hotel he had signed the hotel register which contained no mention of any exemption clauses, but in the bedroom there was a notice disclaiming liability for articles lost or stolen. It was held that the notice was ineffective as he had not been made aware of it until after the contract was made.

Meaning of notice

- 15-010 It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that they should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts⁴⁶ regarding notice in such circumstances are three in number:

- (1) if the person receiving the document did not know that there was writing or printing on it, they are not bound (although the likelihood that a person will not know of the existence of writing or printing on the document is now probably very low);
- (2) if they knew that the writing or printing contained or referred to conditions, they are bound;
- (3) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them.

Reasonable sufficiency of notice

- 15-011 It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties.⁴⁷ But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient.⁴⁸ Cases in which the notice has been held to be insufficient have been those where the conditions

were printed on the back of the document, without any reference, or any adequate reference, on its face, such as, (i) “[f]or conditions, see back”,⁴⁹ (ii) where, on documents sent by fax, reference was made to conditions stated on the back, but those conditions were not in fact stated on the back or otherwise communicated,⁵⁰ or (iii) where the conditions were obliterated by a printed stamp.⁵¹ In many situations, however, the tender of printed conditions will in itself be sufficient.⁵² It is not necessary that the conditions themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given.⁵³ Reference to standard terms to be found on a website may be sufficient to incorporate the terms on the website into the contract.

54



Onerous or unusual terms

- 15-012 Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention.

55

U “Some clauses which I have seen,” said Denning LJ

56

U :

“... would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.”

The words “onerous or unusual” are not terms of art

57

U and it has been observed that the authorities “do not always agree”

58

U on whether a particular term is “onerous or unusual”.

59

U The hurdle which must be overcome has, however, been described as a “high hurdle”.

60

U Terms which have been held to be “onerous or unusual” include broadly worded or “blanket” exclusion clauses

61

U and clauses which require a party to pay an excessive sum of money on the occurrence of a particular event.

62

U But not all exclusion or limitation clauses should be regarded as “onerous or unusual”,

63

U nor is it the case that all terms which require the payment of potentially significant sums of money to the other party are “onerous or unusual”.

64

U Much depends on the facts and circumstances of the case so that the court must “have full regard to the context and the respective bargaining positions of the parties”.

65

U The guiding principle may be said to be that “the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given”.

66

U The requirement that the term has been brought “fairly and reasonably to the other’s attention” is unlikely to be met in the case where the clause is “buried away in the middle of a raft of small print”.

67

U The practical equivalent of a “red hand” may take the form of a “clear reference”

68

U to the term, such as using bold print to highlight the term, the use of capital letters or otherwise giving the clause a degree of prominence in the contract. A further alternative is expressly to draw the existence of the term to the attention of the other party. This additional requirement for “onerous or unusual” clauses applies to terms sought to be incorporated into the contract by notice. It does not apply to contracts which have been signed, although the case law has left open the possibility that in “exceptional” cases this requirement may apply to a contract which has been signed.

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U

Personal disability

It is immaterial that the party receiving the document is under some personal, but non-legal, disability, such as blindness, illiteracy or an inability to read the English language.⁷⁰ Provided the notice is reasonably sufficient for the class of persons to which the party belongs (e.g. passengers on a ship or railway) they will be bound by the conditions.

Printed notices

- 15-014 Where printed notices are exhibited, it may be sufficient if the party to be bound has, before or at the time of making the contract, had their attention drawn to the notices,⁷¹ or received a printed document which refers them to the notices,⁷² in circumstances which make it clear to them that the contract is subject to the conditions contained in the notices.⁷³ The reference may be circuitous provided it is clear.⁷⁴ It has, however, been stated by Denning LJ that:

“The party who is liable at law cannot escape liability by simply putting up a printed notice, or issuing a printed catalogue, containing exempting conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected.”⁷⁵

In many situations it will nevertheless be sufficient to display a prominent public notice which can be plainly seen at the time of making the contract.⁷⁶ But the issue of a catalogue or brochure which states that the contract to be concluded will be subject to exempting conditions may not be sufficient to make the conditions terms of the contract if further steps to incorporate the conditions are not taken at the time the contract is concluded.⁷⁷

Course of dealing

- 15-015 Conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions.
U ⁷⁸
U But they may be incorporated by a “course of dealing” between the parties
U ⁷⁹
U where each party has led the other reasonably to believe that they intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by them in previous transactions.

80

U Whether this test is satisfied or not depends on the facts of the case.

81

U Conditions usual in a particular trade may be incorporated where both parties are in the trade and are aware that conditions are habitually imposed and of the substance of those conditions, even if they are not referred to at the time of contracting.

82

U

Footnotes

19 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416, 421; *Howatson v Webb* [1908] 1 Ch. 1; *The Luna* [1920] P. 22; *L'Estrange v Graucob Ltd* [1934] 2 K.B. 394; *McCutcheon v David MacBrayne Ltd* [1964] 1 W.L.R. 125, 132–134; *Bahamas Oil Refining Co v Kristiansands Tank-rederie A/S* [1978] 1 Lloyd's Rep. 211; *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Con. L.R. 46; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 211 A.L.R. 342; *Peekay Intermark Ltd v Australia and NZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [43]; see further *Spencer* [1978] C.L.J. 104; *Macdonald* [1999] C.L.J. 413, 420; *Peden and Carter* (2005) 21 J.C.L. 96.

20 *Grogan v Robin Meredith Plant Hire* [1996] C.L.C. 1127. In a case where a party signed a document in which it was stated that it had “received and acknowledged” the terms and conditions of the other party (and below the signature were the words “legally binding signature of the Customer”), it was held that the effect of the signature was not simply to acknowledge the existence of the terms but to incorporate them into the contract between the parties (*TRW Ltd v Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558 at [46]–[48]).

21 *Grogan v Robin Meredith Plant Hire* [1996] C.L.C. 1127.

22 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [43].

23 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [43].

24 See, for example, *Jaques v Lloyd D. George & Partners Ltd* [1968] 1 W.L.R. 625; *Avon Finance Co v Bridger* [1985] 2 All E.R. 281.

25 See above, paras 5-049—5-056.

26 *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) at [89]. The example of the car rental agreement signed at the airport is based on *Tilden Rent-*

a-Car Co v Clendenning (1978) 83 D.L.R. (3d) 400 where the Ontario Court of Appeal held that an individual who signed the document at the airport was not bound by its terms.

②7 *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [209]; *Peekay Intermark Ltd v Australia and NZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [43]; *Do-Buy 95 Ltd v National Westminster Bank Plc* [2010] EWHC 2862 (QB) at [91]; and *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [1055(2)].

②8 *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446 at [48]–[49]; *Amiri Flight Authority v BAE Systems Plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767 at [14]–[16]; *One World (GB) Ltd v Elite Mobile Ltd* [2012] EWHC 3706 (QB) at [52]–[58]; *Dawson v Bell* [2016] EWCA Civ 96, [2016] B.C.L.C. 59 at [103]–[104]; *Yedina v Yedin* [2017] EWHC 3319 (Ch) at [268]; *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) at [89]; *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809 (QB), [2020] 1 W.L.R. 141 at [79] and *Blu-Sky Solutions Ltd v Be Caring Ltd* [2021] EWHC 2619 (Comm), [2022] 2 All E.R. 254 at [100] (where the suggestion is made that the inquiry may be fact-sensitive and that it may be appropriate for a court to adopt a “sliding scale” approach according to which the weight to be attached to the signature will vary depending on the facts and circumstances of the case).

②9 *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446 at [49]; *Do-Buy 95 Ltd v National Westminster Bank Plc* [2010] EWHC 2862 (QB) at [91]–[92]; *Woodeson v Credit Suisse (UK) Ltd* [2018] EWCA Civ 1103 at [46]; *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809 (QB), [2020] 1 W.L.R. 141 at [75]–[79].

③0 It is worth noting that the case which is most commonly cited in support of the proposition that there is a greater obligation to draw to the attention of the other party a term which is “onerous or unusual” is *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433 in which no reference is made to the line of authority concerned with the rule that a party is bound by their signature. One explanation for this omission is that the “onerous or unusual” requirement has no application to contracts which have been signed.

③1 *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446 at [48]; *Amiri Flight Authority v BAE Systems Plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767 at [15].

③2 *Blu-Sky Solutions Ltd v Be Caring Ltd* [2021] EWHC 2619 (Comm), [2022] 2 All E.R. 254 at [99], a proposition which is said to find support in the judgment of Fraser J in *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [1055].

33 See *Sales* (1953) 16 M.L.R. 318; *Clarke* [1976] C.L.J. 51.

34 See below, Ch.17.

35 *Burnett v Westminster Bank* [1966] 1 Q.B. 742.

- 36 *Grogan v Robin Meredith Plant Hire* [1996] 2 C.L.C. 1127.
- 37 *Chapelton v Barry UDC* [1940] 1 K.B. 532.
- 38 *Taylor v Glasgow Corp* 1952 S.C. 440.
- 39 *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163.
- 40 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416, 422.
- 41 *Thompson v L.M. & S. Ry* [1930] 1 K.B. 41.
- 42 *Hood v Anchor Line (Henderson Bros) Ltd* [1918] A.C. 837; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450.
- 43 *Alexander v Ry Executive* [1951] 2 K.B. 882, 886.
- 44 For the meaning of notice, see below, para.15-010.
- 45 [1949] 1 K.B. 532. See also *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163 (ticket proffered by automatic machine); *Hollingworth v Southern Ferries Ltd* [1977] 2 Lloyd's Rep. 70; *Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd's Rep. 257; *Dillon v Baltic Shipping Co* [1991] 2 Lloyd's Rep. 155 (ship tickets); *Metaalhandel JA Magnus BV v Ardfields Transport Ltd* [1988] 1 Lloyd's Rep. 197, 204 (conditions in invoice). cf. *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450.
- 46 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416, 421, 423; *Richardson, Spence & Co v Rowntree* [1894] A.C. 217; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] A.C. 837; *McCutcheon v David Macbrayne Ltd* [1964] 1 W.L.R. 125; *Burnett v Westminster Bank* [1966] 1 Q.B. 742; *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC), [2007] B.L.R. 135; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [56]. See *Clarke* [1976] C.L.J. 51. However, the court may be slower to incorporate a term into a contract between two parties where the term sought to be incorporated is to be found in a contract between two other parties or between one of the contracting parties and a third party: *Barrier Ltd v Redhall Marine Ltd* [2016] EWHC 381 (QB); *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661; *TTMI SARL v Statoil ASA* [2011] EWHC 1150 (Comm), [2011] 2 Lloyd's Rep 220.
- 47 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416; *Richardson, Spence & Co v Rowntree* [1894] A.C. 217; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] A.C. 837, 844, 847.
- 48 *Thompson v L.M. & S. Ry* [1930] 1 K.B. 41.
- 49 *Henderson v Stevenson* (1875) L.R. 2 H.L.(Sc.) 470; *Sugar v L.M. & S. Ry* [1941] 1 All E.R. 172; *White v Blackmore* [1972] 2 Q.B. 651, 664. cf. *Rolls Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC), [2004] 2 All E.R. (Comm) 129; *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), [2015] B.L.R. 336.
- 50 *Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd* [1996] 2 Lloyd's Rep. 388; *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), [2015] B.L.R. 336.
- 51 *Richardson, Spence & Co v Rowntree* [1894] A.C. 217. On small and illegible print, see *Paterson Zochonis & Co Ltd v Elder, Dempster & Co Ltd* [1923] 1 K.B. 420, 441. cf. *P.S. Chellaram & Co Ltd v China Ocean Shipping Co* [1991] 1 Lloyd's Rep. 493, 519.

- 52 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] A.C. 837; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450; *Budd v P. & O. Steam Navigation Co* [1969] 2 Lloyd's Rep. 262; cf. *Union Steamships v Barnes* (1956) 5 D.L.R. (2d) 535.
- 53 *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep. 427; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 613; *Crédit Suisse Financial Products v Société Generale d'Enterprises* (1996) 5 Bank. L.R. 220, *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446; *O'Brien v MGN Ltd* [2001] EWCA Civ 1279, [2002] C.L.C. 33; *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 2 Lloyd's Rep. 87.
- 54 *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 25 (Comm) at [16]; *Blu-Sky Solutions Ltd v Be Caring Ltd* [2021] EWHC 2619 (Comm), [2022] 2 All E.R. 254 at [89].
- 55 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416, 428; *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163; *Hollingworth v Southern Ferries Ltd* [1977] 2 Lloyd's Rep. 70; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433; *Dillon v Baltic Shipping Co* [1991] 2 Lloyd's Rep. 155; *A.E.G. (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 265; *Laceys Footwear v Bowler International Freight (Wholesale) Ltd* [1997] 2 Lloyd's Rep. 369, 384–385; *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446, 451; *O'Brien v MGN Ltd* [2001] EWCA Civ 1279, [2002] C.L.C. 33; *Amiri Flight Authority v BAE Systems Plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767; *Kaye v NuSkin UK Ltd* [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep. 40; *Woodeson v Credit Suisse (UK) Ltd* [2018] EWCA Civ 1103; *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] B.L.R. 491 at [46]; *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [959]–[1061].
- 56 *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 466.
- 57 *O'Brien v MGN Ltd* [2001] EWCA Civ 1279, [2002] C.L.C. 33 at [23].
- 58 *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] B.L.R. 491 at [33].
- 59 Further, they do not always agree as to the formulation of the test to be applied. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433 the words used are “onerous or unusual” whereas in *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) the test is formulated in terms of whether the clause is “onerous and unusual”. Thus it is not entirely clear whether it would suffice to demonstrate that the clause was “unusual” but not “onerous”. However, it may be that the courts do not wish to get bogged down in a linguistic analysis of the different ways in which the test can be expressed (see *Bates* at [980]).

- ⑥0 *Bates v Post Office Ltd (No.3: Common Issues) [2019] EWHC 606 (QB)* at [979]; *Higgins & Co Lawyers Ltd v Evans [2019] EWHC 2809 (QB), [2020] 1 W.L.R. 141* at [73].
- ⑥1 See, for example, *Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163*. See also *A.E.G. (UK) Ltd v Logic Resource Ltd [1996] C.L.C. 265* where it was held that a term which required the purchaser to return defective goods at its own expense was both onerous and unreasonable.
- ⑥2 See, for example, *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] Q.B. 433* and *Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm), [2022] 2 All E.R. 254* at [109].
- ⑥3 See, for example, *Shepherd Homes Ltd v Encia Remediation Ltd [2007] EWHC 70 (TCC), [2007] B.L.R. 135*; *Allen Fabrications Ltd v ASD Ltd [2012] EWHC 2213 (TCC)* at [57]–[64]; *Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371, [2018] B.L.R. 491* at [35]; *Natixis SA v Marex Financial [2019] EWHC 2549 (Comm)* at [490]–[502].
- ⑥4 See, for example, *Photolibrary Group Ltd v Burda Senator Verlag GmbH [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 881*, which should be contrasted in this respect with *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] Q.B. 433*. There is also a line of cases concerned with arbitration clauses where the term has been held not to be onerous or unusual: *Stretford v Football Association Ltd [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31*; *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL [2010] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661*.
- ⑥5 *Carewatch Care Services Ltd v Focus Caring Services Ltd [2014] EWHC 2313 (Ch)* at [84].
- ⑥6 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] Q.B. 433, 443*. In *Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371, [2018] B.L.R. 491* at [101] Gross LJ described the approach as the operation of a “sliding scale”. See also *Huntsworth Wine Co Ltd v London City Bond Ltd [2021] EWHC 2831 (Comm)* at [116].
- ⑥7 *Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371, [2018] B.L.R. 491* at [53]. See also *Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm), [2022] 2 All E.R. 254* at [110].
- ⑥8 *O'Brien v MGN Ltd [2001] EWCA Civ 1279, [2002] C.L.C. 33* at [23].
- ⑥9 See above, para.15-006.
- 70 *Thompson v L.M. & S. Ry [1930] 1 K.B. 41*; cf. *Firchuk and Firchuk v Waterfront Cartage Division, etc., Ltd [1969] 2 Lloyd's Rep. 533, 534*. Quaere if the disability is known to the

other contracting party: see *Geier v Kujawa Weston and Warne Bros (Transport) Ltd [1970] 1 Lloyd's Rep. 364*.

71 *Birch v Thomas [1972] 1 W.L.R. 294.*

72 *Watkins v Rymill (1883) 10 Q.B.D. 178.*

73 cf. *Hollingworth v Southern Ferries Ltd [1977] 2 Lloyd's Rep. 70.*

74 *Wyndham Rather Ltd v Eagle Star and British Dominions Insurance Co Ltd (1925) 21 Ll.L. Rep. 214; Thompson v L.M. & S. Ry [1930] 1 K.B. 41; Goodyear Tyre & Rubber Co v Lancashire Batteries [1958] 1 W.L.R. 857.*

75 *Harling v Eddy [1951] 2 K.B. 739, 748.* See also *Olley v Marlborough Court Ltd [1949] 1 K.B. 532, 549; Adams (Durham) Ltd v Trust Houses Ltd [1960] 1 Lloyd's Rep. 380; Mendelssohn v Normand Ltd [1970] 1 Q.B. 177, 182.*

76 *Olley v Marlborough Court Ltd [1949] 1 K.B. 532, 549; Ashdown v Samuel Williams & Sons Ltd [1957] 1 Q.B. 409; Thornton v Shoe Lane Parking Ltd [1970] 1 Q.B. 177; White v Blackmore [1972] 2 Q.B. 651.* Contrast *McCutcheon v David MacBrayne Ltd [1964] 1 W.L.R. 125; Smith v Taylor [1966] 2 Lloyd's Rep. 231; Burnett v British Waterways Board [1973] 1 W.L.R. 700.*

77 *Hollingworth v Southern Ferries Ltd [1977] 2 Lloyd's Rep. 70.*

78 *McCutcheon v David MacBrayne Ltd [1964] 1 W.L.R. 125, HL* (no consistent course of dealing); *Hollier v Rambler Motors (A.M.C.) Ltd [1972] 2 Q.B. 71* (only three or four times in five years); *Capes (Hatherden) Ltd v Western Arable Services Ltd [2009] EWHC 3065 (QB), [2010] 1 Lloyd's Rep. 477* (four contracts in same year with interval of five months between the last of them and the two contracts in question); *Transformers & Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC), [2015] B.L.R. 336* (claimant failed to follow a consistent practice of enclosing its terms and conditions with every purchase order). The Court of Appeal of Singapore in *Nambu PVD Pte Ltd v UBTS Pte Ltd [2021] SGCA 98, [2022] 1 S.L.R. 391* held that the course of dealing must relate to terms which had contractual force in the previous dealings between the parties and that it will not suffice to show that a prior course of dealing concerned non-contractual documents. In other words, reliance on a prior non-contractual document cannot give rise to a course of dealing with contractual effect.

79 Contracting parties may form part of a wider group of traders executing similar transactions, in which case a course of dealing can be established by reference to transactions with the whole group: *SIAT di del Ferro v Tradax Overseas SA [1978] 2 Lloyd's Rep. 470, 490; Lisnave Estaleiros Navais SA v Chemikalien Seetransport [2013] EWHC 338 (Comm), [2013] 2 Lloyd's Rep 203* at [28] and *Provimi France SAS v Stour Bay Co Ltd [2022] EWHC 218 (Comm)* at [234].

80 *J. Spurling Ltd v Bradshaw [1956] 1 W.L.R. 461, 467; Cockerton v Naviera Aznar SA [1960] 2 Lloyd's Rep. 450; Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 A.C. 31, 90, 91, 104, 105, 130; Transmotors Ltd v Robertson Buckley & Co Ltd [1970] 1 Lloyd's Rep. 224; Eastman Chemical International AG v N.M.T. Trading Ltd [1972] 2 Lloyd's Rep. 25; Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd [1973] Q.B. 400; S.I.A.T. di del*

Ferro v Tradax Overseas SA [1978] 2 *Lloyd's Rep.* 470 (*affirmed* [1980] 1 *Lloyd's Rep.* 53); *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1981] 2 *Lloyd's Rep.* 659 (*affirmed* [1982] 2 *Lloyd's Rep.* 42); *McCrone v Boots Farm Sales Ltd* 1981 S.L.T. 103; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] Q.B. 284, 295 (*affirmed* [1983] 2 A.C. 803); *Johnson Matthey Bankers Ltd v State Trading Corp of India Ltd* [1984] 1 *Lloyd's Rep.* 427; *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 *Lloyd's Rep.* 427; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 *Lloyd's Rep.* 629 at [362]–[366]; *Capes (Hatherden) Ltd v Western Arable Services Ltd* [2009] EWHC 3065 (QB), [2010] 1 *Lloyd's Rep.* 477 at [32]–[42]; *Hamad M Aldrees & Partners v Rotex Europe Ltd* [2019] EWHC 574 (TCC), 184 Con. L.R. 145 at [80]–[81]; *Provimi France SAS v Stour Bay Co Ltd* [2022] EWHC 218 (Comm); cf. *Banque Paribas v Cargill International SA* [1992] 1 *Lloyd's Rep.* 96, 98; see *Hoggett* (1970) 33 M.L.R. 518. See also *Photolibrary Group Ltd v Burda Senator Verlag GmbH* [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 881; *SKNL (UK) Ltd v Toll Global Forwarding* [2012] EWHC 4252 (Comm), [2013] 2 *Lloyd's Rep.* 115.

⑧1 *Provimi France SAS v Stour Bay Co Ltd* [2022] EWHC 218 (Comm) at [234]; *Addax Energy SA v Petro Trade Inc* [2022] EWHC 237 (Comm) at [31] where it was observed that the course of dealing need not be “extensive” nor need it be “entirely consistent” provided that the test set out above is satisfied on the facts of the case.

⑧2 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303; *Chevron International Oil Co Ltd v A/S Sea Team* [1983] 2 *Lloyd's Rep.* 356; *Laceys Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 *Lloyd's Rep.* 369, 378; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 *Lloyd's Rep.* 629 at [357]; *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), [2015] B.L.R. 336 at [42]. cf. *Salsi v Jetspeed Air Services Ltd* [1977] 2 *Lloyd's Rep.* 57; *Pancommerce SA v Veecheema BV* [1983] 2 *Lloyd's Rep.* 304, 305; *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 *Lloyd's Rep.* 438; *Shipbuilders Ltd v Benson* [1992] 3 N.Z.L.R. 349; *Grogan v Robin Meredith Plant Hire* [1996] 2 C.L.C. 1127; *Hamad M Aldrees & Partners v Rotex Europe Ltd* [2019] EWHC 574 (TCC), 184 Con. L.R. 145 at [167]–[181]; *Provimi France SAS v Stour Bay Co Ltd* [2022] EWHC 218 (Comm) at [226]. See also *Matrix Europe Ltd v Uniserve Holdings Ltd* [2008] EWHC 11 (QB), [2008] 1 C.L.C. 205 (BIFA terms applied even to unintentional delivery of goods).

(c) - Joinder of Documents and Collateral Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 15 - Express Terms

Section 1. - Identification of the Terms and Their Incorporation Into the Contract

(c) - Joinder of Documents and Collateral Contracts

Incorporation by express reference

- 15-016 The terms of a contract may be contained in more than one document. In such a case, the terms set out in one document may incorporate into the contract terms to be found in another document.

Incorporation without express reference

- 15-017 Contracts may also be found to have been made subject to the terms of a “master agreement” even though that agreement is not referred to in the individual contracts.⁸³ A sequence of emails may be read together even if a later email does not expressly refer to the earlier emails.⁸⁴

Collateral contracts⁸⁵

- 15-018 It may be difficult to treat a statement made in the course of negotiations for a contract as a term of the contract itself, because the statement was clearly prior to and outside the contract, the incorporation of the statement is excluded by an entire agreement clause in the contract itself⁸⁶ or because the existence of the parol evidence rule⁸⁷ prevents its inclusion. Nevertheless, the courts

are prepared in some circumstances to treat a statement intended to have contractual effect as a separate contract or warranty, collateral to the main transaction.⁸⁸ In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point⁸⁹ or unless the other promises not to enforce a term of the written agreement.⁹⁰ Thus in *De Lassalle v Guildford*⁹¹ the claimant and the defendant negotiated for the lease of a house. The terms of the lease were arranged, but the claimant (the prospective tenant) refused to hand over the counterpart of the lease which he had signed unless the defendant assured him that the drains were in good order. The defendant gave this assurance, and the counterpart lease was thereupon handed to him. The drains were not in fact in good order and the claimant sued the defendant on his assurance, no reference to drains having been made in the lease itself. The Court of Appeal held that the assurance constituted a contract collateral to the lease on which the defendant was liable. However, in *Heilbut Symons & Co v Buckleton*,⁹² Lord Moulton said:

“Such collateral contracts, the sole effect of which is to vary or add to the terms of the written contract, are therefore viewed with suspicion by the law ... Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be strictly shown.”

But more recently Lord Denning MR stated⁹³ that “much of what was said in that case is entirely out of date”.

Willingness to find a collateral contract

15-019 It is undoubtedly true that the courts are nowadays much more willing to accept that a pre-contractual assurance gives rise to a collateral contract,⁹⁴ so that such collateral contracts are no longer rare. Where the assurance consists of a statement of present or past fact, there may now be less need to infer a collateral contract, since a remedy in damages may be available under the *Misrepresentation Act 1967*⁹⁵ for a representation of fact. But where the assurance is as to the future, the Act does not apply⁹⁶ and in such a case the claimant must prove a collateral contract or fail completely. Lord Denning MR has said⁹⁷:

“When a person gives a promise or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding.”

Consideration and remedies

- 15-020 Consideration for the collateral contract is normally provided by entering into the main contract,⁹⁸ but a collateral contract may also be actionable even if the main contract is unenforceable, e.g. for illegality.⁹⁹ Breach of the collateral contract will give rise to an action for damages for its breach, but not as a general rule to a right to treat the main contract as repudiated. However, the effect of a collateral contract may be to vary the terms of the main contract¹⁰⁰ or to estop a party from acting inconsistently with it if it would be inequitable for him to do so.¹⁰¹

Third parties

- 15-021 A collateral contract may also be found to exist where the main contract is not between the claimant and the defendant, but between the claimant and a third party. In *Shanklin Pier Ltd v Detel Products Ltd*,¹⁰² the claimants, owners of Shanklin Pier, wished to have their pier painted with suitable paint. They asked the defendants, a firm of paint manufacturers, whether their paint was suitable for this purpose, and were assured that it was. The claimants therefore caused to be inserted in a contract made between them and the contractors who were to paint the pier a stipulation that the defendants' paint should be used. The paint was entirely unsuitable, and the claimants sued the defendants on their assurance. It was held that the assurance constituted a contract, collateral to the contract for painting the pier, the consideration for which was the claimants' entry into the contract containing the stipulation that the defendants' paint should be used. Similarly a collateral contract may exist where the main contract is between the defendant and a third party, as in *Charnock v Liverpool Corp*,¹⁰³ where the main contract to repair a car was between the repairer and an insurance company, but there was also a collateral contract between the repairer and the owner of the car that the repairer should do the repairs within a reasonable time.

Footnotes

- 83 *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 Q.B. 711. But cf. *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm), [2013] 2 Lloyd's Rep. 213.
- 84 *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT* [2011] EWHC 56 (Comm), [2011] 2 All E.R. (Comm) 95, [2012] EWCA Civ 265, [2012] 1 W.L.R. 3674.
- 85 See Paterson, Collateral Warranties Explained (1991) and para.20-008, below.
- 86 See below, para.15-031.

- 87 See below, paras 15-023—15-032.
- 88 *Lindley v Lacey* (1864) 17 C.B.(N.S.) 578; *Mann v Nunn* (1874) 30 L.T. 526; *Spicer v Martin* (1888) 14 App. Cas. 12; *Jacobs v Batavia & General Plantations Trust Ltd* [1924] 1 Ch. 287; *Jameson v Kinmell Bay Land Co Ltd* (1931) 47 T.L.R. 593; *Miller v Cannon Hill Estates Ltd* [1931] 2 K.B. 113; *Birch v Paramount Estates* (1956) 167 E.G. 396; *Frisby v BBC* [1967] Ch. 932; *Quickmaid Rental Services v Reece* (1970) 114 S.J. 372, CA; *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078; *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; *Record v Bell* [1991] 1 W.L.R. 853; *Wake v Renault (UK) Ltd* (1996) 15 Tr. L.R. 514; *Procter & Gamble (Health and Beauty Care) Ltd v Carrier Holdings Ltd* [2003] EWHC 83 (TCC), [2003] B.L.R. 255; *Thinc Group v Armstrong* [2012] EWCA Civ 1227 at [40]–[41]; *Wedderburn* [1959] C.L.J. 58; *Greig* (1971) 87 L.Q.R. 179.
- 89 *Morgan v Griffith* (1871) L.R. 6 Ex. 70; *Erskine v Adeane* (1873) L.R. 8 Ch. App. 756; *Newman v Gatti* (1907) 24 T.L.R. 18, 20; *Heilbut, Symons & Co v Buckleton* [1913] 1 A.C. 30, 47.
- 90 *Couchman v Hill* [1947] K.B. 554; *Webster v Higgin* [1948] 2 All E.R. 127; *Harling v Eddy* [1951] 2 K.B. 739; *City of Westminster Properties* (1934) Ltd v *Mudd* [1959] Ch. 129; *Brikom Investments Ltd v Carr* [1979] Q.B. 467; cf. *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622, (2007) 32 E.G. 90.
- 91 [1901] 2 K.B. 215.
- 92 [1913] A.C. 30, 47. See also *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622, (2007) 32 E.G. 90.
- 93 *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078, 1081; *Howard Marine & Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574, 590. See also *Esso Petroleum Co Ltd v Mardon* [1978] Q.B. 801, 817.
- 94 *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2017] EWHC 1367 (Ch) at [234]. But compare *Howard Marine & Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574.
- 95 s.2(1); see above, para.9-084.
- 96 See above, para.9-008.
- 97 *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078, 1081. But see *Heilbut Symons & Co v Buckleton* [1913] A.C. 30, 38, 42, 47, 49–50; *Jonathan Wren & Co Ltd v Microdec Plc* (1999) 65 Const. L.R. 157; *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep. 611 at [11]; *Brewer v Mann* [2010] EWHC 2444 (QB) at [142].
- 98 cf. *De Lassalle v Guildford* [1901] 2 K.B. 215; *Hill v Harris* [1965] 2 Q.B. 601.
- 99 See below, para.18-232.
- 100 *Wake v Renault (UK) Ltd* (1996) 15 Tr. L.R. 514.
- 101 *Brikom Investments Ltd v Carr* [1979] Q.B. 467; but see above, para.6-151.
- 102 [1951] 2 K.B. 854. See *Brown v Sheen & Richmond Car Sales Ltd* [1950] 1 All E.R. 1102; *Andrews v Hopkinson* [1957] 1 Q.B. 229; *Smith v Spurling Motor Bodies Ltd* (1961) 105 S.J. 967; *Yeoman Credit Ltd v Odgers* [1962] 1 W.L.R. 215; *Wells (Merstham) Ltd v Buckland Sand & Silica Ltd* [1965] 2 Q.B. 170. cf. *Drury v Victor Buckland Ltd* [1941] 1 All E.R. 269; *Independent Broadcasting Authority v EMI Electronics* (1980) 14 Build. L.R. 1; *Lambert v Lewis* [1982] A.C. 225; *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1993] 1

W.L.R. 138 (reversed on other grounds, [1995] Ch. 152); *Fuji Seal Europe Ltd v Catalytic Combustion Corporation* [2005] EWHC 1659 (TCC), 102 Con L.R. 47; *Natixis SA v Marex Financial* [2019] EWHC 2549 (Comm) at [251]–[260].

- 103 [1968] 1 W.L.R. 1498. cf. *Brown and Davis Ltd v Galbraith* [1972] 1 W.L.R. 997. See below, para.20-011.

Section 2. - Admissibility of Extrinsic Evidence and the Parol Evidence Rule

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 15 - Express Terms

Section 2. - Admissibility of Extrinsic Evidence and the Parol Evidence Rule

Introduction: Written documents

- 15-022 Where the parties appear to have embodied their agreement in a written document,¹⁰⁴ the question arises whether extrinsic evidence, that is to say, evidence of matters outside the document, is admissible so as to affect its content. Two issues are involved: first, whether it is permissible to adduce extrinsic evidence of terms other than those included, expressly or by reference, in the document; secondly, whether extrinsic evidence may be admitted to explain or interpret the words used in the document. The former is the subject-matter of this section, whereas the role of extrinsic evidence in interpreting the words used in the document will be examined in the section dealing with the construction of contracts. At this point it suffices to note that different considerations apply to the admissibility of extrinsic evidence to interpret or explain a written agreement than in the case where the extrinsic evidence is relied upon for the purpose of adding another term to the contract.¹⁰⁵ Extrinsic evidence admitted to interpret or explain a written document does not usurp the authority of the written document or contradict, vary, add to or subtract from its terms. It is the writing which operates. The extrinsic evidence does no more than assist in its operation by assigning a definite meaning to terms capable of such explanation or by pointing out and connecting them with the proper subject matter.¹⁰⁶ Accordingly, no “parol evidence rule” (in the sense referred to above and in the following paragraphs) will apply to such a situation.¹⁰⁷

Footnotes

¹⁰⁴ For computerised “documents”, see above, para.15-052.

- 105 See Law Com.No.154, 1986, Cmnd.9700, para.1.2; referred to with approval in *Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep. 127*, 140.
- 106 *Thorpe v Brumfitt (1873) L.R. 8 Ch. App. 650*; *Johnstone v Holdway [1963] 1 Q.B. 601*; *The Shannon Ltd v Venner Ltd [1965] Ch. 682*; *Perrylease Ltd v Imecar AG [1988] 1 W.L.R. 463*.
- 107 *Colpoys v Colpoys (1822) Jac. 451*.

(a) - The Parol Evidence Rule

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(a) - The Parol Evidence Rule

Whether document conclusive: the “parol evidence” rule

15-023 It is often said to be a rule of law that:

“If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract.”¹⁰⁸

Indeed, in 1897, Lord Morris¹⁰⁹ accepted that:

“... parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.”

This rule is usually known as the “parol evidence” rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing, such as drafts,¹¹⁰ preliminary agreements¹¹¹ and letters of negotiation.¹¹² The rule has been justified on the ground that it upholds the value of written proof,¹¹³ effectuates the finality intended by the parties in recording their contract in written form,¹¹⁴ and eliminates “great inconvenience and troublesome litigation in many instances”.¹¹⁵

Exceptions to the rule

- 15-024 However, the parol evidence rule is and has long been subject to a number of exceptions.¹¹⁶ In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties.¹¹⁷ So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement.¹¹⁸ In *Gillespie Bros & Co v Cheney, Eggar & Co*,¹¹⁹ Lord Russell CJ stated:

“... although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement.”

It cannot therefore be asserted that the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document:

“The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties.”¹²⁰

Scope of the rule

- 15-025 It follows that the scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determined that the terms of the parties' agreement are wholly contained in the written document. The rule:

“... only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement.”¹²¹

Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the evidence relevant to this issue. It is therefore always open to a party to adduce extrinsic

evidence to prove that the document is not a complete record of the contract. If, on that evidence, the court finds that terms additional to those in the document were agreed and intended by the parties to form part of the contract, then the court will have found that the contract consists partly of the terms contained in the document and partly of the terms agreed outside of it. The parol evidence rule will not apply. If, on the other hand, the court finds that the document is a complete record of the contract, then it will reject the evidence of additional terms. But it will do so, not because it is required to ignore the additional terms or the evidence said to prove them, but because such evidence is inconsistent with its finding that the document does contain the entire terms of the parties' agreement.¹²² No doubt, in practice, where a document is produced which appears to be a complete contract, a party will experience considerable difficulty in proving, on the balance of probabilities, that further contractual terms were agreed outside the written terms of the document. But extrinsic evidence of such terms is not ipso facto excluded.

Law Commission Report

- 15-026 In 1986, the Law Commission considered¹²³ whether it should recommend that the parol evidence rule be abolished or amended by statute. For this purpose, it was necessary for the Commission to analyse the rule in detail as to its applicability, width and effect. The Commission expressed the opinion¹²⁴ that:

“... although a proposition of law can be stated which can be described as the ‘parol evidence’ rule it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: [W]hen it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.”

The general conclusion¹²⁵ reached by the Commission was:

“... that there is no *rule of law* that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law.”

It is submitted that this general conclusion is correct.¹²⁶

Extrinsic evidence to contradict document

15-027 More justification ¹²⁷ might, however, be found for the parol evidence rule if deployed to prevent extrinsic evidence being adduced to vary or contradict the terms of a written document. It could be said then to fulfil a useful purpose in that it would emphasise the primacy traditionally accorded to the written text of complete contractual documents, where these exist. ¹²⁸ But, where it appears that the parties did not intend to record all the terms of their agreement in a particular document, then on the same analysis extrinsic evidence would be admissible to prove other terms even if they varied or contradicted those in the document. ¹²⁹ Thus if the terms of a document stipulated that payment should be made on a certain day, evidence would be admissible of a contemporaneous agreement outside the document that payment was to be deferred until a later day. ¹³⁰ Or if the terms of the document provided that one party was to have the unqualified right to terminate the contract upon one month's notice in writing, evidence would be admissible to prove a contractual agreement outside the document that the contract should only determine by effluxion of time. ¹³¹ If there is an inconsistency, that is, if effect cannot fairly be given to both terms, then the court might reject that term which least accords with the meaning of the contract as ascertained from the whole of the agreement. ¹³² Of such a situation the Law Commission said ¹³³:

“... it is no different in principle from that in which the parties agree two inconsistent terms both of which are set out in the same document. The court will have to decide which of the inconsistent terms more nearly represents the intention of the parties.”

However, the difficulty of proving that the written document did not express the true and complete agreement of the parties may lead the party who alleges a promise or assurance inconsistent with the document to seek to establish a collateral contract or warranty ¹³⁴ or (in appropriate cases) to seek rectification of the document on the ground that it did not express the concurrent intentions of the parties at the time of its execution. ¹³⁵

Contracts required to be in writing

15-028 Certain contracts are required by law to be in writing. ¹³⁶ The effect of this requirement will be to exclude *oral* evidence which is offered for no other purpose than to contradict, vary, add to or subtract from the contract as contained in writing. In particular, the contracts of the various parties to a bill of exchange or promissory note must be in writing. ¹³⁷ It is well established that, even as between immediate parties to a bill or note, evidence will not be admitted to prove an oral agreement to qualify the absolute undertaking of a party on the instrument, for example, to show

that their liability is to be enforceable against them only in certain contingencies or that it is to be postponed to a time later than that expressed on the face of the instrument.¹³⁸ But:

“... a written agreement on a distinct paper, to renew, or in other respects to qualify, the liability of the maker or acceptor, is good as between the original parties.”¹³⁹

Indeed it would seem that, as between immediate parties, evidence may always be given of a contemporaneous *written* agreement to vary the effect of the instrument and regulate their rights between themselves.¹⁴⁰ However, in the case of a contract for the sale or other disposition of an interest in land which is required by the **Law of Property (Miscellaneous Provisions) Act 1989**¹⁴¹ to be made in writing and signed by or on behalf of each party to the contract, all the terms which the parties have expressly agreed must be incorporated in one document (or, where contracts are exchanged, in each).¹⁴² Terms may be incorporated in a document either by being set out in it or by reference to some other document.¹⁴³ But, in the absence of such a reference in the signed document, evidence will not be admissible to prove that other terms were agreed in writing in addition to those set out in the document,¹⁴⁴ except to show that the document does not satisfy the statutory requirements.¹⁴⁵

Contracts required to be evidenced in writing

- 15-029 Where the contract is one which by statute must be evidenced by a note or memorandum in writing signed by the party to be charged or their agent, as in the case of a contract of guarantee,¹⁴⁶ the memorandum must contain a statement of the material terms of the contract.¹⁴⁷ Extrinsic evidence is not admissible to prove that the parties orally agreed material terms which ought to have been, but were not, included in the memorandum, since the admission of such evidence would plainly not satisfy the statute.¹⁴⁸ Parol evidence is, however, admissible to connect two or more documents, provided that the document which is signed by the party to be charged expressly or by implication refers to the other document or documents,¹⁴⁹ but not otherwise.¹⁵⁰

Collateral contracts

- 15-030 Even though the parties intended to express the whole of their agreement in a particular document, extrinsic evidence will nevertheless be admitted to prove a contract or warranty collateral to that agreement.¹⁵¹ The reason is that “the parol agreement neither alters nor adds to the written one, but is an independent agreement”.¹⁵² Such evidence is certainly admissible in respect of a matter on

which the written contract is silent.¹⁵³ In a number of older cases it was stated that evidence of such a contract or warranty must not contradict the express terms of the written contract.¹⁵⁴ However, more recently, the courts have admitted evidence to prove an overriding oral warranty¹⁵⁵ or to prove an oral promise that the written contract will not be enforced in accordance with its terms.¹⁵⁶ Thus in *City of Westminster Properties (1934) Ltd v Mudd*¹⁵⁷ the draft of a new lease presented to a tenant contained a covenant that he would use the premises for business purposes only and not as sleeping quarters. The tenant objected to this covenant, and the landlords gave him an oral assurance that, if he signed the lease, they would not enforce it against him. The tenant signed the lease, but later the landlords sought to forfeit the lease for breach of this covenant. Harman J held that the oral assurance constituted a separate collateral contract from which the landlords would not be permitted to resile. The collateral contract or warranty may be oral or informal¹⁵⁸ even though the main contract is one which is required by law to be in or evidenced by writing.¹⁵⁹

“Entire agreement” clauses

15-031

 The practice has developed¹⁶⁰ of including in written agreements of a formal character an “entire agreement” clause, for example:

“This Agreement contains the entire and only agreement between the parties and supersedes all previous agreements between the parties respecting the subject matter hereof; each party acknowledges that in entering into this Agreement it has not relied on any representation or undertaking, whether oral or in writing, save such as are expressly incorporated herein.”

The purpose of such a clause is to achieve, by a somewhat roundabout route, the exclusion of liability for statements other than those set out in the written contract. The effect of the clause will necessarily depend upon its precise wording. It has been stated¹⁶¹ that an “entire agreement” clause operates “to denude what would otherwise constitute a collateral warranty of legal effect” rather than to render inadmissible extrinsic evidence to prove terms other than those in the written contract.¹⁶² However, the language of the clause may not be apt to exclude representations¹⁶³ even if it excludes claims arising out of a collateral contract or warranty.¹⁶⁴ It should also not prevent use of extrinsic evidence to ascertain the meaning of an express term in the contract.

¹⁶⁵

 An entire agreement clause may be waived by a party who might otherwise have relied on it.¹⁶⁶

Extrinsic evidence admissible

- 15-032 There are, in any event, a number of situations in which the written instrument is not conclusive evidence of the contract alleged to be embodied in it. These situations may be regarded either as exceptions to the parol evidence rule or simply as cases falling outside the rule.¹⁶⁷ They will now be discussed.

Footnotes

- 108 *Goss v Lord Nugent* (1833) 5 B. & Ad. 58, 64. See also *Countess of Rutland's Case* (1602) 5 Co. Rep. 25b, 26a; *Meres v Ansell* (1771) 3 Wils. 275; *Smith v Doe d. Jersey* (1821) 2 Brod. & Bing. 473, 541; *Smith v Jeffryes* (1846) 15 M. & W. 561; *Hitchin v Groom* (1848) 5 C.B. 515; *Evans v Roe* (1872) L.R. 7 C.P. 138; *Mercantile Agency Co Ltd v Flitwick Chalybeate Co* (1897) 14 T.L.R. 90; *Newman v Gatti* (1907) 24 T.L.R. 18; *Reliance Marine Insurance v Duder* [1913] 1 K.B. 265, 273; *Hitchings & Coulthurst Co v Northern Leather Co of America and Doushkess* [1914] 3 K.B. 907; *Jacobs v Batavia and General Plantations Trust Ltd* [1924] 1 Ch. 287, 295; *Tsang Chuen v Li Po Kwai* [1932] A.C. 715, 727; *O'Connor v Hume* [1954] 1 W.L.R. 824, 830; *Rabin v Gerson Berger Association Ltd* [1986] 1 W.L.R. 526, 530; *Orion Insurance Co Plc v Sphere Drake Insurance Plc* [1992] 1 Lloyd's Rep. 239, 273.
- 109 *Bank of Australasia v Palmer* [1897] A.C. 540, 545 (cited in *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] A.C. 785, 818–819).
- 110 *Miller v Travers* (1832) 8 Bing. 244; *Inglis v Butterly* (1878) 3 App. Cas. 552; *National Bank of Australasia v Falkingham & Sons* [1902] A.C. 585.
- 111 *Evans v Roe* (1871–72) L.R. 7 C.P. 138; *Leggott v Barrett* (1880) 15 Ch. D. 306, 309, 311; *Henderson v Arthur* [1907] 1 K.B. 10; *Newman v Gatti* (1907) 24 T.L.R. 18; *Hitchings & Coulthurst Co v Northern Leather Co of America and Doushkess* [1914] 3 K.B. 907; *Hutton v Watling* [1948] Ch. 398; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127. But see *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [83] and *Medenta Finance Ltd v Hitachi Capital (UK) Plc* [2019] EWHC 516 (Comm) at [49].
- 112 *Mercantile Bank of Sydney v Taylor* [1893] A.C. 317.
- 113 *Pickering v Dowson* (1813) 4 Taunt. 779, 784.
- 114 *Inglis v Butterly* (1877–78) L.R. 3 App. Cas. 552, 577.
- 115 *Mercantile Agency Co Ltd v Flitwick Chalybeate Co* (1897) 14 T.L.R. 90.
- 116 See below, paras 15-032 et seq.
- 117 *Mercantile Bank of Sydney v Taylor* [1893] A.C. 317, 321.
- 118 *Harris v Rickett* (1859) 4 Hurl. & N. 1; *Malpas v L. & S.W. Ry* (1866) L.R. 1 C.P. 336; *Gillespie Bros v Cheney Eggar & Co* [1896] 2 Q.B. 59; *J. Evans & Son (Portsmouth) Ltd*

- v Andrea Merzario Ltd [1976] 1 W.L.R. 1078; Yani Haryanto v E.D. & F. Man (Sugar) Ltd [1986] 2 Lloyd's Rep. 44, 46–47.
- 119 [1896] 2 Q.B. 59, 62.
- 120 *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078, 1083.
- 121 *Harris v Rickett* (1859) 4 Hurl. & N. 1, 7; *Turner v Forwood* [1951] 1 All E.R. 746, 749.
- 122 *Wild v Civil Aviation Authority* Unreported 25 September 1987, CA.
- 123 Law Com.154, 1986, Cmnd.9700. See *Marston* [1986] C.L.J. 192.
- 124 Law Com.154, Cmnd.9700, para.2.7.
- 125 Law Com.154, Cmnd.9700, para.2.17.
- 126 The Commission's Report was referred to with approval in *Wild v Civil Aviation Authority* Unreported 25 September 1987, CA and in *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 N.S.W.L.R. 170, 192. See also *Yani Haryanto v E.D. & F. Man (Sugar) Ltd* [1986] 2 Lloyd's Rep. 44, 46; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127, 133, 140. Contrast the view expressed in Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.6-021.
- 127 For modern instances of support for the rule, see *AIB Group (UK) Ltd v Martin* [2001] UKHL 63, [2002] 1 W.L.R. 94 at [4]; *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919 at [49]; *TTMI Sarl v Statoil ASA* [2011] EWHC 1150 (Comm), [2011] 2 Lloyd's Rep. 220 at [19], [34].
- 128 cf. *Gillespie Brothers & Co v Cheney, Eggar & Co* [1896] 2 Q.B. 59, 62; *Wedderburn* [1959] C.L.J. 58, 62 (presumption only).
- 129 But see e.g. *Angell v Duke* (1875) 32 L.T. 320; *Henderson v Arthur* [1907] 1 K.B. 10.
- 130 *Young v Austen* (1869) L.R. 4 C.P. 553; *Maillard v Page* (1870) L.R. 5 Ex. 312 (in these cases the extrinsic agreement was in writing, as the contract was required to be in writing: see below, para.15-028).
- 131 cf. *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 N.S.W.L.R. 170, 191–192.
- 132 See below, para.15-080.
- 133 Law Com.154, 1986, Cmnd.9700, para.2.16.
- 134 See below, para.15-030.
- 135 See above, para.5-057.
- 136 See above, paras 7-001 et seq.
- 137 Bills of Exchange Act 1882 ss.3(1) (drawer), 17(1) (acceptor), 32(1) (indorser), 83(1) (maker).
- 138 *Hoare v Graham* (1811) 3 Camp. 57; *Free v Hawkins* (1817) 8 Taunt. 92; *Woodbridge v Spooner* (1819) 3 B. & Ald. 233; *Campbell v Hodgson* (1819) Gow 74; *Moseley v Hanford* (1830) 10 B. & C. 729; *Foster v Jolly* (1835) 1 C.M. & R. 703; *Adams v Wordley* (1836) 1 M. & W. 374; *Besant v Cross* (1851) 10 C.B. 895; *Drain v Harvey* (1855) 17 C.B. 257; *Abrey v Crux* (1869) L.R. 6 C.P. 37; *Young v Austen* (1869) L.R. 4 C.P. 553, 556; *Maillard v Page* (1870) L.R. 5 Exch. 312, 319; *Stott v Fairlamb* (1883) 52 L.J. Q.B. 420; *New London Credit Syndicate v Neale* [1898] 2 Q.B. 487; *Hitchings and Coulthurst Co v Northern Leather Co of America and Doushkess* [1914] 3 K.B. 907.

- 139 S. Gleeson (ed), Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.2-156 quoting from Byles on Bills of Exchange and Cheques.
- 140 *Bowerbank v Monteiro* (1813) 4 *Taunt.* 844; *Young v Austen* (1869) *L.R.* 4 *C.P.* 553; *Maillard v Page* (1870) *L.R.* 5 *Exch.* 312, 319. But the written agreement must be supported by valuable consideration (*Bowerbank v Monteiro*; *McManus v Bark* (1870) *L.R.* 5 *Exch.* 65) and be between the same parties (*Salmon v Webb* (1852) 3 *H.L. Cas.* 310).
- 141 See above, para.7-016.
- 142 s.2(1).
- 143 s.2(2).
- 144 But such terms may have effect as a collateral contract or warranty (see below, para.15-030) or as a separate part of a composite agreement (see above para.7-032).
- 145 But see s.2(4) (rectification); above para.7-038.
- 146 Statute of Frauds 1677 s.4.
- 147 *Holmes v Mitchell* (1859) 7 *C.B. N.S.* 361. But cf. Mercantile Law Amendment Act 1856 (consideration need not be stated).
- 148 *Holmes v Mitchell* (1859) 7 *C.B. N.S.* 361; *Sheers v Thimbleby & Son* (1897) 76 *L.T.* 709, 711. But see *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2011] *EWHC* 56 (Comm), [2011] 2 *All E.R.* (Comm) 95 at [78] where Christopher Clarke J suggested that all material terms need not be set out (affirmed [2012] *EWCA Civ* 265, [2012] 1 *W.L.R.* 3674). Also extrinsic evidence will be admitted to show that, by reason of the omission, the memorandum does *not* satisfy the statute: see, e.g. *Beckett v Nurse* [1948] 1 *K.B.* 535 (on Law of Property Act 1925 s.40).
- 149 *Timmins v Moreland Street Property Co Ltd* [1958] *Ch.* 110; *Elias v George Sahely & Co (Barbados) Ltd* [1983] *A.C.* 646; cf. para.7-036 (1989 Act).
- 150 But cf. *Sheers v Thimbleby & Son* (1897) 76 *L.T.* 709.
- 151 See above, paras 15-018—15-020; *Wedderburn* [1959] *C.L.J.* 58, 71.
- 152 *Mann v Nunn* (1874) 30 *L.T.* 526, 527.
- 153 See, e.g. *De Lassalle v Guildford* [1901] 2 *K.B.* 515.
- 154 *Lindley v Lacey* (1864) 17 *C.B.(N.S.)* 578, 586, 587; *Morgan v Griffith* (1871) *L.R.* 6 *Ex.* 70, 73; *Erskine v Adeane* (1873) *L.R.* 8 *Ch. App.* 756, 766; *Angell v Duke* (1875) 32 *L.T.* 320; *Leggott v Barrett* (1880) 15 *Ch. D.* 306, 314; *Newman v Gatti* (1907) 24 *T.L.R.* 18; *Henderson v Arthur* [1907] 1 *K.B.* 10; *Goldfoot v Welch* [1914] 1 *Ch.* 213, 218. See also *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 *C.L.R.* 507, 518; *Donovan v Northlea Farms Ltd* [1976] 1 *N.Z.L.R.* 180 (where the other view was adopted).
- 155 *Couchman v Hill* [1947] *K.B.* 554; *Webster v Higgin* [1948] 2 *All E.R.* 127; *Harling v Eddy* [1951] 2 *K.B.* 739; *Mendelsohn v Normand Ltd* [1970] 1 *Q.B.* 177, 184; *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 *W.L.R.* 1078.
- 156 *City and Westminster Properties* (1934) *Ltd v Mudd* [1959] *Ch.* 129. See also *Brikom Investments Ltd v Carr* [1979] *Q.B.* 467; *AS Klaveness Chartering v Pioneer Freight Futures Co Ltd* [2009] *EWHC* 3386 (Comm), [2010] 2 *Lloyd's Rep.* 613.
- 157 [1959] *Ch.* 129. This case was referred to with approval in *Frisby v BBC* [1967] *Ch.* 932, 945; *Lee-Parker v Izzett (No.2)* [1972] 1 *W.L.R.* 775, 779; *Atlantic Lines and Navigation Co Inc v Hallam Ltd* [1983] 1 *Lloyd's Rep.* 188, 197. It might be thought that the same

- result could be reached by application of the principle of promissory estoppel (see above, para.6-093), but it would appear that that principle may not extend to pre-contractual negotiations: see *Secretary of State for Employment v Globe Elastic Thread Co Ltd [1980] A.C. 506*. Contrast, however, *Bank Negara Indonesia v Philip Hoalim [1973] 2 M.L.J. 3, PC; Brikom Investments Ltd v Carr [1979] Q.B. 467, 484–485; State Rail Authority of New South Wales v Heath Outdoor Pty Ltd (1986) 7 N.S.W.L.R. 171*.
- 158 Unless its subject matter is such that it is itself required to be in or evidenced by writing: *Daulia Ltd v Four Millbank Nominees Ltd [1978] Ch. 231*.
- 159 See, e.g. *Angell v Duke (1875) L.R. 10 Q.B. 174* (but such evidence was later rejected: (1875) 32 L.T. 320); *Record v Bell [1991] 1 W.L.R. 853; AS Klaveness Chartering v Pioneer Freight Futures Co Ltd [2009] EWHC 3386 (Comm), [2010] 2 Lloyd's Rep. 613* at [23].
- 160 The practice probably originated in the United States: see Uniform Commercial Code para.2-203. See also *Peden and Carter (2006) 22 J.C.L. 1; Mitchell (2006) 22 J.C.L. 222*; Lewison, *The Interpretation of Contracts*, 6th edn (2015), para.3.16; McMeel on *The Construction of Contracts: Interpretation, Implication and Rectification*, 3rd edn (2017), Ch.26.
- 161 *Inntrepreneur Pub Co Ltd v East Crown Ltd [2000] 2 Lloyd's Rep. 611, 614; Ravennavi SpA v New Century Shipbuilding Co Ltd [2006] EWHC 733 (Comm), [2006] 2 Lloyd's Rep. 280, [2007] EWCA Civ 58, [2007] 2 Lloyd's Rep. 24; AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1; Papanicola v Sandhu [2011] EWHC 1431 (QB), [2011] 2 B.C.L.C. 811; Mileform Ltd v Interserve Security Ltd [2013] EWHC 3386 (QB)*.
- 162 See *McGrath v Shah (1989) 57 P. & C.R. 452; North Eastern Properties Ltd v Coleman [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715* at [55], [82]–[83].
- 163 *Alman and Benson v Associated Newspapers Group Ltd Unreported 20 June 1980; Thomas Witter Ltd v T.B.P. Industries Ltd [1996] 2 All E.R. 573; Deepak Fertilisers and Petrochemicals Corp v ICI [1999] 1 Lloyd's Rep. 387, 395; South West Water Services Ltd v International Computers Ltd [1999] B.L.R. 420, 424; Government of Zanzibar v British Aerospace (Lancaster House) Ltd [2000] 1 W.L.R. 2333, 2344; Sabah Shipyard (Pakistan) Ltd v Govt of Pakistan [2007] EWHC 2602 (Comm), [2008] 1 Lloyd's Rep. 240* at [130] (deceit); *Barclays Bank Plc v Unicredit Bank AG [2014] EWCA Civ 302, [2014] 2 All E.R. (Comm) 115*. The clause may in any event be ineffective under s.3 of the Misrepresentation Act 1967 (as amended by s.8 of the Unfair Contract Terms Act 1977) or under s.3(2)(b) (ii) of the 1977 Act; *First Tower Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637*. See also ss.11 and 13 of the 1977 Act, and below, para.17-081. Contrast *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep. 581* at [42] (affirmed [2009] EWCA Civ 290, [2010] Q.B. 86). As to whether an entire agreement clause precludes a plea of estoppel by convention, see *Sere Holdings Ltd v Volkswagen Group UK Ltd [2004] EWHC 1551 (Comm); Dubai Islamic Bank v PSI Energy Holding Co [2011] EWHC 2718 (Comm)* at [83]; *Shoreline Housing Partnership Ltd v Mears Ltd [2013] EWCA Civ 639, [2013] C.P. Rep. 39*.
- 164 *Deepak Fertilisers and Petrochemicals Corp v ICI*, above, at 395; *Inntrepreneur Pub Co Ltd v East Crown Ltd*, above; *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA*

Civ 133, above; *Papanicola v Sandhu* [2011] EWHC 1431 (QB), [2011] 2 B.C.L.C. 811. See also *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 (Comm), [2003] 2 Lloyd's Rep. 686 (exclusion of implied terms based on usage or custom). cf. *Milburn Services Ltd v United Trading Group* (1995) C.I.L.L. 1109 (terms implied by necessity); *Great Elephant Corp v Trafigura Beheer BV* [2012] EWHC 1745 (Comm), [2013] 1 All E.R. (Comm) 415 at [89]–[91], [2013] EWCA Civ 905, [2013] 2 All E.R. 992 at [21] (clause not effective to exclude terms implied by the Sale of Goods Act 1979 s.12); *Barclays Bank Plc v Unicredit Bank AG* [2014] EWCA Civ 302, [2014] 2 All E.R. (Comm) 115 at [28].

①165 *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 at [41], [59], [61]; *Buckinghamshire Council v FCC Buckinghamshire* [2021] EWHC 2867 (TCC) at [125]. See also *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] N.Z.L.R. 218, 224.

166 *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC 2733 (TCC), [2003] 1 All E.R. (Comm) 465.

167 See the Report of the Law Commission, Law Com.154, 1986, Cmnd.9700, paras 2.30, 2.31.

(b) - Evidence as to the Validity or Effectiveness of the Written Agreement

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(b) - Evidence as to the Validity or Effectiveness of the Written Agreement

No contract

- 15-033 Extrinsic evidence is admissible to show that what appears to be a valid and binding contract is in fact no contract at all. Thus evidence may be admitted to show that one or both parties contracted under a mistake,¹⁶⁸ or that a person who signed the document was under a misapprehension as to the real nature of the transaction into which they had entered so that it was “not his deed” in law.¹⁶⁹ Also it may be shown that the writing was not intended by the parties to give rise to contractual obligations¹⁷⁰ or that the contract is void for non-compliance with a statute.¹⁷¹

Documents that are not contracts

- 15-034 The parol evidence rule has in any event only been applied to an instrument which is intended itself to be the formal and conclusive expression by the parties of their agreement.¹⁷² If the document in question is not such an instrument, then extrinsic evidence is admissible to ascertain or interpret the intentions of the parties. Thus if a document is intended to be merely an informal memorandum of an agreement previously concluded, extrinsic evidence may be admitted to show that this informal memorandum does not embody the terms contained in the previous agreement.¹⁷³ A receipt,¹⁷⁴ an invoice,¹⁷⁵ a payment instruction¹⁷⁶ and even bills of lading¹⁷⁷ have been held to come within this exception.

Consideration

- 15-035 Consideration is a necessary requirement for the formation of all contracts which are not made by deed.¹⁷⁸ Extrinsic evidence may therefore be admitted to show want of or failure of the consideration stated to have been given in a written instrument.¹⁷⁹ Thus the words in a bill of exchange “for value received” do not preclude the court from finding that no consideration has in fact been given.¹⁸⁰ Extrinsic evidence is also admissible to prove the true consideration where no consideration, or a nominal consideration, has been stated,¹⁸¹ where the expressed consideration is in general terms or ambiguously stated,¹⁸² or where the consideration is inaccurately recorded.¹⁸³ Also an additional consideration may be proved, provided it does not contradict the stated consideration.¹⁸⁴

“The rule is that, where there is one consideration stated in a deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.”¹⁸⁵

Conditional contracts

- 15-036 Extrinsic evidence is admissible to show that, at the time a document was signed by the parties, they were agreed that it was not to take effect as a contract except on the fulfilment of a certain condition,¹⁸⁶ e.g. in the case of deeds, evidence of an escrow.¹⁸⁷

Evidence of date

- 15-037 Extrinsic evidence is admitted to prove the actual date of delivery of a deed,¹⁸⁸ or the date of execution of a written instrument,¹⁸⁹ in contradiction of the date stated therein; and also, where it has no date, to show from what time a written instrument was intended to operate.¹⁹⁰ It is also admitted to show that the parties intended that an instrument should operate retrospectively from a specified date, act or event prior to the date on which the instrument was executed.¹⁹¹

Subsequent variation or discharge

- 15-038 The rule regarding the admissibility of extrinsic evidence applies merely to the discovery of the original intention of the parties as expressed in the instrument, and has no application to the variation¹⁹² or discharge¹⁹³ of the contract by a subsequent agreement.

Fraud, illegality, etc.

- 15-039 Extrinsic evidence will always be admitted to defeat a deed or written contract on the ground of fraud,¹⁹⁴ illegality,¹⁹⁵ misrepresentation,¹⁹⁶ mistake¹⁹⁷ or duress.¹⁹⁸ Also in the application of equitable remedies such as specific performance or the refusal thereof,¹⁹⁹ rectification,²⁰⁰ or rescission,²⁰¹ extrinsic evidence will be admitted to prove the grounds upon which relief is sought.

Footnotes

- 168 *Pym v Campbell* (1856) 6 E. & B. 370, 374; *Raffles v Wichelhaus* (1864) 2 H. & C. 906. See above, para.8-001.
- 169 See, e.g. *Foster v Mackinnon* (1869) L.R. 4 C.P. 704; *Lewis v Clay* (1898) 67 L.J. Q.B. 224; *Roe v R.A. Naylor Ltd* (1918) 87 L.J. K.B. 958, 964. Direct evidence of intention is always admissible where the factum of the instrument is impugned. See below, para.15-044.
- 170 *Bowes v Foster* (1858) 2 H. & N. 779; *Rogers v Hadley* (1863) 2 H. & C. 227; *Pattle v Hornibrook* [1897] 1 Ch. 25; *Orion Insurance Co Plc v Sphere Drake Insurance Plc* [1992] 1 Lloyd's Rep. 239, 273, 301.
- 171 *Lockett v Nicklin* (1848) 2 Exch. 93; *Campbell Discount Co Ltd v Gall* [1961] 1 Q.B. 431.
- 172 Or, in the case of a unilateral instrument such as a deed, the formal and conclusive expression of the intentions of the maker: *Rabin v Gerson Berger Association Ltd* [1986] 1 W.L.R. 526.
- 173 *Orion Insurance Co Plc v Sphere Drake Insurance Plc* [1992] 1 Lloyd's Rep. 239; cf. *Hutton v Watling* [1948] Ch. 398.
- 174 *Graves v Key* (1832) 3 B. & Ad. 313; *Allen v Pink* (1838) 4 M. & W. 140; *Lee v L. & Y. Ry* (1871) L.R. 6 Ch. App. 527; *Beckett v Nurse* [1948] 1 K.B. 535.
- 175 *Holding v Elliott* (1860) 5 H. & N. 117.
- 176 *Guardian Ocean Cargoes Ltd v Banco do Brasil SA* [1991] 2 Lloyd's Rep. 68.
- 177 *Crooks v Allan* (1879) 5 Q.B.D. 38; *Moss Steamship Co v Whinney* [1912] A.C. 254, 264; *The Ardennes* [1951] 1 K.B. 55.
- 178 See above, Ch.6.

- 179 *Abbott v Hendrix* (1840) 1 *Man. & G.* 791, 794, 796; *Young v Austen* (1869) *L.R. 4 C.P.* 553, 556; *Abrey v Crux* (1869) *L.R. 5 C.P.* 37, 45; *Equitable Office v Ching* [1907] *A.C.* 96; Law of Property Act 1925 s.67. But cf. *Roberts v Security Co* [1897] 1 *Q.B.* 111; Law of Property Act 1925 s.68.
- 180 *Solly v Hinde* (1834) 2 *Cr. & M.* 516; *Abbott v Hendrix* (1840) 1 *Man. & G.* 791, 795.
- 181 *Gale v Williamson* (1841) 8 *M. & W.* 405; *Clifford v Turrell* (1845) 1 *Y. & C.C.C.* 138; *Pott v Todhunter* (1845) 2 *Coll.* 76; *Re Holland* [1902] 2 *Ch.* 360, 388.
- 182 *Goldshede v Swan* (1847) 1 *Exch.* 154; *Hoad v Grace* (1861) 7 *H. & N.* 494.
- 183 *Booker v Seddon* (1858) 1 *F. & F.* 196. It is a moot point whether extrinsic evidence is admissible to prove a real (e.g. smaller) consideration inconsistent with that expressed in the instrument. See *Ridout v Bristow* (1830) 9 *Ex.* 48; *Abbott v Hendrix* (1840) 1 *Man. & G.* 791, 796; *Turner v Forwood* [1951] 1 *All E.R.* 746. The views of Lord Hardwicke in *Peacock v Monk* (1748) 1 *Ves. Sen.* 127, 128 must now be read with caution. See also *Woods v Wise* [1955] 2 *Q.B.* 29; *Peffer v Rigg* [1977] 1 *W.L.R.* 285, 293.
- 184 *Leifchild's Case* (1865) *L.R. 1 Eq.* 231; *Townend v Toker* (1866) *L.R. 1 Ch. App.* 446, 459; *Frith v Frith* [1906] *A.C.* 254; *Turner v Forwood* [1951] 1 *All E.R.* 746; *Pao On v Lau Yiu Long* [1980] *A.C.* 614.
- 185 *Clifford v Turrell* (1845) 1 *Y. & C.L.C.* 138, 149.
- 186 *Pym v Campbell* (1856) 6 *E. & B.* 370; *Wallis v Littell* (1861) 11 *C.B.(N.S.)* 369; *Lindley v Lacey* (1864) 17 *C.B.(N.S.)* 578; *Pattle v Hornibrook* [1897] 1 *Ch.* 25; cf. *Smith v Mansi* [1963] 1 *W.L.R.* 26.
- 187 *London Freehold and Leasehold Property v Lord Suffield* [1897] 2 *Ch.* 608, 622. See above, para.1-101.
- 188 *Jayne v Hughes* (1854) 10 *Exch.* 430.
- 189 *Hall v Cazenove* (1804) 4 *East* 477; *Pasmore v North* (1811) 13 *East* 517; *Armfield v Allport* (1857) 27 *L.J. Ex.* 42; Bills of Exchange Act 1882 s.13(1).
- 190 *Davis v Jones* (1856) 17 *C.B.* 625; Bills of Exchange Act 1882 ss.12, 20.
- 191 *Northern & Shell Plc v John Laing Construction Ltd* [2002] *EWHC 2258 (TCC)*, (2002) 85 *Con. L.R.* 179.
- 192 *Goss v Lord Nugent* (1833) 5 *B. & Ad.* 58, 64. But a contract required by law to be in or evidenced by writing can in principle only be varied by writing: see below, para.25-035.
- 193 *Morris v Baron & Co Ltd* [1918] *A.C.* 1; below, para.25-031.
- 194 *Pickering v Dowson* (1813) 4 *Taunt.* 779; *Dobell v Stevens* (1825) 3 *B. & C.* 623.
- 195 *Collins v Blantern* (1767) 2 *Wils.* 347; *Doe d. Chandler v Ford* (1835) 3 *Ad. & El.* 649; *Reynell v Sprye* (1852) 1 *De G.M. & G.* 660, 672; *Madell v Thomas & Co* [1891] 1 *Q.B.* 230. See also *Woods v Wise* [1955] 2 *Q.B.* 29 (evidence to support legality).
- 196 *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 *All E.R.* 1167.
- 197 See above, para.8-001.
- 198 See above, para.10-001.
- 199 *Martin v Pycroft* (1852) *De G.M. & G.* 785; *Webster v Cecil* (1861) 30 *Beav.* 62. See below, Ch.30.
- 200 *Druiff v Parker* (1868) *L.R. 5 Eq.* 131; *Olley v Fisher* (1887) 34 *Ch. D.* 367; *Henderson v Arthur* [1907] 1 *K.B.* 10, 13; *Lovell and Christmas Ltd v Wall* (1911) 104 *L.T.* 85; *Craddock*

Bros v Hunt [1923] 2 Ch. 136, 151; Hamed El Chiaty & Co v Thomas Cook Group Ltd [1992] 2 Lloyd's Rep. 399, 407, 408.

201 *Paget v Marshall (1884) 28 Ch. D. 255.*

(c) - Evidence as to the True Nature of the Agreement

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(c) - Evidence as to the True Nature of the Agreement

True nature of the agreement

- 15-040 Extrinsic evidence is admissible to prove the true nature of the agreement, or the legal relationship of the parties,²⁰² even though this may vary or add to the written instrument.²⁰³ Thus a conveyance may be shown to be merely a mortgage,²⁰⁴ a sale and hire-purchase agreement to be an unregistered bill of sale,²⁰⁵ and a sale of property to be a loan on security.²⁰⁶

Subject matter

- 15-041 The subject matter of the contract may similarly be identified by extrinsic evidence.²⁰⁷ Thus evidence was admitted as to the quality and quantity of wool described in the written contract as “your wool”,²⁰⁸ as to the identity of the property which was the subject matter of a contract of sale²⁰⁹ and as to its exact area,²¹⁰ as to the items of furniture assigned by a deed to which no schedule was attached²¹¹ and as to the liability comprehended by a guarantee.²¹² Extrinsic evidence is also admissible where it is sought to restrict the generality of an obligation by reference to the circumstances or the person.²¹³

Identity of parties

- 15-042 The identity of parties may be established by extrinsic evidence where it is not clear from the written instrument to whom it refers.²¹⁴ So, where a landlord handed to his tenant a letter addressed “[d]ear Sir” in which he promised to renew a lease, extrinsic evidence was admitted to identify the proposed lessee, even though no mention of his name appeared in the agreement.²¹⁵ Extrinsic evidence will also be admitted to show in what capacity the parties contracted, e.g. to show which party was the buyer and which the seller,²¹⁶ or to correct a misnomer.²¹⁷

Equivocations

- 15-043 An equivocation arises when the words of the written contract are intended to refer to one person or thing only, and in fact refer to more than one person or thing. In such a case, if it cannot be ascertained from the document itself which was intended, extrinsic evidence is admissible to resolve the ambiguity. Direct evidence of the party’s intention is this time admissible. Thus if a person buys goods “ex Peerless from Bombay”, and it is shown that there are two vessels of that name sailing from the port of Bombay, the parties may give evidence to show which vessel they themselves intended.²¹⁸ Likewise in the case of a bill or note, where there are two payees of the same name, the drawer or maker may give evidence to identify the intended payee.²¹⁹ However, in *Dumford Trading AG v OAO Atlantybfot*,²²⁰ Rix LJ explored the law relating to *mismnomer* and suggested that where there are two possible entities extrinsic evidence would not be admissible to identify the entity referred to, but if there is only one possible entity then it would be possible to use extrinsic evidence to identify a misdescribed party.

Evidence of agency

- 15-044 Extrinsic evidence may also be adduced to show that one or both of the contracting parties to an agreement were agents for other persons and acted as such in making the contract so as to give the benefit or the burden of the contract to their undisclosed principals.²²¹ Such evidence relates to the factum of the written instrument.²²² It is therefore a moot point whether evidence can be given which is inconsistent with the written agreement. There is authority for the view that, where an action is brought against a party who has contracted in terms indicating that they are the real and only principal, evidence cannot be given that they contracted merely as agent as this would contradict the written agreement.²²³ Thus where a party was described as “owner” of a ship²²⁴ or

as “proprietor” of a building site,²²⁵ he being, in fact, merely the agent of an undisclosed principal, it was held, in an action by the principal on the contract, that evidence could not be received to show the fact of the agency so as to give the principal a right to sue on the contract. On the other hand, these cases may be explained as cases in which the personality of the contracting party was of sufficient importance to have become a term of the contract²²⁶ or simply that they were wrongly decided.²²⁷ The issue is still an open one.²²⁸

Evidence of agency of an unnamed principal

- 15-045 Where a person describes themselves in a contract as agent of an unnamed principal, either they or the other contracting party may bring evidence to show that, although described as agent, they are in fact the principal.²²⁹

Evidence of suretyship

- 15-046 Evidence is admissible to show that a person who signed a document did so as surety, even though it might appear that they entered into the agreement as principal debtor or on behalf of another or in some other capacity.²³⁰

Footnotes

- 202 *Steele v M'Kinlay* (1880) 5 App. Cas. 754, 778–779; *Macdonald v Whitfield* (1883) 8 App. Cas. 733, 745; *National Sales Corp Ltd v Bernardi* [1931] 2 K.B. 188; *McCall Bros Ltd v Hargreaves* [1932] 2 K.B. 423; *Yeoman Credit Ltd v Gregory* [1963] 1 W.L.R. 343; *Yuchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital (2009) Ltd* [2018] EWHC 2580 (Comm), [2019] 1 Lloyd's Rep. 457 at [28]; and see below, para.15-046.
- 203 Including direct evidence of intention.
- 204 *Re Duke of Marlborough* [1894] 2 Ch. 133.
- 205 *Madell v Thomas & Co* [1891] 1 Q.B. 230; *Polsky v S. & A. Services* [1951] 1 All E.R. 1062.
- 206 *Maas v Pepper* [1905] A.C. 102.
- 207 *L.G. Schuler AG v Wickman Machine Tools Sales Ltd* [1974] A.C. 235, 261; *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132, [2018] 2 All E.R. (Comm) 381 at [21]; cf. *Compagnie Noga d'Importation et d'Exportation SA v Abacha* [2003] EWCA Civ 1100, [2003] 2 All E.R. (Comm) 915.
- 208 *Macdonald v Longbottom* (1860) 1 E. & E. 977, 987.

- 209 *Ogilvie v Foljambe* (1817) 3 Mer. 53, 61; *Owen v Thomas* (1834) My. & K. 353; *Bleakley v Smith* (1840) 11 Sim. 150; *Cowley v Watts* (1853) 17 Jur. 172; *Wood v Scarth* (1855) 2 Kay. & J. 33; *Shardlow v Cotterell* (1881) 20 Ch. D. 90; *Plant v Bourne* [1897] 2 Ch. 281; *Harewood v Retese* [1990] 1 W.L.R. 333; *Freeguard v Rogers* [1999] 1 W.L.R. 375. cf. *Doe d. Norton v Webster* (1840) 12 Ad. & El. 442.
- 210 *Scarfe v Adams* [1981] 1 All E.R. 843.
- 211 *England v Downs* (1840) 2 Beav. 522; *McCollin v Gilpin* (1881) 6 Q.B.D. 516. See also *Burges v Wickham* (1863) 3 B. & S. 669, 698; *Savory v World of Golf* [1914] 2 Ch. 566; *Auerbach v Nelson* [1919] 2 Ch. 383; *L.G. Schuler v Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 261. cf. *Caddick v Skidmore* (1857) 2 De G. & J. 52.
- 212 *Heffield v Meadows* (1869) L.R. 4 C.P. 595; *Perrylease Ltd v Imecar AG* [1988] 1 W.L.R. 463; cf. *Holmes v Mitchell* (1859) 7 C.B.N.S. 361.
- 213 See above, para.15-068.
- 214 *Rossiter v Miller* (1878) 3 App. Cas. 1124; *Chapman v Smith* [1907] 2 Ch. 97; *Stokes v Whicher* [1920] 1 Ch. 411; *Estor Ltd v Multifit (UK) Ltd* [2009] EWHC 2108 (TCC), 126 Con. L.R. 40; *Fairstate Ltd v General Enterprise and Management Ltd* [2010] EWHC 3072 (QB), [2011] 2 All E.R. (Comm) 497 at [75]. cf. *Jarrett v Hunter* (1887) 34 Ch. D. 182; *OTV Birwelco Ltd v Technical and General Guarantee Co* [2002] EWHC 2240 (TCC), [2002] 4 All E.R. 668 at [12].
- 215 *Carr v Lynch* [1900] 1 Ch. 613.
- 216 *Newell v Radford* (1867) L.R. 3 C.P. 52. See also below, para.15-044 (agency); *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470, [2013] B.L.R. 447.
- 217 *Willis v Barrett* (1816) 2 Stark. 29; *Dermatine Co Ltd v Ashworth* (1905) 21 T.L.R. 510; *Bird & Co v Thomas Cook & Son* [1937] 2 All E.R. 227, 230–231. But contrast *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919 at [49]; *Dumford Trading AG v OAO Atlantybfot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289 at [32]. See also *Gastronome (UK) Ltd v Anglo-Dutch Meats Ltd* [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587 at [16] and below, para.15-043; *Almatrans SA v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2006] EWHC 2223 (Comm), [2007] 1 Lloyd's Rep. 104; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761 at [81]–[91].
- 218 *Raffles v Wichelhaus* (1864) 2 H. & C. 906.
- 219 *Sweeting v Fowler* (1815) 1 Stark. 106; *Stebbing v Spicer* (1849) 8 C.B. 827.
- 220 [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289 at [32]; *Almatrans SA v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2006] EWHC 2223 (Comm), [2007] 1 Lloyd's Rep. 104. cf. *Gastronome (UK) Ltd v Anglo-Dutch Meats Ltd* [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587 at [16]; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761 at [72], [81], [91], [92], [108].
- 221 *Bateman v Phillips* (1812) 15 East 272; *Wake v Harrop* (1861) 30 L.J. Ex. 273; *McCollin v Gilpin* (1881) 29 W.R. 408; *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] A.C. 203; *Danziger v Thompson* [1944] K.B. 654; *Epps v Rothnie* [1945] K.B. 562; *Finzel, Berry & Co v Eastcheap Dried Fruit Co* [1962] 1 Lloyd's Rep. 370; affirmed [1962] 2 Lloyd's

- Rep. 11; Hamid v Francis Bradshaw Partnership [2013] EWCA Civ 470, [2013] B.L.R. 447.*
See below, paras 21-070, 21-073.
- 222 *Young v Schuler* (1883) 11 Q.B.D. 651; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 715 at [175]. See also *Internaut Shipping v Fercometal SARL* [2003] EWCA Civ 812, [2003] 2 Lloyd's Rep. 430 (evidence of no agency).
- 223 *Magee v Atkinson* (1837) 2 M. & W. 440; *Higgins v Senior* (1841) 8 M. & W. 834; *Humble v Hunter* (1848) 12 Q.B. 310; *Formby Bros v Formby* (1910) 102 L.T. 116. See below, para.21-073.
- 224 *Humble v Hunter* (1848) 12 Q.B. 310.
- 225 *Formby Bros v Formby* (1910) 102 L.T. 116.
- 226 *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] A.C. 203, 210; *Rederiaktiebolaget Argonaut v Hani* [1918] 2 K.B. 247; *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch. 1. See below, para.21-073.
- 227 *Killick & Co v Price & Co* (1896) 12 T.L.R. 263, 274; *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] A.C. 203, 209; *Epps v Rothnie* [1945] K.B. 562, 565 (cases where the description was equivocal). cf. *Ferryways NV v Associated British Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep. 639.
- 228 *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 A.C. 199. See also *Crescent Oil and Shipping Services Ltd v Importang UEE* [1998] 1 W.L.R. 919, 931; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 715 at [175]; *Rolls Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd* [2004] EWHC 2871 (TCC), [2004] 2 All E.R. (Comm) 129; *Talbot Underwriting Ltd v Nausch Hogan & Murray Inc (The Jascons)* [2006] EWCA Civ 889, [2006] 2 Lloyd's Rep. 195 at [55]–[68]; *Ferryways NV v Associated British Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep. 638; see below, paras 21-073, 21-074.
- 229 *Schmaltz v Avery* (1851) 16 Q.B. 655; *Carr v Jackson* (1852) 7 Exch. 392; *Adams v Hall* (1877) 37 L.T. 70; *Harper v Vigers* [1909] 2 K.B. 549; *Electrosteel Castings Ltd v Scan-Trans Shipping and Chartering Sdn Bhd* [2002] EWHC 1993 (Comm), [2003] 1 Lloyd's Rep. 190 at [36]; cf. *Fairlie v Fenton* (1870) L.R. 5 Ex. 169; *Sharman v Brandt* (1871) L.R. 6 Q.B. 720. See below, paras 21-104, 21-105.
- 230 *Hill v Wilcox* (1831) 1 M. & Rob. 58; *Ewin v Lancaster* (1865) 6 B. & S. 571; *Overend Gurney & Co v Oriental Finance Co* (1874) L.R. 7 H.L. 348; *Macdonald v Whitfield* (1883) 8 App. Cas. 733; *Young v Schuler* (1883) 11 Q.B.D. 651; *Gerald McDonald & Co v Nash & Co* [1924] A.C. 625; *V.H.S. Ltd and B.K.S. Air Transport Ltd v Stephens* [1964] 1 Lloyd's Rep. 460; *Sun Alliance Pensions Life & Investments Services Ltd v Webster* [1991] 2 Lloyd's Rep. 410.

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Section 3. - Construction of Terms²³¹

(a) - General Principles of Construction

Construction or interpretation

15-047

The word “construction” refers to the process by which a court determines the meaning and legal effect of a contract. As such, it will embrace oral contracts as well as those in writing. In this chapter, however, the principles of construction discussed in the following paragraphs have mainly been developed in relation to written documents, and in this context “construction” denotes the process (sometimes referred to as *interpretation*) by which a court arrives at the meaning to be given to the language used by the parties in the express terms of a written agreement. The principles applied by the courts to the interpretation or construction of a contract have been the subject of extensive litigation in recent years and both the House of Lords and the Supreme Court have had multiple opportunities to state, or to re-state, these principles. The leading cases include *Investors Compensation Scheme Ltd v West Bromwich Building Society*,²³²

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 *Chartbrook Ltd v Persimmon Homes Ltd*,
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 *Re Sigma Finance Corp*,
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 *Rainy Sky SA v Kookmin Bank*,
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 *Arnold v Britton*

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 and *Wood v Capita Insurance Services Ltd.*

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 Although these principles have been cast in slightly different terms in the various judgments, with apparent differences in emphasis between them, the Supreme Court has nevertheless stated that the “recent history of the common law of contractual interpretation is one of continuity rather than change” which is characterised, at least in commercial matters, by “its stability and continuity”.

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 The parties to litigation often agree that the principles set out in these leading cases are the principles to be applied to the resolution of their dispute but they then disagree as to how these principles are to be applied to the facts of the individual case.

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Principles, not rules

15-048 It is important to note the use of the term “principles” rather than “rules” of construction. Previously, they were referred to as “rules”, which were applied somewhat rigidly and adhered to tenaciously (even though the application of one rule in preference to another might lead to an opposite result). The language of “principles” enables the courts to recognise that, at times, these principles can point in different directions and that, where they do conflict or are in tension, the task of the court is to assess how these principles should be applied to the contract term that is in dispute. The modern approach seeks:

“... to assimilate the way in which [contractual] documents are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life.”²⁴⁰

As a result, most principles of construction are nowadays better regarded merely as guidelines or assumptions as to what the court may regard as the normal use of language and which assist judges to arrive at a reasonable interpretation of the words used, though subject to examination of the relevant circumstances surrounding the transaction. Some principles, on the other hand, such as the contra proferentem principle,²⁴¹ are of a different nature in that they are less obviously designed to assist in interpretation and are more closely assimilated to “rules” in the traditional

sense (although, as we shall see, the practical significance of the *contra proferentem* rule has diminished substantially in recent years).

Striking a balance

- 15-049 Given that the courts are concerned with the application of “principles” rather than “rules”, it is not surprising to find that, as has been noted, these principles can at times conflict and the result is a perceived degree of uncertainty or tension in the case-law. At times the courts seem to place greater emphasis on the need for certainty in commercial transactions and, in such cases, they tend to adopt an interpretation which gives effect to the natural and ordinary meaning of the words used by the parties.²⁴² At other times, less emphasis seems to have been placed on the need for certainty and instead the courts have reminded themselves that the proper approach to interpretation is “contextual and purposive”, not “mechanical” and that “the value of machinery depends upon its being correctly directed towards the right end”.²⁴³ The differences, however, appear to be differences of emphasis rather than principle²⁴⁴ and in all cases the overriding aim of the court is to give effect to the intention of the parties, objectively ascertained, as reflected in the terms of their contract.

Law and fact

- 15-050 The construction of written instruments is a question of mixed law and fact.²⁴⁵ The expression “construction” as applied to a document includes two things, first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them.²⁴⁶ Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts.²⁴⁷ However, the meaning of an ordinary English word,²⁴⁸ of technical or commercial terms²⁴⁹ and of latent ambiguities,²⁵⁰ and the discovery of the surrounding circumstances (when they are relevant) are questions of fact.²⁵¹ Some cases, including cases before the appellate courts, turn entirely on the wording of the particular contract and do not require the courts to give serious consideration to prior case law.²⁵² The precedent value of case-law concerned with the interpretation of contracts is generally low. While they are authoritative in relation to the principles to be applied to the interpretation of contracts, it has been said to be:

“... seldom, if ever, helpful in deciding how to interpret particular contractual provisions to refer to a case in which a court has interpreted different provisions of a differently worded contract made in a different factual context.”²⁵³

Construction of contract not wholly in writing

- 15-051 Where the contract is oral or does not depend solely on written documents, the question as to the character of the contract is properly one of fact.²⁵⁴ But if a document is lost, so that secondary evidence of its contents is admissible, the construction of its terms is still a question of law and not of fact.²⁵⁵

Electronic “documents”

- 15-052 It is submitted that an agreement which is concluded by electronic means, the terms of which are recorded electronically and which are capable of being retrieved and converted into readable form, should be regarded as a written agreement for the purposes of the application of principles of construction and the admissibility of extrinsic evidence.²⁵⁶

A summary of the applicable principles

- 15-053 The principles applied by the courts to the construction or interpretation of commercial documents were helpfully summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The “Ocean Neptune”)*²⁵⁷ in the following terms:

“The court’s task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality

of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

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This summary can be broken into a number of components, namely (i) the objective nature of the assessment; (ii) the “factual matrix” or “available background”; (iii) the meaning of the language used by the parties; (iv) the need to have regard to the contract as a whole; (v) the significance of the nature, formality and quality of the drafting of the contract; (vi) what is to be done when there are two possible meanings of the disputed clause; (vii) the unitary and iterative nature of the process, and (viii) striking the balance between the various, potentially conflicting, principles.

Footnotes

231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).

232 [1998] 1 W.L.R. 896.

233 [2009] UKHL 38, [2009] 1 A.C. 1101.

234 [2009] UKSC 2, [2010] 1 All E.R. 571.

235 [2011] UKSC 50, [2011] 1 W.L.R. 2900.

236 [2015] UKSC 36, [2015] A.C. 1619.

237 [2017] UKSC 24, [2017] A.C. 1173. In *Alebrahim v BM Design London Ltd* [2022] EWCA Civ 183 at [22] it was stated that reference to authority prior to *Rainy Sky*, *Arnold* and *Wood* was “generally unnecessary”. The statement was made with particular reference to the

judgments of Lord Hoffmann in *Investors Compensation Scheme* and *Chartbrook* but other cases can be found in which these judgments, in particular the judgment of Lord Hoffmann in *Investors Compensation Scheme*, continue to be cited as authoritative statements of the principles to be applied by the courts to the interpretation of contracts (see, for example, *Nord Naptha Ltd v New Stream Trading AG* [2021] EWCA Civ 1829 at [31]).

- ②238 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [15]. This view is not, however, one that is universally shared. Lord Sumption has been a vocal critic of some of the recent developments in this area: see Lord Sumption “A Question of Taste: The UK Supreme Court and the Interpretation of Contracts” in D. Clarry (ed.), The UK Supreme Court Yearbook (2016–2017), Vol.8 p.74 at pp.75 and 87. A text of the speech can also be found at <https://www.supremecourt.uk/docs/speech-170508.pdf> [Accessed 1 September 2021]. Lord Hoffmann has responded to Lord Sumption’s critical assessment: *Leonard Hoffmann “Language and Lawyers”* (2018) 134 LQR 553. For an overall assessment see E. McKendrick “Interpretation” in W. Day and S. Worthington (eds), Challenging Private Law (2020) p.3.

- ②239 See, for example, *Nord Naptha Ltd v New Stream Trading AG* [2021] EWCA Civ 1829 at [35]; *Britvic Plc v Britvic Pensions Ltd* [2021] EWCA Civ 867, [2022] 2 All E.R. 457 at [16]; *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm) at [316]; *Primus International Holding Co v Triumph Controls – UK Ltd* [2020] EWCA Civ 1228, [2021] 1 B.C.L.C. 697 at [22].

- 240 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 (Lord Hoffmann). See also *Don King Productions Ltd v Warren* [1998] 2 Lloyd’s Rep. 176, 188, [1999] 1 Lloyd’s Rep. 588.

- 241 See below, paras 15-109 and 17-012.

- 242 See, for example, *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [23].

- 243 *Lloyds TSB Foundation for Scotland v Lloyd’s Banking Group Plc* [2013] UKSC 3, [2013] 1 W.L.R. 366 at [21] and *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [17]–[22]. The need to strike a balance between the indications given by the language and the implications of rival constructions was acknowledged by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [11]–[13]. The current approach of the courts appears to give more weight to the natural and ordinary meaning of the words, at least in the case where the parties are commercially experienced and have access to skilled legal advice: *Canary Wharf Finance II Plc v Deutsche Trustee Co Ltd* [2016] EWHC 100 (Comm) at [17]; *Vitol E & P Ltd v Africa Oil and Gas Corp* [2016] EWHC 1677 (Comm); *Carillion Construction Ltd v Emcor Engineering Services Ltd* [2017] EWCA Civ 65, [2017] B.L.R. 203 at [46]; *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWCA Civ 990, [2017] 1 W.L.R. 1893 at [42]; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [13].

- 244 *Globe Motors Inc v TRW Lucas Varsity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [56]; *Dynniq UK Ltd v Lancashire CC* [2017] EWHC 3173 (TCC),

[2018] *B.L.R.* 81 at [10]; *European Film Bonds A/S v Lotus Holdings LLC* [2021] EWCA Civ 807 at [44].

- 245 *Sattva Capital v Creston Moly* [2014] SCC 53, [2014] 2 S.C.R. 633, where the Supreme Court of Canada held that the “historical approach” according to which the interpretation of the rights and duties of the parties to a written contract was a question of law should be abandoned given that contractual interpretation is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in the light of the “factual matrix” of the contract. However, where the contract is a standard form contract, the Supreme Court of Canada has recognised that the interpretation of such a contract has precedential value and can therefore be regarded as a pure question of law: *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co* [2016] SCC 37, [2016] 2 S.C.R. 23.
- 246 *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1891] 1 Q.B. 79, 85.
- 247 *Bowes v Shand* (1877) 2 App. Cas. 455, 462. See also *Neilson v Harford* (1841) 8 M. & W. 806, 823; *R. v Stephens* (1978) 139 C.L.R. 315; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] A.C. 724, 736; *R. v Spens* [1991] 1 W.L.R. 624, 631; *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042, 2048; *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2005] 1 Lloyd's Rep. 606 at [15]; *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] EWHC 236 (Comm), [2014] 1 Lloyd's Rep. 615 at [43]–[51].
- 248 *Cozens v Brutus* [1973] A.C. 854, 861; *Belgravia Navigation Co SA v Cannon Shipping Ltd* [1988] 2 Lloyd's Rep. 423.
- 249 *Hill v Evans* (1862) 4 De G.F. & J. 288, 295.
- 250 *Robinson v Great Western Ry* (1865) 35 L.J. C.P. 123.
- 251 *Simpson v Margitson* (1847) 11 Q.B. 23.
- 252 See, for example, *British Overseas Bank Nominees Ltd v Analytical Properties Ltd* [2015] EWCA Civ 43 and *Tael One Partners Ltd v Morgan Stanley & Co International Plc* [2015] UKSC 12, [2015] Bus. L.R. 278.
- 253 *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm) at [62].
- 254 *Moore v Garwood* (1849) 4 Exch. 681; *Brook v Hook* (1871) L.R. 6 Ex. 89; *Maskelyne v Stollery* (1899) 16 T.L.R. 97; *Maggs v Marsh* [2006] EWCA Civ 1058, [2006] B.L.R. 395; *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042, 2049; *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [82]; *BVM Management Ltd v Roger Yeomans* [2011] EWCA Civ 1254 at [23].
- 255 *Berwick v Horsfall* (1858) 4 C.B.(N.S.) 450.
- 256 *Derby & Co Ltd v Weldon (No.9)* [1991] 1 W.L.R. 652. See also *Electronic Communications Act 2000*; EC Directive on Electronic Commerce 2000/31 [2000] O.J. L178/1.
- 257 [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep. 654.
- 258 [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep. 654 at [8]. Other helpful summaries of the approach adopted by the courts include *ABC Electrification v National Rail Infrastructure*

Ltd [2020] EWCA Civ 1645, [2021] B.L.R. 97 at [17]–[19] and Minera Las Bambas SA v Glencore Queensland Ltd [2019] EWCA Civ 972 at [20].

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(b) - The Objective Nature of the Assessment

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Section 3. - Construction of Terms²³¹

(b) - The Objective Nature of the Assessment

The objective nature of the test

- 15-054 The court is concerned both to identify the “objective meaning of the language which the parties have chosen” and to ascertain “what a reasonable person … would have understood the parties to have meant”. It can thus be seen that the courts are not concerned to identify the subjective understandings of the parties to the contract or the meaning which they subjectively ascribe to the term in dispute and such evidence is therefore inadmissible.²⁵⁹ Thus the agreement must be interpreted objectively.²⁶⁰ In *Investors Compensation Scheme Ltd v West Bromwich Building Society*²⁶¹ Lord Hoffmann said:

“Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

Footnotes

²³¹ See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*,

- 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 259 *IRC v Raphael [1935] A.C. 96, 142; Prenn v Simmonds [1971] 1 W.L.R. 1381, 1385; Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, 996; Harmony Shipping Co SA v Saudi-Europe Line Ltd [1981] 1 Lloyd's Rep. 377, 416; Nearfield Ltd v Lincoln Nominees Ltd [2006] EWHC 2421 (Ch), [2007] 1 All E.R. (Comm) 421 at [63]; Scottish Power UK Plc v BP Exploration Operating Co Ltd [2015] EWHC 2658 (Comm) at [21]*. In *Rabin v Gerson Berger Association Ltd [1986] 1 W.L.R. 526*, opinions of tax counsel given shortly before or at the time of execution of certain trust deeds were held inadmissible. The subjective intention excluded is subjective intention about what the contract in question means and has been held not to extend to a statement of what one party intends to do outside the contract and after it has been executed: *Kason Kek-Gardner Ltd v Process Components Ltd [2017] EWCA Civ 2132, [2018] 2 All E.R. (Comm) 381* at [16]. The subjective intention of the parties may also be relevant in certain cases where it is sought to rectify the terms of the contract: *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd [2019] EWCA Civ 1361, [2020] Ch. 365* (see above, para.5-086).
- 260 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749, 767, 775, 782; Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, 912–913*. See also *Guardian Ocean Cargoes Ltd v Banco do Brasil SA [1994] 2 Lloyd's Rep. 152; Deutsche Genossenschaftsbank v Burnhope [1995] 1 W.L.R. 1580, 1587; Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyd's Rep. 611* at [10].
- 261 *[1998] 1 W.L.R. 896, 912.*

(c) - The Matrix of Fact

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(c) - The Matrix of Fact

The “available background”

15-055

- U** The courts will, in principle, look at all the circumstances surrounding the making of the contract and available to the parties (usually referred to as the “factual matrix” or “available background”) which would assist in determining how the language of the document would have been understood by a reasonable person in their position. The range of materials on which the modern courts now draw is considerably wider as the ambit of the “factual matrix” has increased, permitting the court to draw upon a greater range of materials when seeking to put the words of the contract in their context and interpret them accordingly. The width of the factual matrix was apparent from Lord Hoffmann’s judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society*²⁶² when he said:

“Subject to the requirement that it should have been reasonably available to the parties ... it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.”²⁶³

This statement must, however, be seen in its proper context. As Lord Hoffmann later observed (in response to criticisms which had been levelled against the expansive nature of the “factual matrix”²⁶⁴):

“I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background … I was certainly not encouraging a trawl through ‘background’ which could not have made a reasonable person think that the parties must have departed from conventional usage.”²⁶⁵

A party who wishes to contend that there is a relevant factual matrix should set out in its statement of case each feature of the matrix which is alleged to be of relevance.

²⁶⁶



Background available to both parties

15-056 The “available background” is limited to facts that were known or reasonably available to both (or all) of the parties to the contract at or before the time of entry into the contract

²⁶⁷



; it does not suffice for this purpose to demonstrate that the facts were known only to one of the parties.

²⁶⁸



In determining what is “reasonably available” to both parties, the court should adopt a “restrained” approach given the “almost unlimited information and knowledge now available through the internet” and the fact that the parties are not subject to a duty to carry out investigations prior to entry into the contract.

²⁶⁹



Rather, the question to be asked should focus on the knowledge a reasonable observer would have expected and believed both contracting parties to have had and each to have assumed the other to have had at the time of entry into the contract. It will not suffice to establish that the reasonable observer believed that the parties “might” have had such knowledge.

²⁷⁰



But a court can take account of specialist or unusual knowledge which only parties who enter into a contractual engagement of the sort in question might reasonably have been assumed to have had.

²⁷¹

Evidence of surrounding circumstances

- 15-057 The willingness of the courts to admit extrinsic evidence as an aid to the interpretation of a written contract is not, however, a new phenomenon. It was established as long ago as 1842 by Tindal CJ in *Shore v Wilson*,²⁷² when he said:

“The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. ... The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party.”

But under the older restrictive view expressed in this statement, and endorsed in a number of subsequent cases, extrinsic evidence was admissible only where the sense and meaning of the words of the written instrument was doubtful or difficulty arose when it was sought to apply the language of the instrument to the circumstances under consideration. If the words had a clear and fixed meaning, extrinsic evidence was not admissible to show that the parties meant something different from what they had written.²⁷³ The modern view, however, is that the words do not have to be vague, ambiguous or otherwise uncertain before extrinsic evidence will be admitted. Since the purpose of the inquiry is to ascertain the meaning which the words would convey to a reasonable person against the available background of the transaction in question, the court is free (subject to certain exceptions) to look to all the relevant circumstances surrounding the transaction, not merely in order to choose between the possible meanings of words which are ambiguous but even to conclude that the parties must, for whatever reason, have used the wrong words or syntax.²⁷⁴ So the court is entitled (and, indeed, bound) to enquire beyond the language of the document and see what the circumstances were with reference to which words were used, and the object appearing from those circumstances which the person using them had in view.²⁷⁵ The court must place itself

in the same “factual matrix” as that in which the parties were.²⁷⁶ In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*,²⁷⁷ Lord Wilberforce said:

“No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as ‘the surrounding circumstances’ but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.”

He further stated²⁷⁸ that, just as the intention of the parties is to be ascertained objectively, so also:

“... when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.”

Public documents and standard form contracts

- 15-058 The “factual matrix” may weigh less heavily on the scales in the case of certain types of contract.  One such example relates to “the interpretation of negotiable and registrable contracts or public documents”.

²⁷⁹

 Thus, the reasonable reader’s background knowledge of a publicly registered document would include the fact that third parties might be expected to rely on the public information contained in the document but it would not ordinarily include matters which had not been included in the public document and remained private between the parties to the document.

²⁸⁰

 In the case of a contract which is intended for standard use throughout a particular industry or market, the court is more likely to focus its attention on the background generally known to participants in the industry or the market and not on the background known to, or the understandings of, the individual parties to the particular transaction.

²⁸¹

 In such a case the standard form contract is not context-specific so that evidence of the particular factual background or matrix has a much more limited, if any, role to play.

Pre-contractual negotiations

- 15-059 Although the range of materials on which a court can draw when examining the “factual matrix” is broad, it is not without its limits. An important limit on the range of admissible materials is the parties’ pre-contractual negotiations. While evidence of the facts about which the parties were negotiating is admissible to assist in the interpretation of the contract, in *Chartbrook Ltd v Persimmon Homes Ltd* 282
- U the House of Lords confirmed the well-established principle that the court is not entitled to look at what the parties said or did whilst the matter was in negotiation for the purposes of drawing inferences about what the contract means. The same principle also applies to the admissibility of drafts or preliminary documents in aid of interpretation. 283
- U This does not exclude the use of such evidence to support a claim for rectification 284
- U or estoppel 285
- U or to establish that a fact which may be relevant as background was known to the parties. 286
- U More controversially, it has been stated that “in some circumstances pre-contractual statements which demonstrate the mutual intentions of both parties may be admissible, but it must be clear that both parties had the same intention”. 287
- U However, as Lord Clarke pointed out in *Oceanbulk Shipping & Trading SA v TMT Asia Ltd*, 288
- U it may sometimes not be a straightforward task to distinguish between material which forms part of the pre-contractual negotiations which is part of the factual matrix and therefore admissible as an aid to interpretation 289
- U and material which is not part of the factual matrix and is not therefore admissible. In the former case the fact that the negotiations are “without prejudice” is immaterial. 290
- U

In *Prenn v Simmonds*²⁹¹ Lord Wilberforce summed up the position as follows:

“In my opinion, then, evidence of negotiations, or of the parties’ intentions, and a fortiori of [the claimant’s] intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the ‘genesis’ and objectively the ‘aim’ of the transaction.”

The phrase “‘genesis’ and … the ‘aim’ of the transaction” has been held to be a “composite phrase” which enables the court to consider the circumstances which led to the execution of the contract in order to identify the purpose of the transaction and to construe the language used in the light of that purpose but which does not entitle a court to seek to rely on what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean.²⁹²

Subsequent acts

- 15-060 The general rule is that evidence of conduct subsequent to the making of a contract is not admissible for the purpose of interpreting the contract. The general rule, in its modern form, was established by the House of Lords in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*²⁹³ where it was held that

“… it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.”

²⁹⁴



Subsequent actions are therefore inadmissible to interpret a written agreement, although there are certain exceptions to this rule: (i) where the contract is oral or partly oral²⁹⁵; (ii) where a conveyance is unclear or ambiguous with respect to the land conveyed by it²⁹⁶; (iii) in the case of ancient documents, contemporaneous or subsequent action may be adduced in order to explain words whose contemporary meaning may have become obscure;²⁹⁷ (iv) to show that an agreement, or a term of an agreement, is a sham²⁹⁸; (v) to show whether there was a contract and

what the terms of the contract were²⁹⁹; (vi) to show that the terms of a contract have been varied or enlarged³⁰⁰; (vii) to found an estoppel³⁰¹; and (viii) to infer the governing law.³⁰²

Footnotes

231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).

262 [1998] 1 W.L.R. 896.

263 [1988] 1 W.L.R. 896, 912–913.

264 In particular the judgment of Staughton LJ in *Scottish Power Plc v Britoil (Exploration) Ltd, The Times, 2 December 1997*. See also *NLA Group Ltd v Bowers* [1999] 1 Lloyd's Rep. 109, 112.

265 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 A.C. 251 at [39]. See also Lord Steyn in *Mannai Investment Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749, 768; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [10]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [133].

266 The Commercial Court Guide (11th edn, 2022) para. C1.3(h). For an application see *Contra Holdings Ltd v Bamford* [2022] EWHC 1857 (Comm) at [62].

267 *Mostyn House Estate Management Co Ltd v Youde* [2022] EWCA Civ 929 at [38]; *BP Oil International Ltd v Vega Petroleum Ltd* [2021] EWHC 1364 (Comm) at [167]–[168].

268 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [21]; *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132, [2018] 2 All E.R. (Comm) 381 at [16]; *Spirit Energy Resources Ltd v Marathon Oil UK LLC* [2019] EWCA Civ 11 at [33].

269 *Lehman Brothers International (Europe) (In Administration) v Exotix Partners LLP* [2019] EWHC 2380 (Ch), [2020] 1 All E.R. (Comm) 635 at [110]; *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch) at [277].

270 *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch) at [279].

271 *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch) at [279]; *Hamid (t/a Hamid Properties) v Francis Bradshaw Partnership* [2013] EWCA Civ 470, [2013] B.L.R. 447 at [49].

272 (1842) 9 Cl. & Fin. 355, 565.

- 273 *Bank of New Zealand v Simpson* [1900] A.C. 182, 188. See also *Blackett v Royal Exchange Co* (1832) 2 Cr. & J. 244; *Inglis v Butterly* (1878) 3 App. Cas. 552; *Edward Lloyd Ltd v Sturgeon Falls Pulp Co* (1901) 85 L.T. 162; *Lovell & Christmas Ltd v Wall* (1911) 104 L.T. 85; *Kinlen v Ennis* [1916] 2 Ir.R. 299; *G.W. Ry v Bristol Corp* (1918) 87 L.J. Ch. 414; *London CC v Henry Boot & Sons Ltd* [1959] 1 W.L.R. 133, 1069; *Codelfa Construction Pty Ltd v State Railway Authority of New South Wales* (1982) 149 C.L.R. 337, 352; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 591; *Hamed El Chiaty & Co v Thomas Cook Group Ltd* [1992] 2 Lloyd's Rep. 399, 407; *Adams v British Airways Plc* [1995] I.R.L.R. 577.
- 274 *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd* [1997] A.C. 749, 774; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 913; *Simon Container Machinery Ltd v Emba Machinery Ltd* [1998] 2 Lloyd's Rep. 429, 433; *R. (Westminster CC) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 W.L.R. 2956 at [5]; cf. *L.G. Schuler AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 261; *Zeus Tradition Marine Ltd v Bell* [1999] 1 Lloyd's Rep. 703, 706–707; *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 1552 (TCC), [2009] B.L.R. 505 at [28].
- 275 *Smith v Thompson* (1849) 8 C.B. 44; *Burges v Wickham* (1863) B. & S. 669; *The Curfew* [1891] P. 131; *River Wear Commissioners v Adamson* (1877) 2 App. Cas. 743, 763; *Mackill v Wright* (1888) 14 App. Cas. 106, 114, 116, 120; *Bank of New Zealand v Simpson* [1900] A.C. 182; *Charrington & Co Ltd v Woorder* [1914] A.C. 71, 77, 80, 82; *A/S Tankexpress v Compagnie Financière Belge des Petroles SA* [1949] A.C. 76; *Prenn v Simmonds* [1971] 1 W.L.R. 1381, 1383, 1384; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 354; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 995, 997; *Bunge v Kruse* [1977] 1 Lloyd's Rep. 492, 495, 497, 498; *Harmony Shipping Co SA v Saudi-Europe Line Ltd* [1981] 1 Lloyd's Rep. 377, 417; *Shell Tankers (UK) Ltd v Astro Comino Armadora SA* [1981] 2 Lloyd's Rep. 40, 44, 45; *Wace v Pan Atlantic Group Inc* [1981] 2 Lloyd's Rep. 339, 343; *Perrylease Ltd v Imecar AG* [1988] 1 W.L.R. 463, 470; *Vitol BV v Compagnie Européenne des Petroles* [1988] 1 Lloyd's Rep. 574, 576; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 590; *Forsikringsaktieselskapet Vesta v J.N.E. Butcher, Bain Dawes Ltd* [1989] 1 Lloyd's Rep. 331, 345; *Anangel Atlas Compania Naviera SA v I.H.I. Co Ltd* [1990] 2 Lloyd's Rep. 526, 552; *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep. 443, 456; *Levett v Barclays Bank* [1995] 1 W.L.R. 1260; *International Fina Services AG v Katrina Shipping Ltd* [1995] 2 Lloyd's Rep. 344, 350; *Cresspark Ltd v Wymering Mansions Ltd* [1996] E.G.C.S. 63; *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd* [1997] A.C. 749, 775; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912; *Don King Productions Ltd v Warren* [1998] 2 Lloyd's Rep. 176, 189; *Ringway Roadmarking v Adbruj* [1998] 2 B.C.L.C. 625, 643; *NLA Group Ltd v Bowers* [1999] 1 Lloyd's Rep. 109, 110; *C. Itoh & Co Ltd v Companhia de Navegacao Lloyd Brasileiro and Steamship Mutual Underwriting Association (Bermuda) Ltd* [1999] 1 Lloyd's Rep. 115, 118; *Eridania SpA v Rudolf A Oetker* [2000] 2 Lloyd's Rep. 209, 217; *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429; *UCB Corporate Services Ltd v Thomason* [2004] 2 All E.R. (Comm) 774; *Sirius International Insurance (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004]

- 1 W.L.R. 3251* at [20]; *Canmer International Inc v Mutual Steamship Assurance Association (Bermuda) Ltd* [2005] EWHC 1694 (Comm), [2005] 2 Lloyd's Rep. 49 at [22]; *Barclays Bank Plc v Kingston* [2006] EWHC 533 (QB), [2006] 2 Lloyd's Rep. 59 at [29]; *Gastronome (UK) Ltd v Anglo-Dutch Meats Ltd* [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587; *Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority* [2007] EWCA Civ 240, [2007] B.L.G.R. 439; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101; *Global Maritime Investments Ltd v STX Pan Ocean Co Ltd* [2012] EWHC 2339 (Comm), [2012] 2 Lloyd's Rep. 354 at [14]; *MRI Trading AG v Erdenet Mining Corp LLC* [2012] EWHC 1988 (Comm), [2012] 2 Lloyd's Rep. 465; *Officeserve Technologies Ltd (in liquidation) v Anthony-Mike* [2017] EWHC 1920 (Ch), [2017] B.C.C. 574 at [48].
- 276 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 997; *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 Lloyd's Rep. 156; *Staffordshire A.H.A. v South Staffordshire Waterworks Co* [1978] 1 W.L.R. 1387, 1395; *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502, 506; *Earl of Lonsdale v Att-Gen* [1982] 1 W.L.R. 887, 900; *Gill & Duffus SA v Société pour l'Exportation des Sucres SA* [1986] 1 Lloyd's Rep. 322, 325; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912; *Galaxy Energy International Ltd v Assuranceforeningen Skuld* [1999] 1 Lloyd's Rep. 249, 253; *Association of British Travel Agents Ltd v British Airways Plc* [2000] 2 Lloyd's Rep. 209, 217.
- 277 [1976] 1 W.L.R. 989, 995–996.
- 278 [1976] 1 W.L.R. 989, 996. See also *Hvalfangerselskapet Polaris Aktieselskap Ltd v Unilever Ltd* (1933) 39 Com. Cas. 1, 3, 19, 25; *Anangel Atlas Compania Naviera SA v I.H.I. Co Ltd* [1990] 2 Lloyd's Rep. 526, 553.
- ②79 *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch. 305 at [124]. This point should not, however, be pushed too far given that otherwise there “is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words”: *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 W.L.R. 85 at [33] and see to similar effect *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 W.L.R. 4317 at [16]–[19]. Thus there is no “bright line” to be drawn between public and private documents and the court must consider in each case the range of materials which it can permissibly draw upon when seeking to interpret the terms of the contract: *Pathway Finance Sarl v Defendants set out in Annex 1 to the Claim* [2020] EWHC 1191 (Ch) at [37].
- ②80 *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch. 305 at [130]; *Mostyn House Estate Management Co Ltd v Youde* [2022] EWCA Civ 929 at [48].
- ②81 *AIB Group (UK) Ltd v Martin* [2001] UKHL 63, [2002] 1 W.L.R. 94 at [7]; *Lehman Brothers Special Financing Inc v National Power Corp* [2018] EWHC 487 (Comm), [2019] 1 All E.R. (Comm) 1027 at [36]–[40]; *Deutsche Trustee Co Ltd v Duchess VI Clo BV* [2019] EWHC

- 778 (Ch), [2019] 2 All E.R. (Comm) 530 at [31]; *Netherlands v Deutsche Bank AG* [2019] EWCA Civ 771 at [56]; *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821, [2021] 2 All E.R. (Comm) 573 at [19]–[21].
- ②282 [2009] UKHL 38, [2009] 1 A.C. 1101. See *Inglis v Buttery* (1878) 3 App. Cas. 552, 558; *Leggott v Barrett* (1880) 15 Ch. D. 306, 311; *Millbourn v Lyons* [1914] 2 Ch. 231, 240; *Davis Contractors Ltd v Fareham UDC* [1956] A.C. 696; *Prenn v Simmonds* [1971] 1 W.L.R. 1381, 1385; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 354; *L.G. Schuler AG v Wickman Machine Tools Ltd* [1974] A.C. 235; *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep. 98, 101, 103, 105; *The Raven* [1980] 2 Lloyd's Rep. 266, 270; *Sudatlantica Navegacion SA v Devamar Shipping Corp* [1985] 2 Lloyd's Rep. 271, 274; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 913; *Aqua Design & Play International Ltd v Kier Regional Ltd* [2002] EWCA Civ 797, [2003] B.L.R. 111; *P&S Platt Ltd v Crouch* [2003] EWCA Civ 1110, [2004] 1 P. & C.R. 18; *NBTY Europe Ltd v Nutricia International BV* [2005] EWHC 734 (Comm), [2005] 2 Lloyd's Rep. 350 at [29]–[32]; *Absalom v TCRU Ltd* [2005] EWHC 1090 (Comm), [2005] 2 Lloyd's Rep. 735 at [25]; *Beazer Homes Ltd v Stroude* [2005] EWCA Civ 265, [2005] N.P.C. 45; *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep. 475 at [31]–[37]; *Nearfield Ltd v Lincoln Nominees Ltd* [2006] EWHC 2421 (Ch), [2007] 1 All E.R. (Comm) 441; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [9]; *ING Lease (UK) Ltd v Harwood* [2007] EWHC 2292 (QB), [2008] Bus. L.R. 762; *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 Lloyd's Rep. 96 at [46]; *Ted Baker Plc v AXA Insurance UK Plc* [2012] EWHC 1406 (Comm). But see *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 3 N.Z.L.R. 765 at [69]–[80] and [232]; *Canterbury Golf International Ltd v Yoshimoto* [2002] UKPC 40, [2001] N.Z.L.R. 523 at [25]; and the observations of Lord Nicholls in *Bank of Credit and Commerce International v Ali* [2001] UKHL 8, [2002] 1 A.C. 251 at [25], and in (2005) 121 L.Q.R. 577 at 582–588; *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 at [33]–[35]; *McMeel* (2003) 119 L.Q.R. 272. For the procedure to be adopted where evidence of pre-contractual negotiations is sought to be adduced, see *Anglo-Continental Educational Group (GB) Ltd v Capital Homes (Southern) Ltd* [2009] EWCA Civ 218, [2009] C.P. Rep. 30.
- ②283 *Inglis v Buttery* (1878) 3 App. Cas. 552; *National Bank of Australasia v Falkingham* [1902] A.C. 585, 591; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127. But an earlier contract may be looked at as part of the factual background for the purpose of interpreting a later contract, although this may be of limited utility where the later contract is intended to supersede the earlier one or is of a different nature or extent in comparison with the earlier one: *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [83]; *Electrosteel Castings Ltd v Scan-Trans Shipping* [2002] EWHC 1993 (Comm), [2003] 1 Lloyd's Rep. 190 at [198]; *Egan v Static Control Components (Europe) Ltd* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429 at [35]; *Multiplex Constructions (UK) Ltd v Cleveland Bridge (UK) Ltd (No.2)* [2007] EWHC 145 (TCC), (2007) 111 Con. L.R. 48 at [150]; *Medenta Finance Ltd v Hitachi Capital (UK)*

Plc [2019] EWHC 516 (Comm) at [49]. cf. *Nearfield Ltd v Lincoln Nominees Ltd* [2006] EWHC 2421 (Ch) at [68]–[70]; *Olympic Council of Asia v Novans Jets LLP* [2022] EWHC 88 (Comm) at [165].

②284 See above, para.5-057.

②285 See above, para.6-116. cf. *Ted Baker Plc v AXA Insurance UK Plc* [2012] EWHC 1406 (Comm) at [118].

②286 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [42]; *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm) at [14]. For this purpose a fact known to both parties means “some objective part of the background matrix of fact other than a mere negotiating position taken by one of the parties, however vigorously expressed”: *Northrop Grumman Missions Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd* [2015] EWCA Civ 844, [2015] B.L.R. 657 at [31].

②287 *Union of Shop, Distributive and Allied Workers v Tesco Stores Ltd* [2022] EWCA Civ 978 at [35]. On the facts of the case there was held to be no relevant mutual intention (see [37]) but the width of the exception identified is difficult to reconcile with the existence of the general exclusionary rule as set out by the House of Lords in *Chartbrook*.

②288 [2010] UKSC 44, [2011] 1 Lloyd's Rep. 96 at [39]. See to similar effect *Merthyr (South Wales) Ltd v Merthyr Tydfil CBC* [2019] EWCA Civ 526 at [55].

②289 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [45]; *Azimut-Benetti SpA v Healey* [2010] EWHC 2234 (Comm), [2010] T.C.L.R. 7; *Proteus Property Partners Ltd v South Africa Property Opportunities Plc* [2011] EWHC 768 (QB); *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 Lloyd's Rep. 96; *Dean & Dean Solicitors v Dionissiou-Moussaoui* [2011] EWCA Civ 1331, [2012] 2 Costs L.O. 94.

②290 *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 Lloyd's Rep. 96.

291 [1971] 1 W.L.R. 1381.

292 *Merthyr (South Wales) Ltd v Merthyr Tydfil CBC* [2019] EWCA Civ 526 at [53]–[54]; *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245, [2020] 1 All E.R. (Comm) 799 at [28]; *Shepherd Construction Ltd v Drax Power Ltd* [2021] EWHC 1478 (TCC) at [35]–[36]; *Schofield v Smith* [2022] EWCA Civ 824 at [22]–[38].

293 [1970] A.C. 573.

②294 [1970] A.C. 583, 603. See also 606, 611, 614; *Penn v Simmonds* [1971] 1 W.L.R. 1381; *English Industrial Estates Corp v George Wimpey & Co Ltd* [1973] 1 Lloyd's Rep. 118; *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601,

- 611; *L.G. Schuler AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 252, 260, 265–270, 272; *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 1 W.L.R. 591, 603; *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep. 98; *Harmony Shipping Co SA v Saudi-Europe Line Ltd* [1981] 1 Lloyd's Rep. 377, 409, 416; *Haydon v Lo & Lo* [1997] 1 W.L.R. 198, 205; *Full Metal Jacket Ltd v Gowlain Building Group Ltd* [2005] EWCA Civ 1809 at [17]; *Proteus Property Partners Ltd v South Africa Property Opportunities Plc* [2011] EWHC 768 (QB) at [46]; *Hyundai Merchant Marine Co Ltd v Trafigura Beheer BV* [2011] EWHC 3108 (Comm) at [13]. Contrast *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 3 N.Z.L.R. 765 at [84]–[90] and [232]; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep. 5, 11; cf. *McMeel* (2003) 119 L.Q.R. 272.
- 295 *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042, 2051; *Maggs v Marsh* [2006] EWCA Civ 1058, [2006] B.L.R. 395; *Kellogg Brown and Root Inc v Concordia Maritime AG* [2006] EWHC 3358 (Comm); *Kier Regional Ltd v City and General (Holborn) Ltd* [2008] EWHC 2454 (TCC), [2009] B.L.R. 90; *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066 at [33]–[34]; *BVM Management Ltd v Roger Yeomans* [2011] EWCA Civ 1254.
- 296 *Ali v Lane* [2007] EWCA Civ 1532, [2007] 1 P. & C.R. 26; *Haycocks v Neville* [2007] EWCA Civ 78, [2007] 12 E.G. 56.
- 297 *Att-Gen v Parker* (1747) 3 Atk. 576, 577; *Duke of Beaufort v Swansea Corp* (1849) 3 Ex. 413, 425; *Lord Waterpark v Fennell* (1859) 7 H.L.C. 650; *Earl de la Warr v Miles* (1880) 17 Ch. D. 535, 573; *Neill v Duke of Devonshire* (1882) 8 App. Cas. 135, 156; *North Eastern Ry v Lord Hastings* [1900] A.C. 260, 269; *L.G. Schuler AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 261, 270 (but see at 252, 261, 269, 272, questions of title to land).
- 298 *Antoniades v Villiers* [1990] 1 A.C. 417, 475; *Bankway Properties Ltd v Pensfold-Dunsford* [2001] EWCA Civ 528, [2001] 1 W.L.R. 1369 at [44].
- 299 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583, 603, 615; *L.G. Schuler AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 261; *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 W.L.R. 1213, 1221, 1229; *Liverpool City Council v Irwin* [1977] A.C. 239, 283; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep. 5, 11; *Wilson v Maynard Shipbuilding Consultants AB* [1978] Q.B. 665, 675, 677; *Todd v British Midland Airways Ltd* [1978] I.C.R. 959, 964, 967; *Mears v Safecar Security Ltd* [1983] Q.B. 54, 77; *Great North Eastern Ry Ltd v Avon Insurance Plc* [2001] EWCA Civ 780, [2001] 2 Lloyd's Rep. 649 at [29]; *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd* [2012] EWHC 1188 (QB), [2012] 2 Lloyd's Rep. 25 at [12], [47].
- 300 *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 W.L.R. 1213; *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042, 2051.
- 301 *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84, 119 (estoppel by convention); *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042, 2051.
- 302 *F.R. Larssen Werft GmbH & Co KG v Halle* [2009] EWHC 2607 (Comm), [2010] 2 Lloyd's Rep. 20 at [38].

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(d) - The Meaning of the Language Used by the Parties

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 15 - Express Terms

Section 3. - Construction of Terms²³¹

(d) - The Meaning of the Language Used by the Parties

Meaning of words³⁰³

- 15-061 Judges have differed widely in their belief in the reliability of language and in the inherent meaning of words. In 1997 in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*³⁰⁴ Lord Hoffmann said³⁰⁵:

“It is of course true that the law is not concerned with the speaker’s subjective intentions. But the notion that the law’s concern is therefore with the ‘meaning of his words’ conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker’s utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also ... to understand a speaker’s meaning, often without ambiguity, when he has used the wrong words.”

Again in 1998, in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,³⁰⁶ he said:

“The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.”³⁰⁷

Some 80 years earlier Holmes J had similarly commented:

“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.”³⁰⁸

It would be unduly pessimistic to accept that human language is such that no sensible meaning can ever be given to the words in a document without reference to the circumstances in which those words came to be used. But even the “plain” and “obvious” meaning may take on a different meaning in the light of the circumstances prevailing when the document was made.³⁰⁹ On the other hand the actual language used by the parties undoubtedly does impose constraints on the court’s willingness to depart from the plain and obvious meaning. If the meaning of the words is clear and unambiguous, why should the court not assume that it was what the parties meant?³¹⁰ Moreover, an examination of all the factual circumstances that might point to an interpretation which differs from the one which the words themselves convey may lead to an unnecessary protraction of the judicial process. A balance has therefore to be struck.³¹¹ As Corbin remarked³¹²:

“The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it. At what point the court should cease listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense.”

Greater focus on the meaning of the words used

- 15-062** The drift of modern authority is in the direction of putting greater emphasis on textual analysis and on the meaning of the words which have been used by the parties.
- U** ³¹³

U That meaning will often (but not necessarily) be the ordinary and natural meaning of the words which the parties have used, at least in the case where the meaning of the words is clear. As Lord Clarke observed, “where the parties have used unambiguous language, the court must apply it”³¹⁴

U and Lord Neuberger similarly stated that:

“... considerations of commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of the provision which is to be construed.”

³¹⁵



On the other hand, it has been stated that the approach of the courts to the construction of contracts is “neither uncompromisingly literal nor unswervingly purposive”.

³¹⁶

U The instrument must speak for itself, but the words used must, as stated by Lord Hoffmann,³¹⁷

U be understood to bear the meaning which they would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The courts have at their disposal various “tools” which they deploy when seeking to ascertain the objective meaning of the language which the parties have used and:

“... the extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.”

³¹⁸



Adoption of the ordinary meaning of words

15-063 The starting point in construing a contract is that words are to be given their ordinary and natural meaning. The interpretative exercise involves the court in identifying what the parties meant:

“... through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.”³¹⁹

This is not necessarily the dictionary meaning of the word,³²⁰ but that in which it is generally understood. The courts assume that the parties have used language in the way that reasonable persons ordinarily do. So terms are:

“... to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.”³²¹

Technical words

15-064 Prima facie the assumption is that technical words should have their technical meaning given to them unless something can be found in the context to exclude it,³²² for if a word is of a technical or scientific character, then its primary meaning is its technical and scientific meaning.³²³ But:

“... when it is clear from the context of an instrument in what sense words are used in that instrument, the sound rule of construction is to attribute to them that meaning, even though the words be technical and have technically a different meaning; for it is only so that you can effectuate the intention.”³²⁴

Also:

“... where it can be ascertained that a particular vernacular meaning is attributed to words under circumstances similar to those in which the [scientific] expression to be construed is found, the vernacular meaning must prevail over the scientific.”³²⁵

Thus “petroleum” in a reservation in a conveyance was construed according to the vernacular, and not the scientific, meaning, and so was held to include gas in solution in the liquid as it existed in the earth.³²⁶ Yet even this distinction is not a rigid one to be applied without regard to the circumstances of the case.³²⁷

Established judicial construction

- 15-065 Where the same words or contractual provisions have for many years received a judicial construction, the court will suppose that the parties have contracted upon the belief that their words will be understood in the accepted legal sense.³²⁸ But the mere fact that a court has previously attached a particular meaning to a form of words does not inevitably require a subsequent court to follow that interpretation, particularly in the case where the interpretation adopted in the earlier case did not give effect to the ordinary and natural meaning of the words used and there is no evidence that parties have subsequently acted to their detriment in reliance upon the interpretation adopted in the earlier case.³²⁹

Special meaning

- 15-066 Although a contract must normally be construed in accord with the ordinary meaning of the expressions contained in it, by considering the circumstances and situation of the parties at the time, and the subject matter of the agreement, the court may be enabled to ascertain a special meaning placed upon the words³³⁰ and such special meaning then takes the place of the ordinary meaning for the purpose of construing the contract. Also words in ancient documents are to be interpreted according to the meaning which they bore at the date of the document.³³¹ In the case where the parties have attached a special meaning to certain words or phrases in their contract, i.e. they used a “private dictionary”, extrinsic evidence is admissible to show that the parties did attach a particular meaning to the words used,
³³²

 even if that evidence is derived from pre-contractual negotiations.³³³

Law of Property Act s.61

- 15-067 By [s.61 of the Law of Property Act 1925](#), in all deeds, contracts, wills, orders and other instruments executed, made, or coming into operation after 31 December 1925, unless the context otherwise requires:

- (a) *month* means calendar month³³⁴;
- (b) *person* includes a corporation³³⁵;

- (c) the singular includes the plural and vice versa³³⁶;
- (d) the masculine includes the feminine and vice versa.

Construction of general words

- 15-068 The approach adopted to the construction of general words is that they are to be restricted according to the nature of the circumstances or of the person.³³⁷ Thus where a railway company agreed *efficiently* to work and repair the railway and works demised, it was held that the word “efficiently” had to be construed according to the resources and powers of the particular company.³³⁸ The same would no doubt apply (subject to the terms of the contract as a whole) to an obligation to take “reasonable steps” or to use “reasonable endeavours”.³³⁹

Footnotes

- 231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 303 See *Farnsworth* (1967) 76 *Yale L.J.* 939.
- 304 [1997] A.C. 749. *Rennie v Westbury Homes (Holdings) Ltd* [2007] EWHC 164 (Ch), [2007] N.P.C. 16; *Savings Bank of the Russian Federation v Refco Securities LLC* [2006] EWHC 857 (Comm), [2006] 2 All E.R. (Comm) 722.
- 305 [1997] A.C. 749, 775.
- 306 [1998] 1 W.L.R. 896. The principles set out by Lord Hoffmann in this case at 912–913 have subsequently been adopted in numerous cases: *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429 at [12]–[14]; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307 at [47]–[48]; *Sirius International Insurance (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 W.L.R. 3251 at [19]; *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22, [2005] 1 W.L.R. 215 at [12]; *NBTY Europe Ltd v Nutricia International BV* [2005] EWHC 734 (Comm), [2005] 2 Lloyd's Rep. 350 at [31]; *Canmer International Inc v UK Mutual Steamship Assurance Assn (Bermuda) Ltd* [2005] EWHC 1694 (Comm), [2005] 2 Lloyd's Rep. 479 at [22]; *Absalom v TCRU Ltd* [2005] EWHC 1090 (Comm), [2005] 2 Lloyd's Rep. 735 at [25]; *Gastronome (UK) Ltd v Anglo-Dutch Meats (UK) Ltd* [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587 at [14]; *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (Comm), [2006] 2 All E.R. (Comm) 722; *Forrest v Glasser* [2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep. 392 at [20];

- Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [9]; Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101 at [14]; Proteus Property Partners Ltd v South Africa Property Opportunities Plc [2011] EWHC 768 (QB); Deutsche Trustee Co Ltd v Fleet Street Finance Three Plc [2011] EWHC 2117 (Ch).
307 [1998] 1 W.L.R. 896, 913.
- 308 *Towne v Eisner* 245 U.S. 416, 425 (1918).
- 309 See above, para.15-057.
- 310 *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 N.Z.L.R. 391, 394 (Lord Hope). See also *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [17]–[22].
- 311 *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047, [2001] 2 All E.R. (Comm) 299 at [16].
- 312 (1944) 53 Yale L.J. 603, 623.
- ③13 *Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd* [2022] EWCA Civ 440 at [31]; *BP Oil International Ltd v Vega Petroleum Ltd* [2021] EWHC 1364 (Comm).
- ③14 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [23]. See also *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd* [2018] EWCA Civ 1556 at [14]; *PM Law Ltd v Motorplus Ltd* [2018] EWCA Civ 1730 at [16].
- ③15 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [17].
- ③16 *Arbuthnott v Fagan* [1995] C.L.C. 1396, 1400 (Bingham MR). See also *Charter Reinsurance Ltd v Fagan* [1997] A.C. 313, 326, 350.
- ③17 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912; above, para.15-054. This approach has been followed in numerous cases, including *Zeus Tradition Marine Ltd v Bell* [1999] 1 Lloyd's Rep. 703, 706; *First Realty Plc v Norton Rose* [1999] 2 B.C.L.C. 428; *Harbinger UK Ltd v GE Information Services Ltd* [2000] 1 All E.R. (Comm) 166; *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep. 339, 344; *Eridania Spa v Rudolf A Oetker* [2000] 2 Lloyd's Rep. 191, 196; *Association of British Travel Agents Ltd v British Airways Plc* [2000] 2 Lloyd's Rep. 209, 216; *City of London v Reeve & Co Ltd* [2000] B.L.R. 211, 216; *Bank of Credit and Commerce International v Ali* [2001] UKHL 8, [2002] 1 A.C. 251 at [8], [39]; *Sirius International Insurance (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 W.L.R. 3251 at [19]; *Westerngeco Ltd v ATP Oil & Gas (UK) Ltd* [2006] EWHC 1164 (Comm), [2006] 2 Lloyd's Rep. 535 at [10]; *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd (No.2)* [2007] EWHC 145 (TCC), (2007) 111 Const. L.R. 48 at [155]–[157]; *UBS AG v HSH Nordbank AG* [2008] EWHC 1529 (Comm), [2008] 2 Lloyd's Rep. 500 at [92]; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [9]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C.

1101 at [21]–[26]; *Secretary of State for Transport v Stagecoach South Western Trains Ltd* [2009] EWHC 2431 (Comm), [2010] 1 Lloyd's Rep. 175 at [36]; *Global Coal Ltd v London Commodity Brokers* [2010] EWHC 1347 (Ch) at [15]; *Osteopathic Education and Research Ltd v Purfleet Office Systems Ltd* [2010] EWHC 1801 (QB) at [62]; *Fenice Investments Inc v Jerram Falkus Construction Ltd* [2009] EWHC 3272 (TCC), 128 Con. L.R. 124; *Emeraldian Ltd Partnership v Wellmix Shipping Ltd* [2010] EWHC 1411 (Comm), [2011] 1 Lloyd's Rep. 301 at [53]; *Re Agrimarche Ltd* [2010] EWHC 1655 (Ch), [2010] B.C.C. 775; *Scottish Widows and Life Assurance Society v BGC International Ltd* [2011] EWHC 729 (Ch) at [17]; *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 W.L.R. 770 at [17]; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [14]; *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA* [2011] EWHC 1822 (Ch), [2011] 2 Lloyd's Rep. 538 at [96]; *Mirador International LLC v MF Global UK Ltd* [2012] EWCA Civ 1662 at [19], [35]; *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch. 305; *National Merchant Buying Society Ltd v Bellamy* [2013] EWCA Civ 452, [2013] 2 All E.R. (Comm) 674 at [39]; *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] B.L.R. 484; *Amlin Corporate Member Ltd v Oriental Assurance Corp* [2013] EWHC 2380 (Comm), [2014] 1 All E.R. (Comm) 415 at [28]; *British Malleable Iron Co Ltd v Relevan (IOM) Ltd* [2013] EWHC 1954 (Ch), [2013] E.G.L.R. 23.

③18 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [13].

319 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [17].

320 An emphasis on the natural and ordinary meaning of the words used by the parties is not to be equated with “an unduly literal or semantic interpretation” (*Fomento de Construcciones y Contratas SA v Black Diamond Offshore Ltd* [2016] EWCA Civ 1141, [2017] 1 B.C.L.C. 196 at [12]) nor does it permit an over-literal interpretation of one provision without regard to the whole of the document, particularly in the case of complex documents which have been put into circulation in the market (*Metlife Seguros de Retiro SA v JP Morgan Chase Bank, National Association* [2016] EWCA Civ 1248). The normal or dictionary meaning of the words used may yield to their context (*Savills (UK) Ltd v Blacker* [2017] EWCA Civ 68 at [33]), although the balance to be struck between the natural and ordinary meaning of the words and their context is not always an easy one to strike.

321 *Robertson v French* (1803) 4 East 130, 135. See also *Shore v Wilson* (1842) 9 Cl. & Fin. 355, 527; *Mallan v May* (1844) 13 M. & W. 511, 517; *Tielens v Hooper* (1850) 5 Ex. 830; *Grey v Pearson* (1857) 6 H.L. Cas. 61, 78, 106; *Beard v Moira Colliery Co* [1915] 1 Ch. 257, 268; *Royal Greek Government v Minister of Transport* [1949] 1 K.B. 525, 528; *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 N.Z.L.R. 391, 394; *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, 384; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307 at [93]; *Thames Valley Power Ltd v Total Gas & Power Ltd* [2003] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep. 441 at [25]; *Forrest v Glasser* [2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep. 392 at [21]; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [12]. Contrast *Staffordshire A.H.A. v South Staffordshire Waterworks Co*

- [1978] 1 W.L.R. 1387, 1394; *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, 391; *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245, [2020] 1 All E.R. (Comm) 799 at [42]; *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645, [2021] B.L.R. 97 at [30].
- 322 *Laird v Briggs* (1881) 19 Ch. D. 22, 34; *Monypenny v Monypenny* (1857) 4 Kay & J. 174, 182; *Roddy v Fitzgerald* (1858) 6 H.L.C. 823, 877.
- 323 *Shore v Wilson* (1842) 9 Cl. & Fin. 355, 511; *Holt & Co v Collyer* (1881) 16 Ch. D. 718, 720; *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245, [2020] 1 All E.R. (Comm) 799 at [42]. See also *L.G. Schuler AG v Wickman Machine Tools Sales Ltd* [1974] A.C. 235, 261 (“technical expressions”).
- 324 *Graham v Ewart* (1856) 1 Hurl. & N. 550, 562; *Musgrave v Forster* (1871) L.R. 6 Q.B. 590, 596; *Holt & Co v Collyer* (1881) 16 Ch. D. 718. See also (insurance contracts) Vol.II, para.44-077.
- 325 *Michael Borys v Canadian Pacific Ry* [1953] A.C. 217, 223; *Lord Provost and Magistrates of Glasgow v Farie* (1888) 13 App. Cas. 657, 669; *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 Q.B. 552.
- 326 *Michael Borys v Canadian Pacific Ry* [1953] A.C. 217. See also *Lovell and Christmas Ltd v Wall* (1911) 103 L.T. 588; *Tester v Bisley* (1948) 64 T.L.R. 184; cf. *Earl of Lonsdale v Att-Gen* [1982] 1 W.L.R. 887.
- 327 *Michael Borys v Canadian Pacific Ry* [1953] A.C. 217, 223.
- 328 *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App. Cas. 484, 490; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] A.C. 724, 735; *Skips A/S Nordheim v Syrian Petroleum Co Ltd* [1983] 2 Lloyd's Rep. 592, 597; *Navrom v Callitsis Ship Management SA* [1987] 2 Lloyd's Rep. 276, 278 (*affirmed* [1988] 2 Lloyd's Rep. 416); *Marc Rich & Co Ltd v Tourloti Compania Naviera SA* [1988] 2 Lloyd's Rep. 101, 105; *Chiswell Shipping Ltd v National Iranian Tanker Co* [1991] 2 Lloyd's Rep. 251, 257; *I.D.C. Group Ltd v Clark* [1992] 2 E.G.L.R. 184, 186; *British Sugar Plc v NEI Power Projects Ltd* (1997) 87 B.L.R. 42, 50; *Rose v Stavrou, The Times*, 3 June 1999, *Cero Navigation Corp v Jean Lion & Cie* [2000] 1 Lloyd's Rep. 292, 294; *Sunport Shipping Ltd v Tryg-Baltica International (UK) Ltd* [2003] EWCA Civ 12, [2003] 1 Lloyd's Rep. 138 at [25], [56]; *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, [2005] 1 W.L.R. 3850 at [29]; *Atlas Navios-Navegacao Lda v Navigators Insurance Co Ltd* [2012] EWHC 802 (Comm), [2012] 1 Lloyd's Rep. 629 at [25]. But contrast *L.G. Schuler AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235; *Macedonia Maritime Co v Austin & Pickersgill Ltd* [1989] 2 Lloyd's Rep. 73.
- 329 *Allianz Insurance Plc v Tonicstar Ltd* [2018] EWCA Civ 434, [2018] 1 Lloyd's Rep. 389, where the clause in dispute provided: “Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years’ experience of insurance or reinsurance”. The particular issue was whether a QC who had practised as a barrister specialising in the field of insurance and reinsurance for more than 10 years satisfied this requirement. In *Company X v Company Y Unreported 17 July 2000*, Morrison J held that a QC did not satisfy this requirement. The Court of Appeal declined to follow the decision of

Morrison J and held that a lawyer practising in the field of insurance and reinsurance fell within the scope of the clause.

- 330 *Shore v Wilson* (1842) 9 Cl. & F. 355, 555; *Smith v Doe* (1821) 2 B. & B. 473, 550, 602; *Payne v Haine* (1847) 16 M. & W. 541; *Myers v Sarl* (1860) 3 E. & E. 306; *Perrin v Morgan* [1943] A.C. 399, 421; *Levermore v Jobey* [1956] 1 W.L.R. 697; *Sydall v Castings Ltd* [1967] 1 Q.B. 302; *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245, [2020] 1 All E.R. (Comm) 799 at [42]; cf. *Hospital for Sick Children v Walt Disney Productions Inc* [1968] Ch. 52; *Zeus Tradition Marine Ltd v Bell* [1999] 1 Lloyd's Rep. 703, 706.
- 331 *Shore v Wilson* (1842) 9 Cl. & F. 355, 566; *North British Ry Co v Budhill Coal and Sandstone Co* [1910] A.C. 116, 128; *Earl of Lonsdale v Att-Gen* [1982] 1 W.L.R. 887, 924–928.
- 332 Partenreederei M.S. Karen Oltmann v Scarsdale Shipping Co Ltd [1976] 2 Lloyd's Rep. 708, 712 (criticised in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] A.C. 1101 at [45]–[47]); *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 (“preferred supplier status”).
- 333 See above para. 15-059. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] A.C. 1101 at [45] Lord Hoffmann stated that he did not consider this an exception to the rule excluding evidence of previous negotiations since “it does not matter whether the evidence of usage by the parties was in the course of negotiations or on any other occasion”.
- 334 Prior to 1926, the general rule was that “month” meant lunar month, but the rule was fortunately almost destroyed by exceptions. The word always meant calendar month in ecclesiastical law, in mercantile transactions, mortgages and statutes (since 1850), or where the meaning required it from the context: see *Schiller v Petersen* [1924] 1 Ch. 394, 417; *Sale of Goods Act 1979* s.10(3). A calendar month ends on the day of the next following month having the same number as that on which computation began, e.g. 30 March to 30 April; but if the next month has no day of the same number, the calendar month ends on the last day of the next month, e.g. 30 January to 28 February or 29 February (in leap year): *Dodds v Walker* [1981] 1 W.L.R. 1027, see also below, para. 24-020. See also the *Interpretation Act 1978* s.5 and Sch.1; *Wilkie v IRC* [1952] 1 Ch. 153.
- 335 cf. *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 W.L.R. 1580, HL.
- 336 cf. *Re A Solicitor's Arbitration* [1962] 1 W.L.R. 353.
- 337 Verba generalia restringuntur ad habilitatem rei vel aptitudinem personae (Bac. Max. 10). See above, para. 15-041.
- 338 *West London Ry v London and N.W. Ry* (1853) 11 C.B. 327, 356. See also *Burges v Wickham* (1863) 3 B. & S. 669, 698; *Booth v Alcock* (1873) L.R. 8 Ch. App. 663, 667; *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App. Cas. 484, 490; *Shell Tankers (UK) Ltd v Astro Comino Armadora SA* [1981] 2 Lloyd's Rep. 40.
- 339 *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), [2007] 2 All E.R. (Comm) 577; *EDI Central Ltd v National Car Parks Ltd* [2010] CSOH 141, 2011 S.L.T. 75.

(e) - The Need to Have Regard to the Contract as a Whole

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Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 15 - Express Terms

Section 3. - Construction of Terms²³¹

(e) - The Need to Have Regard to the Contract as a Whole³⁴⁰

The whole contract is to be considered

15-069 Every contract is to be construed with reference to its object and the whole of its terms,³⁴¹ and accordingly, the whole context must be considered in endeavouring to interpret it, even though the immediate object of inquiry is the meaning of an isolated word or clause³⁴²:

“It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.”³⁴³

And so Lord Davey said in *N.E. Ry v Hastings*,³⁴⁴ quoting Lord Watson³⁴⁵:

“The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible.”

Avoid focus on individual words to neglect of contract as a whole

- 15-070 The courts therefore do not approach the task of construction with too much concentration upon individual words to the neglect of the contract as a whole:

“The common and universal principle ought to be applied: namely, that [an agreement] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.”³⁴⁶

Illustrations

- 15-071 For example, in the case of a bond with a condition, the condition may be read in order to explain the obligatory part of the instrument, e.g. where no species of money was mentioned, but the debtor was bound for 7,700³⁴⁷; and in determining the meaning of words which are used for the purpose of designating periods of time, such as the words “from” and “until”,³⁴⁸ the whole contract is to be taken into consideration.³⁴⁹ Also, when the meaning of a contract for services is ambiguous, the court will take into consideration even the price agreed to be paid for those services for the purpose of enabling them to determine the extent of the service to be rendered under the contract.³⁵⁰ When seeking to ascertain the scope of an indemnity given by a party to a transaction, a court may have regard to the scope of the warranties that have also been given by that party and, the effect of doing so, may be to lead the court to adopt a narrower reading of the indemnity than might otherwise have been the case.³⁵¹

Perfect consistency may not be possible

- 15-072 Although the courts will endeavour to place the clause in dispute in the context of the contract as a whole, it may not be possible to achieve a complete reconciliation of all of the terms of the contract. Thus it has been observed that:

“... it has long been recognised ... that to seek perfect consistency and economy of draftsmanship in a complex form of contract which has evolved over many years is to pursue a chimera.”³⁵²

Although the court is bound to have regard to the whole of the contract and the words used, it may be necessary to adapt the language in order to effect the intentions of the parties.³⁵³

Control by recitals

- 15-073 When the words in the operative part of an instrument are ambiguous, the recitals and other parts of the instrument may be used to fix the appropriate meaning of those words.³⁵⁴ But clear words in the operative part of an instrument cannot be controlled by recitals.³⁵⁵ However, modern methods of interpretation, in which, as we have noted, background plays a far larger part than used to be the case, may have “tempered” the traditional approach, such that recitals in a deed can be looked at as part of the surrounding circumstances of the contract “without a need to find ambiguity in the operative provisions of the contract”.³⁵⁶

Several instruments

- 15-074 Several instruments made to effect one object may be construed as one instrument, and be read together, but so that each shall have its distinct effect in carrying out the main design.³⁵⁷ Thus, a lease and counterpart are two documents relating to one transaction and a palpable mistake in the lease may be corrected by reference to the counterpart, just as it might be by reference to other parts of the lease itself³⁵⁸:

“Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to the case as if they were one deed.”³⁵⁹

Yet although the words “contemporaneously executed” have been used, there is no doubt that this is not essential, so long as the court, having regard to the circumstances, comes to the conclusion that the series of documents represents a single transaction between the same parties.³⁶⁰ So the articles of association of a company may be read to explain the memorandum³⁶¹ and a prospectus which invited applications for deposit notes on certain terms could be read together

with a deposit note from which one of those terms had been omitted.³⁶² In *Re Sigma Finance Corp*³⁶³ the Supreme Court emphasised the need, when looking at a complex series of agreements, to construe an agreement which was part of a series of agreements by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme. Contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner.³⁶⁴

Supplemental instruments

- 15-075 Under s.58 of the Law of Property Act 1925, any instrument expressed to be supplemental to a previous instrument shall, as far as may be, be read and have effect as if the supplemental instrument contained a full recital of the previous instrument.

Alterations and deletions

- 15-076 As has been noted, evidence of prior negotiations is normally not admissible to construe a written contract and drafts will not be admitted either to alter the language of the contract or to help in its interpretation.³⁶⁵ So, where an instrument appears to have been altered while the parties were negotiating, the court cannot look at it as it originally stood compared with the alterations which were made in it, to see whether those alterations will throw any light upon the question of interpretation.³⁶⁶ However, when the parties use a printed form, and delete parts of it, there is some authority for the view that regard may be paid to what has been deleted as part of the surrounding circumstances in the light of which the meaning of the words which they chose to leave in is to be ascertained.³⁶⁷ But there is weighty authority to the contrary.³⁶⁸ In any event, it is doubtful whether the court can look at the words deleted except to resolve an ambiguity in the words retained.³⁶⁹ The position may nevertheless be different where alterations are made to an already concluded agreement. In *Punjab National Bank v De Boinville*³⁷⁰ Staughton LJ said:

“... if the parties to a concluded agreement subsequently agree in express terms that some words in it are to be replaced by others, one can have regard to all aspects of the subsequent agreement in construing the contract, including the deletions, even in a case which is not, or not wholly, concerned with a printed form.”

Also where a one-off contract has been drafted by reference to a standard form contract which formed the basis for its drafting, the court can take into account the omission from the one-off

contract of words that appear in the standard form contract in order to resolve an ambiguity in the former document.³⁷¹

Printed and written clauses

- 15-077 Where the contract is contained in a printed form with writing superadded, the written words, if there should be any reasonable doubt about the sense and meaning of the whole, are to have greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.³⁷² Nevertheless, it is open to the parties to stipulate in their printed conditions of contract that written provisions appended to the printed form are not to override, modify or affect in any way the application or interpretation of that which is contained in the printed conditions, and effect must then be given to such a stipulation even though this is contrary to the ordinary rule.³⁷³

Discrepancy between words and figures

- 15-078 In the event of a difference between words and figures, the written words normally prevail.³⁷⁴

Discrepancy between text and illustration

- 15-079 In the event of a difference between the text and an illustration designed to demonstrate how the text is to apply in a given context, the illustration or example should be interpreted in the same way as any other term of the contract. But in the case of a lengthy contract an illustration or an example may “deserve particular attention as something to which the parties particularly turned their minds”³⁷⁵ because it is “only when narratives and formulae are worked through that their true effect can properly be seen”.³⁷⁶

Inconsistent or repugnant clauses

- 15-080 Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a

whole and the available background, and that part which would defeat it must be rejected.³⁷⁷ The old rule was, in such a case, that the earlier clause was to be received and the later rejected³⁷⁸; but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. When considering how to interpret a contract in the case of alleged inconsistency, the courts distinguish between a case where the contract makes provision for the possibility of inconsistency and the case where there is no such provision. In the latter case the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner.³⁷⁹ However, matters are otherwise in the case where there is a term in the contract dealing with the possibility of inconsistency.³⁸⁰ The parties may do this by including in their contract an order of precedence term which will determine how any conflict between the terms of the contract is to be resolved.³⁸¹ In other cases the court should approach the interpretation of the contract without any pre-conceived assumptions and should neither strive to avoid nor to find an inconsistency but rather should approach the documents in a "cool and objective spirit to see whether there is inconsistency or not".³⁸² To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses.³⁸³ A term may also be rejected if it is repugnant to the remainder of the contract.³⁸⁴ However, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement.³⁸⁵ Thus, if there is a personal covenant and a proviso that the covenantor shall not be personally liable under the covenant, the proviso is inconsistent and void.³⁸⁶ But if a clause merely limits or qualifies without destroying altogether the obligation created by another clause, the two are to be read together and effect is to be given to the contract as disclosed by the instrument as a whole.³⁸⁷

Clauses incorporated by reference

- 15-081 If clauses are incorporated by reference into a written agreement, and those clauses conflict with the clauses of the agreement, then, in the ordinary way,³⁸⁸ the clauses of the written agreement will prevail.³⁸⁹ Moreover, the incorporating provision may be so general or wide as to have the effect of incorporating more than can make any sense in the context of the agreement, in which case the surplus may be rejected as insensible or inconsistent, or disregarded as "mere surplusage".³⁹⁰ A term in a proposal for insurance which conflicts with a term of the policy will be overridden by the term of the policy.³⁹¹

Footnotes

- 231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 340 Ex antecedentibus et consequentibus fit optima interpretatio (2 Co.Inst. 317).
- 341 *Throcmerton v Tracey* (1585) 1 Plow. 145, 161; *Hume v Rundell* (1824) 2 Sim. & St. 174, 177; *Richards v Bluck* (1848) 6 C.B. 437, 441; *Reid v Fairbanks* (1853) 13 C.B. 692, 730; *Re Strand Music Hall Co Ltd* (1865) 35 Beav. 153, 159; *Miller v Borner* [1900] 1 Q.B. 691; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [10]; *PM Law Ltd v Motorplus Ltd* [2018] EWCA Civ 1730 at [12].
- 342 *Smith v Packhurst* (1742) 3 Atk. 135, 136; *Browning v Wright* (1799) 2 B. & P. 13; *Stavers v Curling* (1836) 3 Scott 740; *Turner v Evans* (1853) 2 E. & B. 512; *Glynn v Margetson* [1893] A.C. 351; *Midland Ry of Western Australia v State of Western Australia* [1956] 1 W.L.R. 1037; *Nereide SpA di Navigazione v Bulk Oil International Ltd* [1982] 1 Lloyd's Rep. 1; *Abu Dhabi National Tanker Co v Product Star Shipping Ltd* [1991] 2 Lloyd's Rep. 468, 478, [1993] 1 Lloyd's Rep. 397; *Cementation Piling and Foundations Ltd v Aegon Insurance Co Ltd* [1995] 1 Lloyd's Rep. 97, 101; *International Fina Services AG v Katrina Shipping Ltd* [1995] 2 Lloyd's Rep. 344, 350.
- 343 *Barton v Fitzgerald* (1812) 15 East 529, 541; *Coles v Hulme* (1828) 8 B. & C. 568. See also *Trenchard v Hoskins* (1625) Winch. 93.
- 344 [1900] A.C. 260, 267.
- 345 *Chamber Colliery Co v Twyerould* (1893) reported [1915] 1 Ch. 268n, 272. See also *Sir Lindsay Parkinson & Co v Commissioners of HM Works and Public Buildings* [1949] 2 K.B. 632, 662.
- 346 *Ford v Beech* (1848) 11 Q.B. 852, 866. See also *Smith v Packhurst* (1742) 3 Atk. 135, 136; *Lloyd v Lloyd* (1837) 2 My. & Cr. 192, 202; *SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd* [1953] 1 W.L.R. 1379; affirmed [1954] 1 W.L.R. 496; *Ravennavi SpA v New Century Shipbuilding Ltd* [2007] EWCA Civ 58, [2007] 2 Lloyd's Rep. 24 at [12]; *Garratt v Mirror Group Newspapers Ltd* [2011] EWCA Civ 425, [2011] I.C.R. 880.
- 347 *Coles v Hulme* (1828) 2 B. & C. 568.
- 348 See below, para.24-018.
- 349 *R. v Stevens* (1804) 5 East 244; *Wilkinson v Gaston* (1846) 9 Q.B. 137.
- 350 *Allen v Cameron* (1833) 1 Cr. & M. 832, 840.
- 351 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [27]–[40].
- 352 *Homburg Houtimport PV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 715 at [12], per Lord Bingham, citing *Simond v Boydell* (1779) 1 Dougl. 268; *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] A.C. 16, 20–21; *Hillas & Co Ltd v Arcos Ltd* (1932) 43 Ll. L. Rep. 359; *Chandris v Isbrandtsen-Moller Inc* [1951] 1 K.B. 240, 245.
- 353 See below, para.15-103.
- 354 *Hesse v Albert* (1828) 3 M. & Ry 406; *Walsh v Trevanion* (1850) 15 Q.B. 733, 751; *Re Mitchell's Trusts* (1878) 9 Ch. D. 5, 9; *Leggott v Barrett* (1880) 15 Ch. D. 306, 311; *Re Moon Ex p. Dawes* (1886) 17 Q.B.D. 275, 286; *Orr v Mitchell* [1893] A.C. 238, 253, 254; *Crouch*

- v Crouch [1912] 1 K.B. 378; Rutter v Charles Sharpe & Co [1979] 1 W.L.R. 1429, 1433* (factual matrix).
- 355 *Leggott v Barrett (1880) 15 Ch. D. 306, 311; Re Moon Ex p. Dawes (1886) 17 Q.B.D. 275, 286.* See also *Young v Smith (1865) L.R. 1 Eq. 180, 183; Dawes v Tredwell (1881) 18 Ch. D. 354, 358; Foakes v Beer (1884) 9 App. Cas. 605; Australian Joint Stock Bank v Bailey [1899] A.C. 396; Royal Insurance Co Ltd v G. & S. Assured Investments Co Ltd [1972] 1 Lloyd's Rep. 267, 274; Rutter v Charles Sharpe & Co [1979] 1 W.L.R. 1429, 1433; Mr H TV Ltd v ITV2 Ltd [2015] EWHC 2840 (Comm) at [38]; Qatar National Bank Qpsc v The Owner of the Yacht Force India [2020] EWHC 103 (Admly), [2020] 2 Lloyd's Rep. 343 at [41].*
- 356 *Russell v Stone (trading as PSP Consultants) [2017] EWHC 1555 (TCC), [2017] B.L.R. 429* at [34].
- 357 *Duke of Bolton v Williams (1793) 2 Ves. Jr. 138; Harrison v Mexican Rail Co (1875) L.R. 19 Eq. 358; Stott v Shaw [1928] 2 K.B. 26.*
- 358 *Burchell v Clark (1876) 2 C.P.D. 88; Matthews v Smallwood [1910] 1 Ch. 777.*
- 359 *Manks v Whiteley [1912] 1 Ch. 735, 754* (reversed on other grounds sub nom. *Whiteley v Delaney [1914] A.C. 132*); *Fowler v Hunter (1829) 3 Y. & J. 506.*
- 360 *Smith v Chadwick (1882) 20 Ch. D. 27, 63; Ford v Stuart (1852) 15 Beav. 493; Whitbread v Smith (1854) 3 De G.M. & G. 727.*
- 361 *Re Capital Fire Insurance Association (1882) 21 Ch. D. 209, 212.*
- 362 *Jacobs v Batavia and General Plantations Trusts Ltd [1924] 2 Ch. 329*; cf. *Smith v Chadwick (1882) 20 Ch. D. 27.*
- 363 [2009] UKSC 2, [2010] 1 All E.R. 571. See also *Deutsche Bank AG v Sebastian Holdings Inc [2010] EWCA Civ 998, [2011] 1 Lloyd's Rep. 106* at [40]; *Royal Bank of Scotland Plc v Highland Financial Partners LP [2010] EWCA Civ 809* at [11]; and *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No.1 Plc [2016] UKSC 29, [2017] 1 All E.R. 497* at [30], although it was acknowledged that in the case of a contract or trust deed which governs the terms upon which a negotiable instrument is held “very considerable circumspection” is appropriate before the contents of such other documents are taken into account.
- 364 *RWE Npower Renewables Ltd v JN Bentley Ltd [2014] EWCA Civ 150* at [15]. Thus it should only be in cases of a “clear and irreconcilable discrepancy” that it should be necessary for a court to have to resolve any discrepancy between the terms (see below, para.15-080).
- 365 See above, para.15-059.
- 366 *Inglis v Buttery (1878) 3 App. Cas. 552, 558, 569, 576; Channel Islands Ferries Ltd v Sealink UK Ltd [1987] 1 Lloyd's Rep. 559, 577 (affirmed [1988] 1 Lloyd's Rep. 323); Health and Case Management Ltd v Physiotherapy Network Ltd [2018] EWHC 869 (QB)* at [7].
- 367 *Baumwoll Manufatur von Scheibler v Gilchrest & Co [1892] 1 Q.B. 253, 256; cf. [1893] A.C. 8, 15; Gray v Carr (1871) L.R. 6 Q.B. 522, 524, 529; Stanton v Richardson (1874) L.R. 9 C.P. 390; Glynn v Margetson [1893] A.C. 351, 357; Caffin v Aldridge [1895] 2 Q.B. 648, 650; Santay & Co v Cox, McEllen & Co (1921) 10 Ll.L. Rep. 459, 460; Bailey Sons & Co v Ross, Smythe & Co [1940] 3 All E.R. 60; Louis Dreyfus et Cie v Parnaso Compania Naviera SA [1959] 1 Q.B. 498; London & Overseas Freighters Ltd v Timber Shipping Co SA [1972] A.C. 1, 15; Mottram Consultants Ltd v Bernard Sunley Ltd [1975] 2 Lloyd's Rep. 197, 209; Punjab National Bank v De Boiville [1992] 1 W.L.R. 1138, 1148.*

- 368 *Ambatielos v Jurgens* [1923] A.C. 175, 185; *Sassoon v International Banking Corp* [1927] A.C. 711, 721; *City & Westminster Properties* (1934) Ltd v *Mudd* [1959] Ch. 129; *Finzel, Berry & Co v Eastcheap Dried Fruit Co* [1962] 1 Lloyd's Rep. 370, affirmed [1962] 2 Lloyd's Rep. 11; *Compania Naviera Termar SA v Tradax Export SA* [1965] 1 Lloyd's Rep. 198, 204; *Borthwick (Thomas) (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep. 17; *Tradax Export v Volkswagenwerk* [1969] 2 Q.B. 599, 607; *Ben Shipping Co (Pte) Ltd v An-Board Bainne* [1986] 2 Lloyd's Rep. 285, 291; *Wates Construction (London) Ltd v Franthom Property Ltd* (1991) 7 Const. L.J. 243; *Rhodia Chirex Ltd v Laker Vent Engineering Ltd* [2003] EWCA Civ 1859, [2004] B.L.R. 75; *Mopani Copper Mines Plc v Millennium Underwriting Ltd* [2008] EWHC 1331 (Comm), [2009] Lloyd's Rep. I.R. 158.
- 369 *Louis Dreyfus et Cie v Parnaso Cia. Naviera SA* [1959] 1 Q.B. 498, reversed on other grounds [1960] 2 Q.B. 49; *Mopani Copper Mines Plc v Millennium Underwriting Ltd* [2008] EWHC 1331 (Comm), [2008] All E.R. (Comm) 976 at [120]; *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525, [2019] 1 All E.R. (Comm) 955 at [28]–[29] and [36].
- 370 [1992] 1 W.L.R. 1138, 1149. See also *Centrepoint Custodians Pty Ltd v Lidgerwood Investments Pty Ltd* [1990] V.R. 411; *Trasimex Holdings SA v Addax BV* [1997] 1 Lloyd's Rep. 610, 614; *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [83], [84]; *KPMG v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] Bus. L.R. 1336; *Medenta Finance Ltd v Hitachi Capital (UK) Plc* [2019] EWHC 516 (Comm) at [49]. However, even in those cases where evidence of a deletion is admissible, the court is likely to exercise some caution when determining the assistance which it can derive from the deletion of certain words from a subsequent contract; *Mineralimportexport v Eastern Mediterranean Maritime Ltd ("The Golden Leader")* [1980] 2 Lloyd's Rep. 573, 575; *Health and Case Management Ltd v Physiotherapy Network Ltd* [2018] EWHC 869 (QB) at [71]–[73] and [78].
- 371 *Team Services v Kier Management and Design* (1994) 63 B.L.R. 76.
- 372 *Robertson v French* (1803) 4 East 130, 136; *Glynn v Margetson & Co* [1893] A.C. 351, 358; *Re L. Sutro & Co and Heilbut, Symons & Co* [1917] 2 K.B. 348, 358, 361; *Hadjipateras v Weigall & Co* (1918) 34 T.L.R. 360; *Société d'Avances Commerciales (London) Ltd v A. Besse & Co Ltd* [1952] 1 T.L.R. 644; *The Brabant* [1967] 1 Q.B. 588; *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439, 445; *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep. 116, 121; cf. *T. W. Thomas & Co v Portsea Steamship Co Ltd* [1912] A.C. 1; *Evergos Naftiki Eteria v Cargill Plc* [1997] 1 Lloyd's Rep. 35, 38; *Homburg Houtimport BV v Agrosin Ltd* [2003] UKHL 12, [2004] 1 A.C. 715 at [11]; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54.
- 373 *Gold v Patman & Fotheringham Ltd* [1958] 1 W.L.R. 697, 701; *North West Metropolitan Regional Hospital Board v T. A. Bickerton & Son Ltd* [1970] 1 W.L.R. 607, 617; *English Industrial Estates Corp v George Wimpey & Co Ltd* [1973] 1 Lloyd's Rep. 118. But the written provisions may be looked at “to follow exactly what was going on”, [1973] 1 Lloyd's Rep. 118, at 126, 128.
- 374 *Sauderson v Piper* (1839) 5 Bing.N.C. 425; Bills of Exchange Act 1882 s.9(2).

- 375 *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311 (Comm) at [284].
- 376 *Altera Voyageur Production Ltd v Premier Oil E&P UK Ltd* [2020] EWHC 1891 (Comm), [2021] 1 Lloyd's Rep. 451 at [74].
- 377 *Walker v Giles* (1848) 6 C.B. 662, 702; *Love v Rowtor Steamship Co Ltd* [1916] 2 A.C. 527, 535; *Sabah Flour and Feedmills Sdn Bhd v Comfez Ltd* [1988] 2 Lloyd's Rep. 18; cf. *Taylor v Rive Droite Music Ltd* [2005] EWCA Civ 1300, [2006] E.M.L.R. 4.
- 378 Shep.Touch. 88; *Doe d. Leicester v Biggs* (1809) 2 Taunt. 109, 113; *Forbes v Git* [1922] 1 A.C. 256, 259.
- 379 *RWE Npower Renewables Ltd v JN Bentley Ltd* [2014] EWCA Civ 150.
- 380 *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep. 342; *Alexander (as representative of the "Property 118 Action Group") v West Bromwich Mortgage Co Ltd* [2016] EWCA Civ 496, [2017] 1 All E.R. 942.
- 381 *Triple Point Technology Inc v PTT Public Co Ltd* [2019] EWCA Civ 230, [2019] 1 W.L.R. 3549 at [57].
- 382 *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep. 342, 350; *Alexander (as representative of the "Property 118 Action Group") v West Bromwich Mortgage Co Ltd* [2016] EWCA Civ 496, [2017] 1 All E.R. 942; *Septo Trading Inc v Tintrade Ltd* [2021] EWCA Civ 718 at [28] (the "question must be approached practically, having regard to business common sense, and is not a literal or mechanical exercise").
- 383 *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep. 342, 350; *Cobelfret Bulk Carriers NV v Swissmarine Services SA* [2009] EWHC 2883 (Comm), [2010] 1 Lloyd's Rep. 317 at [20]; *Public Company Rise v Nibulon SA* [2015] EWHC 684 (Comm); *Alexander (as representative of the "Property 118 Action Group") v West Bromwich Mortgage Co Ltd* [2016] EWCA Civ 496, [2017] 1 All E.R. 942; *Apache North Sea Ltd v Euroil Exploration Ltd* [2019] EWHC 3241 (Comm) at [14].
- 384 *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] A.C. 133; *Mercuria Energy Trading Pte Ltd v Citibank NA* [2015] EWHC 1481 (Comm), [2015] 1 C.L.C. 999 at [76].
- 385 *Barton v Fitzgerald* (1812) 15 East 529, 541; *Bush v Watkins* (1851) 14 Beav. 425, 432; *Société Co-operative Suisse des Céréales et Matières Fourrageres v La Plata Cereal Co SA* (1947) 80 Ll.L. Rep. 530, 537; *Bremer Handelsgesellschaft mbH v J.H. Rayner & Co Ltd* [1979] 2 Lloyd's Rep. 216; *Sudatlantica Navegacion SA v Devamar Shipping Corp* [1985] 2 Lloyd's Rep. 271; *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep. 342, 349; *STX Pan Ocean Co Ltd v Ugland Bulk Transport AS* [2007] EWHC 1317 (Comm), [2008] 1 Lloyd's Rep. 86 at [18]; *RWE Npower Renewables Ltd v JN Bentley Ltd* [2014] EWCA Civ 150.
- 386 *Furnivall v Coombes* (1843) 5 M. & G. 736. See also *Watling v Lewis* [1911] 1 Ch. 414; *Re Tewkesbury Gas Co* [1911] 2 Ch. 279 (affirmed [1912] 1 Ch. 1).
- 387 Quoted with approval in *Yuchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital (2009) Ltd* [2018] EWHC 2580 (Comm), [2019] 1 Lloyd's Rep. 457 at [77]. See *Williams v Hathaway* (1877) 6 Ch. D. 544; *Forbes v Git* [1922] 1 A.C. 256, 259; *Walton (Grain & Shipping) Ltd v British Italian Trading Co Ltd* [1959] 1 Lloyd's Rep. 223, 227;

Pagnan SpA v Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep. 342, 351; *Alexander (as representative of the "Property 118 Action Group") v West Bromwich Mortgage Co Ltd* [2016] EWCA Civ 496, [2017] 1 All E.R. 942; *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd* [2017] UKSC 59, [2017] B.L.R. 477; *Septo Trading Inc v Tintrade Ltd* [2021] EWCA Civ 718 at [28]. It is a question of construction for the court whether the multiple provisions which cover the same or similar territory are all effective to impose the several obligations that their terms suggest, or whether the effect of one or more provisions is to modify or exclude the apparent meaning of another provision of the contract: *125 OBS (Nominees)1 v Lend Lease Construction (Europe) Ltd* [2017] EWHC 25 (TCC), 174 Con. L.R. 105 at [99].

- 388 cf. *Sabah Flour and Feedmills Sdn Bhd v Comfez Ltd* [1988] 2 Lloyd's Rep. 18; *The Northgate* [2007] EWHC 2796 (Comm), [2008] 1 Lloyd's Rep. 511 at [39], [53].
- 389 *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] A.C. 133, 155, 178–179; *Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd* [1975] 1 W.L.R. 1281, 1289; *Sabah Flour and Feedmills Sdn Bhd v Comfez Ltd* [1988] 2 Lloyd's Rep. 18, 20; *Metalfer Corp v Pan Ocean Shipping Co Ltd* [1998] 2 Lloyd's Rep. 632, 637; *Finagra (UK) Ltd v O.T. Africa Line Ltd* [1998] 2 Lloyd's Rep. 622, 627; *BCT Software Solutions Ltd v Arnold Laver & Co Ltd* [2002] EWHC 1298 (Ch), [2002] 2 All E.R. (Comm) 85 at [42]; *Petroleum Oil and Gas Corp of South Africa (Pty) Ltd v F38 Singapore Pte Ltd* [2008] EWHC 2480 (Comm), [2009] 1 Lloyd's Rep. 107 at [20]; *Cobelfret Bulk Carriers NV v Swissmarine Services SA* [2009] EWHC 2883 (Comm), [2010] 1 Lloyd's Rep. 317 at [20]; cf. *Bayoil SA v Seaworld Tankers Corp (The Leonidas)* [2001] 1 Lloyd's Rep. 533 (no conflict between clauses).
- 390 *Skips A/S Nordheim v Syrian Petroleum Co Ltd* [1983] 2 Lloyd's Rep. 592, 594; cf. *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] A.C. 676, 683; *Balli Trading Ltd v Afalona Shipping Co Ltd* [1993] 1 Lloyd's Rep. 1, 6; *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriayah C4I) Ltd* [2015] EWCA Civ 844, [2015] B.L.R. 657. When considering whether to incorporate the terms of one contract document into another contract, the first rule of interpretation is to construe the incorporating clause in order to decide on the width of the incorporation, and the second is that the court must read the incorporated wording into the host document to see if, in that setting, some parts of the incorporated wording nevertheless have to be rejected as inconsistent or insensible when read in their new context: *TJH and Sons Consultancy Ltd v CPP Group Plc* [2017] EWCA Civ 46 at [13].
- 391 *Thor Navigation Inc v Ingosstrakh Insurance* [2005] EWHC 19 (Comm), [2005] 1 Lloyd's Rep. 547 (applying *Izzard v Universal Insurance* [1937] A.C. 773, 780).

(f) - The Significance of the Nature, Formality and Quality of the Drafting of the Contract

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(f) - The Significance of the Nature, Formality and Quality of the Drafting of the Contract

Professionally drawn agreements

15-082 The formality and quality of the drafting of the contract does have an impact on the approach of the court to its interpretation. Thus in the case where the contract has been “negotiated and prepared with the assistance of skilled professionals” the court will interpret the agreement “principally by textual analysis”. ³⁹² But even in the case of agreements drawn up with the benefit of professional assistance, the courts do recognise that “negotiators of complex formal contracts may often not achieve a logical and coherent text” so that where the terms lack clarity (because, for example, of the need to compromise in order to reach agreement) the court may have regard to “the factual matrix and the purpose of similar provisions in contracts of the same type” ³⁹³ when seeking to ascertain the meaning of the disputed clause.

Informal contracts

15-083 In the case of contracts that have been concluded informally and which have not had the benefit of skilled professional assistance, the court may place “a greater emphasis on the factual matrix” ³⁹⁴

U when seeking to interpret the contract. So, for example, in the case where both parties have considerable experience of the market in which they are operating, they may not reduce all of their market understandings to writing and, in such a case, the court can be expected to have regard to the understandings of the market as known to the contracting parties when seeking to interpret and give effect to the express terms of their contract. Similarly, in an appropriate case a court may acknowledge that a contract was prepared by and concluded between lay persons where exactitude of language may not be expected and, in such a case, a court may give greater weight to the commercial sense of the agreement as a whole than to the syntax of a particular term.

395



Long term or “relational” contracts

- 15-084 There are no special rules of interpretation applicable to long-term or “relational”³⁹⁶ contracts, although the courts may incline towards a more flexible approach which recognises the need for such contracts to be drafted in broad terms and be slow to conclude that the contract, or a term of the contract, is too vague to be enforced.³⁹⁷ However, the courts may require the parties to such contracts to “adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract” and will not expect them to seek to take advantage of any “infelicities and oddities” in the drafting of the contract “in order to disrupt the project and maximise their own gain”.³⁹⁸

Badly drafted contracts

- 15-085 In *Mitsui Construction Co Ltd v Att-Gen of Hong Kong*³⁹⁹ Lord Bridge said (of a building contract) that the fact that the contract was badly drafted:

“... affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis.”

The fact that the drafting of the contract is generally poor may incline a court to conclude that the parties did not, objectively, intend that the literal meaning of the words they used should be used to “govern and override clear conflicting business common sense”.⁴⁰⁰ In other words, greater weight may be given in such cases to a “purposive” or “contextual” approach to the interpretation of the contract given that an interpretation which gives greater weight to the “ordinary” or “literal” meaning of the words used is less likely to give effect to the intention of the parties.

A spectrum

- 15-086 It should not be thought that the courts draw a rigid divide between contracts drawn up with the benefit of professional assistance and agreements which do not have the benefit of such assistance. Rather, there is a spectrum with complex, formal documents drawn up with the benefit of substantial professional assistance at one end and, at the other end, brief informal agreements between parties who place greater reliance on the understandings derived from their relationship which has evolved over time than the brief written document which they draw up to reflect that understanding. There are many possible points on the spectrum and all that can be said is that, the greater the level of professional assistance, the more likely it is that the court will give principal, but not exclusive, attention to a textual analysis of the terms of the contract.

Footnotes

- 231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 392 *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] A.C. 1173* at [13]. See also *National Bank of Kazakhstan v Bank of New York Mellon SA/NV, London Branch [2018] EWCA Civ 1390, [2018] 2 C.L.C. 103* at [39].
- 393 *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] A.C. 1173* at [13].
- 394 *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] A.C. 1173* at [13]. See also *Contra Holdings Ltd v Bamford [2022] EWHC 1857 (Comm)* at [56].
- 395 *Thorney Park Golf Ltd v Myers Catering Ltd [2015] EWCA Civ 19; Olympic Council of Asia v Novans Jets LLP [2022] EWHC 88 (Comm)* at [163].
- 396 The characteristics of a “relational” contract were set out in non-exhaustive terms by Fraser J in *Bates v Post Office Ltd (No.3: Common Issues) [2019] EWHC 606 (QB)* at [725]–[726].

- In broad terms a relational contract may be defined as a long-term contract which is very often cooperative in nature and which is characterised by a significant degree of flexibility.
- 397 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [64]–[68]; *Teesside Gas Transportation Ltd v CATS North Sea Ltd* [2019] EWHC 1220 (Comm) at [38].
- 398 *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264, [2018] B.L.R. 225 at [93].
- 399 (1986) 33 B.L.R. 1, 14, PC. See also *Sinochem International Oil (London) Ltd v Mobile Sales and Supply Corp* [2000] 1 Lloyd's Rep. 339, 344; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047, [2001] 2 All E.R. (Comm) 299 at [13]; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [26]; *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd* [2017] UKSC 59, [2017] B.L.R. 477 at [48].
- 400 *Cohen v Teseo Properties Ltd* [2014] EWHC 2442 (Ch) at [30]. A point also acknowledged by the Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1613 at [18]. But the mere fact that the contract does not achieve what one party subsequently states was its object does not necessarily result in the conclusion that the contract was badly drafted: *Fairway Lakes Ltd v Revenue & Customs Commissioners* [2015] UKFTT 605 (TC).

(g) - Two Possible Meanings

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(g) - Two Possible Meanings

Ambiguity

- 15-087 A word or phrase in a contract may be open to more than one potential meaning or interpretation. In such a case the court will consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled (but is not obliged ⁴⁰¹) to prefer the construction which is consistent with business common sense and to reject the other. ⁴⁰²

Patent ambiguity

- 15-088 In the case of a patent ambiguity, that is to say, a defect or ambiguity appearing on the face of the document which renders the words used unintelligible or meaningless, a rule is said to exist that any reference to matters outside the document is forbidden. ⁴⁰³ It is doubtful, however, whether such a principle applies today in respect of written contracts, except possibly in the case of total blanks in a document, ⁴⁰⁴ although evidence will not be admitted to show what the author intended to say. ⁴⁰⁵ The view has been expressed that evidence is admissible to give sense to words that are meaningless, but only:

“... within the range of meaning which the words are capable of bearing in their ordinary and natural sense having regard to the aim and purpose of the transaction.”⁴⁰⁶

Saving the document

- 15-089 If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void, ineffective or meaningless, the former sense is to be adopted. This principle is often expressed in the phrase *ut res magis valeat cum pereat*⁴⁰⁷ and it applies where there is a “realistic” alternative construction of the words that are in dispute.⁴⁰⁸ Thus, if by a particular construction the agreement would be rendered ineffectual and the apparent object of the contract would be frustrated, but another construction, though in itself less appropriate looking to the words only, would produce a different effect, the latter interpretation is to be applied, if that is how the agreement would be understood by a reasonable person with a knowledge of the commercial purpose and background of the transaction.⁴⁰⁹ So, where the words of a guarantee were capable of expressing either a past or a concurrent consideration, the court adopted the latter construction, because the former would render the instrument void.⁴¹⁰ If one construction makes the contract lawful and the other unlawful, the former is to be preferred. Thus a bond conditioned “to assign all offices” will be construed to apply to such offices as are by law assignable.⁴¹¹

Footnotes

- 231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 401 *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV [2015] EWHC 150 (Comm), [2016] 1 All E.R. (Comm) 368* at [34].
- 402 *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [21] (Lord Clarke); *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] A.C. 1173* at [11]. The fact that there are two possible meanings of the disputed term has been held to be the beginning of the inquiry, not its end (*Scottish Power UK Plc v BP Exploration Operating Co Ltd [2016] EWCA Civ 1043* at [29]). It is then necessary for the court to apply “all its tools of linguistic, contextual, purposive and common sense analysis to discern what the clause really means” (per Briggs LJ in *Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128*,

- [2016] 1 C.L.C. 573 at [19]). cf. *Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWCA Civ 1413 at [22] (two possible constructions not present).
- 403 Bacon's Law Tracts, p.99; *Colpoys v Colpoys* (1822) Jacob 451; *Great Western Ry v Bristol Corp* (1918) 87 L.J. Ch. 414, 429; cf. *Watcham v Att-Gen of East African Protectorate* [1919] A.C. 533.
- 404 *R. v Ryan* (1811) Russ. & Ry 195; *In the Goods of De Rosaz* (1877) 2 P.D. 66, 69; cf. Bills of Exchange Act 1882 s.20. In *Westville Properties Ltd v Dow Properties Ltd* [2010] EWHC 30 (Ch), [2010] 2 P. & C.R. 19, a contractual blank was filled on the basis of the remaining terms of the contract and the factual matrix.
- 405 *Clayton v Lord Nugent* (1844) 13 M. & W. 200 (will).
- 406 *Zeus Tradition Marine Ltd v Bell* [1999] 1 Lloyd's Rep. 703, 707. A broader view was, however, taken by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [25] when he said that "there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant".
- 407 Verba ita sunt intelligenda ut res magis valeat cum pereat: Bac. Max. 3; Noy. Max. 50. The judicial preference would now appear to be to consider the principle "without reference to its original formulation in Latin": *Egon Zehnder Ltd v Tillman* [2019] UKSC 32, [2020] A.C. 1543 at [38].
- 408 *Egon Zehnder Ltd v Tillman* [2019] UKSC 32, [2020] A.C. 1543 at [42]. The test does not require that the two interpretations be "equally plausible" but it is not so liberal that it is satisfied where there is "an element of ambiguity" to the term in dispute. It was held (at [42]) that to require "equal plausibility" was "to make unnecessary demands on the court and to set access to the principle too narrowly" whereas "an element of ambiguity" was held to "countenance too great a departure from the otherwise probable meaning".
- 409 *Solly v Forbes* (1820) 2 Brod. & Bing. 38, 48. See also Co.Litt. 42a; *Mills v Dunham* [1891] 1 Ch. 576, 590; *Lancashire CC v Municipal Mutual Insurance Ltd* [1996] 3 All E.R. 545, 553, 557; *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 A.C. 251, 269; *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC), [2007] B.L.R. 195 at [57]–[58]; *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] I.C.R. 1539; *Pioneer Freight Futures Co Ltd v TMT Asia Ltd (No.2)* [2011] EWHC 1888 (Comm), [2011] 2 Lloyd's Rep. 565 at [574].
- 410 *Haigh v Brooks* (1839) 10 A. & E. 309; *Goldshede v Swan* (1847) 1 Exch. 154; *Steele v Hoe* (1849) 14 Q.B. 431; *Broom v Batchelor* (1856) 1 H. & N. 255. See also *Rowett Leakey & Co v Scottish Provident Institution* [1927] 1 Ch. 55, 65 (insurance policy).
- 411 *Harrington v Kloprogge* (1785) 2 B. & B. 678, note (a). See also *Fausset v Carpenter* (1831) 2 Dow. & Cl. 232; *Lewis v Davison* (1839) 4 M. & W. 654. The same principle applies to the performance of a contract: if a payment is made in performance of a contract partly legal and partly illegal it is presumed that it is made in performance of the legal part of the contract: *A. Smith & Son (Bognor Regis) Ltd v Walker* [1952] 2 Q.B. 319; *Cantor Art Services Ltd v Kenneth Bieber Photography Ltd* [1969] 1 W.L.R. 1226.

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(h) - A Unitary and Iterative Approach

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(h) - A Unitary and Iterative Approach

Unitary

15-090 The interpretation or construction of a contract has been said to be:



“... one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant.”

⁴¹²



The principles which govern the construction of contracts are the same at law and in equity,⁴¹³ for simple contracts and for specialties.⁴¹⁴

Iterative

15-091

A term much used by the courts when seeking to explain the process by which contracts are interpreted is that it is an “iterative” approach. By this descriptor they mean to denote that it involves a “process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated”.⁴¹⁵ An aspect of this “iterative” approach has been held to be that:

“... there is no hard and fast order for the application of the various tools of interpretation, and that the Court always has the prospect of revisiting or taking an overview of the effect of the application of those tools at every and any moment before the end of the interpretative process.”⁴¹⁶

In carrying out this iterative approach the court should have regard to (i) the natural and ordinary meaning of the relevant words in the disputed clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the disputed clause and the contract as a whole, (iv) the facts and circumstances known or assumed by the parties at the time that the contract was agreed and (v) commercial common sense, but (vi) disregarding subjective evidence of the parties’ intentions.⁴¹⁷ The weight to be given to these various factors will very much depend upon the facts and circumstances of the individual case. The analysis may commence with the factual background and the implications of the possible rival constructions or it may begin with a close examination of the relevant language of the contract: either starting point may be chosen provided that the court “balances the indications given by each”.⁴¹⁸

Footnotes

- 231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 412 See also *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [21]. See also *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG [2014] EWHC 3068 (Comm)*, [2014] 2 Lloyd’s Rep. 579 at [50]; *Arnold v Britton [2015] UKSC 36, [2015] A.C. 1613* at [76]–[77]; *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] A.C. 1173* at [11]; *Bluebon Ltd v Ageas (UK) Ltd [2017] EWHC 3301 (Comm)* at [30]; *Murray Holdings Ltd v Oscatello Investments Ltd [2018] EWHC 162 (Ch)* at [17] and [40]; *Pease v Henderson Administration Ltd [2019] EWCA Civ 158* at [49]; *Lamesa Investments Ltd v Cynergy Bank Ltd [2020] EWCA Civ 821, [2021] 2 All E.R. (Comm) 573* at [36]–[46].
- 413 *Hotham v East India Co (1787) Doug. 272, 277; Eaton v Lyon (1798) 3 Ves. Jr. 690, 692; Re Terry and White’s Contract (1886) 32 Ch. D. 14, 21; Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [25]; *Rainy Sky SA v Kookmin*

- Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [28]; *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG* [2014] EWHC 3068 (Comm), [2014] 2 Lloyd's Rep. 579 at [50].
- 414 *Seddon v Senate* (1810) 13 East 63, 74; *Total Transport Corp v Arcadia Petroleum Ltd* [1998] 1 Lloyd's Rep. 351, 362.
- 415 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [12]. See also *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [28]; *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 B V* [2014] EWCA Civ 984 at [31]–[32]; *BG Global Energy Ltd v Talisman Sinopec Energy UK Ltd* [2015] EWHC 110 (Comm) at [24]; *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [77]; *Europa Plus SCA SIF v Anthracite Investments (Ireland) Plc* [2016] EWHC 437 (Comm) at [29]; *AL Challis Ltd v British Gas Trading Ltd* [2017] EWCA Civ 1972 at [24]–[34]; *Khanty-Mansiysk Recoveries Ltd v Forsters LLP* [2018] EWCA Civ 89, [2018] P.N.L.R. 20 at [21]; *CCUK Finance Ltd v Barclays Bank Plc* [2018] EWHC 304 (Comm) at [26]; *Reliance Industries Ltd v Union of India* [2018] EWHC 822 (Comm), [2018] 1 Lloyd's Rep. 562 at [32]; *Deutsche Trustee Co Ltd v Duchess VI Clo BV* [2019] EWHC 778 (Ch), [2019] 2 All E.R. (Comm) 530 at [31]; *Pease v Henderson Administration Ltd* [2019] EWCA Civ 158 at [49] and *European Film Bonds A/S v Lotus Holdings LLC* [2021] EWCA Civ 807 at [47]. See also *Grabiner* (2012) 128 L.Q.R. 41.
- 416 *125 OBS (Nominees1) v Lend Lease Construction (Europe) Ltd* [2017] EWHC 25 (TCC), 174 Con. L.R. 105 at [98].
- 417 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [15]. See to similar effect *Marley v Rawlings* [2014] UKSC 2, [2015] A.C. 129; *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2015] EWHC 2658 (Comm) at [22] and *Mutual Energy Ltd v Starr Underwriting Agents Ltd* [2016] EWHC 590 (TCC), [2016] B.L.R. 312.
- 418 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [12].

(i) - The Balancing Exercise and the Role of Business Common Sense

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(i) - The Balancing Exercise and the Role of Business Common Sense

Striking the balance

- 15-092 In applying the “iterative” approach and giving due consideration to the various factors which have to be taken into account when seeking to ascertain the meaning of a clause or a term in a contract, the court must seek to strike a balance between “the indications given by the language and the implications of the competing constructions”. ⁴¹⁹ In the case in which the natural and ordinary meaning of the language of the contract and considerations of commercial common sense reach the same conclusion, the court should not face any particular difficulty because the various factors all point in the same direction. But what is to be done in the case where the natural and ordinary meaning of the words is not clear or the various factors point in different directions? How is the court then to resolve the dilemma with which it is confronted? No single answer can be provided to this question given the different contexts in which the issue can arise. It is possible, however, to identify a number of distinct situations which have arisen before the courts.

Grammatical errors

- 15-093 The first situation is one in which the court concludes that the clause contains a grammatical error. Errors of syntax are a particularly frequent source of disputes in relation to written contracts. However plain the syntax of a sentence may be, if it is clear from the content of the instrument and the admissible background that the apparent grammatical construction cannot be the true

one, then that which upon the whole is the true meaning prevails, in spite of the syntax of such particular sentence. So, in *Ewing v Ewing*,⁴²⁰ a deed of partnership provided that the capital of a deceased partner should be paid out as at the last balance by certain regular instalments “with interest thereon from the date of the last balance”. The word “thereon” was held to refer not to the last instalment but was intended to be payable on the balance of the capital remaining unpaid. In *Investors Compensation Scheme Ltd v West Bromwich Building Society*⁴²¹ a majority of the House of Lords held that an exception from an assignment of “[a]ny claim (whether sounding in rescission for undue influence or otherwise)” should be construed to read “[a]ny claim sounding in rescission (whether for undue influence or otherwise)”, thus limiting the exception. The background circumstances and the terms of related non-contractual documents showed, it was said, that the apparent syntax did not convey the intended meaning. In *Chartbrook Ltd v Persimmon Homes Ltd*⁴²² the House of Lords held that to interpret the definition of “additional residential payment” in the contract in accordance with ordinary rules of syntax made no commercial sense and amended the definition accordingly. Lord Hoffmann stated that it must be shown that “something must have gone wrong with the language”⁴²³ and then “what a reasonable person would have understood the parties to have meant by using the language that they did”.⁴²⁴

Absurdity, inconsistency, etc.

15-094

- U** A second situation, which can be closely related to the first, arises where the natural and ordinary meaning of the clause produces an absurd outcome or one which cannot be reconciled with the contract as a whole. In *Investors Compensation Scheme Ltd v West Bromwich Building Society*⁴²⁵ Lord Hoffmann said⁴²⁶:

“The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.”

So, the principle that words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity⁴²⁷ or would create some inconsistency with the rest of the instrument.⁴²⁸ It may also not be applied, as Lord Hoffmann indicates, where there has been an obvious linguistic mistake⁴²⁹ or where, if the words were construed in their ordinary sense, they would lead to a very unreasonable result or impose upon the contractor a responsibility

which it could not reasonably be supposed he meant to assume.⁴³⁰ In *Wickman Machine Tools Sales Ltd v L.G. Schuler AG*⁴³¹ Lord Reid said:

“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make their intention abundantly clear.”⁴³²

However, in *Chartbrook Ltd v Persimmon Homes Ltd*,⁴³³ Lord Hoffmann cautioned that “it clearly requires a strong case to persuade the court that something must have gone wrong with the language” in order to justify a meaning which departs from the words actually used. Not only must it be clear that “something has gone wrong with the language”, it must also be “clear what a reasonable person would have understood the parties to have meant”

⁴³⁴

U: in other words, both the “problem” and the “solution” must be clear if the court is to give to the words a meaning other than that which they ordinarily bear. It is thus “only in exceptional cases” that commercial common sense can “drive the court to depart from the natural meaning of contractual provisions”.⁴³⁵ It is no part of the court’s function to rewrite the contract for the parties so that, where the draftsman has not thought through the consequences of his own drafting, he will not be permitted to say that “something has gone wrong with the language” in order to save himself from the consequences of his own poor or inadequate drafting.⁴³⁶ But in the case where from the language of the contract the court can discern that an event has occurred which was plainly not intended or contemplated by the parties and it is clear what the parties would have intended in the circumstances which have occurred, the court may give effect to that intention even if that intention is not consistent with the primary meaning of the words of the contract.⁴³⁷ It is, however, important to note the limits on the latter principle. The event must “plainly” not have been contemplated by the parties and it must also be “clear” what the parties would have intended in the circumstances which have occurred.⁴³⁸ The principle does not “extend to re-formulating or altering the parties’ bargain”.⁴³⁹

Commercial common sense

- 15-095 The third situation is one in which the natural and ordinary meaning of the words used by the parties leads to a conclusion which is said by one of the parties to be a conclusion which is not commercially sensible and which cannot therefore have been intended by the parties. There is a significant body of authority in which the courts have attached substantial weight to the importance of giving to commercial documents a meaning which is commercially sensible. Thus it has been stated that commercial documents “must be construed in a business fashion”⁴⁴⁰ and “there must

be ascribed to the words a meaning that would make good commercial sense".⁴⁴¹ Indeed, in *The Antaios*⁴⁴² Lord Diplock said that⁴⁴³:

“... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense.”

Lord Diplock's dictum has been referred to many times.⁴⁴⁴ It does not, however, mean that the court can rewrite the language used by the parties, where it is clear and unambiguous, in order to produce a more balanced, fair or “businesslike” result.⁴⁴⁵ There is no overriding criterion of construction to the effect that an interpretation that makes more business common sense is to be preferred.⁴⁴⁶ But if alternative interpretations are available, it will be necessary to consider the implications of each interpretation and which interpretation is most likely to give effect to the commercial purpose of the agreement.⁴⁴⁷

Usage and custom of merchants

15-096 In mercantile contracts, the words employed may also have acquired a special meaning,⁴⁴⁸ and this may be a different meaning from their natural one.⁴⁴⁹ Hence it is that mercantile contracts are to be construed according to the usage and custom of merchants,⁴⁵⁰ provided that the custom is not inconsistent with the agreement.⁴⁵¹ When such contracts contain peculiar expressions which have in particular places or trades a known meaning attached to them, the meaning of these expressions is a question of fact, although the meaning of the contract still remains a question of law.⁴⁵² Further:

“... the custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable.”⁴⁵³

Custom of particular place

15-097 There are also cases in which regard must be had to the usage or custom of the place where the contract was made or to which it had reference, in order to discover the meaning and intention

of the parties. Where, therefore, it appeared that, in the place where a contract concerning a sale of cider was made, the word meant the juice of apples as soon as the juice was expressed, it was held that the contract must be construed to have been for the sale of cider in that sense of the word.⁴⁵⁴ And so where a lease was granted of a warren in Suffolk, and the landlord covenanted to pay £60 per 1,000 rabbits which the tenant was bound to leave on the premises, and it appeared by custom in Suffolk in such cases that 1,000 rabbits meant 1,200, it was held that the landlord was only bound to pay for rabbits reckoned at that rate.⁴⁵⁵ Similarly, the courts have had regard to the custom of the ports of the Tyne for the purpose of identifying what was meant by “regular turns of loading”.⁴⁵⁶ Further, the courts have had regard to the custom of the port of Liverpool for the purpose of proving at what time a ship chartered to that port with a cargo of timber should be deemed to have arrived at her place of discharge within the meaning of the charterparty⁴⁵⁷ and also to show, for example, the meaning of “alongside” and “delivery”,⁴⁵⁸ “discharge”⁴⁵⁹ or “working day”⁴⁶⁰ at a particular port.

Requirements

- 15-098 When considering whether to imply a term into a contract based on custom or usage the courts insist that the custom or usage be notorious, certain and reasonable.⁴⁶¹ A more relaxed approach is, however, evident when the issue before the court is whether to admit evidence of “market practice” or expert evidence of “market practice” when seeking to interpret the words of the contract.⁴⁶² Thus it has been stated that it is:

“... common practice for the Commercial Court to hear evidence of ‘market practice’, which does not amount to evidence of an alleged ‘trade usage or custom’, in order to assist the court with a full understanding of the factual background to the proper construction of a written contract.”⁴⁶³

Custom does not modify meaning

- 15-099 On the other hand, there are occasions when the courts have refused to modify the natural meaning of a word in the light of custom, e.g. to attribute to the word “alongside” in contracts of affreightment a peculiar meaning derived from the custom of a port so as to increase the shipowner’s obligation.⁴⁶⁴ Moreover it is a question of fact in each case whether or not a contract containing terms which have a peculiar meaning owing to some usage or custom was in fact made with reference to that usage or custom, and the mere fact that such a custom exists in the district

covered by the contract does not raise a conclusion in law that the meaning of the contract is to be governed by the custom.⁴⁶⁵

Usage to interpret instrument

- 15-100 The usage of a particular trade has also frequently been admitted to interpret the terms of a written contract.⁴⁶⁶ Thus, where a contract was in these words, “sold eighteen pockets Kent hops at 100s.”, and it appeared that a pocket contained more than a hundred weight, evidence was admitted to show that by the usage of the trade a contract so worded was understood to mean £5 per cwt.⁴⁶⁷ Where a theatrical manager contracted with an actress to engage her for “three years” at a certain salary, it was held that extrinsic evidence might be given to show that, according to the uniform usage of that profession, the claimant was to be paid only during the theatrical season of each of those years.⁴⁶⁸ Evidence of usage has similarly been admitted to resolve ambiguities.⁴⁶⁹

Commercial common sense not to be invoked retrospectively

- 15-101 In those cases where commercial common sense is a factor taken into account by the court, it is important to note that commercial common sense is to be taken into account at the time of entry into the contract, not at the time of the hearing before the court. In other words, it is “not to be invoked retrospectively”⁴⁷⁰ so the fact that the contract has worked out badly, or even disastrously, for one contracting party is not of itself a sufficient reason for departing from the ordinary and natural meaning of the words used by the parties. Thus:

“... commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.”⁴⁷¹

Slow to reject the natural meaning

- 15-102 A court should be “very slow” to reject the ordinary and natural meaning of a contract term “simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight”.⁴⁷² It is not an unknown phenomenon for a contracting party to enter into an agreement which it can see, retrospectively, to have been “ill-advised” but it is:

“... not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice.”⁴⁷³

It is therefore not open to the court to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what the court may think the parties ought to have agreed, or what the court may think would have been a reasonable contract for the parties to make.⁴⁷⁴

Departure from the ordinary meaning of particular words or phrases

- 15-103 A fourth situation in which the court may decide to depart from the natural and ordinary meaning of particular words or phrases used in the contract is where, from the document itself and the admissible background, the meaning of the agreement can reasonably be discerned, and that meaning involves a departure from or a qualification of particular words used. So the court will be prepared to restrict, transpose, modify, supply or reject words or terms in the document, provided the meaning of the document is plain in spite of the words. The duty of the court in this respect was summed up by Kelly C.B. in *Gwyn v Neath Canal Co*⁴⁷⁵:

“The result of all the authorities is, that when a court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned.”

Some examples of these expedients are discussed in the paragraphs which follow.

Restricting

- 15-104 Where some of the words in a printed form of charterparty were left in by oversight, instead of being struck out, the House of Lords restricted the printed words to those applicable to the particular agreement.⁴⁷⁶ Also in *Glynn v Margetson*⁴⁷⁷ there was a wide deviation clause in a bill of lading for the carriage of oranges from Malaga to Liverpool. The ship left Malaga for a port not on the way to Liverpool, and the oranges were damaged by the delay. The House of Lords held that the deviation clause must be restricted to conform with the intention of a voyage from Malaga to Liverpool with a perishable cargo; to hold otherwise would defeat the object of the contract.

Transposing

- 15-105 “Words shall be transposed to support the intent of the parties”⁴⁷⁸; “[t]he law is not nice in grants, and therefore it doth often transpose words contrary to their order to bring them to the intent of the parties”.⁴⁷⁹ In a marriage settlement the words “[s]uch younger child or children” were made to include both sons and daughters by transposing a clause creating a power to make provision “for such younger children” and that containing a limitation to daughters.⁴⁸⁰

Modifying

- 15-106 It has already been noted that the grammatical or ordinary sense of the words of a contract may be departed from if this would lead to some absurdity or inconsistency with the rest of the instrument or if there has been an obvious linguistic mistake.⁴⁸¹ It is also open to the court to correct a misnomer⁴⁸² or mistaken designation in a contract: falsa demonstratio non nocet cum de corpore constat.⁴⁸³ So where the parties to a charterparty attached thereto a typed paramount clause which stated that:

“... this *bill of lading* shall have effect subject to the provisions of the [Carriage by Sea Act of the United States](#) ... which shall be deemed to be incorporated herein,”

it was held that the erroneous description of the charterparty as a bill of lading did not defeat the intention of the parties that the document should be subject to the Act.⁴⁸⁴ However, the court will not be inclined to engage in a “verbal manipulation” of a designation in a contract if the actual words used make perfectly good sense without any modification.⁴⁸⁵ An obvious mistake in a written instrument can be corrected as a matter of construction without obtaining a decree in an action for rectification⁴⁸⁶ (by a process which has been referred to, not without criticism, as “corrective interpretation”⁴⁸⁷) but there must have been a clear mistake and it must be clear what correction ought to be made in order to cure the mistake.⁴⁸⁸ Such a mistake may well emerge only upon consideration of the content of the instrument against the admissible background and correction of the mistake is then an aspect of the task of ascertaining what a reasonable person would have understood the parties to have meant.⁴⁸⁹

Supplying

- 15-107 In principle, the court will not interpolate words into a written instrument, of whatever nature, unless it is clear both that words have been omitted and what those words were.⁴⁹⁰ But, in simple situations, the word “pounds”, for example, when omitted, has been supplied after or before a figure in a bill of sale⁴⁹¹ or a bill of exchange,⁴⁹² and in deeds the name of the grantor,⁴⁹³ the obligor⁴⁹⁴ and the grantee⁴⁹⁵ have been supplied. In more complex cases concerning commercial contracts the courts have gone further and supplied such words as were required to make commercial sense of the agreement.⁴⁹⁶

Rejecting

- 15-108 It might be thought to be a sensible principle of construction that an interpretation which leaves part of the language of a document useless or creates surplusage is to be avoided. But this presumption has often been said to be of little value in the construction of commercial documents.⁴⁹⁷

U If there is in a contract a word or phrase to which no sensible meaning can be given⁴⁹⁸ or which is mere surplusage,⁴⁹⁹ it may be rejected. Inconsistent or repugnant words or expressions, if they cannot be harmonised, must similarly be rejected.

Footnotes

231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).

419 *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] A.C. 1173* at [11]. For an example of this balancing process see *ACON Equity Management LLC v Apple Bodco Ltd [2019] EWHC 2750 (Comm)*.

420 (1882) 8 App. Cas. 822. See also *Wills v Wright (1677) 2 Mod. 285; Waugh v Middleton (1853) 8 Exch. 352, 356; Vitol E&P Ltd v New Age (African Global Energy) Ltd [2018] EWHC 1580 (Comm)* at [28] (“punctuation may be misunderstood, erroneously used or overlooked”). But it does not follow from this that punctuation is irrelevant. So, for example, the use or absence of capital letters, may assume considerable significance in the case

where capitalisation evidences that the term was used in its defined sense, whereas lack of capitalisation may suggest that the term has not been used in its defined sense: *Hopkinson v Towergate Financial (Group) Ltd* [2018] EWCA Civ 2744.

- 421 [1998] 1 W.L.R. 896. See also *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307 at [95]; *Cereal Investments Co (CIC) SA v ED&F Man Sugar Ltd* [2007] EWHC 2843 (Comm), [2008] 1 Lloyd's Rep. 355 at [19]; cf. *Armitage Staveley Industries Plc* [2004] EWHC 2320 (Comm), [2004] Pens. L.R. 385; *Osmium Shipping Corp v Cargill International SA* [2012] EWHC 571 (Comm), [2012] 2 All E.R. (Comm) 197.
- 422 [2009] UKHL 38, [2009] 1 A.C. 1101.
- 423 [2009] UKHL 38, [2009] 1 A.C. 1101 at [15].
- 424 [2009] UKHL 38, [2009] 1 A.C. 1101 at [21]. See also *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 at [22]. An alternative remedy in such circumstances might be rectification, on which see above paras 5-057 et seq.
- 425 [1998] 1 W.L.R. 896.
- 426 [1998] 1 W.L.R. 896, 913 (applied in *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Group Corp* [2000] 1 Lloyd's Rep. 339, 344, 345, 346). cf. *Nippon Yusen Kubishika Kaisha v Golden Strait Corp* [2003] EWHC 16 (Comm), [2003] 2 Lloyd's Rep. 592 at [10], [14].
- 427 *Grey v Pearson* (1857) 6 H.L.C. 61, 106; *Abbott v Middleton* (1858) 7 H.L. Cas. 68, 114; *Thelluson v Rendlesham* (1859) 7 H.L. Cas. 429, 519; *Caledonian Ry v North British Ry* (1881) 6 App. Cas. 114, 130; *Ostfriesische Volksbank EG v Fortis Bank* [2010] EWHC 361 (Comm), [2010] 2 All E.R. (Comm) 921; *MonSolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961; cf. *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, 387; *Zeus Tradition Marine Ltd v Bell* [1999] 1 Lloyd's Rep. 703, 707; *BP Exploration Operating Co Ltd v Dolphin Drilling Ltd* [2009] EWHC 3119 (Comm), [2010] 2 Lloyd's Rep. 192. An alternative remedy in such circumstances might be rectification, on which see above paras 5-057 et seq.
- 428 Words prima facie synonymous should be construed in the same sense throughout the instrument; *Re Birks* [1900] 1 Ch. 417, 418; *Yafai v Muthana* [2012] EWCA Civ 289, but there is no principle of general application to compel this: *Watson v Haggitt* [1928] A.C. 127.
- 429 *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 428; *BP Exploration Operation Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307 at [95]; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [9]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [14], [22]; *Westvilla Properties Ltd v Dow Properties Ltd* [2010] EWHC 30 (Ch), [2010] 2 P. & C.R. 19 at [20]; *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 140 (TCC), 131 Con. L.R. 63 at [12]; *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 at [22]; *Caresse Navigation Ltd v Office Nationale de l'Electricité* [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep. 337 at [45]; cf. *Armitage v Staveley Industries Plc* [2004] EWHC 2320 (Comm), [2004] Pens. L.R. 385; *Canmer International Inc v UK Mutual Steamship Assurance Assn (Bermuda) Ltd* [2005] EWHC 1694 (Comm), [2005] 2 Lloyd's Rep. 479 at [24]–[29]; *Forrest v Glasser*

[2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep. 392 at [24]; Royal Bank of Scotland Plc v Highland Financial Partners LP [2010] EWCA Civ 809 at [11]; Gessner Investments Ltd v Bombardier Inc [2011] EWCA Civ 1118; West v Ian Finlay & Associates [2014] EWCA Civ 316, [2014] B.L.R. 324.

- 430 *Re Levy Ex p. Walton* (1881) 17 Ch. D. 746, 751; *Baumwoll Manufatur von Scheibler v Furness* [1893] A.C. 8, 15; *Dodd v Churton* [1897] 1 Q.B. 562, 566; *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] A.C. 676, 682; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] A.C. 191, 200–201; *Harbinger UK Ltd v GE Information Services Ltd* [2000] 1 All E.R. (Comm) 166; *Kazakstan Wool Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV* [2000] 1 All E.R. (Comm) 708; *AET Inc Ltd v Arcadia Petroleum Ltd* [2009] EWHC 2337 (Comm), [2009] 2 Lloyd's Rep. 593 at [3]. Contrast *Jones v St John's College, Oxford* (1870) L.R. 6 Q.B. 115; *The Raven* [1980] 2 Lloyd's Rep. 266, 269; *Lakeport Navigation Co Panama SA v Anonima Petroli Italiana SpA* [1982] 2 Lloyd's Rep. 205; *Pera Shipping Corp v Petroship SA* [1985] 2 Lloyd's Rep. 103, 107; *Eurico SpA v Phillip Bros* [1987] 2 Lloyd's Rep. 215; *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 N.Z.L.R. 189; *City Alliance Ltd v Oxford Forecasting Services Ltd* [2001] 1 All E.R. (Comm) 233; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [23]; *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm), [2009] 2 Lloyd's Rep. 631 at [27]; *HHR Pascal BV v W2005 Puppet 11 BV* [2009] EWHC 2771 (Comm), [2010] 1 All E.R. (Comm) 399; *Global Coal Ltd v London Commodity Brokers* [2010] EWHC 1347 (Ch) at [71].
- 431 [1974] A.C. 235.
- 432 [1974] A.C. 235, 251. This dictum was cited with approval in *Wace v Pan Atlantic Group Ltd* [1981] 2 Lloyd's Rep. 339, 343; *Forsikringsaktieselskapet Vesta v J.N.E. Butcher Bain Dawes Ltd* [1989] 1 Lloyd's Rep. 331, 346; *Macedonia Maritime Co v Austin & Pickersgill Ltd* [1989] 2 Lloyd's Rep. 73, 81; *Niobe Maritime Corp v Tradax Ocean Transportation SA* [1995] 1 Lloyd's Rep. 579; *International Fina Services AG v Katrina Shipping Ltd* [1995] 2 Lloyd's Rep. 344, 350; *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, 355.
- 433 [2009] UKHL 38, [2009] 1 A.C. 1101 at [15]. See also *Enviroco Ltd v Farstad Supply A/S* [2009] EWCA Civ 1399, [2010] 2 Lloyd's Rep. 375 at [21].
- ④434 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [25]; *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), 165 Con. L.R. 58; *Bouygues (UK) Ltd v Febrey Structures Ltd* [2016] EWHC 1333 (TCC); *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm), 169 Con. L.R. 141 at [281]; *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch) at [58]–[61]; *Altera Voyageur Production Ltd v Premier Oil E&P UK Ltd* [2020] EWHC 1891 (Comm), [2021] 1 Lloyd's Rep. 451 at [67]; *Britvic Plc v Britvic Pensions Ltd* [2021] EWCA Civ 867, [2022] 2 All E.R. 457; *MonSolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961; *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm) at [364] – [369].
- 435 *Carillion Construction Ltd v Emcor Engineering Services Ltd* [2017] EWCA Civ 65, [2017] B.L.R. 203 at [46]; *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd*

- [2016] EWCA Civ 990, [2017] 1 W.L.R. 1893 at [42]; *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [19]–[20]. For examples of such “exceptional” cases see *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd* [2017] EWCA Civ 359 and *MonSolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961.
- 436 *Prophet Plc v Huggett* [2014] EWCA Civ 1013, [2014] I.R.L.R. 797 (where a sentence in a restrictive covenant was held to be a “carefully drawn piece of legal prose” which reflected “exactly what the draftsman intended” but the draftsman had not thought through sufficiently the consequence of one of the restrictions which had been inserted into the clause: the Court of Appeal held that the employer had to live with the consequences of its own drafting). See also *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd* [2018] EWCA Civ 1556 at [15]. In *Credit Suisse Asset Management LLC v Titan Europe 2006-1 Plc* [2016] EWCA Civ 1293 Arden LJ at [28] referred to the fundamental principle of English law of party autonomy, from which it follows that the court will not rewrite the bargain that the parties have freely chosen to make (see also *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm), 169 Con. L.R. 141 at [274]).
- 437 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [22]; *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 S.C.L.R. 114; *Netherlands v Deutsche Bank AG* [2019] EWCA Civ 771 at [51] and [62]; *Munich Re Capital Ltd v Ascot Corporate Name Ltd* [2019] EWHC 2768 (Comm). See also *Lloyds TSB Foundation for Scotland v Lloyd's Banking Group Plc* [2013] UKSC 3, [2013] 1 W.L.R. 366 and *Bromarin AB v IMD Investments Ltd* [1999] S.T.C. 301, 310.
- 438 *Astor Management AG v Atalaya Mining Plc* [2018] EWCA Civ 2407, [2019] 1 All E.R. (Comm) 885 at [40].
- 439 *W Nagel (a firm) v Pluczenik Diamond Co* [2018] EWCA Civ 2640, [2019] Bus. L.R. 692 at [34].
- 440 *Southland Frozen Meat and Produce Export Co Ltd v Nelson Brothers Ltd* [1898] A.C. 442, 444. See also *Glynn v Margetson & Co* [1893] A.C. 351, 359; *Menth & Co v Ropner & Co* [1913] 1 K.B. 27, 32; *Lake v Simmons* [1927] A.C. 487, 509; *Digby v General Accident Fire and Life Assurance Corp Ltd* [1940] 2 K.B. 226, 246; *Panamanian Oriental Steamship Corp v Wright* [1971] 1 Lloyd's Rep. 487, 492 (“a businesslike interpretation”); *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749, 771 (“a commercially sensible construction”); *Handelsbanken Norwegian Branch of Svenska Handelsbanken AB (Publ.) v Dandridge* [2002] EWCA Civ 577, [2002] 2 Lloyd's Rep. 421 at [24] (“a businesslike interpretation in the context in which [the words] appear”); *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 715 at [10] (“a business sense”); *Sirius International Insurance (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 W.L.R. 3251 at [19] (“a ... commercial approach”).
- 441 *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] A.C. 676, 682; *International Fina Services AG v Katrina Shipping Ltd* [1995] 2 Lloyd's Rep. 344, 350; *AXA Reinsurance (UK) Plc v Field* [1996] 3 All E.R. 517, 526; *Society of Lloyd's v Robinson* [1999] 1 All E.R. (Comm) 545, 551.
- 442 *Antaios Compania Naviera SA v Salen Rederierna AB* [1984] A.C. 191.

- 443 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] A.C. 191, 201. See also *Shipping Corp of India Ltd v NBB Niederelke Schiffartsgesellschaft mbH & Co* [1991] 1 Lloyd's Rep. 77, 80; *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep. 443, 456; *International Fina Services AG v Katrina Shipping Ltd* [1995] 2 Lloyd's Rep. 344, 350; *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, 355; but cf. 387; *Sinochem International Oil (London) Ltd v Mobil Sales and Supply Corp* [2001] 1 Lloyd's Rep. 339, 344; *Sirius International Insurance (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 W.L.R. 3251 at [19]; *Mora Shipping Inc v AXA Corporate Solutions Assurance SA* [2005] EWCA Civ 1069, [2005] 2 Lloyd's Rep. 769 at [32]; *Absalom v TCRU Ltd* [2005] EWHC 1090 (Comm), [2005] 2 Lloyd's Rep. 735 at [25].
- 444 *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2008] EWHC 944 (Comm), [2008] 2 Lloyd's Rep. 202 at [26] (reversed on other grounds [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461); *Pratt v Aigainon Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [9]; *Internet Broadcasting Corp Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295 at [27]; *Ostfriesische Volksbank EG v Fortis Bank* [2010] EWHC 361 (Comm), [2010] 2 All E.R. (Comm) 921; *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 W.L.R. 770; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900; *E-Nik Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 3027 (Comm), [2013] 2 All E.R. (Comm) 868 at [261].
- 445 *Co-operative Wholesale Society Ltd v National Westminster Bank Plc* [1995] 1 E.G.L.R. 97, 98; *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732, [2007] C.I.L.L. 2449; *Emeraldian Ltd Partnership v Wellmex Shipping Ltd* [2010] EWHC 1411 (Comm), [2010] 1 C.L.C. 993; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [23]; *Kudos Catering (UK) Ltd v Manchester Central Convention* [2012] EWHC 1192 (QB) at [40], [54]; *Greatship (India) Ltd v Oceanografia SA de CV* [2012] EWHC 3468 (Comm), [2013] 1 All E.R. (Comm) 1244 at [17]; *Ted Baker Plc v AXA Insurance UK Plc* [2012] EWHC 1406 (Comm), [2013] 1 All E.R. (Comm) 129 at [71]; *BMA Special Opportunity Hub Finance Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416 at [24]; *Fons Ltd v Corporal Ltd* [2014] EWCA Civ 304 at [16]; *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] EWHC 236 (Comm), [2014] 1 Lloyd's Rep. 615 at [52]–[58]; *Soufflet Negoce SA v Fedcominvest Europe Sarl* [2014] EWHC 2405 (Comm), [2014] 2 Lloyd's Rep 537 at [27]; *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm) at [54]; *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619 at [17]–[22]; *Credit Suisse Asset Management LLC v Titan Europe 2006-1 Plc* [2016] EWCA Civ 1293 at [28]; *Iraqi Civilians v Ministry of Defence* [2019] EWHC 3088 (QB).
- 446 *Soufflet Negoce SA v Fedcominvest Europe Sarl* [2014] EWHC 2405 (Comm), [2014] 2 Lloyd's Rep 537 at [27], applying *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416 at [24].
- 447 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [30]. See also *Barclays Bank Plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248, [2011] 1 B.C.L.C. 336 at [25], [26]; *Ener-G Holdings Plc v Hormell* [2011] EWHC 3290 (Comm) at [9]; *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal* [2012] EWHC 690 (Comm); *Teal Assurance Co Ltd v WR Berkley Insurance (Europe) Ltd* [2013] UKSC 57, [2013] 2 All E.R.

- (*Comm*) 1009 at [29]–[31]; *Fons Ltd v Corporal Ltd* [2014] EWCA Civ 304 at [15]; *Teesside Gas Transportation Ltd v CATS North Sea Ltd* [2020] EWCA Civ 503.
- 448 See, e.g. *Care Shipping Corp v Itex Itagran Export SA* [1993] Q.B. 1 (“sub-freights”).
- 449 See, e.g. *Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd* [1989] 1 *Lloyd's Rep.* 1, 6 (“whether in berth or not”).
- 450 *Re Walkers, Winser & Hamm and Shaw, Son & Co* [1904] 2 K.B. 152; *Upjohn v Hitchens* [1918] 2 K.B. 48; see below, para.15-100.
- 451 *Gibbon v Young* (1818) 8 *Taunt.* 254; *Hayton v Irwin* (1879) 5 C.P.D. 130; *The Alhambra* (1881) 6 P.D. 68; *Re L. Sutro & Co and Heilbut, Symons & Co* [1917] 2 K.B. 348; *Westacott v Hahn* [1918] 1 K.B. 495; *Palgrave, Brown & Sons v S.S. Turid* [1922] 1 A.C. 397; *Ted Baker Plc v AXA Insurance UK Plc* [2012] EWHC 1406 (*Comm*).
- 452 *Hutchinson v Bowker* (1839) 5 M. & W. 535; *Hill v Evans* (1862) 4 De G.F. & J. 288; see above, para.15-050.
- 453 *Gibson v Small* (1853) 4 H.L. Cas. 353, 397.
- 454 *Studdy v Sanders* (1826) 5 B. & C. 628.
- 455 *Smith v Wilson* (1832) 3 B. & Ad. 728.
- 456 *Leidemann v Schultz* (1853) 14 C.B. 38.
- 457 *Norden S.S. Co v Dempsey* (1876) 1 C.P.D. 654.
- 458 *Aktieselskab Helios v Ekman & Co* [1897] 2 Q.B. 83.
- 459 *Petersen v Freebody* [1895] 2 Q.B. 294.
- 460 *British and Mexican Shipping Co Ltd v Lockett Brothers & Co Ltd* [1911] 1 K.B. 264; *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] A.C. 691, 726.
- 461 See below, para.16-035.
- 462 *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066 at [42]–[48].
- 463 *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066 at [43].
- 464 *Palgrave, Brown & Sons v S.S. Turid* [1922] 1 A.C. 397; *Aktieselskabet Dampsskibsselskabet Primula v Horsley* (1923) 40 T.L.R. 11; *Hillas & Co v Rederiaktiebolaget Aeolus* (1926) 32 Com. Cas. 169; cf. *Aktieselskab Helios v Ekman & Co* [1897] 2 Q.B. 83; *Smith, Hogg & Co v Louis Bamberger & Sons* [1929] 1 K.B. 150.
- 465 *Clayton v Gregson* (1836) 5 Ad. & El. 302.
- 466 *Brown v Byrne* (1854) 3 El. & Bl. 703, 715.
- 467 *Spicer v Cooper* (1841) 1 Q.B. 424.
- 468 *Grant v Maddox* (1846) 15 M. & W. 737. See also *Hutchinson v Bowker* (1839) 5 M. & W. 535; *Myers v Sarl* (1860) 3 E. & E. 306; *Davis v Temco* [1992] C.L.Y. 2064.
- 469 *Bold v Rayner* (1836) 1 M. & W. 343.
- 470 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1613 at [19].
- 471 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1613 at [19].
- 472 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1613 at [20].
- 473 *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1613 at [20].
- 474 *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 *Lloyd's Rep.* 339 at [29]. See also *L.G. Schuler AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 251; *Equity & Law Life Assurance Plc v Bodfield Ltd* [1987] 1 E.G.L.R. 124; *Pratt v*

- Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [12]; *HHR Pascal BV v W2005 Puppet II BV* [2009] EWHC 2771 (Comm), [2010] 1 All E.R. (Comm) 399; *Lord Goff* [1984] L.M.C.L.Q. 382, 391.
- 475 (1865) L.R. 3 Ex. 209, 215, cited with approval by Lord Lowry in *Forsikringsaktieselskapet Vesta v J. N. E. Butcher, Bain Dawes Ltd* [1989] 1 Lloyd's Rep. 331, 345. See also *Indian Oil Corp v Vanol Inc* [1991] 2 Lloyd's Rep. 634, 636.
- 476 *Baumwoll Manufatur von Scheibler v Gilchrest & Co* [1893] A.C. 8, 15. See also *Dudgeon v Pembroke* (1877) 2 App. Cas. 284.
- 477 [1893] A.C. 351, 357. See also *Davy Offshore Ltd v Emerald Field Contracting Ltd* [1992] 2 Lloyd's Rep. 142, 155. cf. *G.H. Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] A.C. 149; *Sudatlantica Navegacion SA v Devamar Shipping Corp* [1985] 2 Lloyd's Rep. 271, 274. See below, para.17-010.
- 478 Comyns' Digest, art.“Parols”, A.21.
- 479 *Parkhurst v Smith* (1742) Willes 327, 332; cf. *Magrath v McGeany* [1938] Ir. R. 309.
- 480 *Fenton v Fenton* (1837) 1 Dr. & W. 66.
- 481 See above, para.15-094.
- 482 The law relating to misnomer was explored by Rix LJ in *Dumford Trading AG v DAO Atlantrybflot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289, where this paragraph was cited (at [27]); but see below, para.15-043. See also *The Tutova* [2006] EWHC 2223 (Comm), [2007] 1 Lloyd's Rep. 104 at [10]; *Front Carriers Ltd v Atlantic and Orient Shipping Corp* [2007] EWHC 421 (Comm), [2007] 2 Lloyd's Rep. 131 at [44]; *Gastronome (UK) Ltd v Anglo Dutch Meals (UK) Ltd* [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587 at [14]; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761 at [81].
- 483 *Llewellyn v Jersey* (1843) 11 M. & W. 183, 189; *Morrell v Fisher* (1849) 4 Ex. 591, 604; *Cowen v Truefitt Ltd* [1899] 2 Ch. 309; *Eastwood v Ashton* [1915] A.C. 900, 914; *Whittam v W.J. Daniel & Co Ltd* [1962] 1 Q.B. 271, 277; *F. Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch. 85; *Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd* [1975] 1 W.L.R. 1281; *Nittan v Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep. 633; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1981] 2 Lloyd's Rep. 659 (affirmed [1982] 2 Lloyd's Rep. 42); *Mohammed bin Abdul Rahman Orri v Seawind Navigation Co SA* [1986] 1 Lloyd's Rep. 36; *Coral (UK) Ltd v Rechtman* [1996] 1 Lloyd's Rep. 235; *Gastronome (UK) Ltd v Anglo-Dutch Meats (UK) Ltd* [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587. Contrast *Internaut Shipping GmbH v Fercometal SARL* [2003] EWCA Civ 812, [2003] 2 Lloyd's Rep. 430 (mistake beyond misnomer).
- 484 *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] A.C. 133. In the Court of Appeal, it had been held that the paramount clause was meaningless and to be rejected: [1957] 2 Q.B. 233.
- 485 *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] A.C. 676. But see *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd* [1997] A.C. 749.
- 486 *East v Pantiles Plant Hire Ltd* [1982] 2 E.G.L.R. 111 at 112; *Holding & Barnes Plc v Hill House Hammond Ltd* [2001] EWCA Civ 1334 at [14]; *Lafarge (Aggregates) Ltd v London Borough of Newham* [2005] EWHC 1337 (Comm), [2005] 2 Lloyd's Rep. 577 at [25]; *Dalkia*

Utilities Services Plc v Celtech International Ltd [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [109]; *Littman v Aspen Oil Broking Ltd* [2005] EWCA Civ 1579, [2006] 2 P. & C.R. 2; *MonSolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961; *Pathway Finance Sarl v Defendants set out in Annex 1 to the Claim* [2020] EWHC 1191 (Ch); *Ffrees Family Finance Ltd v U Holdings Ltd* [2020] EWHC 1911 (Ch). The relationship between interpretation and rectification has been variously described in the case law. In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 A.C. 662, Lord Clarke (at [45]) stated that the relationship between the two was “close”, whereas Leggatt J in *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm) at [13] described them as “very different exercises”.

- 487 *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch. 305 at [62]; *Bouygues (UK) Ltd v Febrey Structures Ltd* [2016] EWHC 1333 (TCC); *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm); *Hayfin Opal Luxco 3 SARL v Windermere VII CMBS Plc* [2016] EWHC 782 (Ch); *Hopkinson v Towergate Financial (Group) Ltd* [2018] EWCA Civ 2744 at [44]. For criticism see *Buxton* [2010] C.L.J. 253.
- 488 *East v Pantiles Plant Hire Ltd* [1982] 2 E.G.L.R. 11 at 112; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [22]; *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 W.L.R. 770 at [21]; *ING Bank NV v Ros Roca* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 at [22]; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761 at [81]; *MonSolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961.
- 489 *KPMG v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] Bus. L.R. 1336 at [44]–[50]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [22]–[23]; *ING Bank NV v Ros Roca* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 at [22]; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761 at [81]; *McDonagh v Bank of Scotland Plc* [2018] EWHC 3262 (Ch) at [65] where it is noted that “to remove words from a written contract and then to interpret the contract without those words is a radical step”.
- 490 *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 715 at [23]; *Cambridge Display Technology Ltd v EI Dupont de Nemours* [2004] EWHC 1415 (Ch), [2005] F.S.R. 14.
- 491 *Mourmand v Le Clair* [1903] 2 K.B. 216; *Coles v Hulme* (1828) 8 B. & C. 568.
- 492 *Elliott's Case* (1777) 2 East P.C. 951; 1 Leach 175.
- 493 *Lord Say and Seal's Case* (1711) 10 Mod. 41, 45.
- 494 *Dobson v Keys* (1610) Cro. Jac. 261.
- 495 Co.Litt. 7a.
- 496 *Tropwood AG of Zug v Jade Enterprises Ltd* [1982] 1 Lloyd's Rep. 232; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 715; cf. *Petroleo Brasileiro SA v Elounda Shipping Co* [1985] 2 Lloyd's Rep. 154; *City Alliance Ltd v Oxford Forecasting Services Ltd* [2001] 1 All E.R. (Comm) 233, 237; *X v Y* [2011] EWHC 152 (Comm), [2011] 1 Lloyd's Rep. 694.

- Royal Greek Government v Minister of Transport* (1949) 83 *Ll.L. Rep.* 228, 235; *Chandris v Isbrandtsen-Moller Inc* [1951] 1 *K.B.* 385, 392; *Total Transport Corp v Arcadia Petroleum Ltd* [1998] 1 *Lloyd's Rep.* 351, 357; *Interactive E-Solutions JLT v O3B Africa Ltd* [2018] *EWCA Civ* 62, [2018] *B.L.R.* 167 at [24]; *Merthyr (South Wales) Ltd v Merthyr Tydfil CBC* [2019] *EWCA Civ* 526 at [39]; *Triple Point Technology Inc v PTT Public Co Ltd* [2021] *UKSC* 29, [2021] *A.C.* 1148 at [119].
- 498 *Smith v Packhurst* (1742) 3 *Atk.* 135, 136; *Stone v Yeovil Corp* (1876) 1 *C.P.D.* 691, 701; *Nicolene v Simmonds* [1953] 1 *Q.B.* 543. Contrast *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 *W.L.R.* 280; *Tropwood AG of Zug v Jade Enterprises Ltd* [1982] 1 *Lloyd's Rep.* 232; *Commercial Union Assurance Co v Sun Alliance Insurance Group Plc* [1992] 1 *Lloyd's Rep.* 475, 480.
- 499 *Waugh v Bussell* (1814) 5 *Taunt.* 707, 711; *Gray v Carr* (1871) *L.R.* 6 *Q.B.* 522, 536, 550, 557; *Burrell & Sons v F. Green & Co* [1914] 1 *K.B.* 293, 303; *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 *K.B.* 240, 245; *Carga del Sur Compania Naviera SA v Ross T. Smyth & Co Ltd* [1962] 2 *Lloyd's Rep.* 147, 154; *The Merak* [1965] *P.* 223; *Pera Shipping Corp v Petroship SA* [1985] 2 *Lloyd's Rep.* 103, 106–107; *Mangistaumunaigaz Oil Production Association v United World Trade Inc* [1995] 1 *Lloyd's Rep.* 617; *Total Transport Corp v Arcadia Petroleum Ltd* [1998] 1 *Lloyd's Rep.* 351, 357–358.

(j) - Construction Against Grantor

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 15 - Express Terms

Section 3. - Construction of Terms²³¹

(j) - Construction Against Grantor

Construction against grantor: the contra proferentem rule⁵⁰⁰

- 15-109 Another principle of construction is that a deed or other instrument shall be construed more strongly against the grantor or maker thereof.⁵⁰¹ This principle (or rule, as it has sometimes been described) has been cited as a rule of construction from Coke's time. Thus Coke says,⁵⁰² "[i]t is a maxim in law that every man's grant shall be taken by construction of law most forcibly against himself". A more modern illustration of the application of the principle is to be found in the judgment of Evershed MR in 1949 when he said:

"We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended ... that it has a remarkably, if not an extravagantly, wide scope, and I think that the rule contra proferentem should be applied."⁵⁰³

Illustrations

- 15-110

So, in the case of a guarantee, if the party who drafts it uses ambiguous language, such ambiguity may be taken more strongly against himself.⁵⁰⁴ If a carrier gives two notices, limiting his responsibility in cases of loss of goods, he is bound by that which is least beneficial to himself.⁵⁰⁵ A notice under which a party claims a general lien is to be construed against him.⁵⁰⁶ And if an instrument is made in terms so ambiguous as to make it doubtful whether it is a bill or note, the holder may, as against the maker of the instrument, treat it as either at his election.⁵⁰⁷ Important applications of this principle arise in the case of conditions, warranties and exceptions in insurance policies⁵⁰⁸ and in the case of time-bar⁵⁰⁹ and exemption clauses,⁵¹⁰ for it is usually the party who has drafted the document who is seeking to rely on the protection of its provisions.⁵¹¹

Justification

15-111 The justification for the rule has been said to be that:



“... a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.”⁵¹²

This justification has come under challenge in recent years, in part because the rule is not necessarily confined to cases in which the term is put forward by the party who is seeking to rely on the rule. This being the case, although the rule is one of considerable longevity and has been applied in numerous cases,⁵¹³ it may be that it is now losing its “last vestiges of independent authority” and is “being subsumed” within the wider principle that clear words are required before a court will conclude that a contracting party has given up a valuable right.

⁵¹⁴

U The diminished status of the rule is also illustrated by doubts expressed about its applicability to negotiated contracts⁵¹⁵ and by the fact that the rule is now more often cited to the court than it is applied by the court.⁵¹⁶ To the extent that the rule continues to exist, it should only be applied to remove (and not to create) a doubt or ambiguity⁵¹⁷ and as a last resort where the issue cannot otherwise be resolved by the application of ordinary principles of construction.⁵¹⁸

Crown contracts

15-112

“The King’s grant is taken most strongly against the grantee, and most favourably for the King, although the thing which he grants came to the King by purchase or descent.”⁵¹⁹

This ancient rule is still applicable to grants of land or of an interest in land,⁵²⁰ but it no longer applies to commercial contracts with the Crown.⁵²¹ In any event, it does not in any way override other principles of construction.⁵²²

Party cannot rely on their own breach

15-113 It has been said that, as a matter of construction, unless the contract clearly provides to the contrary⁵²³ it will be presumed that it was not the intention of the parties that either should be entitled to rely on their own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it.⁵²⁴ This presumption applies only to acts or omissions which constitute a breach by that party of an express or implied contractual obligation,⁵²⁵ or (possibly) of a non-contractual duty,⁵²⁶ owed by them to the other party. Breach of a duty, whether contractual or non-contractual, owed to a stranger to the contract will not suffice.⁵²⁷ However, such a “principle of construction” appears to be somewhat different in nature from the principle that a document will be construed against the grantor. It may therefore be that it is better regarded as depending on an implied term of the contract in question⁵²⁸ or as one illustration of a more general principle that “[a] man cannot be permitted to take advantage of his own wrong”.⁵²⁹

Footnotes

231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).

500 See below para.17-012.

501 *Verba cartarum fortius accipiuntur contra proferentem* (Bac. Max. 3).

502 Co.Litt. 36a, 183a, 183b. For an historical examination of the rule and its ability to survive see J. McCunn (2019) 39 OJLS 483.

503 *John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All E.R. 581, 583.

504 *Hargreave v Smee* (1829) 6 Bing. 244, 248; *Adams v Richardson & Starling Ltd* [1969] 1 W.L.R. 1645, 1653; *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 B.C.L.C. 69; *Coutts & Co v Stock* [2000] 1 W.L.R. 906, 914. But see *Egan v Static Control*

- Components (Europe) Ltd* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429 at [37] and Vol.II, para.47-063.
- 505 *Munn v Baker* (1817) 2 Stark. 255.
- 506 *Crumpston v Haigh* (1836) 2 Scott 684.
- 507 *Edis v Bury* (1827) 6 B. & C. 433; *Lloyd v Oliver* (1852) 18 Q.B. 471.
- 508 *Blackett v Royal Exchange Assurance Co* (1832) 2 Cr. & J. 244; *Petros M. Nomikos Ltd v Robertson* (1939) 64 Ll.L. Rep. 45; *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] EWCA Civ 845, [2005] 2 Lloyd's Rep. 701 at [8]; *Atlas Navios-Navegacao Lda v Navigators Insurance Co Ltd* [2012] EWHC 802 (Comm), [2012] 1 Lloyd's Rep. 629 at [26]; and see Vol.II, para.44-077. See also *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225 at [26].
- 509 *Board of Trade (Minister of Materials) v Steel Bus. & Co Ltd* [1952] 1 Lloyd's Rep. 87; *Pera Shipping Corp v Petroship SA* [1985] 2 Lloyd's Rep. 103.
- 510 See below, para.17-012. There is a possibility that the rule in its application to exclusion clauses might now develop separately from the contra proferentem rule. Instead of searching for the proferens to whom the rule may be applicable, the courts may regard the rule as a general rule of construction applicable to exclusion clauses according to which ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law: *Hut Group Ltd v Nobahar-Cookson* [2016] EWCA Civ 128, [2016] C.L.C. 573 at [18].
- 511 It has, however, been pointed out by Staughton LJ in *Pera Shipping Corp v Petroship SA* [1984] 2 Lloyd's Rep. 363, 365, and in *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127, 134, in relation to the application of the maxim, that the proferens is sometimes regarded as the draftsman of the document and sometimes as the party who seeks to rely on the protection of its provisions. These may not coincide. But note that in *Bloomberg LP v Sandberg (A Firm)* [2015] EWHC 2858 (TCC), [2016] B.L.R. 72 at [24] Fraser J held that the rule was of "no assistance" because he could not identify the proferens.
- 512 *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 B.C.L.C. 69, 77 (Lord Mustill), applied in *Lexi Holdings Plc v Stainforth* [2006] EWCA Civ 988.
- 513 See, for example, *Manchester College v Trafford* (1679) 2 Show. 31; *Johnson v Edgware, etc., Ry* (1866) 35 Beav. 480, 484; *Neill v Duke of Devonshire* (1882) 8 App. Cas. 135, 149; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 715 at [144]; *Dairy Containers Ltd v Tasman Orient Line CV (New Zealand)* [2004] UKPC 22, [2005] 1 W.L.R. 215 at [12]. The principle is now mandatory in respect of certain consumer contracts by s.69 of the Consumer Rights Act 2015: see below, Vol.II, para.40-434.
- 514 © *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29, [2021] A.C. 1148 at [111]. On this view the rule would be subsumed within the principle set out by the House of Lords in cases such as *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] A.C. 689. See also *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, [2012] Ch. 497 at [68] and *Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm), [2019] 1 C.L.C. 207 at [34].

- 515 *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, [2012] Ch. 497; *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401, [2015] 2 Lloyd's Rep. 1 at [69]–[71]; *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 Lloyd's Rep. 51 at [20].
- 516 Perhaps for this reason Fraser J in *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018] EWHC 558 (TCC), [2018] Lloyd's Rep. I.R. 382 at [85] stated that “there is precious little, if anything, of this doctrine remaining in commercial cases”.
- 517 *Borradaile v Hunter* (1843) 5 M. & G. 639; *Birrell v Dryer* (1884) 9 App. Cas. 345, 350; *Cornish v Accident Insurance Co* (1889) 23 Q.B.D. 453, 456; *London & Lancashire Insurance v Bolands Ltd* [1924] A.C. 836, 848; *Houghton v Trafalgar Insurance Co* [1954] 1 Q.B. 247; *Lakeport Navigation Co Panama SA v Anonima Petroli Italiana SpA* [1982] 2 Lloyd's Rep. 205, 208; *Aqua Design & Play International Ltd v Kier Regional Ltd* [2002] EWCA Civ 797, [2003] B.L.R. 111; *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] EWCA Civ 845, [2005] 2 Lloyd's Rep. 701 at [8]; *West v Ian Finlay & Associates (a firm)* [2014] EWCA Civ 316, [2014] B.L.R. 324; *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57, [2017] A.C. 73 at [6]; *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, [2017] P.N.L.R. 29 at [52]–[53]; *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018] EWHC 558 (TCC), [2018] Lloyd's Rep. I.R. 382 at [85].
- 518 *Lindus v Melrose* (1858) 3 Hurl. & N. 177, 182; *Lakeport Navigation Co Panama SA v Anonima Petroli Italiana SpA* [1982] 2 Lloyd's Rep. 205, 208; *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep. 339 at [37]; *Direct Travel Insurance v McGeown* [2003] EWCA Civ 1606 at [13]; *Egan v Static Control Components (Europe) Ltd* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429 at [37]; *Cattles Plc v Welcome Financial Services Ltd* [2010] EWCA Civ 599, [2010] 2 Lloyd's Rep. 514 at [43]; *AJ Building and Plastering Ltd v Turner* [2013] EWHC 484 (QB), [2013] Lloyd's Rep. I.R. 629 (see below, Vol.II, para.44-087 (note)); *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401; *Hut Group Ltd v Nobahar-Cookson* [2016] EWCA Civ 128, [2016] C.L.C. 573 (although note the difference of view between Briggs LJ (who at [12]–[21] invoked the contra proferentem rule) and Hallett LJ and Moylan J. who did not (see [40] and [41])); *Carr v Thales Pension Trustees Ltd* [2020] EWHC 949 (Ch), [2020] Pens. L.R. 19 at [60]–[61].
- 519 *Willion v Berkley* (1562) 1 Plow. 223, 243; *Att-Gen v Ewelme Hospital* (1853) 17 Beav. 366, 385; *Feather v The Queen* (1865) 6 B. & S. 257, 283, 284; *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, 353; *Earl of Lonsdale v Att-Gen* [1982] 1 W.L.R. 887, 901.
- 520 *Earl of Lonsdale v Att-Gen* [1982] 1 W.L.R. 887.
- 521 *Lonrho Exports Ltd v Export Credit Guarantee Department* [1999] Ch. 158.
- 522 *Att-Gen v Ewelme Hospital* (1853) 17 Beav. 366, 386.
- 523 *Micklefield v S.A.C. Technology Ltd* [1990] 1 W.L.R. 1002. See also *Richco International Ltd v Alfred C. Toepfer International GmbH* [1991] 1 Lloyd's Rep. 136.
- 524 *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587, HL. See also *Doe d. Bryan v Bancks* (1821) 4 B. & Ald. 401, 406; *Malins v Freeman* (1838) 4 Bing. N.C. 395, 399; *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] A.C. 1, 6,

- 8, 9, 15; *Quesnel Forks Gold Mining Co Ltd v Ward* [1920] A.C. 222, 227; *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All E.R. 452, 455; *Cheall v Association of Professional Executive and Computer Staff* [1983] 2 A.C. 180, 189; *Ackerman v Protim Services* [1988] 2 E.G.L.R. 259; *Gyllenhammar & Partners International Ltd v Saur Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403, 412; *Micklefield v S.A.C. Technology Ltd* [1990] 1 W.L.R. 1002, 1007; *Richco International Ltd v Alfred C. Toepfer International GmbH* [1991] 1 Lloyd's Rep. 136, 144; *Cerium Investments v Evans* [1991] C.L.Y 1870, CA; *WX Investments Ltd v Begg* [2002] EWHC 925 (Ch), [2002] 1 W.L.R. 2849 at [12]. The breach may be deliberate or inadvertent: *Cheall v Association of Professional Executive and Computer Staff* [1983] 2 A.C. 180.
- 525 *Cheall v Association of Professional Executive and Computer Staff* [1983] 2 A.C. 180; *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587; *Gyllenhammar & Partners International Ltd v Saur Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403; *J. Lauritzen A.S. v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 13; *Antclizo Shipping Corp v Food Corp of India (The Antclizo) (No.2)* [1992] 1 Lloyd's Rep. 558, 567–568.
- 526 *Cheall v Association of Professional Executive and Computer Staff* [1983] 2 A.C. 180; *Ackerman v Protim Services* [1998] 2 E.G.L.R. 259; *J. Lauritzen A.S. v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 13; *Antclizo Shipping Corp v Food Corp of India (The Antclizo) (No.2)* [1992] 1 Lloyd's Rep. 558, 568; *Eurobank Ergasias SA v Kalliroi Navigation Co Ltd* [2015] EWHC 2377 (Comm).
- 527 *Cheall v Association of Professional Executive and Computer Staff* [1983] 2 A.C. 180.
- 528 *Richco International Ltd v Alfred C. Toepfer International GmbH* [1991] 1 Lloyd's Rep. 136. See also *Bulk Shipping AG v Ipcos Trading SA* [1992] 1 Lloyd's Rep. 39, 43; *BDW Trading Ltd v J M Rowe (Investments) Ltd* [2011] EWCA Civ 548, [2011] 20 E.G. 113 (C.S.) at [34]; and below, para.16-027.
- 529 See, e.g. *Rede v Farr* (1817) 6 M. & S. 121, 124; *Doe d. Bryan v Bancks* (1821) 4 B. & Ald. 401, 409; *Roberts v Bury Commissioners* (1870) L.R. 4 C.P. 755; *Alfred C. Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep. 118, 124; *Total Transport Corp v Amoco Trading Co* [1985] 1 Lloyd's Rep. 423, 426. But that principle is not absolute: *Cheall v Association of Professional Executive and Computer Staff* [1983] 2 A.C. 180, 189; *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587, 595; *Micklefield v S.A.C. Technology Ltd* [1990] 1 W.L.R. 1002; *Richco International Ltd v Alfred C. Toepfer International GmbH* [1991] 1 Lloyd's Rep. 136; *Decoma UK Ltd v Haden Drysys International Ltd* [2005] EWHC 2948 (TCC), (2005) 103 Const. L.R. 1. See also below, para.16-027.

(k) - Ejusdem Generis Principle

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Section 3. - Construction of Terms ²³¹

(k) - Ejusdem Generis Principle

Ejusdem generis principle

- 15-114 The so-called “rule” which is laid down with reference to the construction of statutes, namely, that where several words preceding a general word point to a confined meaning the general word shall not extend in its effect beyond subjects ejusdem generis (of the same class), ⁵³⁰ applies in principle to the construction of contracts. ⁵³¹ The principle depends on the assumed intention of the framer of the instrument, i.e. that the general words were only intended to guard against some accidental omission in the objects of the kind mentioned and were not intended to extend to objects of a wholly different kind. Indeed, this principle follows as a corollary of the principle that the whole contract is to be considered, ⁵³² being simply that every word shall be taken in conjunction with the words that accompany it. ⁵³³ Therefore the words “all the perils” in the ordinary form of marine insurance policy include only perils of the sea or perils ejusdem generis therewith, because their meaning is restricted by the subject matter, i.e. marine risks, and by the genus of perils mentioned specifically in the policy. ⁵³⁴ General words such as “other accidents beyond the charterer’s control” occurring at the end of a list of specific exceptions in a charterparty are construed to cover only accidents similar to those expressly mentioned. ⁵³⁵ Where a lease contained a proviso for an abatement of rent in case the demised premises should at any time during the term “be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident”, it was held that the words “inevitable accident” must be construed by the principle of ejusdem generis, that is, they must be taken to mean accident of a similar kind to “fire, flood, storm, or tempest”, and not to include accidents occasioned by the acts or defaults of the contracting parties. ⁵³⁶

No common category

- 15-115 The ejusdem generis principle cannot, however, be applied unless there is a class to which the general words can be restricted.⁵³⁷ Therefore, where the matters specifically referred to are so various that they fall into no common category the meaning of subsequent general words is not limited by relation to them. For instance, liability was repudiated in the event of “deficiency of men or owner’s stores, breakdown of machinery, or damage to hull *or other accident*”. It was held that the matters specifically referred to made up no common category, so that the general words “or other accident” extended to delay caused by stranding.⁵³⁸ The class need not be definable with logical or scientific exactitude, provided it is reasonably clear what it includes and what it excludes; for example, “war and disturbance” sufficiently indicate a class that excludes damage from ice.⁵³⁹ It has been held that where only one matter is specifically referred to, the principle cannot be applied, because a single species cannot constitute a class⁵⁴⁰; but there is no reason why in such a case the general words should not be limited with respect to the subject matter in relation to which they are used.⁵⁴¹ In a commercial contract, if a class cannot be found, that is one factor indicating that the parties did not intend to restrict the meaning of the words; but it is not universally true that, whenever a class cannot be found, the words must have been intended to have their literal meaning, whatever other indications there may be to the contrary.⁵⁴²

Canon of construction

- 15-116 The ejusdem generis principle is not a rigid technical rule, but a mere canon of construction. It is therefore more accurately described as a “guide” to be applied by the court when seeking to interpret the contract.⁵⁴³ It has been held that, in a commercial contract, where general words follow an enumeration of particular things, those words are *prima facie* to be construed as having their natural and larger meaning, and are not to be restricted to things ejusdem generis with those previously enumerated, unless there is something in the instrument which shows an intention so to restrict them.⁵⁴⁴ Also where a charterparty contained an exemption from liability arising from “frost, flood, strikes … and any other unavoidable accidents or hindrances of what kind soever beyond their control delaying the loading of the cargo”, it was held that the parties, by inserting the words, “of what kind soever”, intended to exclude the ejusdem generis principle, and that the contract was to be construed so as to exclude delays caused by a block of other shipping at the loading port.⁵⁴⁵ On the other hand, the words “or otherwise” may be subject to the ejusdem generis principle.⁵⁴⁶

15-117

Where specific words follow general words instead of preceding them, the House of Lords has held that, as a general rule, the generality of the earlier should not be restricted by the insertion of the subsequent words, which may be regarded simply as examples of what was meant by the general words.⁵⁴⁷ Similarly, even if the specific words precede the general words, they may be regarded as examples of what is comprehended in the general words.⁵⁴⁸

Footnotes

- 231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 530 *Sandiman v Breach* (1827) 7 B. & C. 96, 100; *R. v Nevill* (1846) 8 Q.B. 452; *Re Stockport Ragged Schools* [1898] 2 Ch. 687; *Att-Gen v Brown* [1920] 1 K.B. 773.
- 531 *Cullen v Butler* (1816) 5 M. & S. 461; *Harrison v Blackburn* (1864) 17 C.B.(N.S.) 678; *Sun Fire Office v Hart* (1889) 14 App. Cas. 98, 103.
- 532 See above, paras 15-069—15-081.
- 533 The maxim is *noscitur a sociis*: *Newby v Sharpe* (1878) 8 Ch. D. 39, 52.
- 534 *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App. Cas. 484, 490; *Bolivia Republic v Indemnity Mutual Marine Assurance Co* [1909] 1 K.B. 785; *Stott (Baltic) Steamers v Marten* [1916] 1 A.C. 304; *Marine Insurance Act 1906 Sch.I r.12*.
- 535 *Fenwick v Schmalz* (1868) L.R. 3 C.P. 313; *Re Richardsons and Samuel* [1898] 1 Q.B. 261; *Mudie v Strick* (1909) 100 L.T. 701; *Thorman v Dowgate Steamship Co* [1910] 1 K.B. 410; *Hadjipateras v S. Weigall & Co* (1918) 34 T.L.R. 360; *Aktieselskabet Frank v Namague Copper Co* (1920) 25 Com. Cas. 212; *Jones v Oceanic Steam Navigation Co* [1924] 2 K.B. 730 (passage ticket); *Andre & Cie SA v Orient Shipping (Rotterdam) BV* [1997] 1 Lloyd's Rep. 139; *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd* [2010] EWHC 1340 (Comm), [2011] 1 Lloyd's Rep. 187. But see the cases on force majeure clauses in commercial contracts cited below, para.26-072.
- 536 *Saner v Bilton* (1878) 7 Ch. D. 815; *Manchester Bonded Warehouse Co v Carr* (1880) 5 C.P.D. 507; *Barking and Dagenham LBC v Stamford Asphalt Co Ltd*, *The Times*, 10 April 1997.
- 537 *CFH Clearing Ltd v Merrill Lynch International* [2019] EWHC 963 (Comm) at [34].
- 538 *S.S. Magnhild v McIntyre Bros & Co* [1920] 3 K.B. 321, [1921] 2 K.B. 97; *Tillmanns v S.S. Knutsford* [1908] 2 K.B. 385, 395, 403, 409; affirmed [1908] A.C. 406.
- 539 *Tillmanns v S.S. Knutsford* [1908] 2 K.B. 385; *Thorman v Dowgate S.S. Co* [1910] 1 K.B. 410; *Re Richardsons and Samuel* [1898] 1 Q.B. 261.
- 540 *R. v Special Commissioners* [1923] 1 K.B. 393; *Re Ellwood* [1927] 1 Ch. 455.
- 541 See above, para.15-068; *Newby v Sharpe* (1878) 8 Ch. D. 39, 52; *Foscolo Mango & Co Ltd v Stag Line Ltd* [1931] 2 K.B. 48.
- 542 *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 K.B. 240, 246.

- 543 *Burrows Investments Ltd v Ward Homes Ltd* [2017] EWCA Civ 1577, [2018] 1 P. & C.R. 13 at [49].
- 544 *Andersen v Andersen* [1895] 1 Q.B. 749; *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 K.B. 240; *P.J. Vander Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep. 240. Contrast *Tillmanns Co v S.S. Knutsford* [1908] 2 K.B. 385; *Crompton v Jarratt* (1885) 30 Ch. D. 298 where the contrary presumption is said to be correct.
- 545 *Larsen v Sylvester & Co* [1908] A.C. 295; *Earl of Jersey v Neath Poor Law Union* (1889) 22 Q.B.D. 555; *Belcore Maritime Corp v Filli Moretti Cereali SpA* [1983] 2 Lloyd's Rep. 66, 68; *CA Venezolana de Navegacion v BankLine* [1987] 2 Lloyd's Rep. 498, 507; see also *Archbishop of Canterbury's Case* (1596) 2 Co. Rep. 46a (general words following particular words will not be taken to include anything of a superior class to that to which the particular words belong).
- 546 *Re Kershaw, Whittaker v Kershaw* (1890) 45 Ch. D. 320; cf. *Keeble v Keeble* [1956] 1 W.L.R. 94.
- 547 *Ambatielos v Anton Jurgens Margarine Works* [1923] A.C. 175. cf. *Herman v Morris* (1919) 35 T.L.R. 328; affirmed (1919) 35 T.L.R. 574.
- 548 *Stornvaart Maatschappij Sophie H. v Merchants' Marine Insurance Co Ltd* (1919) 89 L.J. K.B. 834, HL.

(I) - Restriction by Express Provisions

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(I) - Restriction by Express Provisions

Expressio unius

- 15-118 The express mention in an instrument of a particular person, power or thing may show an intention to exclude any other similar person, power or thing: *expressio unius est exclusio alterius*.⁵⁴⁹ Thus, where a deed conveyed to a mortgagee an iron foundry and two dwelling-houses, and the appurtenances, together with the fixtures in and about the said houses, it was held that the specification of the fixtures in the dwelling-houses showed that those in the foundry were not intended to pass, although they would have passed had the other not been mentioned.⁵⁵⁰ This maxim has, however, been said to be a valuable servant but a bad master in the construction of documents. Failure to complete the *expressio* may be accidental⁵⁵¹ and the maxim can only be applied if the instrument can be considered to contain all the terms agreed upon by the parties.⁵⁵² But, even with this qualification, arguments based on the maxim seem unlikely to carry much weight at the present day.⁵⁵³ At most it can be only a presumption and subject always to the ascertainment of the true meaning of the contract.

Expressum facit cessare tacitum

- 15-119 It has also been said that, where there is an express covenant in an instrument on a particular matter, no implication of any other covenant on the same subject matter can be raised⁵⁵⁴:

“Where the parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.”⁵⁵⁵

But again it is doubtful whether this principle has any serious role to play in the modern law.

Footnotes

- 231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 549 Co.Litt. 210a; *Blackburn v Flavelle (1881)* 6 App. Cas. 628, 634.
- 550 *Hare v Horton (1833)* 5 B. & Ad. 715. See also *Wood v Rowcliffe (1851)* 6 Ex. 407; *Miller v Emcer Products Ltd [1956]* Ch. 304; *Tropwind v Jade Enterprises Ltd [1977]* 1 Lloyd's Rep. 397, 401; *Continental Bank NA v Aeakos Compania Naviera SA [1994]* 1 W.L.R. 588; *Shell UK Ltd v Total UK Ltd [2010]* EWCA Civ 180, [2010] 2 Lloyd's Rep. 467 at [15].
- 551 *Colquhoun v Brooks (1887)* 19 Q.B.D. 400, 406; affirmed (1889) 14 App. Cas. 493.
- 552 *Devonald v Rosser & Sons [1906]* 2 K.B. 728, 745.
- 553 *Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd [1999]* A.C. 266, 275; *National Grid Co Plc v Mayes [2001]* UKHL 20, [2001] 1 W.L.R. 864 at [55], [67].
- 554 Co.Litt. 183, 210a; *Mathew v Blackmore (1857)* 1 H. & N. 762, 772.
- 555 *Aspdin v Austin (1844)* 5 Q.B. 671, 684; *Stephens v Junior Army and Navy Stores Ltd [1914]* 2 Ch. 516. See also *Broome v Pardess Co-operative Society Ltd [1940]* 1 All E.R. 603, 612 (no implied term).

(m) - Stipulations as to Time

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(m) - Stipulations as to Time

Time in contracts

- 15-120 Generally, the words “till” and “until” are considered to be ambiguous and may be either exclusive or inclusive, according to the subject matter and context⁵⁵⁶; “from” may be taken to be either inclusive or exclusive,⁵⁵⁷ although the general assumption is that the day of the date, act or event is to be excluded in the computation.⁵⁵⁸ This principle, however, is not an absolute one, and the wording of the contract or the factual background may indicate a contrary construction.⁵⁵⁹
- 15-121 “On” or “upon” may mean either before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation with reference to the context, and the subject matter of the agreement.⁵⁶⁰

Footnotes

- 231 See generally, Lewison, *The Interpretation of Contracts*, 6th edn (2015); G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Rectification and Implication*, 3rd edn (2017); Calnan, *Principles of Contractual Interpretation*, 2nd edn (2017); Mitchell, *Interpretation of Contracts* 2nd edn (2020).
- 556 *R. v Stevens (1804) 5 East 244*; *Dakins v Wagner (1835) 3 Dowl. 535, 536*; *Kerr v Jeston (1842) 1 Dowl.(N.S.) 538, 539*; *Startup v Macdonald (1843) 6 M. & G. 593*; *Rogers v Davis*

- (1845) 8 Ir.L.R. 399, 400; *Bellhouse v Mellor, Proudman & Mellor* (1859) 4 Hurl. & N. 116, 123; *Isaacs v Royal Insurance Co* (1870) L.R. 5 Ex. 296; *Heinrich Hirdes GmbH v Edmund [1991]* 2 Lloyd's Rep. 546.
- 557 *Lester v Garland* (1808) 15 Ves. Jr. 248, 258; *Wilkinson v Gaston* (1846) 9 Q.B. 137, 145; *Re North* [1895] 2 Q.B. 264, 269; *Sheffield Corp v Sheffield Electric Light Co* [1898] 1 Ch. 203, 209; *Scottish Metropolitan Assurance Co v Stewart* (1923) 14 Ll.L. Rep. 55; *Carapanayoti & Co Ltd v Comptoir Commercial André & Cie SA* [1972] 1 Lloyd's Rep. 139.
- 558 *Lester v Garland* (1808) 15 Ves. Jr. 248; *Ackland v Lutley* (1839) 9 A. & E. 879, 894; *South Staffordshire Tramways Co v Sickness and Accident Association* [1891] 1 Q.B. 402; *Radcliffe v Bartholomew* [1892] 1 Q.B. 161; *Goldsmiths' Co v West Metropolitan Ry* [1904] 1 K.B. 1, 5; *Stewart v Chapman* [1951] 2 K.B. 792; *Cartwright v MacCormack* [1963] 1 W.L.R. 18; *Re Figgis* [1969] Ch. 123; *London and Overseas Freighters Ltd v Timber Shipping Co SA* [1972] A.C. 1; *Alma Shipping Corp of Monrovia v Mantovani* [1975] 1 Lloyd's Rep. 115; *Dodds v Walker* [1981] 1 W.L.R. 1027; *Zoan v Rouamba* [2000] 1 W.L.R. 1509. See also the “clear day” principle: *Young v Higgon* (1840) 6 M. & W. 49; *Thompson v Stimpson* [1961] 1 Q.B. 195; *Carapanayoti & Co Ltd v Comptoir Commercial André & Cie SA* [1972] 1 Lloyd's Rep. 139. See also below, para.24-018.
- 559 *Pugh v Duke of Leeds* (1777) 2 Cowp. 714; *Cornfoot v Royal Exchange Assurance Corp* [1904] 1 K.B. 40; *English v Cliff* [1914] 2 Ch. 376; *Hare v Gocher* [1962] 2 Q.B. 641; *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 Q.B. 299; *Bevan Ashford v Malin* [1995] I.R.L.R. 360; *Zoan v Rouamba* [2000] 1 W.L.R. 1509 (statute).
- 560 *R. v Humphery* (1839) 10 A. & E. 335, 370; *R. v Arkwright* (1848) 12 Q.B. 960, 970; *Paynter v James* (1867) L.R. 2 C.P. 348, 354; *Wm. Cory & Son Ltd v IRC* [1964] 1 W.L.R. 529 (affirmed [1965] A.C. 1088); *Kuratau Land Co Ltd v Kahu Te Kuru* [1966] N.Z.L.R. 544, 547; *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 N.Z.L.R. 218, 221–222.

Section 1. - Introduction

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Chapter 16 - Implied Terms

Section 1. - Introduction

E. G. McKendrick

Nature of implied terms

- 16-001 So far, only express terms have been discussed, that is to say, those terms which are actually recorded in a written contract or openly expressed at the time the contract is made. But there are cases in which the law implies a term in a contract although it is not expressly included therein by the parties. An implied term may be a condition, a warranty or an intermediate (innominate) term.¹

Implication of terms

- 16-002 The problem of the implication of terms is one which frequently arises in the law of contract. In certain instances, the parties to a contract may have been content to express only the most important terms of their agreement, leaving the remaining details to be understood. The court will then be asked to imply a term or terms to remedy the alleged deficiency. More often, however, a subsequent disagreement reveals that there are contingencies for which the parties have not provided in their express contract. The question is then whether the court can imply a term to cover the contingency which has unexpectedly emerged.

The relationship between interpretation and implication

- 16-003

The principles that traditionally govern the implication of terms differ from those which apply to the construction of express terms.

2

U However, in *Att-Gen of Belize v Belize Telecom Ltd*

3

U Lord Hoffmann challenged the validity of this difference in treatment on the ground that in both cases the court is seeking to establish what the contract would reasonably have been understood to mean having regard to the commercial purpose of the contract as a whole and the relevant available background of the transaction.

4

U The extent to which the process of implication can be assimilated with the principles applicable to the interpretation of the express terms of a contract has since been the subject of some judicial comment

5

U and academic controversy.

6

U More recently the Supreme Court has sought to distance itself from the approach of Lord Hoffmann, with a majority describing his analysis in *Belize* as “a characteristically inspired discussion rather than authoritative guidance on the law of implied terms”

7

U and it has subsequently been stated that it is “no longer” the case that the question whether a term ought to be implied into a contract is to be treated as an aspect of the interpretation of the contract.

8

U Interpretation is concerned with “what is there”

9

U and involves “deciding what the parties meant by what they did say”,

10

U whereas implication is concerned with “inserting what is not there”

11

U and thus involves “deciding whether [the parties] would have said something they did not in fact say had the matter occurred to them”.

12

U Although the processes have been held to be different, the factors taken into account in the two processes are often the same in that both involve taking into account:

“... the words used in the contract, the surrounding circumstances known or available to the parties at the time of the contract, commercial common sense and the reasonable reader or reasonable parties.”

¹³



The process of interpretation or construction generally precedes implication and has been described as “the precursor of implication”

¹⁴

so that, at least in “most cases”, it is only after the process of interpreting or construing the express words of an agreement has been completed that the issue of whether a term is to be implied will be considered by the court.

¹⁵



The sources of implied terms

- 16-004 Implied terms can be classified in different ways. In this chapter a tri-partite division will be adopted for the purposes of exposition. The first category consists of terms implied into contracts by the courts. This category can in turn be subdivided into two elements, namely terms implied in fact and terms implied in law. The second category consists of terms implied by custom and usage. There is a real sense in which this category overlaps with the first category in so far as these are terms implied into the contract by the courts. But they merit separate consideration because the source of these implied terms is not to be found so much in the intention of the parties to the particular contract but in the practice of the market or trade in which the parties are engaged. To this extent, terms implied by custom and usage raise slightly different considerations from those applicable in the first category. The third and final category is terms implied by statute or by statutory instrument where the source of the implied term is to be found in the intervention of Parliament rather than the intention of the parties or the work of the courts.

Footnotes

1 *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG [2012] EWHC 3104 (Comm), [2013] 1 All E.R. (Comm) 1277.*

^{o2}

- See above, Ch.15.
- ^③ [2009] *UKPC* 10, [2009] 1 *W.L.R.* 1988 at [17]–[27]. For an earlier statement of Lord Hoffmann’s views, expressed extrajudicially, see *Lord Hoffmann* (1997) 56 *S.A.L.J.* 656 and (1995) 29 *Law Teacher* 127.
- ^④ *Att-Gen of Belize v Belize Telecom Ltd* [2009] *UKPC* 10, [2009] 1 *W.L.R.* 1988 at [19]–[21].
- ^⑤ See, for example, *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2011] *EWCA Civ* 543, [2011] *Pens. L.R.* 22 at [36]; *Spencer v Secretary of State for Defence* [2012] *EWHC* 120 (Ch), [2012] 2 *All E.R. (Comm)* 480.
- ^⑥ See, for example, *McLauchlan* [2014] *L.M.C.L.Q.* 203; *Courtney and Carter* (2014) 31 *J.C.L.* 151; *Hooley* [2014] *C.L.J.* 315 at 327–334; *Davies* [2010] *L.M.C.L.Q.* 140; *Kramer* [2004] *C.L.J.* 384; G. McMeel, *McMeel on the Construction of Contracts: Interpretation, Implication and Rectification*, 3rd edn (2017), Ch.9.
- ^⑦ *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] *UKSC* 72, [2016] *A.C.* 742 at [31] per Lord Neuberger. Not all members of the Supreme Court are, however, of the same view. Thus in *Marks & Spencer* Lord Carnwath (at [74]) saw no sufficient reason to question the “continuing authority” of the judgment of Lord Hoffmann in *Belize* and the judgment of Lord Clarke (at [76]) is more equivocal, as is the judgment of Lord Mance in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] *UKSC* 74, [2016] 1 *W.L.R.* 85 at [42]–[44]. However, the judgment of Lord Neuberger represents the majority view, so that the authority of Lord Hoffmann’s judgment has now been considerably diminished. See also *Utilise TDS Ltd v Davies* [2016] *EWHC* 2127 (Ch) at [52].
- ^⑧ *National Health Service Commissioning Board v Silovsky* [2017] *EWCA Civ* 1389, (2018) 159 *B.M.L.R.* 92 at [26]. See also *M/V Pacific Pearl Co Ltd v Osios David Shipping Inc* [2022] *EWCA Civ* 798 at [39]; *Parker v Roberts* [2019] *EWCA Civ* 121 at [88] (“We have been told in no uncertain terms by the Supreme Court that interpretation and implication are different”); *Law Debenture Trust Corp Plc v Ukraine* [2018] *EWCA Civ* 2026, [2019] *Q.B.* 1121 at [205]; *Sparks v Biden* [2017] *EWHC* 1994 (Ch) at [36].
- ^⑨ *Greenhouse v Paysafe Financial Services Ltd* [2018] *EWHC* 3296 (Comm) at [12].
- ^⑩ *Byron v Eastern Caribbean Amalgamated Bank* [2019] *UKPC* 16 at [22].
- ^⑪ *Greenhouse v Paysafe Financial Services Ltd* [2018] *EWHC* 3296 (Comm) at [12].
- ^⑫ *Byron v Eastern Caribbean Amalgamated Bank* [2019] *UKPC* 16 at [22]. It is at this point that the similarity between interpretation and implication is most apparent. As Hildyard J observed in *Lehman Brothers International (Europe) (In Administration) v Exotix Partners*

LLP [2019] EWHC 2380 (Ch), [2020] 1 All E.R. (Comm) 635 at [152] “the process of implication is at heart simply reading into the contract those terms which the parties are taken to have intended to include but failed or felt it unnecessary to make explicit”.

- ①13 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] A.C. 742* at [27]; *Clin v Walter Lilly & Co Ltd [2018] EWCA Civ 490, [2018] B.L.R. 321* at [25]; *Sparks v Biden [2017] EWHC 1994 (Ch)* at [36]; *Europa Plus SCA SIF v Anthracite Investments (Ireland) Plc [2016] EWHC 437 (Comm)* at [34]; *Byron v Eastern Caribbean Amalgamated Bank [2019] UKPC 16* at [22]; *M/V Pacific Pearl Co Ltd v Osios David Shipping Inc [2022] EWCA Civ 798* at [39]. The relationship between the two may be particularly close in the case where it is alleged that something has been omitted from the contract. As was noted by Snowden J in *Hayfin Opal Luxco 3 SARL v Windermere VII CMBS Plc [2016] EWHC 782 (Ch), [2018] 1 B.C.L.C. 118* at [68], the gap in such a case can be filled either by a process of corrective interpretation or by the implication of an appropriate term in the contract. But in either case it is important to note that the test applied by the court is a strict one, so that a court will not lightly correct the contract by supplying the alleged missing term, whether by corrective interpretation or by implication.

- ①14 *Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74, [2016] 1 W.L.R. 85* at [35] per Lord Hodge; *Bou-Simon v BGC Brokers LP [2018] EWCA Civ 1525, [2019] 1 All E.R. (Comm) 955* at [13]; *Bates v Post Office Ltd (No.3: Common Issues) [2019] EWHC 606 (QB)* at [690].

- ①15 *Wells v Devani [2019] UKSC 4, [2020] A.C. 129* at [28] and [59]; *Duval v 11–13 Randolph Crescent Ltd [2020] UKSC 18, [2020] A.C. 845* at [26] and [51]. Drawing a clear distinction between interpretation and implication would appear to be more difficult in a case such as *Wells v Devani* where the contract is not reduced to writing but rather is based on a conversation between the parties and their conduct. In such a case the line between interpretation and implication can be somewhat blurred. Contrast in this respect *Bathurst Resources Ltd v L & M Coal Holdings Ltd [2021] NZSC 85, [2021] 3 N.Z.L.R. 765* where the Supreme Court of New Zealand adopted a sequential approach to the extent that it accepted that the express meaning of the words of the contract must be interpreted before an additional term can be implied into the contract ([103]) but nevertheless concluded that the implication of a term is part of the construction of the written contract as a whole ([114]–[116]). To this extent, interpretation and implication were seen as part of the same “iterative” approach with no “bright line” being drawn between interpretation and implication ([114]).

(a) - The Development of the Law

Chitty on Contracts 34th Ed.

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Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 16 - Implied Terms

Section 2. - Terms Implied by the Courts

(a) - The Development of the Law

Terms implied in fact and terms implied in law

- 16-005 As has been noted, terms implied by the courts into contracts can be divided into two broad groups, namely terms implied in fact and terms implied in law.¹⁶ There are important differences between the two categories. Terms implied in fact are implied into a particular contract in order to give effect to the intention of the parties to the particular contract in the light of the express terms of the contract, commercial common sense and the facts known to both parties at the time of entry into the contract.¹⁷ Terms implied in law, by contrast, are implied into:

“... a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it.”¹⁸

The implication of a term into a contract is a matter of law for the court¹⁹ and, in the case of terms implied in law, many such terms have become standardised for particular classes of contract, so that it is somewhat artificial to attribute them to the unexpressed intention of the parties to the particular contract in dispute. The court is, in fact, laying down a general rule of law that in all contracts of a defined type—for example, sale of goods, landlord and tenant, employment, the carriage of goods by land or sea—certain terms will be implied, unless the implication of such a term would be contrary to the express words of the agreement.²⁰ Thus, when deciding whether or not to imply a term as a matter of law into a contract of a particular type, the courts do not

confine themselves to a narrow test of necessity but instead can draw upon a broader range of factors,²¹ such as the reasonableness of the term, its fairness and a range of competing policy considerations, when deciding whether the proposed term is a necessary incident of the type of contractual relationship in question.²²

Terms implied in fact: traditional principles

- 16-006 The requirements which must be satisfied before a term will be implied into a contract as a matter of fact have been stated in various ways over the years. At a high level of principle it may be said that the implication of a term as a matter of fact depends upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances.²³ The court will not make a contract for the parties²⁴ but will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that the parties must have intended the stipulation in question.²⁵ Traditionally, an implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. Both are predicated to depend on the presumed common intention of the parties. Such intention is, in general, to be ascertained objectively and is not dependent on proof of the actual intention of the parties at the time of contracting.²⁶ As so formulated, these criteria were traditionally regarded as “tests” which had to be satisfied if a term was to be implied. We shall briefly examine each “test” in turn.

Efficacy to contract

- 16-007 The source of the test that a term may be implied into a contract where it is necessary, in a business sense, to give efficacy to the contract is to be found in the judgment of Bowen LJ in *The Moorcock*²⁷ where he stated:

“Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention

of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.”

On the facts of the case a term was implied into a contract for the use of a wharf that it was safe for a ship to lie at the wharf. The principle laid down by Bowen LJ has been approved and applied in many cases. For example, a term has been implied into a contract for a Turkish bath that the couches for reclining on were free from vermin²⁸; into a charterparty that the charterer would not order the ship to proceed to a port impossible of access²⁹; and into a mooring contract, an obligation to take reasonable care to see that the layerage was safe.³⁰

Obvious inference from agreement

- 16-008 The sources of the second test are to be found in two judgments in the first half of the twentieth century. According to this test a term will be implied into a contract in order to give effect to the obvious, but unexpressed, intention of the parties such that the parties must have intended it to form part of their contract. The first commonly cited expression of this test is to be found in the judgment of Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* when he stated:

“A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, ‘What will happen in such a case’, they would both have replied, ‘Of course, so and so will happen; we did not trouble to say that; it is too clear’. Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.”³¹

The second, classic expression of this test is to be found in the judgment of McKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* when he stated that:

“Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, ‘oh, of course’.”³²

A term will not, however, thus be implied unless the court is satisfied that *both* parties would, as reasonable people, have agreed to it had it been suggested to them.³³ The knowledge or ignorance of each party of the matter to be implied, or of the facts on which the implication is based, is therefore a relevant factor.³⁴ Further, since:

“... the general presumption is that the parties have expressed every material term which they intended should govern their contract, whether oral or in writing,”³⁵

the court will only imply a term if it is one which must necessarily have been intended by them,³⁶ and in particular will be reluctant to make any implication where it is essential that the contract “should operate in accordance with the terms which appear on their face”³⁷ or “where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them”.³⁸

The overlapping nature of the tests

- 16-009 The criteria contained within these two tests often overlap³⁹ and, in many cases, have been applied cumulatively,⁴⁰ although in other cases they have been treated as alternative grounds.⁴¹ The multifactorial and overlapping nature of the test or tests applied by the courts was confirmed by Lord Simon of Glaisdale, giving the majority judgment of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*, when he stated:

“[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.”⁴²

Att-Gen of Belize v Belize Telecom Ltd

- 16-010 The next significant step in the development of the law was taken by Lord Hoffmann, giving the judgment of the Privy Council in *Att-Gen of Belize v Belize Telecom Ltd*⁴³ when he stated that:

“... in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instrument read against the relevant background, would reasonably be understood to mean”⁴⁴

and that the list of requirements set out in previous cases for the implication of a term:

“... is best regarded not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually meant, or in which they have explained why they did not think that it did so.”⁴⁵

The judgment of Lord Hoffmann appeared to be significant in at least three respects. First, it purported to reduce the various tests which had previously been employed by the courts to a single formula. Second, it sought to assimilate the principles applicable to the implication of a term into a contract with those applied to the interpretation of a contract. Third, it appeared (at least to some) to liberalise the rules relating to the implication of terms, enabling the courts to imply a term into a contract in a broader range of circumstances than had been the case hitherto.

Marks and Spencer v BNP Paribas

- 16-011 Initially, Lord Hoffmann’s judgment received the endorsement of the Court of Appeal⁴⁶ and it was applied or referred to in a number of cases at first instance.⁴⁷ As a result, the traditional “tests” for the implication of terms into a contract were treated as guidelines to be applied by the courts when seeking to answer the single question: Is this what the instrument, read as a whole against the relevant background, would reasonably be understood to mean? However, in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*⁴⁸ the Supreme Court re-established the traditional principles applicable to the implication of terms and “qualified”⁴⁹ the judgment of Lord Hoffmann in *Belize*. In doing so the Supreme Court emphasised that Lord Hoffmann had not diluted the requirements which must be satisfied before a term will be implied into a contract.⁵⁰ The test which must be applied by the courts when seeking to imply a term into a contract as a matter of fact is whether the term satisfies the test of “business necessity”.⁵¹

Necessity not reasonableness

- 16-012 The Supreme Court in *Marks & Spencer* affirmed that it is not enough to show that the term is a reasonable one for it to be implied into the contract.⁵² Reasonableness may be a necessary requirement before a term will be implied⁵³ but it is not sufficient of itself to lead to the implication

of a term into the contract.⁵⁴ Thus a term will not be implied into a detailed commercial contract merely because it appears fair or because the parties might have agreed to it had it been suggested to them.⁵⁵ Nor will a term be implied simply because it would improve the contract⁵⁶ or make the carrying out of it more convenient.⁵⁷ As it has been observed, “[t]he touchstone is always *necessity* and not merely *reasonableness*”.⁵⁸ The test therefore remains one of necessity, albeit not “absolute necessity” but whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term “in order to make the contract work”.⁵⁹ In short, in order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract.⁶⁰ Given the strict nature of the test established by the Supreme Court it is now no easy task to persuade a court to imply a term into a contract, particularly a written contract of some length which has been negotiated with the benefit of legal advice, and a number of cases can now be found in which the courts have applied the approach of the Supreme Court in *Marks & Spencer* and, on that basis, have declined to imply a term into the contract between the parties.

⁶¹

U If the contract does not expressly provide for what is to happen when a particular event occurs or in a particular situation, the most usual inference to be drawn is that nothing is to happen and no term is to be implied.⁶²

A summary of the applicable principles

16-013 A helpful summary of the principles now applied by the courts when considering whether or not to imply a term into a contract as a matter of fact was given by Lord Hughes, giving the judgment of the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago*,⁶³ in the following terms:

“It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, ‘Oh, of course’) and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed

implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”

⁶⁴



Terms implied in law

- 16-014 The test applied by the courts when considering whether or not to imply a term as a matter of law into a particular type of contract is based upon “wider considerations”⁶⁵ than those applicable to a term implied in fact. As in the case of terms implied in fact, it does not suffice to establish that the term is a reasonable one to imply. It must be demonstrated that the term is a necessary one to imply, albeit the test is whether the term is “a necessary incident of a definable category of contractual relationship”.⁶⁶ However, it has also been observed that the concept of necessity in this context is “elusive” and that the court would be:

“... better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations.”⁶⁷

The distinction between a term implied in fact and a term implied in law

- 16-015 Given that the test applicable to the implication of a term as a matter of law is broader and more flexible than that applicable to a term implied in fact, it may be important to know whether a particular term constitutes a term implied in fact or a term implied in law. The hallmark of a term implied in fact is that it is implied into a “particular” contract in order to give effect to the presumed intention of the parties to that contract,⁶⁸ whereas a term implied in law is implied as “a general rule ... in all contracts of a certain type”⁶⁹ or as “a standardised term”⁷⁰ into a “definable category of contractual relationship”.⁷¹ Thus, when a court is considering whether or not to imply a term as a matter of law its focus is less on the particular relationship between the parties to the litigation (as would be the case with a term implied in fact) but on the appropriateness of the term for implication into all contracts of the type that is before the court. So, for example, the term may be implied into a particular type of contractual relationship, such as employer and employee or landlord and tenant, or it may take the form of a standard term, such as the obligation to exercise reasonable care and skill, which is implied into a contract between a professional and his or her client. There

is no finite list of terms implied in law, nor is there always a clear line of distinction between terms implied in law and terms implied in fact. The reality may be that, as Lord Wilberforce observed, there is a “continuous spectrum”⁷² with terms implied in law into certain clearly defined classes of relationship at one end of the spectrum and terms implied in fact into a particular contract at the other end.

Incomplete contract

- 16-016 A further situation where a term may be implied is where the court is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms: “[i]n this sense the court is searching for what must be implied”.⁷³ There is no need for the court first to identify the existence of a contract before considering whether to imply a term into that contract: a term can be implied into what would otherwise be an incomplete agreement if it is necessary to do so in order to make the contract work as intended by the parties.⁷⁴ In *Liverpool City Council v Irwin*⁷⁵ the contract by which dwelling units in a council block were let to tenants consisted of “conditions of tenancy” which imposed obligations upon the tenants, but which were silent as to the contractual obligations of the landlord. The House of Lords implied an obligation on the part of the landlord to take reasonable care to keep the essential means of access and other communal facilities in reasonable repair. In *Sim v Rotherham Metropolitan BC*⁷⁶ the contracts under which secondary school teachers were employed were in general silent as to the extent of the teachers’ obligations as teachers. The court implied an obligation on their part to cover for absent colleagues during non-teaching periods if requested to do so. And in *Scally v Southern Health and Social Services Board*⁷⁷ contracts of employment of public health service employees contained a term, derived from a collective agreement reached between representatives of the employers and of the employees, whereby a valuable pension benefit was conferred upon an employee contingent upon action being taken by him to avail himself of the benefit. An employee could not, in all the circumstances, reasonably be expected to be aware of the term unless it was drawn to his attention. The House of Lords implied an obligation on the employer to take reasonable steps to bring the term in question to the employee’s attention so that he might be in a position to enjoy the benefit. In this type of case, the implication does not appear so much to depend on the intentions of the parties, but resembles more closely an implication of law,⁷⁸ since the term is implied as a “legal incident”⁷⁹ of a definable category of contract, though only where certain circumstances exist.

Term must be formulated with sufficient precision

- 16-017



Whether the term sought to be implied is a term in fact or a term in law, it must be capable of being formulated with sufficient clarity and precision

80

U and it not infrequently happens that the court rejects the implication of a term on the ground that the difficulty in identifying the precise scope of the proposed term evidences that it is not a necessary ingredient of their contract. The vaguer the term, the less likely it is to be implied into the contract.⁸¹ But the point cannot be pushed too far. It may be that the lack of precision in the criterion to be embodied in the term is not fatal to any implication, since:

“... it is no novelty in the common law to find that a criterion on which some important question of liability is to depend can only be defined in imprecise terms which leave a difficult question for decision as to how the criterion applies to the facts of a particular case.”⁸²

However, the more likely inference that the court will draw from the inability of the parties to formulate the term with precision is that no term is to be implied into the contract.

Implied term must not be inconsistent with an express term

16-018 It is “a cardinal rule that no term can be implied into a contract if it contradicts an express term”.

83

U A contradiction, or inconsistency, can for this purpose take one of two forms: direct linguistic inconsistency or substantive inconsistency.⁸⁴ An inconsistency is linguistic where the wording of the proposed implied term contradicts or cannot be reconciled as a matter of language or grammar with one or more of the express terms of the contract. Substantive inconsistency is more difficult to define but it arises where the proposed implied term does not fit with the substance of the parties’ rights and obligations under the express terms of the contract or their express allocation of the risk of the occurrence of a particular event. The fact that an implied term cannot be inconsistent with an express term of the contract lends support to the proposition that interpretation is “the precursor of implication”,⁸⁵ and that the approach of the court should be “sequential”⁸⁶ rather than “iterative”⁸⁷ with the court first giving consideration to the express terms of the contract and, only when it has completed that task, should it turn to consider whether or not it is appropriate to imply a term into that contract. The implied term may, however, be “fashioned” to ensure that it is consistent with the express terms of the contract.⁸⁸ Further, the fact that an express term “covers” a particular issue does not have the inevitable consequence that there can be no implied term where there is no inconsistency between the express term and the implied term, although in such a case “the existence of such an express term makes the co-existence of a further implied term on the

same subject unlikely and especially so in a lengthy and carefully drafted document on which legal professionals have been advising".⁸⁹

Entire agreement clauses and implied terms

- 16-019 An entire agreement clause does not generally affect or prevent the implication of a term as a matter of fact on the basis of necessity given that:

“... it cannot be supposed that the parties would have intended an entire agreement clause to cause the agreement to fail, and to prevent the court from saving it, if there is an available and appropriate means of doing so consistently with, and indeed to give effect to, what the Court finds must have been the true intention of the parties.”

⁹⁰



A similar approach has been held to be applicable to a term implied in law, particularly where the nature of the implied term is to confer a valuable right on a contracting party.⁹¹ So, for example, an entire agreement clause should not be effective to exclude the operation of the implied term of trust and confidence in a contract of employment.⁹² The reason for this is that an implied term is intrinsic to the agreement itself and so not caught by the terms of the entire agreement clause,⁹³ unless the clause uses express language the effect of which is specifically to exclude such implied terms.⁹⁴

Footnotes

- 16 See, for example, *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523 at [55].
- 17 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [15].
- 18 *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523 at [55].
- 19 *Re Comptoir Commercial Anversois and Power, Son & Co* [1920] 1 K.B. 868, 899; *O'Brien v Associated Fire Alarms Ltd* [1968] 1 W.L.R. 1916, 1923, 1925; *IMT Shipping and Chartering GmbH v Chamsung Shipping Co Ltd (The “Zenovia”)* [2009] EWHC 739 (Comm), [2009] 2 Lloyd's Rep. 139 at [22].

- 20 cf. *Johnstone v Bloomsbury H.A.* [1992] Q.B. 333; *Yarm Road Ltd v Hewdon Tower Cranes Ltd* [2002] EWHC 2265 (TCC), 85 Con. L.R. 142.
- 21 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555, 576, 579, 594; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 1 W.L.R. 1095, 1099, 1100; *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1196; *Liverpool City Council v Irwin* [1977] A.C. 239, 255, 258; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294, 307; *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 320, 340, 353; *Ali Shipping Corp v Shipyard Trogir* [1998] 1 Lloyd's Rep. 643, 651; *Mahmud v Bank of Credit and Commerce International SA* [1998] A.C. 20, 34, 45; *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, 458, 459. Contrast *National Bank of Greece SA v Pinios Shipping Co* [1990] 1 A.C. 637; *Reid v Rush & Tompkins Group Plc* [1990] 1 W.L.R. 212, 233; *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G. Tsavliris & Sons Maritime Co* [1990] 1 Lloyd's Rep. 516, 526; *Ashmore v Corp of Lloyd's (No.2)* [1992] 2 Lloyd's Rep. 620, 631 (one-off or sui generis contracts).
- 22 *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523 at [56]; *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] I.C.R. 1615 at [36]; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294; *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2018] EWHC 1743 (Ch) at [45].
- 23 *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1983] 1 Lloyd's Rep. 541, 558; *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408; *IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The "Zenobia")* [2009] EWHC 739 (Comm), [2009] 2 Lloyd's Rep. 139 at [22].
- 24 *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 609.
- 25 *Hamlyn & Co v Wood & Co* [1891] 2 Q.B. 488, 494; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*, above, at 609.
- 26 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [21]. It is important to note that the test is to be applied at the time of contracting and it is not appropriate for a court to seek to use the benefit of hindsight: *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525, [2019] 1 All E.R. (Comm) 955 at [12].
- 27 (1889) 14 P.D. 64, 68.
- 28 *Silverman v Imperial London Hotels Ltd* (1927) 137 L.T. 57.
- 29 *Aktieselskabet Olivebank v Dansk Sølsyre Fabrik* [1919] 2 K.B. 162. Contrast *Eurico Spá v Philipp Brothers* [1987] 2 Lloyd's Rep. 215.
- 30 *George v Coastal Marine 2004 Ltd* [2009] EWHC 816 (Admlty), [2009] 2 Lloyd's Rep. 356.
- 31 *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 K.B. 592, 605. See also *Weg Motors Ltd v Hales* [1961] Ch. 176, 192; *Bronester Ltd v Priddle* [1961] 1 W.L.R. 1294, 1304; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 69; *Gardiner v Moore* [1969] 1 Q.B. 55, 61; *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] 1 Lloyd's Rep. 122, 128; *K/S Stamar v Seabow Shipping Ltd* [1994] 2 Lloyd's Rep. 183, 191; *Fletamentos Maritimos SA v Effjohn International BV* [1995] 1 Lloyd's Rep. 311, 345; *Cargill International SA v Bangladesh Sugar & Food Industries Corp* [1996] 2 Lloyd's Rep. 524, 531 (affirmed [1998] 1 W.L.R. 461); *C. Itoh & Co Ltd v Companhia de Navegacao*

- Lloyd Brasileiro and Steamship Mutual Underwriting Association (Bermuda) Ltd [1999] 1 Lloyd's Rep. 115, 120; Weldon v GRE Linked Life Assurance Ltd [2002] 2 All E.R. (Comm) 914, 919; Modahl v British Athletic Federation Ltd [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 at [119]; Paragon Finance Plc v Nash [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685 at [36]; Adler v Ananhall Advisory & Consultancy Services Ltd [2009] EWCA Civ 586 at [37]; Graiseley Properties Ltd v Barclays Bank Plc [2012] EWHC 3093 (Comm) at [29].*
- 32 *Shirlaw v Southern Foundries (1926) Ltd [1939] 2 K.B. 206, 227 (affirmed [1940] A.C. 701).* This approach was criticised by Lord Hoffmann in (1998) 56 S.A.L.J. 656, 662 and in *Att-Gen of Belize v Belize Telecom Ltd [2009] UKPC 10, [2009] 1 W.L.R. 1988* at [25]. For a different test, see *William Morton & Co v Muir Bros & Co 1907 S.C. 1211, 1224; JH Ritchie Ltd v Lloyd Ltd [2007] UKHL 9, [2007] 1 W.L.R. 670* at [14], [18].
- 33 *Luxor (Eastbourne) Ltd v Cooper [1941] A.C. 108; Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Rederei GmbH [1976] 1 Lloyd's Rep. 250; Liverpool CC v Irwin [1977] A.C. 239, 258, 266; Federal Commerce and Navigation Co Ltd v Tradax Export SA [1977] 1 Lloyd's Rep. 217, 229 (affirmed [1977] 2 Lloyd's Rep. 301, 309); Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd [1980] 1 W.L.R. 425; Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 S.L.T. 205* at [20]–[22], [31]–[33]. cf. the misgivings felt by May LJ in *Marcan Shipping (London) Ltd v Polish S.S. Co [1989] 2 Lloyd's Rep. 138, 142* and by Lord Hoffmann in *Att-Gen of Belize v Belize Telecom Ltd [2009] UKPC 10, [2009] 1 W.L.R. 1988* at [25].
- 34 *The Moorcock (1889) 14 P.D. 64, 68; Partabmull Rameshwar v K.C. Sethia (1944) Ltd [1950] 1 All E.R. 51 (affirmed [1951] 2 All E.R. 352n); Spring v National Amalgamated Stevedores and Dockers Society [1956] 1 W.L.R. 585; Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SpA [1960] 2 Q.B. 115; Jamil Line for Trading and Shipping Ltd v Atlanta Handelsgesellschaft Harder & Co [1982] 1 Lloyd's Rep. 481.* cf. *Greene Wood & McClean LLP v Templeton Insurance Ltd [2009] EWCA Civ 65, [2009] 1 W.L.R. 2013* at [15].
- 35 *Luxor (Eastbourne) Ltd v Cooper [1941] A.C. 108, 137; Kelly v Battershell [1949] 2 All E.R. 830; Att-Gen of Belize v Belize Telecom Ltd [2009] UKPC 10, [2009] 1 W.L.R. 1988* at [17].
- 36 *L. French & Co v Leeston Shipping Co [1922] 1 A.C. 451, 455; Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601, 609; Liverpool CC v Irwin [1977] A.C. 239; Federal Commerce and Navigation Co Ltd v Tradax Export SA [1977] 1 Lloyd's Rep. 217, 228–229 (affirmed [1977] 2 Lloyd's Rep. 301, 309); Equitable Life Assurance Society v Hyman [2002] 1 A.C. 408; Clarion Ltd v National Provident Institution [2000] 2 All E.R. 265; Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059* at [33].
- 37 *Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep. 456* at [23] (financial undertakings).
- 38 *Jones v St John's College, Oxford (1870) L.R. 6 Q.B. 115, 126; Lynch v Thorne [1956] 1 W.L.R. 303; Shell UK Ltd v Lostock Garage Ltd [1976] 1 W.L.R. 1187, 1200; Codelfa Construction Pty Ltd v State Railway Authority of New South Wales (1982) 149 C.L.R. 337, 346; Gordon v Selico Co Ltd [1986] 1 E.G.L.R. 71; J. Lauritzen A/S v Wijsmuller B.V [1990] 1 Lloyd's Rep. 1, 6; Flamar Inter ocean Ltd v Denmac Ltd [1990] 1 Lloyd's*

Rep. 434, 437; *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1998) 62 *Const. L.R.* 64, 71; *Times Newspapers Ltd v George Weidenfeld & Nicolson Ltd* [2002] *F.S.R.* 29; *Leander Construction Ltd v Mulalley & Co Ltd* [2011] *EWHC* 3449 (TCC); *Greatship (India) Ltd v Oceanografia SA de CV* [2012] *EWHC* 3468 (Comm), [2013] 1 *All E.R.* (Comm) 1244 at [41]; *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] *EWHC* 338 (Comm), [2013] 2 *Lloyd's Rep.* 203.

39 See, e.g. *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] 1 *Lloyd's Rep.* 122, 128, 131.
 40 e.g. by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 *K.B.* 592, 598, by Lord Tucker in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] *A.C.* 555, 594, and by Lord Cross in *Liverpool CC v Irwin* [1977] *A.C.* 239, 258. See also *B.P. Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 *A.L.J.R.* 20, 26, *PC*; *Codelfa Construction Pty Ltd v State Ry Authority of New South Wales* (1982) 149 *C.L.R.* 337, 347; *Byrne v Australian Airlines Ltd* (1995) 185 *C.L.R.* 410, 422, 441; *Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] *E.M.L.R.* 472, 480, 482; *Association of British Travel Agents Ltd v British Airways Plc* [2001] 1 *Lloyd's Rep.* 169, 175; [2000] 2 *Lloyd's Rep.* 209, 219; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] *EWCA Civ* 116, [2008] 1 *Lloyd's Rep.* 558 at [105]; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] *EWHC* 84 (Comm), [2010] 2 *Lloyd's Rep.* 641 at [62].

41 *Mosvolds Rederi A/S v Food Corp of India* [1986] 2 *Lloyd's Rep.* 68; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 *W.L.R.* 255, 263; *Barclays Bank Plc v Taylor* [1989] 1 *W.L.R.* 1066, 1076; *Marcan Shipping (London) Ltd v Polish S.S. Co* [1989] 2 *Lloyd's Rep.* 138, 144; *Lauritzen (J.) A/S v Wijsmuller B.V* [1990] 1 *Lloyd's Rep.* 1, 6; *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G. Tsaviris & Sons Maritime Co (The Choko Star)* [1990] 1 *Lloyd's Rep.* 516, 524, 526; *Ashmore v Corp of Lloyds (No.2)* [1992] 2 *Lloyd's Rep.* 620, 627; *C. Itoh & Co Ltd v Compania de Navegacao Lloyd Brasileiro and S.S. Mutual Underwriting Association (Bermuda) Ltd* [1999] 1 *Lloyd's Rep.* 115, 120–121; *Modahl v British Athletic Federation Ltd* [2001] *EWCA Civ* 1447, [2002] 1 *W.L.R.* 1192 at [119]; *Greene Wood & McClean LLP v Templeton Insurance Ltd* [2009] *EWCA Civ* 65, [2009] 1 *W.L.R.* 2013 at [15].

42 *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 *A.L.J.R.* 20, 26. This summary of the applicable principles continues to be cited by the courts on a regular basis.

43 [2009] *UKPC* 10, [2009] 1 *W.L.R.* 1988.

44 [2009] *UKPC* 10, [2009] 1 *W.L.R.* 1988 at [21].

45 [2009] *UKPC* 10, [2009] 1 *W.L.R.* 1988 at [28].

46 *Mediterranean Salvage & Towing Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] *EWCA Civ* 531, [2009] 2 *Lloyd's Rep.* 639 at [8]–[14]; *Chantry Estates (South East) Ltd v Anderson* [2010] *EWCA Civ* 316, 130 *Con. L.R.* 11; *KG Bomiflot Bunkergesellschaft für Mineralöle mbH v Petroplus Marketing AG* [2010] *EWCA Civ* 1145, [2011] 1 *Lloyd's Rep.* 442 at [44]; *Beazer Homes Ltd v Durham CC* [2010] *EWCA Civ* 1175 at [36]; *Crema v Cenkos Securities Plc* [2010] *EWCA Civ* 1444, [2011] 1 *W.L.R.* 2066 at [36]; *Garratt v Mirror Group Newspapers Ltd* [2011] *EWCA Civ* 425, [2011] *I.R.L.R.* 591 at [46]; *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2011] *EWCA Civ* 543, [2011] *Pens. L.R.* 22 at [36]; *BDW Trading Ltd v JM Rowe (Investments) Ltd* [2011] *EWCA Civ* 548,

- [2011] 20 E.G. 113 (C.S.) at [34]; *Consolidated Finance Ltd v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133; *Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWCA Civ 1413; *Rathbone Brothers Plc v Novae Corporate Underwriting Ltd* [2014] EWCA Civ 1464, [2014] 2 C.L.C. 818 at [84].
- 47 *Durham Tees Valley Airport Ltd v BMI Baby Ltd* [2009] EWHC 852 (Ch), [2009] 2 Lloyd's Rep. 246 at [89]; *Inta Navigatori v Ranch Investments Ltd* [2009] EWHC 1216 (Comm), [2010] 1 Lloyd's Rep. 74 at [42]; *AET Inc Ltd v Arcaola Petroleum Ltd* [2009] EWHC 2337 (Comm), [2010] 1 Lloyd's Rep. 593 at [4]; *ENE 1 Kos Ltd v Petroleo Brasileiro SA* [2009] EWHC 1843 (Comm), [2010] 1 Lloyd's Rep. 87 at [42]; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641 at [60]; *Redmayne Bentley Stockbrokers v Isaacs* [2010] EWHC 1504 (Comm) at [84]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] I.C.L.C. 701 at [541]; *F & C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch) at [271]; *Leander Construction Ltd v Mulalley & Co Ltd* [2011] EWHC 3449 (TCC), [2012] B.L.R. 152 at [41]; *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch), [2012] 2 All E.R. (Comm) 480; *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm), [2012] All E.R. (D) 259 (Jul); *Graiseley Properties Ltd v Barclays Bank Plc* [2012] EWHC 3093 (Comm) at [28]; *Wuhan Ocean Economic & Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 All E.R. (Comm) 1277 at [15]; *Greatship (India) Ltd v Oceanografia SA de CV* [2012] EWHC 3468 (Comm), [2013] 1 All E.R. (Comm) 1244 at [41]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [132]; *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] B.L.R. 484 at [44]; *Lombard North Central Plc v Nugent* [2013] EWHC 1588 (QB); *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [72]; *Straw v Jennings* [2013] EWHC 3290 (Ch) at [99]; *Carewatch Care Services Ltd v Focus Care Services Ltd* [2014] EWHC 2313 (Ch) at [104].
- 48 [2015] UKSC 72, [2016] A.C. 742. See also *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] I.C.R. 531 at [5].
- 49 *Walter Lilly & Co Ltd v Clin* [2016] EWHC 357 (TCC), [2016] B.L.R. 247 at [39] and *Manor Asset Ltd v Demolition Services Ltd* [2016] EWHC 222 (TCC) at [45].
- 50 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [24], [66] and [77].
- 51 [2015] UKSC 72, [2016] A.C. 742 at [17].
- 52 [2015] UKSC 72, [2016] A.C. 742 at [23]. See also *Rosenblatt (A Firm) v Man Oil Group SA* [2016] EWHC 1382 (QB) at [59]; *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525, [2019] 1 All E.R. (Comm) 955 at [12].
- 53 *Young & Marten v McManus Childs Ltd* [1969] 1 A.C. 454, 465; *Liverpool CC v Irwin* [1977] A.C. 239, 262; *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 A.L.J.R. 20, 26, PC; *Inta Navigatori v Ranch Investments Ltd* [2009] EWHC 1216 (Comm), [2010] 1 Lloyd's Rep. 74; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641 at [64]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] I.C.L.C. 701 at [544]; *Arash Shipping*

- Enterprises Co Ltd v Groupama Transport* [2011] EWCA Civ 620, [2011] 2 Lloyd's Rep. 607 at [41].
- 54 *Hamlyn & Co v Wood & Co* [1891] 2 Q.B. 488, 491; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 K.B. 592, 598; *Re Comptoir Commercial Anversois v Power, Son and Co* [1920] 1 K.B. 868, 899; *George Trollope & Son v Martyn Bros* [1934] 2 K.B. 436, 443; *R. v Paddington and St Marylebone Rent Tribunal* [1947] K.B. 984, 990; *British Movietonews v London and District Cinemas Ltd* [1952] A.C. 166; *Bundar Property Holdings Ltd v J. S. Darwen (Successors) Ltd* [1968] 2 All E.R. 305; *Lupton v Potts* [1969] 1 W.L.R. 1749; *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601; *Liverpool CC v Irwin* [1977] A.C. 239; *Duke of Westminster v Guild* [1985] Q.B. 688; *Holding and Management (Solitaire) Ltd v Ideal Homes Northwest Ltd* [2004] EWHC 2408 (TCC), [2004] Const. L.R. 114; *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corp* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep. 517 at [32].
- 55 [2015] UKSC 72, [2016] A.C. 742 at [21]; *CFH Clearing Ltd v Merrill Lynch International* [2019] EWHC 963 (Comm) at [52].
- 56 *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 609; *Express Newspapers v Silverstone Circuits, The Independent*, 16 June 1989, CA; *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [16]; *Joseph v Deloitte NSE LLP* [2020] EWCA Civ 1457, [2021] 1 B.C.L.C. 325 at [46].
- 57 *Russell v Duke of Norfolk* [1949] 1 All E.R. 109.
- 58 *Liverpool CC v Irwin* [1977] A.C. 239, 266; *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 A.L.J.R. 20, 26; *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1980] 1 Lloyd's Rep. 44; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80, 104; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294; *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1998) 62 Const. L.R. 64, 71; *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 Lloyd's Rep. 797, 802; *Meridian International Services Ltd v Richardson* [2008] EWCA Civ 609, [2008] Info. T.L.R. 139; *Brookfield Construction Ltd v Foster & Partners Ltd* [2009] EWHC 307 (TCC), [2009] B.L.R. 246; *Arla Foods UK Plc v Barnes* [2008] EWHC 2851 (Ch), [2009] 1 B.C.L.C. 699; *Mediterranean Salvage and Towage Ltd v Seamar Trading & Commerce Inc (The "Reborn")* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639 at [15]–[18]; *IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The "Zenovia")* [2009] EWHC 739 (Comm), [2009] 2 Lloyd's Rep. 139 at [23]; *AET Inc Ltd v Arcadia Petroleum Ltd* [2009] EWHC 2337 (Comm), [2010] 1 Lloyd's Rep. 593 at [39]; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641 at [65]; *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB); *Chantry Estates (South East) Ltd v Anderson* [2010] EWCA Civ 316, 130 Con. L.R. 11; *Re Agrimarche Ltd* [2010] EWHC 1655 (Ch), [2010] B.C.C. 775; *Dhamija v Sunningdale Joineries Ltd* [2010] EWHC 2396 (TCC), [2011] P.N.L.R. 9; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [544]; *Leander Construction Ltd v Mullaley & Co Ltd* [2011] EWHC 3449 (TCC), [2012] B.L.R. 152 at [41]; *NSB Ltd v Worldplay Ltd* [2012] EWHC 927 (Comm); *Consolidated Finance Ltd v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133; *Euroption Strategic Fund*

Ltd v Skandinaviska Enskilda Banken AB [2012] EWHC 584 (Comm), [2013] 1 B.C.L.C. 125; *Greatship (India) Ltd v Oceanografia SA de CV* [2012] EWHC 3468 (Comm), [2013] 1 All E.R. (Comm) 1244 at [41]; *Proton Energy Group SA v Orlen Lietuva* [2013] EWHC 2872 (Comm), [2014] 1 All E.R. (Comm) 972 at [43].

59 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [21] and [77]; *J N Hipwell & Son v Szurek* [2018] EWCA Civ 674 at [38]. Commercial coherence must be ascertained objectively and not simply from the perspective of one party. The fact that without the term the contract might potentially work to the disadvantage of one party in certain circumstances, in that it does not make a profit it might have made at other times, does not necessarily render the contract as a whole incoherent: *J Toomey Motors Ltd v Chevrolet UK Ltd* [2017] EWHC 276 (Comm) at [91]–[92]. The importance of “workability” was emphasised by Hildyard J in *Lehman Brothers International (Europe) (In Administration) v Exotix Partners LLP* [2019] EWHC 2380 (Ch), [2020] 1 All E.R. (Comm) 635 at [171]–[172].

60 *Hallman Holding Ltd v Webster* [2016] UKPC 3 at [14].

61 See, for example, *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57, [2017] A.C. 73 at [31]–[32]; *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm), 169 Con. L.R. 141 at [320]; *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm), [2017] 1 Lloyd's Rep 387 at [190]; *Gard Shipping AS v Clearlake Shipping Pte Ltd (The Zaliv Baikal)* [2017] EWHC 1091 (Comm), [2017] 2 All E.R. (Comm) 179 at [51]; *Co-operative Bank Plc v Hayes Freehold Ltd (in liquidation)* [2017] EWHC 1820 (Ch) at [99]; *Stevensdrake Ltd v Hunt* [2017] EWCA Civ 1173 at [50]; *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2018] EWHC 1743 (Ch) at [45]; *CFH Clearing Ltd v Merrill Lynch International* [2019] EWHC 963 (Comm) at [54], *Yoo Design Services Ltd v Iliv Realty Pte Ltd* [2021] EWCA Civ 560 at [47]; *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2022] EWCA Civ 1021 at [140]. Although it may now be more difficult to imply a term into a contract, cases can still be found in which the courts have been willing to make the implication: see, for example, *J N Hipwell & Son v Szurek* [2018] EWCA Civ 674 and *Sparks v Biden* [2017] EWHC 1994 (Ch).

62 A proposition with which Lord Hoffmann expressed his agreement in *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [17].

63 [2017] UKPC 2, [2017] I.C.R. 531.

64 [2017] UKPC 2, [2017] I.C.R. 531 at [5]. Another summary which is now frequently cited is to be found in the judgment of Carr LJ in *Yoo Design Services Ltd v Iliv Realty Pte Ltd* [2021] EWCA Civ 560 at [51].

65 *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294, 306–307.

66 *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294, 306–307.

67 *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] 4 All E.R. 447 at [36]. See also *Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2018] UKSC 22, [2018] 1 W.L.R. 2073 at [32]; *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 W.L.R. 4021 at [20]–[21].

- 68 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] A.C. 742* at [15].
- 69 *Liverpool City Council v Irwin [1977] A.C. 239, 257* (Lord Cross).
- 70 *Malik v Bank of Credit and Commerce International SA [1998] A.C. 20, 45* (Lord Steyn); *James-Bowen v Commissioner of Police of the Metropolis [2018] UKSC 40, [2018] 1 W.L.R. 4021* at [21].
- 71 *Scally v Southern Health and Social Services Board [1992] 1 A.C. 294, 307* (Lord Bridge).
- 72 *Liverpool City Council v Irwin [1977] A.C. 239, 254.*
- 73 *Liverpool City Council v Irwin [1977] A.C. 239, 254.*
- 74 *Wells v Devani [2019] UKSC 4, [2020] A.C. 129* at [30]–[35], distinguishing (at [31]) as an “unusual case” the decision of the Privy Council in *Scancarriers A/S v Aotearoa International Ltd [1985] 2 Lloyd's Rep. 419* which was held (at [33]) not to stand for the “far-reaching proposition” that it is not possible to turn an incomplete bargain into a legally binding contract by adding expressly agreed terms and implied terms together.
- 75 *[1977] A.C. 239.*
- 76 *[1987] Ch. 216.* cf. *Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority [2007] EWCA Civ 240, [2007] B.L.G.R. 439* (firefighters’ contracts).
- 77 *[1992] 1 A.C. 294.* cf. *University of Nottingham v Evett [1999] 1 W.L.R. 594; Crossley v Faithful & Gould Holdings Ltd [2004] EWCA Civ 293, [2004] I.C.R. 1615;* and see paras 2-062—2-064, above; Vol.II, para.42-155.
- 78 But it is still subject to the test of necessity; *Liverpool City Council v Irwin [1977] A.C. 239, 254, 262, 266; Scally v Southern Health and Social Services Board [1992] 1 A.C. 294.*
- 79 *Liverpool City Council v Irwin [1977] A.C. 239, 255, 270.*
- 80 *Shell UK Ltd v Lostock Garage Ltd [1976] 1 W.L.R. 1187, 1197, 1201.* See also *R. v Paddington and St Marylebone Rent Tribunal [1947] K.B. 984, 990; Lister v Romford Ice and Cold Storage Co Ltd [1957] A.C. 555, 574; Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601, 610, 614; BP Refinery (Westenport) Pty Ltd v Shire of Hastings (1978) 52 A.J.L.R. 20, 26; Terkol Rederierne v Petroleo Brasilero SA [1985] 1 Lloyd's Rep. 395, 401; Ashmore v Corp of Lloyds (No.2) [1992] 2 Lloyd's Rep. 620, 628; WX Investments Ltd v Begg [2002] EWHC 925 (Ch), [2002] 1 W.L.R. 2849 at [29]; Armitage v Staveley Industries Plc [2004] EWHC 2320 (Ch), [2004] Pens L.R. 385; Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558 at [105], [110]; Fortis Bank SA/NV v Indian Overseas Bank [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641 at [67]; Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [544]; Consolidated Finance Ltd v McCluskey [2012] EWCA Civ 1325, [2012] C.T.L.C. 133; Fraser Turner Ltd v PricewaterhouseCoopers LLP [2018] EWHC 1743 (Ch) at [45]; Yoo Design Services Ltd v Iliv Realty Pte Ltd [2021] EWCA Civ 560 at [64]–[70]; Alpha Marine Corp v Minmetals Logistics Zhejiang Co Ltd [2021] EWHC 1157 (Comm), [2022] 1 All E.R. (Comm) 974 at [51]–[54]; Union of Shop, Distributive and Allied Workers v Tesco Stores Ltd [2022] EWCA Civ 978 at [44].*

- 81 *Sparkes v Biden* [2017] EWHC 1994 (Ch) at [63]; *CFH Clearing Ltd v Merrill Lynch International* [2019] EWHC 963 (Comm) at [56]; *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [498].
- 82 *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1204.
- ⑧3 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [28]. See also *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 A.J.L.R. 20, 26; *Duke of Westminster v Guild* [1985] Q.B. 688, 700; *Eurico Spa v Philipp Brothers* [1987] 2 Lloyd's Rep. 215, 219; *Gyllenhammar & Partners International Ltd v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403, 415; *Yorkshire Water Services Ltd v Sun Alliance & London Insurance Plc* [1997] 2 Lloyd's Rep. 21, 33; *Fast Ferries One SA v Ferries Australia Pty Ltd* [2000] 1 Lloyd's Rep. 534, 541; *Times Newspapers Ltd v George Weidenfeld & Nicolson Ltd* [2002] F.S.R. 29; *Wootton Trucks Ltd v Man ERF UK Ltd* [2006] EWCA Civ 1042, [2006] Eu. L.R. 1217; *Port of Tilbury (London) Ltd v Stora Enso Transport & Distribution Ltd* [2009] EWCA Civ 16, [2009] 1 Lloyd's Rep. 391 at [26]–[27]; *Lancore Services Ltd v Barclays Bank Plc* [2009] EWCA Civ 752, [2010] 1 All E.R. 763; *Dominion Corporate Trustees Ltd v Capmark Bank Europe Plc* [2011] EWCA Civ 380; *Southwark LBC v IBM UK Ltd* [2011] EWHC 549 (TCC), 135 Con, L.R. 136; *Carey Group Plc v AIB Group (UK) Plc* [2011] EWHC 567 (Ch), [2011] 2 All E.R. (Comm) 461; *Stevensdrake Ltd v Hunt* [2017] EWCA Civ 1173 at [49]; *Union of Shop, Distributive and Allied Workers v Tesco Stores Ltd* [2022] EWCA Civ 978 at [45]; *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2022] EWCA Civ 1021 at [140].
- 84 *Irish Bank Resolution Corp Ltd v Camden Markets Holding Corp* [2017] EWCA Civ 7, [2017] 2 All E.R. (Comm) 781 at [35].
- 85 *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 W.L.R. 85 at [35] per Lord Hodge.
- 86 The approach adopted by Lord Neuberger in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [28], albeit he did recognise that it may “conceivably be appropriate to reconsider the interpretation of the express term of a contract once one has decided whether to imply a term”.
- 87 The approach adopted by Lord Carnwath in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [71]. In *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 W.L.R. 85 at [43] Lord Mance observed that he “would not encourage advocates or courts to adopt too rigid or sequential an approach to the processes of consideration of the express terms and of consideration of the possibility of an implication.”. Given that Lord Neuberger’s judgment in *Marks & Spencer* is the majority judgment, the correct approach to take is therefore the “sequential” rather than the “iterative” approach, subject to Lord Neuberger’s caveat noted in the previous footnote.
- 88 *Dymoke v Association for Dance Movement Psychotherapy UK Ltd* [2019] EWHC 94 (QB) at [60].
- 89 *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2018] EWHC 1743 (Ch) at [48], approved on appeal at [2019] EWCA Civ 1290, [2019] P.N.L.R. 33 at [33].

90 *J N Hipwell & Son v Szurek [2018] EWCA Civ 674* at [27]. See also *One Fish Co Ltd v Iceland Foods Ltd [2017] EWHC 3366 (Comm)* at [32]; *Kason Kek-Gardner Ltd v Process Components Ltd [2017] EWCA Civ 2132*, [2018] 2 All E.R. (Comm) 381 at [52]; *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133*, [2011] 2 Lloyd's Rep. 1 at [41]; *Exxonmobile Sales and Supply Corp v Texaco Ltd [2003] EWHC 1964 (Comm)*, [2004] 1 All E.R. (Comm) 435 at [27]; *NHS Commissioning Board v Vasant [2019] EWCA Civ 1245*, [2020] 1 All E.R. (Comm) 799 at [51]; *Yoo Design Services Ltd v New Reality Pte Ltd [2020] EWHC 1077 (Comm)* at [82]–[85] (affirmed [2021] EWCA Civ 560 at [26]); *Essex CC v UBB Waste (Essex) Ltd (No.2) [2020] EWHC 1581 (TCC)*, 191 Con. L.R. 77 at [110]–[111]; *Mackie Motors (Brechin) Ltd v RCI Financial Services Ltd [2022] EWHC 1942 (Ch)* at [26]. However, the presence in the contract of an entire agreement clause may be regarded as a factor which counts against the implication of a term: *Sparks v Biden [2017] EWHC 1994 (Ch)* at [54].

91 *Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm)*, [2019] 1 C.L.C. 207 at [37].

92 On which see further para.16-030.

93 *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133*, [2011] 2 Lloyd's Rep. 1 at [41].

94 *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133*, [2011] 2 Lloyd's Rep. 1 at [41]. See also *Exxonmobile Sales and Supply Corp v Texaco Ltd (The Helene Knutsen) [2003] EWHC 1964 (Comm)*, [2003] 2 Lloyd's Rep. 686 where an entire agreement clause which provided that the contract “contains the entire agreement of the parties ... and there is no other promise, representation, warranty, usage or course of dealing affecting it” was held to be effective to exclude an implied term based on custom or usage. In the case where the term is implied into the contract as a result of the intervention of Parliament, the relevant statute or statutory instrument may state in express terms that the implied term cannot be excluded, in which case there is no question of an entire agreement clause being capable of excluding such a term.

(b) - Illustrations

Chitty on Contracts 34th Ed.

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Introduction

- 16-020 The implication of a term into a contract depends to a significant extent on the facts and circumstances of the individual case, particularly where the term sought to be implied is a term in fact (in the case of a term implied in law, once the contract has been found to fall within the relevant class of contractual relationship, the implication of the term is more likely to follow from that classification rather than from the facts of the individual case). By way of illustration, the approach to implication adopted in four recent cases will be examined before turning to consider some examples the significance of which transcends the particular facts of the case and so may be said to be of wider application.

(i) - General Illustrations

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Marks and Spencer v BNP Paribas

16-021 The issue before the Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*⁹⁵ was whether to imply into a lease a term which entitled the lessee to recover that part of an advance payment of rent which related to a period after the exercise by the lessee of a break period in the lease. The Supreme Court declined to make the implication for two principal reasons. First, the lease was:

“... a very detailed document, which had been entered into between two substantial and experienced parties, and had been negotiated and drafted by expert solicitors.”⁹⁶

Further, the terms of the lease demonstrated “how carefully and fully the parties considered and identified their rights against each other”⁹⁷ in relation to the disputed matter but they had not made provision for the return of the balance of an advance payment of rent in the circumstances which had occurred. Second, the existence of the implied term was not supported by “the general attitude of the law to the apportionability of rent payable in advance”.⁹⁸ The long-established rule of the common law, and therefore the default position, is that rent, whether payable in arrears or in advance, is not apportionable in time. This being the case, Lord Neuberger concluded that:

“... save in a very clear case indeed, it would be wrong to attribute to a landlord and a tenant, particularly when they have entered into a full and professionally drafted lease,

an intention that the tenant should receive an apportioned part of the rent payable and paid in advance, when the non-apportionability of such rent has been so long and clearly established.”⁹⁹

Al Jaber v Al Ibrahim

- 16-022 A second example of a recent decision in which the court declined to imply a term into a contract is the decision of the Court of Appeal in *Al Jaber v Al Ibrahim*.¹⁰⁰ The claimant orally agreed to lend US\$30 million to the defendant in connection with the launch of a broadcasting service in the Middle East. Nothing was said at the time about whether or not the loan would bear interest. The Court of Appeal declined to imply a term into the agreement requiring the defendant to pay interest. The first reason given for this conclusion was that it has been clear law since 1812 that interest on a loan cannot be recovered unless there is express provision to that effect in the contract between the creditor and the debtor or an obligation to pay interest can be inferred from a trade usage, custom or the special circumstances of the case.¹⁰¹ So there was no term implied in law. Second, in so far as there was said to be a term implied in fact, the claim was not supported by the evidence. The claimant’s case on interest had “emerged gradually and uncertainly”¹⁰² over the course of the litigation. Third, the loan was held to be capable of operating to the mutual benefit of the parties without interest being payable.¹⁰³ This being the case, it was held that an implied term for the payment of interest was not necessary to give business efficacy to the agreement. Nor was it so obvious that it went without saying or such that the loan would lack commercial or practical consequence without the term.

J N Hipwell & Son v Szurek

- 16-023 On the other side of the line is the decision of the Court of Appeal in *J N Hipwell & Son v Szurek*¹⁰⁴ where a lease made provision for the maintenance of the interior of the building but in relation to its exterior no express provision was made for its maintenance, nor for its plumbing or electrical installation or supply. In this respect the lease was held to contain a “plain and obvious gap”¹⁰⁵ which was “inconsistent with the objective intentions of the parties”.¹⁰⁶ In order to ensure that the lease did not lack commercial or practical coherence, or, as a matter of business necessity,¹⁰⁷ it was held that this gap should be filled by the implication of a term that:

“... the electrical installation which serves the Premises (including all wires, ducts, cables conduits or other channels through which electricity is conveyed) is safe and subject of a current Electrical Safety Certificate.”¹⁰⁸

Duval v 11–13 Randolph Crescent Ltd

- 16-024 A final example is *Duval v 11–13 Randolph Crescent Ltd*¹⁰⁹ in which the Supreme Court implied into a long lease of a block of flats a term that the landlord would not put it out of its power to enforce an absolute covenant by a lessee of the same building not to “cut, maim or injure any wall within or enclosing the demised premises”. So, when a lessee of the building sought the permission of the landlord to remove part of a load-bearing wall, it was held, in a claim brought by another lessee of the same building, that the effect of the implied term was that the landlord was not entitled to grant the permission sought. The purpose of the clause was held to be to provide a degree of protection to all of the lessees of the flats in the building and that protection would have been deprived of “practical content”¹¹⁰ if the landlord had been permitted not to enforce the clause by licensing what would otherwise have been a breach of the clause in consenting to the removal of part of the load-bearing wall.

Assessment

- 16-025 It can be seen from these illustrations that no one factor predominates when deciding whether it is necessary to imply a term into a contract in order to make the contract work. The fact that the contract between the parties is a detailed one, such as a lease, is a factor which militates against implication¹¹¹ but it will not prevent a court from making the implication where there is a “plain and obvious gap” in the lease which needs to be filled in order to make it work as the parties intended.¹¹² While the factors vary from case to case, the constant is the need for the party seeking to establish the implied term to lead evidence to demonstrate that the term is necessary in order to make the contract work. This can be a particularly difficult task in the case where the contractual right sought to be implied is one that is not known to the law and where the courts might expect a party bargaining for such a right to include it as an express term of the contract.¹¹³ Although it is not an easy task to persuade a court to imply a term into a contract, there is nothing anomalous about an implied term. It is an established feature of English contract law, albeit one that operates within relatively narrow limits.

Footnotes

- 95 [2015] UKSC 72, [2016] A.C. 742.
- 96 [2015] UKSC 72, [2016] A.C. 742 at [38].
- 97 [2015] UKSC 72, [2016] A.C. 742 at [40].
- 98 [2015] UKSC 72, [2016] A.C. 742 at [42].
- 99 [2015] UKSC 72, [2016] A.C. 742 at [50].
- 100 [2018] EWCA Civ 1690, [2019] 1 W.L.R. 885.
- 101 [2018] EWCA Civ 1690, [2019] 1 W.L.R. 885 at [27].
- 102 [2018] EWCA Civ 1690, [2019] 1 W.L.R. 885 at [31].
- 103 [2018] EWCA Civ 1690, [2019] 1 W.L.R. 885 at [35].
- 104 [2018] EWCA Civ 674.
- 105 [2018] EWCA Civ 674 at [32].
- 106 [2018] EWCA Civ 674 at [33].
- 107 [2018] EWCA Civ 674 at [38].
- 108 [2018] EWCA Civ 674 at [39].
- 109 [2020] UKSC 18, [2020] A.C. 845.
- 110 [2020] UKSC 18, [2020] A.C. 845 at [55]. The conclusion was reinforced by a clause in the lease under which the landlord covenanted on the request of a lessee and provided it was given security for its costs to enforce against another lessee a covenant such as the undertaking not to remove part of a load-bearing wall. To conclude that the landlord could defeat the entitlement to enforce the covenant by giving its permission to the breach before another lessee could make an enforcement request was held to be “uncommercial and incoherent” (at [57]).
- 111 As was the case in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742.
- 112 As was the case in *J N Hipwell & Son v Szurek* [2018] EWCA Civ 674 and *Duval v 11–13 Randolph Crescent Ltd* [2020] UKSC 18, [2020] A.C. 845.
- 113 As was the case in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 and *Al Jaber v Al Ibrahim* [2018] EWCA Civ 1690, [2019] 1 W.L.R. 885.

(ii) - Illustrations of Particular Implied Terms

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Co-operation

16-026 The court may be willing to imply a term that the parties shall co-operate to ensure the performance of their bargain.¹¹⁴ Thus:

“... as a general rule... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.”¹¹⁵

Notwithstanding the reference to “a general rule,” the term is not an inevitable feature of a commercial contract: the requirements for the implication of a term into a contract must still be satisfied before the implication will be made.¹¹⁶ The term is most likely to be implied where “positive co-operation between the parties is required to bring about a particular end contemplated by the contract”.¹¹⁷ Also the duty to co-operate and the degree of co-operation required is to be determined, not by what is reasonable, but by the obligations imposed—whether expressly or impliedly—upon each party by the agreement itself, and the surrounding circumstances.

¹¹⁸



Prevention of performance

16-027 By the same token:



“... if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can become operative.”¹¹⁹

Also where a binding contract is subject to a condition precedent, a term may be implied that a party will not do an act which, if done, would prevent fulfilment of the condition.¹²⁰ But these implications are not inevitable¹²¹: the alleged term may be unreasonably wide¹²² or be displaced by an express term

¹²³

U or the nature of the contract may indicate otherwise.¹²⁴ A term may also be implied that a right, remedy or benefit expressly conferred upon one party to a contract or to which he may be entitled shall not be available if that party relies on his own breach of the contract to establish his claim.¹²⁵

Export and import licences

16-028 In international trade, contracts of sale of goods are frequently the subject of governmental restrictions and a licence may have to be obtained for the import or export of goods from one country to another. The parties will normally provide expressly who is to assume this responsibility, but, in the absence of any express provision, it will be necessary to imply a term as to whether the duty to obtain a licence rests upon the buyer or the seller.¹²⁶ Once the incidence of this duty has been determined, the court will then have to consider whether the party placed under the duty impliedly undertook to use his best endeavours to obtain a licence¹²⁷ or whether he undertook absolutely that a licence would be obtained.¹²⁸ In any event, both parties are under an obligation to co-operate with each other to the extent that is necessary for the obtaining of a licence.¹²⁹

Implied restriction on contractual discretion ¹³⁰

- 16-029 The courts have sought to ensure that contractual powers, particularly those relating to the exercise of a discretion, are not abused and they have done this by implying a term:

“... as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.”¹³¹

The courts recognise that, in such cases, they are not the primary decision-makers and that their task is to review the decision that has been made by the contracting party.¹³² The standard of review should be no higher than that developed in the context of the judicial review of administrative action but this may require not only that the contractual decision-maker exclude extraneous considerations from the decision-making process but that it should also be required to take into account those considerations which are obviously relevant to the decision in question.¹³³ Unless the court can imply a term that the outcome be objectively reasonable (for example a reasonable price or a reasonable term), the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its commercial purpose.¹³⁴ Thus a number of examples can be found of cases in which the courts have implied a term that the discretion should not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or in a way that no reasonable person, acting reasonably, would act.¹³⁵ The implied term has been described as a duty of rationality¹³⁶ but its precise scope may depend on the nature of the relationship between the parties¹³⁷ and, in a commercial context, may demand no more than that the discretion be exercised “in pursuit of legitimate commercial aims”.¹³⁸ The mere fact that a contracting party has a choice to exercise does not of itself attract the operation of the implied term.¹³⁹ So, for example, a term should not be implied where a contracting party has a decision to make in relation to the exercise of an absolute contractual right.¹⁴⁰ Similarly, the discretion conferred may be found, on its true construction, to be unqualified, in which case the court ought not to imply a term restraining the exercise of the right, given the rule that an implied term cannot contradict or be inconsistent with an express term of the contract.¹⁴¹

Implied term as to trust and confidence

- 16-030 In *Malik v Bank of Credit and Commerce International SA*¹⁴² the House of Lords recognised that, in a contract of employment, there was to be implied a term that the employer should not:

“... without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

The exact boundaries of the incidence of this implication are somewhat uncertain ¹⁴³ but the duty may possibly be reciprocal in some cases and extend to analogous relationships, e.g. principal and agent, ¹⁴⁴ but not to ordinary commercial relationships. ¹⁴⁵

Implied term as to good faith

- 16-031 English law has traditionally been hostile to the imposition of any general principle of good faith in the performance of contracts ¹⁴⁶ but in *Yam Seng Pte Ltd v International Trade Corp Ltd*¹⁴⁷ Leggatt J considered the arguments for (and against) the implication of such a duty. While the issue awaits definitive resolution, it would appear that the courts may now be willing to imply such a duty as a matter of law into a narrow category of contracts, such as “contracts between partners or others whose relationship is characterised as a fiduciary one”¹⁴⁸ or, more controversially, a “relational contract”

¹⁴⁹

U and to imply it as a matter of fact where the implication is necessary to give effect to the intention of the parties. However, the courts are likely to be slow to imply such a term as a matter of fact and are more likely to decline to do so either because it is inconsistent with or does not fit with the express terms of the contract ¹⁵⁰ or because of the arm’s-length nature of the relationship between the parties. ¹⁵¹ The willingness of the court to imply the term may also be linked to the substantive content of the term. The more demanding the term, the less willing the court may be to imply the term. ¹⁵² Conversely, if the term requires only that the parties act honestly and with integrity, ¹⁵³ the court may be more willing to imply the term and, indeed, it may not be possible for the parties to exclude an obligation to act honestly. ¹⁵⁴

Implied term as to duration of contract

- 16-032 A contract which contains no express provision for its determination may yet be determined by reasonable notice on the part of one or both of the parties. The question whether a contract can be determined in this way is often said to depend upon the implication of a term, although it is probably

better to regard it as depending upon the true construction of the agreement.¹⁵⁵ Nevertheless, since ex hypothesi the agreement contains no provisions expressly dealing with determination, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement.¹⁵⁶ Thus a contract to supply gas to a public authority in such quantities as it should require has been held determinable by either party on reasonable notice,¹⁵⁷ and a licence to occupy a theatre and to produce their stage plays, which gave to the licensee an option to extend the licence at stated intervals, but which contained no provisions for determination by the licensor, was held to be determinable by the licensor upon giving reasonable notice.¹⁵⁸ Similar constructions have been adopted in the case of contracts between employer and employee,¹⁵⁹ between principal and agent,¹⁶⁰ and between solicitor and client in respect of an indefinite retainer.¹⁶¹

Contractual licences.

- 16-033 A licence coupled with the grant of an interest in land cannot be revoked so as to defeat the grant to which it is appurtenant.¹⁶² Since the **Judicature Act 1873** such a licence may be made either by deed or by a specifically enforceable agreement in writing.¹⁶³ On the other hand a “bare licence” is revocable at any time upon the licensor giving clear¹⁶⁴ and adequate¹⁶⁵ notice to the licensee. The position of a contractual licensee is that, if a licence is given for consideration and coupled with an agreement, whether express or implied, that it will not be revoked until the effluxion of a specified period of time or the happening of a particular event, it is irrevocable until the expiration of the period or the happening of the event.¹⁶⁶ An injunction will be granted to restrain the licensor from revoking the licence, or from acting in pursuance of the purported revocation,¹⁶⁷ and the licensee may also claim damages for breach of contract¹⁶⁸ and for assault should he be forcibly ejected by the licensor.¹⁶⁹

Implication from words of recital

- 16-034 Where words of recital or reference manifest a clear intention that the parties should do certain acts, the courts may from these infer a covenant to do such acts, just as if the instrument had contained an express agreement to that effect.¹⁷⁰ So a recital in a separation deed that a wife had agreed to live apart from her husband implied a covenant by the wife to live apart.¹⁷¹ In contrast, however, with the use of words of recital in order to ascertain the meaning of a written contract,¹⁷² the courts are reluctant to imply such a covenant in the absence of a manifest intention to do so:

“It is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted.”¹⁷³

So the recital of an agreement will not of itself suffice to create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject matter.¹⁷⁴

Footnotes

- 114 See *Bateson* [1960] *J.B.L.* 187; *Burrows* (1968) 31 *M.L.R.* 390, 402; *Peden* (2000) 15 *J.C.L.* 56. In the event that English law develops an implied term requiring the parties to act in good faith in the performance of the contract (see more generally paras 2-024—2-091 above and para.16-031, below), it is possible that the duty to co-operate may be absorbed within the broader good faith duty: *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] *EWHC 111 (QB)*, [2013] 1 *All E.R. (Comm)* 1321 at [139].
- 115 *Mackay v Dick* (1881) 6 *App. Cas.* 251, 263. See also *Hunt v Bishop* (1853) 8 *Ex.* 675; *Roberts v Bury Commissioners* (1870) *L.R.* 5 *C.P.* 310, 325; *Nelson v Dahl* (1879) 12 *Ch. D.* 568, 592 (*affirmed* (1881) 6 *App. Cas.* 38); *Sprague v Booth* [1909] *A.C.* 576, 580; *Kleinert v Abosso Gold Mining Co* (1913) 58 *S.J. (PC)* 45; *Harrison v Walker* [1919] 2 *K.B.* 453; *Colley v Overseas Exporters* [1921] 3 *K.B.* 302, 309; *Panamena Europa Navegacion v Frederick Leyland & Co Ltd* [1947] *A.C.* 428, 436; *Luxor (Eastbourne) Ltd v Cooper* [1941] *A.C.* 108, 118; *A. V. Pound & Co Ltd v M. W. Hardy & Co Inc* [1956] *A.C.* 588, 608, 611; *Sociedad Financiera de Bienes Raices v Agrimpex* [1961] *A.C.* 135; *Sunbeam Shipping Co Ltd v President of India* [1973] 1 *Lloyd's Rep.* 482, 486; *Schindler v Pigault* [1975] 1 *C.L.* 401; *Metro Meat Ltd v Fares Rural Co Pty Ltd* [1985] 2 *Lloyd's Rep.* 13, 14; *Merton LBC v Hugh Leach Ltd* (1985) 32 *B.L.R.* 51; *Kurt A. Becher GmbH & Co K.G. v Roplak Enterprises SA* [1991] 2 *Lloyd's Rep.* 23, 30, 34; *Davy Offshore Ltd v Emerald Field Contracting Ltd* (1991) 27 *Con. L.R.* 138; *Nissho Iwai Petroleum Inc v Cargill International SA* [1993] 1 *Lloyd's Rep.* 80, 84; *Scottish Power Plc v Kvaerner Construction (Regions) Ltd* 1999 *S.L.T.* 721; *Goodway v Zurich Insurance Co* [2004] *EWHC 137 (TCC)*, (2004) 96 *Const. L.R.* 49; *General Trading Co (Holdings) Ltd v Richmond Corp Ltd* [2008] *EWHC 1479 (Comm)*, [2008] 2 *Lloyd's Rep.* 475 at [87]; *Hudson Bay Apparel Brands LLC v Umbro International Ltd* [2009] *EWHC 2861 (Ch)* at [119], [128], [136], [140]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] *EWHC 111 (QB)*, [2013] 1 *All E.R. (Comm)* 1321 at [139]; *Swallowfalls Ltd v Monaco Yachtung & Technologies S.A.M.* [2014] *EWCA Civ* 186, [2014] 2 *Lloyd's Rep.* 50 at [32], [33]; *Ali v Petroleum Co of Trinidad and Tobago* [2017]

- UKPC 2, [2017] I.C.R. 531 at [8]; *Sanderson Ltd v Simtom Food Projects Ltd* [2019] EWHC 442 (TCC), [2019] B.L.R. 260 at [25]. See also Vol.II, para.39-075.
- 116 *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep. 146, 161; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep. 418 (affirmed [1999] 1 Lloyd's Rep. 482); *Kallang Shipping SA v AXG Assurances Senegal (The "Kallang")* (No.2) [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep. 124 at [79]; *Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou LO (The Duden)* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep. 145 at [55].
- 117 *Kallang Shipping SA v AXG Assurances Senegal (The "Kallang")* (No.2) [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep. 124 at [79]; *Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou LO (The Duden)* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep. 145 at [55].
- ①118 *Mackay v Dick* (1881) 6 App. Cas. 251, 263; *Mona Oil Equipment and Supply Co Ltd v Rhodesia Rys Ltd* [1949] 2 All E.R. 1014; *Hargreaves Transport Ltd v Lynch* [1969] 1 W.L.R. 215; *Liverpool CC v Irwin* [1977] A.C. 239; *Kurt A. Becher GmbH & Co K.G. v Roplak Enterprises SA (The World Navigator)* [1991] 2 Lloyd's Rep. 23, 30, 31, 34; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep. 483, 492; *Jolley v Carmel Ltd* [2000] 2 E.G.L.R. 154, 159; *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [17]; *Brookfield Construction Ltd v Foster and Partners Ltd* [2009] EWHC 307 (TCC), [2009] B.L.R. 246; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [106]; *Re Force India Formula One Team Ltd* [2022] EWHC 933 (Ch) at [29]–[48].
- 119 *Stirling v Maitland* (1864) 5 B. & S. 840, 852. See also *Rhodes v Forwood* (1876) 1 App. Cas. 256, 272, 274; *Turner v Goldsmith* [1891] 1 Q.B. 544; *Ogdens Ltd v Nelson* [1905] A.C. 109; *Warren v Agdeshman* (1922) 38 T.L.R. 588; *C. French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 A.C. 451; *Southern Foundries* (1926) Ltd v *Shirlaw* [1940] A.C. 701; *William Cory & Son Ltd v City of London Corp* [1951] 2 K.B. 476, 484; *A. Hamson & Son (London) Ltd v S. Martin Johnson & Co Ltd* [1953] 1 Lloyd's Rep. 553; *Shindler v Northern Raincoat Ltd* [1960] 1 W.L.R. 1038; *The Unique Mariner* (No.2) [1979] 1 Lloyd's Rep. 37; *Merton LBC v Hugh Leach Ltd* (1985) 32 B.L.R. 51; *Martin-Smith v Williams* [1999] E.M.L.R. 571; *CEL Group Ltd v Nedloyd Lines UK Ltd* [2003] EWCA Civ 1716, [2004] 1 Lloyd's Rep. 381 at [11], [22] and [23]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [139]; *Duval v 11–13 Randolph Crescent Ltd* [2020] UKSC 18, [2020] A.C. 845 at [44]–[59]. See also *Bateson* [1960] J.B.L. 187; *Burrows* (1968) 31 M.L.R. 390; above, para.4-200; Vol.II, para.39-074.
- 120 *Holme v Guppy* (1838) 3 M. & W. 387, 389; *Inchbald v Western Neilgherry Coffee, etc., Co* (1864) 17 C.B. N.S. 733; *Roberts v Bury Improvements Commissioners* (1870) L.R. 5 C.P. 310, 316; *Mackay v Dick* (1881) 6 App. Cas. 251; *Dodd v Churton* [1897] 1 Q.B. 562, 566; *Barque Quilpué Ltd v Brown* [1904] 2 K.B. 264, 271; *Hickman & Co v Roberts* [1913] A.C. 229; *Trollope v Martyn* [1934] 2 K.B. 436; *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All E.R. 452, 455; *Jebco Properties v Mastforce* [1992] N.P.C. 42; *Nissho Iwai Petroleum Co Inc v Cargill International SA* [1993] 1 Lloyd's Rep. 80; *Taylor v Rive Droite Music Ltd* [2005] EWCA Civ 1300, [2006] E.M.L.R. 4.

- 121 *Law Debenture Trust Corp Plc v Ukraine* [2018] EWCA Civ 2026, [2019] Q.B. 1121 at [207] (there is “no general rule” that a term will be implied prohibiting one party from “preventing” the performance of the other).
- 122 *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] E.M.L.R. 472; *Times Newspapers Ltd v George Weidenfeld & Nicolson Ltd* [2002] F.S.R. 29.
- 123 *Locke v Candy and Candy Ltd* [2010] EWCA Civ 1350, [2011] I.R.L.R. 163; *Re Force India Formula One Team Ltd* [2022] EWHC 933 (Ch) at [29]–[48].
- 124 *Aspdin v Austin* (1844) 5 Q.B. 671; *European, etc., Mail Co v Royal Mail Steam Packet Co* (1861) 30 L.J.C.P. 247; *Rhodes v Forwood* (1876) 1 App. Cas. 256; *Hamlyn v Wood* [1891] 2 Q.B. 488; *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108; *William Cory & Son Ltd v City of London Corp* [1951] 2 K.B. 476; *Farr v Admiralty* [1953] 1 W.L.R. 965; *Thompson v Asda-MFI Group Plc* [1988] Ch. 241; *Davy Offshore Ltd v Emerald Field Contracting Ltd* (1991) 27 Con. L.R. 138; *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] E.M.L.R. 477; *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC), (2007) 111 Const. L.R. 78; see Vol.II, para.39-074.
- 125 cf. *Richco International Ltd v Alfred C. Toepfer International GmbH* [1991] 1 Lloyd's Rep. 136, 144; *Bulk Shipping A.G. v Ipcos Trading SA* [1992] 1 Lloyd's Rep. 39, 43; *Petroplus Marketing AG v Shell Trading International Ltd (The “Niviae”)* [2009] EWHC 1024 (Comm), [2009] 2 Lloyd's Rep. 611 at [17].
- 126 *H.O. Brandt & Co v H.N. Morris & Co* [1917] 2 K.B. 784; *J.W. Taylor & Co v Landauer & Co* [1940] 4 All E.R. 335; *Mitchell Cotts & Co (Middle East) Ltd v Hairco Ltd* [1943] 2 All E.R. 552; *A.V Pound & Co Ltd v M.W. Hardy & Co Inc* [1956] A.C. 588; *Congimex Companhia Geral, etc., SARL v Tradax Export SA* [1983] 1 Lloyd's Rep. 250. See Benjamin's Sale of Goods, 11th edn (2021), paras 18-636—18-645.
- 127 *Re Anglo-Russian Merchant Traders Ltd and John Batt & Co (London) Ltd* [1917] 2 K.B. 679; *Brauer & Co (G.B.) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497. See also *Windschuegl Ltd v Pickering & Co Ltd* (1950) 84 Ll.L. Rep. 89, 93; *Société D'Avances Commerciales (London) Ltd v A. Besse & Co (London) Ltd* [1952] 1 T.L.R. 644, 646; *Compagnie Algerienne de Meunerie v Katana Societa de Navigatione Marittima SpA* [1959] 1 Q.B. 527; *Provimi Hellas A.E. v Warinco A.G.* [1978] 1 Lloyd's Rep. 373; *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep. 560, 562; Benjamin's Sale of Goods at paras 18-642—18-666.
- 128 *Mitchell Cotts & Co (Middle East) Ltd v Hairco Ltd* [1943] 2 All E.R. 552; *Partabmull Rameshwar v Sethia (K.C.)* (1944) Ltd [1950] 1 All E.R. 51 (affirmed [1951] 2 All E.R. 352n); *Peter Cassidy Seed Co Ltd v Osuustukkukauppa I.L.* [1957] 1 W.L.R. 273; *Congimex Companhia Geral, etc., SARL v Tradax Export SA* [1983] 1 Lloyd's Rep. 250.
- 129 *A.V. Pound & Co Ltd v M.W. Hardy & Co Inc* [1956] A.C. 588, 608, 611; *Kyprianou v Cyprus Textiles Ltd* [1958] 2 Lloyd's Rep. 60.
- 130 See also above, paras 2-066—2-071.
- 131 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 W.L.R. 1661 at [18].
- 132 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 W.L.R. 1661 at [19]; *Watson v Watchfinder.co.uk Ltd* [2017] EWHC 1275 (Comm), [2017] Bus. L.R. 1309 at [103].

- 133 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 W.L.R. 1661 at [28]–[29].
- 134 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 W.L.R. 1661 at [30].
- 135 *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42, [2014] 4 All E.R. 907 at [37]; *Abu Dhabi National Tanker Co v Product Star Shipping Ltd* [1993] 1 Lloyd's Rep. 397, 404; *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685 at [31]; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047, [2001] 2 All E.R. (Comm) 299 at [67]; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 538 at [60]–[69]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [145]; *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [57], [89]; *Hockin v Royal Bank of Scotland* [2016] EWHC 925 (Ch) at [37]; *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm) at [242]–[276]; see above, para.2-066. cf. *Paragon Finance Plc v Pender* [2005] EWCA Civ 760, [2005] 1 W.L.R. 3412; *Everwarm Ltd v BN Rendering Ltd* [2019] EWHC 3060 (TCC), 187 Con. L.R. 240 at [123]; *UK Acorn Finance Ltd v Markel (UK) Ltd* [2020] EWHC 922 (Comm), [2020] Lloyd's Rep. I.R. 356 at [63]. See also Vol.II, para.41-297 (interest rates); above, para.2-066, Vol.II, para.42-080 (bonuses). The cases in which a term of this nature has been implied are cases in which the contracting party had a choice to make among a range of options, taking into account the interests of both parties. Where, on the other hand, the discretion relates to the exercise of an absolute contractual right, there is no room for the implication of a term placing a limit on the exercise of that contractual right: *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [83].
- 136 *Faieta v ICAP Management Services Ltd* [2017] EWHC 2995 (QB), [2018] I.R.L.R. 227 at [21].
- 137 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 W.L.R. 1661 at [30] where the relationship between the parties was an employment relationship and it was acknowledged (at [32]) that an employment contract is “of a different character from an ordinary commercial contract”.
- 138 *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, [2018] 1 W.L.R. 3529 at [169].
- 139 See also above, para.2-069.
- 140 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [83]; *UBS AG v Rose Capital Ventures Ltd* [2018] EWHC 3137 (Ch) at [50]; *TAQA Bratini Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), [2020] 2 Lloyd's Rep. 64; *Essex CC v UBB Waste (Essex) Ltd (No.2)* [2020] EWHC 1581 (TCC), 191 Con. L.R. 77 at [97]; *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch) at [183]. The question as to what amounts to a “discretion” for this purpose merits further examination: see, for example, *Brogden v Investec Bank Plc* [2016] EWCA Civ 1031, [2017] I.R.L.R. 90 at [20] where the Court of Appeal held that Leggatt J had erred in concluding that the issue before the court was one that related to the exercise of a contractual discretion rather than the interpretation of the scope of a contractual right.

- 141 See para.16-018 and *Reda Ltd v Flag* [2002] UKPC 38, [2002] I.R.L.R. 747 at [45]. However, a court may be slow to conclude that the express terms of the contract confer a power on a contracting party to exercise its discretion irrationally and so read the implied term into what might otherwise appear to be a very broadly worded term. So, for example, a clause which confers an “absolute discretion” on a contracting party may nevertheless be subject to the implied term: *Faieta v ICAP Management Services Ltd* [2017] EWHC 2995 (QB), [2018] I.R.L.R. 227. In this way a discretion which is stated to be “absolute” may not be quite as absolute as the party exercising the right may believe it to be.
- 142 [1998] A.C. 20. See Vol.II, para.42-154.
- 143 See above paras 2-062—2-064, Vol.II, paras 42-154—42-157. For the employee’s duty of fidelity and good faith, see Vol.II, para.42-064.
- 144 *Gledhill v Bentley Designs (UK) Ltd* [2010] EWHC 1965 (QB), [2011] 1 Lloyd’s Rep. 270. But see below, para.21-123.
- 145 *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 451 at [51]; *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Co* [2015] EWHC 1322 (Ch); *Mr H TV Ltd v ITV2 Ltd* [2015] EWHC 2840 (Comm) at [43]–[51]. But see *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 (implied term as to good faith); see above, paras 2-081—2-082.
- 146 See para.2-036, above.
- 147 [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [121]–[154]. Contrast *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [105] and [150]; *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] B.L.R. 484; *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [85], [92]; and see above, paras 2-036, 2-081—2-082.
- 148 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [131].
- 149 *Al Nehayan v Kent* [2018] EWHC 333 (Comm), [2018] 1 C.L.C. 216 at [167]–[174]; *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [711] and [725]–[726]; *Essex CC v UBB Waste (Essex) Ltd (No.2)* [2020] EWHC 1581 (TCC), 191 Con. L.R. 77 at [104]–[106]; *Zymurgorium Ltd v Hammonds of Knutsford Plc* [2021] EWHC 2295 (Ch) at [28]–[32]. A non-exhaustive list of the characteristics of a “relational” contract was set out by Fraser J in *Bates v Post Office Ltd* at [725]. While these characteristics have been described as “helpful indicia” (*Essex CC v UBB Waste (Essex) Ltd (No.2)* [2020] EWHC 1581 (TCC), 191 Con. L.R. 77 at [106]), there has also been doubt cast on the utility of this attempt to define a “relational” contract from which a good faith duty is then derived (see *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [202]–[204]; *Russell v Cartwright* [2020] EWHC 41 (Ch) at [87] and *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch) at [216]). The question whether a particular contract is “relational” has been said to be “very much an area of developing law” (*Mackie Motors (Brechin) Ltd v RCI Financial Services Ltd* [2022] EWHC 1942 (Ch) at [28]). Rather than ask whether the contract is “relational” (on the basis of which a duty of good faith is then derived), the preferable approach would appear to be to examine all the facts and circumstances of the

case, including the alleged “relational” nature of the contract, when answering the question whether a reasonable reader of the contract would consider an obligation of good faith to be so obvious as to go without saying or whether such an obligation is necessary for the proper working of the contract between the parties. One of the difficulties here is that there is an extensive academic literature on “relational” contracts (see in particular *I.R. Macneil* (1978) 72 *Northwestern Univ L Rev* 854 and (1981) 75 *Northwestern Univ L Rev* 1018; and, for a survey of Macneil’s writing on the subject, see D. Campbell, *The Relational Theory of Contracts: Selected Works of Ian Macneil* (2001)) but it is not clear whether judges intend to draw on this literature when seeking to develop the legal concept of a “relational” contract for the purposes of English contract law. In particular, it is not clear whether “relational” here is being used as a synonym for a long-term contract or whether what the courts have in mind is a contract which is lacking in detail because the parties have chosen to repose trust in one another rather than enter into a lengthy, detailed and complex arm’s length deal. It is suggested that the courts should have the latter rather than the former in mind, but the extent to which this is the case remains to be conclusively resolved.

- 150 *Carewatch Care Services Ltd v Focus Care Services Ltd* [2014] EWHC 2313 (Ch) at [109]; *Greenclose Ltd v National Westminster Bank Plc* [2014] EWHC 1156 (Ch); *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC); *TSG Building Services v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] B.L.R. 484; *Globe Motors Inc v TRW Lucas Varsity Electric Steering Ltd* [2016] EWCA Civ 396, [2016] 1 C.L.C. 712 at [68]; *Teesside Gas Transportation Ltd v CATS North Sea Ltd* [2019] EWHC 1220 (Comm) at [38]; *Russell v Cartwright* [2020] EWHC 41 (Ch) at [89]; *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch) at [219] and [223]. Indeed, in an arm’s length commercial relationship the courts will generally incline against the implication of a good faith term and will put the onus on the parties to include an express term to this effect if they wish to be bound by such a duty: *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Co* [2015] EWHC 1322 (Ch) at [80].
- 151 *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat); *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC), [2015] B.L.R. 675; *Myers v Kestrel Acquisitions Ltd* [2015] EWHC 916 (Ch).
- 152 See, for example, *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [86] where the term proposed was taken to require “a contracting party to subordinate its own commercial interests to those of the other contracting party”. See also *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2016] 2 Lloyd’s Rep. 229 at [242]–[276].
- 153 *D&G Cars v Essex Police Authority* [2015] EWHC 226 (QB), [2015] All E.R. (D) 85 (Mar) at [173]; *Apollo Window Blinds Ltd v McNeil* [2016] EWHC 2307 (QB); *T and L Sugars Ltd v Tate and Lyle Industries Ltd* [2015] EWHC 2696 (Comm) at [152] (“while it would be right to imply a term that the Defendant would act in good faith and honestly in carrying out the process envisaged in clauses 3.7.1 and 3.7.3, there is no proper basis for the implication of the very much more onerous term for which the Claimant argues”); *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd* [2020] EWHC 16 (Comm) at [66]–[67] (where a term was implied that the parties would deal honestly with one another but not that they would deal with one another in good faith).

- 154 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [149].
- 155 *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] A.C. 173, 195, 203; *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 Q.B. 556, 578; *Staffordshire A.H.A. v South Staffordshire Waterworks Co* [1978] 1 W.L.R. 1387, 1399–1403, 1405.
- 156 *Re Spennborough UDC's Agreement* [1968] Ch. 139, 147. See also *Llanelli Rail and Dock Co v L. & N.W. Ry* (1873) L.R. 8 Ch. App. 942; (1875) L.R. 7 H.L. 550. cf. *Carnegie* (1969) 85 L.Q.R. 392.
- 157 *Crediton Gas Co v Crediton UDC* [1928] Ch. 174, 447. See also *Beverley Corp v Richard Hodgson & Sons Ltd* (1972) 225 E.G. 799; *Staffordshire A.H.A. v South Staffordshire Waterworks Co* [1978] 1 W.L.R. 1387; *Tower Hamlets LBC v British Gas Corp*, *The Times*, 23 March 1982. Contrast *Kirklees Metropolitan BC v Yorkshire Woollen District Transport Co* (1978) 77 L.G.R. 448; *Power Co Ltd v Gore DC* [1997] N.Z.L.R. 537; *Harbinger UK Ltd v GE Information Services Ltd* [2000] 1 All E.R. (Comm) 166; *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 457; *Servicepower Asia Pacific Pty Ltd v Servicepower Business Solutions Ltd* [2009] EWHC 179 (Ch), [2010] 1 All E.R. (Comm) 238.
- 158 *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] A.C. 173; cf. *Australian Blue Metal Ltd v Hughes* [1963] A.C. 74.
- 159 See Vol.II, paras 42-162, 42-166. Contrast *McClelland v Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594 where express terms prevented such implication.
- 160 *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 Q.B. 556. See below, para.21-166.
- 161 *Milner & Son v Percy Bilton Ltd* [1966] 1 W.L.R. 1582.
- 162 *Thomas v Sorrell* (1673) Vaugh. 330; *Jones v Earl of Tankerville* [1909] 2 Ch. 440.
- 163 *Walsh v Lonsdale* (1882) 21 Ch. D. 9 (or sufficient act of part performance).
- 164 *Mellor v Watkins* (1874) L.R. 9 Q.B. 400.
- 165 *Minister of Health v Bellotti* [1944] 1 K.B. 298; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 W.L.R. 761; *Australian Blue Metal Ltd v Hughes* [1963] A.C. 74.
- 166 *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] A.C. 173; *Bannister v Bannister* [1948] 2 All E.R. 133; *Errington v Errington* [1952] 1 K.B. 290; *Hounslow LBC v Twickenham Gardens Development Ltd* [1971] Ch. 233 (not followed in *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 N.Z.L.R. 309); *Tanner v Tanner* [1975] 1 W.L.R. 1346; *Verrall v Great Yarmouth BC* [1981] Q.B. 202. cf. *Chandler v Kerley* [1978] 1 W.L.R. 693 (contractual licence impliedly revocable on reasonable notice). A licence may also be created by estoppel, or its revocation restrained in equity: see *Inwards v Baker* [1965] 2 Q.B. 29; *E.R. Ives Investment Ltd v High* [1967] 2 Q.B. 379; *Binions v Evans* [1972] Ch. 359; *D.H.N. Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 W.L.R. 852; *Hardwick v Johnson* [1978] 1 W.L.R. 683; *Pascoe v Turner* [1979] 1 W.L.R. 431; *Williams v Staite* [1979] Ch. 291; *Re Sharpe* [1980] 1 W.L.R. 219; *Greasley v Cooke* [1980] 1 W.L.R. 1306; *Grant v Edwards* [1986] Ch. 638; *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107; *Hammond v*

- Mitchell [1991] 1 W.L.R. 1127*; cf. *Coombes v Smith [1986] 1 W.L.R. 808*. See also *Moriarty (1984) 100 L.Q.R. 346* and above, paras 6-155 et seq.
- 167 *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd [1948] A.C. 173*; *Foster v Robinson [1915] 1 K.B. 149, 156*. See also *Verral v Great Yarmouth BC [1981] Q.B. 202* (specific performance), and the cases in equity cited in the previous footnote.
- 168 *Kerrison v Smith [1897] 2 Q.B. 445*.
- 169 *Hurst v Picture Theatres Ltd [1915] 1 K.B. 1*. Contrast *Wood v Leadbitter (1845) 13 M. & W. 838*; *Thompson v Park [1944] K.B. 408*; *Cowell v Rosehill Racecourse Ltd (1936) 56 C.L.R. 605*, but these cases are of doubtful authority: see *Verral v Great Yarmouth BC [1981] Q.B. 202*.
- 170 *Saltoun v Houston (1824) 1 Bing. 433*; *Easterby v Sampson (1830) 6 Bing. 644*; *Courtney v Taylor (1843) 6 Man. & G. 851*; *Great Northern Ry v Harrison (1852) 12 C.B. N.S. 576, 609*; *Knight v Gravesend, etc., Waterworks Co (1857) 2 Hurl. & N. 6*; *Farrall v Hilditch (1859) 5 C.B.(N.S.) 840*; *Jackson v North Eastern Ry (1877) 7 Ch. D. 573*; *Mackenzie v Childers (1889) 43 Ch. D. 265*.
- 171 *Re Weston [1900] 2 Ch. 164*.
- 172 See above, para.15-073.
- 173 *Aspdin v Austin (1844) 5 Q.B. 671, 684*.
- 174 *Dawes v Tredwell (1881) 18 Ch. D. 354, 359*.

Section 3. - Terms Implied by Custom and Usage

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Section 3. - Terms Implied by Custom and Usage

When implied from usage or custom

- 16-035 If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom¹⁷⁵; provided there is no inconsistency between the usage and the terms of the contract.¹⁷⁶ To be binding, however, the usage must be notorious, certain and reasonable¹⁷⁷; and it must also be something more than a mere trade practice.¹⁷⁸ But when such usage is proved, it will form the basis of the contract between the parties, and:

“... their respective rights and liabilities are precisely the same as if without any usage they had entered into a special agreement to the like effect.”¹⁷⁹

These usages are incorporated on the presumption that:

“... the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages”¹⁸⁰

or on the ground that “the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain”.¹⁸¹ However, even in cases where the party alleged to be liable upon an implied promise, arising solely from the established usage of a particular trade, is not shown to have been cognisant of the usage, he can still be held to be liable by virtue of it¹⁸²

on the basis that “a person who deals in a particular market must be taken to deal according to the custom of that market”.¹⁸³

Usage employed by one of the parties

- 16-036 Where the usage is one which merely applies to the mode of dealing of a particular firm, a party cannot be bound thereby, unless he is shown to have had notice of it. To establish such a usage it must be proved that a course of dealing has acquired such a notoriety, has been so well established and has become so universal in the particular trade, that it must be taken to be incorporated into any contract that is entered into by the parties dealing in this particular business.¹⁸⁴

Express terms prevail

- 16-037 A custom or usage can only be incorporated into a contract if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion, and it can only be incorporated if it is not inconsistent with the tenor of the contract as a whole.¹⁸⁵ Thus a custom that commission was only payable to the broker who had negotiated a charterparty when freight was actually earned was ousted by an express term that commission was to be paid on the signing of the charter.¹⁸⁶ And a contract to ship rubber from the East to New York “direct and/or indirect” was alleged to have been duly carried out by shipping goods to the American Pacific seaboard and across the American continent to New York by train. Evidence of such a practice, said to have been common in the First World War, was disallowed as being contrary to the contract.¹⁸⁷

Footnotes

- 175 *Hutton v Warren* (1836) 1 M. & W. 466; *Dale v Humfrey* (1858) El. Bl. & El. 1004; *Tucker v Linger* (1882) 21 Ch. D. 18, 33, 34 (affirmed (1883) 8 App. Cas. 508); *Pike, Sons & Co v Ongley & Thornton* (1887) 18 Q.B.D. 708; *Fox-Bourne v Vernon & Co Ltd* (1894) 10 T.L.R. 647; *Lord Eldon v Hedley Bros* [1935] 2 K.B. 1; *E.E. & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 K.B. 302; *Mount v Oldham Corp* [1973] 1 Q.B. 309; *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303; *Novorossisk Shipping Co v Neopetro Co Ltd* [1990] 1 Lloyd's Rep. 425, 431; *Tony Cox (Dismantlers) Ltd v Jim 5 Ltd* (1997) 13 Const. L.J. 209. See above, paras 15-096—15-100.
- 176 See above, para.15-096; below, para.16-037.
- 177 *Yates v Pym* (1816) 6 Taunt. 446; *Daun v City of London Brewery Co* (1869) L.R. 8 Eq. 155, 161; *Nelson v Dahl* (1879) 12 Ch. D. 568, 575 (affirmed (1881) 6 App. Cas. 38); *Re Walkers*,

- Winser & Hamm and Shaw, Son & Co [1904] 2 K.B. 152; Ropner v Stoate Hosegood & Co (1905) 10 Com. Cas. 73; Cunliffe-Owen v Teather and Greenwood [1967] 1 W.L.R. 1421, 1438, 1439; Constan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust.) Ltd (1986) 160 C.L.R. 226; Pryke v Gibbs Hartley Cooper Ltd [1991] 1 Lloyd's Rep. 602, 615; Danowski v Henry Moore Foundation, The Times, 19 March 1996, CA; Exxonmobil Sales and Supply Corp v Texaco Ltd [2003] EWHC 1964 (Comm), [2003] 2 Lloyd's Rep. 686 at [21]; Lehman Brothers International (Europe) (In Administration) v Exotix Partners LLP [2019] EWHC 2380 (Ch), [2020] 1 All E.R. (Comm) 635 at [167].*
- 178 *Cunliffe-Owen v Teather and Greenwood [1967] 1 W.L.R. 1421, 1438; General Reinsurance Corp v Forsakringsaktiebolaget [1983] Q.B. 856, 874; Pryke v Gibbs Hartley Cooper Ltd [1991] 1 Lloyd's Rep. 602, 615; Vitol SA v Phibro Energy A.G. [1990] 2 Lloyd's Rep. 84, 90; Sucre Export SA v Northern Shipping Ltd [1994] 2 Lloyd's Rep. 266.* But trade practice may be relevant as part of the factual matrix and admissible as an aid to construction or the implication of a term: *Crema v Cenkos Securities Plc [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066* at [41].
- 179 *Raitt v Mitchell (1815) 4 Camp. 146, 149; Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd [1916] 1 A.C. 314, 324.*
- 180 *Hutton v Warren (1836) 1 M. & W. 466, 475; Gibson v Small (1853) 4 H.L. Cas. 353, 397.*
- 181 *Liverpool City Council v Irwin [1977] A.C. 239, 253; Baker v Black Sea & Baltic General Insurance Co Ltd [1998] 1 W.L.R. 974, 979.*
- 182 *Sutton v Tatham (1839) 10 A. & E. 27; Bayliffe v Butterworth (1847) 1 Ex. 425; Reynolds v Smith (1893) 9 T.L.R. 494; Hunt v Chamberlain (1896) 12 T.L.R. 186.*
- 183 *Bayliffe v Butterworth (1847) 1 Exch. 425, 429.*
- 184 *Houlder v General Steam Navigation Co (1862) 3 F. & F. 170; Salsi v Jetspeed Air Services Ltd [1977] 2 Lloyd's Rep. 57.*
- 185 *London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd [1958] 1 W.L.R. 661, 675; Kum v Wah Tat Bank Ltd [1971] 1 Lloyd's Rep. 439, 445.* An inconsistency for this purpose can be either linguistic or substantive: *Irish Bank Resolution Corp Ltd v Camden Markets Holding Corp [2017] EWCA Civ 7, [2017] 2 All E.R. (Comm) 781* at [35].
- 186 *Les Affréteurs Réunis Société Anonyme v Walford [1919] A.C. 801.*
- 187 *Re L. Sutro & Co v Heilbut, Symons & Co [1917] 2 K.B. 348.* See also *Humfrey v Dale (1857) 7 El. & Bl. 266, 274; Tucker v Linger (1883) 8 App. Cas. 508, 511; Westacott v Hahn [1918] 1 K.B. 495; Palgrave, Brown & Son Ltd v S.S. Turid [1922] 1 A.C. 397.*

Section 4. - Terms Implied by Legislation

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Section 4. - Terms Implied by Legislation

Introduction

- 16-038 Terms are sometimes implied into contracts by legislation (whether by statute or by statutory instrument). Typically, these terms are not implied into the contract in order to give effect to the intention of the parties but to pursue a particular policy goal (and this policy often requires not only that the term be implied into the contract but that the contracting parties be denied the freedom expressly to exclude the term from their contract or, to the same effect, that any attempt to do so is not “binding”¹⁸⁸). In such instances, unlike many of the cases discussed thus far in this chapter, there is no doubt about the existence of the implied term. In so far as difficulty is created, it is one that relates to the scope of the implied term and that is principally a question of the interpretation of the term in question. The remaining paragraphs of this chapter are devoted to an outline of some of the more important terms that are implied into contracts by legislation.

Sale of goods, hire-purchase and hire

- 16-039 Undertakings as to title, quality, fitness for purpose and correspondence with description or sample are implied into contracts of sale of goods by ss.12 to 15 of the Sale of Goods Act 1979,¹⁸⁹ into contracts of hire-purchase by ss.8 to 11 of the Supply of Goods (Implied Terms) Act 1973,¹⁹⁰ and into contracts for the hire of goods by ss.7 to 10 of the Supply of Goods and Services Act 1982.¹⁹¹ Under the Consumer Rights Act 2015, contracts concluded between a trader and a consumer for the trader to supply goods or digital content to the consumer are to be “treated as including”¹⁹² a number of terms relating to matters such as title, quality, fitness for purpose and correspondence with description (including the provision of certain pre-contract information) and

sample.¹⁹³ Contracts of sale, hire and hire-purchase all fall within the definition of a contract for a trader to supply goods to a consumer.¹⁹⁴

Supply of goods

- 16-040 Undertakings in respect of the goods similar to those implied in the case of sale, hire-purchase and hire are implied into contracts for the transfer of goods, e.g. for work and materials, by [ss.2 to 5 of the Supply of Goods and Services Act 1982](#).¹⁹⁵ These replace and extend¹⁹⁶ the undertakings previously implied by the common law, for example, into a contract for the manufacture of a set of false teeth,¹⁹⁷ for the repair of a motor car,¹⁹⁸ for the dyeing of a woman's hair,¹⁹⁹ for the supply and installation of a burglar-proof door,²⁰⁰ for the inoculation of cattle,²⁰¹ and for the roofing²⁰² and erection²⁰³ of a building. Similar undertakings are to be treated as included in contracts for the transfer of goods between a trader and a consumer that fall within the scope of the [Consumer Rights Act 2015](#).²⁰⁴

Disposition of property

- 16-041 The covenants for title that are implied on a disposition of property are those set out in [Pt I of the Law of Property \(Miscellaneous Provisions\) Act 1994](#). "Property" is defined²⁰⁵ in the same terms as in the [Law of Property Act 1925](#), i.e. to include "a thing in action, and any interest in real or personal property".

Occupiers of premises

- 16-042 Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, is the "common duty of care".²⁰⁶ The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there,²⁰⁷ except in so far as the occupier is free to²⁰⁸ and does extend, restrict modify or exclude that duty by agreement or otherwise.²⁰⁹ However, the duty cannot be restricted or excluded by the contract so as to diminish the rights of third parties who are entitled to enter by virtue of its provisions.²¹⁰

The same duty applies in relation to fixed and movable structures as it does to premises²¹¹ but does not extend to the obligations imposed by any contract for the hire of, or for the carriage for reward of persons or goods in, any means of transport, or by any contract of bailment.²¹²

Fitness for habitation: sale of land

- 16-043 It is well established that *prima facie* upon a contract for sale of a piece of land with a house on it, there is at common law no warranty as to the habitability of the house.²¹³ The same rule would apply in the case of an uncompleted house, which is the subject matter of a sale, where the structure stands at the time of the sale. But where the vendor sells a piece of land and covenants to build or complete a house on it, there is, at common law, an implied term: (i) that the work will be done in a good and workmanlike manner; (ii) that he will supply good and proper materials; and (iii) that the house will be reasonably fit for human habitation when built or completed.²¹⁴ This implication may, however, be rebutted where the purchaser has himself expressly prescribed the way in which the work is to be done, and the work has been completed in accordance with his instructions.²¹⁵ The *Defective Premises Act 1972*²¹⁶ in addition, imposes on every person who takes on work for or in connection with the provision of a dwelling a similar statutory duty²¹⁷ (which cannot be excluded or restricted by any term of an agreement), subject to certain exceptions provided for in the Act. This statutory duty is owed to any person to whose order the dwelling is provided and also to every person who acquires an interest (whether legal or equitable) in the dwelling.²¹⁸

Fitness for habitation: leases

- 16-044 In general, at common law a landlord gives no implied undertaking that leased premises are or will be fit for habitation or for any particular use,²¹⁹ or that the premises can lawfully be used for any particular purpose.²²⁰ But where a house or flat is let furnished, there is an implied covenant or warranty that it is reasonably fit for human habitation when let,²²¹ although there is no obligation at common law to keep furnished or unfurnished premises in that condition or to repair them during the tenancy.²²² However, by statute covenants on the part of the landlord are implied in the cases of houses let at a low rent²²³ or for a short term.²²⁴

Buildings in multiple occupation

- 16-045

Where an essential means of access to units in a building in multiple occupation is retained by the landlord, a covenant may be implied on his part to use reasonable care to keep the essential means of access in reasonable repair and fit for use.²²⁵

Supply of services

- 16-046 In the case of a contract under which a person agrees to carry out a service, other than a contract of service or apprenticeship²²⁶ and certain other excepted contracts,²²⁷ where the supplier is acting in the course of a business,²²⁸ there is an implied term that the supplier will carry out the service with reasonable care and skill. This term is implied by [s.13 of the Supply of Goods and Services Act 1982](#).²²⁹ If the contract is one for the supply of professional services, the degree of care and skill required of a professional man is that which is to be expected of a member of his profession (in the appropriate speciality, if he be a specialist) of ordinary competence and experience.²³⁰ If the service is to be carried out by an artisan, then the work should be done in a good and workmanlike manner.²³¹ However, the special circumstances of the case may show that the supplier impliedly warrants that his services will produce a specified result or that the product of his service will be reasonably fit for the purpose for which it is required.²³²
- 16-047 By [ss.14 and 15 of the 1982 Act](#), where, under a contract for the supply of a service by a supplier acting in the course of a business,²³³ the time for the service to be carried out, or the consideration for the service, is not fixed or determined by the contract, left to be fixed or determined in a manner agreed by the contract or determined by the course of dealing between the parties, there are respectively implied terms that the supplier will carry out the service within a reasonable time and that the party contracting with the supplier will pay a reasonable charge.²³⁴

Consumer Rights Act

- 16-048 With the coming into force of the [Consumer Rights Act 2015](#), contracts concluded on or after 1 October 2015²³⁵ between a trader and a consumer under which the trader agrees to supply a service to a consumer will be treated as including a term that (i) the trader must perform the service with reasonable care and skill,²³⁶ (ii) the consumer must pay a reasonable price for the service if the consumer has not paid a price and the contract does not expressly fix a price or other consideration and does not say how it is to be fixed,²³⁷ (iii) the trader must perform the service within a reasonable time if the contract does not expressly fix the time for the service to be

performed and does not say how it is to be fixed²³⁸ and (iv) anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service is binding on the trader.²³⁹

Consumer contracts: supply of information

- 16-049 The [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#)²⁴⁰ apply to contracts between traders and consumers²⁴¹ which have been entered into on or after 13 June 2014. They apply in principle to all such contracts but, subject to certain important exceptions,²⁴² [reg.18](#) provides that every contract to which [Pt 2 of the Regulations](#) applies is to be treated as including a term that the trader has complied with the provisions of [regs 9 to 14](#) and [reg.16](#) in [Pt 2](#). These regulations require traders to provide certain information to consumers in relation to contracts concluded between them. The information to be provided varies according to whether the contract is an “on-premises contract”,²⁴³ an “off-premises contract”,²⁴⁴ or a “distance contract”,²⁴⁵ including contracts concluded by electronic means. These three types of contract will include contracts for the sale or supply of goods, of services and of digital content, but they are not limited to such contracts. As a result, many—if not most—contracts entered into between traders and consumers will contain a statutory implied term that the information requirements of [Pt 2 of the Regulations](#) have been complied with. The amount of information required to be given in the case of distance and off-premises contracts is particularly onerous. It may include more than 20 items (listed in [Sch.2](#)). Any information that the trader gives to the consumer as required by [regs 9, 10 and 13](#) is also to be treated as a term of the contract.²⁴⁶ However, [Pt 2](#) does not apply to certain contracts for medical products, to contracts for passenger services other than distance contracts concluded by electronic means and to off-premises contracts under which the payment to be made by the consumer is not more than £42.²⁴⁷

Information supplied incorrect

- 16-050 When the trader gives information as required (see previous paragraph), the regulations provide that the information given is to be treated as included as a term of the contract.²⁴⁸ For consumer contracts made on or after 1 October 2015, the same applies as a result of the [Consumer Rights Act 2015](#)²⁴⁹ which sets out the consumer’s remedies in detail. Information about the main characteristics of the goods will be treated as part of the description, and the consumer will have the normal remedies for non-conformity,²⁵⁰ whereas for other information that is given the consumer may recover costs incurred up to the amount of the price²⁵¹—the trader is in effect, treated as giving a contractual warranty that the information was correct at the time.

Enforcement

- 16-051 Breach by a trader of the obligation to provide the consumer with certain information before the consumer enters into an off-premises contract may attract criminal penalties.²⁵² The enforcement procedures under Pt 8 of the Enterprise Act 2002²⁵³ also apply in relation to a breach of the Regulations. Part 3 of the Regulations gives to consumers the right to cancel a distance or off-premises contract in prescribed circumstances²⁵⁴ and regulates the exercise of the right to withdraw or cancel and the effects of so doing.

Additional charges

- 16-052 Part 4 of the Regulations²⁵⁵ protect the consumer against additional charges. If an unauthorised additional payment or charge is required to be paid by the consumer, the contract is to be treated as providing for the trader to reimburse the consumer.²⁵⁶

Package travel, etc.

- 16-053 By the Package Travel and Linked Travel Arrangements Regulations 2018²⁵⁷ a number of terms are implied into packages offered for sale or sold by traders to travellers²⁵⁸ and to linked travel arrangements. These include implied terms: that the contract contains certain elements specified in the Regulations and that these are communicated in writing to the traveller before the contract is made and a copy of them is supplied to him²⁵⁹; that the traveller may transfer his booking on giving reasonable notice (and notice given seven days or more before the way on which the package starts is always deemed to be reasonable) subject to an obligation to pay appropriate transfer costs²⁶⁰; that severely limits the entitlement of a trader to increase the prices specified in a package travel contract once the contract has been concluded²⁶¹; that entitles the traveller to terminate the package travel contract at any time before the start of the package, although he may be required to pay an appropriate and justifiable termination fee to the organiser except in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and which significantly affect the performance of the package, or the carriage of passengers to the destination when the traveller may terminate the package travel contract before the start of the package without paying any termination fee²⁶²; and that the organiser may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package and is not liable for additional compensation where the number of

persons enrolled for the package is smaller than the minimum number stated in the contract and the organiser notifies the traveller of the termination of the contract within the period fixed in the contract and within the time limits specified in the regulations and the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package.²⁶³ The Regulations also impose (subject to certain exceptions) a strict liability on the other party to the contract for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that party or by other suppliers of services.²⁶⁴

Interest on commercial debts

- 16-054 A term is implied into contracts for the supply of goods and services²⁶⁵ by the [Late Payment of Commercial Debts \(Interest\) Act 1998](#) whereby any qualifying debt²⁶⁶ created by the contract is to carry statutory interest subject to and in accordance with the Act.²⁶⁷

Footnotes

- 188 As in the case of [s.31 of the Consumer Rights Act 2015](#).
- 189 See Vol.II, paras [46-074](#) et seq. See also (on exclusion or restriction of liability) below, para.[17-097](#).
- 190 See Vol.II, paras [41-320](#), [41-386](#) et seq. See also (on exclusion or restriction of liability) below, para.[17-097](#).
- 191 See Vol.II, para.[35-071](#). See also (on exclusion or restriction of liability), below, para.[17-098](#).
- 192 The use of this phrase rather than the more traditional language of “implied term” would not appear to be a change of substance but rather part of an attempt to make the language of the Act more accessible to non-lawyers: see Vol.II, para.[40-480](#).
- 193 On which see further Vol.II, paras [40-494](#) et seq.
- 194 [s.3\(2\) of the Consumer Rights Act 2015](#).
- 195 As amended by Sch.2 para.6 to the Sale and Supply of Goods Act 1994. See *Charlotte Thirty Ltd v Croker Ltd* (1990) [24 Con. L.R. 46](#); *Jonathan Wren & Co Ltd v Microdec Ltd* (1999) [65 Con. L.R. 157](#). See also (on exclusion or restriction of liability), below, para.[17-098](#).
- 196 See *Young and Marten Ltd v McManus Childs Ltd* [1969] [1 A.C. 454](#); *Gloucestershire CC v Richardson* [1969] [1 A.C. 480](#); Vol.II, para.[46-026](#).
- 197 *Samuels v Davis* [1943] [K.B. 526](#).
- 198 *G.H. Myers & Co v Brent Cross Service Co* [1934] [1 K.B. 46](#); *Herschthal v Stewart and Ardern Ltd* [1940] [1 K.B. 155](#); *Stewart v Reavell's Garage* [1952] [2 Q.B. 545](#).
- 199 *Ingham v Emes* [1955] [2 Q.B. 366](#).

- 200 *Reg Glass Pty v Rivers Locking System Pty* (1968) 120 C.L.R. 516. cf. *Davis & Co (Wires) v Afa-Minerva (EMI)* [1974] 2 Lloyd's Rep. 27.
- 201 *Dodd and Dodd v Wilson and McWilliam* [1946] 2 All E.R. 691.
- 202 *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 A.C. 454.
- 203 *Gloucestershire CC v Richardson* [1969] 1 A.C. 480.
- 204 A “contract for transfer of goods” falls within the range of contracts covered by Ch.2 of the Act (see s.3(2)(d) and Vol.II, para.40-493).
- 205 s.1(4).
- 206 Occupiers’ Liability Act 1957 s.5(1), superseding the rule in *Francis v Cockrell* (1870) L.R. 5 Q.B. 501. See further on the background to *s.5 Maguire v Sefton* [2006] EWCA Civ 316, [2006] 1 W.L.R. 2550 at [20]–[24].
- 207 s.2(2).
- 208 See the Unfair Contract Terms Act 1977 ss.1, 2, 3 (below) and *Monarch Airlines Ltd v London Luton Airport Ltd* [1998] 1 Lloyd's Rep. 403.
- 209 Occupiers’ Liability Act 1957 s.2(1). See also *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 Q.B. 409; *White v Blackmore* [1972] 2 Q.B. 651 (notices).
- 210 Occupiers’ Liability Act 1957 s.3(1)–(4).
- 211 s.5(2).
- 212 s.5(3).
- 213 *Hoskins v Woodham* [1938] 1 All E.R. 692; *Lynch v Thorne* [1956] 1 W.L.R. 303, 305.
- 214 *Lawrence v Cassell* [1930] 2 K.B. 83; *Miller v Cannon Hill Estates Ltd* [1931] 2 K.B. 113; *Jennings v Taverner* [1955] 1 W.L.R. 932; *Hancock v B.W. Brazier (Anerley) Ltd* [1966] 1 W.L.R. 1317; *Billyack v Leyland Construction Co Ltd* [1968] 1 W.L.R. 471; *King v Victor Parsons & Co* [1972] 1 W.L.R. 801. See also below, para.16-046 and Vol.II, para.39-080.
- 215 *Perry v Sharon Development Co Ltd* [1937] 4 All E.R. 390, 394; *Lynch v Thorne* [1956] 1 W.L.R. 303; cf. *King v Victor Parsons & Co* [1972] 1 W.L.R. 801.
- 216 ss.1, 2, 6. See also s.3 and Vol.II, para.39-083.
- 217 *Alexander v Mercouris* [1979] 1 W.L.R. 1270; *Andrews v Schooling* [1991] 1 W.L.R. 783; *Bole v Huntsbuild Ltd* [2009] EWCA Civ 1146, 127 Con. L.R. 154; *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), [2011] All E.R. (D) 140 (Jul).
- 218 Defective Premises Act 1972 s.1. The duty arises only in respect of the provision of a new dwelling: *Jenson v Faux* [2011] EWCA Civ 423, [2011] 1 W.L.R. 3038; *Rendlesham Estates Plc v Barr Ltd* [2014] EWHC 3968 (TCC), [2015] B.L.R. 37.
- 219 *Hart v Windsor* (1843) 12 M. & W. 68; *Sutton v Temple* (1843) 12 M. & W. 52; *Robbins v Jones* (1863) 12 M. & W. 68, 87; *Manchester Bonded Warehouse Co Ltd v Carr* (1880) 5 C.P.D. 507; *Bottomley v Bannister* [1932] 1 K.B. 458, 468. Contrast *Western Electric Ltd v Welsh Development Agency* [1983] Q.B. 796 (licence).
- 220 *Edler v Auerbach* [1950] 1 K.B. 359; *Hills v Harris* [1965] 2 Q.B. 601.
- 221 *Smith v Marrable* (1843) 11 M. & W. 5; *Collins v Hopkins* [1923] 2 K.B. 617.
- 222 *Sarson v Roberts* [1895] 2 Q.B. 395; *Sleafer v Lambeth BC* [1960] 1 Q.B. 43, 56–57; *Duke of Westminster v Guild* [1985] Q.B. 688; *Adami v Lincoln Grange Management Ltd* [1998] I.C.L. 379. See also *Warren v Keen* [1954] 1 Q.B. 15. Contrast *Mint v Good* [1951] 1 K.B.

- 517, 522; *Edmonton Corp v Knowles & Son Ltd* (1961) 60 L.G.R. 124; Defective Premises Act 1972 s.4(4).
- 223 Landlord and Tenant Act 1985 ss.8, 9, 10.
- 224 ss.11–17 (term less than seven years) as amended by s.116 of the Housing Act 1988.
- 225 *Miller v Hancock* [1893] 2 Q.B. 177; *Liverpool City Council v Irwin* [1977] A.C. 239. See also Occupiers' Liability Act 1957 s.3(4) and Landlord and Tenant Act 1987 Pt IV.
- 226 Supply of Goods and Services Act 1982 s.12(2).
- 227 Supply of Goods and Services Act 1982 s.12(4). The following orders have been made: Supply of Services (Exclusion of Implied Terms) Order 1982 (SI 1982/1771); Supply of Services (Exclusion of Implied Terms) Order 1983 (SI 1983/902); Supply of Services (Exclusion of Implied Terms) Order 1985 (SI 1985/1).
- 228 By Supply of Goods and Services Act 1982 s.18(1), *business* includes a profession and the activities of any government department or local or public authority.
- 229 Unless excluded (Supply of Goods and Services Act 1982 s.16): *Eagle Star Life Assurance Co Ltd v Griggs* [1997] C.L.Y. 991. See also (on exclusion or restriction of liability), paras 17-088—17-089, 17-098; and see Vol.II, paras 35-053, 39-082. cf. *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm).
- 230 *Harmer v Cornelius* (1858) 5 C.B.N.S. 236, 246; *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586; *Chin Keow v Government of Malaysia* [1967] 1 W.L.R. 813; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 1 W.L.R. 1095, 1100, 1102; *Saif Ali v Sidney Mitchell & Co* [1980] A.C. 198, 218, 220; *Whitehouse v Jordan* [1981] 1 W.L.R. 246, 263; *Maynard v West Midlands Regional Health Authority* [1984] 1 W.L.R. 634, 639; *Thake v Maurice* [1986] Q.B. 644; *Wilson v Best Travel Ltd* [1993] 1 All E.R. 353; *Matrix-securities Ltd v Theodore Goddard* [1998] S.T.C. 1; *Bolitho v City and Hackney Health Authority* [1998] A.C. 232; *Barclays Bank Plc v Weeks Legg & Dean* [1999] Q.B. 309; *Midland Bank Plc v Cox McQueen* [1999] Lloyd's Rep. P.N. 223; *Dhamija v Sunningdale Joineries Ltd* [2010] EWHC 2396 (TCC), [2011] P.N.L.R. 9; *Trebor Bassett Holdings Ltd v ADT Fire & Security Plc* [2011] EWHC 1936 (TCC), [2011] B.L.R. 661.
- 231 *Kimber v W. Willett Ltd* [1947] K.B. 570. See also Vol.II, paras 39-076, 39-082.
- 232 *Samuels v Davis* [1943] K.B. 526; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 1 W.L.R. 1095; *St Alban's City and DC v International Computers Ltd* [1996] 4 All E.R. 481; *Zwebner v Mortgage Corp Ltd* [1998] P.N.L.R. 769. Contrast *Lynch v Thorne* [1956] 1 W.L.R. 303; *Thake v Maurice* [1986] Q.B. 644. See Vol.II, para.39-079. cf. *Platform Funding Ltd v Bank of Scotland Plc* [2008] EWCA Civ 930, [2009] Q.B. 426.
- 233 By Supply of Goods and Services Act 1982 s.18(1), “business” includes a profession and the activities of any government department or local or public authority.
- 234 *Jonathan Wren & Co Ltd v Microdec Ltd* (1999) 65 Con. L.R. 157.
- 235 On the temporal application of the Consumer Rights Act 2015, see below, Vol.II, para.40-012.
- 236 s.49(1), on which see further Vol.II, para.40-575.
- 237 s.51, on which see further Vol.II, para.40-582.
- 238 s.52, on which see further Vol.II, para.40-581.
- 239 s.50 on which see further Vol.II, paras 40-576—40-580.

- 240 SI 2013/3134, amended by SI 2014/870. These Regulations implement most provisions of Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council. See further Vol.II, paras 40-063 et seq.
- 241 As defined in reg.4.
- 242 Listed in reg.6 (including, for example, contracts for services of a banking, credit, insurance, personal pension, investment or payment nature).
- 243 reg.9. An “on-premises contract” is defined in reg.5 see further Vol.II, para.40-093.
- 244 regs 10 to 12. An “off-premises contract” is defined in reg.5: see further Vol.II, paras 40-084—40-088.
- 245 regs 13, 14 and 16. A “distance contract” is defined in reg.5: see further Vol.II, paras 40-089—40-092.
- 246 regs 9(3)(a), 10(5)(a) and 13(6)(a). See also s.50(3) of the Consumer Rights Act 2015 which gives further reinforcement to these terms.
- 247 regs 7(2), (3) and (4).
- 248 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 regs 9(3)(a), 10(5)(a) and 13(6)(a).
- 249 Consumer Rights Act 2015 ss.11(4) and 12 (goods), 36(3) and 37 (digital content) and 50(3) (services; this is without prejudice to s.51(1), which covers a wider range of information given by the trader).
- 250 Consumer Rights Act 2015 ss.11(4) and 19(3) (goods), 36(3) and 42(2) (digital content) and 50(3) and 54(3) (services).
- 251 Consumer Rights Act 2015 ss.12 and 19(5) (goods), 37 and 42(4) (digital content) and 54(4) (services: in this case the consumer is entitled to a price reduction). On these provisions, see further below, Vol.II, paras 40-514—40-528.
- 252 Pt 2 Ch.2 reg.19: on which see further Vol.II, para.40-110.
- 253 See Vol.II, paras 40-136—40-138.
- 254 reg.29 and see further Vol.II, paras 40-116 et seq.
- 255 regs 40 and 41.
- 256 regs 40(4), 41(2).
- 257 SI 2018/634, implementing Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC ([2015] O.J. L326/81). See more generally Vol.II, paras 40-150—40-156.
- 258 The definition of “traveller” is broader than that of a “consumer” and may, in certain circumstances, include an individual who is travelling for business purposes: see 2018 Regulations regs 2(1), 3(2)(c) and 3.3, on which see further Vol.II, para.40-151.
- 259 2018 Regulations reg.7. See also regs 4–6 which set out the various information duties of the trader.
- 260 2018 Regulations reg.9.
- 261 2018 Regulations reg.10.
- 262 2018 Regulations reg.12. The right to a refund is set out in reg.14.

- 263 2018 Regulations reg.13. The right to a refund is set out in reg.14.
- 264 2018 Regulations reg.15. See *Tui UK Ltd v Morgan [2020] EWHC 2944 (Ch)*.
- 265 Other than excepted contracts: Late Payment of Commercial Debts (Interest) Act 1998 s.2(5).
- 266 Defined in s.3.
- 267 s.1(1). See below, para.29-291.

Section 1. - In General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 17 - Exemption Clauses

Section 1. - In General

Simon Whittaker

Generally¹

17-001 It is a common feature of written contracts (and in particular of those in standard form) that the person tendering the document will seek to absolve themselves either wholly or in part from liability under the contract or from liability for a tort connected with the contract, or to qualify or otherwise limit the circumstances in which that liability may arise. Although a total exclusion of liability² is today, due to legislative intervention,³ relatively uncommon, clauses are frequently encountered which seek to exclude or restrict certain obligations or duties undertaken by one of the parties to the contract or the financial consequences of a breach of the contract by that party, the remedies available to the other party in the event of such breach and the time limit within which claims must be made. In other contracts, such as a contract for the supply of services, the supplier may seek to protect themselves, their employees and sub-contractors, against liability, for example, for negligence. It can reasonably be argued that, in many commercial contracts where both parties are of equal bargaining power, such exclusion or restriction of liability does no more than apportion the risk between the parties, in respect of which one party will be expected to insure.⁴ Very often, however, the party imposing the condition is in an economically superior position and can dictate their own terms to the other.⁵ So, while seeking to preserve the integrity of the principle of freedom of contract,⁶ the courts have attempted to correct the imbalance by adopting principles of construction which require the party seeking to exclude or restrict their liability to do so in clear and unequivocal terms.⁷ Inequality of bargaining power, however, in itself, is not a ground for invalidating such a clause at common law any more than it is a ground for invalidating a contract as a whole.⁸

Incorporation of exemption clauses

- 17-002 The question whether an exemption clause contained in a written document, notice or otherwise has been incorporated as a term of the contract is dealt with in the chapter on Express Terms.⁹ The general rule is that the party affected by the clause will be bound if the party tendering the document has done what may reasonably be considered sufficient to give notice of the clause to persons of the class to which they belong,¹⁰ but this finds an important qualification in the rule according to which a person is bound by their signature of a contractual document even though they did not read its terms and are ignorant of their effect.

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Moreover, a clause may be incorporated by course of dealing between the parties or because both parties are aware that it is the practice of the particular trade to contract subject to exempting conditions.¹²

Types of exemption clause

- 17-003 Exemption clauses may broadly be divided into three categories.¹³ First, there are clauses which purport to limit or reduce what would otherwise be the defendant's duty, i.e. the substantive obligations to which he would otherwise be subject under the contract, for example, by excluding express or implied terms, by limiting liability to cases of wilful neglect or default, or by binding a buyer of land or goods to accept the property sold subject to "faults", "defects" or "errors of description".¹⁴

¹⁴

Secondly, there are clauses which purport to exclude or restrict the liability which would otherwise attach to a breach of contract, such as the liability to be sued for breach or to be liable in damages, or which take away from the other party the right to treat as repudiated or rescind the agreement. Similarly, an exemption clause can subject a party's liability for breach of contract to an onerous condition, such as a number of days within which the injured party must serve notice of the breach or bring proceedings.¹⁵ Thirdly, there are clauses which purport to exclude or restrict the duty of the party in default fully to compensate the other party, for example, by limiting the amount of damages recoverable against him, or by providing a time-limit within which claims must be made. Traditionally, the approach of English judges has in all cases been to ascertain the liability of the defendant apart from the exemption clause, and then to consider whether or not

the clause is sufficient to constitute a defence to that liability.¹⁶ It has, however, been argued¹⁷ that such an approach tends to be misleading, at any rate if applied to exemption clauses which fall within the first two categories. These directly limit the substantive contractual content of the promise and circumscribe the liability of the party in default. The whole contract ought therefore initially to be construed together with the exemption clause. There is considerable logical force in this contention and it has found some high judicial support.¹⁸ The task of the courts has been said to be¹⁹:

“... to look at the event [resulting from the breach], and to ascertain from the words and conduct of the parties which created the contract between them what their presumed intention was as to what should be their legal rights and liabilities either original or substituted upon the occurrence of an event of this kind.”

However, the traditional approach was for the most part adopted by the [Unfair Contract Terms Act 1977](#),²⁰ whose focus is on the “exclusion or restriction” of liability.²¹ In the case of consumer contracts, the legislative controls in the [Consumer Rights Act 2015](#) apply in principle to all types of contract term and while this includes exclusions of liability of various types, this breadth of scope reduces considerably the significance of the classification of the clause as an exemption clause.²²

Exemption clauses distinguished from other similar clauses

- 17-004 Agreed or liquidated damages clauses, by which the parties liquidate the damages payable upon breach, are not to be classified as exemption clauses, at least where the liquidated damages provision is a genuine pre-estimate of the loss likely to be suffered in the event of breach.²³ Whereas an agreed damages clause entitles the injured party to recover the sum stipulated without proof of loss, an injured party subject to a limitation clause must prove its actual loss sustained and can recover this loss up to the limitation stipulated²⁴; and an agreed damages clause (unlike a limitation clause) is for the benefit of both the injured party and the party in breach.²⁵ The form of the clause is not decisive of the difference between the two, rather:

“... it is the fact that the clause is expressed as one agreeing a figure [as a pre-estimate of damage], and not as imposing a limit.”²⁶

It has also been said that force majeure clauses are not exemption clauses.²⁷ Likewise ordinary arbitration clauses are “in essence mere machinery”²⁸ and so distinct from exemption clauses, being governed by separate rules.²⁹ But it is possible that a clause which bars one party’s claim

unless arbitration is begun within a specified time may be treated as an exemption clause in so far as it may be construed not to extend to cover a fundamental breach of contract.³⁰

General legislative controls on exemption clauses

- 17-005 In 1969 in *Harbutt's "Plasticine" Ltd v Wayne Tank & Pump Co Ltd* the Court of Appeal had sought to establish that, even where an exemption clause in a contract excluded a party's liability as a matter of construction, a fundamental breach of contract in that party could bring the contract to an end so that the injured party had to treat it as terminated, with the result that the exemption clause ceased to operate.³¹ While this so-called doctrine of fundamental breach was inconsistent with earlier House of Lords' authority in the *Suisse Atlantique* case and was later firmly rejected by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*,³² it reflected a wider concern with the use of contract terms to exclude liability under the contract or in the tort of negligence, particularly where the term formed part of the defendant's standard terms. The problem of exemption clauses was the subject of a series of recommendations by the Law Commissions and their report³³ led to the enactment of the *Unfair Contract Terms Act 1977*, which subjected exemption clauses and certain related contract terms to control in a number of situations and also controlled non-contractual notices disclaiming business liability for negligence.³⁴ These legislative controls have had a significant impact on the way in which the courts have applied traditional approaches to the construction of exemption clauses.³⁵ In addition to this domestic legislation, in 1993 the EEC legislature enacted the Unfair Terms in Consumer Contracts Directive 1993,³⁶ which was implemented by a standalone set of regulations, the *Unfair Terms in Consumer Contracts Regulations*, first issued in 1994 and then reissued in 1999.³⁷ Unlike the *1977 Act*, the *1999 Regulations* applied to most contract terms which had not been "individually negotiated" and not merely to exemption clauses, but, also unlike the *Act*, the *1999 Regulations* were restricted to terms of consumer contracts.³⁸ However, the *1999 Regulations* were themselves revoked and replaced by the *Consumer Rights Act 2015*, which applies to consumer contracts concluded and "consumer notices" provided or communicated on or after 1 October 2015.³⁹ The *2015 Act* created a series of controls on terms in consumer contracts, distinguishing broadly between terms which exclude or restrict liability under the new statutory terms in "goods contracts", "digital content contracts" and "services contracts" which *Pt 1 of the Act* sets out⁴⁰ and terms or notices which fall within a general framework of controls on the ground of unfairness in *Pt 2 of the Act*.⁴¹ As a result of these new provisions dedicated to the control of the terms of consumer contracts and consumer notices, the *1977 Act* was amended so that the latter's provisions apply only to persons other than "consumers" within the meaning of the *2015 Act*.⁴² This chapter will explain the law under the *1977 Act*, noting how this changed on its amendment by the *2015 Act* and leaving the law governing the terms of consumer contracts and consumer notices to Vol.II, Ch.40 Consumer Contracts.

Other legislative or common law controls

- 17-006 In addition to these general legislative controls on exemption clauses, this Chapter will also discuss the (very limited) controls on exemption clauses at common law,⁴³ legislative controls on exemption clauses apart from the [1977](#) or [2015 Acts](#), and some legislation (especially in the context of consumer protection) which designates its provisions as being incapable of exclusion by agreement.⁴⁴

Footnotes

- 1 See Lawson, *Exclusion Clauses and Unfair Contract Terms*, 12th edn (2017); Yates, *Exclusion Clauses in Contracts*, 2nd edn (1982); MacDonald, *Exemption Clauses, Penalty Clauses and Unfair Terms*, 2nd edn (2006); Lewison, *The Interpretation of Contracts*, 7th edn (2020), Ch.12.
- 2 See, for example, *L'Estrange v F. Graucob [1934] 2 K.B. 394*.
- 3 By the [Unfair Contract Terms Act 1977](#) (below, paras 17-069 et seq.) and, in the case of contracts with consumers, the [Consumer Rights Act 2015 Pt 2](#): see below, paras 17-071—[17-074](#) and Vol.II, paras 40-223 et seq.
- 4 See, e.g. *Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128, [2016] 1 C.L.C. 573*, noted below, para.[17-012](#).
- 5 See the discussion of this issue in the English and Scottish Law Commission's joint report (2005) Law Com. No.292, Scottish Law Com. No.199.
- 6 On which generally, see above, paras 2-003 et seq.
- 7 Below, paras [17-007](#) et seq.
- 8 See below, para.[17-066](#).
- 9 See above, paras [15-005](#) et seq.
- 10 *Parker v South Eastern Ry (1877) 2 C.P.D. 416; Richardson, Spence & Co v Rowntree [1894] A.C. 217; Hood v Anchor Line (Henderson Bros) Ltd [1918] A.C. 837; McCutcheon v David Macbrayne Ltd [1964] 1 W.L.R. 125, HL; Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163; Shepherd Homes Ltd v Encia Remediation Ltd [2007] EWHC 70 (TCC), [2007] Build. L.R. 135; Sterling Hydraulics Ltd v Dichtomatik Ltd [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep. 8.*
- 11 *L'Estrange v F. Graucob Ltd [1934] 2 K.B. 394* and see above, paras [15-005](#) et seq. Exceptions to this rule are found where the person seeking to rely on the document has misrepresented its significance (*Curtis v Chemical Cleaning & Dyeing Co [1951] 1 K.B. 805*, below, para.[17-063](#)); where the doctrine of non est factum applies (on which see above, paras 5-049—[5-056](#)) and where the document does not purport to have contractual effect: *Grogan*

v *Robin Meredith Plant Hire Ltd (1996) 15 Tr.L.R.371*, above, para.15-008. It has also been suggested that, even apart from these exceptions, in some “extreme circumstances” signature may not be enough for the incorporation of “particularly onerous or unusual” terms: *Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 Lloyd's Rep. 446* at 454 and see cases cited at para.15-005 (note).

12 See above, paras 15-015, 15-017.

13 *Kenyon, Sons & Craven Ltd v Baxter Hoare & Co Ltd [1971] 1 W.L.R. 519, 522; Trade and Transport Inc v Iino Kaiun Kaisha Ltd [1973] 1 W.L.R. 210, 230*. See also Dawson (1975) 91 L.Q.R. 380.

14 cf. *European Film Bonds AS v Lotus Holdings LLC [2020] EWHC 1115 (Ch)* at [81] (affd without reference to this point *[2021] EWCA Civ 807*), where the effect of two contract terms was held *not* to be an exclusion of liability (the context being the possible application of construction contra proferentem) as they rather provided a step in a procedural process which under the contract had the effect of removing an obligation on one of the parties to pay a sum.

15 e.g. *Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128, [2016] 1 C.L.C. 573* (contractual time-bar an exclusion clause for the purposes of the principle of strict construction) and see the definition of the “exclusion or restriction” of liability in the *Unfair Contract Terms Act 1977 s.13*, below, para.17-079.

16 *Rutter v Palmer [1922] 2 K.B. 87, 92*.

17 Coote, *Exception Clauses* (1964).

18 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, 431; Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 851*.

19 *Hardwick Game Farm v Suffolk Agricultural Poultry Producers' Association [1966] 1 W.L.R. 287, 309, 333, 343* (affirmed sub nom. *Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 A.C. 31, HL*).

20 See *Phillips Products Ltd v Hyland [1987] 1 W.L.R. 659, 664; Smith v Eric S. Bush and Harris v Wyre Forest DC [1990] 1 A.C. 831, 857, 873; Coote (1978) 41 M.L.R. 312; Palmer and Yates [1981] C.L.J. 108; White [2016] J.B.L. 373* and see below, para.17-081.

21 Unfair Contract Terms Act ss.2, 3(2)(a), 6, 7 with the definition of “exclusion or restriction of liability” contained in s.13: below, para.17-079. The exception is found in s.3(2)(b) which extends its controls to contract terms which do not “exclude or restrict” liability: below, paras 17-090—17-095.

22 On the breadth of approach of the 2015 Act s.62, see Vol.II, para.40-260. On the application of this test to different types of exemption clauses, see Vol.II, paras 40-319—40-323.

23 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, 395, 411, 420, 436*. cf. 406. See also below, para.17-024.

24 *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361* at 395 and 420 (demurrage clause in charterparty). As is explained below, paras 29-203 et seq., in *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis [2015] UKSC 67, [2015] 3 W.L.R. 1373* the Supreme Court reframed the common law governing penalty clauses so as to reduce the significance of the distinction between liquidated damages clauses

- and penalty clauses, but this does not affect the distinction drawn in the text between agreed damages clauses and limitation clauses.
- 25 [1967] 1 A.C. 361 at 420–421.
- 26 [1967] 1 A.C. 361 at 420–421.
- 27 *Fairclough Dodd & Jones Ltd v J.H. Vantol Ltd* [1957] 1 W.L.R. 136, 143; cf. *Cero Navigation Corp v Jean Lion & Cie* [2000] 1 Lloyd's Rep. 292, 299. On force majeure clauses generally see below, paras 26-060—26-088. A force majeure clause may come under the control in s.3(2)(b) of the Unfair Contract Terms Act 1977: below, para.17-090.
- 28 *Woolf v Collis Removal Service* [1948] 1 K.B. 11. See also *Atlantic Shipping Co Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250, 258; *Heyman v Darwins Ltd* [1942] A.C. 356, 373–375, 400. Contrast *SHV Gas Supply & Trading SAS v Naftomav Shipping & Trading Co Inc* [2005] EWHC 2528 (Comm), [2006] 1 Lloyd's Rep. 162 at [28]. See also Unfair Contract Terms Act 1977 s.13(2); below, para.17-079. But see in relation to the controls on arbitration clauses in consumer contracts (as specially defined) made on or after 1 October 2015 the Consumer Rights Act 2015 Pt 2 and the Arbitration Act 1996 ss.89–91, on which see Vol.II, paras 34-013, 40-230 et seq. and para.40-426.
- 29 See Vol.II, para.34-197.
- 30 *Atlantic Shipping Co Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250, 258; *Ford & Co Ltd v Cie Furness* [1922] 2 K.B. 797; *Smeaton Hanscomb & Co Ltd v Sasson I. Setty Son & Co (No.1)* [1953] 1 W.L.R. 1468. See, however, the modern position as to the application of exemption clauses to “fundamental breaches” of contract, below, paras 17-023—17-027.
- 31 [1970] 1 Q.B. 447.
- 32 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 844, 847 (which formally overruled *Harbutt's “Plasticine” Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 Q.B. 447). See further below, paras 17-023 et seq.
- 33 Law Commission, Scottish Law Commission, Second Report on Exemption Clauses, Law Com. No.69, Scot. Law Com. No.39 (1975).
- 34 See below, paras 17-084 et seq.
- 35 Below, paras 17-007 et seq.
- 36 Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L95/29.
- 37 Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).
- 38 See Vol.II, para.40-227.
- 39 The Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) art.6(1) provided that the provisions of Pts 1 and 2 of the Act which were brought into force on 1 October 2015 do *not* apply to any contract entered into before 1 October 2015 which would, apart from its provisions, be covered by Pts 1 or 2 nor to any notice provided or communicated before 1 October 2015 which would constitute a “consumer notice” and so be covered by Pt 2 of the Act. Furthermore, art.6(4) of that Order specifically preserves the effect of the Unfair Terms in Consumer Contracts Regulations 1999 (on which see Vol.II para.40-227) in relation

to “any contract or notice relating to any contract” entered into before 1 October 2015 or which is provided or communicated before 1 October 2015 and which would otherwise be covered by [Pts 1 or 2 of the Act](#), despite the revocation of those Regulations by the [2015 Act](#). There is a particular exception to this general pattern in that [Pt 1 of the 2015 Act](#)’s provisions governing “services contracts” (including its controls on exemption clauses in [s.57](#)) apply to “consumer transport services” (as specially defined) only if made on or after 1 October 2016: [SI 2015/1630 arts 3–4 and 6\(2\)](#) as amended by [SI 2016/484 art.2](#).

40 [Consumer Rights Act 2015 ss.31, 47 and 57](#). On these controls see Vol.II, paras [40-535](#), [40-568](#) and [40-590—40-591](#) respectively.

41 [Consumer Rights Act 2015 Pt 2](#). On these controls see Vol.II, paras [40-230](#) et seq.

42 The necessary amendments and deletions of the [1977 Act](#) were effected by [s.75](#) and [Sch.4 of the 2015 Act](#): for the details, see below, paras [17-069](#) et seq.

43 See below, paras [17-062](#) et seq.

44 See below, paras [17-133](#) et seq.

Section 2. - Principles of Construction

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Chapter 17 - Exemption Clauses

Section 2. - Principles of Construction

General principles

17-007

U In principle exemption clauses are to be construed following the principles applicable to contracts generally,

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U and while there is considerable case-law relating specifically to the construction of exemption clauses and to particular forms of words used by exemption clauses, care needs to be taken in relation to some of the older cases owing to the enactment of the *Unfair Contract Terms Act 1977* and to the considerable development of the general approach to construction since the decision of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*

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U : these developments have meant that “[t]he approach of the courts to the interpretation of exclusion clauses (including clauses limiting liability) in commercial contracts has changed markedly in the last 50 years”.

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U First, in very broad terms, the *1977 Act* has led the courts to see the Act as the proper basis for controlling exemption clauses in commercial contracts. So, for example, Lord Diplock observed in *Photo Production Ltd v Securicor Transport Ltd* soon after the *1977 Act* was passed in the course of rejecting the doctrine of fundamental breach:

“[T]he reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what to-day would be called consumer contracts and contracts of adhesion. ... [A]ny need for this kind of

judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977. In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is ... wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.”

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Clearly, therefore, the courts' clear rejection of the doctrine of fundamental breach requires particular care as regards earlier cases which recognise its existence.

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Moreover, since the *Investors Compensation Scheme Ltd* case, the courts have adopted a general approach to the construction of contract terms which has tended to move away from “rules of construction” towards “common-sense principles by which any serious utterance would be interpreted in ordinary life”.

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So, for example, the well-known (and restrictive) principles set out by Lord Morton in *R. v Canada S.S. Lines Ltd*

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for the determination of the question whether a particular exemption clause extends to liability for negligence should be treated as guidance rather than “a litmus test”, as the role of the court remains to ascertain what the parties intended.

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Nevertheless, even after the *Investors Compensation Scheme Ltd* case, the courts have continued to accept that there is a particular role for the approach to the construction of exemption clauses contra proferentem, though its significance has sometimes been down-played.

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Clear and unambiguous expression

17-008



The traditional rule is that exemption clauses must be expressed clearly and without ambiguity or they risk being ineffective.

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U In *J. Gordon Alison & Co Ltd v Wallsend Shipway and Engineering Co Ltd*,

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U a cylinder was sold by the defendants to the claimants “subject to our usual guarantee clauses”. The clause relied on by the defendants “guaranteed” the purchaser against defects of material or workmanship for six months, but excluded liability for consequential damage. The question arose whether the guarantee clause was applicable to this particular contract, and the Court of Appeal held that it was not: “if a person was under a legal liability and wished to get rid of it he could only do so by using clear words”.

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U Exemption clauses have therefore often been said to require strict construction, and the degree of strictness appropriate to their construction may properly depend upon the extent to which they involve departure from the implied obligations ordinarily accepted by the parties in entering into a contract of a particular kind

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U and whether the clause purports entirely to exclude an obligation or liability or merely to limit the compensation recoverable from the party in default.

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U As Lord Leggatt JSC has recently observed, the approach of the courts to the construction of exclusion clauses has changed as a result of their legislative control and of changes in approach to the construction of contracts,

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U and:

“[t]he modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations.”

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In this respect, as Coulson LJ has observed:

“The more valuable the right, the clearer the language of any exclusion clause will need to be; the more extreme the consequences, the more stringent the court must be before construing the clause in a way which allows the contract-breaker to avoid liability for what may be his catastrophic non-performance.”

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Moreover, a majority of the Supreme Court has observed that this strict approach to exemption clauses properly so-called should also apply to terms:

“... where they seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide. The vice of a clause of that kind is that it can have a propensity to mislead, unless its language is sufficiently plain. All that said, words of exception may be simply a way of delineating the scope of the primary obligation.”

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However, as earlier noted, it is clear that the normal principles of construction applicable to written contracts

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apply equally to exemption clauses to ascertain what meaning the words bear.

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This means that if the clause is expressed clearly and unambiguously, there is no justification for placing upon the language of the clause a strained and artificial meaning so as to avoid the exclusion or restriction of liability contained in it.

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On the other hand, an exemption clause must be construed in the wider context of the contract as a whole, in a way which is consistent with business common sense and does not defeat the commercial object of the contract, and so as to give effect to the presumption that parties do not lightly abandon a remedy for breach of contract afforded them by the general law.

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U In an appropriate case, therefore, the existence of such a presumption does not prevent a court from finding, applying “all its tools of linguistic, contextual, purposive and common sense analysis”, that the contract intended to deprive one of the parties of a right at law which he might otherwise have had.

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U As will be explained, more recently, for some judges this means that the traditional rule according to which exemption clauses should be construed contra proferentem has much less of a role to play at least as between two commercial contracting parties.

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Clause must extend to event

17-009

U Each clause must be considered according to its actual wording, but it must clearly extend to the exact contingency or loss which has occurred if it is to protect the party relying on it. Thus in a contract for the sale of goods, a stipulation that the goods are bought “as seen”⁶⁹ or the exclusion of liability for “latent defects”⁷⁰ will not exclude terms as to quality and fitness for purpose implied by the Sale of Goods Act, the exclusion of warranties will not necessarily exclude conditions,⁷¹ and the exclusion of implied terms will not exclude those which are actually expressed.⁷² The exclusion of liability for “consequential loss or damage” will not cover loss which directly and naturally results in the ordinary course of events from the breach, but only loss which is less direct or more remote⁷³ and the “natural and ordinary meaning” of an exclusion of liability for “loss of profit, revenue [or] savings” is that it does not cover expenditure incurred, but wasted because of the other party’s repudiatory breach.

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U And a clause which provided that “the goods delivered shall be deemed to be in all respects in accordance with the contract” unless the buyer gave notice to the contrary within 14 days of the arrival of the goods, was held not to apply to a claim for damages for short delivery, i.e. in respect of goods not delivered.⁷⁵ A clause in a contract of sale or hire-purchase which merely excludes all conditions and warranties, express or implied, will not necessarily extend to the delivery of goods wholly different from the agreed contract goods.⁷⁶ A clause may therefore be too narrow in its terms to cover the obligation or liability which it is sought to exclude or restrict.⁷⁷

Inconsistency with main purpose of contract

- 17-010 Conversely, an exemption clause may be so broad and general in scope that to apply it literally would create an absurdity or defeat the main purpose of the contract into which the parties have entered.⁷⁸ It is the duty of the courts to ascertain the meaning of and to give effect to the agreement of the parties.⁷⁹ If, therefore, looking at the whole of the contract and the relevant background, its main purpose is clear, the court will be justified in attributing to the clause a construction which is not inconsistent with that purpose.⁸⁰ Thus a wide deviation clause in a bill of lading was restrictively construed so as not to cover a deviation by the carrier inconsistent with the contract voyage,⁸¹ and a clause in a bill of lading which provided that “the responsibility of the carrier shall be deemed to cease absolutely after the goods are discharged from the ship” was held not to cover a release of the goods to the consignees without production of the bill, as the bill expressly required the goods to be delivered “unto order or assigns”.⁸² Similarly, the court will be reluctant⁸³ to ascribe to an exemption clause a meaning which effectively absolves one party from all duties and liabilities:

“One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party’s stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent.”⁸⁴

In *Tor Line AB v Alltrans Group of Canada Ltd*,⁸⁵ in a contract of charterparty, shipowners expressly accepted responsibility for delay in delivery of the vessel or for delay during the currency of the charter and for loss or damage to goods on board, if these were caused by unseaworthiness or other personal act or omission or default of the owners or their manager, but stated that they were: “not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants.” In breach of an express warranty, the ship was not of the dimensions specified in the charter. On the charterers’ claim for financial loss consequent upon the breach of this warranty, the shipowners relied upon the exemption clause. The House of Lords held that the loss was not covered by the clause. One of the reasons put forward by Lord Roskill⁸⁶ in his judgment was that, if the clause were to be construed so as to allow a breach of the warranty to be committed or a failure to deliver the vessel at all to take place without financial redress to the charterers:

“... the charter virtually ceases to be a contract for the letting of the vessel and the performance of services by the owners ... and becomes no more than a statement of intent by the owners in return for which the charterers are obliged to pay large sums by way of hire, though if the owners fail to carry out their promises as to description or delivery, are entitled to nothing in lieu.”

He found it difficult to believe that this conclusion would accord with the “true common intention” of the parties.⁸⁷ Nevertheless the clause on its true construction may be found to qualify the main purpose of the contract, so that there is no inconsistency,⁸⁸ or to define the respective roles of the parties under the contract.⁸⁹ And if the clause does not entirely exclude the liability of one party, but merely limits or reduces his liability, it does not render his contractual promises illusory.⁹⁰ Further, if in the context of the contract as a whole and of the business relationship between the parties the words of the clause are clear and fairly susceptible of one meaning only, then effect must in any event be given to the clause.⁹¹ And it has been said recently that the principle in *Tor Line A/B v Alltrans Group of Canada Ltd*⁹² “should be seen as one of last resort” and that there is authority that:

“... it applies only in cases where the effect of the clause is to relieve one party from all liability for breach of any of the obligations which he has purported to undertake”

as “[o]nly in such a case could it be said that the contract amounted to nothing more than a mere declaration of intent”.⁹³

“Four corners” rule

- 17-011 There is some authority for the view that any damage or liability sought to be covered by an exemption clause must fall within the “four corners” of the contract and not outside of it.⁹⁴ This view could be said to derive support from cases which have held an exemption clause to be inapplicable where a carrier deviated without justification from the agreed or usual route,⁹⁵ or carried goods above deck in breach of his obligation to carry them under deck,⁹⁶ where a bailee stored goods in a place other than that agreed,⁹⁷ and where a carrier or bailee in breach of contract parted with possession of the goods to an unauthorised sub-contractor.⁹⁸ Such cases, however, may be *sui generis*.⁹⁹ They are better explained as cases where the exemption clause in question was, on its true construction, not intended to cover the breach which occurred¹⁰⁰ rather than as establishing any general principle that an exemption clause will be construed to extend only to acts of a party or his servants which fall within the four corners of the contract.¹⁰¹ In any event, the clause itself may redefine a party’s obligations with respect to performance¹⁰² or on its terms be construed to cover even a radical departure from the performance contemplated by the contract.¹⁰³

Construction contra proferentem

- 17-012 This traditional principle of construction embraces two differing, but closely related, principles.¹⁰⁴ First, as in the case of any other written document,¹⁰⁵ in situations of ambiguity the words of the document are to be construed more strongly against the party who made the document (the *proferens*) and who now seeks to rely on them. For example, in *John Lee (Grantham) Ltd v Ry Executive*¹⁰⁶ a railway warehouse was leased by the defendants to the claimants. A clause in the lease exempted the defendants from liability for:

“... loss or damage (whether by act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created would not have arisen.”

Owing to a fire caused by the negligence of the defendants in allowing a spark to escape from a railway engine, goods in the warehouse were damaged. It was held that the words “which but for the tenancy hereby created would not have arisen” confined the exemption to liabilities created by the relationship of landlord and tenant. Although the clause was capable of a wider construction, it was ambiguous and would be construed more strongly against the defendants, the makers of the document. The second principle of construction is that, since a party seeking to rely upon an exemption clause bears the burden of proving that the case falls within its provisions,¹⁰⁷ any doubt or ambiguity will be resolved against them and in favour of the other party.¹⁰⁸ While this second principle has not been abandoned entirely by the courts, its significance in commercial contracts has been reduced. In *Nobahar-Cookson v Hut Group Ltd* a clause in a commercial contract provided that the sellers of a company would not be liable for any claim unless the buyer served notice of it within 20 business days “after becoming aware of the matter”.¹⁰⁹ The Court of Appeal held that “there remains a principle that an ambiguity” in the meaning of such an exclusion clause:

“... may have to be resolved by a preference for the narrower construction, if linguistic, contextual and purposive analysis do not disclose an answer to the question with sufficient clarity.”¹¹⁰

The Court recognised that the phrase “after becoming aware of the matter” could have three possible meanings, but held that, given that the commercial purpose of the term was to prevent the buyer from keeping claims of which it was aware “up its sleeve”, and assisted by the principle which it had stated, the phrase should be interpreted as referring to an awareness of a claim and not merely an awareness of facts which could give rise to a claim.¹¹¹ As regards contra proferentem, the Court of Appeal considered that:

“This approach to exclusion clauses is not now regarded as a presumption, still less as a special rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause. Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. Nor is it to be mechanistically applied wherever an ambiguity is identified in an exclusion clause. The court must still use all its tools of linguistic, purposive and common-sense analysis to discern what the clause really means.”¹¹²

Rather, the principle is:

“... essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so.”¹¹³

It will be seen, therefore, that this aspect of the construction contra proferentem is related to the approach of the courts which requires clear and unambiguous language effectively to exclude liability for breach.¹¹⁴ Indeed, Lord Leggatt JSC has recently observed that:

“To the extent that the process has not been completed already, old and outmoded formulas such as the three-limb test in *Canada Steamship Lines Ltd v The King*¹¹⁵ ... and the ‘contra proferentem’ rule are steadily losing their last vestiges of independent authority and being subsumed within the wider *Gilbert-Ash* principle [according to which clear words are needed to exclude normal rights].”¹¹⁶

Moreover, while accepting the existence of the second aspect of the contra proferentem rule, in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* the Court of Appeal observed that “[i]n relation to commercial contracts, negotiated between parties of equal bargaining power, that rule now has a very limited role,”¹¹⁷ quoting Lord Neuberger MR in *K/S Victoria Street v House of Fraser (Stores Management) Ltd* to the effect that:

“... ‘rules’ of interpretation such as contra proferentem are rarely decisive as to the meaning of any provisions in a commercial contract. The words used, commercial sense, and the documentary and factual context are, and should be, normally enough to determine the meaning of a contractual provision.”¹¹⁸

So, while the rule may still be used to resolve “cases of genuine ambiguity”, it should not be the court’s starting point.¹¹⁹ This therefore suggests that contra proferentem is relevant to the construction of ambiguous contract terms only *after* the courts have sought to resolve that ambiguity by reference to the general principles of construction according to which ambiguity

may be resolved by reference to the matrix of fact within which the contract was made and to commercial common sense under the general approach to construction of contracts.

Finally, by contrast, in the case of consumer contracts, the principle of interpretation contra proferentem has been given explicit and particular legislative force as a result of the implementation of the Unfair Terms in Consumer Contracts Directive 1993¹²⁰ by the [Consumer Rights Act 2015](#). According to [s.69\(1\) of the 2015 Act](#):

“... [i]f a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.”¹²¹

This law is discussed in Vol.II, Ch.40.¹²²

Liability for negligence

17-013

- At common law,¹²³ liability for negligence may be excluded or restricted if words are used which sufficiently indicate that the parties intended, in the context of their agreement, that such should be the case.

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Where a clause purports merely to limit the compensation payable by one party for loss or damage caused by his negligence, it is enough that the wording of the clause, when read as a whole, clearly and unambiguously has that effect.¹²⁵ At one time it was thought that the inherent improbability of one party to the contract intending to exclude its liability to the other party from the consequences of the former's own negligence supports a very strict approach to the complete exclusion of liability for negligence, a position closely related to the traditional approach to construction of exclusion clauses contra proferentem.¹²⁶ This view was associated with the three propositions relating to the construction of terms arguably seeking to exclude liability for negligence put forward in the judgment of the Privy Council given by Lord Morton of Henryton in *R. v Canada S.S. Lines Ltd*¹²⁷:

“(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called ‘the proferens’) from the consequences of the negligence of his own servants, effect must be given to that provision ... (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens ... (3) If the words used are wide enough for the above purpose, the court must then

consider whether ‘the head of damage may be based on some ground other than that of negligence’ ... The ‘other ground’ must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification ... the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are *prima facie* wide enough to cover negligence on the part of his servants.”

These tests, or guidelines,¹²⁸ were subsequently approved and applied both by the Court of Appeal¹²⁹ and the House of Lords.¹³⁰ However, while approving Lord Morton’s statement, Lord Bingham later pointed out that:

“Lord Morton was giving helpful guidance on the proper approach to interpretation and not laying down a code. The passage does not provide a litmus test which, applied to the terms of the contract, yields a certain and predictable result. The Court’s task of ascertaining what the parties intended, in their particular commercial context, remains.”¹³¹

Moreover, use of Lord Morton’s observations to justify a specially strict approach to the construction of clauses seeking to exclude liability for negligence has been affected by the wider judicial view earlier seen in relation to construction contra proferentem that these types of clause are neither surprising nor commercially unjustified given that exemption clauses may form part of the contractual apparatus for distributing risk.¹³² In this respect, in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* Jackson LJ noted that:

“... in recent years, and especially since the enactment of UCTA [the Unfair Contract Terms Act 1977], the courts have softened their approach to both indemnity clauses and exemption clauses”¹³³

and his impression was that:

“... at any rate in commercial contracts, the *Canada Steamships* guidelines (in so far as they survive) are now more relevant to indemnity clauses than to exemption clauses,”¹³⁴

as “it is one thing to agree that A is not liable to B for the consequences of A’s negligence,” but “it is quite another thing to agree that B must compensate A for the consequences of A’s negligence”.¹³⁵ It is submitted, therefore, that the proper starting point of a court in relation to contract terms which arguably exclude a party’s liability for negligence should be the general approach to construction rather than Lord Morton’s three guidelines.¹³⁶ In this respect, the first of Lord Morton’s guidelines

reflects entirely the current approach, as the courts will give effect to clear language. By contrast, the second proposition does not accurately reflect the current approach, for while it properly starts with the ordinary meaning of words which it is claimed covers a party's negligence, it then states that any doubt "must be resolved against the proferens", that is, the person seeking to rely on the clause. This proposition is linked to the traditional approach of the courts to the construction of exemption clauses *contra proferentem*, which, it has earlier been argued, applies only after the court has sought to resolve the ambiguity of a term by reference to its contractual context, matrix of fact and, as appropriate, commercial common sense.¹³⁷ And the third of Lord Morton's guidelines is even more problematic, as it appears to invite a court to look for a ground of liability other than for negligence to which the clause could apply (and restrict its application to that other ground) rather than construe the term in its context following the general approach to construction.¹³⁸ As a result, while the following paragraphs will discuss earlier case-law considering the application of Lord Morton's guidelines, it should be recalled that a number of the cases were decided at a time when a much more hostile and therefore much stricter approach was taken by courts to the construction of exclusion clauses.

Words wide enough to cover negligence

17-014 It remains the law that:

"... [i]f the clause contains language which expressly exempts the person in whose favour it is made ... from the consequences of the negligence of his own servants, effect must be given to that provision."¹³⁹

To satisfy this, the first of Lord Morton's guidelines, there must be a clear and unmistakable reference to negligence or to a synonym for it.¹⁴⁰ Words such as "at sole risk",¹⁴¹ "at customers' sole risk",¹⁴² "at owner's risk"¹⁴³ and "at their own risk"¹⁴⁴ will normally cover negligence, as will words which clearly indicate an intention to exclude all liability without exception, for example, "no liability whatever"¹⁴⁵ or "under no circumstances"¹⁴⁶ or "all liability",¹⁴⁷ or all liability save that specified in the clause.¹⁴⁸ If the defendant merely disclaims liability for "any loss", he may be directing attention to the kinds of losses, and not to their cause or origin; so liability for negligence will not necessarily be excluded.¹⁴⁹ But if he says "however arising" or "any cause whatever", these words can cover losses by negligence.¹⁵⁰ Thus the words "howsoever caused",¹⁵¹ "from whatever other cause arising",¹⁵² "howsoever arising",¹⁵³ "arising from any cause whatsoever",¹⁵⁴ "relieves from all responsibility for any injury, delay, loss or damage, however caused"¹⁵⁵ have been held to be effective. Likewise a clause which excluded liability for any damage "which may arise from or be in any way connected with any act or omission of any person ... employed by [the defendant]" has been held to be wide enough to cover negligence on

the part of the defendant's servants.¹⁵⁶ However, as earlier explained, the meaning of a clause must be collected from its entire wording, and in construing the clause other parts of the contract which throw light on the meaning to be given to it, and the factual background, are not to be ignored.¹⁵⁷ So, for instance, even such comprehensive words as "any liability ... whatsoever",¹⁵⁸ "howsoever caused",¹⁵⁹ "any loss howsoever arising"¹⁶⁰ and "at charterers' risk"¹⁶¹ may be limited by their context and thus not extend to the negligence of the defendant which it is sought to exclude. On the other hand, where a clause in a charterparty expressly accepted liability for negligence *only* in certain specified respects, it was held that it necessarily followed that it excluded negligence in all other respects.¹⁶²

Liable only if negligent

- 17-015 There is no rule of law (if there ever was) that, if the only liability of a party seeking to rely on an exclusion clause is for negligence, the clause *must* be construed so as to cover negligence otherwise it would lack subject matter¹⁶³: the duty of the court is always to construe the wording of the clause in question to find its objective meaning.¹⁶⁴

Restricting words to ground of liability other than negligence

- 17-016 Lord Morton's third guideline was that where the words used by a contract term are wide enough to cover negligence, the court must nevertheless consider whether the head of damage may be based on some ground other than that of negligence and, if it can be, restrict its application to that other ground.¹⁶⁵ This derived from a principle of construction enunciated by Lord Greene MR in *Alderslade v Hendon Laundry Ltd*¹⁶⁶ that:

"Where ... the head of damage [liability for which is sought to be excluded] may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss, occurring through that other cause, to the exclusion of loss arising through negligence."

To this statement Lord Morton added the qualification that the "other ground" must not be so fanciful or remote that the party relying on the clause cannot be supposed to have desired protection against it.¹⁶⁷ This guideline has long been seen as problematic and in *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* in 1982 the Court of Appeal cautioned against a too literal or over-legalistic approach.¹⁶⁸ May LJ said¹⁶⁹:

“In seeking to apply Lord Morton’s third test, we should not ask now whether there is or might be a technical alternative head of legal liability which the relevant exemption clause might cover and, if there is, immediately construe the clause as inapplicable to negligence. We should look at the facts and realities of the situation as they did or must be deemed to have presented themselves to the contracting parties at the time the contract was made, and ask to what potential liabilities the one to the other did the parties apply their minds, or must they be deemed to have done so.”

A number of cases provide examples¹⁷⁰ of the application of this third guideline: for instance, it has been illustrated¹⁷¹ by reference to a common carrier whose liability for loss of or damage to the goods carried may be based on a ground, i.e. strict liability, independent of negligence.¹⁷² And, where there were mutual exceptions in a charterparty in certain specified events including “errors of navigation”, one of the reasons advanced for holding that negligent errors of navigation were not covered was that the clause was based on the assumption that a shipowner would be liable without negligence.¹⁷³ Lord Morton’s third guideline was also applied in somewhat different circumstances in *Dorset CC v Southern Felt Roofing Co*¹⁷⁴ where a term in a building contract provided that the employer should bear the risk of “loss or damage in respect of the works by fire, lightning, explosion, aircraft and other aerial devices dropped therefrom”. The Court of Appeal held that the term did not apply to fire caused by the contractor’s negligence since, by the inclusion of events other than fire which might occur without the fault of any human agent, there were risks not fanciful or remote to which the term could relate other than negligence. However, as May LJ’s observations in *Lamport & Holt Lines Ltd* indicate and as earlier more generally argued, Lord Morton’s third guideline should not be seen as an alternative to the court’s construing an ambiguous exemption clause in its context and, as appropriate, according to commercial common sense.

Non-contractual notices

- 17-017 In the absence of a contract, the effect of a notice excluding liability may be to defeat a claimant’s claim for damages for negligence on the basis of volenti non fit injuria.¹⁷⁵ Similarly, where A concludes a contract with B and issues a notice disclaiming liability to C, then, subject to reasonable notice being given to C, at common law this disclaimer can be effective to exclude A’s liability in the tort of negligence to C.

¹⁷⁶



Indemnity clauses

- 17-018 It is not unusual to find clauses by which one party does not merely exclude his liability in negligence to the other party but further requires the other party to indemnify him against his liability in negligence to third parties. The law presumes that a party will not readily be granted an indemnity against a loss caused by his own negligence.¹⁷⁷ Nevertheless there is no doubt that a party is entitled to an indemnity against even the consequences of his own negligence if the clause so provides either expressly or by necessary implication.¹⁷⁸ The three guidelines laid down by Lord Morton in *R. v Canada S.S. Co Ltd*¹⁷⁹ have been said to apply to indemnity clauses.¹⁸⁰ If there is no express reference to negligence, the question is whether the words used are wide enough in their ordinary meaning to cover negligence on the part of the person seeking to be indemnified or his servants.¹⁸¹ And, following the third guideline of Lord Morton in *R. v Canada S.S. Co Ltd*, even if the words used are wide enough for this purpose, the court must consider whether liability for the loss or damage mentioned in the clause may arise on some ground other than such negligence, which ground is not so fanciful or remote that the parties cannot be supposed to have intended the indemnity to apply to it.¹⁸² In the case of dishonest wrongdoing, “general words will not serve”, as “the language used must be such as will alert a commercial party to the extraordinary bargain he is invited to make”.¹⁸³ The scope of the indemnity will therefore depend upon the wording of the particular clause and the intentions of the parties regarding it to be collected from the whole of their agreement.¹⁸⁴ For this purpose, the Supreme Court has recently applied its general approach to contractual construction to an indemnity clause in a detailed and professionally drafted contract concluded by commercially sophisticated parties, without reference to Lord Morton’s guidelines in *R. v Canada S.S. Lines Ltd*. It therefore held that the wording of an “avoidably opaque” clause must be examined in detail in the context of the contract as a whole and taking into account whether the wider factual matrix gives guidance as which is the better of its possible interpretations.¹⁸⁵ In this context, the Supreme Court found that the proper interpretation of the indemnity clause (there relating to the circumstances which triggered the indemnity) was “to be found principally in a careful examination of the language which the parties have used”.¹⁸⁶

Deliberate breaches

- 17-019 It has from time to time been suggested that, if the breach by one party evinces “a deliberate disregard of his bounden obligations”,¹⁸⁷ it will not be covered by an exemption clause.¹⁸⁸ But there is no rule of law to prevent the exclusion or restriction of liability arising from even a deliberate act or omission by one party or his servants if the contract so provides.¹⁸⁹ In the *Suisse Atlantique* case,¹⁹⁰ Lord Wilberforce said¹⁹¹:

“Some deliberate breaches ... may be, on construction, within an exceptions clause (for example, a deliberate delay for one day in loading). This is not to say that ‘deliberateness’ may not be a relevant factor: depending on what the party in breach ‘deliberately’ intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited.”

It may therefore be relevant to consider whether an exemption clause on its true construction does in fact cover deliberate misconduct¹⁹² or a deliberate non-performance of the contract,¹⁹³ but “to create a special rule for deliberate acts is unnecessary and may lead astray”.¹⁹⁴

- 17-020 Some clauses, however, while disclaiming liability for loss or damage caused by negligence, accept liability for loss or damage due to “wilful neglect or default”,¹⁹⁵
- (U) “wilful misconduct”¹⁹⁶ or “gross negligence”.¹⁹⁷

Burden of proof

- 17-021 It is for the party seeking to rely on the exemption clause to show that the clause, on its true construction, covers the obligation or liability which it purports to restrict or exclude. It would also seem that, in general, it is for that party to prove that the claimant’s case is within the clause.¹⁹⁸ If the promise is qualified by an exemption which covers the whole scope of the promise,¹⁹⁹ the claimant must bring himself within the promise as qualified.²⁰⁰ Further, if there is an exception to the exemption, for example, in the event of wilful neglect or default,²⁰¹ then the burden rests upon the claimant to prove that his case falls within the exception.²⁰² The form is not, however, conclusive, and the matter is in every case a question of construction of the instrument as a whole.²⁰³ In *Firestone Tyre & Rubber Co Ltd v Vokins & Co Ltd*,²⁰⁴ where a lighterage clause provided that goods were carried only at owner’s risk, excepting loss arising from pilferage and theft whilst in the course of transit, Devlin J held that the onus was still on the lightermen to prove that the loss did not occur by theft or pilferage.
- 17-022 If the party seeking to rely on the clause makes out a *prima facie* case that the facts are such as to bring the case within the clause, then it appears that the claimant must disprove it by showing that the loss or damage was occasioned by an act or omission falling outside the clause.²⁰⁵ However, in *Levison v Patent Steam Carpet Cleaning Co Ltd*,²⁰⁶ where a clause in a contract of bailment

was sufficient to exclude liability for negligence on the part of the bailee but not a “fundamental breach” of the contract, the Court of Appeal held that the onus was on the bailee to show that he was not guilty of a fundamental breach, although the same court had previously decided²⁰⁷ to the contrary in a case involving a contract of carriage. With the final demise of the doctrine of “fundamental breach”,²⁰⁸ it is suggested that *Levison’s* case deserves reconsideration.²⁰⁹ A bailor may nevertheless be assisted by the rule that it is for a bailee who is sued in respect of the loss of the goods bailed to prove that the loss occurred without his negligence.²¹⁰

Footnotes

- ❶45 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 846, 851; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 68 A.L.R. 385; *Kudos Catering (UK) Ltd v Manchester Central Convention* [2012] EWHC 1192 (QB); *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2015] EWHC 3573 (TCC), [2016] B.L.R. 112 at [25]–[28]; *Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd* [2022] EWCA Civ 440 at [32]–[37] (noting also the rule associated with *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689, 717–718, on which see below, para.17-009).
- ❶46 [1998] 1 W.L.R. 896 on which see above, paras 15-047 et seq.
- ❶47 *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29, [2021] 3 W.L.R. 521 at [107] per Lord Leggatt JSC with whom Lord Burrows JSC agreed (being in the majority on the relevant issue together with Lady Arden DPSC).
- ❶48 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 851 and see similarly at 843 (Lord Wilberforce). See also *Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd* [2007] EWCA Civ 154, [2007] 1 C.L.C. 188 at [46]; *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), [2014] 1 C.L.C. 353 at [25]–[26]; *Bikam OOD, Central Investment Group SA v Adria Cable Sarl* [2012] EWHC 621 (Comm) at [34]–[36]; *Polypearl Ltd v E.on Energy Solutions Ltd* [2014] EWHC 3045 (QB) at [35]–[36]; *Interactive E-Solutions JLT v O3B Africa Ltd* [2018] EWCA Civ 62 at [14] (Lewison LJ noting that courts are “more accepting” of exclusion clauses after the 1977 Act “recognising (at least in commercial contracts between parties of equal bargaining power) that exclusion and limitation clauses are an integral part of pricing and risk allocation”).
- ❶49 See below, paras 17-023—17-027 in relation to *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; Harbutt’s “Plasticine” Ltd v Wayne Tank and Pump Co Ltd [1970] 1 Q.B. 447 and *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827.

- ⑤0 *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896* at 912 per Lord Hoffmann, above, para.15-048. See further *Foxton (2021) J.B.L. 205*.
- ⑤1 *[1952] A.C. 192, 208* and see below, para.17-013.
- ⑤2 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61* at [11] per Lord Bingham, below, para.17-013. cf. the restrictive interpretation of the decision on the construction of a clause disapplying a statutory limitation of liability in *Clarke v Earl of Dunraven and Mount-Earl, The Satanita [1897] A.C. 59* by the PCs in *Bahamas Oil Refining Co International Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG [2016] UKPC 20* at [49], in part on the basis that the earlier case was decided “at a time when the relevant principles of construction were much less developed than they are today”.
- ⑤3 *The Starsin [2004] 1 A.C. 715* at [144]; *Dairy Containers Ltd v Tasman Orient Line CV [2004] UKPC 22, [2004] 2 All E.R. (Comm) 667* at [12]; *Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128, [2016] 1 C.L.C. 573*, esp. at [12]–[22] but cf. *Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606* at [14] and [19] (“artificial approaches to construction” should not be applied to a contract by which the parties entered “mutual undertakings to accept the risk of consequential loss flowing from each other’s breaches of contract”). And see Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.7-010, *Peel [2017] L.Q.R. 6*; *Tofaris [2019] L.M.C.L.Q. 270* and below, para.17-012.
- ⑤4 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 W.L.R. 964, 966, 970*. See also *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] A.C. 689, 717–718*; *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 846, 850*; *Bem Dis a Turk Ticaret S/A TR v International Agri Trade Co Ltd [1999] 1 Lloyd's Rep. 729*; *How Engineering Services Ltd v Lindner Ceilings Floors Partitions Plc (1999) 64 Const. L.R. 67, 79*; *Cero Navigation Corp v Jean Lion & Cie [2000] 1 Lloyd's Rep. 292, 297*; *Stent Foundations Ltd v MJ Gleeson Group Plc [2001] Build. L.R. 134*; *Amiri Flight Authority v BAE Systems Plc [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767* at [25]; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2003] UKHL 12, [2004] 1 A.C. 715* at [144]; *Dairy Containers Ltd v Tasman Orient Line CV [2004] UKPC 22, [2005] 1 W.L.R. 215* at [12]; *Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461* at [22]–[23]; *Seadrill Management Services Ltd v OAO Gazprom (The “Ekha”) [2010] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543* at [184], [217]–[218] (affirmed [2010] EWCA Civ 691). But see *Whitecap Leisure Ltd v John H Rundle Ltd [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep. 216* (imperfect clause enforced); *WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (TCC), 131 Con. L.R. 63* and *Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349* (ordinary rules of construction apply); and cf. *Bahamas Oil Refining Co International Ltd v Owners of the*

Cape Bari Tankschiffahrts GmbH & Co KG [2016] UKPC 20 at [31]–[40] (exclusion of limitation of liability arising by statute and international convention). But see *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd [2013] EWCA Civ 1232, [2014] 1 W.L.R. 2365* at [38], [59], [70] (“no set-off” clause need not be expressed in terms to qualify the payment obligation, though the decision was overruled on other grounds in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd [2016] UKSC 23, [2016] 2 W.L.R. 1193* at [58]); *CNM Estates (Tolworth Tower) Ltd v VeCREF ISARL [2020] EWHC 1605 (Comm), [2020] P.N.L.R. 27* at [16]–[18] (relating this rule of construction to *contra proferentem*); *Shepherd Construction Ltd v Drax Power Ltd [2021] EWHC 1478 (TCC), 196 Con. L.R. 239* at [45]. See also *Foxton (2021) J.B.L. 205, 206–210*. On the special rules for the interpretation of contract terms (including exemption clauses) in consumer contracts see Vol.II, paras 40-430 —40-434 (*Consumer Rights Act 2015 s.69*).

①55 (1927) 43 T.L.R. 323.

①56 (1927) 43 T.L.R. 323, 324.

①57 *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 850*. See also *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, 482*; *Whitecap Leisure Ltd v John H Rundle Ltd [2008] EWCA Civ 429, [2008] 2 Lloyd’s Rep. 16* at [20]; *Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75, [2009] 1 Lloyd’s Rep. 461* at [23]; *Scottish Power UK Plc v BP Exploration Operating Co Ltd [2016] EWCA Civ 1043* at [30].

①58 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 W.L.R. 964, 966, 970*; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 A.C. 803, 814*; *Whitecap Leisure Ltd v John H Rundle Ltd [2008] EWCA Civ 429, [2008] 2 Lloyd’s Rep. 216* at [20]–[22]; *McGee Group Ltd v Galliford Try Building Ltd [2017] EWHC 87 (TCC), [2017] B.T.C. 19* at [22]–[25]. Contrast *Darlington Futures Ltd v Delco Australia Pty Ltd (1987) 68 A.L.R. 385*.

①59 Above, para.17-007.

①60 *Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29, [2021] 3 W.L.R. 521* at [107] per Lord Leggatt JSC with whom Lord Burrows JSC agreed (being in the majority on the relevant issue with Lady Arden DPSC). Lord Sales JSC and Lord Hodge dissented on this issue as a matter of the construction of the particular contract. See also *Huntsworth Wine Co Ltd v London City Bond Ltd [2021] EWHC 2831 (Comm)* at [114]–[115]; *Eurasian Natural Resources Corp Ltd v Dechert LLP [2022] EWHC 1138 (Comm)* at [1630]–[1636].

①61 *Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd [2022] EWCA Civ 440* at [60] (with whom Phillips LJ and Zacaroli J agreed) holding that this “proper approach to exclusion clauses” confirmed the construction of the clause which he had taken on the basis of the natural and ordinary meaning of the words used.

- ⑥2 *Impact Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers at Work Ltd) [2016] UKSC 57, [2017] A.C. 73* at [35] per Lord Toulson (with whom Lord Mance, Lord Sumption and Lord Hodge agreed) (exclusion in contract of professional indemnity insurance). cf. Lord Hodge at [7] (with whom Lord Toulson, Lord Mance, and Lord Sumption agreed) who considered that the established strict construction of exemption clauses does not apply to “exclusion clauses” limiting the extent of cover in a contract of professional liability insurance.
- ⑥3 See above, para.15-047.
- ⑥4 *Sydney City Council v West (1965) 114 C.L.R. 481; Whitecap Leisure Ltd v John H Rundle Ltd [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep. 216* at [20]; *Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349* at [26]; *Motortrak Ltd v FCA Australia Pty Ltd [2018] EWHC 990 (Comm)* at [110]–[130].
- ⑥5 *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 846, 851; George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 A.C. 803; Darlington Futures Ltd v Delco Australia Pty Ltd (1987) 68 A.L.R. 385; Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128, [2016] 1 C.L.C. 573* at [19].
- ⑥6 *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd [2013] EWCA Civ 38 [2013] 2 Lloyd's Rep. 270* at [28]; *Transocean Drilling UK Ltd v Providence Resources Plc [2014] EWHC 4260 (Comm), [2015] B.L.R. 190* at [39]; *First Tower Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637* at [84]; *Acerus Pharmaceuticals Corp v Recipharm Ltd [2021] EWHC 1878 (Comm)* at [19]–[25]. cf. paras 15-090 et seq.
- ⑥7 *Scottish Power UK Plc v BP Exploration Operating Co Ltd [2016] EWCA Civ 1043* at [29] quoting Briggs LJ in *Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128, [2016] 1 C.L.C. 573* at [19].
- ⑥8 See below, para.17-012.
- 69 *Cavendish-Woodhouse v Manley (1984) 82 L.G.R. 376*, but see *Dalmare SpA v Union Maritime Ltd [2012] EWHC 3537 (Comm), [2013] 2 All E.R. 870* at [84] (“as she was” purchase provision in contract for sale of vessel should be read as excluding the right to reject the vessel while leaving the right to claim damages for breach of the terms implied by the Sale of Goods Act 1979 ss.13, 14 unimpaired).
- 70 *Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 A.C. 31*.
- 71 *Baldry v Marshall [1925] 1 K.B. 260; Wallis, Son & Wells v Pratt & Haynes [1911] A.C. 394; KG Bominflot Bunkergesellschaft für Mineralöle mbH & Co v Petroplus Marketing AG [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442* at [62]; *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd [2021] EWHC 1117* at [40]–[42]. cf. *Air Transworld Ltd v*

Bombardier Inc [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [29]. See Vol.II, para.46-056.

72 *Andrews Bros Ltd v Singer & Co Ltd* [1934] 1 K.B. 17. See Benjamin's Sale of Goods, 11th edn (2020), paras 13-025 et seq.

73 *Millar's Machinery Co Ltd v David Way & Son* (1935) 40 Com. Cas. 204; *Saint Line Ltd v Richardsons Westgarth Ltd* [1940] 2 K.B. 99; *Croudace Construction Ltd v Cawood's Concrete Products Ltd* [1978] 2 Lloyd's Rep. 55; *British Sugar Plc v NEI Power Projects Ltd* (1997) 87 B.L.R. 42; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387, 402–403; *BHP Petroleum Ltd v British Steel Plc* [1999] 2 Lloyd's Rep. 583, 597–600, [2000] 2 Lloyd's Rep. 277; *Pegler Ltd v Wang (UK) Ltd* [2000] Build. L.R. 218, 227; *Hotel Services (UK) Ltd v Hilton International Hotels (UK) Ltd* [2000] 1 All E.R. (Comm) 750; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] B.L.R. 218; *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] EWHC 232, [2006] 1 Lloyd's Rep. 673; *Ferryways NV v Associated Pontish Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep. 639 at [84]–[85]; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [314]; *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] 1 All E.R. (Comm) 513 at [96]; *B A Kitchen Components Ltd v Jowat (UK) Ltd* [2021] NIQB 3 at [29] and [32]. But the correctness of this conclusion was reserved by Lord Hoffmann in *Caledonia North Sea Ltd v Norton (No.2) Ltd* [2002] UKHL 4, [2002] 1 All E.R. (Comm) 321 at [100]. Moreover, some of these cases may be decided differently today given that the courts are now more willing to recognise that words take their meaning from their context and that the same word or phrase may mean different things in different documents: *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [15]. cf. *Star Polaris LLC v HHIC-PHIL Inc* [2016] EWHC 2941 (Comm), [2017] 1 Lloyd's Rep. 203 at [11]–[18] and [39] (which noted the statement in the corresponding paragraph of an earlier edition of the present work and the doubts expressed in *Caledonia North Sea* and in *Transocean Drilling UK Ltd* and held that in the context of the particular contract an exclusion of liability for “consequential or special losses, damages or expenses” did not refer to losses, etc. falling within the second limb in *Hadley v Baxendale*, but had a wider meaning). On these issues see *Foxton* (2021) J.B.L. 205, 213–214.

74 *Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd* [2022] EWCA Civ 440 at [57], the CA also explaining (at [60]–[82]) other considerations which supported this construction in the context. See also *Eurasian Natural Resources Corp Ltd v Dechert LLP* [2022] EWHC 1138 (Comm) at [1630]–[1636] (cap on liability in contract of retainer of solicitor LLP applicable to “all Losses arising from or in connection with our service” held not covering wasted fees paid to a solicitor).

75 *Beck & Co v Szymanowski & Co* [1924] A.C. 43.

76 See below, paras 17-030—17-031. But contrast *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] A.C. 803; below, para.17-026.

77 For further examples, see *Pegler Ltd v Wang (UK) Ltd* [2000] B.L.R. 218; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] 1 Lloyd's Rep. 20, 59, 60 (affirmed [2002] EWCA Civ 548,

[2002] 2 *Lloyd's Rep.* 368). cf. *Philip v Cook* [2017] EWHC 3012 (QB) (contract term providing that sellers “are not liable” if a claim is not notified within two years construed in context to extend to rights of set-off); *Primus International Holding Co v Triumph Controls —UK Ltd* [2020] EWCA Civ 1228, [2021] 2 All E.R. (Comm) 369 esp. at [20] (summary exclusion of seller’s liability in a sale of a company restricted to “lost goodwill” held inapplicable given the ordinary legal meaning of goodwill, relevant authorities, the wider contract and the nature of the claimant’s claims).

78 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 398.

79 See above, paras 15-047 et seq.

80 *Glynn v Margetson & Co* [1893] A.C. 351, 357; *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924 (Comm), [2005] 1 *Lloyd's Rep.* 382 at [29]; *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admly), [2009] 1 *Lloyd's Rep.* 177; *Internet Broadcasting Group Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 *Lloyd's Rep.* 295 at [25], [29], [33]; *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38, [2013] 2 *Lloyd's Rep.* 270; *Daniels v Lloyds Bank Plc* [2018] EWHC 660 at [182]–[185].

81 *Leduc v Ward* (1888) 20 Q.B.D. 475; *Glynn v Margetson & Co* [1893] A.C. 351; *Connolly Shaw Ltd v A/S Det Nordenfjeldske D/S* (1934) 49 *Ll.L. Rep.* 183.

82 *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576; *Motis Exports Ltd v Dampsikibsselskabet AF 1912 Aktieselskab* [2000] 1 *Lloyd's Rep.* 211, 213, 216, 217; *East West Corp v DKBS 1912* [2003] EWCA Civ 83, [2003] 1 *Lloyd's Rep.* 238 at [85]. Contrast *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* [1994] 1 *Lloyd's Rep.* 213.

83 *Motis Exports Ltd v Dampsikibsselskabet AF 1912* [2000] 1 *Lloyd's Rep.* 211, 216 (“lean against such a result”). See also *Astrazeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm), [2012] B.L.R. D1 at [313].

84 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 482.

85 [1984] 1 W.L.R. 48.

86 [1984] 1 W.L.R. 48, 58–59 (with whom all other members of the House of Lords agreed).

87 [1984] 1 W.L.R. 48 at 59.

88 See, e.g. *G.H. Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] A.C. 149.

89 *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54.

90 See, e.g. *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 971; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 *Lloyd's Rep.* 79, 92–93; *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924, [2005] 1 *Lloyd's Rep.* 382; *EU Networks Fiber UK Ltd v Abovenet Communications UK Ltd* [2007] EWHC 3099 (Ch); *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admly), [2009] 1 *Lloyd's Rep.* 177.

91 *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 *Lloyd's Rep.* 79, [93]; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 68 A.L.R. 385; *EU Networks Fiber UK Ltd v Abovenet Communications UK Ltd* [2007] EWHC 3099 (Ch); *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admly), [2009] 1 *Lloyd's Rep.* 177 at [112].

- 92 [1984] 1 W.L.R. 48.
- 93 *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [27] per Moore-Bick LJ (with whom McFarlane and Briggs LJJ agreed) referring to *Great North Eastern Railway Ltd v Avon Insurance Plc* [2001] EWCA Civ 780, [2001] 1 Lloyd's Rep. I.R. 793 (the relevant passages are at [31]). See also *Motortrak Ltd v FCA Australia Pty Ltd* [2018] EWHC 990 (Comm) at [126]–[130]; *CNM Estates (Tolworth Tower) Ltd v VeCREF ISARL* [2020] EWHC 1605 (Comm), [2020] P.N.L.R. 27 at [31]–[33].
- 94 *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189, 192; *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 465, 469; *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* (1966) 115 C.L.R. 353, 376; *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 412, 424, 434; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69, 85.
- 95 *London & North Western Ry v Neilson* [1922] 2 A.C. 263, 272; see also below, para.17-032.
- 96 *Royal Exchange Shipping Co Ltd v Dixon* (1886) 12 App. Cas. 11, 16, 19; *J. Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078, 1082, 1084, 1085. But *Wibau Maschinenfabrik Hartman SA v Mackinnon Mackenzie & Co* [1989] 2 Lloyd's Rep. 494 (Hague-Visby Rules) was overruled in *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* [2003] EWCA Civ 451, [2003] 2 Lloyd's Rep. 1.
- 97 *Lilley v Doubleday* (1881) 7 Q.B.D. 510; *Gibaud v G.E. Ry* [1921] 2 K.B. 426, 435; *Woolf v Collis Removal Service* [1948] 1 K.B. 11; *Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd* [1971] 1 W.L.R. 519, 532; see below, para.17-041.
- 98 *Davies v Collins* [1945] 1 All E.R. 247; *Garnham, Harris & Elton Ltd v Ellis (Transport) Ltd* [1967] 1 W.L.R. 940; see below, para.17-041.
- 99 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 845. See also *Kenya Railways v Antares Co Pte Ltd* [1987] 1 Lloyd's Rep. 424, 430; *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* [2003] EWCA Civ 451 at [15]–[44]; and *The Cap Palos* [1921] P. 458, 468; *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admly), [2009] 1 Lloyd's Rep. 177 at [113]–[116] (towage); and below para.17-032.
- 100 [1980] A.C. 827. See also *Compania Portorafti Commerciale SA v Ultramar Panama Inc* [1990] 1 Lloyd's Rep. 310; *Parsons Corp v CV Scheepvaartonderneming "Happy Ranger"* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep. 857 (Hague-Visby Rules).
- 101 See *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 155, 162 (“collateral” negligence); *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 68 A.L.R. 385.
- 102 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 851.
- 103 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803 (below, para.17-026); *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* [1994] 1 Lloyd's Rep. 213.
- 104 *Pera Shipping Corp v Petroship SA* [1984] 2 Lloyd's Rep. 363, 365; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127, 134; *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 esp. at [14] and [16]; *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [20] (contra proferentem has no role to play where the meaning of the words is clear or where

- a clause favours both parties equally); *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [52]–[53]; *Windsor-Clive v Rees* [2019] EWHC 1008 (Ch), [2019] 4 W.L.R. 74 at [44]–[60] (role of contra proferentem in reservations to landlord in a lease). See generally Peel in Burrows and Peel, Contract Terms (2007), Ch.4; *Peel* [2017] L.Q.R. 6; *Barrett and Wilmot-Smith* (2017) Butterworths Journal of International Banking and Finance Law 707; *Tofaris* [2019] L.M.C.L.Q. 270 at 282–284.
- 105 This has been termed the “classic form” of the rule of construction contra proferentem: *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 at [14] per Briggs LJ and see above, paras 15–109 et seq.
- 106 [1949] 2 All E.R. 581. See also *Webster v Higgin* [1948] 2 All E.R. 127; *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 Q.B. 247; *Billyack v Leyland Construction Co Ltd* [1968] 1 W.L.R. 471; *Adams v Richardson & Starling Ltd* [1969] 1 W.L.R. 1645, 1653; *Pera Shipping Corp v Petroship SA* [1985] 2 Lloyd’s Rep. 103; *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] 2 Lloyd’s Rep. 216 at [22]; *Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd* [2010] EWHC 965 (TCC), (2010) 26 Const. L.J. 542.
- 107 See below, para.17-021.
- 108 This appears to be the sense in which the principle was referred to in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 847; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 969, 970; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 814; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 A.C. 71 at [144]; *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22, [2005] 1 W.L.R. 215 at [12].
- 109 [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 at [5].
- 110 [2016] EWCA Civ 128 at [21] per Briggs LJ.
- 111 [2016] EWCA Civ 128 at [36] (with whom Hallett LJ and Moylan J agreed, though placing greater emphasis on the commercial sense of the resulting decision: [2016] EWCA Civ 128 at [40] and [41]).
- 112 *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 at [19] per Briggs LJ; followed in *European Film Bonds AS v Lotus Holdings LLC* [2020] EWHC 1115 (Ch) at [80]–[81], where it was also held that the term in question was not an exemption clause. See similarly *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [57] per Jackson LJ.
- 113 *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691, [2011] 1 All E.R. (Comm) 1077 at [29] per Moore-Bick LJ quoted by Briggs LJ in *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128 at [19]; *Federal Republic of Nigeria v JP Morgan Chase Bank N.A.* [2019] EWHC 347 (Comm) at [34] affd [2019] EWCA Civ 1641, [2019] 2 C.L.C. 559 esp. at [35]–[39].
- 114 Above, para.17-008.
- 115 On which see below, paras 17-013—17-016.
- 116 *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29, [2021] 3 W.L.R. 521 at [111] (Lord Burrows JSC agreed) and see above, para.17-008 on this principle.
- 117 *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [52] per Jackson LJ (with whom Moylan and Beatson LJJ agreed). See similarly *Multiplex Construction*

- Europe Ltd v Dunne [2017] EWHC 3073 (TCC), [2018] B.L.R. 36* at [28]–[32] (in relation to contracts of guarantee on which see Vol.II, para.47-063); *Bates v Post Office Ltd (No.3: Common Issues) [2019] EWHC 606 (QB)* at [634]–[638].
- 118 [2011] EWCA Civ 904, [2012] Ch. 497 at [68], quoted at [2017] EWCA Civ 373 at [52].
- 119 *Taberna Europe CDO Plc v Selskabet AF 1 [2016] EWCA Civ 1261, [2017] Q.B. 633* at [23] per Moore-Bick LJ. See also *Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606* at [20] and [28] (contra proferentem has no application to unambiguous clauses).
- 120 Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts art.5.
- 121 See formerly the *Unfair Terms in Consumer Contracts Regulations 1999* reg.7.
- 122 Vol.II, at paras 40-430—40-434.
- 123 On the controls on the exclusion or restriction of “business liability” for negligence by contract term or notice see the *Unfair Contract Terms Act 1977* s.2 (below, paras 17-085—17-087) and, in the consumer context, ss.65 and 66 of the *Consumer Rights Act 2015* (Vol.II, para.40-423).
- 124 For this purpose, the normal meaning of “negligence” includes both breach of a contractual obligation to take reasonable care and breach of a duty to take reasonable care in tort, unless the intention of the parties as a matter of construction indicates otherwise; and the Supreme Court has held that, in its context, an exception for liability for negligence in a limitation clause applied to the party’s contractual liability for negligence: *Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29, [2021] 3 W.L.R. 521* at [52] (Lady Arden DPSC), [100] and [114]–[121] (Lord Leggatt JSC and Lord Burrows JSC); Lord Sales JSC (with whom Lord Hodges JSC agreed) dissented on the ground that as a matter of construction reference to “negligence” should be restricted to a freestanding liability in tort and so not apply to the party’s breach of contractual obligation to take reasonable care: at [125]–[126].
- 125 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 W.L.R. 964, 966, 970; George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 A.C. 803, 814*. See also *Continental Illinois National Bank & Trust Co of Chicago v Papanicolau [1986] 2 Lloyd's Rep. 441, 444*, and *Skipskreditforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66, 76* (“no set-off” clause) and *Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 Lloyd's Rep. 446, 452; BHP Petroleum Ltd v British Steel Plc [2000] 2 Lloyd's Rep. 277, 285* (time-limit clause). But see *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61* at [63]; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251*.
- 126 *Gillespie Bros Ltd v Roy Bowles Transport Ltd [1973] Q.B. 400, 419; Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 W.L.R. 964, 970; Sonat Offshore SA v Amerada Hess Development Ltd [1988] 1 Lloyd's Rep. 145, 157 and 162; Stent Foundations Ltd v M.J. Gleeson Group Plc [2001] B.L.R. 134*. On construction contra proferentem, see above, para.17-012.
- 127 [1952] A.C. 192, 208. For a criticism of these propositions, see *Palmer [1983] L.M.C.L.Q. 557; Foxton (2021) J.B.L. 205, 211–213*.

- 128 *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 168, 178; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 45, 48–49, 51; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [11], [63], [116]; *Lictor Anstalt v Mir Steel UK Ltd* [2012] EWCA Civ 1397, [2013] C.P. Rep. 7 at [31]–[35].
- 129 *Gillespie Bros Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42.
- 130 *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61.
- 131 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [11]. See similarly *Lictor Anstalt v Mir Steel UK Ltd* [2012] EWCA Civ 1397, [2013] C.P. Rep. 7 at [35].
- 132 Above, para.17-012.
- 133 *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [56] per Jackson LJ (with whom Moylan and Beatson LJJ agreed). See also *Taberna Europe CDO II Plc v Selskabet AF1* [2016] EWCA Civ 1262, [2017] Q.B. 633 at [24] (“the law has moved on since [the decision in *Canada Steamship*]”).
- 134 [2017] EWCA Civ 373 at [56]. See also *Taberna Europe CDO II Plc v Selskabet AF1* [2016] EWCA Civ 1262, [2017] Q.B. 633 at [24] (“the law has moved on since [the decision in *Canada Steamship*]”); *Aprile SpA v Elin Maritime Ltd* [2019] EWHC 1001 (Comm) at [58]–[69]. See also *Tofaris* [2019] L.M.C.L.Q. 270 at 284–286.
- 135 *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at [55] per Jackson LJ.
- 136 See above, paras 15-047 et seq. And cf. the observations of Lord Leggatt JSC in *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29, [2021] 3 W.L.R. 521 at [111] quoted above, para.17-012 referring to “old and outmoded formulas such as the three-limb test in *Canada Steamship Lines Ltd v The King* ... and the ‘contra proferentem’ rule”.
- 137 Above, para.17-012.
- 138 See further below, para.17-016.
- 139 [1952] A.C. 192, 208.
- 140 *Clark v Sir William Arrol & Co Ltd* (1974) S.L.T. 90, 92; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 169, 173; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 45, 47, 51; *Spriggs v Sotheby Parke Bernet & Co* [1986] 1 Lloyd's Rep. 487; *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297.
- 141 *Forbes, Abbott & Lennard Ltd v G.W. Ry* (1927) 44 T.L.R. 97; *The Jessmore* [1951] 2 Lloyd's Rep. 512; *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 W.L.R. 459; *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 1 W.L.R. 995; *Norwich City Council v Harvey* [1989] 1 W.L.R. 828.
- 142 *Rutter v Palmer* [1922] 2 K.B. 87.
- 143 *Burton & Co v English & Co* (1883) 12 Q.B.D. 218, 223; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69; cf. *Allan Bros and Co v James Bros & Co* (1897) 3 Com. Cas. 10, 12; *Svenssons Travaruaktiebolag v Cliffe Steamship Co* [1932] 1 K.B. 490, 496; *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd* [1991] 2 Lloyd's Rep. 391.

- 144 *Reynolds v Boston Deep Sea Fishing & Ice Co Ltd* (1921) 38 T.L.R. 22, 429; *Pyman S.S. Co v Hull and Barnsley Ry* [1915] 2 K.B. 729. Contrast *Woolmer v Delmer Price Ltd* [1955] 1 Q.B. 291.
- 145 *Reynolds v Boston Deep Sea Fishing & Ice Co Ltd* (1921) 38 T.L.R. 22; *Gibaud v G.E. Ry* [1921] 2 K.B. 426; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79. See also *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 (“no liability of any nature”).
- 146 *Haigh v Royal Mail Steam Packet Co* (1883) 52 L.J. Q.B. 640; *Akerib v Booth* [1960] 1 W.L.R. 454 (reversed on other grounds [1961] 1 W.L.R. 367); *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; *J. Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 Q.B. 495; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 846. cf. *Taubman v Pacific Steam Navigation Co* (1872) 26 L.T. 704.
- 147 *BHP Petroleum Ltd v British Steel Plc* [2000] 2 Lloyd's Rep. 277.
- 148 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79; *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, [2017] 2 C.L.R. 28 at [60] (“liability for any claim in relation to asbestos is excluded”).
- 149 *Price v Union Lighterage Co* [1904] 1 K.B. 412 (“any loss of or damage to goods which can be covered by insurance”).
- 150 *Joseph Travers & Sons Ltd v Cooper* [1915] 1 K.B. 73, 101; *Gibaud v G.E. Ry* [1921] 2 K.B. 426, 437; *Rutter v Palmer* [1922] 2 K.B. 87, 94.
- 151 *Austin v Manchester, Sheffield & Lincs Ry* (1852) 10 C.B. 454; *The Stella* [1900] P. 161; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 K.B. 73; *Ashby v Tolhurst* [1937] 2 K.B. 242; *Harris Ltd v Continental Express Ltd*; *White v Blackmore* [1972] 2 Q.B. 651; *Stag Line Ltd v Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep. 211, 222; *Hunt & Winterbotham (West of England) Ltd v B.R.S. (Parcels) Ltd* [1962] 1 Q.B. 617 (“however sustained”). See also *Aprile SpA v Elin Maritime Ltd* [2019] EWHC 1001 (Comm), [2020] 1 Lloyd's Rep. 111 esp. at [69], noting that “words of exemption which are wider in effect than “howsoever caused” are difficult to imagine and, over the last 100 years, they have become “the classic phrase” whereby to exclude liability for negligence and unseaworthiness” (per Stephen Hofmeyr QC sitting as a judge of the HC).
- 152 *Ashenden v L.B. & S.C. Ry* (1880) 5 Ex. D. 190; *Manchester, Sheffield & Lincs. Ry v Brown* (1883) 8 App. Cas. 703.
- 153 *Pyman S.S. Co v Hull & Barnsley Ry* [1915] 2 K.B. 729; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251. cf. *Bishop v Bonham* [1988] 1 W.L.R. 742.
- 154 *A.E. Farr Ltd v Admiralty* [1953] 1 W.L.R. 965.
- 155 *The Stella* [1900] P. 161.
- 156 *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42. See also *Monarch Airlines Ltd v London Luton Airport Ltd* [1998] 1 Lloyd's Rep. 403 (“act, omission, neglect or default”).
- 157 *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 168; *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2010] 2 Lloyd's Rep. 467 at [15]; *CNM Estates (Tolworth*

- Tower) Ltd v VeCREF I SARL* [2020] EWHC 1605 (Comm), [2020] P.N.L.R. 27 at [46]–[50] (clause held in the context not to extend to a receiver's equitable duty of care).
- 158 *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165.
- 159 *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 155.
- 160 *Bishop v Bonham* [1988] 1 W.L.R. 742. See also *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145 ("any damage whatsoever").
- 161 *Svenssons Travaruaktiebolag v Cliffe S.S. Co* [1932] 1 K.B. 490, 496; *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd* [1991] 2 Lloyd's Rep. 391.
- 162 *Mineralimportexport v Eastern Mediterranean Maritime Ltd* [1980] 2 Lloyd's Rep. 573. But contrast *Tor Line AB v Alltrans Group of Canada Ltd* [1984] 1 W.L.R. 48; *Airline Engineering v Intercon Cattle Meat* Unreported 24 January 1983, CA; *Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 W.L.R. 221, 229 (affirmed [1994] 1 W.L.R. 1515); *CNM Estates (Tolworth Tower) Ltd v VeCREF I SARL* [2020] EWHC 1605 (Comm), [2020] P.N.L.R. 27 at [23] and [24].
- 163 *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189, 192. See also *Rutter v Palmer* [1922] 2 K.B. 87, 92; *Forbes Abbott & Lennard Ltd v G.W. Ry* (1927) 44 T.L.R. 97, 98.
- 164 *Hollier v Rambler Motors (A.M.C.) Ltd* [1972] 2 Q.B. 71, 80 (disapproving *Turner v Civil Service Supply Association* [1926] 1 K.B. 50; *Fagan v Green & Edwards Ltd* [1926] 1 K.B. 102); *Gillespie Bros Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400, 414; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 108; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 49, 51.
- 165 [1952] A.C. 192, 208, above, para.17-013.
- 166 [1945] 1 K.B. 189, 192.
- 167 [1952] A.C. 192, 208.
- 168 *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 45, 50, 51.
- 169 [1982] 2 Lloyd's Rep. 42, 50.
- 170 An example often cited is that of *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 1285; but see *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd* [1982] 2 Lloyd's Rep. 42, 46. See also *R. v Canada S.S. Lines Ltd* [1952] A.C. 192, 210; *Re Polemis, Furness, Withy & Co Ltd* [1912] 3 K.B. 560; *Olley v Marlborough Court Ltd* [1949] 1 K.B. 532; *A.M.F. International Ltd v Magnet Bowling Ltd* [1968] 1 W.L.R. 1028; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 169, 174, 179; *Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 W.L.R. 221, 228 (affirmed [1994] 1 W.L.R. 1515); *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297, 301; *Toomey v Eagle Star Insurance Co Ltd (No.2)* [1995] 2 Lloyd's Rep. 88, 92; *Stent Foundations Ltd v M.J. Gleeson Group Plc* [2001] B.L.R. 134; *Casson v Ostley P.J. Ltd* [2001] EWCA Civ 1013, (2002) 18 Const. L.J. 145; *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [367]–[368]; *Jose v MacSalvors Plant Hire Ltd* [2009] EWCA Civ 1329, [2010] T.C.L.R. 2; *Onego Shipping and Chartering BV v JSC Arcadia Shipping* [2010] EWHC 777 (Comm), [2010] 2 Lloyd's Rep. 221. cf. *Try Build Ltd v Blue Star Garages Ltd* (1998) 66 Const. L.R. 90; *HIH Casualty and General Insurance Ltd v North Hampshire Insurance*

- Co [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [131]–[140]; HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61.*
- 171 *Rutter v Palmer [1922] 2 K.B. 87, 90.*
- 172 See Vol.II, para.38-014.
- 173 *Seven Seas Transportation Ltd v Pacifico Union Marina Corp [1982] 2 Lloyd's Rep. 465, 475 (affirmed [1948] 1 Lloyd's Rep. 488). cf. Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co SA [1983] 1 Lloyd's Rep. 310, 314.*
- 174 (1990) 6 Const. L.J. 37. See also *Sonat Offshore SA v Amerada Hess Development Ltd [1988] 1 Lloyd's Rep. 145.*
- 175 *McCawley Ry v Furness (1872) L.R. 8 Q.B. 57; Buckpitt v Oates [1968] 1 All E.R. 1145; Bennett v Tugwell [1971] 2 Q.B. 267; Birch v Thomas [1972] 1 W.L.R. 294.* But contrast *Burnett v British Waterways Board Ltd [1973] 1 W.L.R. 700* (employee acting under orders of his employer), s.149(3) of the Road Traffic Act 1988 and s.2(3) of the Unfair Contract Terms Act 1977 (on which see below, para.17-086) or the Consumer Rights Act 2015 s.65(2) (on which see Vol.II, para.40-423).
- 176 *Hedley Byrne & Co v Heller & Partners [1964] A.C. 465* (though no contract A/B); *Smith v Eric S. Bush [1990] 1 A.C. 831* (though the non-contractual disclaimer was held unreasonable under s.2(2) of the Unfair Contract Terms Act 1977); *Taberna Europe CDO II Plc v Selskabet AF1 [2016] EWCA Civ 1262, [2017] Q.B. 633* at [16]–[20] and cf. *McClean v Thornhill [2022] EWHC 457 (Ch), [2022] S.T.C. 1110* at [67] et seq., esp. at [113] where the terms of an agreement between A and B were held to be inconsistent with a duty of care in C to A in relation to tax advice in relation to a scheme promoted by B where the advice was given by C to B and made available to A; in the circumstances it was not reasonable for A to rely on C's advice without independent enquiry nor ought C to have reasonably foreseen that A would do so.
- 177 *Walters v Whessoe [1968] 1 W.L.R. 1056, 1057; Smith v South Wales Switchgear Co Ltd [1978] 1 W.L.R. 165, 168; Colour Quest Ltd v Total Downstream UK Plc [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [369]–[370]; Jose v MacSalvors Plant Hire Ltd [2009] EWCA Civ 1329, [2010] T.C.L.R. 2.*
- 178 Before the Consumer Rights Act 2015 came into force, the *Unfair Contract Terms Act 1977* s.4 provided that a person “dealing as consumer” could not by reference to a contract term be made to indemnify another person in respect of liability that may be incurred by that other person except to the extent to which the contract term is reasonable and such an indemnity clause could also fall under the general controls on the fairness and transparency of “consumer contracts” in the *Unfair Terms in Consumer Contracts Regulations 1999*. However, as noted below, paras 17-071—17-093, on the coming into force on 1 October 2015 of the relevant provisions of the *2015 Act*, s.4 of the 1977 Act was deleted and the *1999 Regulations* were revoked and such an indemnity clause in a “consumer contract” would fall within the general controls on the fairness and transparency of contract terms put in place by the *2015 Act* s.62 and 68, on which see Vol.II, paras 40-230 et seq.
- 179 [1952] A.C. 192, 208; see above, paras 17-013—17-016.

- 180 *Walters v Whessoe Ltd* [1968] 2 All E.R. 816 (Note), 6 B.L.R. 23; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, HL; *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387, 396; *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [367]–[368]; *Jose v MacSalvors Plant Hire Ltd* [2009] EWCA Civ 1329, [2010] T.C.L.R. 2; *Greenwich Millennium Ltd v Essex Services Plc* [2014] EWCA Civ 960, [2014] 1 W.L.R. 3517 at [94]. See also *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145 (off-hire payment clause); *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310, [2016] 2 W.L.R. 1429 at [10]; *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, [2017] B.L.R. 417 at [55]–[56]. But see *Morris v Breaveglen Ltd* [1997] C.L.Y. 937 (clear intention).
- 181 *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387.
- 182 *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, 169, 174, 179; *Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 W.L.R. 221, 228 (affirmed [1994] 1 W.L.R. 1515); *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297.
- 183 *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 per Lord Bingham of Cornhill (exemption clause); *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310, [2016] 2 W.L.R. 1429 at [10] (indemnity clause).
- 184 See (effective indemnities): *A.E. Farr Ltd v Admiralty* [1953] 1 W.L.R. 965; *Swan Hunter and Wigham Richardson Ltd v France, Fenwick Tyne & Wear Co Ltd (The Albion)* [1953] 1 W.L.R. 1026; *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 W.L.R. 459; *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; *Westcott v J.H. Jenner Plasterers and Bovis* [1962] 1 Lloyd's Rep. 309; *Spalding v Tarmac Civil Engineering Ltd* [1967] 1 W.L.R. 1508; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] 1 Q.B. 400; *Blake v Richards & Wallington Industries* (1974) 16 K.I.R. 151; *Comyn Ching & Co (London) v Oriental Tube Co* [1981] Com. L.R. 67; *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 1 W.L.R. 995; *Thompson v T. Lohan (Plant Hire) Ltd* [1987] 1 W.L.R. 649; *Hancock Shipping Co Ltd v Deacon & Trysail (Private) Ltd* [1991] 2 Lloyd's Rep. 550; *Nelson v Atlantic Power and Gas* (1995) S.L.T. 46; *Morris v Breaveglen Ltd* [1997] C.L.Y. 937; *Smedvig Ltd v Elf Exploration UK Plc* [1998] 2 Lloyd's Rep. 659; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387; *Great Eastern Shipping Co Ltd v Far East Chartering Ltd* [2011] EWHC 1372 (Comm), [2011] 2 Lloyd's Rep. 309 at [43]; *Greenwich Millennium Ltd v Essex Services Plc* [2014] EWCA Civ 960, [2014] 1 W.L.R. 3517 at [96]; *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310, [2016] 2 W.L.R. 1429; *Rabilizirov v A2 Dominion London Ltd* [2019] EWHC 186 (QB), [2019] T.C.L.R. 5 at [49]–[54]. Contrast (ineffective indemnities) *A.M.F. International Ltd v Magnet Bowling Ltd* [1968] 1 W.L.R. 1028; *Walters v Whessoe Ltd* [1968] 1 W.L.R. 1056; *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303; *C. Davis Metal Producers Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep. 422; *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165; *Actis Co Ltd v Sankis S.S. Co Ltd* [1982] 1 Lloyd's Rep. 7; *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep. 145;

- Dorset CC v Southern Felt Roofing Co* (1990) 6 Const. L.J. 37; *Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 W.L.R. 1515; *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* [1994] 1 Lloyd's Rep. 213; *Shell Chemicals Ltd v P.&O. Roadtanks Ltd* [1995] 1 Lloyd's Rep. 297; *Stirling v Norwest* (1997) S.L.T. 974; *Hawkins v Northern Marine Management Ltd* 1998 S.L.T. 1107; *Stent Foundations Ltd v M.J. Gleeson Group Plc* [2001] B.L.R. 134; *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [367]–[394]; *Seadrill Management Services Ltd v OAO Gazprom (The "Ekha")* [2010] 1 Lloyd's Rep. 543 at [217]–[218] (affirmed [2010] EWCA Civ 691); *Jose v MacSalvors Plant Hire Ltd* [2009] EWCA Civ 1329, [2010] T.C.L.R. 2.
- 185 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 W.L.R. 1095 at [26].
- 186 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge (with whom Lord Neuberger of Abbotbury, Lord Mance, Lord Clarke of Stone-cum-Ebony and Lord Sumption agreed).
- 187 *Sze Hai Tong Bank Co Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576, 588.
- 188 *Alexander v Ry Executive* [1951] 2 K.B. 882; *Swan Hunter and Wigham Richardson Ltd v France Tyne & Wear Co Ltd (The Albion)* [1953] 1 W.L.R. 1026, 1030; *Sze Hai Tong Bank Co Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576; *Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep. 352, 363. For a time it was considered that a “deliberate” breach had to be one which could be attributed to the contracting party personally, and not one imputed vicariously through his employees or agents: *Chartered Bank of India v British India Steam Navigation Ltd* [1909] A.C. 369, as explained in *Sze Hai Tong Bank Co Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576, 588; *John Carter (Fine Worsteds) Ltd v Harrison Haulage (Leeds) Ltd* [1965] 2 Q.B. 495, but it submitted that this view would no longer be followed. See *Guest* (1961) 77 L.Q.R. 98, 116. But see *Internet Broadcasting Corp Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295 at [23]–[24].
- 189 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; below, para.17-025; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1052 (Comm), [2004] 2 Lloyd's Rep. 251 at [141]–[152].
- 190 [1967] 1 A.C. 361; below, para.17-024.
- 191 [1967] 1 A.C. 361, 435. See also at 394, 414, 415, 429.
- 192 *Alexander v Ry Executive* [1951] 2 K.B. 882 (but see below, para.17-039); *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576, 587; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69.
- 193 *The Cap Palos* [1921] P. 458, 471, 472. Contrast *Compania Portorafti Commerciale SA v Ultramar Panama Inc* [1990] 1 Lloyd's Rep. 310 (Hague-Visby Rules). See also *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admly), [2009] 1 Lloyd's Rep. 177 at [113]–[116]; *Internet Broadcasting Corp Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295 at [17]–[19]; *Polypearl Ltd v Building Research Establishment Ltd Unreported 28 July 2016 (Mercantile Ct)* at [83] and [88]; *Mott MacDonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC), [2021] B.L.R. 440. But see *Astrazeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm), [2012] B.L.R. D1 at [301]. It is also to be noted that the Unfair Contract Terms Act 1977 s.1(4) provides that “[i]n relation

- to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional”, on which see below, para.17-101.
- 194 *Suisse Atlantique case [1967] 1 A.C. 361, 435*. Nor is there any presumption that an exemption clause does not apply to deliberate or repudiatory breaches: *Mott MacDonald Ltd v Trant Engineering Ltd [2021] EWHC 754 (TCC), [2021] B.L.R. 440* at [64]–[65], following *Astrazeneca UK Ltd v Albermarle International Corp [2011] EWHC 1574 (Comm), [2012] B.L.R. D1* at [301].
- 195 On the meaning of this phrase, see *Re City Equitable Fire Insurance Co Ltd [1925] 1 Ch. 407; Circle Freight International Ltd v Medeast Gulf Exports Ltd [1988] 2 Lloyd's Rep. 427; Bovis International Ltd v Circle Line Partnerships [1995] N.P.C. 128*. cf. *Eurasian Natural Resources Corp Ltd v Dechert LLP [2022] EWHC 1138 (Comm)* at [1645]–[1647] (contract of retainer of solicitors containing exception to liability cap for “reckless disregard of professional obligations”, which was held to cover deliberate disregard).
- 196 On the meaning of this phrase, see *Hoare v G.W. Ry (1877) 37 L.T. 186; Lewis v G.W. Ry (1877) 3 Q.B.D. 195, 206; Graham v Belfast & Northern Counties Ry Co [1901] 2 I.R. 13; Forder v G.W. Ry [1905] 2 K.B. 532; Re City Equitable Fire Insurance Co Ltd [1925] 1 Ch. 407; Horabin v B.O.A.C. [1952] 2 Lloyd's Rep. 450; Rustenberg Platinum Mines Ltd v SAA [1977] 1 Lloyd's Rep. 564, 569; National Semiconductors (UK) Ltd v UPS Ltd [1996] 2 Lloyd's Rep. 212, 214; Lacey's Footwear v Bowler International Freight (Wholesale) Ltd [1997] 2 Lloyd's Rep. 369; Thomas Cook Group Ltd v Air Malta Co Ltd [1997] 2 Lloyd's Rep. 399; Rolls Royce Plc v Heavylift-Volga DNEPR Ltd [2000] 1 Lloyd's Rep. 653; Patrick v Royal London Mutual Insurance Society Ltd [2006] EWCA Civ 421, [2006] 2 All E.R. (Comm) 344; Denfleet International Ltd v TNT Global Spa [2007] EWCA Civ 405, [2007] 2 Lloyd's Rep. 504; Colour Quest Ltd v Total Downstream UK Plc [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep. 1 at [394]; De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC) at [206]; Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54; Alpstream AG v Airfinance Sarl [2013] EWHC 2370 (Comm), [2014] 1 All E.R. (Comm) 441 at [92]–[94]. See also Vol.II, paras 37-038—37-042, 38-131.*
- 197 On the meaning of this phrase, see *Red Sea Tankers Ltd v Papachristidis [1997] 2 Lloyd's Rep. 547, 586; Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54* at [161].
- 198 *The Glendarroch [1894] P. 226, 231; Munro Brice & Co v War Risks Association [1918] 2 K.B. 78* (reversed on other grounds *[1920] 3 K.B. 94*); *Fujitsu Services Ltd v IBM United Kingdom Ltd [2014] EWHC 752 (TCC), [2014] 1 C.L.C. 353* at [25]. Contrast *Hurst v Evans [1917] 1 K.B. 352*.
- 199 See, e.g. *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827*; below, para.17-025.
- 200 *Munro Brice & Co v War Risks Association [1918] 2 K.B. 78* at 88.
- 201 See above, para.17-020.
- 202 *H.C. Smith Ltd v G.W. Ry [1922] 1 A.C. 178; Kenyon Son & Craven Ltd v Baxter Hoare Ltd [1971] 1 W.L.R. 232; Johnson Matthey & Co Ltd v Constantine Terminals Ltd [1976] 2*

- Lloyd's Rep.* 215; *Sig Bergesen DY. and Co v Mobil Shipping and Transportation Co* [1993] 2 *Lloyd's Rep.* 453, 462. cf. *Port Swettenham Port Authority v T.W. Wu & Co* [1979] A.C. 580, and para.17-022, below (bailment).
- 203 *Munro Brice & Co v War Risks Association* [1918] 2 K.B. 78 at 89.
- 204 [1951] 1 *Lloyd's Rep.* 32, followed in *Euro Cellular (Distribution) Plc v Danzas Ltd* [2003] EWHC 3161 (Comm), [2004] 1 *Lloyd's Rep.* 521 at [55].
- 205 *The Glendarroch* [1894] P. 226, 231; *Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 C.L.R. 142, 168.
- 206 [1978] Q.B. 69. See also *Woolmer v Delmer Price Ltd* [1955] 1 Q.B. 291; *Euro Cellular (Distribution) Plc v Danzas Ltd* [2003] EWHC 3161 at [64].
- 207 *Hunt & Winterbotham (West of England) Ltd v B.R.S. (Parcels) Ltd* [1962] 1 Q.B. 617.
- 208 See below, para.17-027. Levison's case [1978] Q.B. 69 was decided before *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (below, para.17-025) but was not doubted in that case.
- 209 See *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* [1994] 1 *Lloyd's Rep.* 213, 238; contrast *Euro Cellular (Distribution) Plc v Danzas Ltd* [2003] EWHC 3161 (Comm).
- 210 *Joseph Travers & Sons Ltd v Cooper* [1915] 1 K.B. 73; *Woolmer v Delmer Price Ltd* [1955] 1 Q.B. 291; *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 466; *Houghland v R.B. Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69, 82; *Port Swettenham Port Authority v T.W. Wu & Co* [1979] A.C. 580; *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 *Lloyd's Rep.* 570; see Vol.II, paras 35-012, 35-050.

Section 3. - Fundamental Breach

Chitty on Contracts 34th Ed.

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Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 17 - Exemption Clauses

Section 3. - Fundamental Breach

Supposed rule of law

- 17-023 It was at one time supposed that a party to a contract would be precluded from relying upon an exemption clause contained in it where he had been guilty of a fundamental breach of contract or the breach of a fundamental term. Statements in certain cases²¹¹ tended to encourage the view that there existed a rule of substantive law preventing a party from relying on an exemption clause in situations of fundamental breach or the breach of a fundamental term, regardless of the wording of the clause. It was said that there were certain breaches of contract ("fundamental breaches") which were so totally destructive of the obligations of the party in default that liability for such a breach could in no circumstances be excluded or restricted by means of an exemption clause. Similarly there existed a category of terms ("fundamental terms") which were narrower than a condition of the contract. A fundamental term, so it was said:

"... underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates."²¹²

It was part of the "core" of the contract,²¹³ and "however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term".²¹⁴ The two expressions "fundamental breach" and "breach of a fundamental term" were used to some extent interchangeably,²¹⁵ but formulated in this way they embodied a rule of law to be applied notwithstanding the agreement of the parties as expressed in the exemption clause.

Suisse Atlantique case

- 17-024 The view that the principle of fundamental breach constituted a rule of law was, however, rejected by Pearson LJ in *U.G.S. Finance Ltd v National Mortgage Bank of Greece*, where he said²¹⁶:

“As to the question of ‘fundamental breach,’ I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties. ... This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exceptions clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally.”

This statement was unanimously approved by the House of Lords in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*.²¹⁷ In that case, shipowners sued the charterers of a ship for damages for delays in loading and unloading the chartered vessel. The charterers relied on the usual demurrage clause in the charterparty as establishing the full measure of their liability; but the shipowners contended that this clause did not protect the charterers since the breaches of contract which caused the delays amounted to a fundamental breach of contract. They claimed damages at large. The House of Lords rejected this claim. Their Lordships held:

- (i)that the demurrage clause was not an exemption clause but an agreed damages provision²¹⁸;
- (ii)that, in any event, since the shipowners had not treated the charter as repudiated, they were still bound by its provisions²¹⁹; and
- (iii)that, even if the clause were an exemption clause, it plainly covered the breach alleged, whether or not this was “fundamental” in the sense that it would have entitled the shipowners to be discharged.²²⁰

Their Lordships were clearly of the opinion that any statement of the principle of fundamental breach as a rule of law could not be supported in principle or in the light of previous authority.²²¹ So far as the use of the expression “fundamental breach” was concerned, Lord Wilberforce pointed out²²² that it had been used in the cases to denote two quite different things, namely:

- (i)a performance totally different from that which the contract contemplated;
- (ii)a breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse further performance of the contract.

There was no necessary coincidence between these two kinds of (so-called) fundamental breach. After giving a series of examples²²³ of how the courts had approached the problem of a fundamental breach in the former sense, he concluded²²⁴:

“The conception, therefore, of ‘fundamental breach’ as one which, through ascertainment of the parties’ contractual intentions, falls outside an exceptions clause is well recognised and comprehensible.”

On the other hand, Lord Reid said²²⁵:

“General use of the term ‘fundamental breach’ is of recent origin, and I can find nothing to indicate that it means either more or less than the well known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract.”

While, therefore, their Lordships were agreed that the application of an exemption clause to a breach of contract was a matter of construction of the contract, the question whether and to what extent any special rules were applicable to cases of “fundamental breach” (in the sense of “total” as opposed to repudiatory breach), was to some extent left open.

Securicor case

17-025 Certain statements in the *Suisse Atlantique* case further suggested (perhaps by way of illustration only) that in particular instances of fundamental breach an exemption clause would or would be presumed to be inapplicable.²²⁶ Moreover, in his speech Lord Reid said²²⁷:

“I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist, including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist.”

Lord Reid’s statement was taken up and extended by the Court of Appeal in subsequent cases²²⁸ which held that the protection of an exemption clause ceased to be available to a party guilty of a repudiatory breach if the other party accepted the breach as terminating the contract or if the breach was of such a nature as to render the contract impossible of further performance. This departure was, however, condemned by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*.²²⁹ In that case, the defendants agreed to provide a visiting patrol service to the

claimants' factory at a charge of £8. 15s. a week. The contract contained an exemption clause, the most relevant part of which stated:

“Under no circumstances shall the company [the defendants] be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer.”

An employee of the defendants deliberately lit a fire in the factory, and a large part of the premises was burned down. The Court of Appeal held²³⁰ that the defendants, having been employed to safeguard the factory, had committed a fundamental breach of their contract with the claimants and that the exemption clause could not be construed to cover the act of their employee in setting the premises on fire. It was further held that the destruction of the factory brought the contract to an end by rendering further performance impossible so that the defendants could not rely on the exemption clause to protect them from the consequences of the breach. The House of Lords reversed the Court of Appeal's decision. Their Lordships unanimously rejected the view that a breach of contract by one party, accepted by the other as discharging him from further performance of his obligations under the contract, brought the contract to an end, and, together with it, any exemption clause.²³¹ The House further reaffirmed²³² the principle that the question whether an exemption clause protected one party to a contract in the event of breach, or in the event of what would (but for the presence of the exemption clause) have been a breach, depended upon the proper construction of the contract. They held that, as a matter of construction, the exemption clause in question clearly relieved the defendants from liability. The defendants had effectively modified their obligation to one of exercising due diligence in their capacity as employers. The clause apportioned the risk between the parties: the risk of arson not being accepted by the defendants having regard to the nature and cost of the services provided and falling on the claimants who could more economically insure against it.

George Mitchell case

- 17-026 A third leading case is that of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*,²³³ where the respondents ordered from the appellants, who were seed merchants, a quantity of Dutch winter white cabbage seeds. The seeds supplied were invoiced as “Finney's Late Dutch Special”. Owing to errors by the appellants' suppliers and employees, the seeds were in fact not of this variety but were autumn cabbage seeds. The resulting crop proved to be worthless and had to be ploughed in. In an action by the respondents for wasted expenditure and loss of anticipated profits, the appellants relied on their standard conditions of sale. These provided: first, that in the event of any seeds sold or agreed to be sold not complying with the express terms of the contract of sale, the limit of the appellants' obligation was to replace the seeds or refund the purchase price; secondly, that the appellants excluded:

“... all liability for any loss or damage arising from use of any seeds ... supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds ... supplied by us or for any other loss or damage whatsoever save for, at our option, liability for any such replacement or refund as aforesaid”;

thirdly, that express or implied conditions and warranties not stated in the conditions were excluded. A majority of the Court of Appeal²³⁴ held that, at common law, this wording was insufficient to limit the appellants' liability. Oliver LJ²³⁵ considered that the first condition applied only to seeds “sold or agreed to be sold” and so could only relate to goods which were actually the subject matter of the contract between the parties, i.e. winter white cabbage seeds. The second condition was merely a supplement to the first and did not cover a case where what had been supplied was wholly different from what had been ordered. The House of Lords, however, unanimously held that, at common law, the limitation was effective.²³⁶ The second condition, read as a whole, unambiguously limited the appellants' liability to replacement of the seeds or a refund of the price. The defective seeds were seeds sold and delivered, just as clearly as they were seeds supplied, by the appellants to the respondents. The judgment of Oliver LJ came, it was said²³⁷:

“... dangerously near to reintroducing by the back door the doctrine of ‘fundamental breach’ which this House in *Securicor* ... had so forcibly evicted from the front.”

Conclusion

17-027 It is clear that there is now no rule of law by which exemption clauses are rendered ineffective in the face of a “fundamental breach” or the breach of a “fundamental term”. In the *Photo Production* case, Lord Diplock stated²³⁸ that, if the expression “fundamental breach” is to be retained, it should, in the interests of clarity, be confined to the ordinary case of a breach of which the consequences are such as to entitle the innocent party to elect to put an end to all primary obligations of both parties remaining unperformed. No express reference was made by him to the expression “fundamental term”, but the inference is that there exists no category of terms which can be said to be in any sense “fundamental” other than conditions.²³⁹ On this basis, it is submitted that there is no presumption that, in inserting a clause of limitation or exclusion into their contract, the parties are not contemplating its application to a fundamental breach or the breach of a fundamental term.²⁴⁰ The question is in all cases whether the clause, on its true construction, extends to cover the obligation or liability which it is sought to exclude or restrict.

Footnotes

- 211 *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 465; *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936, 940, 943; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] A.C. 576, 587, 588, 589; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508, 520; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683, 710; *Astley Industrial Trust v Grimley* [1963] 1 W.L.R. 1468, 1470; see also above, para.17-022.
- 212 *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty, Son & Co* [1953] 1 W.L.R. 1468, 1470; see above, para.27-022.
- 213 See *Melville* (1956) 19 M.L.R. 26.
- 214 *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936, 943.
- 215 cf. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 393, 421; *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep. 14, 19.
- 216 [1964] 1 Lloyd's Rep. 446, 450. See also *Gibaud v G.E. Ry* [1921] 2 K.B. 426, 435; *The Cap Palos* [1921] P. 458, 470, 472; *L. & N.W. Ry v Neilson* [1922] 2 A.C. 263, 272; *Cunard S.S. Co v Buerger* [1927] A.C. 1, 13; *Frenkel v MacAndrews & Co Ltd* [1929] A.C. 545, 562; *Calico Printers' Association v Barclays Bank* (1931) 36 Com. Cas. 197, 203; *Connolly Shaw v Nordenfieldske S.S. Co* (1934) 50 T.L.R. 418.
- 217 [1967] 1 A.C. 361; see *Treitel* (1966) 29 M.L.R. 546.
- 218 See above, para.17-004.
- 219 [1967] 1 A.C. 361, 395, 407, 413, 426, 437.
- 220 [1967] 1 A.C. 361, 395, 407, 415, 426, 437.
- 221 [1967] 1 A.C. 361, 392, 399, 405, 410, 425, 431–432.
- 222 [1967] 1 A.C. 361, 431.
- 223 [1967] 1 A.C. 361, 432–435.
- 224 [1967] 1 A.C. 361, 434. See also Lord Dilhorne, 393.
- 225 [1967] 1 A.C. 361, 397. See also Lord Hodson, 410; Lord Upjohn, 422.
- 226 See Lord Denning MR in *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69; *Photo Production Ltd v Securicor Transport Ltd* [1978] 1 W.L.R. 856, 863.
- 227 [1967] 1 A.C. 361, 398. See also Lord Upjohn, 425.
- 228 *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447. See also *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 W.L.R. 1053; *Eastman Chemical International AG v N.M.T. Trading Ltd* [1972] 2 Lloyd's Rep. 25; *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep. 14 (where contract affirmed).
- 229 [1980] A.C. 827. See also *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964; *Lifesavers (Australasia) Ltd v Frigmobile Pty Ltd* (1983) 1 N.S.W.R. 431.
- 230 [1978] 1 W.L.R. 856.

- 231 [1980] A.C. 827, 844–845, 847–850, 853. See also s.9(1) of the Unfair Contract Terms Act 1977 (deleted on the coming into force of the Consumer Rights Act 2015 Pt 2: s.75, Sch.4 para.10): below, para.17-071 (note). An exception may exist in “deviation” cases; see below, para.17-032.
- 232 [1980] A.C. 827, 845, 850–851, 853.
- 233 [1983] 2 A.C. 803.
- 234 [1983] Q.B. 284 (Oliver and Kerr LJ, Lord Denning MR dissenting).
- 235 Kerr LJ (with whom Oliver LJ agreed) also based his decision on the ground that the clause was not sufficiently unambiguous to exclude liability for negligence: see above, para.17-013.
- 236 But the clause was, however, held unreasonable under the modified s.55 of the Sale of Goods Act 1979, as set out in para.11 of Sch.1 to that Act. See now the Unfair Contract Terms Act 1977; below, para.17-107.
- 237 [1983] 2 A.C. 803 at 813. See also *Radius Housing Association Ltd v JNP Architects* [2018] NIQB 57, [2018] P.N.L.R. 31 at [64]–[67] (lack of consent by employer to changes by architect does not prevent the latter from relying on a limitation clause, as this would be akin to holding that a fundamental breach prevented the contract breaker from relying on the contract).
- 238 [1980] A.C. 827, 849. See also the *Suisse Atlantique case* [1967] 1 A.C. 361, 397, 410, 422.
- 239 [1980] A.C. 827, 849. See also the *Suisse Atlantique case* [1967] 1 A.C. 361, 422; and above, para.17-024.
- 240 *Mott MacDonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC), [2021] B.L.R. 440 at [64]–[65] following *Astrazeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm), [2012] B.L.R. D1 at [301]. But cf. Lord Upjohn in the *Suisse Atlantique case* [1967] 1 A.C. 361, 427 and Thomas J in *China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha* [2000] 1 Lloyd's Rep. 367, 376; *Internet Broadcasting Corp Ltd v MAR LLC* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295 at [33]. See also above, para.17-010.

Section 4. - Application of Principles of Construction to Particular Contracts

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Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 17 - Exemption Clauses

Section 4. - Application of Principles of Construction to Particular Contracts

Generally

- 17-028  The principles of construction mentioned in the second section of this chapter may now be illustrated in their application to particular contracts. Certain of the cases cited were, however, decided at a time when the principle of “fundamental breach” was to a greater or less extent recognised by the courts. Such cases should probably now be regarded as instances where an exemption clause was, as a matter of construction, held to be inapplicable. Moreover, other cases were decided at a time when the courts were generally more hostile to the contractual exclusion or limitation of liability even in commercial cases than they are now.²⁴¹

Contracts of sale of goods: terms about title

- 17-029 The [Unfair Contract Terms Act 1977](#)²⁴² invalidates (except in the case of international sales)²⁴³ any term exempting the seller of goods from liability for breach of the terms about title implied by [s.12 of the Sale of Goods Act 1979](#).²⁴⁴ Even at common law, however, it is probable that the courts would be reluctant to hold that an exemption clause, framed in general terms, should be construed so as completely to exclude liability for breach of the implied term on the part of the seller that he has a right to sell the goods, since “the whole object of a sale is to transfer property from one person to another”.²⁴⁵ They would have to be satisfied that the parties intended the transaction to

be merely the sale and purchase of a chance (*emptio spei*) that the seller might or might not have a good title to the goods sold.²⁴⁶

Sale of goods: terms as to quality, etc.

17-030

U The **Unfair Contract Terms Act 1977 Act**²⁴⁷ provides that liability for breach of the terms as to quality, fitness for purpose, and correspondence with description and sample implied by ss.13 to 15 of the **Sale of Goods Act 1979** can be excluded or restricted by contract term only in so far as it satisfies the requirement of reasonableness.²⁴⁸ In the case of contracts made on or after 1 October 2015,²⁴⁹ these controls in the **1977 Act** no longer protect persons “dealing as consumer” and do not apply to those consumer contracts governed by **Consumer Rights Act 2015 Pt 1 Ch.2,**²⁵⁰ but the **2015 Act** precludes traders from excluding or restricting their liability arising under the equivalent statutory terms as to description, quality, etc. of the goods.²⁵¹ However, even at common law, if there is a gross disparity between the goods as described in the contract of sale and as delivered, a number of cases have held that an exemption clause, for example, which purports to require the buyer to take the goods “with all faults and imperfections”, or to exclude the seller’s liability for errors of description, or to take away the buyer’s right to reject the goods, may be held not to apply to a failure to supply the contract goods.

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U Even a clause in a comprehensive form which excludes all conditions and warranties, express or implied by common law, statute or otherwise, may possibly not be construed to cover the delivery of goods which are wholly different from those contracted for.²⁵³ However, there is no rule of law to prevent a seller, who—to use a familiar example—has contracted to deliver peas, from excluding or restricting his liability in the event that he delivers beans,²⁵⁴ or permits him to substitute beans in their place,²⁵⁵ provided that the clause is sufficiently unambiguous in its terms to admit of this construction.

Hire purchase

17-031

The **Unfair Contract Terms Act 1977 s.6(1)**²⁵⁶ makes general provision prohibiting, either absolutely or subject to certain qualifications, exclusion of the terms as to title, quality, fitness for purpose, and correspondence with description or sample implied by ss.8 to 11 of the **Supply of Goods (Implied Terms) Act 1973.**²⁵⁷ In the case of contracts entered on or after 1 October 2015, the statutory terms in the **1973 Act** no longer protect persons “dealing as consumer” and do not

apply to those consumer contracts governed by [Consumer Rights Act 2015 Pt 1 Ch.2](#),²⁵⁸ but terms which seek to exclude a trader's liabilities for breach of the statutory terms in the [2015 Act](#) as to the trader's right to sell the goods, and as to the description, quality, etc. of the goods do not bind the consumer.²⁵⁹ At common law, principles have been applied to hire-purchase transactions which are similar to those applied to contracts of sale noted in the preceding paragraph. It has been held, for example, that a clause in such terms as:

“... no condition or warranty as to the condition or fitness for any purpose of the goods is given by the owner or implied herein”

will not be construed to extend to the supply of goods which are so defective that what is delivered is totally different from that promised.²⁶⁰ It is also probable that the courts would not construe a general exemption clause to have so wide an ambit as to negative the implied undertaking on the part of the owner that he has a good title to the goods let on hire, particularly in view of the fact that such terms as “owner” and “option to purchase” appear in the agreement.²⁶¹

Carriage of goods: deviation

17-032

The terms of contracts for the carriage of goods are controlled only to a limited extent by the [Unfair Contract Terms Act 1977](#).



[262](#)

U At common law, in a contract for the carriage of goods, any unnecessary deviation from the agreed or customary route constitutes a breach of the contract of affreightment.

[263](#)

U Such a breach entitles the owner to treat himself as discharged, and, unless, with knowledge of the facts, he elects to affirm the transaction, the special terms of the contract (including any exemption clause) which are designed to apply to the contract journey are held to have no application to the deviating journey.

[264](#)

U So strict is this rule that although the deviation has not been the cause of any loss to the owner's goods and is a mere incident in the voyage, nevertheless, once it has taken place the carrier is no longer entitled to rely on clauses of exemption contained in the contract, unless it can be shown that the loss would have happened in any event.

[265](#)

U But, even if the contract is treated as continuing, exemption clauses will be strictly construed, so that, for example, a disclaimer of liability for loss of or damage to goods "in transit" will not extend to cover a deviation.

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U Deviation cases are, however, *sui generis* and not to be extended.

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U Moreover, clauses which confer upon the carrier a liberty to deviate will, if clearly expressed, be upheld

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U although they may be so construed as not substantially to defeat the main purpose of the contract voyage.

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Carriage of goods: delay

17-033 It is also the duty of the carrier to carry the goods with all reasonable dispatch to their destination. An unreasonable and protracted delay may entitle the charterer or consignor to treat the contract as repudiated.²⁷⁰ Delay will not necessarily lie outside the scope of an exemption clause,²⁷¹ but it will do so where the parties cannot be taken to have agreed that the clause should extend to the period of the delay²⁷² or to a risk consequent upon the delay which is wholly at variance with the contract of carriage.²⁷³

Carriage on deck

17-034 Where a carrier of goods by sea undertakes to carry the goods under deck, an exemption clause which excludes or restricts his liability for loss or damage to the goods carried may be held to be inapplicable if the goods are carried on deck.²⁷⁴ The same might apply if goods carried by land are similarly conveyed in an unauthorised manner.

Road and seaworthiness

17-035

A carrier of goods by land probably does not give any implied warranty, in the sense of an absolute undertaking, that he will provide a roadworthy vehicle or a competent and honest driver or crew.²⁷⁵ At common law, however, a carrier of goods by sea, in the absence of an express stipulation to the contrary,²⁷⁶ impliedly undertakes that his ship is seaworthy.²⁷⁷ Although an undertaking of seaworthiness has been said “to underlie the whole contract of affreightment”,²⁷⁸ its breach will not entitle the shipper to be discharged unless the breach is such as to frustrate the commercial purpose of the contract.²⁷⁹ Nevertheless, as a matter of construction, exceptions in the charter or bill of lading may not be read as applying to breaches of an obligation to provide a seaworthy ship²⁸⁰ unless their meaning is clear and unambiguous.²⁸¹

Misdelivery by carrier

- 17-036 Misdelivery of the goods does not, of itself, prevent the application of an exemption clause in a contract of carriage.²⁸² But where the main object and intent of the contract is that delivery should be made to a certain person or persons, the clause may be limited and modified to the extent necessary to give effect to that object and intent. In *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*²⁸³ goods carried by sea were to be delivered “unto order or his assigns”, but the contract provided that the responsibility of the carrier should be deemed to cease absolutely after the goods were discharged from the ship. After the goods were discharged from the ship, the carrier’s agent released the goods to the consignees without production of the bill of lading. It was held that the exemption clause could not be construed to apply to a deliberate breach by the carrier of his primary obligation under the contract.

Bailment: acts inconsistent with bailment

- 17-037 Contracts of bailment for deposit may be controlled in certain situations by the *Unfair Contract Terms Act 1977*²⁸⁴ and, as regards consumer contracts made on or after 1 October 2015, the *Consumer Rights Act 2015 Pt 2*.²⁸⁵ At common law, any act of a bailee which is basically inconsistent with the terms of the bailment, such as the sale,²⁸⁶ pledge²⁸⁷ or offering for sale²⁸⁸ of the goods bailed, puts an end to the bailment and the immediate right to possession of the goods forthwith reverts in the bailor.²⁸⁹ It is probable that, in the absence of specific authority to do such acts, a court would hold that they were not within the ambit of an exemption clause which simply limited or excluded the bailee’s liability for loss of or damage to the goods bailed.²⁹⁰

Storage in wrong place

- 17-038 In the *Suisse Atlantique* case, Lord Hodson observed that if, under a contract of bailment:

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“... the bailee uses a place other than that agreed on for storing the goods, or otherwise exposes the goods to risks quite different from those contemplated by the contract, he cannot rely on clauses in the contract designed to protect him against liability within the four corners of the contract, and has only such protection as is afforded him by the common law.”²⁹¹

It should be emphasised, however, that this principle is only one of construction: the terms of the contract may not require storage in a particular place, and may be otherwise sufficient to exclude liability for negligence, so that the bailee will not be liable.

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Misdelivery by bailee

- 17-039 Upon termination of the bailment, a bailee is normally under an obligation to return the goods to the bailor or his nominee. If he negligently delivers the goods to a person not entitled to receive them, this will not necessarily preclude him from relying on an exemption clause, which may well be construed to cover the misdelivery in question. In *Hollins v J. Davy Ltd*,²⁹³ the claimant garaged his motorcar at the defendants' garage under a contract which excluded liability for misdelivery. An employee of the defendants honestly, but mistakenly, delivered the car to a person who fraudulently represented that he had the claimant's authority to collect it, and the car was lost. It was held that this act was covered by the exemption clause. On the other hand, in *Alexander v Ry Executive*,²⁹⁴ where the officials in charge of a railway cloakroom permitted an unauthorised person to break open and remove the baggage of a depositor without the production of the cloakroom ticket, it was held that an exemption clause limiting liability for loss or misdelivery could not be relied upon to protect the railway executive. These cases are not easily distinguishable except on the ground that the former involved an honest, though negligent, error, whereas the latter was concerned with a misdelivery which was known to be unauthorised by the terms of the bailment.²⁹⁵

Theft or deliberate damage

- 17-040 A clause which is sufficient to exclude or restrict a bailee's liability for negligence may not in its terms be sufficient to exclude or restrict liability for theft by the bailee's servants, or damage by reckless or wilful misconduct.²⁹⁶

Sub-contracting

- 17-041 The terms of a contract of carriage or bailment may expressly or impliedly permit the carrier or bailee to sub-contract his obligations to a third party.²⁹⁷ If the contract, on its true construction, does not authorise the carrier or bailee to sub-contract, or limits the persons who may properly be employed as sub-contractors, it would appear that the carrier or bailee will not be protected if he exceeds his authority by an exemption clause which is construed to apply only while the goods are in his possession or control.²⁹⁸

Footnotes

241 cf. above, paras 17-007, 17-012—17-013.

242 1977 Act s.6(1) and see below, para.17-097; Vol.II, para.46-085.

243 See s.26 of the 1977 Act; below, para.17-127; Vol.II, para.46-125.

244 Unfair Contract Terms Act 1977 s.6(1). After the coming into force of the Consumer Rights Act 2015 on 1 October 2015, s.12 of the 1979 Act no longer applies to a contract to which Ch.2 of Pt 1 of the Consumer Rights Act 2015 applies (s.12(7)), but s.17 of the 2015 Act makes equivalent provision and s.31(1)(i) prevents any exclusion or restriction of liability for breach of the relevant statutory terms: see Vol.II, paras 40-509 and 40-535.

245 *Rowland v Divall* [1923] 2 K.B. 500, 507. See also *Guest* (1961) 77 L.Q.R. 98, 100. Contrast *Hudson* (1957) 20 M.L.R. 236; (1961) 24 M.L.R. 690; and see Coote, Exception Clauses (1964), p.61.

246 *Chapman v Speller* (1850) 14 Q.B. 621; *Eichholz v Bannister* (1864) 17 C.B. N.S. 708; *Bagueley v Hawley* (1867) L.R. 2 C.P. 625; *Warmings Used Cars v Tucker* [1956] S.A.S.R. 249. See also s.12(3) of the Sale of Goods Act 1979: Vol.II, para.46-085.

247 1977 Act s.6(2) on which see below, para.17-097; Vol.II, para.46-117; but see 1977 Act s.26 (international sales).

248 1977 Act s.6(1A). An exclusion of liability for breach of an express term as to the quality, etc. of the goods in a person's "written standard terms of business" may be subject to the test of reasonableness under the 1977 Act s.3: see below, paras 17-088—17-095.

- 249 The relevant provisions of the 2015 Act apply to consumer contracts made on or after 1 October 2015: see above, para.17-005 and also below, para.40-241.
- 250 1979 Act ss.13(5), 14(9) and 15(5) (as inserted by the Consumer Rights Act 2015 Sch.1 paras 12, 13(3) and 14 on its coming into force on 1 October 2015).
- 251 Consumer Rights Act 2015 ss.9–16, 31(1)(a)–(h) on which see Vol.II, paras 40-499—40-507 and 40-535 (which explains that the new provisions extend to certain “goods contracts” which do not count as “sales contracts”).
- 252 *Shepherd v Kain* (1821) 5 B. & Ald. 240; *Nichol v Godts* (1854) 10 Exch. 191; *Wieler v Schilizzi* (1856) 17 C.B. 619; *Josling v Kingsford* (1863) 13 C.B. N.S. 447; *Azémar v Casella* (1867) L.R. 2 C.P. 677; *Bowes v Shand* (1877) 2 App. Cas. 455, 480; *Gorton v Macintosh* [1883] W.N. 103; *Wallis, Son and Wells v Pratt and Haynes* [1911] A.C. 394; *Wimble v Lillico* (1922) 38 T.L.R. 296; *Munro & Co Ltd v Meyer* [1930] 2 K.B. 312; *Green v Arcos Ltd* (1931) 47 T.L.R. 336; *Wilensko v Fenwick* [1938] 3 All E.R. 429; *Champanhac & Co Ltd v Waller & Co Ltd* [1948] 2 All E.R. 724; *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty, Son & Co (No.1)* [1953] 1 W.L.R. 1468, 1470; *Boshali v Allied Commercial Exporters Ltd* (1961) 105 S.J. 987; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 404, 410, 427, 433; Benjamin's Sale of Goods, 11th edn (2021), paras 13-023 et seq.; Vol.II, para.46-127.
- 253 *Pinnock Bros v Lewis and Peat* [1923] 1 K.B. 690; *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 K.B. 17, 23; *Suisse Atlantique Société d'Armement Maritime v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 404, 413, 432, 433. Contrast *L'Estrange v F. Graucob Ltd* [1934] 2 K.B. 394. See also *Beck & Co v Szymanowski & Co* [1924] A.C. 43, 48; *Pollock & Co v Macrae* (1922) S.C.(H.L.) 192; and below, para.17-031 (hire purchase). This was said to be “not entirely clear” by Rix LJ in *KG Bominfot mbH & Co v Petroplus Marketing AG* [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442 at [48].
- 254 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803 (although, at 813, Lord Bridge said “[i]n my opinion, this is not a ‘peas and beans’ case at all”).
- 255 See *Lord Devlin* [1966] C.L.J. at 212.
- 256 See below, para.17-097; Vol.II, para.41-395.
- 257 See Vol.II, paras 41-320, 41-386.
- 258 The disapplication of the provisions applicable to hire-purchase agreements in the 1973 Act was effected by 2015 Act s.60, Sch.1 paras 1–7, by substituting “relevant hire-purchase agreement” for “hire-purchase agreement” in the 1973 Act and then defining a relevant hire-purchase agreement as one which “is not a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies”, as well as making consequential amendments to the 1973 Act: see Vol.II, para.40-474.
- 259 Consumer Rights Act 2015 ss.9–16, 31(1)(a)–(h) on which see Vol.II, paras 40-499—40-508 and 40-535.
- 260 *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; *Charterhouse Credit Ltd v Tolly* [1963] 2 Q.B. 683 (which was overruled in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827); *Unity Finance Ltd v Hammond* (1962) 106 S.J. 327; *Suisse Atlantique* [1967] 1 A.C. 361, 402, 404, 425, 433; *Farnworth*

Finance Facilities Ltd v Attryde [1970] 1 W.L.R. 1053; Guarantee Trust of Jersey v Gardner (1973) 117 S.J. 564, CA. Contrast *Handley v Marston (1962) 106 S.J. 327; Astley Industrial Trust Ltd v Grimley [1963] 1 W.L.R. 584.*

- 261 See Vol.II, para.41-322. For the implied undertakings of title at common law, see *Karflex Ltd v Poole [1933] 2 K.B. 251; Mercantile Union Guarantee Corp v Wheatley [1938] 1 K.B. 490; Warman v Southern Counties Car Finance Corp Ltd [1949] 2 K.B. 576.*
- ②62 See ss.2, 3 and Sch.1 paras 2, 3. See below, paras 17-085, 17-088—17-089, 17-123, 17-124, cf. para.17-128. Under the *Consumer Rights Act 2015 Pt 2*, in principle a term in a consumer contract for the carriage of goods falls under the test of unfairness in *s.62 of the 2015 Act* unless it falls within the exception in *s.73* as regards “mandatory statutory or regulatory provisions” including “the provisions or principles of an international convention to which the United Kingdom is a party”, and this is significant in the context of international carriage: see Vol.II, para.40-264. While *Pt 2 of the 2015 Act* came into force generally on 1 October 2015 and applies to contracts made on or after that day, there is an exception as regards its provisions relating to the exclusion or restriction of liability in “services contracts” which do not apply to certain “consumer transport services” (certain rail passenger services, carriage by air, and sea and inland waterway transport, all as specially defined by Order 2015/1630 art.2) until 1 October 2016: *2015 Order arts 4 and 6(2)* as amended by SI 2016/484 art.2. See further Vol.II, para.40-241.
- ②63 *L. & N.W. Ry v Neilson [1922] 2 A.C. 363* (carriage by land); *Hain S.S. Co Ltd v Tate & Lyle Ltd (1936) 41 Com. Cas. 350* (carriage by sea). See also *Rotterdamsche Bank NV v B.O.A.C. [1953] 1 W.L.R. 493, 502–503* (carriage by air); *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, 390, 399, 411, 422, 433*; Coote, *Exception Clauses* (1964), p.80. See Vol.II, para.38-036.
- ②64 See *Davis v Garrett (1830) 6 Bing. 716; Leduc v Ward (1888) 20 Q.B.D. 475; The Dunbeth [1897] P. 133; Mallett v G.E. Ry [1899] 1 Q.B. 309; J. Thorley Ltd v Orchis S.S. Ltd [1907] 1 K.B. 660; Internationale Guano, etc. v Macandreir & Co [1909] 2 K.B. 360; Gunyon v S.E. & Chatham Ry Companies' Managing Committee [1915] 2 K.B. 370; J. Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd [1916] 2 K.B. 783; London & N.W. Ry v Neilson [1922] 2 A.C. 263; US Shipping Board v Bunge y Born (1925) 31 Com. Cas. 118; Cunard S.S. Co Ltd v Buerger [1927] A.C. 1; Stag Line Ltd v Foscolo, Mango & Co Ltd [1932] A.C. 328; Hain S.S. Co Ltd v Tate & Lyle Ltd (1936) 41 Com. Cas. 350.*
- ②65 *Suisse Atlantique [1967] 1 A.C. 361, 442.* cf. *Drew Brown v The Orient Trader [1973] 2 Lloyd's Rep. 174.*
- ②66 *L. & N.W. Ry v Neilson [1922] 2 A.C. 263, 278.*
- ②67 *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 845.* In *Kenya Railways v Antares Pte Ltd [1987] 1 Lloyd's Rep. 424, 430* and *State Trading Corp of India v M. Golodetz*

Ltd [1989] 2 Lloyd's Rep. 277, 289, Lloyd LJ stated that “they should now be assimilated into the ordinary law of contract”, but this would be difficult to achieve while it remains the case that the protection of the clause goes in the absence of affirmation. See *Baughen [1991] L.M.C.L.Q. 70*. And see also *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd [2003] EWCA Civ 451, [2003] 2 Lloyd's Rep. 1* and *Dera Commercial Estate v Derya Inc [2018] EWHC 1273 (Comm), [2019] 1 All E.R. 1147* at [74]–[118] esp. at [107]–[108]; *Huntsworth Wine Co Ltd v London City Bond Ltd [2021] EWHC 2831 (Comm)* at [184]–[188].

- ②68 *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd [1972] 1 Lloyd's Rep. 410; Trade and Transport Inc v Iino Kaiun Kaisha Ltd [1973] 1 W.L.R. 210, 232.*

- ②69 *Leduc v Ward (1988) 20 Q.B.D. 475; Glynn v Margetson [1893] A.C. 351; Potter v Burrell [1897] 1 Q.B. 97, 104; V.O.S. of Moscow v Temple S.S. Co Ltd (1945) 173 L.T. 373, 376; Suisse Atlantique [1967] 1 A.C. 361, 393, 412, 427, 430.*

- 270 *Freeman v Taylor (1831) 8 Bing. 124; Scaramanga v Stamp (1880) 5 C.P.D. 295; Brandt v Liverpool, Brazil & River Plate Steam Navigation Co [1924] 1 K.B. 575; Cunard S.S. Co Ltd v Buerger [1927] A.C. 1*. See Vol.II, para.38-037.
- 271 *Colverd & Co Ltd v Anglo-Overseas Transport Ltd [1961] 2 Lloyd's Rep. 352*. cf. *Marston Excelsior Ltd v Arbuckle Smith & Co Ltd [1971] 1 Lloyd's Rep. 70.*
- 272 *The Cap Palos [1921] P. 458* (towage); *Brandt v Liverpool, Brazil and River Plate S.N. Co [1924] 1 K.B. 575, 597, 601*; *Bontex Knitting Works Ltd v St John's Garage [1943] 2 All E.R. 690; affirmed [1944] 1 All E.R. 381n*. But see *Suisse Atlantique [1967] 1 A.C. 361, 435.*
- 273 *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd [1966] 2 Lloyd's Rep. 347.*
- 274 *Royal Exchange Shipping Co Ltd v Dixon (1886) 12 App. Cas. 11, 16, 19; J. Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 W.L.R. 1078, 1082, 1084, 1085*. Contrast *Kenya Railways v Antares Co Pte Ltd [1987] 1 Lloyd's Rep. 424; Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd [2003] EWCA Civ 451, [2003] 2 Lloyd's Rep. 1* (Hague-Visby Rules or Hague Rules).
- 275 *Readhead v Midland Ry (1869) L.R. 4 Q.B. 379; J. Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q.B. 495*. However, where the consignor of goods is a consumer, then the contract of carriage may be treated as one for “services” so as to attract the statutory terms (and the controls on the exclusion of liability for their breach) in the *Consumer Rights Act 2015 Pt 1 Ch.3*, on which see Vol.II, paras 40-571 et seq.
- 276 Such a stipulation must be expressed in clear words and without ambiguity, or it will be insufficient: *Rathbone v McIver [1903] 2 K.B. 378; Elderslie v Borthwick [1905] A.C. 93; Nelson v Nelson [1908] A.C. 16; Chartered Bank v British India Steam Navigation Co [1909] A.C. 369, 375; The Rossetti [1972] 2 Lloyd's Rep. 116.*
- 277 But under the *Carriage of Goods by Sea Act 1971 Sch. para.1, art.III(1)*, the carrier is only bound to exercise due diligence to make the ship seaworthy. See also s.3 of the 1971 Act (absolute warranty of seaworthiness not to be implied in contracts to which the Hague Rules apply).
- 278 *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co [1922] 2 A.C. 250, 260.*

- 279 *The Europa* [1908] P. 84; *Kish v Taylor* [1912] A.C. 604, 617; *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26; see below, para.27-012.
- 280 *Tattersall v National S.S. Co Ltd* (1884) 12 Q.B.D. 297. See also *Steel v State Line S.S. Co* (1877) 3 App. Cas. 72.
- 281 *Kish v Taylor* [1912] A.C. 604; *Bank of Australasia v Clan Line* [1916] 1 K.B. 39; *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250, 257. *Petrofina SA of Brussels v Compagnie Italiana Transporto Olii Minerali of Genoa* (1937) 63 T.L.R. 650, 653. But see *Parsons Corp v CV Scheepvaartonderneming "Happy Ranger"* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep. 357 (Hague-Visby Rules).
- 282 *Smackman v General Steam Navigation Co* (1908) 98 L.T. 396; *Chartered Bank v British India Steam Navigation Co* [1909] A.C. 369; *Pringle of Scotland v Continental Express* [1962] 2 Lloyd's Rep. 80; *Port Jackson Stevedoring Pty Ltd v Salmon and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138; *Chellaram & Co Ltd v China Ocean Shipping Co* [1989] 1 Lloyd's Rep. 493. See also *Hollins v J. Davy Ltd* [1963] 1 Q.B. 844 (bailment), and Vol.II, paras 38-029—38-030, 38-040.
- 283 [1959] A.C. 576. See also *Alexander v Railway Executive* [1951] 2 K.B. 882 (bailment); *Sydney City Council v West* (1965) 114 C.L.R. 481; *Suisse Atlantique case* [1967] 1 A.C. 361, 411, 434; *Kanematsu (Hong Kong) Ltd v Eurasia Express Line* [1998] 1 C.L.Y. 4404; *Motis Exports Ltd v Dampsksibsselskabet AF 1912 Aktieselskab* [2000] 1 Lloyd's Rep. 211, 213, 216, 217; *East West Corp v DKBS 1912* [2003] EWCA Civ 83, [2003] Q.B. 1509 at [65]—[68], [85]. cf. *Port Jackson Stevedoring Pty Ltd v Salmon and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138; *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp Berhad* (1989) 86 A.L.R. 375; *Sacre Export SA v Northern Shipping Ltd* [1994] 2 Lloyd's Rep. 266; *Pyramid Sound NV v Briese Schiffahrts GmbH & Co* [1995] 2 Lloyd's Rep. 144.
- 284 1977 Act ss.2, 3; see below, paras 17-085, 17-088—17-095 and, in the context of bailment, Vol.II, paras 35-044, 35-054 and 35-078.
- 285 See Vol.II, paras 40-223 et seq. A contract of bailment may constitute a contract for services so as to attract both the statutory terms provided by the 2015 Act for the latter category of contract and the special controls on the exclusion of liability for their breach contained in that Act: 2015 Act Pt 1 Ch.3 and see Vol.II, para.35-045 and paras 40-571 et seq. esp. at para.40-589. Where a bailment constitutes a consumer contract of hire the statutory terms applicable to “hire contracts” and controls on the exclusion of liability for their breach contained in the 2015 Act apply: 2015 Act Pt 1 Ch.1 and see Vol.II, paras 35-074, 35-078, and paras 40-487 et seq. esp. at paras 40-491 and 40-535.
- 286 *Fenn v Bittleston* (1851) 7 Ex. 152.
- 287 *Nyberg v Handelaar* [1892] 2 Q.B. 202.
- 288 *North Central Wagon and Finance Co v Graham* [1950] 2 K.B. 7.
- 289 See Vol.II, paras 35-014, 35-023, 35-034, 35-042, 35-052, 35-080.
- 290 *North Central Wagon and Finance Co v Graham* [1950] 2 K.B. 7, 15; *Alexander v Ry Executive* [1941] 2 K.B. 882, 889; *Garnham, Harris & Elton Ltd v Ellis (Transport) Ltd* [1967] 1 W.L.R. 940, 946.
- 291 *Suisse Atlantique case* [1967] 1 A.C. 361, 412. See also at 392, 424, 434, and *Lilley v Doubleday* (1881) 7 Q.B.D. 510; *Gibaud v G.E. Ry* [1921] 2 K.B. 426, 435; *Alderslade v*

- Hendon Laundry Ltd [1945] K.B. 189, 192; J. Spurling Ltd v Bradshaw [1956] 1 W.L.R. 461, 465; Mendelssohn v Normand Ltd [1970] 1 Q.B. 177, 184; Coote, Exception Clauses (1964), p.99.*
- ②92 *Harris v G.W. Ry (1876) 1 Q.B.D. 515; Gibaud v G.E. Ry [1921] 2 K.B. 426; Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd [1971] 1 W.L.R. 519.* cf. *Huntsworth Wine Co Ltd v London City Bond Ltd [2021] EWHC 2831 (Comm)* at [98]–[101] and [184]–[188] (considering the possible special treatment of “deviation” in bailment). See further above, para.17-012.
- 293 [1963] 1 Q.B. 844. See also *Ashby v Tolhurst [1937] 2 K.B. 242; B.G. Transport Service Ltd v Marston Motor Co Ltd [1970] 1 Lloyd's Rep. 371.*
- 294 [1951] 2 K.B. 882. See also *Tozer Kemsley & Millbourn (Australasia) Pty Ltd v Collier's Interstate Transport Service Ltd (1956) 94 C.L.R. 384; Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd [1959] A.C. 576* (carriage); *Sydney CC v West (1965) 114 C.L.R. 481; Levison v Patent Steam Carpet Cleaning Co Ltd [1978] Q.B. 69.*
- 295 In *Suisse Atlantique case [1967] 1 A.C. 361, 435*, Lord Wilberforce rejected the view that there is a separate category of “deliberate breaches” (see above, para.17-019) and explained *Alexander v Ry Executive [1951] 2 K.B. 882* as a case of “total departure” from what was contractually contemplated. cf. *J. Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q.B. 495.*
- 296 *Levison v Patent Steam Carpet Cleaning Co Ltd [1978] Q.B. 69.*
- 297 See below, para.17-057 and Vol.II, para.35-026.
- 298 *Davies v Collins [1945] 1 All E.R. 247; Garnham, Harris & Elton Ltd v Ellis (Transport) Ltd [1967] 1 W.L.R. 940; The Berkshire [1974] 1 Lloyd's Rep. 185.*

Section 5. - Exemption Clauses and Third Parties

Chitty on Contracts 34th Ed.

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Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 17 - Exemption Clauses

Section 5. - Exemption Clauses and Third Parties

Application to third parties

- 17-042 It sometimes happens that one of the parties to a contract seeks to extend the burden of its exempting provisions to persons who are not in any direct contractual relationship with him, or endeavours to confer the benefit of those provisions on persons outside the contract, e.g. to his employees, agents or sub-contractors. At common law, the general rule is that the doctrine of privity of contract²⁹⁹ prevents the application of an exemption clause to third parties, although this general rule is subject to a number of exceptions and qualifications.³⁰⁰ The common law rule was, however, fundamentally affected by the *Contracts (Rights of Third Parties) Act 1999*.³⁰¹ Exemption clauses seeking to protect third parties are unequivocally brought within the purview of the Act,³⁰² but the Act may also be relevant to exemption clauses seeking to restrict a third party's right as provided by the Act.³⁰³ In any case involving the application of an exemption clause to a third party it is therefore necessary to consider whether and, if so, to what extent the common law rule has been altered by this statute.

The general common law rule: burden

- 17-043 At common law, two persons cannot by contract impose the burden of an exemption clause on one who is not a party to that contract.³⁰⁴ In *Haseldine v C.A. Daw & Son Ltd*,³⁰⁵ the owners of a block of flats by contract employed the defendants to maintain a lift in the premises. This contract purported to exempt the defendants from liability for accidents due to their negligence.³⁰⁶ A third party was injured owing to the negligent repair of the lift by the defendants. It was held that the

defendants were not protected against an action in tort by the third party. On the other hand, where A and B enter into a contract, A may seek to exclude its liability to a third party C by way of a non-contractual notice of exclusion or disclaimer.³⁰⁷ At common law such a disclaimer takes effect on its terms if C has been given reasonable notice of the exclusion, but it may be subject to legislative controls under the [Unfair Contract Terms Act 1977](#)³⁰⁸ or the [Consumer Rights Act 2015](#).³⁰⁹

Effect of the 1999 Act: burden

17-044

The [Contracts \(Rights of Third Parties\) Act 1999](#) does not alter the common law position as regards the burden of contracts on third parties. However, where, by virtue of the provisions of the Act, a contract confers upon a third party a “positive” right to enforce a contractual term, that right may be affected by an exemption clause in the contract which excludes or limits the liability of one of the parties for breach of that term.

³¹⁰

U Suppose that A (the promisor) enters into a contract with B (the promisee) which contains a term under which A is to render certain services to C (a third party), but the contract also contains an exemption clause which effectively excludes or limits the liability of A to B for breach of the term. If A fails to perform the services or fails to perform them satisfactorily, the exemption clause will be available as a defence to A in any proceedings brought by C under the Act to enforce his right to those services. The reason is that the Act provides that, where (in reliance on the Act)

³¹¹

U proceedings for enforcement of a term are brought by a third party, the promisor is to have available to him by way of defence any matter that arises from or in connection with the contract and is relevant to the term, and would have been available to him by way of defence if the proceedings had been brought by the promisee.

³¹²

U The question, however, arises whether A can rely on the exemption clause as against C if, by statute, it would not have been available as a defence to A if the proceedings had been brought by B (for example, because it seeks to exclude A's contractual liability to B, is caught by [s.3 of the Unfair Contract Terms Act 1977](#)

³¹³

U and is unreasonable as between A and B). Under the [1977 Act](#), the position appears to be as follows. A cannot rely on an exemption clause which seeks to exclude A's business liability for negligence (whether contractual or in tort) causing death or personal injuries nor on a non-contractual notice which seeks to exclude A's business liability in tort for negligence in respect of death or personal injuries.

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U On the other hand, as regards other loss or damage, A can rely on the exemption clause where C is claiming damages for breach of a *contractual* duty to take reasonable care, as [s.7\(2\) of the 1999 Act](#) provides that [s.2\(2\) of the 1977 Act](#) “shall not apply where the negligence consists of the breach of an obligation arising from a term of a contract”. However, this statutory disapplication applies only to a claim by C brought under [s.1 of the 1999 Act](#), that is, to enforce a term of the contract and therefore does not cover any claim by C brought in tort for negligence.

315

U As a result, in the latter case, an exemption clause in the contract *may* operate as a non-contractual notice (if it is brought reasonably to the attention of C), but if it were able to do so, it could then fall within the controls of [s.2\(2\) of the 1977 Act](#).

316

U And if C is seeking to rely against A on a liability arising under the contract between A and B other than based on A’s negligence, it would seem that any exemption clause protecting A would not be caught by the controls provided by [s.3 of the 1977 Act](#) (subject to their own conditions) as [s.3](#) applies only “as between contracting parties” and protects only persons dealing on the other’s written standard terms.

317

U Since the coming into force of the [Consumer Rights Act 2015](#) as regards contracts made on or after 1 October 2015, [s.2 of the 1977 Act](#) has no longer applied to terms in consumer contracts nor to “consumer notices” which are instead governed by [Pt 2 of the 2015 Act](#).

318

U For this purpose, [s.65 of the 2015 Act](#) applies a bar on the exclusion or restriction of liability in a trader of its liability for death or personal injury resulting from negligence following the model in [s.2\(1\) of the 1977 Act](#)

319

U and it is submitted that this bar (which applies to contract terms and to consumer notices) equally applies so as to prevent a trader (A) party to a contract from excluding its liabilities against either B or C, whether these liabilities arise for breach of the contract’s duties to take reasonable care or for negligence in tort. Secondly, under [s.62 of the 2015 Act](#) any attempted exclusion by the trader of its liabilities for negligence for damage or loss other than personal injuries or death (whether by a term in a consumer contract or a “consumer notice”) is subject to a test of fairness, failing which the term or notice does not bind the consumer.

320

U While this broadly follows [s.2\(2\) of the 1977 Act](#), the [2015 Act](#) did not amend the [1999 Act](#) so as to include a disapplication provision similar to [s.7\(2\) of the 1999 Act](#)’s disapplication of [s.2\(2\) of the 1977 Act](#). While it is clear that the controls of the [2015 Act](#) [s.62\(6\)](#) applicable to “consumer notices” may apply so as to prevent a trader (A) from excluding its liabilities in tort by notice as against a third party consumer in a similar way to the position under [s.2\(2\) of](#)

the 1977 Act (though not being restricted to liabilities in tort for negligence), in the case of the trader's *contractual* liabilities (whether for negligence or otherwise), it would appear that these would not be caught directly by the control on unfair contract terms in s.62(4) of the 2015 Act as this provides that an unfair term does not bind the consumer, meaning, the consumer party to the contract with the trader.³²¹

³²¹

U On the other hand, where the promisee is a consumer and can therefore take advantage of the non-bindingness of a contract term as against a promisor/trader, it would appear that as a result the promisor/trader would *not* have the benefit of such a contract term as against the third party claiming under the 1999 Act on the ground that it would not be able to do so against the promisee/consumer.

³²²

U As a result, while the controls on unfair contract terms in Pt 2 of the 2015 Act do not themselves seek to benefit a third party, where they restrict the promisor's defences as against the promisee, this may benefit that third party, whether or not that third party is a consumer.

³²³



The general common law rule: benefit

- 17-045 At common law, two persons cannot by contract confer the benefit of an exemption clause on one who is not a party to that contract.³²⁴ Thus it was held that an employee of the London Passenger Transport Board, who was sued by a passenger for damages in negligence, was not protected by the terms of a pass given to the passenger by the Board which expressly purported to exempt the employees of the Board from all liability³²⁵; that the master and boatswain of a ship, who were sued by a passenger alleged to have been injured by their negligence, were not protected by a clause inserted in the passenger's ticket by their employers³²⁶; that stevedores, who had negligently damaged a drum of chemicals while handling it, were not protected by a clause in the bill of lading which exempted the carriers of the goods from liability in excess of a certain pecuniary limit³²⁷; and that a licensor of technology and know-how was not protected by a clause in a contract between its licensee and the person to whom the technology and know-how was transferred.³²⁸

Effect of the 1999 Act: benefit

- 17-046

The Contracts (Rights of Third Parties) Act 1999 enables a third party, subject to certain conditions, to take advantage of an exemption clause inserted in a contract for his benefit. The provisions of the Act are dealt with more fully in Ch.20 of this work.³²⁹ Section 1 of the Act sets out the circumstances in which a person who is not a party to a contract (a “third party”) may in his own right enforce a term of a contract if the contract expressly provides that he may³³⁰ or if the term purports to confer a benefit on him.³³¹ The Act makes it clear that it applies so as to enable a third party to avail himself of an exclusion or limitation clause as well as to enforce “positive” rights such as the right to payment of money or to the performance of some other obligation.³³² However, the third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.³³³ So, for example, if A (the promisor) enters into a contract with B (the promisee) by which A agrees that B’s sub-contractors may avail themselves of a term of the contract which excludes or limits the liability of B to A, and A seeks to hold C, a sub-contractor of B, liable, C may rely on the term as a defence notwithstanding that there is no privity of contract between himself and A. However, s.3(6) of the Act provides:

“Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.”

On a literal reading, this appears to provide that C is able to rely on the exemption clause only if he could have done so had he been party to the contract,

³³⁴

but the Law Commissions’ understanding of an almost identical form of words in the draft Bill was broader, as they considered that the phrase “the third party can rely on the exclusion ... clause to the extent that he could have done so had he been a party to the contract” should be understood to “include matters that affect the validity of the exclusion clause as between the contracting parties as well as matters affecting validity or enforceability that relate only to the third party”.³³⁵ The difference between the two interpretations may matter where an exemption clause stipulated as being for the benefit of C could fall within legislative controls which distinguish between the exclusion of liability in a person depending on whether or not they act in the course of business. So, certainly, where B and C both act in the course of business, then under s.3(6) of the 1999 Act the controls on their exclusions of liability under, for example, s.3 of the Unfair Contract Terms Act 1977 would not differ as between them.³³⁶ Moreover, in the (perhaps unlikely) situation where B does not contract in the course of business, but C does so contract, then, on either reading of s.3(6), C could rely on the exemption clause only to the extent to which s.3’s requirement of reasonableness were satisfied since C “may not” enforce the term “if he could not have done so

(whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract” and he could not have done on the literal (and narrower) reading unless the term was reasonable. On the other hand, where B contracts in the course of a business but C does not, then on the literal reading, C *could* rely on the term without the need for it to satisfy the test of reasonableness in [s.3 of the 1977 Act](#), as [s.3](#) applies only to “business liability” and if C had been party to the contract, [s.3](#) would not have applied to his liability; whereas on the Law Commissions’ understanding of the wording of [s.3\(6\)](#), C could not rely on the clause any more than could B, as B’s inability to rely on the term would affect C’s position.

Contracts excluded from the 1999 Act

17-047 Certain types of contract are excluded (wholly or partly) from the application of the [1999 Act](#).³³⁷ In particular these contracts include contracts for the carriage of goods by sea³³⁸ and contracts for the carriage of goods by rail or road, or for the carriage of cargo by air, which are subject to the rules of the appropriate international transport convention.³³⁹ However, it is expressly provided that a third party may in reliance on [s.1 of the Act](#) avail himself of an exclusion or limitation of liability in such a contract.³⁴⁰

Common law exceptions preserved

17-048 [Section 7\(1\) of the 1999 Act](#) specifically provides that [s.1 of the 1999 Act](#)’s provision for the creation of a right in a third party “does not affect any right or remedy of a third party that exists or is available apart from this Act”.³⁴¹ The provisions of the Act therefore supplement and are in addition to the common law or other statutory exceptions to the doctrine of privity of contract which allow a third party “a right or remedy” against one of the contracting parties. If, therefore, apart from the [1999 Act](#), a person could take the benefit of an exemption clause in a contract to which he is not a party, then the situation remains unaffected by the Act. In most cases, where a third party claims to be entitled to the benefit of an exemption clause, he will rely on [s.1 of the 1999 Act](#). But where the requirements of that section are not satisfied, for example, where the person claiming the benefit of the clause is not identified or not sufficiently identified in the contract, he can still fall back on a common law exception (if any is applicable) to the privity rule. While the [1999 Act](#) makes no explicit provision to this effect, if it is sought to establish that a person is bound by an exemption clause in a contract to which he is not a party, this can be done only by reference to an exception to the privity rule at common law since the Act does not generally provide for the burden of an exemption clause to be imposed on third parties. It is therefore necessary to consider what exceptions exist to the doctrine of privity of contract apart from the Act.

Vicarious immunity

- 17-049 The proposition was at one time advanced that, at common law, where a contract contained an exemption clause, any employee or agent who acted under the contract could claim the same exemption as attached to the liability of his employer or principal.³⁴² This concept of “vicarious immunity” was, however, rejected by the House of Lords in *Scrutons Ltd v Midland Silicones Ltd*³⁴³ where it was held that no such principle existed in English law so far as exemption clauses were concerned.

Agency

- 17-050 At common law a third party may be able to take the benefit of an exemption clause by showing that the party imposing the exemption clause was acting as agent in the transaction so as to bring the third party into a direct contractual relationship with the claimant.³⁴⁴ This device was first employed in the nineteenth century in relation to railways. It frequently happened that passengers or goods might be transported over a network of independent railway companies before reaching their destination. The question arose whether the exemption clauses inserted in the contract of carriage with the contracting company could be made to extend to the others with whom there seemed to be no direct contractual relationship. The courts held that the contracting company should be treated either as agent for the passenger or consignor to contract with the other companies³⁴⁵ or as their agent to contract with him.³⁴⁶ In more modern times clauses are frequently encountered in standard form contracts whereby one contracting party, e.g. a carrier,³⁴⁷ repairer³⁴⁸ or building contractor³⁴⁹ purports to contract on behalf of his employees, agents and the independent contractors employed by him, and to extend to such employees, agents and independent contractors protection from liability. Such clauses are—at least in the context of carriage of goods by sea—usually referred to as “Himalaya clauses”.³⁵⁰ In *Scrutons Ltd v Midland Silicones Ltd*³⁵¹ the House of Lords left open the question whether, at common law, stevedores could be protected by an exemption clause contained in a contract of carriage to which they were not a party if the carrier contracted as agent on their behalf. Lord Reid said³⁵²:

“I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore

would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.”

- 17-051 These four conditions were held to have been satisfied in *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)*.³⁵³ In that case, the Judicial Committee of the Privy Council, by a majority, held that a stevedore, who had negligently damaged goods in the course of unloading, was protected by a clause in a bill of lading which contained appropriate words exempting him from liability and which was stated to have been made by the carrier acting as agent on his behalf. An action against him by the shipper therefore failed. The Board considered that:

“... the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual between the shipper and the [stevedore], made through the carrier as agent. This became a full contract when the [stevedore] performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the [stevedore] should have the benefit of the exemptions and limitations contained in the bill of lading.”³⁵⁴

This reasoning is, however, somewhat artificial, and the courts of certain Commonwealth jurisdictions initially showed a reluctance to follow the *Eurymedon* case or a readiness to find grounds for distinguishing it.³⁵⁵ But it has subsequently been endorsed and justified on grounds of policy: that established commercial practice now requires the stevedore, in normal circumstances, to enjoy the benefit of contractual provisions in the bill of lading.³⁵⁶ In *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The New York Star)*,³⁵⁷ after goods had been unloaded from a ship and placed in a shed on the wharf under the stevedore’s control, a servant of the stevedore negligently delivered the goods to thieves without production of the bill of lading. The High Court of Australia held that the stevedore was not protected by a clause in substantially the same form as that considered in the *Eurymedon* case, since he was no longer acting on behalf of the carrier under the bill of lading. The carrier’s responsibilities and immunities under the bill of lading had ceased when the goods were discharged from the ship. On appeal, the Judicial Committee again held that the stevedore was protected on the ground that, whereas the carrier’s responsibility as a carrier terminated as soon as the goods left the ship’s tackle, his responsibility as bailee under the bill of lading continued until the consignee took delivery of the goods. During this period, both the carrier and the stevedore were entitled to the protection conferred by the bill.

- 17-052 “Himalaya clauses” have therefore attained a degree of general acceptance.³⁵⁸ The technical nature of the *Eurymedon* principle is, however, “all too apparent”.³⁵⁹ In some cases, the courts have rejected its application on the ground that they were compelled to do so by established principles of the law of contract or of agency. Thus, the benefit of an exemption clause has been held not to extend to a third party because the contract did not make it clear that the third party was

intended to be protected or that the contracting party contracted as agent for the third party as well as on his own behalf,³⁶⁰ or because there was no act of the third party which could be identified as constituting acceptance of the offer made to him through the agent,³⁶¹ or because no agency could be established since the third party was at all relevant times unascertained,³⁶² or because the negligence of the third party in respect of which exemption was sought was collateral and not related to the performance of his duties under the contract.³⁶³ Since the enactment of the *Contracts (Rights of Third Parties) Act 1999* a third party is more likely now to rely simply and directly on the provisions of that Act rather than on the *Eurymedon* principle and so will be absolved from having to establish the more esoteric requirements, e.g. authority and consideration,³⁶⁴ of that principle.

Trust

- 17-053 Exemption clauses are sometimes found which provide that a party contracts, for the purpose of the clause, as trustee on behalf of third parties, e.g. associated companies, or his employees or sub-contractors. It has been doubted whether a trust of the benefit of an exemption clause would be effective,³⁶⁵ but it is possible that such a trust would be upheld at common law (the contracting party acting as a bare trustee) provided that the identity of the beneficiaries of the trust was sufficiently certain.

Agreement not to sue, etc.

- 17-054 An exemption clause which purports to negative the liability of a third party to a contract cannot be construed as a promise not to sue that third party.³⁶⁶ However, the contract may contain an express or implied provision whereby one party promises the other that he will not institute legal proceedings against a third party, e.g. any employee or sub-contractor of the promisee.³⁶⁷ In such a situation, the third party cannot, at common law, rely on the promise as a defence to an action brought against him. But the promisee could, if he has a sufficient interest in the enforcement of the promise, apply for an order or claim a declaration that the action be stayed or dismissed.³⁶⁸

No voluntary assumption of risk

- 17-055 An exemption clause which purports to protect a third party cannot ordinarily be construed as a voluntary assumption of risk by the promisor.³⁶⁹

Occupier's liability

- 17-056 The Occupiers' Liability Act 1957³⁷⁰ provides that where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which they owe to them as their visitors cannot be restricted or excluded by that contract, but (subject to any provisions of the contract to the contrary) shall include the duty to perform their obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty. This rule applies to regulate the obligations (qua occupier) of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft; and to the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves their visitors.³⁷¹

Bailment³⁷²

- 17-057 A carrier, warehouseman or other bailee of goods may sub-contract to another performance of the contract between themselves and the bailor and for that purpose deliver possession of the goods to the sub-contractor as sub-bailee. If the sub-bailee has sufficient notice that the original bailor is interested in the goods, then they are under a duty to the original bailor, as well as to the bailee, to use reasonable care to safeguard the goods while in their possession and they will be liable to the original bailor if the goods are lost or damaged³⁷³ through their negligence notwithstanding the absence of any contract between them.³⁷⁴ Since the sub-bailee is not a party to the contract between the bailee and the original bailor, they cannot rely upon an exemption clause contained in that contract,³⁷⁵ unless the bailee contracted as agent on their behalf.³⁷⁶ Nor, in principle, will the original bailor be bound by an exemption clause contained in the sub-contract between the bailee and sub-bailee to which the original bailor is not a party,³⁷⁷ unless the bailee entered into the sub-contract as their agent.³⁷⁸ However, it has been held that the original bailor is bound by the terms of the sub-bailment if they have expressly or impliedly consented to the bailee making a sub-bailment containing those terms: the original bailor cannot, despite the lack of any contractual relationship, disregard those terms against the sub-bailee.³⁷⁹ Thus an exemption clause contained in the sub-contract which excludes or restricts the liability of the sub-bailee may protect the sub-bailee in an action against them by the original bailor. This principle was taken one step further by Donaldson J in *Johnson Matthey & Co Ltd v Constantine Terminals Ltd*,³⁸⁰ who stated that the original bailor might be bound by an exemption clause in the sub-contract irrespective of whether the bailee was authorised to sub-bail the goods on terms to the sub-bailee. But the Judicial Committee of the Privy Council has subsequently held³⁸¹ that the sub-bailee can invoke the terms of a sub-

bailment under which they receive the goods from the bailee as qualifying or otherwise affecting their responsibility to the original bailor only if the original bailor consented to them.

- 17-058 On the other hand, the courts have been reluctant to extend these principles to cases where the relationship between the claimant and the defendant who seeks to rely on the exemption clause is not one of bailor and bailee or sub-bailee.³⁸² So, for example, if it is agreed between the buyer and seller of goods that the seller will enter into a contract for the carriage of the goods to the buyer and for that purpose will bail the goods to a carrier on terms, then, if the goods are lost or damaged by the negligence of the carrier, the buyer will not be bound by an exemption clause contained in the contract of carriage to which they are not a party³⁸³ unless, in view of the nature and terms of the sales contract, the seller is taken to have bailed the goods to the carrier on behalf of the buyer so that the carrier is in possession of the goods as their bailee or sub-bailee.³⁸⁴ In the absence of any such relationship between them, the carrier will have to establish an implied or collateral contract between themselves and the buyer³⁸⁵ or that the seller's rights of suit under the contract of carriage have been transferred to and vested in the buyer³⁸⁶ or that they have attorned to the buyer by acknowledging that they hold the goods as bailee for the buyer on the terms of the contract of carriage.³⁸⁷

Building and construction contracts

- 17-059 Where a contractor is employed to carry out building or construction works or works of repair, it may be agreed or understood that the contractor ("the main contractor") will engage a sub-contractor or sub-contractors to execute part of the works. Since there is normally no privity of contract between the employer and the sub-contractors, any action brought by the employer against a sub-contractor in respect of loss or damage caused to them by the sub-contractor must be brought in tort for negligence. As a general rule, no such action will lie in respect of defects in the works which the sub-contractor is engaged to carry out.³⁸⁸ But the employer is entitled to claim against a sub-contractor damages in tort for negligence if the sub-contractor negligently causes physical damage to the existing structure or to property other than the thing supplied by them.³⁸⁹ The question, however, arises whether, in such an action, the sub-contractor can rely on an exemption clause contained in: (a) the main contract between the employer and the main contractor; or (b) their own sub-contract with the main contractor. The initial contractual arrangements between the employer, the main contractor and the sub-contractor may be such as to give rise to a contract between the employer and the sub-contractor.³⁹⁰ But, even if no such direct contractual relationship exists between them, the sub-contractor may nevertheless be entitled to rely upon an exemption clause contained in the main contract between the employer and the main contractor. This may be justified either on the ground that the duty of care in tort owed by the sub-contractor to the employer is negatived or qualified by the clause,³⁹¹ or on the ground that, if

the clause places a risk in whole or in part on the employer, the circumstances show that the sub-contractor contracted with the main contractor on a like basis.³⁹²

- 17-060 Whether the sub-contractor is also entitled to rely upon an exemption clause in their sub-contract with the main contractor is more problematical. *Prima facie* the employer would not be bound by a clause in a contract to which they were not a party.³⁹³ But, again, the contractual arrangements between the employer, main contractor and sub-contractor may be such as to show that the employer knew of and consented to the clause as, for example, where the sub-contractor is a nominated sub-contractor and the employer is aware of and accepts the terms on which the sub-contractor agrees to carry out the works. In such a case it is submitted that the employer could be held to be bound by the exemption clause.³⁹⁴

Effect of the 1999 Act

- 17-061 The common law exceptions referred to above in relation to bailment and building and construction contracts operate independently of and are not affected by the limitations contained in the **Contracts (Rights of Third Parties) Act 1999**.³⁹⁵ In particular, for example, where a sub-bailee or sub-contractor seeks the protection of an exemption clause in a contract to which they are not a party, they do not have to show that they are identified in the contract as the beneficiary of the clause by name, class or description as they would in a case where they rely on s.1 of the 1999 Act.

Footnotes

299 See above, para.6-040 and below, Ch.20.

300 See below, para.17-048.

301 The 1999 Act applies to contracts made after 11 May 2000; s.10(2).

302 1999 Act s.1(6) and see below, para.17-046.

303 Below, para.17-044.

304 *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd [1986] A.C. 785, 817*. See also the cases cited in paras 17-059, 17-060, below (building contracts) and paras 17-057—17-058, below (carriage of goods and bailment). Contrast *Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 Q.B. 402*, which was said in *Scruttons Ltd v Midland Silicones Ltd [1962] A.C. 446, 471* to be supportable only on the ground of an implied contract between the party seeking to rely on the exemption and the third party: see also *The Kapetan Markos (No.2) [1987] 2 Lloyd's Rep. 321, 331*.

- 305 [1941] 2 K.B. 343. Contrast *Fosbroke-Hobbes v Airwork Ltd* [1937] 1 All E.R. 108, which is explicable (if at all) only on the ground that the contracting party contracted as agent for his guests; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450, 461 (agency for wife).
- 306 [1941] 2 K.B. 343, 379.
- 307 On the validity of non-contractual notices of disclaimer generally see *White v Blackmore* [1972] 2 Q.B. 651 (occupier's liability); *Hedley Byrne & Co v Heller & Partners* [1964] A.C. 465; *Smith v Eric S. Bush* [1990] 1 A.C. 831 (both liability for negligent misstatements, though in *Smith* the non-contractual disclaimer was held unreasonable under s.2(2) of the Unfair Contract Terms Act 1977); *Taberna Europe CDO II Plc v Selskabet AF1* [2016] EWCA Civ 1262, [2017] Q.B. 633 at [16]–[20].
- 308 Unfair Contract Terms Act 1977 s.2 referring to the exclusion of liability for negligence by “a notice given to persons generally or to particular persons”: see below, paras 17-085—17-087.
- 309 Consumer Rights Act 2015 s.61(4)–(8), s.62(2) and (6), and s.65 (referring to “consumer notices”) on which see Vol.II, paras 40-418, 40-419 and 40-423.
- 310 See below, paras 20-091 et seq.
- 311 1999 Act s.1; see below, para.17-046.
- 312 1999 Act s.3(2).
- 313 Below, paras 17-088—17-089.
- 314 This follows from the control on contract terms and non-contractual notices in s.2(1) of the 1977 Act, which is not qualified or dis-applied by the 1999 Act. This reflects a choice of policy: Law Com. No.242, 1996, para.13.12 and see below, para.20-131.
- 315 Law Com. No.242, 1996, para.13.12.
- 316 If this analysis is correct, then it would appear that the (non-contractual) notice should be assessed for its reasonableness as against C rather than as against B.
- 317 See 1999 Act ss.1(4), 7(4) and see Law Com. No.242, 1996, para.13.10. Section 3 of the 1977 Act formerly also protected parties “dealing as consumer” but this was deleted on the coming into force of Pt 2 of the Consumer Rights Act 2015 on 1 October 2015.
- 318 2015 Act s.61 defines “consumer contract” and “consumer notice” for these purposes: see Vol.II, paras 40-230 et seq. esp. at 40-423. The disapplication of s.2 took effect by the insertion of a new s.2(4) into the 1977 Act: 2015 Act s.75, Sch.4 para.4. On the qualification on the date of the coming into force of the relevant provisions of the 2015 Act in the case of “consumer transport services”, see above, para.17-005.
- 319

In particular, the scope of the controls imposed by s.65 is restricted by s.66: see below, para.17-087 and Vol.II, para.40-423.

320 2015 Act s.62 and see Vol.II, paras 40-260 et seq. (terms) and 40-418—40-420 (notices).

321 2015 Act s.62(1).

322 i.e. under the 1999 Act s.3(2) and see below, paras 20-119–20-123.

323 cf. Law Commissions Consultation Paper No.166 (2002) paras 4.176–4.177 which recommended that a third party should not be able to challenge unfair terms in the contracts from which they derive their rights (including as regards consumer contracts) except as regards the exclusion of liability for death or personal injuries caused by negligence.

324 Contrast *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 D.L.R. (4th) 261 (Supreme Court of Canada); noted (1993) 109 L.Q.R. 349; (1993) 56 M.L.R. 722.

325 *Cosgrove v Horsfall* (1945) 62 T.L.R. 140. See also *Genys v Matthews* [1966] 1 W.L.R. 758; cf. *Gore v Van der Lann* [1967] 2 Q.B. 31.

326 *Adler v Dickson* [1955] 1 Q.B. 158.

327 *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446. See also *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd's Rep. 346; *Krawill Machinery Corp v Robert C. Head & Co Ltd* [1959] 1 Lloyd's Rep. 305; *Canadian General Electric Co Ltd v The "Lake Bosomtwe"* [1970] 2 Lloyd's Rep. 81; *Herrick v Leonard and Dingley Ltd* [1975] 2 N.Z.L.R. 566; *The Suleyman Stalskiy* [1976] 2 Lloyd's Rep. 609; *Lummus v East African Harbours Corp* [1978] 1 Lloyd's Rep. 317; *Circle Sales & Import Ltd v The Tarantel* [1978] 1 F.C. 269 (Canada); *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 155. Contrast *Cabot Corp v John W. McGrath Corp* [1971] 2 Lloyd's Rep. 351; *The Mormaclynx* [1971] 2 Lloyd's Rep. 476; *Cable & Montanari Inc v American Export Isbrandtsen Lines Ltd* [1968] 1 Lloyd's Rep. 260 (affirmed 386 F.2d 839; (1967) cert. denied (1968) 390 U.S. 1013); *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] A.C. 154; *Tessler Bros (B.C.) Ltd v Italpacific Line and Matson Terminals Inc* [1975] 1 Lloyd's Rep. 210; *Eisen und Metall AG v Ceres Stevedoring Co Ltd* [1977] 1 Lloyd's Rep. 665; *Miles International Corp v Federal Commerce & Navigation Co* [1978] 1 Lloyd's Rep. 285; *Port Jackson Stevedoring Pty Ltd v Salmon and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138; *Godina v Patrick Operations Pty Ltd* [1984] 1 Lloyd's Rep. 333; *The Pioneer Container* [1994] 2 A.C. 324; *The Mahkutai* [1996] A.C. 650, 664–665; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 (see also the principles relating to sub-bailments discussed below, para.17-057). See also art.IV bis (2) of the Hague-Visby Rules contained in the Schedule to the Carriage of Goods by Sea Act 1971.

328 *Deepak Fertilisers and Petrochemicals Corp v ICI* [1998] 2 Lloyd's Rep. 139, 163, [1999] 1 Lloyd's Rep. 387.

329 Below, paras 20-091—20-133.

330 s.1(1)(a).

331 s.1(1)(b), subject to s.1(2) (“if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party”).

332 s.1(6).

333 s.1(3), see below, paras 20-100—20-102.

334 An example may be found in the case of a third party seeking to rely on a clause to exclude or limit his liability for personal fraud, which cannot be excluded at common law (see below, para.17-067); cf. *Eurasian Natural Resources Corp Ltd v Dechert LLP [2022] EWHC 1138 (Comm)* at [1650]–[1654] (client of solicitors LLP promised in contract of retainer not to sue partners or employees personally construed as inapplicable to fraud or reckless disregard of professional duty, the HC not referring to the 1999 Act).

335 Law Com. No.242 1996 para.10.22.

336 Similarly, where A is a consumer within the meaning of the Consumer Rights Act 2015, C will be able to benefit from an exclusion of liability in B only to the extent that he could have done if he (C) had been party to the contract and this would depend on whether he was acting in the course of business: on the controls on terms (including exemption clauses) in the 2015 Act see Vol.II, paras 40-243 et seq.

337 1999 Act s.6; see below, paras 20-124—20-126.

338 Defined in s.6(6) and (7) of the 1999 Act.

339 Defined in s.6(8) of the 1999 Act.

340 1999 Act s.6(5).

341 See below, para.20-127.

342 *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd [1924] A.C. 522, 534, 548, 565; Mersey Shipping and Transport Co Ltd v Rea Ltd (1925) 21 Ll.L. Rep. 375, 378; Gilbert Stokes and Kerr Proprietary Ltd v Dalgety & Co Ltd (1948) 81 Ll.L. Rep. 337; Waters Trading Co Ltd v Dalgety & Co Ltd [1951] 2 Lloyd's Rep. 385.*

343 [1962] A.C. 446.

344 *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd [1924] A.C. 522, 534; Scruttons Ltd v Midland Silicones Ltd [1962] A.C. 446, 474, 480.*

345 *Hall v N.E. Ry (1875) L.R. 10 Q.B. 437, 442.*

346 *Hall v N.E. Ry (1875) L.R. 10 Q.B. 437, 443; Barrett v G.N. Ry (1904) 20 T.L.R. 175.*

347 See Vol.II, para.38-046.

348 *Stag Line Ltd v Tyne Ship Repair Group Ltd [1984] 2 Lloyd's Rep. 211, 217.*

349 *Southern Water Authority v Carey [1985] 2 All E.R. 1077.*

350 After the name of the cruise liner in *Adler v Dickson [1955] 1 Q.B. 158.*

351 [1962] A.C. 446.

352 [1962] A.C. 446, 474.

353 [1975] A.C. 154 (noted (1974) 90 L.Q.R. 301).

354 *The Eurymedon [1975] A.C. 154, 167–168;* cf. *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2003] UKHL 12, [2004] 1 A.C. 715* at [163], [197].

355 *Herrick v Leonard and Dingley Ltd [1975] 2 N.Z.L.R. 566; The Suleyman Stalskiy [1976] 2 Lloyd's Rep. 609; Lummus v East African Harbours Corp [1978] 1 Lloyd's Rep. 317; Circle*

- Sales and Import Ltd v The Tarantel* [1978] 1 F.C. 269 (Canada). See *Palmer and Rose* (1976) 39 M.L.R. 466.
- 356 *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138, 143. See also *The Mahkutai* [1996] A.C. 650, 664; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [56].
- 357 [1979] 1 Lloyd's Rep. 298, [1981] 1 W.L.R. 138. See also *Reynolds* (1979) 95 L.Q.R. 183; *Reynolds* (1980) 96 L.Q.R. 506; *Coote* [1981] C.L.J. 13; *Clarke* [1981] C.L.J. 17; *Rose* (1981) 44 M.L.R. 336.
- 358 *The Mahkutai* [1996] A.C. 650, 664–665; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715; *The Borvigilant* [2003] EWCA Civ 935 at [34], [51], [93], [140]–[162], [192], [2003] 2 Lloyd's Rep. 520.
- 359 *The Mahkutai* [1996] A.C. 650, 664.
- 360 *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1992] 2 Lloyd's Rep. 578, 585; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715; cf. *The Borvigilant* [2003] EWCA Civ 935 at [17], [18], [33].
- 361 *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 154.
- 362 *Southern Water Authority v Carey* [1985] 2 All E.R. 1077. See also *The Suleyman Stalskiy* [1976] 2 Lloyd's Rep. 609.
- 363 *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep. 154. cf. *Lotus Cars Ltd v Southampton Cargo Handling Plc* [2000] 2 Lloyd's Rep. 532, 543.
- 364 See *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [149], [163], [197].
- 365 *Southern Water Authority v Carey*, above. See also *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd* [1971] 2 Lloyd's Rep. 399, 408 (at first instance); *Deepak Fertilisers and Petrochemicals Corp v ICI* [1998] 2 Lloyd's Rep. 139, 163, [1999] 1 Lloyd's Rep. 387, and below, para.20-089.
- 366 *Gore v Van der Lann* [1967] 2 Q.B. 31; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [24], [55], [100], [145], [195].
- 367 Such a clause is not subject to ss.2 or 10 of the Unfair Contract Terms Act 1977 (below, paras 17-085 and 17-131): *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 Lloyd's Rep. 438. On the other hand, where A (a consumer) in a consumer contract with B (a trader) agrees not to sue C (a third party, for example, a manufacturer) then the term in which this agreement is contained may fall within the controls on unfair terms in consumer contracts provided by the Consumer Rights Act 2015 Pt 2 subject to its own conditions: on these controls see Vol.II, paras 40-230 et seq.
- 368 *Snelling v John G. Snelling Ltd* [1973] Q.B. 87; *Nippon Yusen Kaisha v International Import and Export Co Ltd* [1978] 1 Lloyd's Rep. 206; *European Asian Bank AG v Punjab & Sind Bank* [1982] 2 Lloyd's Rep. 356, 359; *Deepak Fertilisers and Petrochemicals Corp v ICI* [1999] 1 Lloyd's Rep. 387, 400–402; *Whitesea Shipping and Trading Corp v El Paso Rio Clara Ltda (the "Marielle Bolten")* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd's Rep. 648. cf. *Gore v Van der Lann* [1967] 2 Q.B. 31; *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 Lloyd's Rep. 438. See below, para.20-072.

- 369 *Cosgrove v Horsfall* (1945) 62 T.L.R. 140; *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446; *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd* [1975] A.C. 154, 168, 173, 182; *Unfair Contract Terms Act 1977* s.2(3); *Consumer Rights Act 2015* s.65(2). But see above, para.17-017. Compare also *Norwich City Council v Harvey* [1989] 1 W.L.R. 828, see below, paras 17-059 and 17-060.
- 370 1957 Act s.3(1).
- 371 1957 Act s.1(3).
- 372 See Vol.II, paras 35-026—35-031 (bailment); para.38-046 (carriage). Palmer, *Bailment*, 2nd edn (1991), pp.1295, 1631; *Palmer and Murdoch* (1983) 46 M.L.R. 73; *Palmer* [1989] L.M.C.L.Q. 466; *Adams and Brownsword* (1990) 10 L.S. 12; *Swadling* [1993] L.M.C.L.Q. 9; *Reynolds* (1995) 111 L.Q.R., 8; Palmer and McKendrick (eds), *Interests in Goods*, 2nd edn (1998).
- 373 Contrast *Bart v British West Indian Airways Ltd* [1967] 1 Lloyd's Rep. 239; *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd* [1972] 1 Lloyd's Rep. 410, 416; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311.
- 374 *Meux v G.E. Ry* [1895] 2 Q.B. 387; *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716; *Learoyd Bros & Co v Pope and Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep. 142; *Lee Cooper Ltd v C.H. Jeakins & Sons Ltd* [1967] 2 Q.B. 1; *Moukataff v B.O.A.C.* [1967] 1 Lloyd's Rep. 396; *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 W.L.R. 1262; *James Buchanan & Co Ltd v Hay's Transport Services Ltd* [1972] 2 Lloyd's Rep. 535; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400; *C. Davis Metal Brokers Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep. 422; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215, 220; *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 Lloyd's Rep. 570; *China Pacific SA v Food Corp of India* [1982] A.C. 939, 957; *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos N.L.) (No.2)* [1987] 2 Lloyd's Rep. 321, 332, 340; *The Pioneer Container* [1994] 2 A.C. 324, 341; *Spectra International Plc v Hayesoak Ltd* [1997] 1 Lloyd's Rep. 153, [1998] 1 Lloyd's Rep. 162; *Lotus Cars v Southampton Cargo Handling Plc* [2000] 2 Lloyd's Rep. 532; *East Westcorp v DKBS* 1912 [2003] EWCA Civ 83, [2003] Q.B. 1509 at [25]; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [132]–[138]; cf. *Targe Towing Ltd v Marine Blast Ltd* [2004] EWCA Civ 346, [2004] 1 Lloyd's Rep. 721 at [28].
- 375 *Lee Cooper Ltd v C.H. Jeakins & Sons Ltd* [1967] 2 Q.B. 1; *Moukataff v B.O.A.C.* [1967] 1 Lloyd's Rep. 396.
- 376 *The Mahkutai* [1996] A.C. 650, 667–668. See above, para.17-051.
- 377 *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; *Learoyd Bros & Co v Pope and Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep. 142; *Lee Cooper Ltd v C.H. Jeakins & Sons Ltd* [1967] 2 Q.B. 1; *Moukataff v B.O.A.C.* [1967] 1 Lloyd's Rep. 396; *C. Davis Metal Brokers Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep. 422.
- 378 *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 731, 741; and see *Hall v N.E. Ry* (1875) L.R. 10 Q.B. 437, 443; *Barrett v G.N. Ry* (1904) 20 T.L.R. 175. cf. *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 Lloyd's Rep. 570.

- 379 *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] A.C. 522, 564; *The Kite* (1933) 46 Ll.L. Rep. 83; *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 729–730, 741; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215, 220; *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos N.L.)* (No.2) [1987] 2 Lloyd's Rep. 321, 332, 340; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164; *Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395, 405; *Dresser (UK) Ltd v Falcongate Freight Management Ltd* [1992] Q.B. 502, 511; *The Pioneer Container* [1994] 2 A.C. 324; *Spectra International Plc v Hayesoak Ltd* [1997] 1 Lloyd's Rep. 153, [1998] 1 Lloyd's Rep. 162; *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep. 48; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [132]–[138]; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] 2 Lloyd's Rep. 172 at [53]–[66]; *East West Corp v DKBS 1912* [2003] EWCA Civ 83, [2003] Q.B. 1509 at [30].
- 380 [1976] 2 Lloyd's Rep. 215. See also *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 168; *Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395, 406; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311, 327. Donaldson J (at 222) left open the question whether a sub-bailee who himself damages the goods would also be able to rely upon the terms of the sub-contract.
- 381 *The Pioneer Container* [1994] 2 A.C. 324.
- 382 *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep. 79, 98; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785, 818; *Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395, at 404, 405; *The Mahkutai* [1996] A.C. 650.
- 383 *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785, 818; *Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395, 405.
- 384 *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos N.L.)* (No.2) [1987] 2 Lloyd's Rep. 321; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [36]–[41], [64], [89], [92], [139]; *Scottish and Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462 at [47]; Benjamin's Sale of Goods, 10th edn (2017), paras 18-092, 18-190—18-191.
- 385 *Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 2 Lloyd's Rep. 395 (BP claim). See also the “*Brandt v Liverpool*” contract (*Brandt v Liverpool etc. Steam Navigation Co* [1924] 1 K.B. 575) and Benjamin's Sale of Goods 11th edn (2020), at paras 18-346—18-349. cf. *Borealis AB v Stargas Ltd (The Berge Sisar)* [2002] 2 A.C. 205.
- 386 By statute under the *Bills of Lading Act 1855* or (now) under the *Carriage of Goods by Sea Act 1992* (see Benjamin's Sale of Goods, 11th edn (2020), at paras 18-265—18-319).
- 387 *Cremer v General Carriers SA* [1974] 1 W.L.R. 341; and see Vol.II, para.35-030. Contrast *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311;

- Sonicare International Ltd v East Anglia Freight Terminal Ltd [1997] 2 Lloyd's Rep. 48.* See Benjamin's Sale of Goods, 11th edn (2020), at paras 18-177—18-179.
- 388 *Simaan General Contracting Co v Pilkington Glass Ltd (No.2) [1988] Q.B. 758; D. & F. Estates Ltd v Church Commissioners for England [1989] A.C. 177; Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd [1989] Q.B. 71; Murphy v Brentwood DC [1991] 1 A.C. 398; Department of the Environment v Thomas Bates and Son Ltd [1991] 1 A.C. 499; Warner v Basildon Development Corp (1991) 7 Const. L.J. 146; Nitrigin Eireann Teoranta v Inco Alloys Ltd [1992] 1 W.L.R. 598.* See also *Robinson v PE Jones (Contractors) Ltd [2011] EWCA Civ 9, [2011] B.L.R. 206.* Contrast *Junior Books Ltd v Veitchi Co Ltd [1983] 1 A.C. 520* (which must now be regarded as an exceptional, if not heretical, case) and Vol.II, paras 39-092, 39-180—39-184.
- 389 *Norwich City Council v Harvey [1989] 1 W.L.R. 828; Nitrigin Eireann Teoranta v Inco Alloys Ltd [1992] 1 W.L.R. 598.* For the problem of “complex structures”, see *D. & F. Estates Ltd v Church Commissioners for England [1989] A.C. 177*, and *Murphy v Brentwood DC [1991] 1 A.C. 398*.
- 390 *Welsh Health Technical Services Organisation v Haden Young (1987) 37 B.L.R. 130.*
- 391 *Junior Books Ltd v Veitchi Co Ltd [1983] 1 A.C. 520, 546; Southern Water Authority v Duvivier [1984] C.I.L.L. 90; Southern Water Authority v Carey [1985] 2 All E.R. 1077; Welsh Health Technical Services Organisation v Haden Young (1987) 37 B.L.R. 130; Norwich CC v Harvey [1989] 1 W.L.R. 828; Pacific Associates Inc v Baxter [1990] 1 Q.B. 993, 1022, 1033, 1038.* Contrast *National Trust v Haden Young Ltd (1995) 72 B.L.R. 1; Precis (521) Plc v William Mercer Ltd [2005] EWCA Civ 114, [2005] P.N.L.R. 28.*
- 392 *Norwich City Council v Harvey [1989] 1 W.L.R. 828.* cf. *National Trust v Haden Young Ltd (1995) 72 B.L.R. 1.*
- 393 *Rumbelows Ltd v AMK [1980] 19 B.L.R. 33; Twins Transport Ltd v Patrick and Brocklehurst (1983) 25 B.L.R. 65.* See also *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] A.C. 785, 817; Simaan General Contracting Co v Pilkington Glass Ltd (No.2) [1988] Q.B. 758, 782, 785;* Vol.II, paras 39-180—39-184.
- 394 *Morris v C.W. Martin & Sons Ltd [1966] 1 Q.B. 716, 729; Rumbelows Ltd v AMK [1980] 19 B.L.R. 33, 49.* See also *Junior Books Ltd v Veitchi Co Ltd [1983] 1 A.C. 520, 534; Muirhead v Industrial Tank Specialities Ltd [1986] Q.B. 507, 525.*
- 395 s.1; see above, para.17-046.

Section 6. - Common Law Qualifications

Chitty on Contracts 34th Ed.

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Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 17 - Exemption Clauses

Section 6. - Common Law Qualifications

Introduction

- 17-062 While the most important qualifications of the general rule according to which an exemption clause which is validly incorporated in a contract takes effect according to its terms are found in legislation (and notably the [Unfair Contract Terms Act 1977](#)³⁹⁶ and the Consumer Rights Act 2015³⁹⁷), there are also some limited qualifications on this general rule which exist at common law.

Misrepresentations as to effect of exemption clause

- 17-063 A party who misrepresents, whether fraudulently or otherwise, the terms or effect of an exemption clause inserted by them in a contract will not be permitted to rely on it in the face of their misrepresentation. In *Curtis v Chemical Cleaning and Dyeing Co*³⁹⁸ the claimant took a dress to the defendants' shop to be cleaned. She was asked to sign a receipt which contained a clause exempting the defendants from all liability for damage to the articles cleaned. When the claimant asked why she was required to sign the receipt, the defendants' employee replied that it merely covered risks such as damage to the beads and sequins on the dress. The dress was returned to the claimant badly stained. It was held that the defendants were not protected since their employee had represented the effect of the exemption clause to be narrower than was, in fact, the case. However, the reasoning by which the Court of Appeal reached this result differed. Somervell LJ (with whom Singleton LJ agreed) held that the defendants' misrepresentation as the effect of the clause meant that it had not been incorporated into the contract, referring to a dictum of Scrutton LJ in *L'Estrange v F. Graucob Ltd*³⁹⁹ which acknowledges an exception to the rule that a person is bound by the terms of a document which they have signed in the case of misrepresentation.⁴⁰⁰

Denning LJ also referred to this exception to the general rule governing incorporation of terms by signature, but he appeared to rely on an independent rule to the effect that that a person who misrepresents the content of an exemption clause is not entitled to rely on it.⁴⁰¹ Finally, if the misrepresentation gives rise to a fundamental mistake as to the character of the document, non est factum may also be pleaded.⁴⁰²

Acknowledgments

- 17-064 Clauses are often inserted in standard form agreements whereby one party “acknowledges and agrees” that they have “not been induced to enter into the contract by any representation of the other party”, or that they have “examined the goods”, or that they have “not made known to the other party expressly or by implication the purpose for which the goods are required”. In *Lowe v Lombank Ltd*⁴⁰³ the Court of Appeal held that such a clause can only give rise to an estoppel, preventing the party making the acknowledgment from asserting the contrary, and cannot operate as a positive contractual obligation. Diplock J said:

“To call it an agreement as well as an acknowledgment by the plaintiff cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future.”⁴⁰⁴

In the particular case, which concerned an acknowledgment by a hirer under a hire-purchase agreement,⁴⁰⁵ the court found that none of the requirements for an estoppel by representation was satisfied, and so no estoppel arose. However, more recently it was said that:

“... there is no reason in principle why parties should not agree that a certain state of affairs should form the basis for the transaction whether it be the case or not”

and that, in such an event:

“... neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as those aspects of the relationship to which their agreement was directed.”⁴⁰⁶

The contract itself then gives rise to an estoppel.⁴⁰⁷ This analysis was followed in a number of cases at first instance⁴⁰⁸ and it was subsequently endorsed by the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank*.⁴⁰⁹ As a result, provided that an acknowledgement

clause is appropriately drafted as an agreement or contract, it can be effective by virtue of a contractual estoppel and it is unnecessary to show, as suggested in *Lowe v Lombank*, that the requirements for estoppel by representation have been satisfied.⁴¹⁰ Further, the Court of Appeal stated that the words of Diplock J quoted above:

“... are not binding authority for the far-reaching proposition that there can never be an agreement in a contract that the parties are conducting their dealings on the basis that a past event had not occurred or that a particular fact was the case, even if it was not the case and both parties knew it was not.”⁴¹¹

Collateral warranties and guarantees

- 17-065 A party who would otherwise be entitled to rely on an exemption clause will not be permitted to do so if they give an express oral warranty which runs counter to the tenor of the written exemption.⁴¹² A warranty given before the agreement is entered into may also be enforced as a collateral contract the consideration of which is the entering into of the written agreement.⁴¹³ Thus in *Webster v Higgin*⁴¹⁴ an oral warranty as to the present condition of a car was enforced as a collateral contract in return for which a contract of hire-purchase, which contained exempting provisions, was signed. Where goods are sold or otherwise supplied to a consumer with a guarantee, the *Consumer Rights Act 2015* s.30 provides that the guarantee takes effect as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and the associated advertising.⁴¹⁵ The issues arising from a purported exclusion or limitation of liability under the guarantee are discussed in Vol.II, Ch.40.⁴¹⁶

No general control on the reasonableness of exclusion clauses at common law

- 17-066 In some older cases, it was stated that a clause which excludes or restricts liability should not be given effect if it is unreasonable, or if it would be unreasonable to apply it in the circumstances of the case, at least in contracts in standard form where there is inequality of bargaining power.⁴¹⁷ Moreover, in *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* Brooke L.J argued in favour of use of a principle of good faith in contracts⁴¹⁸ so as to assess whether it was in all the circumstances fair to hold a party bound by the condition in question rather than:

“... to have resort to interpretative devices of almost Byzantine sophistication to arrive at a result that the words of a contract do not mean what, on the face of it, they clearly do mean.”⁴¹⁹

However, other judicial general observations on the effectiveness of contract terms and, in particular, exclusion clauses have emphasised that, at least in commercial contracts, freedom of contract and the commercial usefulness of the contractual allocation of risk argue in favour of their validity.⁴²⁰ It is submitted, therefore, that, except in those situations expressly provided for by the **Unfair Contract Terms Act 1977** or (in respect of consumer contracts) by the **Consumer Rights Act 2015**,⁴²¹ it is not open to a court to strike down an exemption clause merely on the ground that it is in substance unreasonable or unfair.⁴²²

Fraud

17-067 No exemption clause can protect a person from liability for their own fraud⁴²³ or require the other party to assume what they know to be false.⁴²⁴ But it is uncertain whether, there is any rule of law, based on public policy, which would prevent the exclusion by a principal of liability for fraud on the part of their agent acting as such.⁴²⁵ It is, however, clear that any such exclusion would have to be expressed in clear and unmistakable terms on the face of the contract so as to leave the other party in no doubt that fraud was covered.⁴²⁶

Rights of set-off

17-068 There is no longer any rule of law to prevent a party, by contract, from agreeing to exclude rights of set-off, whether legal or equitable.⁴²⁷ Since it is a remedy only which is excluded, it seems that a clause excluding rights of set-off may extend to preventing set-off even in cases of fraud.⁴²⁸

Footnotes

396 Below, paras 17-069—17-132.

397 See Vol.II, paras 40-223 et seq. (the general controls on unfair contract terms in **Pt 2 of the 2015 Act**) and paras 40-435, 40-568 and 40-589—40-591 (the special controls on the

- exclusion or restriction of liability arising from breach of statutory terms included in the consumer contracts which are the subject of Pt 1 of the 2015 Act).
- 398 [1951] 1 K.B. 805. See also *Jaques v Lloyd D. George & Partners Ltd* [1968] 1 W.L.R. 625; *Mendelssohn v Normand Ltd* [1970] 1 Q.B. 177, 183–184, 186; *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Con. L.R. 46; *Lloyds Bank Plc v Waterhouse* [1993] 2 F.L.R. 97; cf. *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450; *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [47]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1 at [105].
- 399 [1934] 2 K.B. 394, 403.
- 400 [1951] 1 K.B. 805 at 807–808. See *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1 at [99]–[105] where Rix LJ drew attention to the contrasting reasoning in the CA in *Curtis*. See also *Mendelssohn v Normand Ltd* [1970] 1 Q.B. 177, 183–184, 186 (where the majority (Denning and Phillimore LJ) adopted Denning LJ's reasoning in *Curtis*); *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Con. L.R. 46 at 53; *Lloyds Bank Plc v Waterhouse* [1993] 2 F.L.R. 97; *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [44] and [47] (all referring to the effect of the decision in *Curtis* without explicit adoption of the reasoning of majority or minority there).
- 401 [1951] 1 K.B. 805 at 808–810.
- 402 See above, paras 5-049—5-056.
- 403 [1960] 1 W.L.R. 196. See also *China Shipbuilding Corp v Nippon Yusen Kaisha* [2000] 1 Lloyd's Rep. 367, 373; *Watford Electronics Ltd v Sanderson Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 143 at [40]; *EA Grimstead & Son Ltd v McGarrigan* [1999] EWCA Civ 3029.
- 404 [1960] 1 W.L.R. 196, 204.
- 405 See Vol.II, para.41-397.
- 406 *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [56] per Moore-Bick LJ.
- 407 [2006] EWCA Civ 386 citing *Colchester BC v Smith* [1991] Ch. 448, affirmed [1992] Ch. 421.
- 408 *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397 at [465]; *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1793 (Comm) at [537]–[569] (Gloster J); *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep. 581 at [36] (affirmed [2009] EWCA Civ 290, [2010] Q.B. 86); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [87]; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [230].
- 409 [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 at [169]. See also *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701; *Olympic Airlines SA v ACG Acquisition XX LLC* [2013] EWCA Civ 369, [2013] 1 Lloyd's Rep. 658 at [49]–[54]; *Crestsign Ltd v National Westminster Bank Plc* [2014] EWHC 3043 (Ch) at [112]–[119] (permission to appeal on

- other grounds: [2015] EWCA Civ 986); *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [97]–[111] (appeal dismissed by CA, Unreported 9 January 2018) (on “basis clauses” stipulating that defendants were not providing advice in relation to interest rate “swap agreements”).
- 410 Nor is it necessary to show that the requirements of estoppel by convention (see above, para.6-116) have been satisfied, in particular, that it would be unconscionable for a party to resile from the assumed state of facts: *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 at [177]. See further above, para.9-161.
- 411 [2010] EWCA Civ 1221 at [155] per Aikens LJ.
- 412 *Couchman v Hill* [1947] K.B. 554; *Harling v Eddy* [1951] 2 K.B. 739; *Mendelsohn v Normand Ltd* [1970] 1 Q.B. 177. See also *J. Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078.
- 413 See above, para.15-018.
- 414 [1948] 2 All E.R. 127.
- 415 Consumer Rights Act 2015 s.30 (on which see Vol.II, para.40-531).
- 416 See Vol.II, para.40-532.
- 417 *Van Toll v S.E. Ry* (1862) 12 C.B. N.S. 75, 88; *Parker v S.E. Ry* (1877) 2 C.P.D. 416, 428; *Watkins v Rymill* (1883) 10 Q.B.D. 178, 179; *Thompson v L.M. & S. Ry* [1930] 1 K.B. 41, 56; *John Lee & Sons (Grantham) Ltd v Railway Executive* [1949] 2 All E.R. 581, 584; *Gillespie v Roy Bowles Transport Ltd* [1973] Q.B. 400, 416; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69, 79; *Photo Production Ltd v Securicor Transport Ltd* [1978] 1 W.L.R. 856, 865 (reversed [1980] A.C. 827).
- 418 But cf. above, paras 2-024 et seq.
- 419 [1997] 2 Lloyd's Rep. 369, 385 (making reference to the judgment of Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes* [1989] Q.B. 433, 439 (above, para.15-012)).
- 420 *Grand Trunk Ry of Canada v Robinson* [1915] A.C. 740, 747; *Ludditt v Ginger Coote Airways Ltd* [1947] A.C. 233, 242; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848 and see the cases discussed, above, para.17-012 in the context of construction of exemption clauses contra proferentem. This positive approach to the effectiveness of contract terms is reflected in the SC's decision in *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 in relation to penalty clauses, on which see below, paras 29-203 et seq.
- 421 See Vol.II, paras 40-230 et seq.
- 422 *Grand Trunk Ry of Canada v Robinson* [1915] A.C. 740, 747; *Ludditt v Ginger Coote Airways Ltd* [1947] A.C. 233, 242; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848. But see above, para.15-012 (notice of particularly onerous or unusual terms). See generally *Tiplady* (1983) 46 M.L.R. 601.
- 423 *S. Pearson & Son Ltd v Dublin Corp* [1907] A.C. 351, 353, 362; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [16], [76], [98]; *Granville Oil & Chemicals Ltd v Davis Turner & Co* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356 at [15]. See also *Kollerich & Cie. SA v State Trading Corp of India* [1980] 2 Lloyd's Rep. 32 (false certificates). Contrast *Tullis v Jackson* [1892] 3 Ch.

- 441 (criticised in *Czarnikow v Roth, Schmidt & Co* [1922] 2 K.B. 478, 488); *Compania Portorafiti Commerciale SA v Ultramar Panama Inc* [1990] 1 Lloyd's Rep. 310 (Hague-Visby Rules); *Armitage v Nurse* [1998] Ch. 241; *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13 (trustees).
- 424 *Re Banister* (1879) 12 Ch. D. 131.
- 425 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [14]–[17], [76]–[82], [118]–[126]. See *Handley* (2003) 119 L.Q.R. 537.
- 426 [2003] UKHL 6 at [16] and cf. at [124].
- 427 *Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 Q.B. 514; *Coca-Cola Financial Corp v Finsat International Ltd* [1998] Q.B. 43; *Re Kaupthing Singer and Friedlander Ltd* [2009] EWHC 740 (Ch), [2009] 2 Lloyd's Rep. 154, [2010] EWCA Civ 518. cf. below, paras 17-079 and 17-111 (control of exclusion of rights of set-off under the Unfair Contract Terms Act 1977).
- 428 *Society of Lloyd's v Leighs* [1997] C.L.C. 1398 at 1407; *Skipskreditfereningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66, 74–75.

(a) - Introduction

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Section 7. - The Unfair Contract Terms Act 1977

(a) - Introduction

The Unfair Contract Terms Act as enacted

- 17-069 As enacted, the [Unfair Contract Terms Act 1977](#) (“the 1977 Act”) ⁴²⁹ derived substantially from recommendations made by the Law Commission and the Scottish Law Commission in their Second Report on Exemption Clauses. ⁴³⁰ Very broadly, the Act subjected exemption clauses and certain related clauses, ⁴³¹ and non-contractual notices disclaiming liability to a series of controls, some of these controls rendering a contract term or notice ineffective without more, ⁴³² some rendering them ineffective only having failed a test of reasonableness. ⁴³³ While generally restricted to exclusion clauses and notices seeking to exclude or to limit “business liability”, ⁴³⁴ the Act protected a range of persons, sometimes protecting persons generally (as in the case of exclusions of business liability for negligence causing death or personal injury ⁴³⁵), sometimes protecting persons generally subject to the condition that they dealt “on the other’s written standard terms of business” (thereby including other traders), ⁴³⁶ and sometimes protecting persons “dealing as consumer” (which was held to include a business in certain circumstances). ⁴³⁷

First implementation of the European Directive on Unfair Terms in Consumer Contracts 1993

17-070

This directive required the UK to subject most contract terms in consumer contracts that have not been “individually negotiated” to a test of fairness and, in the case of written terms, to a requirement of transparency.⁴³⁸ As a result, there was clearly considerable substantive overlap between the existing legislative controls in the [1977 Act](#) and the new controls required by the 1993 Directive. Despite this overlap, the UK implemented the 1993 Directive by standalone statutory instrument, first in 1994, and then by the [Unfair Terms in Consumer Contracts Regulations 1999](#) (the “[1999 Regulations](#)”). The complexity which these distinct but overlapping sets of legislative controls attracted criticism and recommendations for legislative reform by the Law Commissions.⁴³⁹ Their proposals recommended the creation of a unified legislative regime for the control of unfair terms in consumer contracts, putting together the controls provided by the [Unfair Contract Terms Act 1977](#) and the [Unfair Terms in Consumer Contracts Regulations 1999](#); preserving the protection given by the [Unfair Contract Terms Act 1977](#) in business contracts; and extending existing protection against unfair contract terms for consumers to small businesses.

Consumer Rights Act 2015

17-071 However, the legislative strategy adopted by the [Consumer Rights Act 2015](#) (“the [2015 Act](#)”) differed considerably from that recommended by the Law Commissions. Instead of placing the legislative controls of the [1977 Act](#) and the [1999 Regulations](#) in a single Act, the [2015 Act](#) created a new, dedicated regime for the control of unfair terms in consumer contracts and unfair “consumer notices” as well as making special provision for the control of the exclusion or limitation of liabilities arising under a series of new statutory terms “treated as included” in consumer “goods contracts”, “digital content contracts” and “services contracts”.⁴⁴⁰ The controls set out by the [2015 Act](#) generally took effect on 1 October 2015 and are discussed by Vol.II, Ch.40 of the present work.⁴⁴¹ However, apart from revoking the [1999 Regulations](#), the correlative of this new set of controls for the benefit of consumers was that the [2015 Act](#) amended the [1977 Act](#) so that it no longer applied for the benefit of “consumers” (as the [2015 Act](#) defines them⁴⁴²) and, in so doing, abolished the protections provided by the [1977 Act](#) for those “dealing as consumer”.⁴⁴³ In addition, the [2015 Act](#) deleted other provisions of the [1977 Act](#): s.4 (controlling unreasonable indemnity clauses relied on against a person dealing as consumer),⁴⁴⁴ s.5 (making special provision for guarantees of consumer goods)⁴⁴⁵ and s.9 (concerning the effect of breach in relation to a term held reasonable under the Act).⁴⁴⁶

The abolition of protection in the 1977 Act for persons “dealing as consumer”

17-072

As just noted, under the law provided by the 1977 Act as enacted (and applicable to contracts entered before 1 October 2015),⁴⁴⁷ the Act sometimes referred to the situation where a party to a contract “deals as consumer” in relation to the other party. In particular, the Act used the concept of “dealing as consumer” so as to provide an additional situation in which a person would be protected under [s.3 of the Act](#), specific protection against unreasonable indemnity clauses, and distinct controls for the exclusion or restriction of the implied liabilities in sale of goods and certain related contracts.⁴⁴⁸ For these purposes, [s.12 of the Act](#) defined when a person “deals as consumer” and in general two conditions had to be satisfied: first, they must neither make the contract in the course of a business nor hold themselves out as doing so and, secondly, the other party must make the contract in the course of a business.⁴⁴⁹ In *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd*,⁴⁵⁰ it was held that a freight forwarding and shipping agency company had dealt as consumer when it entered into a conditional sale agreement with a finance company for the purchase of a motor car for personal and business use by one of its directors, on the ground that, to be in the course of a business, the transaction must be an integral part of the business carried on or, if only incidental to it, be of a type regularly entered into.

- 17-073 On the coming into force of the [Consumer Rights Act 2015](#) (which applies to contracts made on or after 1 October 2015), the references to a person “dealing as consumer” were deleted from the [1977 Act](#) and the controls in that Act were stated as being inapplicable to “consumer contracts” within the meaning of [s.61 of the 2015 Act](#).⁴⁵¹ Instead the [2015 Act](#) introduced its own set of controls on unfair contract terms for the benefit of “consumers”.⁴⁵² One aspect of this change is that under the [2015 Act](#) a “consumer” is restricted to an “individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”,⁴⁵³ a definition which represented (arguably) an expansion of the protection earlier provided by the [Unfair Terms in Consumer Contracts Regulations 1999](#) for “consumers” in that it explicitly includes persons acting mainly for non-business purposes.⁴⁵⁴ However, the deletion of “dealing as consumer” from the [1977 Act](#) represented an overall narrowing of the category of persons protected from unfair terms, as “consumer” under the [2015 Act](#) does not include (as can the concept of a person “dealing as consumer”) incorporated persons nor does it include individuals who conclude a contract in the course of their business in the broadest sense but the contract so concluded does not form an integral part of their business that they carry on or, if only incidental to it, is not of a type regularly entered into by them.⁴⁵⁵ Moreover, this change in the scope of application of the remaining controls on unfair terms in the 1977 should be borne in mind in reading cases decided under the [1977 Act](#) which concerned persons “dealing as consumer” and determined the reasonableness of contract terms as this feature of the person against whom the term is relied would often have been of key importance for these purposes.⁴⁵⁶

Two regimes of control of unfair terms and notices

- 17-074 Overall, therefore, after the general coming into force of Pts 1 and 2 of the 2015 Act on 1 October 2015,⁴⁵⁷ there are two principal legislative regimes controlling the effectiveness of unfair contract terms and notices: the general regime in the 1977 Act controlling exemption clauses and closely related terms (inapplicable in the consumer context); and the consumer regime in the 2015 Act controlling a much wider range of contract terms, and combining (with some changes) the controls earlier provided by the 1999 Regulations and special treatments of certain categories of exemption clause similar to those previously provided by the 1977 Act. This section will discuss the controls in the 1977 Act as amended (noting in the footnotes any relevant changes taking effect in 2015), leaving the controls in the 2015 Act itself to Vol.II, Ch.40.⁴⁵⁸

Overview of the 1977 Act

- 17-075 The title of the Act was always somewhat misleading. In the first place, the controls imposed by the Act are not limited to contract terms, but extend to non-contractual notices which exclude or restrict liability in tort.⁴⁵⁹ Secondly, as earlier noted, the Act does not seek to control unfair contract terms generally, but applies, for the most part,⁴⁶⁰ only to terms that purport to exclude or restrict liability, that is to say, to exemption clauses. Moreover, the Act does not, in general, affect the basis of liability,⁴⁶¹ so that the first inquiry must normally be whether or not the person seeking to rely on the terms is in fact under any obligation or liability, for example, for breach of contract or for negligence, apart from the term.⁴⁶²

Pattern of control

- 17-076 The controls exercised by the 1977 Act over exemption clauses in contracts are complex in nature and by no means comprehensive. There are three main distinct controls. First, control over contract terms or notices which exclude or restrict liability (whether contractual or tortious) for “negligence”.⁴⁶³ Secondly, control over contract terms⁴⁶⁴ which exclude or restrict liability for breach of certain terms implied by statute or the common law in contracts of sale of goods,⁴⁶⁵ hire purchase⁴⁶⁶ and in other contracts for the supply of goods.⁴⁶⁷ Thirdly, a more general control in limited circumstances over contract terms which exclude or restrict liability for breach of contract⁴⁶⁸ or which purport to entitle one of the parties to render a contractual performance substantially different from that reasonably expected of them or to render no performance at all.⁴⁶⁹

However, the provisions of the Act may overlap, so that, in any given situation, it may be necessary to consider whether more than one section is relevant. Further, certain very important contracts are excluded, either wholly or subject to qualifications, from the operation of the Act.⁴⁷⁰

Types of control

- 17-077 If the contract term or notice is subject to the control of the Act, that control may assume one of two forms: the exclusion or restriction of liability may be rendered absolutely ineffective,⁴⁷¹ or it may be effective only in so far as the term satisfies the requirement of reasonableness.⁴⁷²

Footnotes

- 429 See Thompson, Unfair Contract Terms Act 1977; Rogers and Clarke, The Unfair Contract Terms Act 1977; Lawson, Exclusion Clauses and Unfair Contract Terms, 11th edn (2014); Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), paras 7-039 et seq.; Benjamin's Sale of Goods, 11th edn (2020), paras 13-063 et seq.; *Coote (1978) 41 M.L.R. 312*; *Adams (1978) 41 M.L.R. 703*; *Sealy [1978] C.L.J. 15*; *Reynolds [1978] L.M.C.L.Q. 201*; *Palmer and Yates [1981] C.L.J. 108*; *Adams and Brownsword (1988) 104 L.Q.R. 94*; *Peel (1993) 56 M.L.R. 98*; *Brown and Chandler (1993) 109 L.Q.R. 41*; *Adams (1994) 57 M.L.R. 960*.
- 430 Law Com. No.69, Scot. Law Com. No.39 (1975). Pt I of the Act applies only to England and Wales and Northern Ireland; Pt II applies only to Scotland; and Pt III applies to the whole of the United Kingdom.
- 431 The main provisions apply to contract terms which “exclude or restrict liability” as defined by s.13: s.2, 3(2)(a); s.6 and s.7 below, paras 17-079—17-082. However, s.3(2)(b) applies to clauses which do not fall within exclusions or restrictions of liability as so defined; and s.10 applies to a contract term “prejudicing or taking away rights”: see below, paras 17-090—17-095 and 17-131 respectively. Moreover, s.2 of the Act also applies to the exclusion of liability by “a notice given to persons generally or to particular persons”: below, para.17-085. Until its deletion by the Consumer Rights Act 2015 s.4 subjected indemnity clauses relied on by a person against a person dealing as consumer to the test of reasonableness.
- 432 e.g. 1977 Act s.2(1) below, para.17-085.
- 433 e.g. 1977 Act s.2(2) and s.3 below, paras 17-085 and 17-088 et seq.
- 434 1977 Act s.1(3) (noting the exception stated in s.6(4)) on these see below, paras 17-083 and 17-097.
- 435 1977 Act s.2 (below, para.17-085). See also s.6(1), 7(3A) and (4) below, paras 17-097—17-098.
- 436 1977 Act s.3(1) below, paras 17-088—17-089.

- 437 1977 Act s.3(1), s.4, s.6(2) and s.7(2) before their amendment or deletion by the 2015 Act. On the interpretation of “dealing as consumer” and its deletion by the 2015 Act see below, paras 17-071—17-072.
- 438 [1993] O.J. L95/29 and see Vol.II, para.40-225.
- 439 Law Commission, Scottish Law Commission, Unfair Terms in Contracts (Law Com. No.292, Scot Law Com. No.199, 2005) and see Vol.II, paras 40-226—40-228.
- 440 2015 Act ss.31, 47 and 57 and Pt 2.
- 441 See Vol.II, paras 40-230 et seq., 40-535, 40-568 and 40-589. Parts 1 and 2 of the 2015 Act came into force generally on 1 October 2015. The general date of the coming into force of the 2015 Act on 1 October 2015 has an exception as regards “consumer transport services” (as specially defined) in relation to which the relevant provisions of the 2015 Act came into force only for contracts made on or after 1 October 2016: the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) arts 4 and 6(2) as amended by the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484) art.2. This applies to the amendments to Sch.1 of the 1977 Act: SI 2015/1630 art.4(c) referring, inter alia, to the 2015 Act Sch.4 paras 26 and 27. These amendments do not apply to contracts made before 1 October 2015: SI 2015/1630 art.6 See also Vol.II, para.40-241.
- 442 2015 Act s.2(3)—(6); s.76(2) on which see Vol.II, paras 40-244—40-246 and the more general discussion of “consumer” at paras 40-031 et seq.
- 443 2015 Act s.75, Sch.4 paras 5(2), 6–7, 8(3), 9(3) and 12.
- 444 2015 Act s.75, Sch.4 para.6. After the coming into force of the 2015 Act, an indemnity clause in a consumer contract as understood by Pt 2 of that Act is subject to the test of unfairness and the requirement for transparency which the 2015 Act itself puts in place: 2015 Act ss.62, 67–68 on which see Vol.II, paras 40-230 et seq.
- 445 2015 Act s.75, Sch.4 para.7. The Law Commission, Unfair Terms in Contracts (2005) Law Com No.292, Scot Law Com No.199 para.3.48 saw s.5 as unnecessary given the controls provided by s.2(1) of the 1977 Act and by the Consumer Protection Act 1987. Under the 1987 Act a manufacturer, importer into the UK or distributor of a product may be liable for death or personal injuries and for damage to property where “of a description of property ordinarily intended for private use, occupation or consumption” and was “intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption” subject to a threshold of £275: 1987 Act s.5(3) and (4). These liabilities are subject to a proof that the claimant’s damage was caused by a defect in a product which the manufacturer, etc. supplied: 1987 Act s.2–4. They are incapable of exclusion by contract term or notice: 1987 Act s.7. See further Vol.II, paras 46-457 et seq. Moreover, the 2015 Act itself makes equivalent provision to s.2 of the 1977 Act so as to control the exclusion of business liabilities for negligence whether contained in a contract term or notice: 2015 Act ss.65–66 (personal injuries or death) and s.62 (the general controls which govern exclusions of other loss or damage) on which see Vol.II, para.40-423 and paras 40-273 et seq. respectively.
- 446 2015 Act s.75, Sch.4 para.10. s.9 provided that a term that is required to satisfy the test of reasonableness, and does so, may be given effect notwithstanding that the contract has

been terminated either by breach or by the innocent party electing to treat it as repudiated and the affirmation of the contract does not of itself exclude the requirement of reasonableness. [1977 Act s.9](#) had originally been enacted so as to ensure that the doctrine of fundamental breach would not prevent a valid clause applying, and this is no longer necessary as the doctrine of fundamental breach had been abolished by the House of Lords: Law Commission, Scottish Law Commission, Unfair Terms in Contracts (Law Com. No.292, Scot Law Com. No.199 (2005) para.6.37. On the doctrine of fundamental breach and its rejection by the House of Lords see above, paras [17-023—17-027](#).

[447](#) Above, para.[17-071](#).

[448](#) [1977 Act ss.3\(1\), 4, 6\(2\), 7\(2\)](#) before their amendment or deletion by the [2015 Act](#).

[449](#) There were additional restrictions on when a person qualified as “dealing as consumer” in contracts of sale of goods or hire-purchase and auction sales: [1977 Act s.12\(1\)\(c\), \(1A\)](#) and [\(2\)](#) before the deletion of [s.12](#) by the [2015 Act](#).

[450](#) [\[1988\] 1 W.L.R. 321](#) esp. at 330–331, 335–336.

[451](#) [1977 Act s.2\(4\)\(a\); s.3\(3\), s.6\(5\)](#) and [s.7\(4A\)](#) (as inserted by the [2015 Act s.75](#), Sch.4 paras [4, 5, 8](#) and [9](#)); the definition of “consumer contract” is provided by [s.14](#) of the [1977 Act](#) (as inserted by the [2015 Act s.75](#), Sch.4 para.[13](#)) which refers to [s.61](#) of the [2015 Act](#) (on the latter of which see Vol.II, paras [40-428](#) et seq.).

[452](#) Above, paras [17-071—17-074](#).

[453](#) [2015 Act ss.2\(3\)](#) and [76\(2\)](#).

[454](#) See Vol.II, para.[40-244](#).

[455](#) cf. *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd* [\[1988\] 1 W.L.R. 321](#), noted above, para.[17-072](#).

[456](#) On the test of reasonableness and earlier decided cases see below, paras [17-099](#) et seq.

[457](#) On the details of the coming into force of the relevant provisions of the [2015 Act](#) see above, para.[17-071](#).

[458](#) See Vol.II, paras [40-223](#) (general controls in [Pt 2 of the Act](#)); [40-535](#), [40-568](#) and [40-589—40-591](#) (controls on the exclusion or restriction of liability arising on breach of the statutory terms imposed by [Pt 1 of the 2015 Act](#)).

[459](#) [1977 Act s.2](#).

[460](#) But see [ss.3\(2\)\(b\)](#) and [10](#) of the [1977 Act](#), below, paras [17-091—17-095](#) and [17-131](#).

[461](#) But see [ss.3\(2\)\(b\)](#) of the [1977 Act](#), below, paras [17-091—17-092](#).

[462](#) See above, para.[17-003](#); below, para.[17-081](#).

[463](#) [1977 Act s.2](#), below, paras [17-085—17-087](#). The definition of “negligence” is found in [s.1\(1\)](#) and see below, para.[17-085](#).

[464](#) Whether in the same or in another contract between the same parties. cf. [1977 Act s.10](#) below, para.[17-131](#).

[465](#) [1977 Act s.6](#); see below, para.[17-097](#); Vol.II, paras [46-085](#), [46-117](#).

[466](#) [1977 Act s.6](#); see below, para.[17-097](#); Vol.II, para.[41-388](#).

[467](#) [1977 Act s.7](#); see below, para.[17-098](#).

[468](#) [1977 Act s.3\(1\), \(2\)\(a\)](#) and see below, paras [17-088—17-095](#). See also [s.4](#); below, para.[15-088](#).

- 469 1977 Act s.3(1), (2)(b) and see below, paras 17-088—17-095.
- 470 See below, paras 17-121—17-129.
- 471 1977 Act ss.2(1), 6(1) and 7(3A). Until the coming into force of the 2015 Act, there were further examples in s.6(2) and 7(2) but these provisions were deleted by the 2015 Act.
- 472 1977 Act ss.2(2), 3, 6(1A), 7(1A) and 7(4) and see on the test of reasonableness below, paras 17-099 et seq.

(b) - The General Scope of the Controls in the 1977 Act

Chitty on Contracts 34th Ed.

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Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 17 - Exemption Clauses

Section 7. - The Unfair Contract Terms Act 1977

(b) - The General Scope of the Controls in the 1977 Act

Contract terms and notices

17-078 All the Act's controls apply to "contract terms"⁴⁷³ and the questions as to the existence of the contract, whether the alleged term is in fact a term of the contract,⁴⁷⁴ and, if it is, whether on its true construction it applies to the obligation or liability which it purports to exclude or restrict are all left by the Act to the general law.⁴⁷⁵ However, s.2 of the Act (which controls the exclusion or restriction of liability for death, personal injury and other loss or damage caused by negligence) applies to such exclusion or restriction both by contract term and by "notice given to persons generally or to particular persons",⁴⁷⁶ "notice" being defined as including "an announcement, whether or not in writing, and any other communication or pretended communication".⁴⁷⁷ As has earlier been noted, at common law such a notice can be effective to exclude or liability to a person whether or not they are party to any contract.⁴⁷⁸

Varieties of exemption clause

17-079 Subject to certain exceptions,⁴⁷⁹ the contract terms controlled by the 1977 Act are only those which "exclude or restrict" liability.⁴⁸⁰ In considering whether a contract term has this effect, the court is concerned with the substance and not the form of the provision.⁴⁸¹ In this respect, Lewison LJ has observed (in the context of the exclusion or restriction of liability for the purposes of the

controls in [s.3 of the Misrepresentation Act 1967](#) and non-reliance clauses⁴⁸²), that the question whether a term excludes or restricts liability “can only be answered by inquiring what the position would have been if [the contract term] had not been there,”⁴⁸³ though he noted that:

“... it is of course the case that clauses in a contract which might appear at first sight to be exclusion clauses do no more than delimit the primary obligations of one of the contracting parties.”⁴⁸⁴

[Section 13\(1\) of the Act](#) itself explains the meaning of the exclusion or restriction of liability for its purposes by providing that:

“To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents:

(a)making the liability or its enforcement subject to restrictive or onerous conditions [as, for example, in the case of terms which require a party to make a claim within a certain time-limit or to commence proceedings within a shorter time-limit than the normal limitation period⁴⁸⁵];

(b)excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy [as, for example, in the case of terms which preclude a party from relying on or enforcing a right of set-off⁴⁸⁶ or which take away or limit their right to reject defective goods, or require them to pay the expenses of redelivery on rejection];

(c)excluding or restricting rules of evidence or procedure [as, for example, terms which state that acceptance of goods or services shall be conclusive evidence that they are in conformity with the contract].”⁴⁸⁷

This is a very broad and inclusive definition, but it would seem probable that a genuine liquidated damages clause would not be subject to the Act even though its effect is to put a cap on liability in damages.⁴⁸⁸ It is also specifically provided that an agreement in writing to submit present or future differences to arbitration is not to be treated under [Pt I of the Act](#) as excluding or restricting any liability.⁴⁸⁹

Limitation clauses

- 17-080 The inclusion of a term which *restricts* liability as opposed to excluding liability altogether makes clear that limitation clauses are caught by the main controls of the Act.⁴⁹⁰ While no distinction is made by these controls themselves,⁴⁹¹ in considering the application of the test of reasonableness in [s.11 of the Act](#) to a contract term which seeks to restrict liability to a specified sum of money:

“regard shall be had in particular ... to—

- (a)the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
- (b)how far it was open to him to cover himself by insurance.”⁴⁹²

This provision is considered below.⁴⁹³

Exclusion or restriction of “the relevant obligation or duty”

- 17-081 At the end of the three “extensions” of the significance of “excluding or restricting” liability included by s.13(1) quoted above,⁴⁹⁴ the section continues that:

“And (to that extent) sections 2, 6 and 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.”

Section 2 concerns the exclusion or restriction of liability for negligence and ss.6 and 7 concern the exclusion or restriction of liability for breach of the implied terms in contracts of sale, hire, hire-purchase and other contracts under which goods pass.⁴⁹⁵ The purpose of the provision quoted above appears to be⁴⁹⁶ to bring within the control of the 1977 Act terms, which, for example, state that the seller gives no undertaking with respect to the quality or fitness for purpose of the goods sold or which state that a surveyor accepts no responsibility with respect to the accuracy of a valuation report supplied by him.⁴⁹⁷ Exemption clauses of this nature do not purport to exclude or restrict *liability* for breach of an obligation or duty, but purport to exclude the relevant obligation (e.g. the conditions implied by s.14 of the Sale of Goods Act 1979) or duty (e.g. to use reasonable care and skill in carrying out the valuation). It may be difficult, however, to differentiate between contractual provisions which exclude or restrict the relevant obligation or duty, and those which define the scope of the obligation or which specify the duties of the parties.⁴⁹⁸ A simple example of the latter may be found in the situation where a decorator agrees to paint the outside woodwork of a house except the garage doors: in the view of the Law Commissions, this would be a “a convenient way of defining the obligation” and should not be assimilated to an exemption clause.⁴⁹⁹ Further examples could be found where a seller of kitchen utensils expressly states that they are suitable to be used only on electric cookers and not with gas,⁵⁰⁰ or a surveyor stipulates that he undertakes to carry out a valuation of the property and not a full structural survey.⁵⁰¹ However, in other cases there may be more difficulty in distinguishing between provisions which exclude or restrict the relevant obligation or duty, and those which prevent it from arising, such as a clause limiting the

ostensible authority of an agent to give undertakings⁵⁰² or an “entire agreement” clause.⁵⁰³ In *Smith v Eric S. Bush*,⁵⁰⁴ a case concerning the common law duty to take reasonable care and a non-contractual notice disclaiming liability, Lord Griffiths read the relevant provisions of the Act as introducing a “but for” test, that is to say, whether the duty would exist “but for” the notice excluding liability. But it is submitted that this test could not always be satisfactorily applied to contract terms which, in effect, limit the extent of the obligation or duty which one party owes to the other or which even prevent the accrual of the obligation or duty in particular situations.

⁵⁰⁵

U Finally, it is to be noticed that s.13(1)’s treatment of “terms and notices which exclude or restrict the relevant obligation or duty” does not apply for the purposes of the controls in s.3 of the Act. This may be explained by the fact that s.3 is not limited merely to the control of terms which exclude or restrict liability, but extends also to terms under which a person claims to be entitled to render a contractual performance substantially different from that which was reasonably expected of them, or in respect of the whole or any part of their contractual obligation, to render no performance at all. This is discussed below.⁵⁰⁶

Prospective not accrued liability

17-082 Section 13’s explanation of the exclusion or restriction of liability indicates that the 1977 Act is concerned with terms or notices which seek to exclude liabilities not already arising and it has, been stated that the Act:

“... is normally regarded as being aimed at exemption clauses in the strict sense, that is to say, clauses in a contract which aim to cut down prospective liability arising in the course of performance of the contract in which the exemption clause is contained,”⁵⁰⁷

and not to liability already accrued.⁵⁰⁸

“Business liability”

17-083 The 1977 Act is concerned, for the most part,⁵⁰⁹ with terms that exclude or restrict “business liability”, that is:

“... liability for breach of obligations or duties arising—

(a)from things done or to be done by a person in the course of a business (whether his own business or another's); or

(b)from the occupation of premises used for business purposes of the occupier; and references to liability are to be read accordingly but liability of an occupier of premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier.”⁵¹⁰

“Business” is not defined by the Act, except to the extent that it is stated to include a profession and the activities of any government department or local or public authority.⁵¹¹ The words “in the course of a business” appear to require that the thing done or to be done is an integral part of the business carried on or that there is a sufficient degree of regularity about the type of transaction in question.⁵¹² The words “whether his own business or another's” presumably cover the activities of an agent in the course of his principal's business. Finally, it will be seen that the final part of the definition (starting “but liability of an occupier”) makes special provision in respect of an occupier's liability towards “a person obtaining access to the premises for recreational or educational purposes”.⁵¹³

Footnotes

473 1977 Act ss.2, 3, 6, 7 and 10.

474 1977 Act s.11(2) and above, para.15-005.

475 1977 Act s.11(2) and above, paras 17-007 et seq.

476 1977 Act s.2(1); the reference to notices is then included by reference in s.2(2) by providing that “[i]n the case of other loss or damage, a person cannot *so* exclude or restrict his liability for negligence...” (emphasis added).

477 1977 Act s.14.

478 *White v Blackmore* [1972] 2 Q.B. 651 (occupier's liability); *Hedley Byrne & Co v Heller & Partners* [1964] A.C. 465; *Smith v Eric S. Bush* [1990] 1 A.C. 831 (both liability for negligent misstatements, though in Smith the non-contractual disclaimer was held unreasonable under s.2(2) of the 1977 Act); *Taberna Europe CDO II Plc v Selskabet AF1* [2016] EWCA Civ 1262, [2017] Q.B. 633 at [16]–[20]; and see above, para.17-043.

479 1977 Act ss.3(2)(b) and s.10 on which see below, paras 17-088—17-095 and 17-131 respectively. Until the coming into force of the 2015 Act of 1 October 2015, there was a further example in s.4 of the 1977 Act which controlled unreasonable indemnity clauses relied on as against a person “dealing as consumer”, but s.4 was deleted by the 2015 Act: 2015 Act s.75 and Sch.4 para.6.

- 480 1977 Act s.2, 3(2)(a), 6 and 7.
- 481 *Cremdean Properties Ltd v Nash* [1977] 244 E.G. 547, 551; *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659, 666; *Johnstone v Bloomsbury HA* [1992] Q.B. 333, 346; *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [68]; *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2011] Bus. L.R. D65; [2011] 1 Lloyd's Rep. 123 at [310] and *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637 at [60]–[61] and [99] (the last two being in the context of s.3 of the Misrepresentation Act 1967).
- 482 On which see below, para.17-133 and above, paras 9-157 et seq.
- 483 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637 at [41] per Lewison LJ (with whom Leggatt LJ and Sir Colin Rimer agreed at [89] and [113] respectively) and see above, para.9-161.
- 484 [2018] EWCA Civ 1396 at [42] per Lewison LJ.
- 485 *BHP Petroleum Ltd v British Steel Plc* [1999] 2 Lloyd's Rep. 583, 586, 592 (affirmed [2002] 2 Lloyd's Rep. 277); *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356; *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18.
- 486 *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600; *Fastframe Ltd v Lochinski Unreported* 3 March 1993, CA (noted (1994) 57 M.L.R. 960); *Esso Petroleum Co Ltd v Milton* [1997] 1 W.L.R. 938; *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd* [1997] C.L.Y. 906; *Skipskreditforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep. 498; *WRM Group Ltd v Wood* [1998] C.L.C. 189; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1.
- 487 See *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574; *United Trust Bank Ltd v Dohil* [2011] EWHC 3302 (QB), [2012] 2 All E.R. (Comm) 765 (statement of account to be binding and conclusive against guarantor in the absence of manifest error): see below, para.17-106.
- 488 See above, para.17-004 referring to the *Suisse Atlantique* case [1967] 1 A.C. 361, 395, 411, 420 and 436; and below, para.29-206. But see Law Com. No.69, Scot. Law Com. No.39, 1975, para.166.
- 489 1977 Act s.13(2); *Kaye v Nu Skin UK Ltd* [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep. 40. But see the special protection for “consumers” (as specially defined so as to include “legal persons”) in the Arbitration Act 1996 ss.89–92, on which see Vol.II, para.34-013 and paras 40-324 and 40-426.
- 490 1977 Act ss.2, 3, 6 and 7.
- 491 cf. the position under s.57 of the Consumer Rights Act 2015, which applies a different control according to whether the contract term excludes or restricts liability: see Vol.II, para.40-590.
- 492 1977 Act s.11(4).
- 493 Below, para.17-103.
- 494 Above, para.17-079.
- 495 Below, paras 17-085, 17-097 and 17-098 respectively.

- 496 For a different view as to its purpose, see *Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] Q.B. 600, 605* where Lord Donaldson of Lymington MR (with whom Balcombe LJ agreed), while finding the provision “obscure”, considered that it did not restrict the ambit of the preceding words, but instead “what is intended to be covered is an exclusion or restriction of liability not by contract but by reference to notices or terms of business which are not incorporated in a contract”.
- 497 As in *Smith v Eric S. Bush* and *Harris v Wyre Forest DC [1990] 1 A.C. 831*; and see below.
- 498 See the observations of Lewison LJ in *First Tower Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637* at [42]–[67] in the context of “non-reliance clauses” and the exclusion of liability for misrepresentation.
- 499 Law Commissions, Exemption Clauses (1975) (Law Com No.69) para.143, quoted by Lewison LJ in *First Tower Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396* at [42].
- 500 See *Macleod (1981) 97 L.Q.R. 550*.
- 501 *Gibbs v Arnold Son & Hockley (1989) 45 E.G. 156*. cf. *Roberts v J. Hampson & Co [1990] 1 W.L.R. 94*.
- 502 See *Overbrooke Estates Ltd v Glencombe Properties Ltd [1974] 1 W.L.R. 1335*; *Collins v Howell-Jones (1981) 259 E.G. 331*; *Museprime Properties Ltd v Adhill Properties Ltd [1990] 2 E.G.L.R. 196, 200* (misrepresentation); above, para.9-160.
- 503 *McGrath v Shah (1989) 57 P. & C.R. 452*; *Thomas Witter Ltd v TBP Industries Ltd [1996] 2 All E.R. 573*; *E.A. Grimstead & Son Ltd v McGarrigan [1999] EWCA Civ 3029*; *South West Water Services Ltd v International Computers Ltd [1999] B.L.R. 420, 424*; *Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyd's Rep. 611, 614*; *Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] Build. L.R. 143, 155*; *SAM Business Systems Ltd v Hedley & Co [2002] EWHC (TCC) 2733, [2003] 1 All E.R. (Comm) 465*; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep. 581 at [42] (affirmed [2009] EWCA Civ 290, [2010] Q.B. 86)*; *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1*; *Crestsign Ltd v National Westminster Bank Plc [2014] EWHC 3043 (Ch)* at [112]–[119] (permission to appeal granted on other grounds: [2015] EWCA Civ 986); *Thornbridge Ltd v Barclays Bank Plc [2015] EWHC 3430 (QB)* at [97]–[111] (appeal dismissed by CA, Unreported 9 January 2018) (on “basis clauses” stipulating that defendants were not providing advice in relation to interest rate “swap agreements”); *Al-Hasawi v Nottingham Forest Football Club Ltd [2018] EWHC 2884 (Ch)*. See also above paras 9-154 and 9-161—9-163. But cf. Vol.II, para.40-343. [1990] 1 A.C. 831, 857. See also *Phillips Products Ltd v Hyland [1987] 1 W.L.R. 659*.
- 505 *Hurley v Dyke [1979] R.T.R. 265 HL* (tort) (but see 281, 282); *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264* at [67]–[70] (affirmed [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92* at [98]. Contrast *Harris v Wyre Forest DC [1990] 1 A.C. 831* (reversing the decision of the Court of Appeal [1988] Q.B. 835) (tort); *Cremdean Properties Ltd v Nash (1977) 244 E.G. 547*; *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010]*

- 2 C.L.C. 705 (misrepresentation); *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35 at [139]–[146] and see above, para.9-160; *Hughes v Hall* [1981] R.T.R. 430; *McClean v Thornhill* [2022] EWHC 457 (Ch), [2022] S.T.C. 1110 at [165]–[172]; *Macdonald* (1992) 12 L.S. 277.
- 506 Below, paras 17-090—17-095.
- 507 *Tudor Grange Holdings Ltd v Citibank N.A.* [1992] Ch. 53, 65.
- 508 See also 1977 Act s.10, below, para.17-131.
- 509 Except s.6 (implied terms in contracts of sale of goods and hire-purchase), on which see below, para.17-097.
- 510 1977 Act s.1(3) (as amended by the Occupiers Liability Act 1984 s.2).
- 511 1977 Act s.14. A business need not necessarily be carried on with a view to profit: see *Roles v Miller* (1884) 27 Ch. D. 71, 88; *Town Investments Ltd v Department of Environment* [1978] A.C. 359. Contrast *Smith v Anderson* (1880) 15 Ch. D. 247, 258.
- 512 *Havering LBC v Stevenson* [1970] 1 W.L.R. 1375; *Davies v Sumner* [1984] 1 W.L.R. 1301; *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349.
- 513 For discussion of exclusions of liability by an occupier see Clerk and Lindsell on Torts, 23rd edn (2020), paras 11-46 et seq. The scope of the controls on the exclusion or restriction of a trader's liability to a consumer for negligence in s.65 of the Consumer Rights Act 2015 differ as these do not apply in the case of liability of "an occupier of premises to a person who obtains access to the premises for recreational purposes", and therefore does not exclude cases where consumers have access for educational purposes: 2015 Act s.66(4) and see Vol.II, para.40-423.

(c) - The Controls Provided by the 1977 Act

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(c) - The Controls Provided by the 1977 Act

Introduction

17-084 As earlier noted,⁵¹⁴ the 1977 Act provides three main distinct controls on the effectiveness of contract terms and, in the case of negligence liability, notices, and these depend on the nature of the liability affected: liability for negligence (controls provided by s.2); contractual liability in general (controls provided by s.3) and liability for breach of implied terms in contracts for the sale or supply of goods (controls provided by ss 6 and 7).⁵¹⁵ In addition, the 1977 Act includes special provision which prevents evasion by means of secondary contract.⁵¹⁶ However, it is important to note that the provisions which set out these controls are themselves subject to significant qualifications in the case of international supply contracts,⁵¹⁷ contracts where the law applicable is English law only by choice of the parties,⁵¹⁸ and a range of types of contract as set out in Sch.1 of the Act.⁵¹⁹ Moreover, contract terms which are authorised or required by statute or international convention are excluded from the Act's controls⁵²⁰ and those which are incorporated or approved by a competent authority are taken as satisfying the requirement of reasonableness.⁵²¹ These qualifications are discussed later in this section.⁵²²

Footnotes

514 Above, para.17-076.

515 See below, paras 17-085—17-087, 17-088—17-096 and 17-097—17-098 respectively.

- 516 1977 Act s.10 and see below, para.[17-131](#).
- 517 1977 Act s.29 below, para.[17-127](#).
- 518 1977 Act s.27(1) below, para.[17-130](#).
- 519 See below, paras [17-121](#)—[17-126](#).
- 520 1977 Act s.29(1) below, para.[17-128](#).
- 521 1977 Act s.29(2) below, para.[17-129](#).
- 522 See preceding notes.

(i) - Exclusion of Liability for Negligence

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(i) - Exclusion of Liability for Negligence

Negligence liability

17-085 Section 2 of the 1977 Act restricts the power of a person to exclude or restrict their business liability⁵²³ for negligence whether by reference to a term of a contract or by reference to a “notice given to persons generally or to particular persons”.⁵²⁴ For this purpose “negligence” is defined to mean the breach:

- “(a)of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of a contract;
- “(b)of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty); and
- “(c)of the common duty of care imposed by the Occupier’s Liability Act 1957
...”⁵²⁵

It will be seen, therefore, that “negligence” may be contractual or tortious. A prominent example of contractual negligence may be found in breach of the implied term that the supplier of a service under a relevant contract for services will carry it out with reasonable care and skill.⁵²⁶ Section 2 itself distinguishes between two types of damage. In the case of death or personal injury⁵²⁷ resulting from negligence, any purported exclusion or restriction of a person’s business liability is wholly ineffective without any assessment of its reasonableness.⁵²⁸ In the case of “other loss or

damage” (which includes damage to property and pure economic loss), a person cannot so exclude or restrict their business liability, except insofar as the term or notice satisfies the requirement of reasonableness.⁵²⁹ The words of s.2 are wide enough to include a term which purports to transfer from one contracting party to the other responsibility for injury or damage caused to the latter by negligence on the part of an employee of the former.⁵³⁰ They do not extend to a term by which one party requires the other to indemnify them against injury or damage caused to third parties by their own negligence or that of their employees,⁵³¹ nor to a covenant not to sue a third party.⁵³² In *Smith v Eric S. Bush* the House of Lords held that s.2(2)’s controls on the reasonableness of non-contractual notices can apply to a disclaimer which sought to operate so as to avoid a duty of care in the tort of negligence arising by preventing any assumption of responsibility.⁵³³

Assumption of risk

17-086 Section 2(3) of the 1977 Act provides that, where a contract term or notice⁵³⁴ purports to exclude or restrict liability for negligence a person’s agreement to it or awareness of it is not of itself to be taken as indicating his voluntary acceptance of the risk.⁵³⁵

Section 2 not applicable where Consumer Rights Act 2015 applies

17-087 Since the coming into force of the Consumer Rights Act 2015 on 1 October 2015, s.2 of the 1977 Act has not applied to a term in a “consumer contract” entered into nor to a “consumer notice” provided or communicated on or after that date,⁵³⁶ but it instead refers the reader to the provisions governing the fairness of such terms or notices set out by the 2015 Act.⁵³⁷

Footnotes

523 1977 Act s.1(3), above, para.17-083.

524 Above, para.17-078.

525 1977 Act s.1(1). An example of (c) may be found in *Monarch Airlines Ltd v London Luton Airports Ltd [1998] 1 Lloyd's Rep. 403*.

526 Supply of Goods and Services Act 1982 s.13 and see above, para.16-046. However, a contract for the provision of services to a consumer is not a “relevant contract” for the purposes of the 1982 Act: s.1(1).

527 “Personal injury” is defined by s.14 of the 1977 Act to include “any disease and any impairment of physical or mental condition”.

- 528 1977 Act s.2(1).
- 529 1977 Act s.2(2). See also s.2(3) (voluntary acceptance of risk). On the test of reasonableness see 1977 Act s.11, below, paras 17-099 et seq.
- 530 *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659. See also *Flamar Inter ocean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep. 434.
- 531 *Thompson v T. Lohan (Plant Hire) Ltd* [1987] 1 W.L.R. 649; *Hancock Shipping Co Ltd v Deacon & Trysail (Private) Ltd* [1991] 2 Lloyd's Rep. 550.
- 532 *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 Lloyd's Rep. 438; see above, para.17-054.
- 533 [1990] 1 A.C. 831 at 847–849, 862 and 873–874 relying in part on s.13(1) of the Act's provision that s.2 "also prevent[s] excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty": on which see above, para.17-081. See also Clerk and Lindsell on Torts, 23rd edn (2020), para.3-138. However, in *First National Bank Plc v Loxley* [1997] P.N.L.R. 211 (CA) at 214–215 the CA noted that the law had developed since *Smith v Eric S. Bush* in particular after the rehabilitation of the concept of assumption of responsibility in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, on which see above, paras 3-072 et seq.
- 534 See above, para.17-078.
- 535 But see above, para.17-017 and cf. *Johnstone v Bloomsbury H.A.* [1992] Q.B. 333, 343, 346.
- 536 2015 Act s.75, Sch.4 para.4 inserting s.2(4) into the 1977 Act.
- 537 2015 Act s.62 and 65 on which see Vol.II, paras 40-230 et seq. The 2015 Act ss.67 and 68 also make requirements as to the transparency of terms of consumer contracts and consumer notices: see Vol.II, paras 40-428—40-434 to which s.2(4) of the 1977 Act does not refer.

(ii) - Exclusion of Contractual Liability in General

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(ii) - Exclusion of Contractual Liability in General

Liability arising in contract

17-088 Section 3 of the Act applies generally to liability arising in contract and (unlike ss.6 and 7 which are limited to the control of exemption clauses in contracts of sale, hire, hire-purchase and other contracts under which goods pass) in principle it is not limited to contracts of a particular type.⁵³⁸ However, the section applies as between contracting parties only where one of them deals on the other's written standard terms of business,⁵³⁹ and, following the general pattern in the Act, where the liability which it is sought to exclude is a business liability.⁵⁴⁰ Section 3 controls not merely contract terms which seek to exclude or restrict liability, but also certain related terms.⁵⁴¹ On the other hand, s.3 does not apply to a term in a consumer contract, these being instead controlled generally under Pt 2 of the Consumer Rights Act 2015.⁵⁴²

“The other’s written standard terms of business”

17-089 The controls in s.3 are limited to the situation where one party deals on “the other’s written standard terms of business”. These expressions are not defined or explained by the Act, but it would seem probable that “standard terms of business” would embrace the standard terms of a third party, e.g.

a trade association, incorporated into the contract by reference or by course of dealing.⁵⁴³ The requirement that the term is part of the other party's standard terms of business has been held to mean that "it has to be shown that that other party habitually uses those terms of business" and it is not enough that a model form has, on the particular occasion, been used.⁵⁴⁴ Where such habitual use of terms of business is established, the question arises whether variations or omissions from or additions to such standard terms (notably as to subject matter and price but also more generally) thereby render them "non-standard" and, if they do not, whether all the terms then become standard terms. Where negotiations have taken place around standard terms before the contract is made, and amendments agreed, it is a question of fact whether one party can be said to have dealt on those standard terms.

⁵⁴⁵

U If it is alleged that an ostensibly "one-off" or bespoke contract is in fact the other's written standard terms of business, extensive disclosure may be involved to determine the terms on which contracts have been concluded with others. The burden of proving that he dealt on the other's written standard terms of business appears to rest on the party who alleges that s.3 applies.⁵⁴⁶ For this purpose:

"... it is relevant to enquire whether there have been more than insubstantial variations to the terms which may otherwise have been habitually used by the other party to the transaction. If there have been substantial variations, it is unlikely to be the case that the party relying on the Act will have discharged the burden on him to show that the contract has been made 'on the other's written standard terms of business'."⁵⁴⁷

Where there is "substantial negotiation" (leading to many amendments to the draft contract as first proposed by the other party) this may be enough to demonstrate that the terms ultimately agreed were not standard business terms even though the particular term was not itself affected: "[t]here is ... no requirement that negotiations must relate to the exclusion terms of the contract, if the Act is not to apply".⁵⁴⁸ It is to be noted that s.3 makes clear that it applies only to *written* standard terms, unlike the provision in Pt 2 of the 1977 Act applicable in Scotland which refers to "standard form contracts".⁵⁴⁹

The contract terms controlled by s.3

17-090

In cases falling within s.3, as against the party dealing on the other's written standard terms of business, that other party cannot by reference to any contract term,⁵⁵⁰ except in so far as the term satisfies the requirement of reasonableness, do either of two things:

“(a)when himself in breach of contract, exclude or restrict any liability of his in respect of breach⁵⁵¹; or

(b)claim to be entitled:

(i)to render a contractual performance substantially different from that which was reasonably expected of him⁵⁵²; or

(ii)in respect of the whole or part of his contractual obligations to render no performance at all.”⁵⁵³

The situation covered by s.3(2)(a) is straightforward as it reflects the Act’s general concern with the exclusion or restriction of liability,⁵⁵⁴ but the two situations presented in (b) are less so. It would appear to have been the intention of s.3(2)(b) that it should apply where there is no breach of contract at all (and therefore no exclusion or restriction of liability as such), but where the obligation as to performance has been limited or qualified.⁵⁵⁵ An example falling within s.3(2)(b)(i) may be found in the case of a shipowner who agrees on written standard terms to provide a cruise to a travel agent for a party of tourists on a particular vessel on a particular route, but claims to be entitled to change the vessel by reference to a contract term.⁵⁵⁶ A further example in a commercial contract might be that of a force majeure clause⁵⁵⁷ by reference to which a seller of goods claims to be entitled to suspend or postpone delivery of the goods, or to deliver substitute goods, or to cancel the contract, upon the happening of events beyond his control.⁵⁵⁸ In both these cases, the clause provides the party with a power to vary their *own* obligation or performance. By contrast, s.3(2)(b) does not extend to a contract term which entitles one party to alter the performance required of the *other* party (e.g. a term by which a seller of goods is entitled to increase the price payable by the buyer to the price ruling at the date of delivery, or a term by which a person advancing a loan is entitled to vary the interest payable by the borrower on the loan).⁵⁵⁹ Instead,

“... the contract term must be one which has an effect (indeed a substantial effect) on the contractual performance reasonably expected of the party who relies on the term. The key word is ‘performance’.”⁵⁶⁰



On the other hand, the Court of Appeal has held that while an entire agreement clause (which on its construction was effective to exclude collateral warranties) did not fall under s.3(2)(a) (as it prevented any collateral contract or warranty from coming into existence, rather than being an exemption clause⁵⁶¹), it could fall under s.3(2)(b)(i) since “in appropriate circumstances a pre-contractual representation or promise may affect the performance that is reasonably expected of a party”.⁵⁶²

Contractual performance and the scope of the party's obligation

- 17-091 The argument could be advanced⁵⁶³ that the effect of clauses caught by s.3(2)(b) (such as those mentioned above⁵⁶⁴) is to define the scope of the obligation of the party seeking to rely on the clause with respect to performance: the contract must be read together with and subject to the clause.⁵⁶⁵ The other party could not therefore reasonably expect that the party seeking to rely on the clause would render a contractual performance other than that as qualified by that clause, nor would there be any contractual obligation in respect of which the party seeking to rely on the clause would be claiming to render no performance at all. However, it is submitted that a sensible meaning can in most cases only be given to para.(b) if one assumes that the contractual performance and contractual obligation referred to is the performance required and the obligation imposed by the contract apart from the contract term relied on.⁵⁶⁶ For this purpose, the contractual performance reasonably expected of a party may, in appropriate cases be determined by the content of representations made by that party in pre-contract negotiations.⁵⁶⁷ On the other hand, where on its true construction a contract term provides for performance to a certain level by the party relying on the clause, the other party cannot claim that that very term entitles the party so relying to render a contractual performance substantially different from that which he reasonably expected. For example, in *Hodges v Aegis Defence Services (BVI) Ltd* a contractor providing security services in Iraq engaged the services of an individual and their contract contained a term under which the contractor agreed to take out insurance for a sum of \$200,000 payable on that individual's death.⁵⁶⁸ After the individual died during service, insurance monies were paid over a period in excess of that figure, but his widow (as principal nominee of the benefit of the insurance) claimed that the term required payment of \$200,000 as a minimum lump sum and, secondly, that any term which gave the insured less than such a minimum lump sum fell within s.3(2)(b)(i) and was unreasonable.⁵⁶⁹ However, Longmore LJ (in the majority) held, first, that on its proper construction the term did not require such a lump sum and, secondly, that this meant that the contractor did not claim by reference to that term to be entitled to render a contractual performance substantially different from that which was expected of it under the contract.⁵⁷⁰

Termination clauses

- 17-092 The wording of s.3(2)(b) of the 1977 Act is broad enough to include within the scope of its controls contract terms which allow the party (A) relying on it to terminate the contract whether at his apparently unrestricted option or on one or more specified grounds. In the case of the latter, these grounds may include the occurrence of a particular event or events, the failure to perform by the other party (B) without the latter's breach or, and in particular, on the ground of breach by the other party (B) (whether this is achieved by designating the term which is breached a technical

condition, specifying that performance is of the essence, or otherwise). Where A exercises such a power to terminate on the ground of breach of contract by B, then in principle this releases A from future performance of his obligations under the contract⁵⁷¹ and therefore could be said to enable him (depending on the circumstances) to “render a contractual performance substantially different from that which was reasonably expected of him” or “in respect of the whole or part of his contractual obligations to render no performance at all.”⁵⁷² And the exercise of a power of termination under an express term in other situations could have a similar effect, depending, in particular, on the construction of the particular term and of the wider contract.

Arguments against the inclusion of termination clauses

- 17-093 There are, however, several arguments that could be advanced against the inclusion of termination clauses of these types within the scope of s.3(2)(b). First, it could be argued that the Law Commission report which recommended the reform which led to the 1977 Act did not contemplate that termination clauses would be affected. While the report recognised that certain types of contract terms which were not exemption clauses in the ordinary sense of excluding or restricting a person’s liability should be controlled, they identified “the mischief we wish to control” as:

“... the likelihood (in the light of the surrounding circumstances including the way in which the contract is expressed) that the promisee might reasonably have misunderstood the extent of the promisor’s obligation.”⁵⁷³

This might not readily look relevant to the use of termination clauses, but in some situations it could well be argued that a party could make use of such a clause so as to avoid the fulfilment of their own obligation as expected by the other party, particularly where the position otherwise applicable in law would not so allow. Secondly, when Parliament amended s.3 of the 1977 Act by the Consumer Rights Act 2015, it did so by *narrowing* its scope by deleting the protection given to persons “dealing as consumer”, thereby excluding from protection business customers who dealt other than on the other’s written standard terms of business,⁵⁷⁴ even though the Law Commissions had earlier recommended an *expansion* of the controls on the fairness of contract terms based on the approach in the European Directive on Unfair Terms in Consumer Contracts so to protect small businesses.⁵⁷⁵ However, to this it could be countered that the main purpose of the 2015 Act in relation to unfair contract terms was to divide their control between consumer contracts (in the 2015 Act itself) and other contracts (in the 1977 Act), and that it did not affect at all the controls on unfair terms in s.3 of the 1977 Act in the situation where it remained applicable, i.e. where a party deals on the other’s written standard terms of business. Thirdly, it could be argued that a termination clause is not caught by s.3(2)(b) of the 1977 Act as “performance” for its purposes should be read subject to the clause in question, so that, in the case of s.3(2)(b)(i), the other party has no reasonable expectation apart from one qualified by the clause and that in the case

of both ss.3(2)(b)(i) and 3(2)(b)(ii) where a clause allows the termination of a party's obligations, then there is no relevant "obligation". This argument is, however, less convincing as the courts have apparently rejected this restrictive understanding of the party's "reasonable expectation".⁵⁷⁶ Fourthly, it has been argued in relation to clauses which allow termination for failure to perform that the phrase "by reference to any contract term" in the first line of s.3(2):

"… should be taken to mean 'by reference *only* to such a term'—not by reference to it combined with other circumstances justifying [the injured party's] refusal [to perform], such as a failure by the other party to perform his part."⁵⁷⁷

However, it is submitted that this position involves rewriting the statute and, in the case of a termination clause which does not render the breach repudiatory, it also seems inconsistent with the view that termination takes place under a power granted by the clause, *rather than* by reason of the breach.⁵⁷⁸

Application to termination clauses not clearly settled

- 17-094 The question as to the application of s.3(2)(b) to termination clauses has not been definitively settled by the courts. The question was raised in *Timeload Ltd v British Telecommunications Plc* in the context of a contract for the provision of services between a public telecommunications operator (BT) and a business which set up a free telephone enquiry service.⁵⁷⁹ After the allocation of a freephone number (which was based on BT's own freephone directory inquiries service) to the business, BT purported to terminate the contract on the basis of a clause in its standard terms which allowed termination on a month's notice. The Court of Appeal upheld the decision of the court below granting an injunction in effect preventing BT from terminating their business customer's use of the particular telephone number on the basis that the apparently very broad power to terminate the contract had to be construed so that BT "should not be permitted to exercise a potentially drastic power of termination without demonstrable reason or cause for doing so", emphasising the special statutory background of the contract.⁵⁸⁰ As regards the construction and ambit of s.3(2)(b), Sir Thomas Bingham MR (as he then was) considered this to be "by no means clear," but that it was "at least arguable" that it would apply in the circumstances.⁵⁸¹ Moreover, in *Bates v Post Office Ltd (No.3: Common Issues)* Fraser J in the course of a complex judgment on unusual facts⁵⁸² considered a number of terms in the contracts between the Post Office and sub-postmasters before him which he considered related to the Post Office's own contractual performance for the purposes of s.3(2)(b), these including termination clauses under which the Post Office could bring the sub-postmaster's appointment and therefore their operation of the branch to an end.⁵⁸³ As regards the latter, Fraser J held reasonable a clause allowing termination on notice which he had construed as restricted to cases of repudiatory breach, though he acknowledged that

if the clauses were construed in the way contended for by the Post Office without such a restriction, it would have been unreasonable.⁵⁸⁴

- 17-095 On balance, it is submitted that the question whether a term providing for termination of the contract at the option of one party can fall within s.3(2)(b) of the Act should be determined simply by reference to the question whether it fulfils the statutory criteria in either s.3(2)(b)(i) or (ii) rather than by reference to a general view that termination clauses in general or clauses which allow termination on breach in particular do or do not fall within its scope.⁵⁸⁵ For this purpose, the proper construction of the clause and the consequence under the contract and/or as a matter of the general law of the exercise of the right to terminate which it provides will clearly be crucial. And where it is held that a contract term *does* fall within the scope of either s.3(2)(b)(i) or (ii), then the circumstances in which it allows termination will be central to (though by no means conclusive of) the question whether or not it is reasonable within the meaning of s.11 of the Act.

Section 3 not applicable where Consumer Rights Act 2015 applies

- 17-096 Since the coming into force of the *Consumer Rights Act 2015* on 1 October 2015, s.3 of the 1977 Act has not applied to a term in a “consumer contract” entered into on or after that date,⁵⁸⁶ but it instead refers the reader to the provision governing the fairness of such terms set out by the 2015 Act.⁵⁸⁷

Footnotes

- 538 There are significant exclusions on the scope of the controls in s.3: 1977 Act s.1(2) and Sch.1, below, paras 17-121—17-127.
- 539 Until the coming into force of the *Consumer Rights Act 2015* on 1 October 2015, the controls in s.3 also applied as against a person “dealing as consumer”, but this protection was abolished by that Act: above, paras 17-072—17-073.
- 540 On “business liability” see 1977 Act s.1(3) and above, para.17-083.
- 541 Section 3(2)(b) and see below, paras 17-090—17-095.
- 542 1977 Act s.3(3) (inserted by the 2015 Act on its coming into force on 1 October 2015). For the controls on the terms of consumer contracts see esp. 2015 Act s.62 and Vol.II, paras 40-223 et seq.
- 543 See the example of use of the RIBA form of engagement in *British Fermentation Products Ltd v Compare Reavell Ltd [1999] 2 All E.R. (Comm) 389* at [46] (HH Judge Bowsher QC), expressly approved in *African Export-Import Bank v Shebah Exploration and Production Co Ltd [2017] EWCA Civ 845, [2018] 1 W.L.R. 487* at [20] (Longmore LJ).

- 544 *African Export-Import Bank v Shebah Exploration and Production Co Ltd [2017] EWCA Civ 845*, [2018] 1 W.L.R. 487 at [20] per Longmore LJ (with whom Henderson LJ agreed).
- 545 cf. *St Alban's City and District Council v International Computers Ltd [1996] 4 All E.R. 481*, 490–491, with *Salvage Association v Cap Financial Services [1995] F.S.R. 654*. See also *Flamar Inter ocean Ltd v Denmac Ltd [1990] 1 Lloyd's Rep. 434, 438*; *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd (1991) 56 B.L.R. 115, 131*; *South West Water Services Ltd v International Computers Ltd [1999] B.L.R. 420*; *British Fermentation Products Ltd v Compair Reavell Ltd (1999) 66 Const. L.R. 1*; *Pegler Ltd v Wang (UK) Ltd [2000] B.L.R. 218*; *Hadley Design Associates Ltd v Westminster CC [2003] EWHC 1617 (TCC), [2004] T.C.L.R. 1*; *Ferryways NV v Associated British Ports [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep. 639* at [92]; *University of Wales v London College of Business Ltd [2015] EWHC 1280 (QB)* at [91]–[95]; *Commercial Management (Investments) Ltd v Mitchell Design & Construct Ltd [2016] EWHC 76 (TCC)* at [61]–[73] (A's standard terms incorporated only to the extent to which B's terms did not prevail over them, term held still one of A's "written standard terms of business"); *Britton (2006) 22 Const. L.J. 23*. See also *Eurasian Natural Resources Corp Ltd v Dechert LLP [2022] EWHC 1138 (Comm)* at [1643] (the fact that all the "essential machinery" of a cap on liability was contained in the defendant's written standard terms is enough for it to fall under s.3 even though the level of the cap was set by a separate letter of retainer).
- 546 *British Fermentation Products Ltd v Compair Reavell Ltd (1999) 66 Const. L.R. 1*.
- 547 *African Export-Import Bank v Shebah Exploration and Production Co Ltd [2017] EWCA Civ 845* at [25] per Longmore LJ (with whom Henderson LJ agreed), approving dicta in *McCrone v Boots Farm Sales [1981] S.L.T. 103* at 105; *Hadley Design Associates v Westminster City Council [2003] EWHC 1617 (TCC), [2004] T.C.L.R. 1* at [78]. See also *Bates v Post Office Ltd (No.3: Common Issues) [2019] EWHC 606 (QB)* at [1065]–[1075].
- 548 *African Export-Import Bank v Shebah Exploration and Production Co Lt [2017] EWCA Civ 845* at [36] per Longmore LJ.
- 549 1977 Act s.17; *M'Crone v Boots Farm Sales 1981 S.C. 68* at 73–74 (entirely oral contract made by reference to supplier's standard terms of which the customer was aware caught by s.17).
- 550 Whether in the same or in another contract between the same parties. cf. 1977 Act s.10, below, para.17-131.
- 551 See *Charlotte Thirty Ltd v Croker Ltd (1990) 24 Con. L.R. 46*; *St Alban's City and District Council v International Computers Ltd [1996] 4 All E.R. 481*.
- 552 i.e. at the time the contract was made: *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep. 570, 612*. See *Timeload Ltd v British Telecommunications Plc [1995] E.M.L.R. 459*.
- 553 1977 Act s.3(2)(a) and (b).
- 554 See 1977 s.13 and above, para.17-079.
- 555 *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep. 570, 611–612*; *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2*

- Lloyd's Rep. I* at [50]. See also Law Commission, Scottish Law Commission, Exemption Clauses (1975) Law Com. No.69, Scot. Law Com. No.39, paras 143–146.
- 556 cf. *Anglo-Continental Holidays Ltd v Typaldos Lines (London) Ltd [1967] 2 Lloyd's Rep. 61*, given by the Law Commissions in Law Com. No.69, Scot. Law Com. No.39, para.146 as an example of the sort of term which it intended should be included under its proposed controls which were similar to s.3(2)(b). cf. the special provisions controlling the variation of package holiday contracts by the *Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288)* (replaced as of 1 July 2018 by the *Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634)* on which see generally Vol.II, paras 40-144 et seq. and in particular paras 40-146 and 40-152).
- 557 See below, paras 26-060 et seq.
- 558 But see below, paras 17-092—17-094 on termination clauses more generally.
- 559 *Paragon Finance Plc v Nash [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685, at [76]–[77] (pet. dis. [2002] 1 W.L.R. 2303)* approving the view of the law set out by the first two sentences of this paragraph in an earlier edition. But such a term in a consumer contract may be unfair and not binding on the consumer under the *Consumer Rights Act 2015 Pt 2*, on which see Vol.II, paras 40-230 et seq. and esp. at paras 40-338—40-341.
- 560 *Paragon Finance Plc v Nash [2001] EWCA Civ 1466* at [77] per Dyson LJ. The proper approach is therefore to identify “‘the contractual performance’ reasonably expected of [the party], in respect of which the contract term in question ‘must have an effect (indeed a substantial effect)’”: *Bates v Post Office Ltd (No.3: Common Issues) [2019] EWHC 606 (QB)* at [1081] (Fraser J) and see further on applying this approach to a series of contract terms in contracts between the Post Office (PO) and sub-postmasters (SPMs) at [1082]–[1084], including terms under which the PO was entitled to change the character or the nature of its performance by unilateral variation of the terms upon which SPMs were appointed; terms which related to the way in which the PO would be entitled to claim payment from, or reduce remuneration otherwise due to, the SPM for running the branch; and terms under which the PO could bring the appointment of the SPM to an end, such that the operation of the branch by the SPM who had been contracted for that purpose would come to an end. See also *Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd [2022] EWCA Civ 153* at [105] where the CA held that a clause under which an adjudicator was entitled to fees for adjudication where he had exercised an unqualified right to resign did not fall within s.3(2) (b) as the clause simply regulated the circumstances in which, if the adjudicator resigned, he was entitled to be paid for the work he had done and “did not mean that [the adjudicator] rendered a contractual performance substantially different from that which was reasonably expected of him, or render no performance at all” as it “did not go to the performance of his contractual obligations as adjudicator” (per Coulson LJ); moreover, if it had fallen within s.3, the clause would have been found reasonable: *[2022] EWCA Civ 153* at [106].
- 561 *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. I* at [49] with whom Wilson LJ and Rix LJ agreed: *Paragon Finance Plc v Nash* at [76] and [77]. See also above, para.9-163.

- 562 The entire agreement clause was, however, held reasonable in the circumstances: [2011] *EWCA Civ 133* at [66].
- 563 Treitel, Frustration and Force Majeure, 3rd edn (2014), para.12-022.
- 564 Above, paras 17-090—17-091.
- 565 See above, para.17-003.
- 566 *Zockoll Group Ltd v Mercury Communications Ltd (No.2) [1998] I.T.C.L.R. 104*. It has been said, therefore, that a party may not be able to rely on a term where this disappoints the other party's reasonable expectation “even though he was not actually obliged to render the performance expected: the criterion is the reasonable expectation of the other party, not the obligation of [the first party] under the contract”; conversely “there would, however, be no such reasonable expectation where the contract made it clear that, while [the party] would endeavour to provide a particular service, he also reserved the right to substitute a reasonable alternative”: Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.7-056, referring for the latter point to *Duffy v Newcastle United Football Club Ltd, The Times, 7 July 2000*.
- 567 *SAM Business Systems Ltd v Hedley & Co [2002] EWHC 2733 (TCC), [2003] 1 All E.R. (Comm) 465; AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1* at [50].
- 568 [2014] *EWCA Civ 1449*.
- 569 [2014] *EWCA Civ 1449* at [5] and [6].
- 570 [2014] *EWCA Civ 1449* at [52] (Longmore L.J). McCombe LJ agreed with Longmore LJ both as a matter of the construction of the term and its effectiveness, but as regards the latter on the ground that the term in question was reasonable under the 1977 Act: [2014] *EWCA Civ 1449* at [33]–[34]. Vos LJ dissented on the issue of construction and did not find it necessary to consider the effect of s.3(2)(b): [2014] *EWCA Civ 1449* at [43]–[45]. cf. *Everwarm Ltd v BN Rendering Ltd [2019] EWHC 3060 (TCC), 187 Con. L.R. 240* where a contract term entitled the employer of a building contractor to assess the value of work done and, therefore, what it owed and, where relevant, to recover the difference from what it had paid. It was held, first, that this assessment was subject to an implied term that it would not be undertaken in an arbitrary, capricious or irrational manner. It was further held that the express term (as properly construed in its contractual and statutory context and as so qualified) did not entitle the employer to render a performance substantially different from that which was reasonably expected of it as the “implied term and the combined system of notices and adjudication are sufficient controls to ensure that [the employer] cannot, unilaterally, carry out an Assessment and make a demand for payment which bears no relation to the value of the works undertaken by [the contractor]”: [2019] *EWHC 3060 (TCC)* at [158].
- 571 Below, para.27-081.
- 572 Whittaker in Burrows and Peel (eds), Contract Terms (2007), Ch.13 especially at pp.263–267.
- 573 Law Commission, Scottish Law Commission, Second Report on Exemption Clauses, Law Com. No.69, Scot. Law Com. No.39 (1975) para.143 and see further at paras 144–146.
- 574 2015 Act s.75; Sch.4 para.5. Some business customers (even if corporate) could “deal as consumer” as it was held that to be made in the course of a business, a transaction must be an

integral part of the business carried on or, if only incidental to it, be of a type regularly entered into: *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321, above, para.17-072. Such a customer does not count as a “consumer” within the meaning of the 2015 Act s.2(3) and 76(2) as not being “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”: on this definition see Vol.II, paras 40-244—40-245.

- 575 Law Commission, Scottish Law Commission, Unfair Terms in Contracts (Law Com. No.292, Scot Law Com. No.199, 2005) and see above, paras 17-070.
- 576 *Zockoll Group Ltd v Mercury Communications Ltd* [1999] E.M.L.R. 385, 395 and see above, para.17-091.
- 577 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.7-057.
- 578 *Financings Ltd v Baldock* [1963] 2 Q.B. 104 at 112 and 123.
- 579 [1995] E.M.L.R. 459.
- 580 [1995] E.M.L.R. 459 at 467 and 469. Hoffmann LJ agreed that there was a triable issue on the question whether the power had to be limited to cases where BT could show cause, but did not comment on the issue of the application of s.3 of the 1977 Act; Henry LJ agreed with Sir Thomas Bingham MR: [1995] E.M.L.R. 459 at 471.
- 581 [1995] E.M.L.R. 459 at 468. The MR added that, if it did not, this may not be “the end of the matter”, as it would then be arguable that “the common law could, if the letter of the statute does not apply, treat the clear intention of the legislature expressed in the statute as a platform for invalidating or restricting the operation of an oppressive clause in a situation of the present, very special kind,” though, with respect, this line of argument—using a statutory provision as the basis for a common law development responding to a particular problem of unfairness in lieu of recognition of a general principle of good faith—does not accord with more traditional understanding of statutory intervention as exceptional, and, in particular, with judicial treatment of the so-called doctrine of fundamental breach after the enactment of the 1977 Act, on which see above, paras 17-023 et seq. cf. *Hadley Design Associates Ltd v City of Westminster* [2003] EWHC 1617 (TCC), [2004] T.C.L.R. 1 at [76] referring to Sir Thomas Bingham MR’s “provisional view” in *Timeload* that the exercise of a right of termination did not fall within s.3(2)(b).
- 582 See also above, para.2-084 on the implication of terms of good faith into these “relational contracts”.
- 583 [2019] EWHC 606 (QB) at [1084].
- 584 [2019] EWHC 606 (QB) at [1107].
- 585 In *Paragon Finance Ltd v Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685 at [76] the CA stated that a passage in an earlier edition of the present work (Chitty on Contracts 28th ed (1999) para.14-071) which stated that “it seems unlikely that a contract term entitling one party to terminate the contract in the event of a material breach by the other (e.g. failure to pay by the due date) would fall within paragraph (b), or, if it did so, would be adjudged not to satisfy the requirement of reasonableness” accurately stated the law, but this approval might well have related (at least principally) to later sentences also quoted which concerned a clause varying the *other* party’s obligation which was the issue relevant to the case before it.

- 586 2015 Act s.75, Sch.4 para.5(3) inserting s.3(3) into the 1977 Act. On the temporal application of this change see above, para.17-071.
- 587 2015 Act s.62 on which see Vol.II, paras 40-223 et seq. The 2015 Act ss.67 and 68 also make requirements as to the transparency of terms of consumer contracts and consumer notices: see Vol.II, paras 40-428—40-434 to which s.3(3) of the 1977 Act does not refer.

(iii) - Exclusion of Liability for Breach of Implied Terms in Contracts for the Sale or Supply of Goods

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(c) - The Controls Provided by the 1977 Act

(iii) - Exclusion of Liability for Breach of Implied Terms in Contracts for the Sale or Supply of Goods

Sale and hire purchase

17-097 Section 6 of the 1977 Act⁵⁸⁸ limits the ability of a seller of goods, or of the owner of goods let under a hire-purchase agreement, to exclude or restrict their liability in respect of breach of the terms implied by ss.12 to 15 of the Sale of Goods Act 1979⁵⁸⁹ or ss.8 to 11 of the Supply of Goods (Implied Terms) Act 1973.⁵⁹⁰ For this purpose, s.6 distinguishes between the various implied terms. Contract terms purporting to exclude the seller's or (in the case of hire-purchase) owner's liability for breach of the statutory implied terms as to title and right to sell the goods are ineffective without any assessment of their reasonableness.⁵⁹¹ By contrast, in the case of purported exclusions of the statutory implied terms as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose,⁵⁹² s.6 subjects the exclusion to the test of reasonableness.⁵⁹³ The liabilities referred to in s.6 are not confined to business liabilities,⁵⁹⁴ but they are confined to those which arise from breach of the statutory *implied* undertakings and some of these are themselves restricted to the situation where the seller or owner is acting in the course of business.⁵⁹⁵ After its amendment by the Consumer Rights Act 2015 on 1 October 2015 and as regards contracts made on or after that date, s.6 does not apply to consumer contracts, noting the controls on the exclusion or restriction of liability for breach of the equivalent statutory terms in Pt 1 of that Act.⁵⁹⁶

Miscellaneous contracts under which goods pass

17-098 **Section 7 of the 1977 Act**⁵⁹⁷ is concerned with contract terms which exclude or restrict business liability⁵⁹⁸ for breach of an implied obligation in a contract “where the possession or ownership of the goods passes under or in pursuance of” the contract other than a contract governed by the law of sale of goods or hire-purchase. Examples of such contracts are contracts for the hire of goods or for work and materials. The obligation in the contract must be one which arises “by implication of law from the nature of the contract”.⁵⁹⁹ In most cases, the obligations to be implied in such contracts are those set out in ss.2 to 5 and 7 to 10 of the Supply of Goods and Services Act 1982.⁶⁰⁰ First, s.7 of the 1977 Act provides that liability for breach of the obligations as to title, etc., arising under s.2 of the 1982 Act (such as in contracts for work and materials) cannot be excluded or restricted by reference to any contract term,⁶⁰¹ but in the case of other contracts in this category (e.g. contracts for the hire of goods) terms excluding or restricting liability in respect of the right to transfer ownership of the goods or give possession, or the assurance of quiet possession to a person taking goods in pursuance of the contract, are subject to the test of reasonableness.⁶⁰² Secondly, s.7 provides that any liability arising in respect of the goods’ correspondence with description or sample, or their quality or fitness for any particular purpose cannot be excluded or restricted by a term of a contract unless that term satisfies the test of reasonableness.⁶⁰³ After its amendment by the Consumer Rights Act 2015 on 1 October 2015 and as regards contracts made on or after that date, s.7 does not apply to consumer contracts, noting the controls on the exclusion or restriction of liability for breach of the equivalent statutory terms in Pt 1 of that Act.⁶⁰⁴

Footnotes

- 588 As amended by s.63 of and Sch.3 to the Sale of Goods Act 1979 and by the Consumer Rights Act 2015 s.75; Sch.4 para.8. In particular, the 2015 Act deleted s.6(2) (which formerly rendered ineffective attempted exclusions or restrictions of liability arising for breach of specified statutory terms as against a person dealing as consumer (on which see above, paras 17-072—17-073)) and inserted s.6(5) (which provides that s.6 does not apply to the terms of “consumer contracts”, on which see below in this paragraph).
- 589 See Vol.II, paras 46-085, 46-117 et seq.
- 590 See Vol.II, paras 41-386 and 41-395.
- 591 1977 Act s.6(1). On these statutory implied terms see Vol.II, paras 41-320—41-322 (hire purchase) and Vol.II, paras 46-075—46-085 (sale of goods).
- 592 Sale of Goods Act 1979 s.13—15 (sale of goods); Supply of Goods (Implied Terms) Act 1973 ss.9—11.

- 593 1977 Act s.6(1A). On the test of reasonableness see 1977 Act s.11 and below, paras 17-099 et seq.
- 594 1977 ss.1(3) and 6(4). See above, para.17-083.
- 595 e.g. Sale of Goods Act 1979 s.14(2) and (3) on which see Vol.II, para.46-096. Similarly, Supply of Goods (Implied Terms) Act 1973 s.10(2) and (3).
- 596 1977 Act s.6(5) referring to the 2015 Act s.31 on which see Vol.II, para.40-535. On the coming into force of the 2015 Act and its transitional provisions see above, paras 17-071—17-074.
- 597 As amended by the Supply of Goods and Services Act 1982 ss. 17(2) and (3), 20(5); the Regulatory Reform (Trading Stamps) Order 2005 (SI 2005/871) Sch.1 para.1, and the Consumer Rights Act 2015 s.75, Sch.4 para.8. In particular, the 2015 Act deleted s.7(2) (which formerly rendered ineffective attempted exclusions or restrictions of liability for breach of implied terms in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose as against a person dealing as consumer (on which see above, para.17-072—17-073)) and inserted s.7(4A) (which provides that s.7 does not apply to the terms of "consumer contracts", on which see below in this paragraph).
- 598 1977 Act s.1(3) above, para.17-083.
- 599 See above, paras 16-039—16-040.
- 600 1982 Act ss.2—5 which formally apply to contracts under which one person transfers or agrees to transfer to another the property in goods, other than a contract of sale of goods, a hire-purchase agreement, a transfer or agreement to transfer which is made by deed and for which there is no consideration other than the presumed consideration imported by the deed or a contract intended to operate by way of mortgage, pledge, charge or other security: s.1(1)—(2). The provisions in the 1982 Act governing bailment for hire are contained in ss.6—10. See Vol.II, paras 35-071, 46-026. As from the coming into force of the Consumer Rights Act 2015 on 1 October 2015, the provisions of the 1982 Act apply only to "relevant contracts" and therefore not to "goods contracts" falling within the 2015 Act Pt 1, Ch.2: 1982 Act s.1(1) (as amended by the 2015 Act s.60, Sch.1 para.39).
- 601 1977 Act s.7(3A).
- 602 1977 Act s.7(4) (as amended).
- 603 s.7(1A) (as inserted by the 2015 Act s.75, Sch.4 para.9(2)) and see Vol.II, para.35-078.
- 604 1977 Act s.7(4A) referring to the 2015 Act s.31 on which see Vol.II, para.40-535. On the coming into force of the 2015 Act see above, para.17-071.

(d) - The Test of Reasonableness

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(d) - The Test of Reasonableness

Test of reasonableness: contract terms

- 17-099 Except in those instances where the [1977 Act](#) renders absolutely ineffective the exclusion or restriction of liability,⁶⁰⁵ the contract terms controlled by the Act are subject to the requirement of reasonableness. In relation to a contract term, under [s.11\(1\) of the Act](#) the requirement of reasonableness for the purposes of the Act (and of [s.3 of the Misrepresentation Act 1967](#)⁶⁰⁶) is that:

“... the term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.”⁶⁰⁷

The reasonableness of the term must therefore be assessed as of the time at which the contract was made. That assessment is therefore not affected by the nature or seriousness of the loss or damage actually caused to a party, nor by the way in which the term has in fact operated or been relied on,⁶⁰⁸ except to the extent to which such events were or ought reasonably to have been in the contemplation of the parties at that time. Further, it would appear that circumstances known only to the party seeking to allege that the term is reasonable, for example, the experimental nature of a product sold or the fact that it had been purchased from a foreign supplier subject to an effective exclusion of liability of his part,⁶⁰⁹ are irrelevant if they were not known, and could not reasonably have been known, to the other party at the time the contract was made.⁶¹⁰

Test of reasonableness: notices

- 17-100 As has been seen, s.2(2) of the 1977 Act subjects non-contractual notices seeking to exclude business liability for negligence to a test of reasonableness.⁶¹¹ This test is set out in s.11(3) of the Act, which provides that:

“In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.”⁶¹²

This test differs from the test applicable to contract terms in s.11(1) in that the question is not whether the notice was fair and reasonable when made, for example, when any announcement or other communication was made,⁶¹³ but is instead whether it is fair and reasonable “to allow reliance on it” by the person seeking to do so.⁶¹⁴ However, the temporal focus is not contemporary to that person’s *actual* reliance on the notice, but instead refers to “all the circumstances obtaining when the liability arose or (but for the notice) would have arisen,” which may precede the time at which the person actually relies on it. According to the Court of Appeal, this test:

“... seems to let in a consideration of the particular facts of particular cases and to go much wider than the fairness and reasonableness of the disclaimer itself.”⁶¹⁵

In *Smith v Eric Bush*

⁶¹⁶

U a non-contractual notice in a report by a building society surveyor disclaiming all liability for negligence in conducting the survey of a modest dwelling-house was held to be unreasonable in view of the fact that the report would be relied on by an intending purchaser of the property, the parties’ relative bargaining power, the practicability of the intending purchaser obtaining advice from an alternative source, the difficulty of the task being undertaken for which liability is being excluded and the practical consequences of the decision on the question of reasonableness, including the ability of the parties to bear the loss, including by insurance.

Guidelines

17-101

The tests of reasonableness set out by [s.11\(1\)](#) for contract terms and [s.11\(3\)](#) for non-contractual notices in the [1977 Act](#) are both very broad, but [s.1\(4\) of the Act](#) specifically provides that:

“In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.”

This exclusion therefore clearly applies to the assessment of both terms and notices under the tests of reasonableness in [s.11](#).^{[617](#)} More positively, [s.11\(2\) of the Act](#) refers to five guidelines laid down in [Sch.2](#)^{[618](#)} and regard is to be had to these in determining whether a contract term satisfies the requirement of reasonableness.^{[619](#)} The guidelines are only made expressly applicable for the purposes of [s.6](#) (sale of goods and hire-purchase) and [s.7](#) (other contracts for the supply of goods) and therefore the test of reasonableness applicable to contract terms in [s.11\(2\)](#), but they are frequently regarded as being of general application for contract terms.^{[620](#)} The guidelines are:

“(a)the strength of the bargaining positions of the parties relative to each other, taking account (among other things) alternative means by which the customer’s requirements could have been met

^{[621](#)}

;

(b)whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term^{[622](#)};

(c)whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any course of dealing between the parties)^{[623](#)};

(d)where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable^{[624](#)};

(e)whether the goods were manufactured, processed or adapted to the special order of the customer.”^{[625](#)}

Further factors

The guidelines set out in Sch.2 to the Act are not, however, exhaustive and in *Overseas Medical Supplies Ltd v Orient Transport Services Ltd*⁶²⁶ Potter LJ identified no fewer than seven further factors going to the question of reasonableness of contract terms which, in his view, had been regarded as relevant by the courts in previous cases. This list is obviously not a closed one.

Limits on amount

- 17-103 Exemption clauses in contracts frequently limit the liability in damages of one party to a fixed or determinable sum. **Section 11(4)** provides:

“Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above⁶²⁷ in the case of contract terms) to—

- (a)the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
- (b)how far it was open to him to cover himself by insurance.”

This provision was clearly designed to provide some alleviation to the small business, and to professional persons, who may not have the resources available to meet unlimited liability or who may not be able to obtain insurance or who may be exposed to claims in excess of the sums for which insurance cover can be obtained.⁶²⁸ But it might in some circumstances be construed to operate against those enterprises with such resources or which are able to insure.

⁶²⁹

It seems probable that the words “a specified sum of money” would embrace a determinable sum, e.g. the contract price. But it is more questionable whether (b) covers the situation where insurance cover can be obtained, but only on terms which are uneconomic in relation to the margin of profit achieved.⁶³⁰

Burden of proof as to reasonableness

- 17-104 The onus of proving that a term or notice satisfies the relevant requirement of reasonableness⁶³¹ lies on the party so contending.⁶³² It is therefore unnecessary for a claimant to indicate in their

statement of case that they intend to challenge the reasonableness of a term in a contract relied on by the defendant.⁶³³

Judicial application of the reasonableness test⁶³⁴

- 17-105 There is a large body of reported cases which illustrate in general terms the way in which the courts may approach the test of reasonableness of contract terms contained in the Act. However, they are of limited value as precedents since the position of the parties and the circumstances surrounding the transaction, and the precise wording of the clause in question, will necessarily differ in each particular situation. Moreover, with the coming into force of the *Consumer Rights Act 2015*, it should be borne in mind that some cases decided under the earlier law in relation to persons “dealing as consumer” would fall under the controls provided by the *2015 Act* for “consumers”, while other cases so decided would remain under the *1977 Act* though no longer subject to its earlier controls provided for persons dealing as consumer.⁶³⁵

Decisions under earlier legislation

- 17-106 A small number of decisions were reported with respect to the reasonableness test contained in *s.55 of the Sale of Goods Act 1893*⁶³⁶ (repealed in 1979) or *s.3 of the Misrepresentation Act 1967* (amended in its wording by *s.8 of the Unfair Contract Terms Act 1977*), both of which sections, however, required the court to determine whether it would be fair and reasonable to allow *reliance* on the contract term, and not whether it was fair and reasonable to incorporate the term having regard to the circumstances at the time the contract was made.⁶³⁷ In *Rasbora Ltd v J.C.L. Marine Ltd*⁶³⁸ it was held (obiter)⁶³⁹ that it was not fair and reasonable to allow a boatbuilder to rely on a term excluding all liability (other than a warranty to replace defective parts) when the boat was wholly destroyed by a fire, due to defective electrical installations, on the day following its acceptance by the buyer. In *R.W. Green Ltd v Cade Bros Farms*⁶⁴⁰ a term in a contract for the bulk sale of seed potatoes providing a short time-limit for complaints in respect of latent defects could not be relied on by the seller when the potatoes were infected with a virus; but reliance on a term limiting the liability of the seller to the contract price was allowed, as the term had been in use for many years with the approval of negotiating committees acting on behalf of both buyers and sellers. And in *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd*⁶⁴¹ the Court of Appeal by a majority⁶⁴² held that it would not have been fair and reasonable to allow reliance on a term in a contract for the hire of barges which provided that acceptance was to be conclusive evidence that the barges were fit for their intended use, even if the clause had been apt (which it was not) to cover a misrepresentation by the owners of the barges as to their deadweight capacity. Lord Denning MR, however, considered that both the clause itself and reliance on it was

fair and reasonable, since the parties were of equal bargaining power, the term was contained in negotiated drafts and it was a familiar term in charterparties and other commercial contracts, such as structural and engineering contracts.

- 17-107 In *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*⁶⁴³ the appellant seed merchants, by their standard conditions of sale, limited their liability in respect of seeds that did not comply with the contract of sale to replacement of the seeds or refund of the price, but otherwise excluded all liability for loss or damage arising from the use of seeds supplied by them apart from such replacement or refund. The respondents, who were farmers, purchased from them for £201 a quantity of winter white cabbage seeds. The seeds in fact supplied were autumn cabbage seed; the crop failed; and the respondents claimed damages in excess of £60,000. The House of Lords held that it would not be fair or reasonable to allow the appellants to rely on the limitation of liability. Lord Bridge said that, in having regard to the various matters to which the relevant statutory provision directs attention⁶⁴⁴:

“... the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down.”⁶⁴⁵

In the instant case, although a similar limitation of liability had for long been embodied without protest in the terms of the trade between seedsmen and farmers,⁶⁴⁶ the practice was to negotiate settlements of farmers' claims for damages in excess of the price of the seeds if it was thought that the claims were genuine and justified. This indicated that reliance on the limitation would not be fair or reasonable. Two further facts weighted the scale in favour of the respondents: the error was due to the negligence of the appellants' organisation, and seedsmen could insure⁶⁴⁷ against the risk of crop failure resulting from the supply of the wrong variety of seeds without materially increasing the price of seeds.

Reasonableness of contract terms under Unfair Contract Terms Act 1977

- 17-108 As regards the test of reasonableness of contract terms in the 1977 Act itself,⁶⁴⁸ in *Walker v Boyle*,⁶⁴⁹ where a vendor in response to preliminary inquiries represented that she was unaware of any boundary dispute connected with the property, although she ought to have known that there was such a dispute, it was held that condition 17 of the National Conditions of Sale, even with a statement that “accuracy is not guaranteed, and [the replies] do not obviate the need to make appropriate searches, inquiries and inspections”, did not meet the test of reasonableness required by s.11 of the Act.⁶⁵⁰ In *Stag Line Ltd v Tyne Shiprepair Group Ltd*⁶⁵¹ a term in a ship-repairing contract excluding liability on the part of the repairer for consequential economic loss was held to

be reasonable, but not a condition that the shipowner should have no remedy unless he returned the vessel to the repairer's yard for repair, or to such other place as the repairer should direct. In *Phillips Products Ltd v Hyland*⁶⁵² the Court of Appeal held unreasonable in the circumstances⁶⁵³ a term in a contract for the hire of an excavator and driver which provided that the driver was to be regarded as an employee of the hirer who alone was to be responsible for all claims arising in connection with the operation of the plant by the driver. In *Rees-Hough Ltd v Redland Reinforced Plastics Ltd*⁶⁵⁴ a term in a contract for the supply of piping which excluded all liability of the seller unless notified of complaints within three months of delivery was held unreasonable. In *Charlotte Thirty Ltd v Croker Ltd*⁶⁵⁵ the court held unreasonable a term in a contract to design and build an industrial plant which exonerated the contractor from all liability except as provided in a six-month warranty to replace defective components if these were returned carriage paid to the contractor for adjudication. And in *Stewart Gill Ltd v Horatio Myer & Co Ltd*⁶⁵⁶ a term in a contract for the supply and installation of a conveyor system, which provided that the purchaser was not to be entitled to withhold payment of any sum due to the supplier under the contract by reason of "any payment, credit, set-off ... or for any other reason whatsoever", failed to satisfy the requirement of reasonableness.

- 17-109 In *St Alban's City and DC v International Computers Ltd*⁶⁵⁷ a term in a computer software contract made with a local authority limited the liability of the supplier to £100,000, and in *Salvage Association v Cap Financial Services*⁶⁵⁸ a term in a computer accounting contract limited the liability of the supplier to £25,000. Both were held to be unreasonable. In *Edmund Murray Ltd v BSP International Foundations Ltd*⁶⁵⁹ the court held unreasonable a term in a contract for the sale of a drilling rig with detailed requirements for performance, which purported to exclude liability on the part of the seller for breach of both express and implied obligations, and in *AEG (UK) Ltd v Logic Resource Ltd*⁶⁶⁰ a term in a contract for the sale of radar equipment which excluded all warranties and conditions implied by the *Sale of Goods Act 1979* was held to be unreasonable despite the giving of an express warranty that the equipment was free of defects caused by faulty materials or bad workmanship. Also in *Timeload Ltd v British Telecommunications Plc*⁶⁶¹ the Court of Appeal held unreasonable a term in BT's standard terms and conditions which permitted BT to terminate the contract on one month's notice since the term was not limited to cases where there was a good reason for the termination. In *Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd*⁶⁶² terms in a contract for the supply of a software package which excluded all terms relating to performance, quality, fitness for purpose etc. to the fullest extent permitted by law were held unreasonable despite a warranty that the program provided would in all material respects provide the facilities and functions set out in the operating documents (which were not supplied when the contract was signed). In *Trustees of Ampleforth Abbey Trust v Turner and Townsend Management Ltd* a term in a project management contract which provided, in favour of the project managers, a liability cap of approximately £111,000 was held to be unreasonable because the contract imposed on them an obligation to take out professional indemnity insurance to a level of £10 million.⁶⁶³

17-110 In *Overseas Medical Supplies Ltd v Orient Transport Services Ltd*⁶⁶⁴ the defendants undertook to carry medical equipment belonging to the claimants to be exhibited at an overseas exhibition and to ensure full insurance cover for the exhibits. The Court of Appeal refused to disturb the finding of the trial judge that a term which purported to limit the liability of the defendants to £600 in the event that occurred, namely a breach by the defendants of their contractual duty to insure the goods, was unreasonable. In *Pegler Ltd v Wang (UK) Ltd*,⁶⁶⁵ terms in a contract for the supply of computer hardware and software excluding liability for indirect, special and consequential loss and imposing a two-year contractual limit for claims were held unreasonable because the supplier “had so misrepresented what [it] was selling that breaches of contract were not unlikely” and because the customer had no choice but to accept them. In *Britvic Soft Drinks Ltd v Messer UK Ltd*⁶⁶⁶ the Court of Appeal held that clauses in a contract for the sale of bulk carbon dioxide to be used by the buyer for the carbonation of drinks, which purported to exclude the terms as to satisfactory quality and fitness for purpose implied by the *Sale of Goods Act 1979*, were unreasonable, and in *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd*⁶⁶⁷ it held that a clause in a similar contract, which operated as a blanket exclusion of liability on the part of the seller for any loss or damage (with certain exceptions) sustained by the buyer, was likewise unreasonable. And in *Phoenix Interior Design Ltd v Henley Homes Plc* a clause which provided that a supplier should not be liable for breach of an express warranty of goods supplied if the total price of the goods had not been paid by the due date for payment was held not to satisfy the reasonable test in the context.⁶⁶⁸

17-111 On the other hand, in *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd*,⁶⁶⁹ where a finance company purchased a motorcar from a dealer and agreed to sell it under a conditional sale agreement to a commercial company, Dillon LJ expressed the opinion (obiter)⁶⁷⁰ that a clause in the conditional sale agreement which excluded all conditions and warranties, express or implied, as to merchantability or fitness for purpose was in the circumstances reasonable, since the director who entered into the agreement on behalf of the buyer company was a man of commercial experience and the finance company never had possession of or inspected the car.⁶⁷¹ In *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority*,⁶⁷² where a machine sub-bailed to a port authority was damaged in the course of loading, Steyn J held reasonable a clause disclaiming responsibility for damage other than that arising from the proven negligence of the authority and a clause limiting the liability of the authority to a sum of £800 per tonne.⁶⁷³ In *Sonicare International Ltd v East Anglia Freight Terminal Ltd*⁶⁷⁴ a term in the National Association of Warehouse Keepers' conditions limiting liability to £100 per tonne was similarly held reasonable in the circumstances of that case. A “no set-off” clause in the standard conditions of the British International Freight Association (freight forwarders) was upheld as reasonable in *Schenkers Ltd v Overland Shoes Ltd*,⁶⁷⁵ and “no set-off” clauses in loan and financial agreements have also been

upheld.⁶⁷⁶ A term in a freight forwarders' contract excluding all liability unless suit was brought within nine months was likewise adjudged reasonable.

⁶⁷⁷

 In *Robinson v PE Jones (Contractors) Ltd*⁶⁷⁸ the Court of Appeal held reasonable a clause in an NHBC agreement between a builder and a homeowner excluding tortious liability for a defect causing economic loss.

17-112 Clauses limiting the amount of damages recoverable have been upheld as reasonable in *Moore v Yakeley Associates Ltd*,⁶⁷⁹ where a term in the Royal Institute of British Architects' Standard Form limited the liability of an architect to £250,000, and in *Britvic Soft Drinks Ltd v Messer UK Ltd*⁶⁸⁰ where there was a term in a contract for the sale of bulk carbon dioxide limiting the liability of the seller in respect of direct physical damage to property, and losses arising directly therefrom, whether through negligence or otherwise, to £500,000.⁶⁸¹ In *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd*⁶⁸² a clause in the BIFA (freight forwarders) contract limiting the damages recoverable in respect of loss by theft of mobile telephones (valued at £2m) to approximately £25,000 was upheld as reasonable and in *Sterling Hydraulics Ltd v Dichtomatik Ltd*⁶⁸³ a clause in a contract for trailer parts which restricted the seller's liability for defects to the value of the goods was likewise held to be reasonable. In *Regus (UK) Ltd v Epcot Solutions Ltd*⁶⁸⁴ terms in a contract for the hire of serviced office accommodation were held reasonable which excluded liability for consequential loss and which limited liability to 125 per cent of fees or £50,000. By contrast, in *B A Kitchen Components Ltd v Jowat (UK) Ltd* a clause in a contract of sale of adhesive by its manufacturer to a manufacturer of kitchen doors limiting the adhesive manufacturer's liability to the price of the adhesive was held not unreasonable: relevant considerations were that the clause was common practice in the industry, there had been no inducement to accept the clause, there was no particular issue as to inequality of bargaining power, the relatively inexpensive adhesive could cause considerable loss when incorporated into complex items, and the supplier was insured against liability for the loss in question.⁶⁸⁵ Apparently crucial, however, was the fact that the seller had:

“... designed the product, knew its ingredients, sought to replace the [buyer]’s existing supplier, examined the [buyer]’s materials and processes, tested the suitability of the adhesive for those materials and processes and presented the adhesive as capable of replacing the existing supplier”⁶⁸⁶

whereas it contained a latent defect. Overall, it was held appropriate that the risk of the defect should lie on the supplier whose fault it was rather than on the buyer.⁶⁸⁷

17-113

In *Thames Tideway Properties Ltd v Serfaty & Partners*⁶⁸⁸ terms in a contract for the handling of cargoes of waste paper which provided that goods handled would be at the sole risk of the customer and that the handling company should not be liable for any damage to the goods unless such damage was proved by the customer to have been caused by the neglect or default of the company or its employees were held to be reasonable. In *British Fermentation Products Ltd v Compair Reavell Ltd*⁶⁸⁹ the court held reasonable a term in a contract for the supply of machinery which provided that the supplier undertook to repair or replace machinery which proved to be defective within 12 months of delivery if it was returned to him at his expense but stipulated that this was: “in lieu of any warranty or condition implied by law as to the quality or fitness for any particular purpose of the goods.”

- 17-114 A number of cases have emphasised the importance of upholding the agreed contract terms where experienced businessmen are involved and the parties are of equal bargaining power in terms of size and resources. In *Photo Productions Ltd v Securicor Transport Ltd*⁶⁹⁰ (a case which did not involve consideration of any provision of the 1977 Act) Lord Wilberforce stated that, in commercial matters generally, when the parties were not of unequal bargaining power, and when risks were to be borne by insurance, Parliament’s intention in the Act seemed to be one of “leaving the parties free to apportion the risks as they think fit … and respecting their decisions”.⁶⁹¹
- 17-115 This was the approach adopted in *Monarch Airlines Ltd v London Luton Airport Ltd*⁶⁹² where a term in a contract between an airline and an airport operator excluded liability for damage to an aircraft caused by any act, omission, neglect or default on the part of the latter, except if done with intent to cause damage or recklessly with knowledge that damage would probably result. It was held that this term was reasonable on the ground that it was generally accepted in the market, its meaning was clear and both parties could make insurance arrangements on the basis of the term. It was also the approach adopted in *Watford Electronics Ltd v Sanderson CFL Ltd*⁶⁹³ where the Court of Appeal, reversing the decision of the trial judge, held reasonable a term in a contract for the supply of a bespoke integrated software system which excluded the liability of either party for indirect and consequential losses, whether arising from negligence or otherwise, and limited the liability of the supplier to the amount of the contract price. Chadwick LJ said:

“Where experienced businessmen representing substantial companies of equal bargaining power negotiated an agreement, they may be taken to have had regard to the matters known to them. They should, in my view, be taken to be the best judges of the commercial fairness of the agreement which they have made; including the fairness of each of the terms of that agreement.”

As has been noted, recently the courts have emphasised the proper role of exemption clauses in commercial contracts for the allocation of risks between the contracting parties in the context of the significance of the traditional rule of construction contra proferentem, especially where the

contract is negotiated between the parties and/or where they benefit from legal advice.⁶⁹⁴ This suggests that a broad distinction may be drawn between the application of the test of reasonableness for the purposes of [s.3 of the 1977 Act](#) (where, ex hypothesi, the party seeking to avoid the effect of the exemption clause is dealing on the other party's "written standard terms of business"⁶⁹⁵ (which strongly suggests an absence of negotiation on the content of the terms⁶⁹⁶) and the controls provided by [s.2\(2\)](#) (governing the exclusion of business liability for negligence causing loss or damage other than personal injuries or death⁶⁹⁷) and [ss.6](#) and [7](#) (as regards the exclusion of liabilities for breach of implied terms in contracts of sale of goods, hire purchase and miscellaneous other contracts under which goods pass⁶⁹⁸), which are not restricted to the situation where the party seeking to avoid the effect of the exemption clause is dealing on the other party's "written standard terms of business". For example, in the case of an exemption clause controlled by [s.2\(2\)](#) (but not contained in the relevant party's written standard terms), the courts may well see the clause as a legitimate expression of the parties' contractual allocation of risk and on this ground reasonable.

Powers of the court in relation to contract terms

- 17-116 Although the [1977 Act](#) uses the words "except in so far as the term satisfies the requirement of reasonableness",⁶⁹⁹ it is the contract term as a whole that has to be reasonable and not merely some part of it.⁷⁰⁰ Thus if the term as a whole is unreasonable, a party cannot be heard to say that the part of the term on which he relies is reasonable.⁷⁰¹ However, where a single provision in a contract consists of several sub-clauses or sentences, it may be difficult to identify what is "the term" for the purposes of the Act.⁷⁰²
- 17-117 There is little doubt that the court's powers under the Act are limited to declaring the term either to be reasonable or unreasonable. The court cannot rewrite the term by (say) increasing the amount specified in a limitation of liability clause to a sum which it considered to be fair and reasonable.⁷⁰³ Nor, it seems, could the court sever words which made the term unreasonable so as to render the term reasonable or limit the application of an unreasonable clause so as to produce a reasonable result.⁷⁰⁴ On the other hand, where a contract term falling under [s.3 of the Act](#) appears to provide a very broad power of termination for a contracting party, but the court holds that this power must be subject to an implied qualification (for example, limiting the power of termination to repudiatory breaches), the assessment of the reasonableness of the term should be on the basis of its significance as so qualified.⁷⁰⁵
- 17-118 If a single term purports to exclude or restrict liability which by the Act cannot in any circumstances be excluded or restricted (for example, liability for death and personal injury resulting from negligence) and also liability which can be excluded or restricted subject to the

test of reasonableness (for example, liability in negligence for other loss or damage), the term, while being ineffective to exclude or restrict the former liability, may nevertheless be upheld as reasonable in respect of the restriction or exclusion of the latter liability.⁷⁰⁶

Appeals

- 17-119 A decision by the judge of first instance as to whether a contract term was a fair and reasonable one to be included cannot accurately be described as an exercise of discretion. Nevertheless, since it involves the balancing of various considerations, Lord Bridge has said⁷⁰⁷:

“... in my view ... when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong.”

Summary judgment

- 17-120 Under [CPR r.24\(2\)](#) a court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue where they have no real prospect of success on it and where “there is no other compelling reason why the case or issue should be disposed of at a trial”.⁷⁰⁸ It has been stated that “the issue of reasonableness is fact sensitive. Accordingly, particular caution is needed before concluding ... that the test of reasonableness is plainly satisfied” so that it is appropriate for a judge to grant summary judgment on the basis of a decision on the issue.⁷⁰⁹

Footnotes

605 [1977 Act s.2\(1\)](#) (above, para.[17-085](#)); [s.6\(1\)](#) (above, para.[17-097](#)) and [s.7\(3A\)](#) (above, para.[17-098](#)).

606 Below, para.[17-133](#).

607 [s.11\(1\)](#). Contrast [s.11\(3\)](#) (notices) below, para.[17-100](#).

608 *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep. 570, 612*. See also *Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] Q.B. 600*; *Balmoral Group Ltd v Borealis UK Ltd [2006] EWHC 1900 (Comm)*, [2006] 2 Lloyd's Rep. 629 at [420]–[421].

609 See below, para.[17-076](#).

- 610 See also *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 169; *Flamar Intercean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep. 434; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273, 277; *Pegler Ltd v Wang (UK) Ltd* [2000] B.L.R. 218 (availability of insurance may be relevant, but actual insurance position at time irrelevant); para.17-103, below.
- 611 Above, paras 17-078 and 17-085.
- 612 cf. the requirement of fairness of “consumer notices” in s.62(6) and (7), on which see Vol.II, paras 40-418—40-421.
- 613 cf. the definition of “notice” in s.14 to include “an announcement, whether or not in writing, and any other communication or pretended communication”: above, para.17-078.
- 614 *First National Bank Plc v Loxley* [1997] P.N.L.R. 211 (CA) at 215.
- 615 *First National Bank Plc v Loxley* [1997] P.N.L.R. 211 (CA) at 215–216 (in the context of refusal to strike out a claim as disclosing no reasonable cause of action). On the factors relevant to the reasonableness of non-contractual notices see *Smith v Eric S. Bush and Harris v Wyre Forest DC* [1990] 1 A.C. 831, 858–860 and 1977 Act s.11(4) (in relation to limitations of liability), on which see below para.17-103.
- ⑥616 [1990] 1 A.C. 831 esp. at 851–854; 857–859 and 873–874; see also *Harris v Wyre Forest DC* [1990] 1 A.C. 831; *Davies v Idris Parry* (1988) 20 E.G. 92, 21 E.G. 74; *Beaton v Nationwide Anglia Building Society* (1991) 31 E.G. 218. cf. *McClean v Thornhill* [2022] EWHC 457 (Ch), [2022] S.T.C. 1110 at [162]–[164] (though the HC took the view at [165]–[172] that the 1977 Act was not engaged). See also below, paras 17-101 et seq. on the guidelines and factors taken into account by the courts in relation to the reasonableness of contract terms.
- 617 Its inclusion in the 1977 Act can be explained by the fact that it had sometimes been suggested that exemption clauses cannot cover deliberate breaches of contract: see above, paras 17-019 and 17-025.
- 618 The guidelines are similar to those formerly set out in s.55(5) of the Sale of Goods Act 1893 as inserted by s.4 of the Supply of Goods (Implied Terms) Act 1973, and repealed on the enactment of the Sale of Goods Act 1979.
- 619 See Vol.II, paras 46-122 et seq.
- 620 *Flamar Intercean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep. 434, 438–439; *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600, 608. See also *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 169; *St Alban's City and District Council v International Computers Ltd* [1995] F.S.R. 686 (affirmed [1996] 4 All E.R. 481); *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273, 277; *Pegler Ltd v Wang (UK) Ltd* [2000] B.L.R. 218; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356 at [15]; *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC (TCC) 2733, [2003] 1 All E.R. (Comm) 465 at [67]; *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629; *Trustees of Ampleforth Abbey Trust v Turner and Townsend Management Ltd* [2012] EWHC 2137 (TCC), [2012] T.C.L.R. 8 at [199]; *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [1089].
- ⑥621

- See *R.W. Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164; *St Alban's City and District Council v International Computers Ltd* [1995] F.S.R. 686; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep. 498; *Thames Tideway Properties Ltd v Serfaty & Partners* [1999] 2 Lloyd's Rep. 110; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273; *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Const. L.R. 1; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 143; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 57; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251 at [159]; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [407]–[409]; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC), [2007] Build. L.R. 135; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [105]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1; *Southwark LBC v IBM UK Ltd* [2011] EWHC 549 (TCC), 135 Con. L.R. 136; *Rohlig UK Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349; *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35 at [152]–[153]; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]–[75]; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [288]; *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [91], [92]; *West v Ian Finlay & Associates* [2014] EWCA Civ 316, [2014] B.L.R. 324. In *Denholm Fishselling Ltd v Anderson* (1991) S.L.T. (Sh. Ct.) 24, it was held that there was no preponderance of bargaining power where buyers might not be able to purchase except on similar standard conditions but nevertheless had a choice of suppliers but cf. *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [116] (appeal dismissed by CA, Unreported 9 January 2018) (equal bargaining power evidenced by party threatening to go elsewhere); *Polypearl Ltd v Building Research Establishment Ltd* Unreported 28 July 2016 (Mercantile Ct) at [105]; *Halsall v Champion Consulting Ltd* [2017] EWHC 1079 (QB), [2017] P.N.L.R. 32 at [297]; *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [1097]–[1110]; *Natixis SA v Marex Financial* [2019] EWHC 2549 (Comm), [2019] 2 Lloyd's Rep. 431 at [525]–[526] (relative bargaining power of limited relevance where defendant performs a completely gratuitous service); *Huntsworth Wine Co Ltd v London City Bond Ltd* [2021] EWHC 2831 (Comm) at [221].
- 622 *R.W. Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164; *Thames Tideway Properties Ltd v Serfaty & Partners* [1999] 2 Lloyd's Rep. 110; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 at [410]; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm),

- [2010] 2 Lloyd's Rep. 92 at [105]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 1 Lloyd's Rep. 1; *Southwark LBC v IBM UK Ltd* [2011] EWHC 549 (TCC), 135 Con. L.R. 136.
- 623 See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Con. L.R. 46; *AEG (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 625; *Thames Tideway Properties Ltd v Serfaty & Partners* [1999] 2 Lloyd's Rep. 110; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273; *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Const. L.R. 1; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 at [411]; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [106]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 1 Lloyd's Rep. 1; *Rohlig UK Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349; *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35 at [152]–[153]; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]–[75]; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [288]; *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [91], [92]; *West v Ian Finlay & Associates* [2014] EWCA Civ 316, [2014] B.L.R. 324 at [67]–[68]; *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm) at [90]; *Polypearl Ltd v Building Research Establishment Ltd* Unreported 28 July 2016 (*Mercantile Ct*) at [105]; *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [1092] (emphasising that this factor concerns what was known or ought to have been known of the existence and the extent of the term); *Phoenix Interior Design Ltd v Henley Homes Plc* [2021] EWHC 1573 (QB) at [85] (uncommon clause).
- 624 See *R.W. Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602; *Stag Line Ltd v Tyne Ship Repair Group Ltd* [1984] 2 Lloyd's Rep. 211; *Rees-Hough Ltd v Redland Reinforced Plastics Ltd* (1985) 2 Con. L.R. 109; *Sargent v CIT (England) (t/a Citalia)* [1994] C.L.Y. 566; *Knight Machinery (Holdings) v Rennie* 1995 S.L.T. 166; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570; *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 at [288]; *Commercial Management (Investments) Ltd v Mitchell Design & Construct Ltd* [2016] EWHC 76 (TCC) at [86]–[88]; *Phoenix Interior Design Ltd v Henley Homes Plc* [2021] EWHC 1573 (QB) at [85].
- 625 It is uncertain whether the existence of this factor would operate against or in favour of the customer, but it is submitted that it should operate against the customer and in favour of the supplier. But see *Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 Con. L.R. 1. cf. *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Const. L.R. 1; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; *Air Transworld Ltd*

- v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [132]; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]–[75].
- 626 [1999] 2 Lloyd's Rep. 273, 276–277. See also *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [412]–[413]; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [73]–[75].
- 627 See above, para.17-101.
- 628 The statement in the text was approved by *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [76] and [80]–[87] (affirmed [2018] EWCA Civ 1371, [2018] B.L.R. 491).
- 629 The availability of insurance may be a relevant consideration in applying the test of reasonableness under s.11(1): see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 817 (below, para.17-107); *Rees-Hough Ltd v Redland Reinforced Plastics Ltd* (1985) 2 Con. L.R. 109; *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659, 666–668; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 169; *Smith v Eric Bush* [1990] 1 A.C. 831, 858; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1990] 2 Lloyd's Rep. 273, 277; *Pegler Ltd v Wang* [2000] B.L.R. 218; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251 at [159]; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm) at [415]–[416]; *Eurasian Natural Resources Corp Ltd v Dechert LLP* [2022] EWHC 1138 (Comm) at [1639]–[1642]. But the actual insurance position of the parties at the time is normally irrelevant: *Flamar Interoccean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep. 434; cf. *St Alban's City and District Council v International Computers Ltd* [1995] F.S.R. 686 (affirmed [1996] 4 All E.R. 481); *Salvage Association v Cap Financial Services* [1995] F.S.R. 654; *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC (TCC) 2733, [2003] 1 All E.R. (Comm) 465; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 1710 (TCC), [2007] Build. L.R. 13; *Trustees of Ampleforth Abbey Trust v Turner and Townsend Management Ltd* [2012] EWHC 2137 (TCC), [2012] T.C.L.R. 8 at [201]; *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] B.L.R. 491 at [64]–[67]; [76]–[83].
- 630 cf. *Smith v Eric Bush* [1990] 1 A.C. 831, 858 (cost); *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC), [2007] Build. L.R. 135.
- 631 1977 Act s.11(1) (contract terms) above, para.17-099; s.11(3) (notices), above, para.17-100.
- 632 1977 Act s.11(5). See *AEG (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 265, 278; *Shah v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB), [2013] 1 All E.R. (Comm) 72 at [223]–[224].
- 633 *Sheffield v Pickfords Ltd* [1997] C.L.C. 648.
- 634 See *Adams and Brownsword* (1988) 104 L.Q.R. 94; *Brown and Chandler* (1993) 109 L.Q.R. 41; *Adams* (1994) 57 M.L.R. 960.
- 635 This is notably the case as regards the controls provided by s.3 of the 1977 Act owing to the differences between persons “dealing as consumer” under the 1977 Act (before this was deleted by the 2015 Act) and “consumers” within the meaning of the 2015 Act: see above, paras 17-072—17-073.

- 636 Inserted by s.4 of the Supply of Goods (Implied Terms) Act 1973.
- 637 But see *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] *Q.B.* 574, 594. cf. the test of reasonableness of non-contractual notices in s.11(3) of the 1977 Act, above, para.17-100.
- 638 [1977] *1 Lloyd's Rep.* 645.
- 639 The sale was held to be a consumer sale and the exclusion therefore on this ground ineffective under s.55(4) and (7) of the Sale of Goods Act 1893 (as then so providing).
- 640 [1978] *1 Lloyd's Rep.* 602.
- 641 [1978] *Q.B.* 574; see above, para.9-084.
- 642 Bridge and Shaw LJJ (but giving no reasons).
- 643 [1983] *2 A.C.* 803; see above, para.17-026.
- 644 Sale of Goods Act 1979 s.55 (as amended) or s.11 of the Unfair Contract Terms Act 1977.
- 645 [1983] *2 A.C.* 803, 816.
- 646 But never negotiated by representative bodies.
- 647 See above, para.17-103.
- 648 On the application of the test of reasonableness to non-contractual notices see above, para.17-100.
- 649 [1982] *1 W.L.R.* 495. See also *Southwestern General Property Co Ltd v Marton* (1982) 263 *E.G.* 1090 and above, para.9-164; *Cleaver v Schyde Investments Ltd* [2011] *EWCA Civ* 929 (cl.7 of the Standard Conditions of Sale, 4th edn). cf. *Lloyd v Browning* [2013] *EWCA Civ* 1637, [2014] *1 P. & C.R.* 11 at [33]–[36], [42] (cl.8 of Standard Conditions of Sale, 4th edn, held reasonable in context); *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] *EWCA Civ* 1396, [2019] *1 W.L.R.* 637 at [68]–[76] and see above para.9-161 (“no-reliance” clauses).
- 650 For the purposes of s.3 of the Misrepresentation Act 1967 (as amended).
- 651 [1984] *2 Lloyd's Rep.* 211.
- 652 [1987] *1 W.L.R.* 659. But contrast *Thompson v Lohan (Plant Hire) Ltd* [1987] *1 W.L.R.* 649.
- 653 The contract was on a “take it or leave it” basis, and the hirer had no control over the way the driver would do the work.
- 654 (1985) *2 Con. L.R.* 109. See also *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] *EHHC* 2004 (*QB*), [2007] *1 Lloyd's Rep.* 8 (defects to be reported within one week of delivery). Contrast *Expo Fabrics (UK) Ltd v Naughty Clothing* [2003] *EWCA Civ* 1165 (textiles: 20-day time limit held reasonable).
- 655 (1990) *24 Con. L.R.* 46. But see Vol.II, para.39-086 (construction contracts).
- 656 [1992] *Q.B.* 600. See also *Fastframe Ltd v Lochinski* *Unreported 3 March 1993, CA* (noted (1994) *57 M.L.R.* 960); *Esso Petroleum Co Ltd v Milton* [1997] *1 W.L.R.* 938, 948, 954. But see the cases cited in para.17-111.
- 657 [1995] *F.S.R.* 686 (*affirmed on this issue* [1996] *4 All E.R.* 481).
- 658 [1995] *F.S.R.* 654.
- 659 (1994) *33 Con. L.R.* 1.
- 660 [1996] *C.L.C.* 265. Contrast *Allen Fabrications Ltd v ASD Ltd* [2012] *EHHC* 2213 (TCC) at [73]–[92].

- 661 [1995] *E.M.L.R.* 459. Contrast *Zockoll Group Ltd v Mercury Communications Ltd* [1998] *I.T.C.L.R.* 104.
- 662 [2010] *EWHC* 965 (TCC), [2010] 26 *Const. L.J.* 542.
- 663 [2012] *EWHC* 2137 (TCC), [2012] *T.C.L.R.* 8 at [201].
- 664 [1999] 2 *Lloyd's Rep.* 273.
- 665 [2000] *B.L.R.* 218.
- 666 [2002] *EWCA Civ* 548, [2002] 2 *Lloyd's Rep.* 368. See also *Balmoral Group Ltd v Borealis UK Ltd* [2006] *EWHC* 1900 (Comm), [2006] 2 *Lloyd's Rep.* 629 at [418].
- 667 [2002] *EWCA Civ* 549, [2002] 2 *Lloyd's Rep.* 379.
- 668 [2021] *EWHC* 1573 (QB) at [85]–[86].
- 669 [1988] 1 *W.L.R.* 321. See also *W. Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 *Tr.L.R.* 146, *QBD*.
- 670 [1988] 1 *W.L.R.* 321, 331–332. The company was held to be “dealing as consumer”: see above, paras 17-072—17-074.
- 671 See also *Abbey National Business Equipment Leasing Ltd v Dora Ife* [2003] *C.L.Y.* 723 (hire). But the fact that the finance company had not seen the goods was considered insufficient in *Sovereign Finance Ltd v Silver Crest Furniture* [1997] *C.C.L.R.* 76 (hire purchase) following *Purnell Secretarial Services v Lease Management Services* [1994] *C.C.L.R.* 127 (hire).
- 672 [1988] 2 *Lloyd's Rep.* 164.
- 673 This figure was below that of the Hague-Visby Rules (£1,210), the CMR convention (£5,195) and the Warsaw Convention (£10,050) at the relevant time.
- 674 [1997] 2 *Lloyd's Rep.* 48.
- 675 [1998] 1 *Lloyd's Rep.* 498. See also *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] *EWCA Civ* 18, [2011] 2 *All E.R. (Comm)* 1161; *SKNL (UK) Ltd v Toll Global Forwarding* [2012] *EWHC* 4252 (Comm), [2013] 2 *Lloyd's Rep.* 115 at [27]–[28]; *University of Wales v London College of Business Ltd* [2015] *EWHC* 1280 (QB) at [98].
- 676 *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd* [1997] *C.L.Y.* 906; *Skipskreditforeningen v Emperor Navigation* [1998] 1 *Lloyd's Rep.* 66; *WRM Group Ltd v Wood* [1998] *C.L.C.* 189; *United Trust Bank Ltd v Dohil* [2011] *EWHC* 3302 (QB), [2012] 2 *All E.R. (Comm)* 765 at [19].
- 677 *Granville Oil Chemicals Ltd v Davis Turner & Co Ltd* [2003] *EWCA Civ* 570, [2003] 2 *Lloyd's Rep.* 450; *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] *EWCA Civ* 18, [2011] 2 *All E.R. (Comm)* 1161. See also *Readie Construction Ltd v Geo Quarries Ltd* [2021] *EWHC* 3030 (QB) at [8].
- 678 [2011] *EWCA Civ* 9, [2011] *B.L.R.* 206. See also *McCullagh v Lane Fox and Partners Ltd* (1996) 49 *Con. L.R.* 124, [1996] 1 *E.G.L.R.* 35.
- 679 (1999) 62 *Con. L.R.* 76 (affirmed [2000] *C.L.Y.* 810).
- 680 [2002] 1 *Lloyd's Rep.* 20, see also *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] 1 *Lloyd's Rep.* 62 (both decisions by Tomlinson J). The point was not in issue in either case on appeal [2002] *EWCA Civ* 548, [2002] *EWCA Civ* 549, [2002] 2 *Lloyd's Rep.* 368, [2002] 2 *Lloyd's Rep.* 379.

- 681 cf. the special treatment of limitations (as opposed to exclusions) of the trader's liability in consumer contracts for services under [s.57 of the Consumer Rights Act 2015](#) on which see Vol.II, para.40-590.
- 682 [\[2004\] EWHC 1502 \(Comm\), \[2004\] 2 Lloyd's Rep. 251](#).
- 683 [\[2006\] EWHC 2004 \(QB\), \[2007\] 1 Lloyd's Rep. 8](#) (but not a provision that defects were to be reported within one week of delivery).
- 684 [\[2008\] EWCA Civ 361, \[2009\] 1 All E.R. \(Comm\) 586](#).
- 685 [\[2021\] NIQB 3 at \[39\]](#).
- 686 [\[2021\] NIQB 3 at \[44\] per Sir Ronald Weatherup](#).
- 687 [\[2021\] NIQB 3 at \[46\] and \[47\]](#).
- 688 [\[1999\] 2 Lloyd's Rep. 110](#).
- 689 [\(1999\) 66 Const. L.R. 1](#).
- 690 [\[1980\] A.C. 827](#).
- 691 [\[1980\] A.C. 827, 843](#) (applied in *IFE Fund SA v Goldman Sachs International* [\[2006\] EWHC 2887 \(Comm\)](#), [\[2007\] 1 Lloyd's Rep. 264 at \[52\]–\[54\]](#)).
- 692 [\[1998\] 1 Lloyd's Rep. 403](#).
- 693 [\[2001\] EWCA Civ 317, \[2001\] Build. L.R. 143 at \[63\]](#). See also *Salvage Association v CAP Financial Services* [\[1995\] F.S.R. 654, 676](#); *E.A. Grimstead & Son Ltd v McGarrigan* [\[1999\] EWCA Civ 3029 at \[29\]](#); *SAM Business Systems Ltd v Hedley & Co* [\[2002\] EWHC 2733, \[2003\] 1 All E.R. \(Comm\) 465 at \[63\]](#); *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [\[2003\] EWCA Civ 570, \[2003\] 2 Lloyd's Rep. 356 at \[31\]](#); *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [\[2004\] EWHC 1502 \(Comm\), \[2004\] 2 Lloyd's Rep. 251 at \[158\]](#); *JP Morgan Chase Bank v Springwell Navigation Corp* [\[2008\] EWHC 1793 \(Comm\) at \[604\]](#); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [\[2010\] EWHC 211 \(Comm\), \[2010\] 2 Lloyd's Rep. 92 at \[100\]](#); *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [\[2010\] EWHC 1392 \(Comm\), \[2011\] 1 Lloyd's Rep. 123 at \[321\]](#); *AXA Sun Life Services Plc v Campbell Martin Ltd* [\[2011\] EWCA Civ 133, \[2011\] 2 Lloyd's Rep. 1](#); *Southwark LBC v IBM UK Ltd* [\[2011\] EWHC 549 \(TCC\), 135 Con. L.R. 136](#); *Rohlig UK Ltd v Rock Unique Ltd* [\[2011\] EWCA Civ 18, \[2011\] 2 All E.R. \(Comm\), 1161](#); *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [\[2011\] EWHC 479 \(Comm\), \[2011\] 2 B.C.L.C. 54](#); *Astrazeneca UK Ltd v Albermarle International Corp* [\[2011\] EWHC 1574 \(Comm\), \[2012\] B.L.R. D1](#). cf. *Balmoral Group Ltd v Borealis UK Ltd* [\[2006\] EWHC 1900 \(Comm\), \[2006\] 2 Lloyd's Rep. 629 at \[404\], \[422\]–\[426\]](#); *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [\[2012\] EWHC 2198 \(Ch\), \[2012\] P.N.L.R. 35 at \[152\]–\[153\]](#); *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [\[2013\] EWHC 1191 \(TCC\), 148 Con. L.R. 127 at \[288\]](#); *Marex Financial Ltd v Creative Finance Ltd* [\[2013\] EWHC 2155 \(Comm\), \[2014\] 1 All E.R. \(Comm\) 122 at \[91\], \[92\]](#); *Natixis SA v Marex Financial* [\[2019\] EWHC 2549 \(Comm\), \[2019\] 2 Lloyd's Rep. 431 at \[522\]–\[534\]](#).
- 694 Above, para.17-012.
- 695 This is the case under the law governing contracts made on or after 1 October 2015, at which date the [Consumer Rights Act 2015](#) deleted from [s.3](#) the reference to a person “dealing as consumer”, see above, paras 17-088—17-089.
- 696 See above, paras 17-088—17-089, with the qualifications there noted.

- 697 Above, paras 17-085—17-087.
- 698 Above, paras 17-097—17-098.
- 699 1977 Act s.3(2) or, in ss.6(3), 7(3), “only in so far as”.
- 700 *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600, 608; *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2009] EWHC 1919 (TCC) at [131]. cf. *R.W. Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602; above, para.17-099.
- 701 *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600, 607. But see *Skipskreditforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66, 75; *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379 at [26]; *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3024 (TCC); *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All E.R. (Comm) 586 at [44]; *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [70] (affirmed [2018] EWCA Civ 1371, [2018] B.L.R. 491 without reference to this point).
- 702 e.g. *Trolex Products Ltd v Merrol Fire Protection Engineers Ltd* Unreported 20 November 1991, CA, (contrasting views of Staughton and Nourse LJJ as to whether a clause should be treated as one or more “terms” for the purposes of the Act); *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [71] (though expressly obiter; affirmed [2018] EWCA Civ 1371, [2018] B.L.R. 491 without reference to this point).
- 703 See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 816 (on the wording of s.55 of the Sale of Goods Act 1979 (as amended)).
- 704 *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600. But see *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3024 (TCC) at [137]; *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All E.R. (Comm) 586, where the contrary view was expressed.
- 705 *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [1107], and see above, para.17-094.
- 706 *Trolex Products Ltd v Merrol Fire Protection Engineers Ltd* Unreported 20 November 1991, CA, (under issue B(viii)), quoting with approval the view then tentatively expressed by the equivalent paragraph to para.15-114 in the 26th edition (1989) of the present work; *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC), [2017] B.L.R. 389 at [66]–[70] (affirmed [2018] EWCA Civ 1371, [2018] B.L.R. 491 without reference to this point distinguishing the issue of the “excision” of part of a term wholly ineffective under the 1977 Act and the issue considered in *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600 where it was held that a party had to show that the whole of a term was reasonable and not merely that part of a term on which it wished to rely). cf. Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.7-075 arguing that the approach in *Trolex Products Ltd* is not easy to reconcile with *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573, 598 which held unreasonable a contract term excluding liability for any pre-contractual misrepresentations on the ground that, on its proper construction, it includes a purported exclusion of liability for fraud: see *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573, 598; *South West Water Services Ltd v International Computers Ltd* [1999] B.L.R. 420 and see above, para.9-164.

- 707 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 810. See also *Edmund Murray Ltd v BSP International Foundations Ltd* (1994) 33 Con. L.R. 1; *St Alban's City and District Council v International Computers Ltd* [1996] 4 All E.R. 481, 491; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273, 276; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368 at [19]; *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379 at [20]; *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161; *Cleaver v Schyde Investments Ltd* [2011] EWCA Civ 929 at [31]; *Hodges v Aegis Defence Services (BVI) Ltd* [2014] EWCA Civ 1449 at [33]–[34]. cf. *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] Build. L.R. 143; *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep. 356 (first instance decision reversed).
- 708 CPR r.24(2)(b). For general guidance on summary judgment see *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (Lewison J), approved in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep. I.R. 301 at [24].
- 709 *Macquarie Internationale v Glencore* [2008] EWHC 1716 (Comm), [2008] 2 C.L.C. 223 at [84] per Walker J; *Fine Lady Bakeries Ltd v EDF Energy Customers Ltd (formerly EDF Energy Customers Plc)* [2020] EWHC 87 (QB) at [41]–[45], [75]–[76] (judge below wrong to grant summary judgment on exclusion clauses challenged on the ground of their reasonableness, as issues of the relative bargaining position of the parties and the availability of insurance remained to be evidenced); *Lalji v Post Office Ltd* [2003] EWCA Civ 1873 at [17] per Brooke LJ; *Williams v Nu Design & Build Ltd* [2021] EWHC 835 (TCC) at [11] (summary judgment refused as to unreasonableness of exemption clause where determinable only on facts to be decided at trial). cf. *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm), [2015] 1 C.L.C. 180 at [55], where Cook J recognised that reasonableness was a fact-sensitive issue but granted summary judgment on the issue (holding the exclusion clause reasonable at [89]–[91]) as he could “see no basis upon which any significant new factors could emerge at trial above and beyond what is currently known” and so he was therefore “in as good a position to resolve the matter now as any trial judge would be”.

(e) - Exclusions from the Scope of the 1977 Act or Some of its Provisions

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 5 - The Terms of Contract

Chapter 17 - Exemption Clauses

Section 7. - The Unfair Contract Terms Act 1977

(e) - Exclusions from the Scope of the 1977 Act or Some of its Provisions

Specific exceptions

- 17-121 Some or all of the provisions of the [1977 Act](#) do not apply in the case of contracts of certain types or as regards certain contract terms, as explained in the following paragraphs. Before the coming into force of the [2015 Act](#) on 1 October 2015, terms excluded in this way from the application of the [1977 Act](#) could nonetheless be subject to the controls applicable to *consumer* contracts provided by the [Unfair Terms in Consumer Contracts Regulations 1999](#), subject to their satisfying the conditions for the application of those controls.⁷¹⁰ On its coming into force, however, the [2015 Act](#) replaced the [1999 Regulations](#) with its own controls on unfair terms in consumer contracts and, for the most part, does not replicate the qualifications previously set out by the [1977 Act](#).⁷¹¹ More generally, the limited impact of the [Consumer Rights Act 2015](#)⁷¹² directly on the wording of these exclusions in the [1977 Act](#) will be noted.

Schedule 1⁷¹³

- 17-122 By [para.1 of Sch.1 to the Act](#) (as amended), [s.2](#) (negligence liability) and [s.3](#) (liability arising in contract)⁷¹⁴ do not extend to:

- (a)any contract of insurance (including a contract to pay an annuity on human life)⁷¹⁵;

(b)any contract so far as it relates to the creation or transfer of an interest in land,⁷¹⁶ or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise⁷¹⁷;

(c)any contract so far as it relates to the creation of a right or interest in any patent, trade mark, copyright or design right, registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest⁷¹⁸;

(d)any contract so far as it relates:

(i)to the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership); or

(ii)to its constitution or the rights or obligations of its corporators or members;

(e)any contract so far as it relates to the creation or transfer of any right or interest in securities⁷¹⁹;

(f)anything that is governed by art.6 of Regulation (EU) 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) 2006/2004.⁷²⁰

17-123 Paragraph 2 of Sch.1 of the 1977 Act lists three contracts:



(a)any contract of marine salvage or towage;

(b)any charterparty of a ship or hovercraft; and

(c)any contract for the carriage of goods by ship

⁷²¹

or hovercraft.⁷²²

These contracts are subject to the control in s.2(1) of the 1977 Act governing the exclusion or restriction of business liability for death or personal injury resulting from negligence, but otherwise s.2 (negligence liability), s.3 (liability arising in contract) and s.7 (miscellaneous contracts under which goods pass) do not apply to the terms of these contracts.⁷²³ However, under the Consumer Rights Act 2015, terms in consumer contracts of the types listed by para.2 of Sch.1 of the 1977 Act are subject to the controls on unfair contract terms which the 2015 Act itself provides.⁷²⁴

17-124 Paragraph 3 of Sch.1 deals with the situation where goods are carried by ship



or hovercraft⁷²⁶ in pursuance of a contract which either:

(a)specifies that as the means of carriage over part of the journey to be covered; or

(b)makes provision as to the means of carriage and does not exclude that means.

Where this is the case, [s.2\(2\)](#) (exclusion or restriction of liability for loss or damage resulting from negligence other than death or personal injury) and [s.3](#) (liability arising in contract) do not extend to the contract as it operates for and in relation to the carriage of goods by that means. However, under the [Consumer Rights Act 2015](#), terms in consumer contracts of the types listed by [para.3 of Sch.1 of the 1977 Act](#) are subject to the controls on unfair contract terms which the [2015 Act](#) itself provides.⁷²⁷

- 17-125 By [para.4 of Sch.1 s.2\(1\)](#) and [\(2\)](#) (negligence liability) do not extend to a contract of employment, except in favour of the employee.⁷²⁸
- 17-126 By [para.5 of Sch.1 s.2\(1\)](#) (exclusion or restriction of liability for death or personal injury resulting from negligence) does not affect the validity of any discharge and indemnity given by a person, on or in connection with an award to him of compensation for pneumoconiosis attributable to employment in the coal industry, in respect of any further claim arising from his contracting that disease.⁷²⁹

International supply contracts

- 17-127 By [s.26 of the 1977 Act](#), the limits imposed by the Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under an international supply contract (as defined in subss.(3) and (4) of that section),⁷³⁰ nor are the terms of such a contract subject to any requirement of reasonableness under [s.3](#) (liability arising in contract).⁷³¹ With the coming into force of the [2015 Act](#), the [1977 Act](#) has no longer applied to the terms of consumer contracts, which are instead subject to the controls in the [2015 Act](#) and these apply equally to international supply contracts.⁷³²

Contractual provisions authorised or required by statute or international agreement

- 17-128 By [s.29\(1\)](#), nothing in the [1977 Act](#) removes or restricts the effect of, or prevents reliance upon, any contractual provision which:

“(a)is authorised or required by the express terms or necessary implication of an enactment⁷³³; or

(b) being made with a view to compliance with an international agreement to which the United Kingdom is a party, does not operate more restrictively than is contemplated by the agreement.”⁷³⁴

This subsection covers (inter alia), provisions in statutes and international conventions relating to the carriage of goods by sea⁷³⁵ and of passengers, goods and luggage by land and air.⁷³⁶

Contractual provisions approved by a competent authority

- 17-129 By s.29(2)⁷³⁷ a contract term is to be taken for the purposes of the Act as satisfying the requirement of reasonableness if it is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority⁷³⁸ acting in the exercise of any statutory⁷³⁹ jurisdiction or function and is not a term in a contract to which the competent authority is itself a party.⁷⁴⁰

Choice of English law clauses

- 17-130 Commercial contracts are frequently made subject to English law by choice of the parties even though having no substantial connection with England and Wales.⁷⁴¹ Section 27(1) of the 1977 Act⁷⁴² provides that, where the law applicable to a contract is the law of any part of the UK⁷⁴³ only by choice of the parties (and apart from that choice would be the law of some country outside the UK) ss.2 to 7 of the Act do not operate as part of the law applicable to the contract,⁷⁴⁴ unless the term expressing this choice appears to the court, arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the 1977 Act.⁷⁴⁵ For contracts entered into before 1 October 2015 (when the relevant provisions of the Consumer Rights Act 2015 came into force⁷⁴⁶), the exclusion set out by s.27(1) does not apply where one of the parties dealt as consumer and was then habitually resident in the UK, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf⁷⁴⁷; but the 2015 Act deleted this qualification,⁷⁴⁸ reflecting the fact that the 1977 Act no longer makes special provision for persons dealing as consumer⁷⁴⁹ and that it does not apply to the terms of “consumer contracts” (which are instead governed by the 2015 Act).⁷⁵⁰ There is, however, no provision in the 2015 Act equivalent to s.27(1).⁷⁵¹

Footnotes

- 710 On the temporal application of the [2015 Act](#), see above, paras 17-071—17-074. And see generally Vol.II, paras [40-243](#) et seq.
- 711 An exception is found in relation to the invalidity of contract terms excluding or limiting a trader's liability for negligence without any assessment of its fairness: [s.66\(1\)](#) and [\(2\) of the 2015 Act](#) reflecting the [1977 Act Sch.1](#) paras [1\(a\)](#) and [\(b\)](#) and [4](#) on which see Vol.II, para. [40-423](#). On the [2015 Act](#)'s provisions on unfair contract terms and notices generally, see Vol.II, paras [40-230](#) et seq.
- 712 Above, paras 17-071—17-074. The Act applies generally to contracts made on or after 1 October 2015.
- 713 [1977 Act s.1\(2\)](#).
- 714 Before its deletion by the [Consumer Rights Act 2015](#) s.75, Sch.4 para.26, these exclusions also applied to [s.4](#) unreasonable indemnity clauses, on which see above, para. [17-071](#).
- 715 cf. [s.66\(1\)\(a\) of the 2015 Act](#): see Vol.II, para. [40-423](#).
- 716 cf. [s.66\(1\)\(b\) of the 2015 Act](#): see Vol.II, para. [40-423](#).
- 717 *Electricity Supply Nominees Ltd v IAF Group Ltd [1993] 1 W.L.R. 1059* (no set-off clause in lease); *Cheltenham and Gloucester B.S. v Ebbage [1994] C.L.Y. 3292* (mortgage); *Star Rider Ltd v Inntrepreneur Pub Co [1998] 1 E.G.L.R. 53* (no set-off clause in draft lease); *Unchained Growth III Plc v Granby Village (Manchester) Management Co Ltd [2000] 1 W.L.R. 739* (no set-off clause in lease). cf. the position under Pt 2 of the [2015 Act](#).
- 718 cf. *Salvage Association v Cap Financial Services [1995] F.S.R. 654*. cf. the position under Pt 2 of the [2015 Act](#).
- 719 *Micklefield v S.A.C. Technology Ltd [1990] 1 W.L.R. 1002*.
- 720 On IP completion day, Regulation (EU) 181/2011 became part of retained EU law under [s.3](#) of the European Union (Withdrawal) Act 2018 (on which see above, paras [1-020](#) et seq.) and was amended by the Rights of Passengers in Bus and Coach Transport (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/141) reg.4 which did not, however, amend art.6.
- ①721 See [Carriage of Goods by Sea Act 1971](#). But see also below, para. [17-124](#).
- 722 See [Hovercraft \(Civil Liability\) Order 1986 \(SI 1986/1305\)](#) made under [s.1](#) of the Hovercraft Act 1968. But see also below, para. [17-124](#).
- 723 [1977 Act Sch.1 para.2](#) was amended by the [Consumer Rights Act 2015](#) so as to reflect its deletion of protections for persons dealing as consumer and the creation of its own controls on the terms of consumer contracts provided by [ss.62](#) and [68–69: 2015 Act](#) s.75, Sch.4 para.26(4), above, paras 17-071—17-073 and, for the controls in the [2015 Act](#), see Vol.II, paras [40-223](#) et seq.
- 724 [2015 Act Pt 2](#) on which see Vol.II, paras [40-230](#) et seq.
- ①725 See [Carriage of Goods by Sea Act 1971](#).
- 726 See [Hovercraft \(Civil Liability\) Order 1986 \(SI 1986/1305\)](#) made under [s.1](#) of the Hovercraft Act 1968.
- 727 [1977 Act Sch.1 para.3](#) was amended by the [Consumer Rights Act 2015](#) so as to reflect its deletion of protections for persons dealing as consumer and the creation of its own controls on the terms of consumer contracts provided by [ss.62](#) and [68–69: 2015 Act](#) s.75; Sch.4

- para.26(5), above, paras 17-071—17-073 and, for the controls in the **2015 Act**, Vol.II, paras 40-223 et seq.
- 728 See *Johnstone v Bloomsbury H.A. [1992] Q.B. 333*. This exclusion from the **1977 Act** was not affected by the **Consumer Rights Act 2015**. cf. **2015 Act s.61(2)** which excludes contracts of employment or apprenticeship from Pt 2 of that **Act** which contains its general controls on unfair terms in consumer contracts: see Vol.II, para.40-251.
- 729 This exclusion from the **1977 Act** was not affected by the **Consumer Rights Act 2015**.
- 730 **1977 Act s.26(1)** and see Vol.II, para.46-125.
- 731 **1977 Act s.26(2)**.
- 732 As recommended by the Law Commission and Scottish Law Commission Unfair Terms in Consumer (2005), Law Com No.292, Scot Law Com No.199 Pt 7, especially para.7.6, and see Vol.II, paras 40-249 and 40-439.
- 733 Defined by the **1977 Act s.29(3)**.
- 734 cf. the exclusion from the scope of the controls on terms in consumer contracts by **s.73 of the Consumer Rights Act 2015**, on which see Vol.II, para.40-264.
- 735 **Carriage of Goods by Sea Act 1971**; **Merchant Shipping Act 1995**. See below para.17-139.
- 736 See below, paras 17-138, 17-140, and Vol.II, Chs 37 and 38. **Section 29(1)** itself was not amended by the **Consumer Rights Act 2015**, but the **2015 Act** deleted the specific temporary provision made by the **1977 Act** in respect of the Athens Convention 1974 on the carriage of passengers and their luggage by sea in **s.28 of the 1977 Act: 2015 Act s.75 Sch.4 para.25**. This amendment generally came into force as regards contracts made on or after 1 October 2015, but this position has an exception as regards “consumer transport services” where the relevant date is 1 October 2016: **SI 2015/1630 arts 3(g), 4(c) and 6(2)** (as amended by **SI 2016/484 art.2**) referring to the **2015 Act Sch.4 para.25**. On the coming into force of the **2015 Act** see above, para.17-071.
- 737 **s.29(2)** was not amended by the **Consumer Rights Act 2015**, though its scope of application changed owing to the disapplication of consumer contracts from **ss.2, 3, 6 and 7 of the 1977 Act**: above, para.17-071.
- 738 Defined in **s.29(3)**.
- 739 Defined in **s.29(3)**.
- 740 cf. *Timeload Ltd v British Telecommunications Plc [1995] E.M.L.R. 459* (“approval” by Director General of Fair Trading not in exercise of statutory function).
- 741 On the general rules governing choice of applicable law see below, paras 33-018 et seq. and esp. at paras **33-066** et seq.
- 742 As amended by **s.5** of and **Sch.4 to the Contracts (Applicable Law) Act 1990** and by the **Consumer Rights Act 2015 Sch.4 para.24**.
- 743 “United Kingdom” does not include the Channel Islands or the Isle of Man: **Interpretation Act 1978 s.5** and **Sch.1**.
- 744 On **s.27** see *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd [1997] C.L.Y. 906; Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [98]–[108]; *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd [2021] EWHC 1117 (Comm)* at [51]–[54]. cf. *Balmoral Group Ltd v Borealis UK Ltd [2006] EWHC 1900**

(*Comm*), [2006] 2 *Lloyd's Rep.* 629 at [435]. On the general significance of choice of law see below, paras 33-067 et seq.

745 1977 Act s.27(2)(a).

746 Above, para.17-071. By way of exception to this position, the changes noted in the text apply to “consumer transport services” where made on or after 1 October 2016: SI 2015/1630 arts 4(c) and 6(2) (as amended by SI 2016/484 art.2) referring to the 2015 Act Sch.4 para.24.

747 1977 Act s.27(2)(b).

748 2015 Act s.75, Sch.4 para.24.

749 Above, paras 17-072—17-073.

750 Above, para.17-071.

751 See Vol.II, para.40-439.

(f) - Anti-evasion Provisions

Chitty on Contracts 34th Ed.

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Chapter 17 - Exemption Clauses

Section 7. - The Unfair Contract Terms Act 1977

(f) - Anti-evasion Provisions

Evasion by means of secondary contract

17-131

Section 10 provides that:

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“A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another’s liability which this Part of this Act prevents that other from excluding or restricting.”⁷⁵²

The purpose of this provision has been said to be to prevent rights arising in favour of A under a contract between A and B from being affected by the terms of a secondary contract between A and C which take away or inhibit the exercise of those rights,⁷⁵³ as, for example, where a term in a contract between a manufacturer of goods and a person purports to affect the rights of that person as buyer under the Sale of Goods Act against the retailer from whom he purchases the goods.⁷⁵⁴ The scope of the section is, however, enigmatic. It employs the words “prejudicing or taking away rights” instead of the usual “excludes or restricts liability”. The extended interpretation of the latter phrase⁷⁵⁵ therefore does not apply. Also the reference to “the enforcement of another’s liability” would preclude the application of s.10 to a case where the terms of the secondary contract purported to entitle a party to another contract to render a performance substantially different from that reasonably expected of him, or to render no performance at all.⁷⁵⁶ It has been held that the section does not apply to the compromise or waiver of an existing contractual claim, e.g. to the

release by a person of rights which have accrued to them as the result of the breach of another contract to which they are a party.

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Evasion of the 1977 Act by choice of law

- 17-132 Section 27(2) further prevents evasion of the Act by choice of a foreign law the law applicable to the contract. This provision is considered in Ch.33 on the Conflict of Laws.⁷⁵⁸

Footnotes

752 Similar provision is made by the *Consumer Rights Act 2015* s.72 in relation to the application of Pt 2 of the Act, on which see Vol.II, para.40-435.

753 *Tudor Grange Holdings Ltd v Citibank N.A. [1992] Ch. 53.*

754 The buyer's rights against the seller would arise under ss.12–14 of the *Sale of Goods Act 1979*. cf. *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd [1983] 2 Lloyd's Rep. 438*, where Parker J held that s.10 had no application to a covenant not to sue a third party (see above, para.17-054) in tort.

755 s.13; see above, para.17-079. See also Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.9-083.

756 s.3(2)(b); above, paras 17-090—17-095 (there being no breach of contract).

757 *Tudor Grange Holdings Ltd v Citibank N.A. [1992] Ch. 53* (noted (1992) 55 M.L.R. 866); *Times Travel (UK) Ltd v Pakistan International Airlines Corp [2017] EWHC 1367 (Ch)* at [273]–[275] (there was no appeal on this issue: [2019] EWCA Civ 828, [2020] Ch. 98 at [27]). See also Sch.1 para.5.

758 See below, para.33-009. cf. *Kingspan Environmental Ltd v Borealis A/S [2012] EWHC 1147 (Comm)*.

(a) - Liability for Misrepresentation

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Section 8. - Other Legislative Controls on Exemption Clauses

(a) - Liability for Misrepresentation

Misrepresentation Act 1967 s.3

17-133 Section 3 of the Misrepresentation Act 1967, as substituted by s.8 of the Unfair Contract Terms Act 1977, provides that, if a contract contains a term which would exclude or restrict:

(a)any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b)any remedy available to another party to the contract by reason of such a misrepresentation; that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in s.11(1) of the 1977 Act⁷⁵⁹; and it is for those claiming that the term satisfies the requirement of reasonableness to show that it does. The implications of this section have been discussed in a previous chapter⁷⁶⁰ and it is clear that it applies to a term which excludes or restricts any liability or remedy in respect of misrepresentations⁷⁶¹ where the latter have not become terms of the contract. It seems equally clear that it does not apply to a term which excludes or restricts any liability or remedy in respect of a breach of the terms of a contract, whether statements or promises, if those terms were never communicated as representations before the contract was made. It is, however, probable that s.3 will apply so as to inhibit the exclusion or restriction of the right to rescind a contract where a misrepresentation, first made independently, is subsequently incorporated as a contractual term.⁷⁶² But, in so far as a term excludes or restricts any liability or remedy based on an alleged breach of contract, its validity has to be tested by reference to the different scheme in the 1977 Act.⁷⁶³

17-134

Since the coming into force of the relevant provisions of the **Consumer Rights Act 2015** on 1 October 2015,⁷⁶⁴ s.3 of the **Misrepresentation Act 1967** has not applied to a term in a consumer contract within the meaning of Pt 2 of the 2015 Act.⁷⁶⁵ Instead, such a term is subject to the general test of unfairness and the requirement for transparency provided by the 2015 Act.⁷⁶⁶

Footnotes

759 Above, paras 17-099 et seq.

760 See above, para.9-157.

761 The ambit of liability for misrepresentation under s.2 of the 1967 Act was altered by the **Consumer Protection (Amendment) Regulations 2014** (SI 2014/870) reg.5 (in force 1 October 2014) so as not to entitle a person to be paid damages for a misrepresentation under the section if the person claiming has a right to redress under Pt 4A of the **Consumer Protection from Unfair Trading Regulations 2008** (SI 2008/1277 as inserted by the 2014 Regulations) in respect of the conduct constituting the misrepresentation: see above, para.9-002 and Vol.II, paras 40-204 et seq. esp. at 40-216—40-221. The 2008 Regulations as amended do not make explicit provision as to the exclusion of the consumer's rights to redress which they provide, but a term purporting to do so falls under the controls in the Consumer Rights Act 2015 s.62: see Vol.II, para.40-222.

762 See s.1(a) of the 1967 Act (and s.2(2)).

763 *Skipskreditforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66, 75.*

764 Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) arts 3 and 6(1) and (4); the relevant provisions of the 2015 Act are ss.61–76 and Sch.4 para.1.

765 1967 Act s.3(2) as inserted by 2015 Act s.75, Sch.4, para.1.

766 2015 Act ss.62, 68–69 on which see Vol.II, paras 40-230 et seq.

(b) - Consumer Protection Legislation

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Section 8. - Other Legislative Controls on Exemption Clauses

(b) - Consumer Protection Legislation

Consumer protection legislation on unfair contract terms

- 17-135 As has been seen,⁷⁶⁷ since the enactment of the [Consumer Rights Act 2015](#),⁷⁶⁸ the [Unfair Contract Terms Act 1977](#) has not protected “consumers” from unfair contract terms and instead Pt 2 of the 2015 Act has itself provided a general scheme for the control of unfair terms in consumer contracts, and Pt 1 of the 2015 Act has provided that liability for breach of a series of statutory terms treated as included by that Act in “goods contracts”, “digital content contracts” and “services contracts” are generally not capable of exclusion or restriction by the contract. This law is discussed in Vol.II, Ch.40.⁷⁶⁹

Mandatory character of much consumer protection legislation

- 17-136 Many legislative provisions setting out rights or other protections for consumers are expressly mandatory in the sense that they may not be excluded or limited by the agreement of the contracting parties, much of this legislation reflecting the EU directives which it implemented and which so required.⁷⁷⁰ As a result, the liability of a person by virtue of [Pt I of the Consumer Protection Act 1987](#) to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant or relative of such a person, cannot be limited by any contract term, by any notice or by any other provision.⁷⁷¹ The [Package Travel and Linked Travel Arrangements Regulations 2018](#)⁷⁷² render any waiver or contractual arrangement purporting to restrict their application not

binding on the traveller,⁷⁷³ and similar provision is made for the rights of consumers in relation to timeshare and other “holiday accommodation contracts” provided by the [Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010](#).⁷⁷⁴ The [Electronic Commerce \(EC Directive\) Regulations 2002](#) impose a series of information duties on providers of information society services in relation to contracts concluded by electronic means for the benefit of all “recipients” of the service, and these may be excluded by agreement only where the parties are not consumers.⁷⁷⁵ While the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) do not expressly make the duties of information and rights of cancellation in off-premises contracts, distance contracts and other protections for consumers which they create incapable of exclusion by the agreement, the EU directive which they implemented expressly so provides and this argues for their mandatory character by way of the principle of conforming interpretation.⁷⁷⁶ Finally, on IP completion day, the European Denied Boarding Regulation (which provides rights to travellers in respect of certain flights which have been delayed or cancelled) was incorporated into UK law as part of retained EU law⁷⁷⁷ (as amended)⁷⁷⁸ and it provides that:

“... obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage.”⁷⁷⁹

Consumer Credit Act 1974

- 17-137 The [Consumer Credit Act 1974](#) generally forbids “contracting-out” of its provisions and renders a contract term void if, and to the extent that, it is inconsistent with a provision for the protection of the debtor or hirer or their relative or any surety contained in this Act or in any regulation made under this Act.⁷⁸⁰ Moreover, under [s.140A of the Consumer Credit Act 1974](#)⁷⁸¹ the court may make an order under [s.140B](#) (which confers on the court wide powers to give directions to the parties and to set aside or to alter contractual terms) in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is “unfair”.⁷⁸²

Footnotes

767 Above, paras 17-071—17-073.

768 On the coming into force of the [2015 Act](#), see above, para.17-071.

769 On the general scheme of control in [Pt 2 of the 2015 Act](#) see Vol.II, paras 40-230 et seq. On the treatment of the exclusion or restriction of liability arising under [Pt 1 of the 2015 Act](#) relating to the exclusion of liability are found in [ss.31, 47 and 57](#), on which see Vol.II, paras

- 40-535 (goods contracts), 40-568 (digital content contracts) and 40-590 (services contracts) (which each explain the exceptions to this general rule rendering exemptions or limitations of liability not binding on the consumer).
- 770 On IP completion day (as explained above, paras 1-016 et seq.), the UK legislation which implemented the European directives mentioned in this paragraph became part of “retained EU law” by operation of the European Union (Withdrawal) Act 2018 s.2 subject to amendments which are noted at the particular paragraphs to which the reader is cross-referred in the following notes.
- 771 Consumer Protection Act 1987 s.7.
- 772 SI 2018/634 which implemented Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 art.23 of which provides for the “imperative nature” of its provisions: see further Vol.II, paras 40-149—40-156. The 2018 Regulations replaced the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) reg.15(5) of which provided similarly as to their mandatory nature: see Vol.II, paras 40-144—40-148.
- 773 SI 2018/634 reg.30 on which see generally Vol.II, paras 40-144 et seq.
- 774 SI 2010/2960 reg.19 which implemented Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts art.12 and see Vol.II, para.40-162.
- 775 Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) reg.9(1) and (2) which reflect Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”) [2000] O.J. L178/17 arts 10 and 11 on which see Vol.II, para.40-165.
- 776 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134); Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 art.25 on which see Vol.II, paras 40-064 et seq. esp. at 40-069. cf. Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.16(1) on which see Vol.II, para.40-143. See also the position as regards the rights to redress created for consumers in respect of certain categories of unfair commercial practices by amendments in 2014 to the Consumer Protection from Unfair Trading Regulations (SI 2008/1277) as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870), where a term seeking to exclude these rights is subject to the general regime controlling terms in consumer contracts provided by Pt 2 of the Consumer Rights Act 2015: see Vol.II, para.40-222.
- 777 European Union (Withdrawal) Act 2018 s.3 (as amended by the EU (WA) Act 2020 s.25(2)) on which see above, paras 1-020 et seq. esp. at para.1-024. On IP completion day, see above, para.1-021.
- 778 Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, etc (retained EU law) (amended by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019 (SI 2019/278) reg.8) (the reference in reg.1(3) to the 2019 Regulations coming into force on exit day must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4)

- and Sch.5 para.1). On the Denied Boarding Regulation generally, see Vol.II, paras 37-054—37-072.
- 779 Regulation (EC) 261/2004 (retained EU law) art.15(1).
- 780 Consumer Credit Act 1974 s.173.
- 781 Inserted by ss.19–22 of the Consumer Credit Act 2006.
- 782 See Vol.II, paras 41-213—41-233. cf. *Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475* at [276]–[290].

(c) - Legislation Governing Contracts of Carriage

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Carriage by road or rail ⁷⁸³

- 17-138 The [Public Passenger Vehicles Act 1981](#) invalidates a provision contained in a contract for the conveyance of a passenger in a public service vehicle which purports to restrict the liability of a person in respect of a claim which may be made against him in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of such liability.⁷⁸⁴ The [Carriage of Goods by Road Act 1965](#)⁷⁸⁵ regulates the international carriage of goods, by road. The [Railway \(Convention on International Carriage by Rail\) Regulations 2005](#)⁷⁸⁶ give the force of law to the Convention concerning International Carriage by Rail (COTIF) as modified by the Vilnius Protocol, which regulates the international carriage of passengers and their luggage,⁷⁸⁷ and the international carriage of goods,⁷⁸⁸ by rail. Each of these “international” instruments contains provisions prohibiting contracting out.

Carriage by sea

- 17-139 The [Carriage of Goods by Sea Act 1971](#),⁷⁸⁹ which gives effect to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels in 1924 (the Hague Rules), as amended by the Protocol signed at Brussels in 1968 (the Hague-Visby Rules) imposes certain duties and obligations upon a carrier who enters into a contract for the carriage of

goods by sea to which the Act applies, and invalidates any clause which relieves the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in those duties or obligations, or which lessens such liability otherwise than as provided in the Act.⁷⁹⁰ The Athens Convention of 1974, and the 1976 Protocol thereto, regulates the carriage of passengers and their luggage by sea⁷⁹¹ and in effect invalidates any contractual provision which seeks to reduce the liability of the carrier contrary to the terms of the Convention.⁷⁹²

Carriage by air⁷⁹³

17-140 The Warsaw Convention (as supplemented and amended) regulates the liability of a carrier by air in respect of the international carriage of goods, passengers and passengers' luggage. It is given statutory force by the [Carriage by Air Act 1961](#), which was amended by the [Carriage by Air \(Supplementary Provisions\) Act 1962](#) and by the [Carriage by Air and Road Act 1979](#),⁷⁹⁴

U and applies with modifications to non-international carriage by the [Carriage by Air Acts \(Application of Provisions\) Order 2004](#).⁷⁹⁵

U The Convention imposes certain liabilities on the carrier which cannot be excluded or limited by special contract; but, under its provisions, the carrier is *prima facie* relieved from liability in excess of certain stated pecuniary limits.

Footnotes

783 See below, Vol.II, Ch.38.

784 s.29 and see Vol.II, para.38-063. Since 19 August 2013, s.29 has not applied to anything governed by Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) 2006/2004 [2011] O.J. L55/1, art.6 of which provides that the obligations which it contains cannot be excluded by the contract of transport. On IP completion day (on which see above, paras 1-016 et seq.), Regulation (EU) 181/2011 has formed part of "retained EU law" under the [European Union \(Withdrawal\) Act 2018](#) s.3 subject to amendment (though not as regards art.6) by the [Rights of Passengers in Bus and Coach Transport \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (SI 2019/141) reg.4 (reg.1(2)'s reference to the 2019 Regulations coming into force on "exit day" must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), Sch.5 para.1). See also s.149 of the Road Traffic Act 1988 (agreements between

user of motor vehicle and passenger, as amended by SI 2019/1047 reg.2, Sch.1 Pt 1 para.12 (in force 1 November 2019)) and, as regards passengers by rail, EC Regulation 1371/2007 [2007] O.J. L315/3 art.6 and the *Rail Passengers' Rights and Obligations Regulations 2010* (SI 2010/1504). On IP completion day, Regulation (EC) 1371/2007 became part of “retained EU law” under the 2018 Act s.3 and was amended by the *Rail Passengers' Rights and Obligations (Amendment) (EU Exit) Regulations 2018* (SI 2018/1165): (reg.1(2)’s reference to the 2018 Regulations coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), Sch.5 para.1), which also amended the 2010 Regulations.

785 Implementing the CMR (as amended by the *Carriage by Air and Road Act 1979*: see SI 1980/1966). See Vol.II, para.38-118.

786 SI 2005/2092.

787 App.A (CIV).

788 App.B (CIM).

789 See the *Carriage of Goods by Sea Act 1971 (Commencement) Order 1977* (SI 1977/981).

790 art.III r.8; *The Hollandia [1983] 1 A.C. 565*. But see *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc [2004] UKHL 49, [2005] 1 W.L.R. 1363* (transfer of responsibility); *Yuzhny Zavod Metall Profil LLC v Eems Beheerder BV [2013] 2 Lloyd's Rep.487*.

791 See Merchant Shipping Act 1995 s.183 and Sch.6; SI 1987/670, SI 1998/2917. See *R. G. Mayor v P. & O. Ferries Ltd [1990] 2 Lloyd's Rep. 144*. See also the 2002 Protocol to the Convention and SIs 2014/1355, 2014/1438, and 2014/1361.

792 Athens Convention art.18.

793 See below, Vol.II, Ch.37.

⑦94 See also SI 1998/1751, SI 1999/1312, SI 2002/263, SI 2004/1418, SI 2004/1899, SI 2004/1974, SI 2005/975, SI 2006/3303, SI 2009/3018; European Parliament and Council Regulations 889/2002, 261/2004, 785/2004. On IP completion day (on which see above, paras 1-1016 et seq.), this body of law was amended by the *Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019* (SI 2019/278) (reg.1’s reference to most of the provisions of the 2019 Regulations coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), Sch.5 para.1). See Vol.II, paras 37-023—37-094.

⑦95 SI 2004/1899 as amended by SI 2019/278 Pt 3 reg.4. See also Council Regulation (EC) 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (Retained EU legislation) on which see Vol.II, para.37-019.

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Insurance

- 17-141 The [Road Traffic Act 1988 s.148](#), invalidates certain limitations on cover and conditions precedent to liability in connection with claims in respect of third-party risks under a compulsory policy of insurance, although these do not affect the position between the insurance company and the insured himself.⁷⁹⁶ Moreover, the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) and the [Insurance Act 2015](#) make important new provision governing the assured's duties in respect of disclosure and representation and provide widely against the parties "contracting-out" from the scheme of rules so established.⁷⁹⁷

Defective premises

- 17-142 The [Defective Premises Act 1972 s.6\(3\)](#), provides that any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of the Act,⁷⁹⁸ or any liability arising by virtue of any such provision, is to be void.

Employment and services

- 17-143

The [Law Reform \(Personal Injuries\) Act 1948](#) s.1(3), invalidates any provision contained in a contract of employment or apprenticeship, or in any agreement collateral thereto, in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed or apprenticed by the negligence of persons in common employment with him. Restrictions on contracting out are also found in the [Employment Rights Act 1996](#)⁷⁹⁹ and in the [Equality Act 2010](#).⁸⁰⁰

Solicitors

17-144 The [Solicitors Act 1974](#) regulates the enforcement of agreements between solicitor and client as to remuneration for non-contentious

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U and contentious

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U business, and provides for the determination by the court of the fairness and reasonableness of any such agreement.

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U A provision in an agreement with respect to contentious business that a solicitor shall not be liable for his negligence or that of any employee of his, is void if the client is a natural person who, in entering that agreement, is acting for purposes which are outside his trade, business or profession, and a provision in a contentious business agreement that the solicitor shall be relieved from any responsibility to which he would otherwise be subject as a solicitor, is declared to be void by the Act.

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Finance

17-145 Any provision of the trust deed of an authorised unit trust scheme is void in so far as it would have the effect of exempting the manager or trustee from liability for any failure to exercise due care and diligence in a discharge of his functions in respect of the scheme.⁸⁰⁵ Regulation 137 of

the Payment Services Regulations 2017,⁸⁰⁶ which implemented in the UK the Second Payment Services Directive,⁸⁰⁷ provides that:

“... a payment service provider may not agree with a payment service user that it will not comply with any provision of these Regulations unless—

- (a)such agreement is permitted by these Regulations, or
- (b)such agreement provides for terms which are more favourable to the payment service user than the relevant provisions of these Regulations.”

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Commodities

17-146 The warranty of fitness of animal feeding stuffs implied by the Agriculture Act 1970 has effect notwithstanding any contract or notice to the contrary.⁸⁰⁹ Likewise the warranties arising from the statutory statements which are required to be given by that Act in relation to fertilisers and feeding stuffs,⁸¹⁰ and by regulations made under the Plant Varieties and Seeds Act 1964 in relation to seeds,⁸¹¹ cannot be excluded.

Interest on commercial debts

17-147 By s.8 of the Late Payment of Commercial Debts (Interest) Act 1998⁸¹² any contract terms are void to the extent that they purport to exclude the right to statutory interest conferred by the Act in relation to a debt for goods or services supplied, unless there is a substantial contractual remedy for late payment of the debt.⁸¹³ The parties may not agree to vary the right to statutory interest in relation to the debt unless either the right to statutory interest as varied or the overall remedy for late payment of the debt is a substantial remedy.⁸¹⁴ Further, any contract terms are void to the extent that they purport to confer a contractual right to interest that is not a substantial remedy for late payment of the debt, or vary the right to statutory interest so as to provide for a right to statutory interest that is not a substantial remedy for late payment of the debt, unless the overall remedy for late payment of the debt is a substantial remedy.⁸¹⁵ The meaning of “substantial remedy” is set out in s.9 of the Act. It requires (inter alia) an assessment whether or not it would be fair and reasonable to allow the remedy to be relied on to oust (or as the case may be) to vary the right

to statutory interest that would otherwise apply in relation to the debt.⁸¹⁶ An injunction may in certain circumstances be applied for to restrain the use of an offending term.⁸¹⁷

Footnotes

796 See Vol.II, para.44-124. See also s.149. Sections 148 and 149 were amended by SI 2019/1047 reg.1, Sch.I paras 11 and 12 (in force 1 November 2019).

797 See Vol.II, paras 44-046, 44-060.

798 See Vol.II, para.39-083.

799 s.203. See Vol.II, Ch.42. See also Trade Union and Labour Relations (Consolidation) Act 1992 s.288; National Minimum Wage Act 1998 s.49; Employment Relations Act 1999 s.14.

800 ss.142–146.

801 Solicitors Act 1974 ss.56–58.

802 Solicitors Act 1974 ss.59–66.

803 Solicitors Act 1974 ss.57(5), 61(2) (as amended). The Act explains what is meant by “non-contentious business agreement” and “contentious business agreement” for this purpose: ss.57 and 59 respectively. Where the agreement is a “consumer contract” within the meaning of the Consumer Rights Act 2015 Pt 2, its terms will in principle also be subject to the requirement of fairness set out in s.62 of that Act, see *Higgins & Co Lawyers Ltd v Evans [2019] EWHC 2809 (QB), [2020] 1 W.L.R. 2809* at [101], on which see Vol.II, para.40-411 (note).

804 Solicitors Act 1974 s.60(5), (6), inserted by the Legal Services Act 2007 Sch.16 para.56(c).

805 Financial Services and Markets Act 2000 s.253. “Authorised unit trust scheme” is defined in s.237.

806 SI 2017/752. The 2017 Regulations revoked with general effect from 13 January 2018 the substantive provisions of the earlier Payment Services Regulations 2009 (SI 2009/209) implementing the (first) Payment Services Directive, Directive 2007/64/EC of the European Parliament and the Council on payment services in the internal market [2007] O.J. L3319/1. On IP completion day (on which see above, paras 1-016 et seq.), the Payment Services Regulations 2017 became part of “retained EU law” by operation of the European Union (Withdrawal) Act 2018 s.2 and were amended by the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1201) reg.3 and Sch.2 paras 23–73 which did not, however, amend reg.137 of the 2017 Regulations. See further Vol.II, paras 36-225 and 41-514.

807 (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] O.J. L337/35 (“Second Payment Services Directive”).

- ⑧08 Provisions in the [2017 Regulations](#) allowing the exclusion of certain of their requirements include regs 40(7), 42(2)(b) and (c), 63(5) and 65(2) (none of which were amended by SI 2018/1201).
- 809 Agriculture Act 1970 s.72(3).
- 810 Agriculture Act 1970 s.68(6).
- 811 Plant Varieties and Seeds Act 1964 ss.16, 17.
- 812 As considerably amended: see below, paras [29-291](#) et seq.
- 813 Late Payment of Commercial Debts (Interest) Act 1998 (“1998 Act”) s.8(1).
- 814 1998 Act s.8(3).
- 815 1998 Act s.8(4).
- 816 1998 Act s.9(1)(b).
- 817 Late Payment of Commercial Debts Regulations 2002 (SI 2002/1674) (as amended by SI 2018/117).

Section 9. - Limitations of Liability and Contributory Negligence

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Reduction for contributory negligence before the application of a limitation of liability

- 17-148 Where a person is liable in damages (whether in tort or for breach of contract), but that liability is subject both to a reduction on the ground of the claimant's contributory negligence under the Law Reform (Contributory Negligence) Act 1945⁸¹⁸ and to an (effective) cap on liability under a limitation clause or notice of limitation of liability, the question arises as to the proper relationship between these two qualifications. In *Natixis SA v Marex Financial Ltd*,⁸¹⁹

U a bank (A) had contracted to buy nickel from a commodities broker (B), which also undertook to provide warehouse receipts, the nickel being stored at C's warehouse. B received purportedly genuine warehouse receipts from D and delivered them to A who therefore paid B the purchase price. At B's request, C's employee verified two sets of the warehouse receipts as genuine, but it later appeared that they were all forged. The High Court held B liable to A for the losses caused by its breach of contract in respect of the supply of the forged receipts,⁸²⁰ and also held C liable to B in tort for negligence based on an assumption of responsibility by its employee by verifying the two sets of receipts (14 in total).⁸²¹ However, it further held that C's liability to B should be reduced by 25 per cent on the ground of B's contributory negligence in failing to send some of the warehouse receipts to C for verification⁸²² and also that C's liability was subject to an effective limitation of liability of €100,000 per warehouse receipt examined and authenticated (the "cap").⁸²³ The High Court later considered how these two qualifications on C's liability should relate to each other.⁸²⁴ In this respect, s.1(1) of the 1945 Act provides:

Section 1:(1)

“(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage:

Provided that—

...

(b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.”

C argued that B’s “damage” for the purposes of the opening phrase of [s.1\(1\)](#) (“Where any person suffers damage...”) is B’s loss as limited by the cap and therefore only after that reduction should the amount be reduced for B’s contributory negligence, and this would lead to damages of €1.4m (the loss caused by each warehouse receipt capped at €100,000) and then reduced by 25 per cent so as to give an overall figure of €1,050,000.⁸²⁵ However, the High Court rejected this argument, holding that the proper approach to [s.1\(1\)](#) was first to identify a claimant’s basic loss and then reduce this to the extent appropriate given the claimant’s contributory negligence⁸²⁶; and only after this should the cap be applied.⁸²⁷ C’s argument would, indeed, give no application to the provision governing limitations of liability in [s.1\(1\)\(b\)](#).⁸²⁸ Given that B’s losses even after they were reduced by 25 per cent exceeded the caps for each receipt, this led to an award of €1.4m.⁸²⁹

Footnotes

818 As explained below, para.[29-094](#), damages for breach of contract (as opposed to in tort) can be reduced under the [1945 Act](#) only where the defendant’s liability in contract is for breach of a contractual obligation of reasonable care concurrent with a breach of a duty to take reasonable care in tort (referred to there as a “category 3” case): *Forsikringsaktieselskapet Vesta v Butcher [1989] A.C. 852*.

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- [2019] EWHC 2549 (Comm), [2019] 2 Lloyd's Rep. 431 (main issues); [2019] EWHC 3163 (Comm), [2020] 2 All E.R. (Comm) 807 (the relationship between the two qualifications on liability and costs).
- 820 [2019] EWHC 2549 (Comm) at [159]–[161] (which detail other breaches).
- 821 [2019] EWHC 2549 (Comm) at [333], [341] and [440].
- 822 [2019] EWHC 2549 (Comm) at [468]–469] and [472].
- 823 [2019] EWHC 2549 (Comm) at [532]–[533].
- 824 [2019] EWHC 3163 (Comm) at [17] et seq.
- 825 [2019] EWHC 3163 (Comm) at [20] and [21].
- 826 Relying, in particular, on *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190 at 210, 213–215.
- 827 [2019] EWHC 3163 (Comm) at [40]–[42].
- 828 [2019] EWHC 3163 (Comm) at [34]–[35].
- 829 [2019] EWHC 3163 (Comm) at [42]. This figure was subject to a minor adjustment in the case of a particular warehouse receipt.

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Chapter 18 - Illegality and Public Policy

Section 1. - Introduction

D.D. Prentice

Underlying principles

18-001

U The enforcement of contractual claims is in certain circumstances against public policy, for reasons that are often described broadly as involving “illegality”. The same is true of other claims arising out of contractual situations, such as claims for the restitution of benefits that were transferred under contracts that are unenforceable for reasons of public policy, and arising from torts. Within the heading of “illegality” there is a distinction between cases in which the claims will not be enforced on the grounds of illegality in a narrow sense of being contrary to public policy because the contract somehow involves the commission of a legal wrong,¹ and cases in which the claim may not be enforced for reasons of public policy even though no otherwise unlawful act is involved. Further, for reasons that may also be described broadly as public policy, some contractual claims are rendered unenforceable by statute (“statutory illegality”). The effects of public policy differ considerably depending upon the circumstances; thus, in some instances, one or both parties are prevented from suing upon some particular undertaking contained in the contract (or even, where the doctrine of severance² can be applied, upon part of some particular undertaking), whereas in other cases one or both parties are prevented from suing upon the contract at all. The same is true of contracts rendered unenforceable by statute. The principle of illegality also applies to claims in restitution and tort. In dealing with what is undoubtedly the leading case on illegality, *Patel v Mirza*,³ the Supreme Court considered that:

“... it was intended to provide guidance as to the proper approach to the common law of illegality across the civil law more generally.”



Complexity and contradiction

- 18-002 English law has a long standing “repugnance to claims which are founded on the claimant’s own illegal or immoral acts”.⁵ As was stated by Lord Mansfield CJ in *Holman v Johnson*,⁶ “[No] court will lend its aid to a man who founds his course of action on an immoral or illegal act”. As Lord Sumption in *Les Laboratoires Servier v Apotex Inc*⁷ stated:

“The question what is involved ‘in founding on an immoral or illegal act’ has given rise to a large body of inconsistent authority which rarely rises to the level of general principle. The main reason for this disordered state of the case law is the distaste of the courts for the consequences of applying their own rules ...”⁸

The diversity of the fields with which public policy is concerned, and of the circumstances in which a contractual claim may be affected by it, combine to make this branch of the law of contract inevitably complex. Indeed, in relation to illegality in the narrower sense identified above, the courts have conceded that: “[I]llegality and the law of contract is notoriously knotty territory”⁹ and that it is “one of the least satisfactory parts of the laws of contract”.¹⁰ Speaking extra-judicially, Lord Sumption stated that:

“... the law of illegality is an area in which there are few propositions, however contradictory or counter-intuitive, that cannot be supported by respectable authorities of the highest levels.”¹¹

In a similar vein Lord Mance has characterised the law on illegality as “an unhappy mix of rigid rules and value judgments, and its application has unpredictable and haphazard consequences”.¹² He considered that “by the end of the twentieth century it had become encrusted with an incoherent mass of inconsistent authority”.¹³ In *Jetivia SA v Bilta (UK) Ltd* (reported sub nom. *Bilta (UK) Ltd v Nazir (No.2)*)¹⁴ Lord Neuberger considered that:

“... the defence of illegality needs to be addressed by this court (certainly with a panel of seven and conceivably with a panel of nine) as soon as appropriately possible ...”

Effects of illegality

- 18-003 Much confusion would have been avoided if contracts were no longer themselves categorised as being voidable for illegality, or on grounds of public policy, in the same kind of way as contracts are categorised as being void on other grounds, because the effect of illegality on the contract may vary according to the circumstances. Once the court finds that the contract or claim is illegal and unenforceable, a second question should have been posed which would also have led to greater clarity: do the facts justify the granting of some consequential relief (other than enforcement of the contract) to either of the parties to the contract?¹⁵ As will be seen, the courts, although not posing this question directly, have been willing to grant consequential relief to the parties to illegal contracts.¹⁶

Clarification by the Supreme Court

- 18-004 The issue of the complexity arising from “inconsistent authority” has been addressed by a nine-judge panel of the Supreme Court in *Patel v Mirza*,¹⁷ which provides structured and clear principles in providing a solution to this issue. In dealing with the issue of illegality the court considered that it was necessary to address a “trio of necessary considerations that can be found in the case law”.¹⁸ The trio of considerations required the court to consider:

“(a) ... the underlying purpose of the prohibition that has been transgressed, (b) ... any other public policies the effectiveness of which would be affected by the denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality.”¹⁹

Although their Lordships diverged in their approach, the decision does clarify aspects of this difficult issue, particularly as regards remedies; and in addressing the question of the effect of illegality in the narrow sense on contractual claims, the court formulated what it referred to as a “factors-based approach” under which the questions that the court should now pose are very close, if not identical, to those suggested above.

The scope of the factors-based approach

- 18-005

In *Patel v Mirza*²⁰ the court was addressing illegality in the narrower sense identified above, viz contracts that somehow involve a legal wrong. The decision seems not to affect the enforceability of contracts that are contrary to public policy for other reasons, though it does affect the question of restitutive remedies arising out of contracts that are unenforceable for this reason.²¹ Nor does it affect directly the question of statutory illegality. Lord Toulson, speaking for the majority, said that the court “must abide by the terms of any statute”,²² but the court in construing the statute could:

“... have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in the denial of the relief claimed.”²³

Thus the factors will be used as interpretative aids.

The principle of illegality as applied to contracts

18-006 Illegality can either be “statutory” or “common law” illegality. A recent illustration of the difference is the case of *Okedina v Chikale*.²⁴ The court pointed out that statutory illegality arises where statute, expressly or by implication, renders the contract or a term of the contract unenforceable by one or other party.²⁵

“The underlying principle is straightforward: if the legislation itself has provided that the contract is unenforceable in full and in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute.”²⁶

Analysing the cases on statutory illegality as applied to contracts involves a degree of judicial discretion making the outcome unpredictable:

“... [I]t does not necessarily follow from the fact that one party is prohibited from entering into a contract, and/or made subject to a penalty if they do so, that Parliament intended to ‘prohibit’ the contract itself in the relevant sense of rendering it unenforceable by *either party*. Whether that was the intention must depend on a consideration of all relevant factors including matters of public policy.”²⁷

Common law illegality arises “where the formation, purpose or performance of the contract is illegal or contrary to public policy” and where it is appropriate to deny enforcement of the contract.²⁸ In *Okedina* the claimant brought various claims of a contractual nature under a contract

of employment. At the relevant time the claimant's visa had expired and she could no longer be legally employed because of a statutory prohibition rendering such employment illegal. The court gave a strongly purposive construction to the statutory provisions which the court referred to as the "blunt weapon of statutory illegality".²⁹ The court considered that the relevant statutory prohibitions did not require the court to give it a construction that would have "the effect of depriving the innocent employee of all contractual remedies against the employer ...".³⁰ As to common law illegality, the court considered that "[i]n his judgment in *Patel v Mirza* Lord Toulson was attempting to identify the broad principles underlying the illegality rule" and that there was no requirement for the court to consider "how the rule has been applied in the previous case law except where such an application is inconsistent with those principles".³¹ In other words, the application of the illegality doctrine is a purposive, principled doctrine. The defence of common law illegality was rejected because

"... the touchstone for the availability of [this defence is] that the employee has knowingly participated in the illegal performance of the contract ... so called 'knowledge plus participation'."³²

and the claimant did not know that her visa had not been extended.³³

Plan of chapter

- 18-007 It is proposed in this chapter to deal first with the nature of the illegality defence preventing a party from enforcing a contract which they could otherwise be entitled to enforce; and to deal first with contracts that involve the commission of a legal wrong; secondly, with those that are contrary to public policy in some other way. The authorities make it necessary then to treat separately the position at common law and by statute; the enforcement of collateral and proprietary rights and of claims in restitution is dealt with next; and thirdly the doctrine of severance, by which the court may reject the illegal part of an agreement and enforce what remains as unobjectionable, is considered.

Footnotes

- 1 Which for this purpose should be taken to include contracts that have the purpose of the commission of a legal wrong, e.g. selling a knife to enable the buyer to murder someone with it. See below, paras 18-061—18-064.
- 2 See below, paras 18-252 et seq.
- 3 [2016] UKSC 42, [2017] A.C. 467.
- 4

Henderson (A Protected Party by her litigation friend, The Official Solicitor) v Dorset Healthcare University NHS Foundation Trust [2020] UKSC 43, [2021] A.C. 563 at [76].

5 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] A.C. 430 at [13].

6 (1775) 1 Corp. 341, 343.

7 [2015] A.C. 430 at [14].

8 The consequences are set out infra particularly at paras 18-007—18-041.

9 *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338, [2013] Q.B. 840 at [28].

10 [2012] EWCA Civ 1338, [2013] Q.B. 840 at [43].

11 *Reflections on the Law of Illegality* (Chancery Bar Association, 23 April 2012) [2012] 20 R.L. Rev 1 at p.1.

12 Ex turpi causa—when Latin avoids liability [2014] Edin. L.R. 175.

13 *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23, [2016] A.C. 1 at [61].

14 [2015] UKSC 23 at [15] (a panel of seven).

15 See further below, paras 18-229 et seq. cf. for example, the sophisticated approach as to remedies in “The Illegality Defence In Tort” (Law Com. Consultation Paper No.160, 2001); Enonchong, Illegal Transactions (1998); *Daido Asia Japan Ltd v Rothen* [2002] B.C.C. 589 at [21]; *Hewison v Meridian Shipping PTE* [2002] EWCA Civ 1821, [2002] All E.R. (D) 146.

16 See below, paras 18-229 et seq.

17 [2017] A.C. 467.

18 [2017] A.C. 467 at [101].

19 [2017] A.C. 467. See also *Saunders v Edwards* [1987] 1 W.L.R. 1116 at 1134B where Bingham LJ considered that it would be “unacceptable that the court should, on the first indication of unlawfulness ... draw up its skirts and refuse assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct”.

20 [2017] A.C. 467. See paras 18-028 et seq. where the case is dealt with.

21 See below, para.18-233.

22 [2017] A.C. 467 at [109].

23 [2017] A.C. 467 at [109].

24 [2019] EWCA Civ 1393, [2019] I.C.R. 1635 at [12].

25 [2019] EWCA Civ 1393 at [12].

26 [2019] EWCA Civ 1393 at [12].

27 [2019] EWCA Civ 1393 at [20].

28 [2019] EWCA Civ 1393 at [12]. The court held that *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 had set out the approach to this form of illegality.

29 [2019] EWCA Civ 1393 at [49].

30 [2019] EWCA Civ 1393 at [49].

31 [2019] EWCA Civ 1393 at [62].

32 [2019] EWCA Civ 1393 at [13], referring to the judgment of Peter Gibson LJ in *Hall v Woolston Hall Leisure Ltd* [2001] I.C.R. 99 at [31].

33 [2019] EWCA Civ 1393 at [14].

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Section 2. - The Position at Common Law

Chitty on Contracts 34th Ed.

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Section 2. - The Position at Common Law

Public policy

- 18-008 The seriousness and turpitude of the illegality which renders a contract unenforceable varies considerably.³⁴ The illegality can arise either from statute or the common law and, particularly where the latter is involved, the courts are faced squarely with the issue of whether public policy requires that a contract (otherwise valid and enforceable) should not be enforced because it is tainted with illegality. Also where the terms of a contract involve contravention of a statutory provision “it is rare ... for the statute to state expressly what are to be the consequences in terms of its enforceability”.³⁵ Obviously a doctrine of public policy is somewhat open-textured and flexible, and this flexibility has been the cause of judicial censure of the doctrine.³⁶ On occasions it has been seen by the courts as being vague and unsatisfactory, “a treacherous ground for legal decision”, “a very unstable and dangerous foundation on which to build until made safe by decision”.³⁷ It is in the context of this doctrine that the unruly horse metaphor rode into the litany of the English lawyer.³⁸ However, the doctrine has had its defenders. For Winfield, the “variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it”.³⁹ Lord Denning MR also viewed the doctrine with favour⁴⁰: “[w]ith a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles”. In many respects the discussions on the nature of the doctrine of public policy is a matter of temperament, and it often appears to be nothing more than a verbal dispute. Although it is not something about which one can be dogmatic, the following seems reasonably clear.

An evolving doctrine

- 18-009 First, it is inevitable that some doctrine of public policy would evolve with respect to the validity of contracts. As was stated by Sir William Holdsworth⁴¹:

“In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.”

- 18-010 Secondly, public policy is not immutable:

“Rules which rest on the foundation of public policy, not being rules which belong to the fixed customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce.”⁴²

And vice versa, a practice which was once permissible may be proscribed.⁴³

New heads of public policy

- 18-011 Thirdly, there is some doubt as to whether the courts can create new heads of public policy rather than merely apply existing doctrines to new situations. This is an area where the precedents hunt in packs of two. Broadly speaking, there are two conflicting positions, that have been referred to as the “narrow view” and “the broad view”.⁴⁴ According to the former, the courts cannot create new heads of public policy,⁴⁵ whereas the latter countenances judicial law-making in this area.⁴⁶ To a large extent this debate is verbal. There is a general agreement that the courts may extend existing public policy to new situations⁴⁷ and rules founded on public policy “not being rules which belong to fixed or customary law, are capable ... of expansion and modification”.⁴⁸ The difference between extending an existing principle as opposed to creating a new one will often be wafer thin. There will, however, be an understandable reluctance on the part of the courts to create completely new heads of public policy because of the existence of governmental bodies charged with the specific task of law reform and a more activist legislature. However, where Parliament

has clearly articulated a principle of public policy then the courts may be willing to extend it by analogy into the field of contract.⁴⁹

Policy of upholding contracts

- 18-012 Lastly, and most importantly, there is a public policy in favour of upholding contracts freely entered into, a policy which of course the doctrine of illegality completely undermines. The point was made forcefully by Jessel MR in *Printing and Numerical Registering Co v Sampson*⁵⁰:

“It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not likely to interfere with freedom of contract.”

Scope of public policy

- 18-013 Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects which are illegal by common law or by legislation⁵¹

U; secondly, objects injurious to good government either in the field of domestic⁵² or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and, fifthly, objects economically against the public interest. This classification is adopted primarily for ease of exposition. Certain cases do not fit clearly into any of these five categories. For example, an agreement was held unenforceable by reason of the undertaking contained in it on the part of one of the parties, a newspaper, not to publish any comment on the activities of a company with which the other party was connected (although this was also held to be injurious to trade and commerce as in restraint of trade).⁵³ Any undertaking not to disclose matters of legitimate public interest may be insufficient consideration to support a contract,⁵⁴ and, if the matters are such that in the public interest they ought to be disclosed, an undertaking not to disclose them certainly will not be enforced.⁵⁵ Although a contract may be associated with a particular illegality, the public policy underlying the illegality

may be such that it results in the contract being enforceable. In *Hill v Secretary of State for the Environment, Food and Rural Affairs*⁵⁶ the defendant argued that the contract that it had entered into with the claimant was illegal as the director, who had acted for the claimant, had been declared a bankrupt and had therefore committed an offence under **s.11 of the Company Directors Disqualification Act 1986** which prohibits an undischarged bankrupt from taking part in the management of a company. As the court pointed out, this proscription had been introduced to protect persons dealing with companies and, were the argument of the defendant to prevail, it would have the effect of prejudicing creditors since it would prevent the company from enforcing the contract. Accordingly, public policy favoured the claimant's rights of enforcement and the defendant's defence of illegality failed.⁵⁷

Public policy underlying illegality

18-014 The Law Commission identified the principal policy rationales for the illegality doctrine as:

“(1) furthering the purpose of the rule infringed by the claimant’s behaviour, (2) consistency, (3) prevention of profit from the claimant’s wrongdoing, (4) deterrence, and (5) maintaining the integrity of the legal system.”⁵⁸

A sixth rationale, “punishment”, was seen as more controversial as many considered this to be a matter for the criminal courts.

Footnotes

34 See generally “Illegal Transactions: The Effect of Illegality On Contracts And Torts” (Law Com. Consultation Paper No.154, 1999).

35 *Patel v Mirza [2016] UKSC 42* at [40]. See paras 18-189 et seq.

36 See generally Bell, Policy Arguments in Judicial Decisions (1983), particularly Ch.VI dealing with restraint of trade.

37 *Janson v Driefontein Consolidated Mines Ltd [1902] A.C. 484, 500*, per Lord Davey; and see 507.

38 “It is a very unruly horse, and when once you get astride it you never know where it will carry you”: *Richardson v Mellish (1824) 2 Bing. 229, 252*, per Burrough J. See also *Money Markets International Stockbrokers Ltd v London Stock Exchange [2002] 1 W.L.R. 1150* at [80].

39 (1928–29) 42 Harv. L. Rev. 76, 94.

40 *Enderby Town Football Club Ltd v The Football Association Ltd [1971] Ch. 591, 606*.

41 History of English Law, Vol.III, p.55.

42 *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch. 630, 666. See also *Nagle v Feilden* [1966] 2 Q.B. 633, 650; *Shaw v Groom* [1970] 2 Q.B. 504, 523; *Multiservice Bookbinding Ltd v Mardon* [1979] Ch. D. 84 where the court had to determine whether an index-linked money obligation was contrary to public policy and decided it was not.

43 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 322–324, 333.

44 Lloyd, Public Policy (1953), pp.112–117.

45 *Egerton v Earl Brownlow* (1853) 4 H.L. Cas. 1, 106–107, 122–124; *Janson v Driefontein Consolidated Mines Ltd* [1902] A.C. 484, 491, 500, 507.

46 *Egerton v Earl Brownlow* (1853) 4 H.L. Cas. 1, 149–151; *Wilson v Carnley* [1908] 1 K.B. 729, 737–738. See also *Initial Services Ltd v Putterill* [1968] 1 Q.B. 396; *McLoughlin v O'Brian* [1983] 1 A.C. 410, 426–428, 441–443.

47 *Egerton v Earl Brownlow* (1853) 4 H.L. Cas. 1, 149; *Montefiore v Menday Motor Components Co* [1918] 2 K.B. 241, 246.

48 *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch. 630, 661.

49 See, e.g. *Nagle v Feilden* [1966] 2 Q.B. 633; cf. *Newland v Simons & Willer (Hairdressers) Ltd* [1981] I.C.R. 521.

50 (1875) L.R. 19 Eq. 462, 465.

51 Amongst statutory restrictions had to be included those articles of the Treaties of the European Community and those regulations and directives made thereunder which, either by virtue of the Treaties themselves or of the case-law of the European Court, were directly applicable to the United Kingdom: *European Communities Act 1972* ss.2 and 3. On the concept of direct applicability of Community law, see Hartley, *The Foundations of European Union Law*, 8th edn (2014), Ch.7.

52 For an unusual example under this head, see *Amalgamated Society of Ry Servants v Osborne* [1910] A.C. 87.

53 *Neville v Dominion of Canada News Co* [1915] 3 K.B. 556.

54 *Brown v Brine* (1875) 1 Ex. D. 5; such an undertaking would seem not to render unenforceable an otherwise good contract: see *Jennings v Brown* (1842) 9 M. & W. 496.

55 *Initial Services Ltd v Putterill* [1968] 1 Q.B. 396.

56 [2005] EWHC 696 (Ch), [2006] 1 B.C.L.C. 601.

57 See also para.18-223. The company could probably have enforced the contract without relying on any illegality; see *Hounga v Allen* [2014] UKSC 47, [2014] 1 W.L.R. 2889.

58 *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 at [22] referring to the various reports of the Law Commission set out in [21] with apparent approval.

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(a) - Introduction

Contracts involving the commission of a legal wrong

- 18-015 In this section we deal with the enforceability of claims made under contracts that involve illegality in the narrow sense of the commission of a legal wrong or being made with the purpose of the commission of such a wrong.⁵⁹

The nature of the illegality defence

- 18-016 Where the illegality defence is raised, it involves three questions:

“(i) What are the illegal or immoral acts which give rise to the defence? (ii) What relationship must those acts have to the claim? (iii) On what principles should the illegal or immoral acts of an agent be attributed to his principal, especially when the principal is a company?”⁶⁰

It is the third of these questions that raises the most acute difficulties⁶¹; but we shall see that it is often uncertain what answer should be given the first two questions also. It is the first two questions that will be addressed in this section.

Footnotes

- 59 See above, para.18-001.
- 60 *Bilta (UK) Ltd v Nazir (No.2) [2015] UKSC 23, [2016] A.C. 1.*
- 61 See below, paras 18-212 et seq.

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(i) - Determining the Existence of Illegality

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(i) - Determining the Existence of Illegality

Wrongs that may trigger the illegality defence

18-017 Although as we shall see the law relating to illegality has been fundamentally restructured⁶² it is still necessary to determine when a contract will be considered illegal as involving the commission of a legal wrong.⁶³ When a contractual right is said to be unenforceable on the ground that *ex turpi causa non oritur actio*, sometimes all that is meant is that the general principles discussed earlier in this chapter⁶⁴ apply to deprive the party of a contractual remedy which he would otherwise have, though the maxim is generally confined to cases involving criminality or immorality. On other occasions the maxim is used with specific reference to unenforceability at common law on the ground that an apparently innocent contract was entered into for an objectionable purpose. Thus in *Pearce v Brooks*⁶⁵ the plaintiff sued the defendant, a prostitute, for the hire of a brougham which he knew was to be used by her in her calling. It was held that he could not recover and Pollock C.B. said:

“I have always considered it was settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied ... Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is *ex turpi causa non oritur actio*.”

This is, in effect, merely an application of the general common law principle that one who knowingly enters into a contract with an improper object cannot enforce his rights thereunder.

Illegal activity does not necessarily prevent claim

- 18-018 In *Lilly Icos LLC v 8pm Chemists Ltd*⁶⁶ it was argued that there was a broad principle that a claimant could not recover for a loss arising out of “the claimant’s own involvement in an illegal activity whether under English law or foreign law”.⁶⁷ The court rejected this as being incompatible with a number of cases the most important of which is *Tinsley v Milligan*⁶⁸ where recovery on the grounds of title was allowed even where the title had been acquired in the course of an illegal transaction. It has been held that before the ex turpi causa rule is engaged outside the criminal law, there must be “an element of moral turpitude or moral reprehensibility in the relevant conduct”.⁶⁹

When ex turpi causa doctrine is engaged

- 18-019 In *Les Laboratoires Servier v Apotex Inc*⁷⁰ Lord Sumption, delivering the opinion of the majority, said:

“The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as “quasi-criminal” because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law ... ”⁷¹

“... the question what constitutes ‘turpitude’ for the purpose of the defence depends on the legal character of the acts relied on. It means criminal acts, and what I have called quasi-criminal acts. This is because only acts in these categories engage the public interest which is the foundation of the illegality defence. Torts (other than those of which dishonesty is an essential element), breaches of contract, statutory and other civil

wrongs, offend against interests which are essentially private, not public. There is no reason in such a case for the law to withhold its ordinary remedies. The public interest is sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected.”⁷²

While in the later case of *Patel v Mirza*⁷³ this question was not mentioned in the majority judgment delivered by Lord Toulson, it seems that Lord Sumption’s statement is wholly compatible with the factors-based approach adopted in the later case. Similarly, the claimant’s state of knowledge at the time he committed the act is relevant also:

“If the claimant knew the material facts, and particularly if he committed the act in question intentionally, then the rule is likely to apply.”⁷⁴

18-020 Flaux J in *Safeway Stores Ltd v Twigger*⁷⁵ stated that the policy behind the ex turpi causa rule is “a flexible one and its application is not rigid but depends upon particular circumstances”, citing the dictum of Lord Hoffmann in *Gray v Thames Trains Ltd*⁷⁶ that the rule “expresses not so much a principle as a policy … not based on a single justification but on a group of reasons, which vary in different circumstances”. The “range of factors” principle applied in *Patel v Mirza*⁷⁷ endorses this approach.⁷⁸ Where the ex turpi maxim is applicable, it applies to assignees.⁷⁹ It has not been expressly decided whether the maxim applies to a criminal act of strict liability where the claimant has not in any way been at fault.⁸⁰ There is also uncertainty as to the level of fault that is needed in order to trigger the rule.⁸¹ It is, however, clear that “ordinary private wrongs, sounding in tort or contract, do not give rise to the illegality defence”.⁸² Also there may be situations where a competing public policy “requires the imposition of civil liability notwithstanding that the claim is founded on illegal acts”.⁸³ Most of these issues will now be subsumed into the factors-based approach adopted by *Patel v Mirza*.

Nature of the public policy when contracts involve commission of a legal wrong

18-021 Lord Mance has considered that the policy underlying the illegality doctrine in this narrow sense at least is one of “judicial abstention”, by which he meant the “judicial power of the state is withheld where its exercise would give effect to advantages derived from an illegal act”.⁸⁴ Lord Sumption, in a somewhat similar vein, has stated that “the illegality defence is based on the subordination of private rights and liabilities to certain interests belonging to the public sphere”.⁸⁵ Requirements of consistency have also been considered to underlie the illegality principle. The law “cannot give

away with one hand what it takes away with another”.⁸⁶ The courts have also considered that “the underlying principle or policy is one of deterrence; that the courts will not encourage illegal acts by allowing claims based upon them.”⁸⁷ In applying the principle of illegality the court has to identify in the specific context the specific rule that is applicable, there is not “one single rule with blanket effect across all areas of the law”, rather the court has to identify the rule which is “tailored to the particular context in which the illegality principle is said to apply.”⁸⁸ The principles underlying these statements are not altered by the adoption of a factors-based approach.

Footnotes

62 See *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467; paras 18-025 et seq.

63 This issue is addressed in paras 18-021—18-023. For illegality under foreign law see para.18-071.

64 See above, paras 18-053, 18-054; *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1, 34–37.

65 (1865-66) L.R. 1 Ex. 213, 217. See also *K. v P. and J.* [1993] Ch. 140 (defence of ex turpi causa does not preclude a claim for contribution under the Civil Liability (Contribution) Act 1978). For the application of the ex turpi causa principle in tort see *Hall v Herbert* [1993] 2 S.C.R. 159 (*noted*, (1994) 110 L.Q.R. 357).

66 [2009] EWHC 1905 (Ch).

67 [2009] EWHC 1905 (Ch) at [273].

68 [1994] 1 A.C. 340; see below para.18-237. See also *O'Kelly v Davies* [2014] EWCA Civ 1606.

69 *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm) at [26]. The phrase “morally reprehensible” was derived from the decision of the Singapore Court of Appeal in *United Project Consultants Ltd v Leong Kwok Onn (trading as Leong Kwok Onn & Co)* [2005] 4 S.L.R. 214 at [54] which the court cited with approval.

70 [2014] UKSC 55, [2015] A.C. 430.

71 At [25].

72 At [28].

73 [2016] UKSC 42, [2017] A.C. 467.

74 [2011] EWHC 730 (Pat) at [93].

75 [2010] EWHC 11 (Comm).

76 [2009] 3 W.L.R. 167 at [30]. See also *Les Laboratoires Servier v Apotex Inc* [2011] EWHC 730 (Pat).

77 [2016] UKSC 42, [2017] A.C. 467.

78 See below, para.18-023.

79 *DR Insurance Co v Central National Insurance Co of Omaha* [1996] C.L.C. 64, 73, [1996] 1 Lloyd's Rep. 74, 82.

80 *Safeway Stores Ltd v Twigger* [2010] EWHC Civ 1472 at [18]. See below, para.18-213.

81 *Griffin v UHY Hacker Young & Partners (a firm)* [2010] EWHC 146 (Ch).

- 82 *Bilta (UK) Ltd v Nazir (No.2) [2015] UKSC 23, [2016] A.C. 1* (hereafter *Bilta (UK) Ltd*).
83 See also *R. (on the application of Best) v Chief Land Registrar [2015] EWCA Civ 17* at [43].
84 *Bilta (UK) Ltd v Nazir (No.2) [2015] UKSC 23, [2016] A.C. 1*.
85 [2015] UKSC 23 at [100].
86 *Hounga v Allen [2014] 1 W.L.R. 2889* at [55].
87 *K/S Lincoln v CB Richard Ellis Hotels Ltd [2009] EWHC 2344* at [22].
88 *R. (on the application of Best) v Chief Land Registrar [2015] EWCA 17* at [52]. See also *Gray v Thames Trains Ltd [2009] UKHL 33, [2009] A.C. 1339* at [30] (ex turpi causa based on a “group of reasons which vary in different situations”); and *Patel v Mirza [2016] UKSC 42, [2017] A.C. 497*.

(ii) - The Impact of Illegality

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(ii) - The Impact of Illegality

How illegality may affect a contract—the rules-based approach

18-022

Illegality may affect a contract in a number of ways⁸⁹ but it has been traditional to distinguish between: (1) illegality as to formation; and (2) illegality as to performance. Broadly speaking the first refers to the situation where the contract itself is illegal at the time it is formed, whereas the latter involves a contract which on its face is legal but which is performed in a manner which is illegal. In this latter situation it is possible for either both or only one of the parties to intend illegal performance. Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, under the new factors-based approach⁹⁰ it remains unlikely that the courts will enforce the contract, or provide any other remedies arising out of the contract. The benefit of the public, and not the advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract. “The principle of public policy”, said Lord Mansfield:

“... is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would

then have the advantage of it; for where both are equally at fault, potior est conditio defendantis.”⁹¹

The rules on illegality have been criticised as being unprincipled but a better way of viewing them, as the previous dictum from *Holman v Johnson* illustrates, is as “being indiscriminate in their effect and are capable therefore of producing injustice”.⁹² It has been recognised that the case law on illegality is in a “disordered state” and this has been caused by the distaste of the courts for the consequence of applying their own rules,⁹³ as was recognised by Lord Mansfield in *Holman v Johnson*. The defence of illegality as formulated by Lord Mansfield “is a rule of law and not a mere discretionary power” and “it is based on public policy, and not on a perceived balance of merits between the parties to any particular dispute”.⁹⁴ The doctrine can operate harshly as it bars claims that may otherwise have succeeded and accordingly:

“... it is in the nature of things bound to confer capricious benefits on defendants some of whom have little to be said for them in the way of merits legal or otherwise.”⁹⁵

The doctrine was also criticised as operating harshly as it bars claims that may otherwise have succeeded and accordingly:

“... it is in the nature of things bound to confer capricious benefits on defendants some of whom have little to be said for them in the way of merits legal or otherwise.”⁹⁶

Footnotes

- 89 The principle that a man is not permitted, either directly or through his representatives, to found a contractual claim on the commission of a crime is discussed at paras 18-224—18-232, below.
- 90 The factors-based approach is dealt with below at paras 18-030 et seq.
- 91 *Holman v Johnson* (1775) 1 Cowl. 341, 343. The maxim is further explained in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] K.B. 65, 72; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)* [2000] 1 Lloyd's Rep. 218, 227–228, 231–232; *Vellino v Chief Constable of the Greater Manchester Police* [2001] EWCA Civ 1249, [2002] 1 W.L.R. 218.
- 92 *Tinsley v Milligan* [1994] 1 A.C. 340, 362.
- 93 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] A.C. 430 at [14].
- 94 [2014] UKSC 55 at [13].
- 95 [2014] UKSC 55 at [13].

96 *Les Laboratoires Servier v Apotex Inc [2014] UKSC 55* at [14].

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(i) - The Treatment of Illegality Prior to the Factors-Based Approach

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(b) - A Factors-Based Approach

(i) - The Treatment of Illegality Prior to the Factors-Based Approach

A more flexible approach pre Patel v Mirza

18-023

U A number of cases in the 1980s and 1990s had rejected the application of “rules of illegality” and had applied instead a general principle that the court would only refuse to assist the claimant where to do so would be “an affront to the public conscience”.

⁹⁷

U This approach was rejected unanimously by the House of Lords in *Tinsley v Milligan*.

⁹⁸

U However, their Lordships disagreed as to what principle should apply in that case

⁹⁹

U and Lord Goff suggested that, if there was to be any change of approach it should only be attempted by legislation after a review by the Law Commission. A reference was duly made to the Law Commission, which published a series of consultation papers and reports. Initially the Law Commission’s provisional proposals were that, where the formation, purpose or performance of a contract involves the commission of a legal wrong (other than a mere breach of the contract in question), the court should be given a statutory discretion to decide whether or not illegality should operate as a defence to enforcement of the contract.

100

U However, although there was considerable support for this approach, the Law Commission ultimately concluded that it should not recommend a statutory discretion except for claims under trusts. In a second consultation paper on illegality,¹⁰¹

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U the Law Commission explained that this change of approach was partly because of the difficulty of drafting a statutory discretion that would be sufficiently certain and would not involve the courts in considering illegality in large numbers of cases where it would not arise under the common law rules, and partly because the Law Commission considered that, in dealing with illegality, it was open to the courts to adopt a more flexible approach which took account of the policies underlying the doctrine.

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U The Law Commission stated:

“We provisionally recommend that the courts should consider in each case whether the application of the illegality defence can be justified on the basis of the policies that underlie that defence. These include: (a) furthering the purpose of the rule which the illegal conduct has infringed; (b) consistency; (c) that the claimant should not profit from his or her own wrong; (d) deterrence; and (e) maintaining the integrity of the legal system. Against those policies must be weighed the legitimate expectation of the claimant that his or her legal rights will be protected.”

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It distinguished this approach from the “public conscience test”, which was “vague”, because its suggested approach required the court to base their decision on the underlying policies.

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U The Law Commission confirmed this approach in its final Report, and it argued that since publication of its second consultation paper, Lord Hoffmann’s observations in *Gray v Thames Trains Ltd*¹⁰⁵

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U had demonstrated that this “incremental change” was already taking place.

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U In *Henderson v Dorset Healthcare University NHS Foundation Trust*,

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U where the facts were similar to those in *Gray v Thames Trains Ltd*,

④ the court considered that the latter case remained binding on it
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④ and was not affected by *Patel v Mirza*.
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Footnotes

①97 See, for example *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1 and the decision of the Court of Appeal in *Tinsley v Milligan* [1992] Ch. 310.

①98 [1994] 1 A.C. 340.

①99 For the facts and decision, see below, para.18-237.

①100 Law Commission, Consultation Paper No.154, The Effect of Illegality on Contracts and Trusts, para.9.4.

①101 Law Commission, Consultative Report, Consultation Paper No.189, The Illegality Defence (2009); see paras 3.107–3.115.

①102 Consultation Paper No.189, paras 3.136 (on enforcement of contract claims) and 4.42 (on restitution when a contract is unenforceable because of illegality).

①103 Consultation Paper No.189, para.3.142.

①104 Consultation Paper No.189, para.3.140.

①105 [2009] 1 A.C. 1339 at [30].

①106 The Illegality Defence, The Law Commission (Law Com No.320), para.3.38.

①107 [2020] UKSC 43, [2021] A.C. 563. See below, paras 18-036 et seq. for detailed consideration.

①108 [2009] 1 A.C. 1339.

①109 [2018] EWCA Civ 1841 at [91].

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[2017] A.C. 467. The court also considered that this was the case with respect to *Clunis v Camden and Islington Health Authority* [1998] Q.B. 978. The case is noted critically by O'Sullivan [2021] C.L.J. 215.

(ii) - The Adoption of a More Flexible Approach

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- 18-024 In a number of subsequent cases the Court of Appeal addressed the issue of illegality¹¹¹ and endorsed the flexible approach which had been recommended by the Law Commission. The issue was also addressed by the Supreme Court. In *Hounga v Allen*¹¹² the Supreme Court referred to the important judgment of McLachlin J (now Chief Justice) in the supreme court of Canada in *Hall v Herbert*¹¹³ in which she emphasised that a central concern was the integrity of the legal system in that the court would be refusing to enforce a contract which the parties had agreed to because of an overriding illegality.¹¹⁴ In two Supreme Court decisions¹¹⁵ that preceded *Patel v Mirza*¹¹⁶ there was a significant difference of opinion by members of the House of Lords as to the correct approach to take in cases of illegality, a “rules based approach” or one that considers the underlying policies in deciding whether it would be disproportionate to deny the claimant a remedy. In *Bilta (UK) Ltd (In Liquidation) v Nazir (No.2)*¹¹⁷ Lord Neuberger pointed out the different approaches and said:

“... that the proper approach to the defence of illegality needs to be readdressed by the Supreme Court (conceivably with a panel of nine justices) as soon as appropriately possible ...”¹¹⁸

Footnotes

- 111 *Les Laboratoires Servier v Apotex* [2012] EWCA Civ 593; *Parking Eye v Somerfield Stores Ltd* [2012] EWCA Civ 1338, [2013] Q.B. 840.
- 112 [2014] UKSC 47, [2014] 1 W.L.R. 2889; see particularly Lord Wilson with whom Baroness Hale and Lord Kerr agreed at [42]–[44].
- 113 [1993] S.C.R. 159 cited at [2014] UKSC 47 at [44].
- 114 [2014] UKSC 47 at [44]–[52].
- 115 *Les Laboratoires Servier v Apotex* [2014] UKSC 55, [2015] A.C. 430; *Bilta (UK) Ltd v Nazir (No.2)* [2015] UKSC 23, [2016] A.C. 1. For the facts and decision in this case, which involved the question of attribution, see below, para.18-212.
- 116 [2017] A.C. 467.
- 117 [2015] UKSC 23, [2016] A.C. 1.
- 118 [2015] UKSC 23 at [15]. See also *Top Brands Ltd v Sharma* [2015] EWCA Civ 1140, [2017] 1 All E.R. 854 at [38].

(iii) - The Adoption of a Factors-Based Approach

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A new approach—the current law

18-025 In *Patel v Mirza*¹¹⁹ the Supreme Court fundamentally recast the doctrine of illegality in contract. The law remains that the court will not order performance or grant damages for breach of a contract if the claim should not be enforced because of illegality. A minority of the court did not adopt the “factors based” majority approach but adopted a rules-based approach, holding in particular that a party is entitled to restitutionary relief where an illegal contract is entered into but not carried out. The minority argued that such an application of the rules¹²⁰ “does not require any balancing of a series of different factors” which is a significant requirement of the factors based approach.¹²¹ The majority, in contrast, held that the question is to be decided on a “factors-based approach”, though agreeing that the court will normally order restitution of any money or property transferred under an illegal contract.¹²² The result is that much of the previous law on judicial remedies with respect to illegal contracts is mainly of historical interest.

18-026 In effect, in *Patel v Mirza* the Supreme Court, by a majority, has adopted the flexible approach advocated by the Law Commission. Lord Toulson (with whom Baroness Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed; Lord Neuberger appears also to have supported Lord Toulson’s approach¹²³) considered that the doctrine of illegality was:

“... not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.”¹²⁴

Lord Toulson added that the primary question was whether the “relief claimed should be granted” rather than “whether the contract should be regarded as tainted with illegality”.¹²⁵ A minority of the Justices of the Supreme Court (Lords Mance, Clarke and Sumption¹²⁶) disagreed with this approach. Lord Clarke, for example, considered that there was “no support in any of the authorities for this approach” and was contrary to *Hall v Herbert*¹²⁷ and *Tinsley v Milligan*¹²⁸ which had been cited by other members of the court.¹²⁹ Subsequently, in *Mohammad Saeed v Mohammad Ibrahim*¹³⁰ the court considered that in the light of *Patel v Mirza*:

“... the question was whether consideration of the policy factors and of the nature and circumstances of the illegality should result, given the public interest in preserving the integrity of the justice system, in the denial of the relief claimed. Thus the focus was on whether relief should be granted rather than whether the contract was tainted by illegality.”

This is undoubtedly an accurate reading of Lord Toulson’s judgment.

Trio of necessary considerations

- 18-027 As Lord Lloyd-Jones explained in the later case of *Stoffel & Co v Grondona*, the “trio of necessary considerations” are relevant not because it is considered desirable that a particular policy should be promoted but rather “because of their bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions”.

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U In the application of stages (a) and (b) of the trio, the “essential question is whether to allow the claim would damage the integrity of the legal system”,¹³² the answer to which “will depend on whether it would be inconsistent with the policies of which the legal system gives effect”.¹³³ This analysis would be conducted at a high level of generality and normally would not:

“... address evidence on matters such as the effectiveness of the criminal law in particular situations or the likely consequences of permitting a claim in specified circumstances.”¹³⁴

Thus in considering (a) and (b) of the trio of considerations, the court stresses the high level of generality at which the analysis is carried out. In considering issue (c) in the trio of necessary considerations, proportionality, the court considered it likely “that the court will have to give close scrutiny to the detail of the case in hand”.¹³⁵ It might not even be necessary to exhaustively examine the trio of considerations; where a clear conclusion emerges that the defence should not be allowed, it will not be necessary to consider the issue of proportionality.¹³⁶

Patel v Mirza

18-028 In *Patel v Mirza*¹³⁷ P transferred £620,000 to M for the purpose of betting on the price of shares in a listed company on the basis of information from contacts in the listed company. The information from the company contacts was an anticipated government announcement which would affect the price of the shares. The agreement between P and M constituted the criminal offence of insider trading under s.52 of the Criminal Justice Act 1993. The government announcement did not materialise and P brought an action against M to recover the £620,000 he had transferred to M. The claim was put on various grounds, one of which was unjust enrichment; as the money had been transferred for a consideration that failed, P claimed to be entitled to recover it. In order to show such failure P had to disclose the illegality involving the insider trading. The Supreme Court held that the doctrine of illegality (ex turpi causa) applied to unjust enrichment actions¹³⁸ but on the facts P was entitled to rescind the contract and recover his money. Both the first instance judge and the Court of Appeal¹³⁹ considered that the claim for unjust enrichment was precluded by the decision in *Tinsley v Milligan*¹⁴⁰ as the claimant had to rely on his illegality. However, the Court of Appeal, disagreeing with the court at first instance, held that the claimant could rely on the locus poenitentiae principle.¹⁴¹ In *Patel v Mirza*¹⁴² the Supreme Court considered that the reasoning in *Tinsley* “should no longer be followed”¹⁴³ but the result in that case was considered correct as it would:

“... have been disproportionate to have prevented her (the respondent) from enforcing her equitable interest in the property and conversely to have left Miss Tinsley unjustly enriched.”¹⁴⁴

The “factors-based” approach

- 18-029 Lord Toulson gave the majority judgment of the court in *Patel v Mirza*,¹⁴⁵ which upheld the Court of Appeal’s judgment in favour of recovery by the claimant but on a different basis. The action in *Patel v Mirza* was not an action to enforce an illegal contract but to obtain restitution and recover money transferred under an illegal contract.¹⁴⁶ However, the Court laid down a fundamentally different approach to the effect of illegality with respect to contract, tort, restitutionary and property claims. The issue before the court was “whether the policy underlying the rule which made the contract ... illegal would be stultified”¹⁴⁷ if the claim (on the facts, a claim for unjustified enrichment) were to succeed. In answering the question of whether allowing recovery for a claim tainted with illegality would be harmful to the integrity of the legal system, the court could not do so without¹⁴⁸:

“(a) considering the underlying purpose of the prohibition that has been transgressed, (b) considering conversely other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality.”

Thus the law in illegality in contract is no longer a prescriptive, mechanical rule but rather involves a determination of whether the policy underlying a particular rule would be advanced or frustrated by the application of the rule. The court granted restitutionary recovery to prevent the unjust enrichment of the defendant. This emphasis on restitutionary relief, coupled with a requirement of “proportionality”, is a development of considerable significance introduced by *Patel v Mirza*.

Footnotes

119 [2016] UKSC 42, [2017] A.C. 467; see also *Singularis Holdings Ltd v Daiwa Capital Markets Ltd* [2017] EWHC 257 (Ch) at [216]–[220].

120 *Patel v Mirza* [2016] UKSC 42 at [212].

121 See para.18-029 below.

122 See paras 18-028 et seq.

- 123 See below, para.[18-039](#).
- 124 [2016] UKSC 42, [2017] A.C. 467 at [101].
- 125 [2016] UKSC 42 at [109].
- 126 The minority's approach is explained below, paras [18-040—18-042](#).
- 127 [1993] 2 S.C.R. 159.
- 128 [1994] 1 A.C. 340.
- 129 [2016] UKSC 42 at [219].
- 130 *[2018] EWHC 1804 (Ch)* at [89] (emphasis added). This is very much the approach of Lord Neuberger: see below paras [18-044—18-045](#).
- ①131 *Stoffel & Co v Grondona* [2020] UKSC 42, [2021] A.C. 540 at [26].
- 132 [2020] UKSC 42 at [26].
- 133 [2020] UKSC 42 at [26].
- 134 [2020] UKSC 42 at [26].
- 135 [2020] UKSC 42 at [26].
- 136 [2020] UKSC 42 at [26].
- 137 [2016] UKSC 42, [2017] A.C. 467 (a panel of nine Justices).
- 138 *Patel v Mirza* [2016] UKSC 42 at [2]: “Illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort, or unjust enrichment, and in a wide variety of circumstances”.
- 139 [2015] Ch. 271. Gloster LJ held that the claimant could recover as he did not have to rely on the illegal contract to recover his money.
- 140 [1994] 1 A.C. 340.
- 141 See below, paras [18-237—18-240](#).
- 142 [2016] UKSC 42, [2017] A.C. 467.
- 143 [2016] UKSC 42 at [110].
- 144 [2016] UKSC 42 at [112].
- 145 [2016] UKSC 42 (the minority judgments also favoured recovery).
- 146 On the remedy of restitution see para.[18-241](#).
- 147 [2016] UKSC 42 at [115].
- 148 [2016] UKSC 42 at [101].

(iv) - Rule-Based and Factors-Based Approaches Contrasted

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Rule-based approach vs range of factors approach

- 18-030 In *Patel v Mirza*¹⁴⁹ Lord Toulson set out two alternative approaches in analysing the law of illegality in contract developed by Professor Burrows—the “rule-based approach” and the “range of factors approach”.¹⁵⁰

Rule-based approach

- 18-031 A possible example of a rule-based approach given by Burrows would be a single master rule involving reliance:

“If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), a party cannot enforce the contract if he has to rely on that conduct to establish its claim.”¹⁵¹

Burrows then sets out a more extended analysis of the rule-based approach which goes beyond the reliance rule. This approach involved two core rules: rule 1 refers to “illegality in formation”, that is, the contract is illegal as made, and rule 2 refers to “illegality in performance”.¹⁵² Burrows

considers that the rule-based approach is fatally flawed because it will simply be too complex, it fails to distinguish between serious and trivial illegalities, in practice it does not give rise to greater certainty, and it is well nigh impossible to formulate comprehensive rules with appropriate exceptions to cover all eventualities.¹⁵³ The law of illegality needs to have a greater degree of flexibility than that allowed by a rule-based approach.

Range of factors approach

18-032 A possible formulation of range of factors approach is set out by Burrows as follows¹⁵⁴:

“If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), the contract is unenforceable by one or either party if to deny enforcement would be an appropriate response to that conduct, taking into account where relevant—

- (a) how seriously illegal or contrary to public policy the conduct was;
- (b) whether the party seeking enforcement knew of, or intended, the conduct;
- (c) how central to the contract or its performance the conduct was;
- (d) how serious a sanction the denial of enforcement is for the party seeking enforcement;
- (e) whether denying enforcement will further the purpose of the rule which the conduct has infringed;
- (f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy;
- (g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct;
- (h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.”¹⁵⁵

Lord Toulson found the Burrows list “helpful” but that he “would not attempt to lay down a prescriptive or definitive list because of the infinite variety of cases”.¹⁵⁶

The majority approach summarised

18-033



The approach adopted by the majority in *Patel v Mirza* was summarised by Lord Toulson as follows¹⁵⁷:

“The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.”

As explained earlier,¹⁵⁸ this “trio of necessary considerations” are relevant not because it is considered desirable that a particular policy should be advanced but “because of their bearing in determining whether to allow a claim could damage the integrity of the law by permitting incoherent contradictions”.

¹⁵⁹

 This observation is of considerable significance, as the Supreme Court in *Stoffel & Co v Grondona*¹⁶⁰ was of the opinion that applying stages (a) and (b) required the court to consider the relevant policy considerations at a high level of generality and would not involve an analysis of relevant social policies as the “essential question is whether to allow the claim would damage the integrity of the legal system”.¹⁶¹ In considering stage (c), the court would need to give closer scrutiny to the detail of the case before it.¹⁶² It may not be necessary to examine exhaustively all stages of the trio of considerations, as if it is clear that the defence of illegality should not be allowed “there will be no need to go on to consider proportionality,” because there is no risk of disproportionate harm to the claimant in refusing relief to which he or she would otherwise be entitled.”¹⁶³

Role of appellate courts in illegality cases

In *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd*¹⁶⁴ the issue arose as to circumstances in which an appellate court should interfere with a first instance judgment applying the *Patel v Mirza*¹⁶⁵ test. On appeal the court stated that with respect to this issue both parties had accepted that the court should only interfere “where the judge made an error of principle or reached a conclusion wholly outside the range of reasonable probabilities”.¹⁶⁶ A caveat was raised against this view in the Supreme Court, where Baroness Hale stated:

“I should, however, record my reservations about the view expressed by the Court of Appeal as to the role of an appellate court in relation to the illegality defence: that an ‘appellate court should only interfere if the first instance judge has proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant’ ... Daiwa point out that applying the defence is ‘not akin to the exercise of discretion’ ...¹⁶⁷ and an appellate court is as well placed to evaluate the arguments as is the trial judge. It is not necessary to resolve this in order to resolve this appeal and there are cases concerning the illegality defence pending in the Supreme Court where it should not be assumed that this court will endorse the approach of the Court of Appeal.”¹⁶⁸

Not all offences may trigger the doctrine

18-035 Not all criminal offences may trigger the illegality doctrine.



“[T]he reservation made in *Gray v Thames Trains Ltd* in relation to trivial offences¹⁶⁹ may be an example of such a case, as may the strict liability offences where the claimant is not proxy to the facts making his act unlawful.”

¹⁷⁰



Also in *Gray* Lord Phillips reserved his position as to whether the ex turpi causa principle applies where¹⁷¹ “the judge makes it clear that he does not consider that the defendant should bear significant personal responsibility for his crime”.

Proportionality

18-036

As stated by the Supreme Court in *Henderson v Dorset Healthcare University NHS Foundation Trust*,

¹⁷²

U the four factors recognised by Lord Toulson in *Patel*¹⁷³ to determine whether denial of a claim on the grounds of illegality were

“(i) the seriousness of the conduct; (ii) the centrality of the conduct to the transaction; (iii) whether the conduct was intentional; and (iv) whether there was a marked disparity in the parties’ respective wrongdoing.”

These four factors are relevant in determining the issue of proportionality, namely, “whether denial of the claim would be a proportionate response to the illegality”, and no other factors appear to be relevant.¹⁷⁴ The factors are considered necessary to avoid “the possibility of overkill”, and were in “other words … a disproportionality check rather than a proportionality requirement”.¹⁷⁵ Attaching importance to proportionality and the development of these factors could provide a more nuanced approach to the illegality defence. They could provide a basis for dealing with the situation where, for example, the “index” offence is “trivial”¹⁷⁶ or it could involve “strict liability offences where the claimant is not privy to the facts making his act unlawful”.¹⁷⁷

18-037 *Dhaliwal v Hussain*¹⁷⁸ also displays a sensitive balancing exercise in applying the factors. In that case, the claimant brought an action for damages alleging fraudulent and negligent misrepresentation in connection with the purchase of a dental practice from the defendants. The purchase price was apportioned between the purchase of the freehold, fixtures and fittings and goodwill. The defendants raised the defence of illegality, alleging that the claimant had dishonestly understated the value of the freehold in order to avoid or reduce liability for Stamp Duty Land Tax.¹⁷⁹ The court, citing from the headnote in *Saunders v Edwards*,¹⁸⁰ considered that the current legal position was that the court had to “assess whether the public interest would be harmed by the enforcement of the illegal contract”. In answering the question in *Dhaliwal v Hussain*,¹⁸¹ the court doubted whether¹⁸²:

“… the court would ordinarily consider it appropriate to confer a windfall defence on a party who had obtained a substantial financial advantage by giving a false warranty, particularly one known to be untrue, by reason that the innocent party had set out (in fact only embarked on preliminary steps) to achieve a relatively minor collateral tax advantage.”

Countervailing policy

- 18-038 As indicated in Lord Toulson's summary in *Patel v Mirza* quoted earlier,¹⁸³ the court must "consider any other relevant public policy on which the denial of the claim may have an impact". In other words, it must take into account countervailing policy considerations. Thus in *Hounga v Allen* Lord Wilson had concluded that the countervailing policy considerations underlying the Race Relations Act outweighed the policy considerations in favour of applying the illegality defence.¹⁸⁴ Another example of countervailing policy reasons prevailing is provided by the Court of Appeal in *R. (on the application of Best) v Chief Land Registrar*.¹⁸⁵ There may be exceptional cases when even criminal acts should not attract the defence; and in particular the defence should not apply where the consequences of an illegal act are merely collateral to the claim.¹⁸⁶ In that case it was held that the importance of certainty of title was such when Parliament enacted that the occupation by the squatter constituted a criminal offence¹⁸⁷ it could not have intended the settled law of adverse possession to be upset, and the squatter could rely on adverse possession of possession of land to claim title to the land.¹⁸⁸ In *Stoffel & Co v Grondona*¹⁸⁹ solicitors were sued for admitted professional negligence with respect to a conveyancing transaction which was part of a mortgage fraud of which they had no knowledge. The court, among other factors, considered it unlikely that the fight against mortgage fraud would be greatly assisted if "mortgagors involved in making false representations to mortgagees were unable to recover if their solicitors were negligent in failing to register the mortgagee's security".¹⁹⁰ However, the illegality doctrine can be applied to thwart existing rights. In *Al-Dowaisan v Al-Salam*,¹⁹¹ a case involving an illegal tax fraud, it was held not to be a disproportionate response to deny the claimant a right to recover his property "[n]otwithstanding the interference with his rights of property under the first Protocol to the Convention on Human Rights, article 1 ...".¹⁹²

The minority approach to enforcement of contract claims

- 18-039 In relation to contract claims generally, Lord Neuberger favoured the approach of Lord Toulson,¹⁹³ and although his "analysis might be slightly different" there was no difference in practice.¹⁹⁴ He preferred this to the "multi-factorial" approach of Burrows as the approach of Lord Toulson was a "structured approach" and not "akin in practice to a discretion ...".¹⁹⁵ In contrast, the remaining Justices (Lords Clarke, Mance and Sumption) favoured the retention of a rule-based approach, though as explained below,¹⁹⁶ they (and Lord Neuberger) favoured a relaxation of the rules preventing the enforcement of equitable rights and the restitution of benefits transferred under contracts that are unenforceable because of illegality.

The minority approach: Lord Mance

- 18-040 Lord Mance considered that Lord Toulson and the majority had attempted to rewrite the law of illegality on the basis of the reasoning of the Canadian Supreme Court in *Hall v Hebert*¹⁹⁷; which is set out in Lord Toulson's judgment.¹⁹⁸ Lord Mance was critical of such an approach as it would "introduce not only a new era but entirely novel dimensions into an issue of illegality".¹⁹⁹ Under such an approach the²⁰⁰:

"… [c]ourts would be required to make a value judgment, by reference to a widely spread, mélange of ingredients, about the overall ‘merits’ or strengths, in a highly unspecific non-legal sense, of the prospective claims of the public interest and of each of the parties."

The minority approach: Lord Sumption

- 18-041 Lord Sumption considered that as regards the enforcement of a claim founded on an illegal act the underlying principle is that for reasons of consistency the court will not give effect, at the suit of a person who committed the illegal act (or someone claiming through him), to a right derived from that act. By "consistency", citing extensively from the judgment of McLachlin J in *Hall v Hebert*,²⁰¹ he meant that the law should not "allow a person to profit from illegal or wrongful conduct or would permit an evasion or rebate of a penalty prescribed by the criminal laws".²⁰² The law "cannot give with one hand what it takes away with the other".²⁰³

Lord Sumption considered that the test for determining the effect of illegality was whether a party was relying on the illegality, the "reliance test".²⁰⁴ The reliance test was the "narrowest test of connection" between the illegality and the contract; all alternative tests would widen the application of the defence of illegality and render its application more uncertain.²⁰⁵ The strength of the test was that (a) it gave "effect to the basic principle that a person may not derive a legal right from his own illegal act",²⁰⁶ (b) it established a direct causal link between the illegality and the claim and distinguished between collateral or background facts,²⁰⁷ and (c) it ensured that the illegality principle would not be applied more widely than was needed to prevent legal rights from being derived from illegal acts.²⁰⁸ In opting for the reliance test, Lord Sumption rejected the test that the facts relied on should be "inextricably linked" with the illegal act on the grounds that it is "far from clear what the test means".²⁰⁹

18-042 Lord Sumption also dealt with the “range of factors” approach²¹⁰ put forward by Burrows²¹¹ which he considered was derived from the Law Commission Consultative Report²¹² on illegality.²¹³ As regards the range of factors identified by the Law Commission and Professor Burrows the important issue for Lord Sumption was whether these factors are to be regarded²¹⁴:

“(i) as part of the policy rationale of a legal rule and the various exceptions to that rule, or (ii) as matters to be taken into account by a judge deciding in each case whether to apply the legal rule at all.”

Lord Sumption considered that the former approach represents the law. The latter would require the courts to “weigh or balance, the adverse consequences of respectively granting or refusing relief on a case by case basis”,²¹⁵ an approach that had been rejected in *Tinsley v Milligan*.²¹⁶ He considered that as the principle of illegality was based on public policy, the:

“... operation of the principle cannot depend on the evaluation of the equities as between the parties or the proportionality of its impact upon the claimant.”²¹⁷

The range of factors approach would largely devalue the principle of consistency because it resulted in the court making an evaluative judgment as to the weights to be attributed to the various factors.²¹⁸ He considered that factor (g) of the Burrows schema (“whether denying enforcement will ensure that the party seeking enforcement does not profit from his conduct”) was “fundamental to the principle of consistency, and not just a factor to be weighed against others”.²¹⁹ Lord Sumption also strongly objected to factor (a) (“how seriously illegal or contrary to public policy the conduct was”) as it was:

“... difficult to reconcile with any kind of principle the notion that there may be degrees of illegality as Professor Burrows’ factor (a) seems to envisage.”²²⁰

Such a rule would depend “on the court’s view of how illegal the illegality was or how much it matters”²²¹ and there would be “no principle whatever to guide the evaluation other than the judge’s gut instinct”.²²² The adoption of the range of factors approach would discard “any requirement for an analytical connection between the illegality and the claim”²²³ by making it one factor in a broad evaluation of the case without offering “guidance as to what sort of connection might be relevant”.²²⁴ Lord Sumption dissented from the conclusion of Lord Toulson²²⁵ that the illegality principle should depend on the “policy factors involved and ... the circumstances of the illegal conduct”.²²⁶ Lord Sumption considered that this was:

“... far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights ... it converts a legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of ‘complexity, uncertainty, arbitrariness and lack of transparency’.”²²⁷

He considered that the remedy of restitution would not give effect to the illegal act but:

“... return the parties to the status quo ante where they should always have been ... This was Gloster LJ’s main reason for upholding Mr Patel’s right to recover the money.”²²⁸

Lord Clarke gave a brief judgment agreeing with Lord Sumption’s reasons²²⁹ for rejecting the “range of factors” approach.²³⁰

Footnotes

149 *[2016] UKSC 42*.

150 Burrows, Restatement of the English Law of Contract (2016) at pp.221–223.

151 Burrows, Restatement of the English Law of Contract (2016) at p.224.

152 Burrows, Restatement of the English Law of Contract (2016) at p.225.

153 See *[2016] UKSC 42* at [87]–[92] where Lord Toulson sets out the criticisms made by Burrows, Restatement of the English Law of Contract (2016) at pp.224–229.

154 Burrows, Restatement of the English Law of Contract (2016) at pp.229–230, cited in *Patel v Mirza* *[2016] UKSC 42* at [93].

155 Burrows noted that the final factor could be given a wider or narrower interpretation depending on the meaning attached to inconsistency: Burrows, Restatement of the English Law of Contract (2016) at p.230 (this question is not referred to in the 2nd edn, 2020). For the two possible interpretations see below, para.18-204.

156 *[2016] UKSC 42* at [107]. Lord Neuberger also considered that it was not “helpful to list all the potentially relevant factors”: *[2016] UKSC 42* at [173].

157 *[2016] UKSC 42* at [120].

158 See above, para.18-027.

159 *Stoffel & Co v Grondona* *[2020] UKSC 42*, *[2021] A.C. 540* at [26]. The case is noted by O’Sullivan *[2021] C.L.J. 215*.

160 *[2020] UKSC 42*.

161 *Stoffel & Co v Grondona* *[2020] UKSC 42* at [26] (a standard mortgage fraud case).

162 *Stoffel & Co v Grondona* *[2020] UKSC 42* at [26].

163 *Stoffel & Co v Grondona* *[2020] UKSC 42* at [26].

- 164 [2019] UKSC 50, [2019] 3 W.L.R. 997.
- 165 [2016] UKSC 42, [2017] A.C. 461.
- 166 [2018] 1 W.L.R. 2777 at [65].
- 167 Citing Lord Neuberger of Abbotbury PSC in *Patel v Mirza* [2016] UKSC 42 at [175].
- 168 [2019] UKSC 50, [2019] 3 W.L.R. 997 at [21].
- 169 [2009] 1 A.C. 1339 at [14].
- 170 *Henderson (A Protected Party by her litigation friend, The Official Solicitor) v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, [2021] A.C. 563 at [112].
- 171 *Gray v Thames Trains Ltd* [2009] 1 A.C. 1339 at 1367E–F.
- 172 [2020] UKSC 43, [2021] A.C. 563 at [138]. The case is noted by O’Sullivan [2021] C.L.J. 215.
- 173 [2016] UKSC 42 at [107].
- 174 *Henderson* [2020] UKSC 43 at [138].
- 175 [2020] UKSC 43 at [123].
- 176 [2020] UKSC 43 at [112].
- 177 [2020] UKSC 43 at [118].
- 178 [2017] EWHC 2655.
- 179 The court held the defence failed on the facts: [2017] EWHC 2655 at [115].
- 180 [1987] 1 W.L.R. 1116.
- 181 [2017] EWHC 2655.
- 182 [2017] EWHC 2655 at [114]. The court held that the illegality defence failed on the facts (at [115]).
- 183 [2016] UKSC 42 at [120]; see above, para.18-033.
- 184 [2015] EWCA Civ 17, [2016] Q.B. 23 at [54].
- 185 [2015] EWCA Civ 17.
- 186 [2015] EWCA Civ 17 at [59] and [61].
- 187 Under Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.144.
- 188 [2015] EWCA Civ 17 at [75].
- 189 [2018] EWCA Civ 2031.
- 190 [2018] EWCA Civ 2031 at [37].
- 191 [2019] EWHC 301 (Ch).
- 192 [2019] EWHC 301 (Ch) at [234].
- 193 [2016] UKSC 42 at [174]–[175], referring to Lord Toulson’s judgment at [101].
- 194 [2016] UKSC 42 at [186]. Lord Clarke considered that Lord Neuberger “expressed some support for the approach of Lord Toulson” but he was not persuaded by his reasoning that it was appropriate: [2016] UKSC 42 at [223].
- 195 [2016] UKSC 42 at [175].
- 196 See paras 29-143 et seq.
- 197 [1993] 2 S.C.R. 159.

- 198 Lord Toulson also referred to the Burrows range of factors approach: [\[2016\] UKSC 42](#) at [93].
- 199 [\[2016\] UKSC 42](#) at [206].
- 200 [\[2016\] UKSC 42](#) at [206].
- 201 [\[1993\] 2 S.C.R. 159](#) at 169 (now Chief Justice McLachlin). Also analysed by Lord Toulson at [\[2016\] UKSC 42](#) at [55]–[61].
- 202 [\[2016\] UKSC 42](#) at [230] citing the judgment of McLachlin J in *Hall v Hebert* [\[1993\] 2 S.C.R. 159](#) at 169.
- 203 *Hounga v Allen* [\[2014\] UKSC 47](#), [\[2014\] 1 W.L.R. 2889](#) at [55] (a dissenting judgment, but not on this point) cited in *Patel v Mirza* [\[2016\] UKSC 42](#) at [232].
- 204 *Patel v Mirza* [\[2016\] UKSC 42](#) at [239].
- 205 [\[2016\] UKSC 42](#) at [239].
- 206 [\[2016\] UKSC 42](#) at [239].
- 207 [\[2016\] UKSC 42](#) at [239].
- 208 [\[2016\] UKSC 42](#) at [239].
- 209 [\[2016\] UKSC 42](#) at [240].
- 210 [\[2016\] UKSC 42](#) at [259].
- 211 Burrows, Restatement of the English Law of Contract (2016) at pp.229–231.
- 212 The Illegality Defence (LCCP 189, 2009).
- 213 [\[2016\] UKSC 42](#) at [259].
- 214 [\[2016\] UKSC 42](#) at [261].
- 215 [\[2016\] UKSC 42](#) at [261].
- 216 [\[1994\] 1 A.C. 340](#).
- 217 [\[2016\] UKSC 42](#) at [262(i)].
- 218 [\[2016\] UKSC 42](#) at [262(ii)].
- 219 [\[2016\] UKSC 42](#) at [262(ii)]. Lord Sumption mistakenly refers to this as factor (f).
- 220 [\[2016\] UKSC 42](#) at [262(iii)].
- 221 [\[2016\] UKSC 42](#) at [262(iii)].
- 222 [\[2016\] UKSC 42](#) at [262(iii)].
- 223 [\[2016\] UKSC 42](#) at [262(iii)].
- 224 [\[2016\] UKSC 42](#) at [262(iii)].
- 225 [\[2016\] UKSC 42](#) at [265].
- 226 Lord Toulson, [\[2016\] UKSC 42](#) at [109].
- 227 [\[2016\] UKSC 42](#) at [265].
- 228 [\[2016\] UKSC 42](#) at [268]. Lord Sumption considered that a possible objection to this is that the court should not sully itself by being involved with the illegality as not being a “reputable foundation for the law of illegality”: [\[2016\] UKSC 42](#) at [268].
- 229 These are set out in para.[18-041](#).
- 230 [\[2016\] UKSC 42](#) at [216]. See also at [223], where he disagrees with Lord Neuberger in so far as the latter supports the opinion of Lord Toulson. The criticisms of the “range of factors approach” are set out above, para.[18-042](#).

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(v) - The Restitutionary Basis of Recovery

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(v) - The Restitutionary Basis of Recovery

Restitution of property transferred for an illegal purpose: the majority approach

- 18-043 The decision in *Patel v Mirza*²³¹ has changed the law governing the restitution of benefits conferred under a contract that is unenforceable because of illegality in a fundamental way. It would normally permit the recovery of any money or restitution in respect of other benefits transferred under the contract. As Lord Toulson, speaking for the majority, stated²³²:

“... 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.”

Lord Toulson was here applying the factors-based approach²³³; but the minority also considered that restitution should be available, as previously explained.²³⁴

The minority approach: Lord Neuberger's view

- 18-044

Lord Neuberger saw the issue in *Patel v Mirza*²³⁵ as involving:

“... a claim for the return of money paid by the claimant to the defendant pursuant to a contract to carry out an illegal activity, and the illegal activity is not in the event proceeded with owing to matters beyond the control of either party.”

He considered that in such a case “the general rule should ... be that the claimant is entitled to the return of the money which he has paid”.²³⁶ He referred to this as “the Rule”.²³⁷ The Rule should apply in appropriate cases “even where the contemplated illegal activity has been performed in part or in whole”.²³⁸ The Rule required a determination of what constitutes an illegal contract. Lord Neuberger considered that this would involve:

“... a contract where the illegality would result in the court (if it could otherwise do so) not being able to award specific performance of the contract or damages for its breach”²³⁹;

this would obviously apply to a contract whose whole purpose or essential ingredient was the commission of a crime.²⁴⁰ The application of the Rule was subject to possible exceptions, two of which were identified by Lord Neuberger. The first was where the criminal legislation was designed to protect one of the parties to the contract.²⁴¹ The second was where the defendant was “unaware of the facts which gave rise to the illegality”²⁴² particularly where “he had received money and had altered his position so that it might be oppressive to expect him to repay it”.²⁴³ This second exception, ignorance of the facts and alteration of position, adds considerable flexibility to the illegality principle.

Restitution close to enforcing contract

18-045 Lord Neuberger also addressed the criticism that the Rule would come close to enforcing the contract. He conceded that this was indeed the case and that “application of the Rule would sometimes involve the court making an order whose effect in practice is similar to performance of the illegal contract”.²⁴⁴ An example, not given by Lord Neuberger, would be an illegal lending contract where the borrower had to repay the money. He considered that there was nothing to this point that the Rule could produce an outcome equivalent to performance; if a:

“... particular outcome is correct, then the mere fact that the same outcome could have been arrived at on a wrong basis does not make it a wrong outcome.”²⁴⁵

This view was questioned by Lord Sumption. As Lord Sumption pointed out:

“... an order for restitution would be functionally indistinguishable from an order for enforcement, as in the case of an illegal loan or a foreign exchange contract.”²⁴⁶

Citing *Boissevain v Weil*²⁴⁷ for the principle that “if the law will not enforce an agreement it will not give the same financial relief under a different label”,²⁴⁸ Lord Sumption was “inclined to think that the principle is sound”²⁴⁹ but preferred not to express a concluded view.

The minority approach: Lords Sumption and Mance

- 18-046 As mentioned above, Lord Sumption considered that when a contract is unenforceable for illegality, the remedy of restitution should be available; it would not give effect to the illegal act but:

“... return the parties to the status quo ante where they should always have been ... This was Gloster LJ’s main reason for upholding Mr Patel’s right to recover the money.”²⁵⁰

Lord Sumption gave the following hypothetical:

“If I pay £10,000 to a hitman to kill my enemy, he should not kill my enemy and should not have £10,000. The fact that when it comes to the point he is unwilling or unable to kill my enemy does not give him any legal or moral entitlement to keep the £10,000. If he does kill him, the rational response is the same. He should be convicted of murder, but he should never have received the money for such a purpose and by the same token not be allowed to retain it”.²⁵¹

This is rightly criticised by Burrows²⁵² as being an inappropriate response to the extreme illegality involved and would entail that the party arranging the murder would gain what he wanted at no cost.

Lord Mance, agreeing with Lord Sumption,²⁵³ considered that the right of a party to recover property or money transferred under an illegal transaction was a consequence of the exercise of the right of rescission and this “right should be restored to its former significance and generalised”.²⁵⁴ The principle of rescission should not be restricted:

“... the logic of the principle is that the illegal transaction should be disregarded, and the parties restored to the position in which they would have been, had they never entered into it.”²⁵⁵

There should be no objection to permitting rescission after part performance “by making, where possible appropriate adjustments for benefits received …”.²⁵⁶ He specifically dissented from the decision of Lord Neuberger on certain points.²⁵⁷ He could not see how “an imbalance or lack of parity of delict between the parties could act as a necessary or even probable bar to rescission”.²⁵⁸

Footnotes

- 231 [2016] UKSC 42. See Strauss, “*The Diminishing Power of the Defendant: Illegality After Patel v Mirza*” [2016] R.L.R. 145; Burrows, A New Dawn for the Law of Illegality, Oxford Legal Studies Research Paper No.42 (2017). See above, paras 18-028—18-029.
- 232 [2016] UKSC 42, [2017] A.C. 467 at [116].
- 233 See above, para.18-029.
- 234 See above, paras 18-040—18-042.
- 235 [2016] UKSC 42 at [145].
- 236 [2016] UKSC 42 at [146].
- 237 [2016] UKSC 42 at [146].
- 238 [2016] UKSC 42 at [167].
- 239 [2016] UKSC 42 at [159].
- 240 [2016] UKSC 42 at [159].
- 241 [2016] UKSC 42 at [162].
- 242 [2016] UKSC 42 at [162].
- 243 [2016] UKSC 42 at [162].
- 244 [2016] UKSC 42 at [171].
- 245 [2016] UKSC 42 at [171].
- 246 [2016] UKSC 42 at [255].
- 247 [1950] A.C. 327.
- 248 [2016] UKSC 42 at [255].
- 249 [2016] UKSC 42 at [255].
- 250 [2016] UKSC 42 at [268]. Lord Sumption considered that a possible objection to this is that the court should not sully itself by being involved with the illegality as not being a “reputable foundation for the law of illegality”: [2016] UKSC 42 at [268].
- 251 [2016] UKSC 42 at [254].
- 252 Burrows, “A New Dawn for the Law of Illegality” in Green and Bogg (eds), *Illegality after Patel v Mirza* (2018), Ch.2 at 33.
- 253 [2016] UKSC 42 at [245]–[252].
- 254 [2016] UKSC 42 at [197].
- 255 [2016] UKSC 42 at [197]. In his opinion this principle had considerable lineage, citing Mellish LJ in *Taylor v Bowers* [1876] 1 Q.B.D. 291, 300.

256 *[2016] UKSC 42* at [198].

257 Set out at *[2016] UKSC 42* at [162] and dealt with above, paras 18-044—18-045.

258 *[2016] UKSC 42* at [198].

(vi) - The Effect of Illegality

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Illegal contract unenforceable

- 18-047 The “effect of illegality is not substantive but procedural”, it prevents the plaintiff from enforcing the illegal transaction.²⁵⁹ The “ex turpi causa defence”, as was stated by Kerr LJ in *Euro-Diam Ltd v Bathurst*²⁶⁰:

“... rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.”

As will be seen later, illegal contracts are not devoid of legal effect,²⁶¹ but the ex turpi causa maxim may entail that no action on the contract can be maintained. If the parties’ unlawful conduct is part of a scheme involving a number of contracts, it may not be necessary to establish that each contract is unlawful as each may be unenforceable by virtue of being part of the unlawful scheme.²⁶²

Footnotes

- 259 *Tinsley v Milligan [1994] 1 A.C. 340, 374*. See *Les Laboratoires Servier v Apotex Inc [2014] UKSC 55, [2015] A.C. 430* at [25] for an extended definition of what constitutes “a criminal act”.
- 260 *[1990] Q.B. 1* (although the manner in which the court applied the illegality doctrine in this case was disapproved of in *Tinsley v Milligan [1994] 1 A.C. 340, 363*, the dictum quoted in the text must remain true as a general principle).
- 261 Below, paras 18-212 et seq.
- 262 *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd [2013] EWHC 1063 (Comm)* at [27]; the outcome would probably be the same under the factors-based approach adopted in *Patel v Mirza*.

(c) - Application of Previous Decisions in the Light of the Factors-Based Approach

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Application of new approach

- 18-048 The following paragraphs ²⁶³ reflect “a rules-based approach” to illegality, as this was the basis on which the cases were decided. *Patel v Mirza*²⁶⁴ has adopted “a range of factors approach”, but even if this had been applicable it is questionable whether the cases would have been differently decided. The Court of Appeal has said that there is no requirement for the court to consider “how the rule has been applied in the previous case law except where such an application is inconsistent with [the *Patel v Mirza*] principles”.²⁶⁵ *Patel v Mirza* involved a restitutionary claim for repayment of money paid under an illegal contract involving the crime of insider dealing contrary to the *Criminal Justice Act 1993 s.52*. The analysis by Lord Toulson giving the judgment of the court involved a wide-ranging analysis of the law of contractual illegality and was not restricted to restitution and property claims. In *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd*²⁶⁶ the court recognised that “*Patel v Mirza* was a restitution claim”²⁶⁷ but did not specifically confine its judgment to such claims²⁶⁸ and as a matter of principle there is little justification for so confining it.
- 18-049 The scope and effect of the *Patel* approach was also analysed in *Henderson (A Protected Party, by her litigation friend, The Official Solicitor) v Dorset Healthcare University NHS Foundation Trust.*

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U The claimant had a history of mental illness and killed her mother during a bout of her illness for which she was found guilty of the crime of manslaughter. The claimant was under the care of the defendant NHS Trust. The claimant brought an action in negligence against the trust alleging that she would not have killed her mother if the trust had competently cared for her and the trust been in breach of duty to her. Under the various heads of damages she claimed general damages for her loss of liberty, past loss for a share in her mother's estate which she had forfeited and the cost of psychotherapy (by way of future loss).²⁷⁰ The trust admitted breach of duty but argued that all heads claimed were irrecoverable on the grounds of illegality in that the heads of claim arose from the unlawful killing of her mother. The House of Lords upheld the decision of the trial judge and Court of Appeal dismissing her claim. The House of Lords made a number of points as regards *Patel*. Firstly, *Patel* dealt with common law illegality; as regards statutory illegality the outcome would be determined by the terms of the statute.²⁷¹ Secondly, although *Patel* involved a claim for unjust enrichment:

“... there can be little doubt that it was intended to provide guidance as to the proper approach to the common law illegality defence across civil law more generally.”²⁷²

Thirdly, as the court stated, *Patel* does not represent “year zero” in the sense that *Patel* and only *Patel* was to constitute the relevant authority on illegality. Decisions on illegality pre-*Patel* were to be accorded value as precedents and:

“... remain of precedential value unless it can be shown that they are not compatible with the approach set out in *Patel* in the sense that they cannot stand with the reasoning in *Patel* or were wrongly decided in the light of that reasoning.”²⁷³

Footnotes

263 That is paras 18-050—18-056.

264 [2016] UKSC 42, [2017] A.C. 461.

265 *Okedina v Chikale* [2019] EWCA Civ 1393 at [62].

266 [2019] UKSC 50, [2019] 3 W.L.R. 997 at [14].

267 [2019] UKSC 50 at [14].

268 The case involved illegality in providing false documents and breach of fiduciary obligations, see [2019] UKSC 50 at [16] and below, para.18-192.

269 [2020] UKSC 43, [2021] A.C. 563.

270 [2020] UKSC 43 at [28] (there were six heads of loss).

271 [2020] UKSC 43 at [74]. On statutory illegality see below, para.18-189.

272 [2020] UKSC 43 at [76].

273 [2020] UKSC 43 at [77].

(i) - Former Categories of Illegality

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(i) - Former Categories of Illegality

Illegality as to formation

- 18-050 Contracts may be illegal when entered into because they cannot be performed in accordance with their terms without the commission of an illegal act. Thus the contract may involve a breach of the criminal law, statutory or otherwise, or alternatively it may be a statutory requirement that the parties to the transaction possess a licence and where they do not the contract will be illegal as formed. An example of a contract which was illegal as formed is provided by *Levy v Yates*,²⁷⁴ a case concerned with the former statutory rule that no play could be lawfully acted within 20 miles of London without a royal licence, which might be given only in certain circumstances. In that case the contract, between a theatre owner and an impresario, was itself for the performance of a theatrical production prohibited by the statute. The contract was unenforceable since²⁷⁵ “the agreement could not be carried into effect without a contravention of the law”: the parties had contracted to do the very thing forbidden by the statute and the contract was therefore unenforceable. Where a contract can only be carried out by the performance of an illegal act, it is illegal as to formation. A contract which is illegal as to formation is “unenforceable” rather than “void” where void means “that the agreement was never made”. The reason for this is that “property can pass under an illegal contract” and the court in certain circumstances will “enforce a contract which contains an element of illegality”.²⁷⁶ Although this results in an illegal contract having some legal consequences, this in no way constitutes enforcement.

Illegality as to performance

- 18-051 The illegality may arise because both or one of the parties may intend to perform the contract in an illegal manner. The law in this paragraph reflects a rules-based approach but it is not affected by the law as formulated in *Patel v Mirza*.²⁷⁷ The court may deny its assistance where both or one²⁷⁸ of the parties intended to perform the contract in an illegal manner or to effect some illegal purpose. In this situation it is customary to distinguish between the situation where the legally objectionable features were known to both parties and the situation where they are known only to one. For the illegality as to performance rule to apply there is no requirement that the illegal performance be intended from the time the contract is entered into; the formation of the intention after the execution of the contract can bring the rule into play.²⁷⁹

Illegal purpose

- 18-052 An otherwise innocent contract may also be illegal if it was entered into for an objectionable purpose.²⁸⁰ Thus in *Pearce v Brooks*²⁸¹ the plaintiff sued the defendant, a prostitute, for the hire of a brougham which he knew was to be used by her in her calling. It was held that he could not recover and Pollock C.B. said:

“I have always considered it was settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied ... Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is ex turpi causa non oritur actio.”

The outcome of this case would not be different under the range of factors approach adopted in *Patel v Mirza*.²⁸²

Footnotes

274 (1838) 8 A. & E. 129; cf. *Dungate v Lee* [1959] 1 Ch. 545.

275 (1838) 8 A. & E. 129, 134. See also *Ewing v Osbaliston* (1837) 2 My. & Cr. 53. Occasionally it will be difficult to classify a contract as being illegal as to formation as opposed to being illegal as performed: see *J. M. Allan (Merchandising) Ltd v Cloke* [1963] 2 Q.B. 340.

- 276 *Paros Plc v Wordlink Group Plc [2012] EWHC 394 (Comm)* at [80]. See para.18-234 (“Transfer of property under illegal transactions”) and part 8 of this chapter (“Severance”).
- 277 *[2016] UKSC 42, [2017] A.C. 497.*
- 278 Where a party is not aware of the *facts* when the contract is made as a result of which the contract cannot be performed legally, see below, paras 18-054 and 18-232 et seq. for his remedies. Ignorance of the law is no excuse; see below, para.18-055.
- 279 *ParkingEye Ltd v Somerfield Stores Ltd [2012] EWCA 1338, [2013] Q.B. 840* at [33].
- 280 See further below, para.18-053.
- 281 *(1866) L.R. 1 Ex. 213, 217.* See also *K. v P. and J. [1993] Ch. 140* (defence of ex turpi causa does not preclude a claim for contribution under the Civil Liability (Contribution) Act 1978). For the application of the ex turpi causa principle in tort see *Hall v Herbert [1993] 2 S.C.R. 159* (noted, *(1994) 110 L.Q.R. 357*).
- 282 *[2016] UKSC 42, [2017] A.C. 497.*

(ii) - Knowledge of the Parties

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(ii) - Knowledge of the Parties

Both parties aware of legally objectionable features

18-053 Neither party can sue upon a contract if:

- (a) both knew that its performance necessarily involved the commission of an act which, to their knowledge,²⁸³ is legally objectionable, that it is illegal or otherwise against public policy; or
- (b) both knew that the contract is intended to be performed in a manner which, to their knowledge²⁸⁴ is legally objectionable in that sense; or
- (c) the purpose of the contract is legally objectionable and that purpose is shared by both parties²⁸⁵; or
- (d) both participate in performing the contract in a manner which they know to be legally objectionable.²⁸⁶

*Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd*²⁸⁷ provides a good example of a contract which was illegal as to performance so as to bar either party from maintaining an action with respect to it. The defendants agreed to transport two boilers belonging to the plaintiffs and did so by carrying the boilers on lorries which could not lawfully carry the loads in question. The goods were damaged in the course of transit but the claim of the owner for damages was rejected; the owner of the goods not only knew that the goods were being transported in an illegal manner but

had actually “participated” in the illegality in the sense of assisting the defendant carrier to perform the contract in an illegal manner. However, that a party commits some illegality in the course of performance does not result in his being unable to enforce the contract.²⁸⁸

“The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract unless the contract was entered into with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of … performance) is prohibited by law.”

Thus in *St John Shipping Corp v Joseph Rank Ltd*²⁸⁹ the carrier was able to enforce its claim for freight even though it had illegally overloaded its vessel. However, the plaintiff company would not have been entitled to recover freight had it intended from the beginning to perform the contract in an illegal manner. Where both parties are aware of the contracts illegal purposes and enter into the contract for this purpose *Patel v Mirza* will not alter the outcome. However, knowledge of the parties would now probably be treated as a factor.

Legally objectionable features unknown to one party

- 18-054 It follows from what has been said that, if the performance of a contract necessarily and to the knowledge²⁹⁰ of the plaintiff involves or has as its object the commission by one or both parties of an act known to be legally objectionable, the plaintiff cannot sue on the contract²⁹¹ and this is so irrespective of the state of knowledge of the defendant. But when the contract does not necessarily involve the commission of a legally objectionable act and the legally objectionable intention or purpose of one party is unknown to the other, the latter is not precluded from enforcing the contract.²⁹² Thus in *Archbolds (Freightage) Ltd v S. Spanglett Ltd*,²⁹³ the A Co agreed with the B Co to carry goods in a van which, unknown to the B Co, was not licensed for the purpose. The contract, which was not expressly or impliedly prohibited by statute, involved the commission of a criminal offence by the A Co in using the van for this purpose. But since the B Co was unaware of this fact, it was not prevented from suing the A Co for failure to deliver the goods. And in *Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages Ltd*²⁹⁴ the A Co had accepted a bill of exchange drawn upon itself by B Co who later discounted the bill to C Co, a company resident in Germany. When sued by C Co for dishonour of the bill, A Co contended that the discounting of the bill to C Co amounted to the export of a bill of exchange which was unlawful under Exchange Control regulations without the permission of the Treasury. The Court of Appeal held that, as C Co did not know of B Co’s failure to obtain Treasury permission and was entitled to assume that B Co had complied with the requirement, it was not precluded from suing upon the bill.²⁹⁵ The justification for this result is that it would be inequitable for a person who enters into an apparently unobjectionable contract to be deprived of his rights thereunder merely because the other party had an unlawful object in mind in entering into the contract. To deprive the

innocent party of his rights would merely “injure the innocent, benefit the guilty and put a premium on deceit”.²⁹⁶ But upon learning of the illegal object of the other, the innocent party must refuse to assist him by carrying the contract into effect; the innocent party in such circumstances has a quantum meruit for what he has already lawfully done.²⁹⁷ Similarly in a case where the contract appears legally unobjectionable but the other party later elects to perform the contract in an illegal manner: the innocent party is not thereby deprived of his rights but where he learns of the illegal mode of performance he must not participate in it but should do all reasonably within his power to avoid or prevent such performance.²⁹⁸ If he goes on with the contract with knowledge of what is objectionable he cannot recover, except where the illegality is merely the breach of a by-law which is subsequently waived by the authority which made it, so that the other party lawfully enjoys benefits under the contract, and can modify the work done so as to comply with the by-law.²⁹⁹ However, where a party to a contract knows that the other party may have an illegal purpose in mind this does not preclude recovery provided there is no participation in carrying out the illegal purpose; there is a difference between:

“... the supply of an ordinary vehicle by a motor dealer in the ordinary course of business to a customer known to be a drug dealer, and the supply of a vehicle with special compartments for the concealment of drugs.”³⁰⁰

Parties' ignorance of the law

18-055

“Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not.”³⁰¹

Thus, in *Miller v Karlinski*,³⁰² an employee, whose mode of payment amounted to a fraud on the Revenue, was held unable to recover arrears of salary, whether or not the parties knew that what they were doing was illegal. Equally, where a statute makes the contract itself illegal, the parties' ignorance of the law does not make it the less so.³⁰³ Even where the contract is capable of lawful performance, if the express purpose for which it was made was to do something unlawful, failure by the parties, through ignorance of the law, to appreciate that the purpose was unlawful is irrelevant.³⁰⁴ But where the contract is not unlawful on its face and is capable of performance in a lawful way and the parties merely contemplate that it will be performed in a particular way which would be unlawful, the parties, through ignorance of the law, failing to appreciate that fact, the contract may be enforced³⁰⁵ on the ground that there was never a “fixed intention” to do that which was later discovered to be lawful and that while the parties “contemplated” such an unlawful act, they did not “intend” to do it.³⁰⁶ In other words, knowledge of the law is of evidential significance

with respect to the parties' intended mode of performance. It is important in this situation that at least the party seeking to enforce the contract can carry it out in a legal manner. Where the parties do not intend to enter into an illegal transaction but make a mistake as to the characterisation of the contract, for example treating a contract of service as a contract for services for tax purposes so that it is illegal, the contract has been held to be enforceable.³⁰⁷

Footnotes

- 283 Knowledge of illegality by an agent generally has no less effect than knowledge by the principal: *Apthorp v Neville* (1907) 23 T.L.R. 575; cf. *Stoneleigh Finance Ltd v Phillips [1965] 2 Q.B. 537, 572, 580.*
- 284 *Apthorp v Neville* (1907) 23 T.L.R. 575; cf. *Stoneleigh Finance Ltd v Phillips [1965] 2 Q.B. 537, 572, 580.*
- 285 *Alexander v Rayson [1936] 1 K.B. 169, 182; Edler v Auerbach [1950] 1 K.B. 359; Bigos v Bousted [1951] 1 All E.R. 92; J.M. Allan (Merchandising) Ltd v Cloke [1963] 2 Q.B. 340.*
- 286 *Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828.*
- 287 *[1973] 1 W.L.R. 828.*
- 288 *Coral Leisure Group Ltd v Barnett [1981] I.C.R. 503, 509*; see also *Newland v Simons & Willer (Hairdressers) Ltd [1981] I.C.R. 521, 530; Hall v Woolston Hall Leisure Ltd [2001] 1 W.L.R. 225.*
- 289 *[1957] 1 Q.B. 267*; see also below, para.18-205.
- 290 i.e. knowledge of fact, not of law; see below, para.18-053 on parties' ignorance of the law.
- 291 *Edler v Auerbach [1950] 1 K.B. 359; Nash v Stevenson Transport Ltd [1935] 2 K.B. 341; Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828.*
- 292 *Mason v Clarke [1955] A.C. 778, 793, 805; Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages Ltd [1971] 1 W.L.R. 149.*
- 293 *[1961] 1 Q.B. 374; Davidson v Pillay [1979] I.R.L.R. 275; Corby v Morrison [1980] I.C.R. 564* (the test of knowledge is a subjective one). Where the contract is ex facie illegal, no question of knowledge arises: *Newland v Simons & Willer (Hairdressers) Ltd [1981] I.C.R. 521*. In *Hall v Woolston Hall Leisure Ltd [2001] 1 W.L.R. 225, 249*, Mance LJ cast doubt on the reasoning and outcome of the *Newland* case.
- 294 *[1971] 1 W.L.R. 149*. See also *Credit Lyonnais v P.T. Barnard & Associates [1976] 1 Lloyd's Rep. 557.*
- 295 Contrast the position where the contract infringes a *foreign* exchange control regulation imposed consistently with the IMF Agreement and will be, if it is an "exchange contract", unenforceable in the United Kingdom under the *Bretton Woods Agreements Act 1945*, irrespective of the British party's ignorance of the foreign illegality: *Wilson, Smithett & Cope Ltd v Terruzzi [1976] Q.B. 683*. See below, para.18-075. On the status of the *Bretton Woods Agreements*, see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), pp.2370–2376.
- 296 *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 387.*

- 297 *Clay v Yates (1856) 1 H. & N. 73.*
- 298 *Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828.* A possible way of analysing this situation is that the contract has been varied by the parties and the new agreed contractual performance is illegal. See *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 393.*
- 299 *Townsend (Builders) Ltd v Cinema News & Property Management Ltd [1959] 1 W.L.R. 119.*
- 300 *Anglo-Petroleum Ltd v TFB (Mortgages) Ltd [2007] EWCA Civ 456, [2007] All E.R. (D) 243* at [78].
- 301 per Blackburn J in *Waugh v Morris (1873) L.R. 8 Q.B. 202, 208.* And see *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 221.*
- 302 (1945) 62 T.L.R. 85; *Napier v National Business Agency Ltd [1951] 2 All E.R. 264; Tomlinson v Dick Evans "U" Drive Ltd [1978] I.C.R. 639* (rule about defrauding Revenue applies even in case of a junior employee who goes along with employer's tax fraud); *Newland v Simons & Willer (Hairdressers) Ltd [1981] I.C.R. 521; Hall v Woolston Hall Leisure Ltd [2001] 1 W.L.R. 225, 249.*
- 303 *Kiriri Cotton Co Ltd v Dewani [1960] A.C. 192; Re Mahmoud and Ispahani [1921] 2 K.B. 716.* The court may of course decide that breach of the statute does not render the contract unenforceable: see *Shaw v Groom [1970] 2 Q.B. 504* and below, paras 18-195, 18-198.
- 304 *J.M. Allan (Merchandising) Ltd v Cloke [1963] 2 Q.B. 340.*
- 305 *Waugh v Morris (1873) L.R. 8 Q.B. 202.* cf. *Nash v Stevenson Transport Ltd [1936] 2 K.B. 128.*
- 306 See *Reynolds v Kinsey [1959] (4) S.A. 50* where the authorities are reviewed. cf. *Best v Glenville [1960] 1 W.L.R. 1198.*
- 307 *Enfield Technical Services Ltd v Payne [2007] I.R.L.R. 840* (parties in good faith mistakenly treating a contract of service as a contract for services for tax purposes).

(iii) - Compromises

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(c) - Application of Previous Decisions in the Light of the Factors-Based Approach

(iii) - Compromises

Compromises of illegal contracts

- 18-056 There is a manifestly obvious public policy in favour of encouragement and enforcement of compromises of disputes to which the parties themselves have agreed. Compromises result in a saving of public resources and probably produce an optimum result from the disputants' point of view in that they have agreed to one, and that this has not been imposed by a third-party adjudicator. However, to enforce compromises of illegal contracts would have the effect of undermining the public policy underlying the illegality doctrine: it would be paradoxical, to say the least, to permit a party to enforce the compromise of an illegal contract but not the illegal contract itself. Whether the compromise of an illegal transaction is itself enforceable depends on the question of whether the courts must give effect to the broad social policy underlying the illegality despite any private arrangement between the parties.³⁰⁸ Normally this will mean that the compromise, like the illegal contract, is not enforceable. An interesting problem on the compromise of an allegedly illegal contract arose in *Binder v Alachouzos*.³⁰⁹ A lent a sum of money to B which B refused to repay on the grounds that the transaction was one of moneylending and A was not a registered moneylender. A sued B, and after taking legal advice B compromised the action on the terms that he would repay the loan and not contend that the contract was one of moneylending. B then repudiated the compromise arguing that it, like the illegal contract, was unenforceable. The Court of Appeal upheld the compromise, but it did so on the grounds that the compromise was of a dispute of fact whether the contract was in actual fact an illegal moneylending contract.³¹⁰ This was not a case

where a clearly illegal contract was compromised, assuming arguendo that such a contract could be compromised.³¹¹ It has also been held that an arbitration agreement was to be treated “as a distinct and separable agreement from the contract of which it forms part”.³¹² It follows from this that the unenforceability of the contract, for example, because of illegality will not result in the unenforceability of the arbitration agreement.

Footnotes

- 308 *Kok Hoong v Leon Cheong Kweng Mines Ltd [1964] A.C. 993, 1014–1019* (estoppel by way of judgment in default could not operate with respect to illegal moneylending agreement). cf. *A.R. Dennis & Co Ltd v Campbell [1978] Q.B. 365*.
- 309 *[1972] 2 Q.B. 151*.
- 310 “In my judgment, a bona fide agreement of compromise such as we have in the present case (which is a dispute as to whether the plaintiff is a moneylender or not) is binding”: *[1972] 2 Q.B. 151, 158*, per Lord Denning MR.
- 311 On compromises see above, paras 6-050—6-055.
- 312 *Beijing Siamlong Heavy Industry Group v Golden Ocean Group Ltd [2015] EWHC 1063 (Comm)* at [23].

(d) - Acts or Objects Which May Trigger the Illegality Defence

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(d) - Acts or Objects Which May Trigger the Illegality Defence

The meaning of “ex turpi causa”

18-057 As we saw earlier, in *Les Laboratoires Servier v Apotex Inc*³¹³ Lord Sumption, speaking for the majority, said³¹⁴:

“The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as “quasi-criminal” because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered by Flaux J in *Safeway Stores Ltd v Twigger*.³¹⁵

... Torts (other than those of which dishonesty is an essential element), breaches of contract, statutory and other civil wrongs, offend against interests which are essentially private, not public. There is no reason in such a case for the law to withhold its ordinary

remedies. The public interest is sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected.”

*Patel v Mirza*³¹⁶ does not discuss the law on when a court will find that a civil wrong would render a contract illegal. However, the range of factors approach could well produce a result similar to that in *Les Laboratoires Servier v Apotex Inc*. In this section we give examples of acts and objects which, based on earlier case law, will or will not be held to render claims unenforceable by reason of illegality.

Examples of criminality

- 18-058 Criminal acts or objects which disentitle a party to contractual relief include doing something forbidden by statute,³¹⁷ or delegated legislation,³¹⁸ such as infringing food and drug legislation³¹⁹ or exchange control legislation,³²⁰ and the commission of offences at common law such as publication of a criminal libel³²¹ and blasphemy.³²² A fortiori the courts will not enforce a contract the object of which is such as to render the contract a criminal conspiracy,³²³ e.g. to corrupt public morals³²⁴ or to rig the market for shares in a company.³²⁵ Whether an agreement to fight is illegal depends upon whether the infliction of the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public, which is a question of fact.³²⁶ Similarly, a contract, even if made abroad, is illegal if its purpose is the infringement of the laws of England.³²⁷ But mere knowledge that goods sold abroad may possibly be smuggled into England will not disentitle the seller to sue for their price.³²⁸

Evasion of statute

- 18-059 It is now established that it is not a criminal offence for any person, whether or not acting in concert with others, to do acts which are neither prohibited by Act of Parliament nor at common law, and do not involve dishonesty or fraud or deception, even though an object which Parliament hoped to achieve by its legislation may be thereby thwarted³²⁹; nor is it an offence to commit a conspiracy to effect a public mischief.³³⁰ Even though agreements which frustrate the policy of an Act of Parliament are not per se criminal conspiracies, it may be uncertain whether such agreements are civilly enforceable. If, e.g. to take the facts of *Bhagwan*,³³¹ the owner of the vessel from which B disembarked in order to avoid immigration control had sued for his fare, could B have contended that the agreement was unenforceable since its purpose was to frustrate the policy of the Immigration Acts? It is submitted that unless the policy of the Act in question is one already recognised by the courts as protected under existing heads of public policy, or the means used

by the parties are unlawful or dishonest, the agreement is fully enforceable.³³² There may also be the possibility of a restitutionary remedy where a contract is rendered void by statute. Thus where a contract was an illegal gaming contract, the principal could recover from the agent moneys intended to be used for betting which the agent had diverted to his own use.³³³

Waiver of statutory rights

- 18-060 Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute (*quilibet potest renunciare juri pro se introducto*) difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver. Thus in *Johnson v Moreton*³³⁴ the House of Lords held that a tenant could not contract out of the protection afforded by s.24 of the Agricultural Holdings Act 1948 as this would undermine the overall purpose of the Act in promoting efficient farming in the national interest. A contract between a landlord and a statutorily protected tenant whereby the tenant promises to give up possession in return for the landlord's promise of a sum of money is not illegal as an attempt to contract out of the Rent Acts; and although the landlord cannot obtain possession otherwise than under the Acts,³³⁵ the tenant, if he performs his part, can recover the sum promised.³³⁶

Fraud

- 18-061 Where the object of a contract is the perpetration of a fraud,³³⁷ e.g. upon prospective shareholders in a company³³⁸ or upon the Government,³³⁹ or a trader³⁴⁰ the contract is illegal. Such frauds are usually criminal³⁴¹ but the rule appears to be general; thus a creditor cannot enforce an agreement with an insolvent debtor under which the latter is to pay him an amount in excess of his share under a composition agreement since the agreement to do so is a fraud upon the other parties to the composition agreement.³⁴² Likewise it is against public policy to enforce an agreement where the purpose of both parties was to defeat the proper claims of the Commissioners of Inland Revenue³⁴³ or of a rating authority.³⁴⁴ However, where the contract in question is remote from the illegality, the court will enforce the contract.³⁴⁵

Other civil wrongs

- 18-062 If a contract has as its object the deliberate commission of a tort,³⁴⁶ it would seem that the contract is illegal, even though no criminality or fraud is involved.³⁴⁷ Thus a printer cannot recover the cost of printing matter which he knew to be libellous³⁴⁸ and the purchaser cannot recover a sum of money deposited with the printer on account of the cost to be incurred in printing it.³⁴⁹ However, a contract will not be illegal simply because it involves a tort or breach of contract. In *Les Laboratoires Servier v Apotex Inc*³⁵⁰ Lord Sumption concluded that the illegality defence is not engaged by the mere selling of drugs manufactured in breach of the Canadian patent, which give rise to private rights no different to those founded on contract, breaches of statutory duty or torts.³⁵¹

Footnotes

313 [2014] UKSC 55, [2015] A.C. 430.

314 [2014] UKSC 55 at [29]–[30].

315 [2010] EWHC 11 (Comm), [2010] 3 All E.R. 577.

316 [2016] UKSC 42.

317 e.g. see below, paras 18-224, 18-227 but cf. below, para.18-232.

318 e.g. see *Palaniappa Chettiar v Arunasalam Chettiar* [1962] A.C. 294.

319 e.g. see *Langton v Hughes* (1813) 1 M. & S. 593; and *Askey v Golden Wine Co* [1948] 2 All E.R. 35.

320 *Bigos v Bousted* [1951] 1 All E.R. 92; *Shaw v Shaw* [1965] 1 W.L.R. 537; cf. *Wilson, Smithett & Cope Ltd v Terruzzi* [1976] Q.B. 683.

321 *Fores v Johnes* (1802) 4 Esp. 97; as to civil libels, see below, para.18-062.

322 *Cowan v Milbourn* (1867) L.R. 2 Ex. 230; but see now *Bowman v Secular Society* [1917] A.C. 406, as to what constitutes blasphemy.

323 As to where one or both parties are prohibited by statute from making a contract such as that sued upon, see below, paras 18-189 et seq.

324 *Poplett v Stockdale* (1825) Ry & Mood. 337; and see *Shaw v DPP* [1962] A.C. 220.

325 *Scott v Brown, Doering, McNab & Co* [1892] 2 Q.B. 724; cf. *Harry Parker Ltd v Mason* [1940] 2 K.B. 590.

326 *Lane v Holloway* [1968] 1 Q.B. 379; thus an ordinary boxing match with gloves is not unlawful: *R. v Coney* (1882) 8 Q.B.D. 534, 539; see also Buller, *Nisi Prius*, 7th edn, p.16; and *Hunt v Bell* (1822) 1 Bing. 1.

327 *Clugas v Penaluna* (1791) 4 Term Rep. 466; *Waymell v Reed* (1794) 5 Term Rep. 599.

328 *Pellecat v Angell* (1835) 2 Cr. M. & R. 311; and see *Holman v Johnson* (1775) 1 Cowp. 341.

- 329 *DPP v Bhagwan* [1972] A.C. 60; cf. *Zamir v Secretary of State for the Home Department* [1980] A.C. 930.
- 330 *DPP v Withers* [1975] A.C. 842.
- 331 See *DPP v Bhagwan* [1972] A.C. 60; cf. *Zamir v Secretary of State for the Home Department* [1980] A.C. 930.
- 332 See above, para.18-008.
- 333 *Close v Wilson* [2011] EWCA Civ 5.
- 334 [1980] A.C. 37. See generally, Bennion, Statutory Interpretation, 7th edn (2017), Sect.7.4.
- 335 *Barton v Fincham* [1921] 2 K.B. 291; see Megarry, The Rent Acts, 11th edn (1988), pp.26–27.
- 336 *Rajbenback v Mamon* [1955] 1 Q.B. 283; see Megarry, pp.26–27.
- 337 Deliberate deceit, even in the absence of moral turpitude, is sufficient: *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Q.B. 621. This should be distinguished from contracts induced by fraud which are not necessarily illegal: see Treitel in Tapper (ed.), Crime, Proof and Punishment, Essays in Memory of Sir Rupert Cross (1981), p.107.
- 338 *Begbie v Phosphate Sewage Co Ltd* (1875) L.R. 10 Q.B. 491.
- 339 *Willis v Baldwin* (1780) 2 Doug. K.B. 450.
- 340 *Berg v Sadler and Moore* [1937] 2 K.B. 158.
- 341 See *R. v Scott* [1975] A.C. 819; Treitel in Tapper, Crime, Proof and Punishment, Essays in Memory of Sir Rupert Cross, p.87. cf. Fair Trading Act 1973 Pt XI, brought into operation by Fair Trading Act 1973 (Commencement No.1) Order 1973 (SI 1973/1545) which provides for the regulation of pyramid selling and similar trading schemes.
- 342 *Cockshott v Bennett* (1788) 2 T.R. 763; *Mallalieu v Hodgson* (1851) 16 Q.B. 689; cf. above, para.6-141.
- 343 *Miller v Karlinski* (1945) 62 T.L.R. 85; *Napier v National Business Agency* [1951] 2 All E.R. 264; *Beauvale Furnishings Ltd v Chapman* [2000] All E.R. (D) 2038.
- 344 *Alexander v Rayson* [1936] 1 K.B. 169; cf. *Saunders v Edwards* [1987] 1 W.L.R. 1116.
- 345 *21st Century Logistic Solutions Ltd v Madysen Ltd* [2004] EWHC 231 (QB), [2004] 2 Lloyd's Rep. 92. (In this case a company that intended to evade the payment of VAT could nevertheless enforce a contract for the supply of goods, the avoidance of VAT not being an integral part of the contract.)
- 346 As to where the object is the deliberate procurement of a breach of contract with a third party, see *Lauterpacht* (1936) 52 L.Q.R. 494.
- 347 See Pearce LJ in *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Q.B. 621, 638, though the case concerned fraud; *Allen v Rescous* (1676) 2 Lev. 179.
- 348 *Apthorp v Nevill* (1907) 23 T.L.R. 575; see above, para.18-054 as to the printer's proper course if he first learns of the libellous nature of the material after commencing performance of the contract.
- 349 *Apthorp v Nevill* (1907) 23 T.L.R. 575; as to agreements to indemnify against civil liability for libel, see below, para.18-231.
- 350 [2014] UKSC 55, [2015] A.C. 430.
- 351 [2014] UKSC 55 at [30].

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(i) - Domestic Affairs

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Section 4. - Contracts Contrary to Public Policy Though Not Involving a Legal Wrong

(a) - Objects Injurious to Good Government

(i) - Domestic Affairs

Sale of public offices and contracts

- 18-063 Contracts for the sale or transfer of public appointments, though they may not be prohibited in particular cases by the statutes relative to the sale of public offices,³⁵² are nonetheless contrary to public policy.³⁵³ So also is a secret agreement to assign to another, in circumstances amounting to a fraud on the Government, the profits of a public contract, such as for the conveyance of the mails.³⁵⁴ And where a clerk of the peace, appointed by the corporation of a borough under the **Municipal Corporations Act 1882** and having fees attached to his office, entered into an agreement with the corporation to receive a salary and account to them for the fees, it was held that the agreement was against public policy, as the acceptor of an office of trust can make no bargain in respect of it, and the presumption is that the fees are required to enable the holder to perform the duties of his office.³⁵⁵

Contracts by employees and members of public authorities

18-064



It is an offence at common law for a public officer to accept a bribe or show favour³⁵⁶ and a contract with such an object is undoubtedly unenforceable. It is now provided by statute that any officer with a direct or indirect pecuniary interest in a contract to be entered into by a local authority is to give notice that he is so interested and no officer is to take a fee or reward beyond his ordinary remuneration.³⁵⁷ Members of local authorities are under a similar duty to disclose their interest if they are present at a meeting of the authority at which the contract is the subject of consideration.³⁵⁸



Procurement of honours

- 18-065 Though not exactly the sale of an office, an agreement to pay money in return for the procurement of a knighthood for the payer is against public policy since it gives a third person an immediate interest in procuring the title by means which are likely to be improper.³⁵⁹ In *Parkinson v College of Ambulance Ltd*³⁶⁰ the plaintiff had brought an unsuccessful action to recover money from a charity to which he had made a donation on the undertaking by the charity to secure a knighthood for the plaintiff. While there seems no doubt that such an agreement remains unenforceable, the decision on the claim for return of the money is now doubtful. As Lord Toulson pointed out, where the bribe had been made to a public body such as a political party or the holder of a public office, it might be regarded “as more repugnant to the public interest that the recipient should keep it than that it should be returned”.³⁶¹ In *Patel v Mirza*³⁶² Lord Neuberger stated that he considered that, on the availability of a restitutive remedy, *Parkinson v College of Ambulance Ltd*³⁶³ had been “wrongly decided”. Likewise a will limiting estates to persons who should acquire the title of marquis or duke has been held against public policy,³⁶⁴ but not, perhaps surprisingly, on condition of acquiring a baronetcy, as that was held not to involve public duties.³⁶⁵

Assignment of pay, pensions, etc.³⁶⁶

- 18-066 An agreement to assign or mortgage the salary of a public officer, i.e. one paid from national funds,³⁶⁷ is against public policy; and the same is true of the pension attached to such an office.³⁶⁸ For instance, the pay of a naval surgeon on active service cannot be assigned³⁶⁹ nor can half-pay of an army officer.³⁷⁰ A clerk of petty sessions cannot assign his salary.³⁷¹ But it has been held that there may be a lawful partnership in the profits of an office.³⁷²

Neglect of duty

- 18-067 An agreement, the natural effect of which is to induce a public officer to neglect his duty or which would influence him to perform it in a particular way, is against public policy. Thus an agreement between one who held the offices of town clerk and clerk of the peace of a borough and an attorney, that the former would, for reward to him, recommend the latter to parties who might want an attorney to conduct prosecutions arising in the town clerk's office, was held illegal.³⁷³

Procurement of public benefits

- 18-068 An agreement to induce a person who has access to persons of influence to use his position to procure a benefit from the Government is contrary to public policy.³⁷⁴ Similarly the sale of a recommendation to be given on an application for a beer-house licence is contrary to public policy. But a contract between the tenant of a beer-house and brewers, one of whom was a magistrate, that, in consideration of their paying the costs of his application to the magistrates for a licence, he would tie the premises to them, was held not to be void although it involved the brewers supporting the application, on the ground, *inter alia*, that the agreement was not void for champerty since an application for a licence is not litigation, licensing sessions not being a court.³⁷⁵

Withdrawal of opposition to Bill

- 18-069 At any rate in the absence of any intention to practise a fraud on some individual or on the legislature, bargains between the promoters of a private Parliamentary Bill and a third party under which the promoters agree to purchase property from the third party³⁷⁶ partly as an inducement for him to withdraw opposition to the proposed Bill, or to amend the Bill and pay the third party a sum of money, appear not to be contrary to public policy.³⁷⁷ Although the court has jurisdiction to enforce by injunction a contract entered into by a person or corporation that they will not apply to Parliament, or will not oppose an application to Parliament, no such injunction appears ever to have been granted and judges have frequently stated that it is difficult to conceive a case in which such jurisdiction should be exercised.³⁷⁸

Footnotes

- 352 For the definition of a public officer under s.47(3) of the Solicitors Act 1932 (re-enacted by s.22 of the Solicitors Act 1974 and amended by Administration of Justice Act 1985 s.6); see *Beeston & Stapleford UDC v Smith* [1949] 1 K.B. 656. Section 22 was repealed by the Legal Services Act 2007 and the conduct of a solicitor's profession is now subject to Pt 3 of the Legal Services Act.
- 353 *Blachford v Preston* (1799) 8 T.R. 89, 94; *Parsons v Thompson* (1790) 1 H.B. 322.
- 354 *Osborne v Williams* (1811) 18 Ves. Jr. 379.
- 355 *Liverpool Corp v Wright* (1859) 28 L.J. Ch. 868; and see *McCreery v Bennett* [1904] 2 Ir.R. 69.
- 356 *R. v Whitaker* [1914] 3 K.B. 1283.
- 357 Local Government Act 1972 s.117; cf. *Mellis v Shirley and Freemantle Local Board of Health* (1885) 16 Q.B.D. 446. See above, para.13-032.
- ①358 See Localism Act 2011 s.31, which replaces Local Government Act 1972 s.94 (repealed by Local Government Act 2000 s.107).
- 359 *Parkinson v College of Ambulance Ltd* [1925] 2 K.B. 1. Such an agreement would now constitute an offence under the Honours (Prevention of Abuses) Act 1925.
- 360 [1925] 2 K.B. 1.
- 361 [2016] UKSC 42 at [118]; see also at [228].
- 362 [2016] UKSC 42 at [150].
- 363 [1925] 2 K.B. 1.
- 364 *Egerton v Earl Brownlow* (1853) 4 H.L. Cas. 1.
- 365 *Re Wallace* [1920] 2 Ch. 274.
- 366 See below, para.22-049.
- 367 *Re Mirams* [1891] 1 Q.B. 594 (involving the assignment of the salary of the chaplain to a workhouse which was held not to be against public policy).
- 368 *Grenfell v The Dean and Canons of Windsor* (1840) 2 Beav. 544. Such assignments may also be avoided by statute: e.g. see s.356 of the Armed Forces Act 2006 and *Roberts v Roberts* [1986] 1 W.L.R. 437 which dealt with the previous legislation which was identical. See also the Sale of Offices Act 1551 as extended by the Sale of Offices Act 1809 and the cases thereon cited in the 22nd edition of this work, paras 856–860; both of these Acts were repealed by Statute Law (Repeals) Act 2013 with no indication of replacement.
- 369 *Apthorpe v Apthorpe* (1887) 12 P.D. 192.
- 370 *Flarty v Odlum* (1790) 3 T.R. 681.
- 371 *McCreery v Bennett* [1904] 2 Ir.R. 69.
- 372 *Sterry v Clifton* (1850) 9 C.B. 110; and see *Collins v Jackson* (1862) 31 Beav. 645.
- 373 *Hughes v Statham* (1825) 4 B. & C. 187; *Savill Bros v Langman* (1898) 79 L.T. 44.
- 374 *Montefiore v Menday Motor Components Co* [1918] 2 K.B. 241.
- 375 *Savill Bros v Langman* (1898) 79 L.T. 44; cf. *Hughes v Statham* (1825) 4 B. & C. 187 and Criminal Law Act 1967 ss.13, 14.
- 376 *Taylor v Chichester & Midhurst Ry* (1870) L.R. 4 H.L. 628.

- 377 *Simpson v Lord Howden* (1842) 9 Cl. & F. 61; and see *Shrewsbury and Birmingham Ry Co v London and N.W. Ry Co* (1851) 17 Q.B. 652; *Edwards v Grand Junction Ry Co* (1836) 1 My. & Cr. 650. “A landowner cannot be restricted of his rights because he happens to be a Member of Parliament”: *Earl of Shrewsbury v North Staffordshire Ry* (1865) L.R. 1 Eq. 593, 613. See also, Standards in Public Life (First Report of the Committee on Standards in Public Life, Cm.2850–1), Ch.2.
- 378 *Bilston Corp v Wolverhampton Corp* [1942] Ch. 391; *Ware v Grand Junction Waterworks Co* (1831) 2 Russ. & My. 470, 483; *Heathcote v North Staffordshire Ry Co* (1850) 2 Mac. & G. 100, 109; *Re London, Chatham & Dover Ry Arrangement Act* (1869) L.R. 5 Ch. App. 671.

(ii) - Foreign Affairs

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 4. - Contracts Contrary to Public Policy Though Not Involving a Legal Wrong

(a) - Objects Injurious to Good Government

(ii) - Foreign Affairs

Trading with the enemy

- 18-070 All trading with the enemy,³⁷⁹ except with royal licence, is against public policy.³⁸⁰ On the same principle “it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of” this country in time of war³⁸¹ or involving intercourse with or benefit to the enemy,³⁸² however insignificant in quantum³⁸³ and notwithstanding the benefit which may accrue to this country from such a contract.³⁸⁴ Nor may the contract merely be suspended during hostilities.³⁸⁵ Thus, a contract by a British subject to insure an enemy against loss through capture by British ships is unenforceable ab initio, even though it was entered into before the commencement of hostilities.³⁸⁶ Similarly, a contract of insurance on goods shipped from an enemy’s port on board a neutral ship, the goods having been purchased in the enemy’s country by the agent of the assured after hostilities had commenced, has been held to be against public policy.³⁸⁷ An English company found to have enemy character by reason of enemy control³⁸⁸ does not cease, in the eye of English law, to be an English company subject to this rule.³⁸⁹

Illegality under applicable foreign law ³⁹⁰

- 18-071 Where the contract is governed by a system of law other than English, i.e. under the principles of English private international law, as laid down in the Rome I Regulation on the law applicable to contractual obligations,³⁹¹ the law governing the contract is foreign, and the contract is unenforceable for illegality under the relevant doctrine of the foreign system, the contract is also unenforceable in England,³⁹² unless the vitiating illegality under the governing law is one that the English court declines to recognise because, e.g. it imposes an unfair discrimination upon one or both of the contracting parties.³⁹³

Performance contrary to public policy in place for performance

- 18-072 Where a contract governed by English law is contrary to the public policy of the state where it is to be performed, this will not necessarily constitute a bar to the contract being enforceable in England.³⁹⁴ However, in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*³⁹⁵ Phillips J stated that³⁹⁶:

“... the English courts should not enforce an English law contract which fails to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.

In such a situation international comity combines with English domestic policy to militate against enforcement.”

Presumably condition (i) would be sufficient to prevent the contract from being enforced irrespective of the governing law or where the place of performance of the contract may be.³⁹⁷ However, not all principles of public policy are necessarily of universal application and where the policy is based on “considerations which are purely domestic”³⁹⁸ then this would not constitute a bar to enforcement of a contract that has to be performed abroad.

Contracts legal under applicable law but not under English law

- 18-073

Where the contract is, however, valid by its foreign governing law, will it be unenforceable in England because it would be regarded as illegal or contrary to public policy under the rules governing domestic contracts? Article 21 of the Rome I Regulation provides that the:

“... application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum.”³⁹⁹

Under the previous law it was clear that if the contract involved criminality either by statute or at common law, then it might be unenforceable in England despite its validity under the governing law and it may be that this is still so if the criminality is serious enough.⁴⁰⁰ Where, however, the contract, though not involving criminality, is alleged to offend against one of the recognised heads of English public policy, great care should be exercised by the courts in determining whether the domestic policy demands the non-enforcement of a contract with substantial or even exclusive foreign elements which is valid under the system of law with which it has the closest connection. It cannot, however, be said that the courts have carefully considered this problem; instead they have usually applied the English heads of public policy and held such contracts unenforceable in England.⁴⁰¹ In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*⁴⁰² the court held that the approach adopted in this paragraph would also “seem apposite in the case of an English law contract to be performed abroad”.

- 18-074 Where again the contract is valid by its foreign governing law, but fails to comply with an English regulatory statute rendering similar domestic contracts void or unenforceable but not illegal, the courts have sometimes enforced the agreement,⁴⁰³ sometimes not.⁴⁰⁴ It is thought that the proper principle is that such agreements should be enforced unless the social policy expressed in the English statute is of such paramount importance that it must be applied even to a transaction with foreign elements or unless the contract, or its breach, has a substantial contact with England. This seems to accord with art.21 cited above; and also art.9 which allows the application of overriding mandatory provisions of the law of the forum, i.e. rules:

“... to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”

Illegality under foreign law other than law applicable to contract

- 18-075 Is a contract unenforceable in England in a case where it is illegal by a foreign law other than the law applicable to the contract? The decisions on this question are somewhat confusing, but the

following propositions appear to represent the law before the adoption of the Rome Convention. The English courts would not enforce any contract the recognition of which might constitute a hostile act against a foreign friendly government. Thus, in *De Wiitz v Hendricks*⁴⁰⁵ the plaintiff, in order to raise a loan in support of Greek rebels against their Turkish government, deposited with the defendant certain papers. The loan having fallen through, the purpose of the transaction which encompassed the overthrow of a friendly government prevented the plaintiff recovering the papers. Likewise in *Regazzoni v K.C. Sethia (1944) Ltd*⁴⁰⁶ a contract to export a commodity from India to South Africa contrary to the law of the former country was held unenforceable. And although the English courts have refused to enforce a penal law at the suit of a foreign state,⁴⁰⁷ nevertheless they will not enforce a contract which involves the breach of such a law,⁴⁰⁸ or grant equitable relief⁴⁰⁹ to one whose claim is based on such breach unless the law in question was “repugnant to English conceptions of what may be regarded as within the ordinary field of legislation or administrative order even in this country” or such that its enforcement would be against “morals”.⁴¹⁰ There appear to be two principles at work.

Parties intend to violate law of country where contract to be performed

18-075A The first principle is that English courts have refused to enforce a contract where the common intention of the parties was to violate the law of a foreign friendly state.⁴¹¹ If a common intention to violate the law is shown, it does not matter that the contract could be performed in a lawful manner.⁴¹² But the principle has not been extended to cases where there was a sale in England in the mere knowledge that the goods were to be imported into a foreign country contrary to the revenue law of that country⁴¹³ or where there was the giving of an English cheque as part of an arrangement which, as the parties knew and intended, would involve the doing of acts in a foreign country which were criminal by the laws of that country.⁴¹⁴ Nor has the fact that strict compliance with the contract would cause a party to perform illegal acts contravening exchange control regulations in the country of his residence, or place of business, prevented the English court from upholding the contract and awarding damages in the event of its breach.⁴¹⁵

Contract requires act that is illegal in place of performance

18-076 The second principle is that English courts will not enforce a contract where performance of that contract is forbidden by the law of a friendly State in which it must be performed.
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U The principal authority is *Ralli Bros v Compania Naviera Sota y Aznar*, in which the freight for the carriage of a cargo of jute to Barcelona was to be paid in Spanish currency to a Spanish company. After the contract was made the Spanish Government set a maximum for freight, which was lower than the amount agreed. The receivers of the cargo declined to pay above that threshold and the Spanish owners sued in London for the balance. It was held that they could not recover it.

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U In these cases it is not necessary that the parties intended to commit an illegal act or were aware that performance would involve one.

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U But it “is an essential and necessary ingredient of the principle” that the act should be illegal under the law of the country where it is to be carried out.

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U The rule does not apply if performance of the contracts does not “necessarily” involve the doing of an act which was unlawful by the law of the place where it had to be carried out.

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U Difficulties have been encountered in ascertaining whether performance of a contract involves such an illegal act. In making this assessment it was said to be:

“... immaterial whether one party has to equip himself for performance by an illegal act in another country. What matters is whether performance itself necessarily involves such an act.”

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Where the principle in *Ralli Bros* applies, the:

“... party relying on the doctrine will in general not be excused if he could have done something to bring about valid performance and failed to do so.”

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This second principle would clearly apply where the English law is the law governing the contract. Where the contract is governed by a foreign law, it has been doubted whether the same rules apply; the cases supporting it have been considered in the final analysis to turn on other propositions,

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U or to have reflected the application of standard principles of contract law or principles of English public policy.

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U There does not appear to be any overriding requirement of English public policy rendering such contracts unenforceable where they are governed by a foreign system of law and are not regarded as illegal under that system.

A flexible approach

18-076A In *Magdeev v Tsvetkov*⁴²⁵ the claimant had entered into an investment agreement in October 2014 (“the October Agreement”) to loan US\$10 million to a Dubai company.⁴²⁶ The claimant also entered into an employment contract (“the RM Employment Agreement”)⁴²⁷ which was a sham as the claimant had no responsibilities under it. It was intended to use the remuneration payable under the employment contract to repay the loan. The court found that the agreement between the parties⁴²⁸:

“... reflected an (1) Investment Agreement containing an agreement for an interest free loan of \$10 million and requiring a sham employment agreement as a ‘vehicle for paying a return’ and (2) the sham employment agreement itself.”

The sham employment agreement constituted criminal forgery under the UAE Penal Code.⁴²⁹ The case might involve either of the principles described in previous paragraphs. Cockerill J pointed out that there are questions about each of them:

“(i) Does the existence in a contract of a term which can only be performed in a manner which is unlawful in the place of performance render unenforceable a different obligation, the fulfilment of which would not necessarily be unlawful in the place of performance?

(ii) How is the principle in *Foster v Driscoll* to be applied where the parties have more than one object and intention in reaching their arrangement, one of which objects necessitates the performance of an act unlawful by the place of performance and one of which does not?”⁴³⁰

It was argued that after the decision of the Supreme Court in *Patel v Mirza*⁴³¹ the court should apply the same multi-factorial approach whether the illegality is domestic or foreign.⁴³² Cockerill J rejected this, pointing out that the public policy underpinning the law relating to domestic illegality is ex turpi causa and consistency, but that underpinning both *Ralli Bros*⁴³³ and *Foster v Driscoll*⁴³⁴ is international comity.⁴³⁵ Nonetheless Cockerill J considered that *Patel v Mirza* provides a guide for a flexible balancing exercise that has to be performed in applying either of the two principles. Proportionality is not specifically relevant, because that assumes an understanding

of the questions of weight and gravity which may not be available in respect of a foreign court's or foreign judicature's priorities; but other factors should be balanced,⁴³⁶ such as (i) intention to breach the law,⁴³⁷ (ii) seriousness of the alleged wrong (in the case of forgery)⁴³⁸ and (iii) "iniquity", the seriousness of the wrong in terms of its wider deleterious effect on the society and the economy.⁴³⁹ The sham employment contract was not a mere administrative contravention, nevertheless there were no prosecution or enforcement proceedings by the UAE authorities and there was unchallenged evidence that "the UAE authorities might not take this kind of breach too seriously".⁴⁴⁰ The performance of the dominant part of the contract (the loan) did not involve illegality. Likewise, although there was some form of intention, there was no evidence that the parties knew that their act would be contrary to UAE law. Cockerill J concluded "that it would be contrary to justice to refuse enforcement" of the agreement.⁴⁴¹

Foreign laws of extraterritorial application

- 18-077 Thirdly, certain foreign laws are of extraterritorial application and may purport to make contracts illegal although these contracts do not necessitate any illegal acts within the foreign jurisdiction and although the parties to them do not contemplate such acts.⁴⁴² In such circumstances there is no authority that the English courts would refuse to enforce the contract solely on account of the extraterritorial application of the foreign law, and there are indications to the contrary.⁴⁴³

Knowledge of foreign illegality

- 18-078 Where illegality by foreign law is pleaded, it may be that one of the parties is unaware of the illegality of the transaction, or of the illegal purpose intended by the other party. In such circumstances, the principles discussed above at paras 18-054 and 18-055 have been applied, except that, foreign law being regarded by an English court as a matter of fact, ignorance as to the actual content of the foreign rule would appear to be equivalent to a mistake of fact, not of law. Thus in *Fielding & Platt Ltd v Najjar*⁴⁴⁴ English machinery manufacturers contracted with a Lebanese company to make and deliver an aluminium press for £235,000, payment to be made by promissory notes given by N, the company's managing director, and payable at intervals during the progress of the work. The English manufacturers began the work, presented the first note for payment, but it was not honoured. In an action upon the note N pleaded that the whole transaction was illegal and unenforceable in that it was agreed that the manufacturers should render invoices which they knew to be false for the purpose of deceiving the Lebanese authorities into admitting goods into Lebanon under import licences which did not in fact cover these goods. The Court of Appeal held that the English manufacturers were entitled to succeed since, even on the assumption that the foreign illegality was capable of vitiating an English contract, it was not a term that the false

invoices be made, so that the contract could be performed lawfully; and even if there were such a term, there was not sufficient evidence to show that the manufacturers appreciated the illegality or intended to participate in it.

Footnotes

- 379 As to who is an enemy, see above, paras 14-025 et seq., and below, para.18-210.
- 380 *Ertel Bieber & Co v Rio Tinto Co* [1918] A.C. 260, 273, 289; and see *The Hoop* (1799) 1 C.Rob. 196; *Ogden v Peele* (1826) 8 Dow. & Ry I; as to illegality by statute, see below, paras 18-189 et seq. See further McNair, Legal Effects of War, 4th edn (1966); and see below, paras 18-210—18-211, as to the frustrating effect of war.
- 381 *Furtado v Rogers* (1802) 3 Bos. & Pul. 191, 198.
- 382 *Kuenigl v Donnersmarck* [1955] 1 Q.B. 515, 536; *Ertel Bieber & Co v Rio Tinto Co* [1918] A.C. 260, 274.
- 383 *Bevan v Bevan* [1955] 2 Q.B. 277, 240.
- 384 *The Hoop* (1799) 1 C.Rob. 196, 199–200.
- 385 *Ertel Bieber & Co v Rio Tinto Co* [1918] A.C. 260.
- 386 *Furtado v Rogers* (1802) 3 Bos. & Pul. 191; *Ertel Bieber & Co v Rio Tinto Co* [1918] A.C. 260, 273, 289–290.
- 387 *Potts v Bell* (1800) 8 T.R. 548. As to the validity of insurance against seizure immediately before the outbreak of hostilities, see *Janson v Driefontein Consolidated Mines Ltd* [1902] A.C. 484, 499.
- 388 See below, para.18-210.
- 389 *Kuenigl v Donnersmarck* [1955] 1 Q.B. 515; and see at 539: “Many of the old decisions dating from a more liberal age which suggest that British subjects in enemy territory enjoy a measure of freedom in their dealings with the enemy are of doubtful authority today”.
- 390 See below, paras 33-287 et seq.; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), r.216.
- 391 Applicable by virtue of the Contracts (Applicable Law) Act 1990.
- 392 Rome I Regulation arts 10, 12.
- 393 Rome I Regulation art.21; *Heriz v Riera* (1840) 11 Sim. 318; *Kahler v Midland Bank Ltd* [1950] A.C. 24; *Zivnostenska Banka National Corp v Frankman* [1950] A.C. 57; *MacKender v Feldia AG* [1967] 2 Q.B. 590, 601; *Re Lord Cable* [1977] 1 W.L.R. 7. As to meaning of applicable law see below, paras 33-019 et seq.
- 394 *Collier* (1988) C.L.J. 169, 170 and cases there cited.
- 395 [1988] Q.B. 448; *Tekron Resources Ltd v Guinea Investment Co Ltd* [2004] 2 Lloyd's Rep. 26.
- 396 [1988] Q.B. 448, 461.
- 397 [1988] Q.B. 448, 459.
- 398 [1988] Q.B. 448, 459.

- 399 See generally, Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), r.221 and r.229.
- 400 *Boissevain v Weil* [1950] A.C. 327; Dicey, Morris and Collins on the Conflict of Laws, r.210.
- 401 *Grell v Levy* (1864) 16 C.B.(N.S.) 73; *Kaufman v Gerson* [1904] 1 K.B. 591; contrast the narrower and, it is submitted, better approach in *Addison v Brown* [1954] 1 W.L.R. 779. See also *Att-Gen of New Zealand v Ortiz* [1984] A.C. 1.
- 402 [1988] Q.B. 448, 459.
- 403 *Quarrier v Colston* (1842) 1 Ph. 147; *Saxby v Fulton* [1909] 2 K.B. 208; *Sayers v International Drilling Co* [1971] 1 W.L.R. 1176.
- 404 *Leroux v Brown* (1852) 12 C.B. 801; cf. *English v Donnelly* (1958) S.C. 494 and *Brodin v A/R Seljan* (1973) S.L.T. 198.
- 405 (1824) 2 Bing. 314.
- 406 [1958] A.C. 301. See also *Mahonia Ltd v JP Morgan Chase Bank* [2003] 2 Lloyd's Rep. 911; *Mahonia Ltd v West LB AG* [2004] EWHC 1938 (Comm); *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep. 335, [2004] All E.R. (D) 10.
- 407 *Government of India v Taylor* [1955] A.C. 491. On what constitutes a penal law see *Att-Gen of New Zealand v Ortiz* [1984] A.C. 1.
- 408 *Regazzoni v K.C. Sethia Ltd* [1958] A.C. 301; cf. *Pye v B.G. Transport Service* [1966] 2 Lloyd's Rep. 300; *Fielding & Platt Ltd v Najjar* [1969] 1 W.L.R. 357.
- 409 *Re Emery's Investment Trusts* [1959] Ch. 410.
- 410 *Regazzoni v K.C. Sethia Ltd* [1958] A.C. 301, 327, per Lord Keith; see also Lord Somerville, 330; *Brokaw v Seatrain UK Ltd* [1971] 2 Q.B. 476; *Att-Gen of New Zealand v Ortiz* [1984] A.C. 1.
- 411 *Foster v Driscoll* [1929] 1 K.B. 470; *Toprak Mahsullri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep. 98, 106–107; *Ispahari v Bank Melli Iran* (1997) T.L.R. 701.
- 412 *Foster v Driscoll* [1929] 1 K.B. 470, 521; see *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [304]–[306] and for a recent consideration of the principle, *Haddad v Rostamani* [2021] EWHC 1892 (Ch) (on which see further below, para.18-076A).
- 413 *Foster v Driscoll* [1929] 1 K.B. 470, 518.
- 414 *Sharif v Azad* [1967] 1 Q.B. 605; cf. *Mansouri v Singh* [1986] 1 W.L.R. 1393. The contract in this case involved exchange control legislation, on which see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), r.264; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 A.C. 168, 188–191.
- 415 *Kleinwort Sons & Co v Ungarische Baumwolle Industrie Aktiengesellschaft* [1939] 2 K.B. 678; *Kahler v Midland Bank Ltd* [1950] A.C. 24, 48; *Rossano v Manufactures' Life Assurance Co* [1963] 2 Q.B. 352. See, however, Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), r.264.
- 416 *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 K.B. 287; *Soleimany v Soleimany* (1998) C.L.C. 779, 792 (“Nor will it [i.e. English law] enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if

performance is illegal by the law of that country”); *Magdeev v Tsvetkov [2020] EWHC 887 (Comm)* at [297]. Although the courts will not enforce a contract illegal by the law of the country of performance, where it has been performed the courts may recognise its effect: *Royal Boskalis Westminster NV v Mountain [1997] C.L.C. 816, 866*. In *Eurobank Ergasias SA v Kalliroi Navigation Co Ltd [2015] EWHC 2377 (Comm)* at [36] the court considered “that *Ralli* remains good law” despite the Convention on the Law Applicable to Contractual Obligations (Rome Convention): on this and on the effect of the Rome I Regulation see paras 33-291 et seq.

④17 See further below, para.33-290.

④18 *Magdeev v Tsvetkov [2020] EWHC 887 (Comm)* at [297].

④19 *Dana Gas PJSC v Dan Gas Sukuk Ltd [2017] EWHC 2928 (Comm)* at [82]. “The rule does not apply ... where the act ‘might’ be unlawful or where there is a ‘risk’ (which is unknown) that the authorities might take a dim view of performance”: *Ridley v Dubai Islamic Bank PJSC [2022] EWHC 1912 (Comm)* at [66].

④20 *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728, 743–746; Magdeev v Tsvetkov [2020] EWHC 887 (Comm)* at [297].

④21 [1989] Q.B. 728, 744.

④22 *Banco San Juan International Inc v Petroleos De Venezuela SA [2020] EWHC 2937 (Comm)* at [84].

④23 Reynolds (1992) 109 L.Q.R. 553. See further below, para.33-290.

④24 Reynolds (1992) 109 L.Q.R. 553; Collier, Conflict of Laws, 4th edn (2013), pp.210–212; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), r.221 at paras 32-144 —32-151; (discussing, inter alia, whether *Ralli Bros* survives the Rome Convention).

425 [2020] EWHC 887 (Comm); followed in *Haddad v Rostamani [2021] EWHC 1892 (Ch)* (see at [88]). The argument in the *Haddad* case was based on an intention to breach a foreign law, not on either domestic illegality or the fact that performance would have been illegal under a foreign law: at [80].

426 [2020] EWHC 887 (Comm) at [17].

427 [2020] EWHC 887 (Comm) at [15].

428 [2020] EWHC 887 (Comm) at [27].

429 [2020] EWHC 887 (Comm) at [294].

430 [2020] EWHC 887 (Comm) at [333].

431 [2016] UKSC 42.

432 [2020] EWHC 887 (Comm) at [327].

433 *Ralli Bros v Compania Naviera Sota y Aznar [1920] 2 K.B. 287*; above, para.18-076.

- 434 [1929] 1 K.B. 470; above, para.18-075A.
- 435 [2020] EWHC 887 (Comm) at [331].
- 436 [2020] EWHC 887 (Comm) at [332].
- 437 [2020] EWHC 887 (Comm) at [335].
- 438 [2020] EWHC 887 (Comm) at [336]. Cockerill J (at [315]) cited a dictum by Lord Collins in *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544, [2016] 1 HKEC 323 at [57] that “There may ... be cases in which a sufficiently serious breach of foreign law which reflects important policies of the foreign state or separate law district may be such that it would be contrary to public policy to enforce a contract. But there is no basis in authority or principle for holding that every breach of foreign law would come into this category”).
- 439 [2020] EWHC 887 (Comm) at [337]. These factors would also be relevant to illegality under English law.
- 440 [2020] EWHC 887 (Comm) at [339].
- 441 [2020] EWHC 887 (Comm) at [341].
- 442 e.g. the United States Sherman Act 1890; see the Report of the Attorney-General’s Committee to Study the Antitrust Laws (1955), pp.66–67; Brewster et al., Waller’s Antitrust and American Business Abroad, 3rd edn (1997).
- 443 *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] Ch. 19; *Sharif v Azad* [1967] 1 Q.B. 605, 617. See also Protection of Trading Interests Act 1980. Under s.7(1) effect may be given to the mandatory rules of another country but this, by s.7(2), is not to restrict effect being given to the law of the forum where it is mandatory, irrespective of the law otherwise applicable to the contract.
- 444 [1969] 1 W.L.R. 357.

(i) - Agreements to Conceal Offences and Compromises

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(i) - Agreements to Conceal Offences and Compromises

Concealment of crime generally

- 18-079 A provision in any agreement not to disclose misconduct of such a nature that it ought, in the public interest, to be disclosed to others is against public policy.⁴⁴⁵ There is no confidence as to the disclosure of iniquity.⁴⁴⁶ But it may well be permissible for a person against whom frauds have been, and are intended to be, committed to give a binding promise of secrecy, in order to obtain information relating to those frauds, which will enable him, by taking steps himself, to prevent the commission of future frauds. However, such a promise will be against public policy where it extends to frauds committed and contemplated against others to whom the communication of the information obtained would be of use in preventing the commission of such frauds.⁴⁴⁷

Criminality of agreements to conceal an arrestable offence

- 18-080 In many cases where there is, in effect, an undertaking not to disclose a crime, the crime amounts also to a civil wrong against the promisor and the undertaking is given as part of an agreement to compromise or settle the civil wrong; the question then arises whether the inclusion of the undertaking not to disclose the information or to instigate a public prosecution renders

unenforceable the compromise of the civil wrong. [Section 5 of the Criminal Law Act 1967](#) provides that where an arrestable offence ⁴⁴⁸ has been committed, anyone who knows or believes:

- (i)that an arrestable offence ⁴⁴⁹ has been committed; and
- (ii)that he has information which might be of material assistance in securing the prosecution or conviction of any offender for it,

is guilty of an indictable offence ⁴⁵⁰ if he accepts, for not disclosing that information, any consideration other than:

(a)the making good of loss or injury occasioned by the offence; or

(b)the making of reasonable compensation for that loss or injury. ⁴⁵¹

Otherwise the compounding of an offence (other than treason) is no longer a criminal offence by English law. ⁴⁵²

18-081 An agreement, express or implied, ⁴⁵³ which is criminal by virtue of the provisions of [s.5 of the Criminal Law Act 1967](#), is undoubtedly unenforceable civilly. ⁴⁵⁴ But are compromises of offences ⁴⁵⁵ other than those which are unlawful under [s.5 of the Criminal Law Act 1967](#) enforceable? Where the consideration or part of it takes the form of a promise not to report the matter to the police, or not to initiate a prosecution, the transaction runs the risk of being considered a stifling of a prosecution and may be considered contrary to public policy. It is in any case clear that where a person has already made a statement with a view to the provision of evidence in support of criminal proceedings, even if that person is the victim of the alleged crime, that person becomes a witness and the promise to him of an inducement, ⁴⁵⁶ even by way of compensation for the loss or injury, to alter or withdraw the statement, constitutes the crime at common law of attempting to pervert the course of justice, ⁴⁵⁷ and is therefore unenforceable. It is clear that an agreement that would not be offensive to public policy is where the innocent party is seen clearly to be compromising *only* his civil claim, and is not offering either not to report the matter, or not to initiate a prosecution, or to withdraw statements already made. Whether other agreements, for example, one involving a promise not to bring a criminal action, would not be enforceable is not clear. Prior to the [1967 Act](#), an undertaking not to take action with respect to misdemeanours was binding and enforceable; where the agreement pertained to a crime which was a felony or a misdemeanour of a public nature it was not enforceable. What is left of the old learning in the light of both the abolition of the distinction between misdemeanours and felonies and [s.5 of the Criminal Law Act 1967](#) is not clear. The commentators do not speak with a single voice. ⁴⁵⁸ Given that the courts appear to have been given an opportunity to reconsider the matter, the preferable solution would be to jettison completely the old rule and only strike down those compromises which were manifestly contrary to the public interest. ⁴⁵⁹

Trustees in bankruptcy

- 18-082 The trustee in bankruptcy of one who has paid money or given security in pursuance of an agreement which is rendered illegal by s.5 of the *Criminal Law Act 1967* is probably in no better position than the bankrupt and is therefore unable to recover⁴⁶⁰ unless perhaps the payment was an offence against the bankruptcy laws.⁴⁶¹

Footnotes

- 445 *Initial Services Ltd v Putterill* [1968] 1 Q.B. 396. cf. *Schering Chemicals Ltd v Falkman Ltd* [1982] Q.B. 1; *Hubbard v Vosper* [1972] 2 Q.B. 84; *A. v Hayden* (1985) 59 A.L.J.R. 6. See also *Lion Laboratories Ltd v Evans* [1985] Q.B. 526; *Att-Gen v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109, 268–269.
- 446 *Gartside v Outram* (1857) 26 L.J. Ch. 113, 114.
- 447 *Howard v Odhams Press* [1938] 1 K.B. 1, 41–42.
- 448 As to what is an arrestable offence, see *Police and Criminal Evidence Act 1984* s.24(1).
- 449 *Police and Criminal Evidence Act 1984* s.24(1).
- 450 Not necessarily the offence which has in fact been committed.
- 451 Such an offence can be prosecuted only by or with the consent of the Director of Public Prosecutions: *Criminal Law Act 1967* s.5(3).
- 452 *Criminal Law Act 1967* s.5(1); cf. *Flower v Sadler* (1882) 10 Q.B.D. 572.
- 453 As to the implication of an agreement in such circumstances, see *William v Bayley* (1886) L.R. 1 H.L. 200; *Brook v Hook* (1871) L.R. 6 Ex. 89; *Whitmore v Farley* (1881) 45 L.T. 99; *McClatchie v Haslam* (1891) 65 L.T. 691; *Jones v Merionethshire Building Society* [1892] 1 Ch. 173. cf. *Howard v Odhams Press* [1938] 1 K.B. 1; *Bhowampur Banking Corp Ltd v Sreemati Durgesh Nandini Dasi* (1941) 68 L.R.I.A. 144, per Lord Atkin at 148. As to the possibility of a plea of duress or undue influence in such cases, see above, paras 10-055—10-059.
- 454 See above, para.18-058.
- 455 *Criminal Law Act 1967* s.1(1) abolished as from 1 January 1968, the distinction between felonies and misdemeanours, and s.1(2) provides that, subject to the provisions of that Act, on all matters on which a distinction was previously made between felonies and misdemeanours, the law and practice is to be the law and practice applicable at the commencement of the Act in relation to misdemeanours. The special rules relating to the stifling of a prosecution of a felony have thus been abrogated.
- 456 If part of the consideration is also a promise not to commence a civil action for damages, see below, paras 18-252 et seq. for the principles on the possibility of severing the tainted from the untainted promise.

457 *R. v Panayiotou [1973] 1 W.L.R. 1032.*

458 See *Hudson (1980) 43 M.L.R. 532.*

459 *Hudson (1980) 43 M.L.R. 532.*

460 cf. *Re Mapleback (1876) 4 Ch. D. 150* as to the position at common law before 1968 (the trustee takes the estate subject to its limitations in the hands of the bankrupt).

461 cf. *Re Campbell (1884) 14 Q.B.D. 32* as to the position at common law before 1968; and see below, paras 23-025—23-026.

(ii) - Other Contracts Affecting the Course of Justice

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(ii) - Other Contracts Affecting the Course of Justice

Interference with course of justice

- 18-083 Any contract which tends to abuse, prevent or impede the due course of justice is against public policy. A bond upon consideration that criminal proceedings shall be so conducted that the name of a certain person shall not be mentioned, or shall be mentioned only in such a way as not to damage him, is against public policy,⁴⁶² as is an agreement not to appear and give evidence at a criminal trial.⁴⁶³ Similarly agreements to institute a prosecution as a means of gaining publicity,⁴⁶⁴ or to consent to a verdict of not guilty in respect of a public nuisance,⁴⁶⁵ have been held to be contrary to public policy. And a contract with one who has stood bail to indemnify him amounts to an indictable offence⁴⁶⁶ and is unenforceable.⁴⁶⁷ However, there are many circumstances in which parties can agree as to the future course of legal proceedings. Thus, for example, in a commercial agreement relating to the sale of land, it has been held not to be against public policy for one of the parties to agree to support the other party's application for planning permission.⁴⁶⁸

Procurement of pardon and withdrawal of election petition

18-084

An agreement to pay money, in consideration of a party using his interest to procure the pardon of a convict, is against public policy.⁴⁶⁹ And so is an agreement in consideration of a money payment to withdraw an election petition in which charges of bribery are made,⁴⁷⁰ it being in the public interest that the investigation should be carried out.

Winding up

- 18-085 An agreement by a shareholder in a company which is being compulsorily wound up that, in consideration of a sum of money, he would endeavour to postpone the making of a call or would support the claim of a creditor is unenforceable as being contrary to the policy of the insolvency legislation and perhaps also an interference with the course of public justice.⁴⁷¹

Bankruptcy

- 18-086 All “composition” agreements between a debtor and creditor of a preferential character are unenforceable.⁴⁷² In addition the essence of such agreements being equality between the creditors, a creditor who has executed a composition deed is entitled to repudiate it against the other creditors if he afterwards discovers that they have been induced to execute the deed by means of a secret bargain for a payment to them in excess of the composition, even if the bargain was made after his own execution of the deed.⁴⁷³ Similarly, agreements for the withdrawal of opposition to the discharge of a bankrupt are unenforceable.⁴⁷⁴ But a contract by an undischarged bankrupt in consideration of a small loan to pay in full a debt due from him at the commencement of and provable in his bankruptcy is not void as being contrary to public policy or the principles of the law of bankruptcy.⁴⁷⁵

Divorce: collusive agreements

- 18-087 A collusive agreement between the parties⁴⁷⁶ to matrimonial proceedings is an agreement or bargain between the parties or their agents whereby the initiation of the suit is procured or its conduct provided for.⁴⁷⁷ At one time these were held to be unenforceable. However, in *Sutton v Sutton*⁴⁷⁸ the court held that public policy, particularly in the light of s.1(2)(d) of the Matrimonial Causes Act 1973 (permitting divorce by agreement after two years’ separation), no longer rendered a contract unenforceable on the grounds of collusion. In that case the parties, who had lived apart for three years, agreed to an amicable divorce on the grounds of two years’ separation and as part of

the arrangement the husband agreed to transfer title to the matrimonial home to the wife. The wife sought specific performance of this promise and, although she was unsuccessful on the grounds that the agreement was unenforceable as an attempt to oust the jurisdiction of the court, the court held that the principle that collusive agreements were void and unenforceable, was no longer the law. If of course the parties fabricate the grounds on which a divorce is sought then this would make any agreement to do this unenforceable as an attempt to pervert the course of justice.⁴⁷⁹

Footnotes

- 462 *Lound v Grimwade* (1888) 39 Ch. D. 605.
- 463 *Collins v Blantern* (1767) 2 Wils. K.B. 347; 1 Sm.L.C., 13th edn, p.406; cf. *Fulham Football Club Ltd v Cabra Estates Plc* [1993] P.L.R. 29, [1994] 1 B.C.L.C. 363.
- 464 *Dann v Curzon* (1910) 104 L.T. 66.
- 465 *Windhill Local Board v Vint* (1890) 45 Ch. D. 351.
- 466 *R. v Porter* [1910] 1 K.B. 369.
- 467 *Hermann v Jeuchner* (1885) 15 Q.B.D. 561 (money actually deposited with a surety was held not to be recoverable); *Consolidated Exploration & Finance Co v Musgrave* [1900] 1 Ch. 37; *Re Gurwicz* [1919] 1 K.B. 675.
- 468 *Fulham Football Club Ltd v Cabra Estates Plc* [1994] 1 B.C.L.C. 363. A term in a settlement not to repeat claims made in proceedings was not against public policy: *Australia and New Zealand Bank Group Ltd v Cie Woga D'Importation et D'Exportation SA* [2007] EWHC 293 (Comm), [2007] 1 Lloyd's Rep. 487.
- 469 *Norman v Cole* (1800) 3 Esp. 253; but see *Lampleigh v Brathwait* (1615) Hob. 105.
- 470 *Coppock v Bower* (1838) 4 M. & W. 361.
- 471 *Elliott v Richardson* (1870) L.R. 5. C.P. 744.
- 472 *Mallalieu v Hodgson* (1851) 16 Q.B. 689; and see *Staines v Wainwright* (1839) 6 Bing.N.C. 174. See below, paras 23-028 et seq.
- 473 *Re Milner* (1885) 15 Q.B.D. 605. And see *Re Myers* [1908] 1 K.B. 941; *Farmers' Mart v Milne* [1915] A.C. 106; *Re Johns* [1928] Ch. 737; cf. above, para.18-061.
- 474 See *McKewan v Sanderson* (1875) L.R. 20 Eq. 65; *Kearley v Thomson* (1890) 24 Q.B.D. 742.
- 475 *Wild v Tucker* [1914] 3 K.B. 36; and see *Jakeman v Cook* (1878) 4 Ex. D. 26 where the promisor was a discharged bankrupt.
- 476 cf. *Prevost v Wood* (1905) 21 T.L.R. 694 as to an agreement between a petitioner and a third party with whom sexual relations took place.
- 477 *Gosling v Gosling* [1968] P. 1, 11-12.
- 478 [1984] Ch. 184; see Cretney and Masson, Principles of Family Law, 8th edn (2008), Ch.13.
- 479 Although there is a provision enabling the parties to refer an agreement to the court for approval, this procedure is now obsolete: see Rayden and Jackson, Law and Practice in Divorce and Family Matters, 16th edn (1991), p.508.

(iii) - Ouster of Jurisdiction

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Maintenance agreements

- 18-088 Any provision by which a wife binds herself not to apply to the divorce court for maintenance is void as an ouster of the jurisdiction of the courts⁴⁸⁰: but one which, by purporting to make maintenance a debt enforceable at law, is now by statute⁴⁸¹ binding on the parties and provides consideration for a counter-promise, although on application to the court it may be varied or revoked.⁴⁸² But an agreement is not, even at common law, void as contrary to public policy merely because it limits a husband's right to apply to the courts for a reduction in his liability for maintenance for his wife⁴⁸³ or because it ousts the jurisdiction of a foreign court.⁴⁸⁴

Arbitration⁴⁸⁵

- 18-089 If the parties seek by agreement to take the law out of the hands of the courts and into the hands of a private tribunal, except as permitted by the **Arbitration Act 1996**, then the agreement, to the extent that it deprives recourse to the courts in case of errors of law, is contrary to public policy.⁴⁸⁶ In

Leigh v National Union of Railwaymen,⁴⁸⁷ it was held that, since the court's jurisdiction could not be ousted, the court was not bound by an express provision in a trade union's rules that domestic remedies must be exhausted first, though a plaintiff would have to show cause why the court should intervene; in the absence of any such provision, though the court would more readily grant relief, it might first require the plaintiff to resort to the domestic remedies. An arbitration clause per se does not at common law oust the jurisdiction of the court⁴⁸⁸ and it was held in *Scott v Avery*⁴⁸⁹ that a provision making an arbitration award a condition precedent to the bringing of an action did not oust the jurisdiction of the court. And it is not against public policy to agree that all claims are to be taken to arbitration and that unless this is done within a certain period (however short) a claim is to be deemed as having been waived.⁴⁹⁰ The court will set aside an arbitrator's award if it seeks to give effect to a contract which is illegal or contrary to public policy.⁴⁹¹

- 18-090 The **Arbitration Act 1996** enables parties to enter into binding arbitration agreements which enable the parties to determine "how their disputes are resolved"⁴⁹² and to curtail the jurisdiction of the court to interfere with the arbitral procedure which they have established.⁴⁹³ In order to oust effectively the jurisdiction of the court and to have the rights of the parties determined by arbitration, the parties must have entered into an arbitration agreement. An arbitration agreement is defined as any agreement by the parties in writing⁴⁹⁴ to submit their disputes to arbitration.⁴⁹⁵ Where an arbitration agreement within the meaning of the **1996 Act** is entered into, certain provisions of the Act, referred to as mandatory provisions, have effect irrespective of any agreement of the parties to the contrary.⁴⁹⁶ The effect of these mandatory provisions is to ensure that the dispute is resolved by the terms of the agreement and not by recourse to courts.⁴⁹⁷

Questions of fact and expert evaluation

- 18-091 There is no objection to the parties making a private tribunal the final arbiter on questions of fact.⁴⁹⁸ Thus, it often happens that by the rules of a game or a race or competition a stated person is to decide who is the winner and so on and that his decision shall be final. Those questions must be decided by the designated person or persons.⁴⁹⁹ Where an agreement provides that in the case of a dispute the services of an expert should be used and that his decision "shall be conclusive and final and binding for all purposes", this will be binding on the parties unless there has been fraud or bias on the part of the expert or he has been guilty of "mistake".⁵⁰⁰ Mistake in this context requires the expert to have "departed from his instructions in a material respect"⁵⁰¹ for example, an expert who has been employed to value shares values the wrong number of shares or values shares in the wrong company.⁵⁰² Accordingly, the determination of the expert will be binding if "he has answered the question in the wrong way" but if "he has answered the wrong question, his decision will be a nullity".⁵⁰³ However, an attempt to oust completely the jurisdiction of the court

in the sense that the parties are precluded from seeking judicial redress even if there is fraud or bias by the expert would be ineffective.⁵⁰⁴ However, the parties can validly give a power to one of them “to determine something which affects their rights”.⁵⁰⁵

Footnotes

- 480 *Hyman v Hyman* [1929] A.C. 601; *Bennett v Bennett* [1952] 1 K.B. 249; *Sutton v Sutton* [1984] Ch. 184, 195–198; Matrimonial Causes Act 1973 s.34.
- 481 Matrimonial Causes Act 1973 s.34. As to the previous position at common law, see *Bennett v Bennett* [1952] 1 K.B. 249, 262, see also para.18-087. The private ordering of the consequences of divorce raises difficult issues: see Cretney and Masson, Principles of Family Law, 8th edn (2008), Ch.13.
- 482 Matrimonial Causes Act 1973 s.35 (as amended).
- 483 *Russell v Russell* [1956] P. 283.
- 484 *Addison v Brown* [1954] 1 W.L.R. 779.
- 485 See below, Vol.II, Ch.34.
- 486 *Lee v Showmen's Guild of Great Britain* [1952] 2 Q.B. 329.
- 487 [1970] Ch. 326.
- 488 *Scott v Avery* (1856) 5 H.L. Cas. 811; *Edwards v Aberayron Mutual Ship Insurance Society* (1876) 1 Q.B.D. 563; *Hallen v Spaeth* [1923] A.C. 684.
- 489 (1856) 5 H.L. Cas. 811.
- 490 *Atlantic Shipping & Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250. But under s.12 of the Arbitration Act 1996 the court has power to extend the time: Ch.34.
- 491 *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 W.L.R. 562; cf. *Birtley & District Co-operative Society Ltd v Windy Nook & District Industrial Co-operative Society Ltd (No.2)* [1960] 2 Q.B. 1; but see *Bellshill & Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd* [1960] A.C. 832.
- 492 s.1(b).
- 493 s.1(c).
- 494 s.5, note in particular s.5(3) and (6).
- 495 s.6 (the dispute does not have to be contractual).
- 496 s.4 and Sch.1.
- 497 in particular, ss.9–11.
- 498 *Baker v Jones* [1954] 1 W.L.R. 1005, 1010; *West of England Shipowners Mutual Insurance Association v Cristal Ltd* [1996] 1 Lloyd's Rep. 370. Such a decision, however, is open to challenge on the grounds of fraud or perversity: *West of England Shipowners'* [1996] 1 Lloyd's Rep. 370, 377–379.
- 499 *Brown v Overbury* (1856) 11 Exch. 715; *Sadler v Smith* (1869) L.R. 5 Q.B. 40; *Cipriani v Burnett* [1933] A.C. 83.
- 500 *Jones v Sherwood Computer Service Plc* [1989] 1 W.L.R. 277 (noted (1993) 109 L.Q.R. 385).

- 501 *Jones v Sherwood Computer Service Plc* [1989] 1 W.L.R. 277, 287.
- 502 *Jones v Sherwood Computer Service Plc* [1989] 1 W.L.R. 277.
- 503 *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 E.G.L.R. 103, 108. For other relevant authorities see (1993) 109 L.Q.R. 385.
- 504 (1993) 109 L.Q.R. 385 discussing *Re Davstone Estate's Ltd Leases* [1969] 2 Ch. 378.
- 505 *Charles Stanley & Co v Adams* [2013] EWHC 2137 (QB) at [17]. This is subject to the normal caveat that the parties cannot oust the jurisdiction of the court.

(iv) - Maintenance and Champerty

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Maintenance and champerty formerly crimes

- 18-092 For many centuries prior to 1968 maintenance and champerty were crimes both at common law⁵⁰⁶ and by statute.⁵⁰⁷ However the **Criminal Law Act 1967** now provides⁵⁰⁸ that, as from 1 January 1968, “any distinct offence under the common law in England and Wales of maintenance (including champerty)” should be abolished; and the Act repealed⁵⁰⁹ various old statutes relating to the two crimes. The Act further abolished⁵¹⁰ tortious liability for maintenance and champerty. But s.14(2) of the Act provides that:

“... the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.”

Public policy today respecting maintenance and champerty

18-093



It is thought that the provisions of s.14(2) of the Criminal Law Act 1967 must mean that at least *prima facie* contracts which under the law before 1968 would have been unenforceable for maintenance⁵¹¹ or champerty⁵¹² are still to be unenforceable therefor, even though the criminality attaching to such contracts has been removed. In *Trendtex Trading Corp v Credit Suisse*,⁵¹³ Lord Roskill considered it plain from s.14(2) that:

“Parliament intended to leave the law as to the effect of maintenance and champerty upon contracts unaffected by the abolition of them as crimes and torts.”

This is an area where the courts clearly recognise that public policy is subject to change in the light of, for example, the need to ensure access to civil justice.⁵¹⁴ Thus the recent reforms on “no win no fee” arrangements obviously effect a significant change in public policy with respect to maintenance and champerty.⁵¹⁵ In *Kellar v Williams*⁵¹⁶ Lord Carswell stated obiter that the:

“... content of public policy can change over the years, and it may now be time to reconsider the accepted [common law] prohibition [on conditional fees] in the light of modern practising conditions.”⁵¹⁷

In *Sibthorpe v Southwark LBC*⁵¹⁸ it was argued that the modern law of champerty should reflect the more tolerant attitude towards maintenance and champerty and ask (in this case, with respect to a conditional fee arrangement):

“... whether it would undermine the purity of justice, or would corrupt public justice, a question to be decided on a case by case basis.”⁵¹⁹

Although the court saw the attractions of such an approach, it considered that on the basis of authority it had no application to a champertous agreement:

“... entered into with a person who is conducting the litigation in question (or providing advocacy services in connection therewith).”⁵²⁰

Such arrangements were considered a “special” case and subject to stricter rules.

⁵²¹

 However, Lord Neuberger considered that “it would be inappropriate in the 21st century to extend the law of champerty”.⁵²²

Maintenance

- 18-094 A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse.⁵²³ The mischief directed against is wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever and where the assistance he renders to one or the other party is without justification or excuse.⁵²⁴ The bounds of justification and excuse for supporting litigation by others have been greatly widened over time.⁵²⁵ In the strict sense of the term, the doctrine of maintenance applies only to litigation⁵²⁶ actually pending⁵²⁷; but unjustified *instigation* of actions by others is treated as “savouring of maintenance”.⁵²⁸ It is not the less maintenance because the maintained action was successful.⁵²⁹ A restitutionary claim is subject to the law of maintenance and the assignee of such a claim would have to show a legitimate interest in the subject matter of the arrangement.⁵³⁰ All contracts fall within the scope of maintenance and champerty, and an assignment of the right to litigate or “mere transfer” of a cause of action infringing the rules of champerty and maintenance may be void.

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- U In *Farrar and Candey Ltd v Miller*⁵³² F had commenced proceedings against the defendant in 2014. In September 2019⁵³³ he purported to assign his cause of action to the firm of solicitors who had acted for him. In October 2019 F died unexpectedly. The supposed assignee applied to be substituted for F in the proceedings F had commenced in 2014. It was held that the assignment was champertous and therefore void.

Justification

- 18-095 The doctrine of maintenance, being founded on considerations of public policy, “cannot at any time become frozen into immutable respectability”⁵³⁴ but must be “reappraised in light of current notions of public policy and of international trading practices”.⁵³⁵ As long ago as 1883 it was said that it was unhelpful to go back very far in the authorities relating to justification⁵³⁶ and the grounds of justification have been further greatly widened,⁵³⁷ so that Danckwerts J’s judgment in *Martell v Consett Iron Co Ltd*⁵³⁸ can now be taken as the foundation of the modern law.⁵³⁹ In that case an association for the protection of the rights of owners and occupiers of fisheries and for the prevention of pollution of rivers supported an action by one of its members in respect of alleged pollution of a river flowing through the member’s land. Danckwerts J rejected the defendant’s contention that the association was unlawfully maintaining the action, holding that “support of

legal proceedings based on a bona fide community of pecuniary interest or religion or principle or problems” did not constitute maintenance.⁵⁴⁰ The Court of Appeal, in affirming the decision, held that the defendants had not shown that the association was not acting in defence of the collective interests of its members on the principle of mutual protection.⁵⁴¹

Examples of justification

18-096 It has been said that most of the actions in our courts today:

“... are supported by some association or other, or by the state itself. Comparatively few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies.”⁵⁴²

It is clear that ordinarily none of those cases today constitutes maintenance.⁵⁴³ Similarly a body is not guilty of maintenance in supporting an action for defamation brought by one of its officers where, if the defamatory words complained of are true, the officer is unfit to continue in the body’s employment.⁵⁴⁴ It has always been a justification for the maintenance of an action that the maintainer acted solely with a charitable motive, and that is so even though there was no ground for the maintainer’s action which he took without reasonable inquiry.⁵⁴⁵ There may be evidence of maintenance in a solicitor taking up an action for a poor person⁵⁴⁶ though it is probable that he may do so if he acts bona fide and has perhaps satisfied himself that there is a proper cause of action.⁵⁴⁷ Blood relationship would seem to be a justification for maintenance.⁵⁴⁸ The courts, particularly in commercial cases, have recognised that a sufficient interest does not have to be proprietary in character and in *Trendtex Trading Corp v Credit Suisse*⁵⁴⁹ Oliver LJ was willing to go so far as to hold that maintenance would be justified “wherever the maintainer has a genuine pre-existing financial interest in maintaining the solvency of the person whose action he maintains”. The interest, however, must be distinct from any benefit which arises under the contract which is allegedly illegal as constituting maintenance.⁵⁵⁰ It has been held that despite the judgment of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd*⁵⁵¹ a majority shareholder in a company possesses a sufficient interest so that an assignment to him of the company’s cause of action is not against public policy.⁵⁵²

Professional funders

18-097

As the courts have pointed out there have been “major changes to the law and practice relating to the funding of litigation”.

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U In *Singularis Holdings Ltd (In Official Liquidation) v Chapel Credit Opportunity Master Fund Ltd*

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U the court was told that litigation funding plays an important role in providing access to justice but that it is highly risky for funders, who often seek to protect themselves by asking for “outsize returns”; “it is not unusual (however undesirable this may be for all of the parties) for the funder to be entitled to the entirety of any award and for the claimant to be entitled to nothing”.

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U Of course if the claimant is not successful the funder will lose all of its investment and if the recoveries are low there is a potential loss of a fraction of its investment.

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U *Arkin v Borchard Lines Ltd*

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U involved a litigation funder who provided funding for expert witnesses for a contingent fee of 25 per cent of the first £5 million in damages and 23 per cent thereafter. The professional funder took no part in the litigation and the agreement was non-champertous. The court held the agreement to be enforceable. The court considered that provided the agreement was non-champertous, if the funded party was unsuccessful the funder should be potentially liable for the costs of the opposing party up to the extent of the funding provided (“the *Arkin* cap”), whereas if the funder entered into a champertous agreement he would be “likely to render himself liable for the opposing party’s costs without limit should the claim fail”.

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U The scope of the *Arkin* principle was developed in *Chapelgate Credit Opportunity Master Fund Ltd v Money*.

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U In that case Snowden J had declined to apply the *Arkin* cap; the funder appealed unsuccessfully. There were a number of factors distinguishing the cases: (i) in *Arkin* the funder only funded part of the claimant’s costs whereas all of the costs were funded by the funder in *Chapelgate*, (ii) in *Chapelgate* the funder stood to receive a return profit amounting to a multiple of what it spent and the court considered it “legitimate for a judge to attach importance to the funder’s prospective gains as well as to its outlay ...”,

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U and (iii) the court was entitled to consider the extent to which “the *Arkin* cap would leave the respondents out of pocket”.

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U The Association of Litigation Funders of England and Wales have published a Code of Conduct of Litigation Funders.

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Effect of maintenance

18-098 In principle a contract of maintenance should be held to be unenforceable between the parties to it.⁵⁶³ But even when maintenance was a crime, the illegal maintenance of an action was not a defence to the action, nor did it afford a ground for stay of proceedings.⁵⁶⁴ The remedy of the other party to the litigation was before 1968 an action in tort. It would still appear to be the position that the court will not stay proceedings which are being maintained provided the proceedings do not constitute an abuse of the process of the court, that is, an action commenced in bad faith with no genuine belief in its merits but commenced for an ulterior purpose.⁵⁶⁵ Also, the court does not have inherent jurisdiction to dismiss a maintained action which is not an abuse of the process of the court because the maintainer declines to give an undertaking as to costs, or to make such an order itself.⁵⁶⁶

Champerty

18-099 Champerty has been defined as “an aggravated form of maintenance”⁵⁶⁷ and occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit⁵⁶⁸ or other contentious proceedings where property is in dispute.⁵⁶⁹ For champerty there must not only be interference in the suit but there must be the added factor of a division of the spoils.⁵⁷⁰ There is an obvious relationship between maintenance and champerty, you cannot have the latter without the former but “there can still be champerty even if the maintenance is not unlawful”.⁵⁷¹ In *Sibthorpe v Southwark LBC*

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U an agreement by a solicitor to indemnify a claimant client against any liability for costs awarded in favour of the defendant was not champertous. The court found that no case had been cited to it in which an agreement was held champertous where a person agreed “to run the risk of a loss if the action in question fails, without enjoying any gain if the action succeeds”.⁵⁷³ The court

considered that the various definitions of champerty “all envisage a gain if the action concerned succeeds”.⁵⁷⁴ The court also considered that modern public policy was to facilitate access to civil justice and accordingly it was hard to accept that it was against public policy for a lawyer to agree to shoulder the risk of an adverse order for costs.⁵⁷⁵ In *Giles v Thompson*,⁵⁷⁶ Lord Mustill was of the opinion that champerty as it related to an agreement by a solicitor to accept payment of his fees measured as a proportion of the damages recovered by his client survived largely as a rule of professional conduct.⁵⁷⁷ While there undoubtedly have been significant changes in the rules relating to fee arrangements between solicitors and their clients which now permit arrangements which previously would have been champertous,⁵⁷⁸ it is suggested that it would be going too far to treat the rule as being merely one of professional conduct. It is no justification for a champertous agreement that the contracting parties are related by blood.⁵⁷⁹ The question arises whether the court can enjoin proceedings that are champertous. The reasoning in *Abraham v Thompson*⁵⁸⁰ would suggest not. Where the plaintiff relies on a champertous assignment to sue, the action would be enjoined not, however, because of the champerty as such but because it is not possible to assign a cause of action.

Champertous agreements between solicitor and client

18-100

U At common law an agreement by a solicitor to provide funds for litigation⁵⁸¹ or without charge to conduct litigation,⁵⁸² in this country, in consideration of a share of the proceeds is champertous,⁵⁸³

U and this is so even though the agreement was made abroad.⁵⁸⁴ It was argued in *Wallersteiner v Moir (No.2)*⁵⁸⁵ that considerations of policy demanded an exception to this rule, namely where a shareholder intended to bring an action on behalf of a company against those in control of the company who had allegedly committed wrongs against it, such an action being extremely costly to the individual and, in the event of success, bringing him probably small personal benefit. But a majority⁵⁸⁶ of the Court of Appeal refused to create such an exception. In *Awwad v Geraghty & Co (A Firm)*⁵⁸⁷ it was held that at common law an agreement whereby the client would pay a lower fee if he lost but a higher fee if he won was illegal and unenforceable.⁵⁸⁸ The agreements in *Awwad* and *Thai Trading* would now be valid under s.27 of the Access to Justice Act 1999.⁵⁸⁹ An agreement whereby a solicitor obtained more than his profit costs (unless it was a permitted conditional fee), or a contingent fee, would probably be unenforceable.⁵⁹⁰ Where a solicitor enters into a champertous agreement, he cannot recover from his client his own costs⁵⁹¹ or even his out-of-pocket expenses.⁵⁹² But the solicitor does not act champertously unless he is a party to the agreement or participates in it by voluntarily doing a positive act to assist the parties in its execution, and the mere fact that the solicitor knows or gets to know of a champertous agreement

relating to litigation in which he is engaged does not prevent him from suing on an otherwise lawful retainer.⁵⁹³ If a lawful retainer is subsequently varied by a champertous agreement, the solicitor probably cannot disregard the agreement and rely on his ordinary rights under the retainer.⁵⁹⁴

Assignment of causes of action between solicitor and client

18-100A The assignment of a cause of action to the ex-solicitor of a client would also be champertous. In

U *Farrar and Candey Ltd v Miller*

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U proceedings had been commenced against the defendant, a firm of solicitors, in 2014. The claimant in the 2014 proceedings died suddenly in 2019. The firm of solicitors who had acted for the deceased applied to be substituted in the 2014 proceedings for the deceased, the basis for the application being that the deceased had assigned his claim to the firm. The application was opposed on the grounds, *inter alia*, that it was champertous. The agreement did not fall within the *Courts and Legal Services Act 1990*.

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U The court rejected the broad contention

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U that such an arrangement might be valid despite the fact that the provisions in the *Courts and Legal Services Act 1990*

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U had made only conditional fees and damaged based agreements (DBA) enforceable. The solicitors' narrower contention was that the arrangement had to be viewed in the context that they had acted for the deceased under a DBA and the replacement of the DBA by the assignment would facilitate the deceased's access to justice; but this was dismissed as only marginal.

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U Control of the litigation would pass to a "party uninterested in the litigation"

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U; they may have been "familiar or conversant" with the litigation but this did not constitute an interest in the litigation.

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U The assignment of right to litigate which is connected to a right of property may be justified but the assignees had no such right.

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U The fact that the assignment makes the position no worse than a DBA was not of any relevance, the arrangements outside the statutory scheme validating conditional fee agreements or DBAs are champertous.

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U The decision was upheld on appeal on the ground

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U that the Court was bound by its previous decisions that a solicitor acting for a client in legal proceedings may not validly take an assignment of the client's cause of action prior to judgment

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U and that a champertous agreement not sanctioned by the 1990 Act remains contrary to public policy and unenforceable.

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U

Non-champertous agreements between solicitor and client

18-101 **U** Section 58 of the Courts and Legal Services Act 1990, as amended by s.27 of the Access to Justice Act 1999, is designed to enable a solicitor and client to enter into a conditional fee agreement. A conditional fee agreement is one whereby a person providing advocacy or litigation services is only to be paid his fees or expenses in specified circumstances,

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U or which provides for a success fee.

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U Such an agreement must be in writing, relate to proceedings which can be the subject of conditional fee arrangements, and comply with the requirements (if any) specified by the Lord Chancellor.

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U Where the conditional fee provides for a success fee, the percentage increase must comply with any order made by the Lord Chancellor regulating the permitted percentage of increase.

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U Section 58 provides that agreements "shall not be unenforceable by reason of being a conditional fee agreement" as permitted by s.58 but that other conditional fee agreements shall be unenforceable.

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U Certain proceedings cannot be the subject matter of any form of conditional fee; these are criminal and family proceedings as defined in [s.58A of the Courts and Legal Services Act 1990](#). There are other forms of fee agreement between a solicitor and client which are not treated as being champertous. There is no objection to a solicitor agreeing to charge no costs against his client.

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U And a solicitor and client may agree for a fixed remuneration in lieu of costs,

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U such agreement must be in writing and is subject to the proviso that no validity is given to any purchase by a solicitor of his client's interests in any action, suit or other contentious proceedings, or to any success.

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U The mere fact that a solicitor had conducted proceedings on credit or that he was aware of his clients lack of means did not entail that he was unlawfully maintaining that action.

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U [Section 58 of the 1990 Act](#) (as amended) only applies to those who could be described as "litigators", that is, advocates and those conducting the litigation.

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U Thus it has been held that an agreement whereby accountants were paid 8 per cent of damages recovered for professional services in preparing claimants' claim but which did not involve the issue of liability, was not champertous.

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U An agreement made in England which is champertous is lawful if it relates to litigation in a country where champerty is lawful.

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U A similar result was reached where a claims' recovery agent in respect of damages to sea cargo, acted on a "no cure no pay" basis but if the claim was successful 5 per cent of the recovery would be paid to the agent.

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U However, situation where an expert was to give evidence on a contingent fee basis was highly undesirable and the court would seldom consent to an expert being instructed on a contingent fee basis.

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U

Agreements savouring of champerty: assignments of the right to litigate

- 18-102 In *Trendtex Trading Corp v Credit Suisse*,⁶²¹ the Court of Appeal and House of Lords fundamentally re-examined the law of maintenance and champerty in so far as it applied to the assignment of the right to litigate. Much simplified, the facts in that case were as follows. The plaintiff (T) sold cement, payment to be made by confirmed letter of credit. The issuing bank (CBN) failed to honour the letter of credit and T sued for payment. T was successful in the Court of Appeal but leave was given to CBN to appeal to the House of Lords. At this juncture T assigned its right of action against CBN to the defendants, Credit Suisse, to whom T was heavily indebted for financial assistance provided in connection with the cement contract and the litigation arising out of the dishonouring of the letter of credit. The agreement whereby T assigned its right of action to Credit Suisse also provided that Credit Suisse could assign the right of action to a third party which Credit Suisse eventually did. T subsequently considered that it had been duped by the defendants into making the assignment for what turned out to be a gross undervaluation, and sought to have the assignment set aside on the ground that the whole transaction was champertous.⁶²² The Court of Appeal upheld the assignment. Credit Suisse had “a legitimate and genuine interest” in the action by Trendtex against CBN as it “had financed the transaction that had given rise to the right of action”,⁶²³ which would have justified them in maintaining an action by the plaintiff or in participating in any proceeds of action and, in the light of this, Oliver LJ, could not see why the actual “assignment of the cause of action itself” should not also be valid.⁶²⁴ Lord Denning MR saw no reason why the benefit of the right to sue for damages for breach of contract should not be assignable given that the benefit of the contract before breach was assignable.⁶²⁵ However, the right to litigate about purely personal claims is not assignable⁶²⁶ and where a solicitor is involved the courts would not adopt such a tolerant attitude to the validity of the assignment:

“... because an English court will not permit one of its own officers to put himself in a position in which his interest and duty may conflict.”⁶²⁷

- 18-103 Broadly speaking the House of Lords supported the reasoning of the Court of Appeal, although it differed on the application of that reasoning to the facts of the instant case. Lord Roskill considered that Oliver LJ, had not failed⁶²⁸ to distinguish between the interest:

“... necessary to support an assignment of a cause of action and the interest which would justify the maintenance of an action by a third party.”

If the assignee has:

“... a genuine commercial interest in taking the assignment and in enforcing it for his own benefit (there was) no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.”⁶²⁹

Lord Roskill did, however, disapprove⁶³⁰ of the view of Lord Denning MR in the Court of Appeal that “[t]he old saying that you cannot assign a ‘bare right of litigate’ is gone”; this still remained a fundamental principle of English law and the assignee needed to demonstrate a commercial interest in the enforcement of the claim for the assignment to be valid.

⁶³¹

U The House of Lords considered that the assignment in this case was void because it was the first step in a transaction whereby the cause of action was to be assigned to a third party who had no legitimate commercial interest in the transaction. If the assignment had merely been to Credit Suisse it would have been valid.⁶³²

- 18-104 That the vice in *Trendtex* was that the assignment contemplated the assignee selling the claim to a stranger for a higher price than it had paid for it is clear from *Brownton Ltd v Edward Moore Inbucon Ltd*.⁶³³ In that case the plaintiffs sought advice from A on the installation of computer equipment and on the basis of that advice purchased equipment from B. The equipment never worked. The plaintiffs sued A for damages who in turn alleged that the defective operation of the equipment was due to the fault of B, whereupon the plaintiffs joined B as second defendants. A paid a sum of money into court in settlement of its liability towards the plaintiffs and the plaintiffs were willing to accept this as full satisfaction of its claim against both A and B provided it could reach a satisfactory arrangement on the costs of the various parties. When B refused to agree to any arrangement, A assigned to the plaintiffs any cause of action it might have against B arising out of installation of the equipment. B’s claim that this assignment was champertous failed. The court found that the plaintiffs had a sufficient commercial interest to justify the assignment and this distinguished the case from *Trendtex* where the:

“... contemplated assignment to the anonymous third party was objectionable ... because he had no genuine pre-existing commercial interest in the outcome of the cause of action.”⁶³⁴

- 18-105 The court also held that for the assignment to be valid it was not necessary that the “assignee’s interest applied to every facet of the cause of action”,⁶³⁵ all that was needed was that the assignee possess a genuine commercial interest which had to be determined on an examination of the transaction as a whole. In addition, it was not fatal to the validity of an assignment that the assignee might be better off as a result of the assignment, or that the assignee might make a profit out of

it.⁶³⁶ However, where the “figures … were massively disproportionate”, the figures being what the assignee paid and what he was liable to gain, then the agreement would be champertous.⁶³⁷

- 18-106 All previous authorities must now be read in the light of *Trendtex*'s greater liberality on assignments of the right to litigate and its rejection of any broad rule supposedly prohibiting the assignment of the right to litigate for damages. What appears in the following paragraphs are examples of recurrent situations involving the assignment of a right to litigate. Of course, where the court permitted assignment before *Trendtex* then obviously it will also be permitted after it. Thus assignments of debts are permissible⁶³⁸ (even though the assignee's object in taking the assignment was to make the debtor bankrupt),⁶³⁹ or assignments of the fruits of an action,⁶⁴⁰ or assignments of property (even though the property is incapable of being recovered without litigation),⁶⁴¹ or assignments designed “to support or enlarge” a property interest which the assignee already possesses.⁶⁴² It may also be that the old distinctions between maintenance, champerty and assignment are being dissolved. As was stated by Lloyd LJ in *Brownton Ltd v Edward Moore Inbucon Ltd*⁶⁴³ there is no difference between the interest “required to justify a share in the proceeds, or the interest required to support an out-and-out assignment”. On this reasoning involvement in litigation will be justified if it can be shown that the party in question has sufficient interest in the litigation.

Personal claims

- 18-107 As was stated above,⁶⁴⁴ a personal claim⁶⁴⁵ is not capable of assignment.⁶⁴⁶ It has been held that in determining whether a claim is personal for the purpose of this prohibition the “critical question … is whether the identity of the person to whom the obligation is owed is an essential aspect of it”.⁶⁴⁷ A very narrow interpretation has been given to this prohibition and it has been considered that it does not preclude assignment of a claim for damages for personal injury.⁶⁴⁸ The court reasoned that it was difficult to see why a claim for damages to property caused by negligence could not be assigned and, if this were the case, a claim for damages for personal injury should be treated analogously.⁶⁴⁹ The court did recognise that enforcing such a claim could give rise to complications such as those relating to “the provision of statements of truth, disclosure, set-off and counterclaim and other procedural matters”⁶⁵⁰ but that these were inherent in all assignments of a cause of action and not unique to personal injury claims.

Assignment incidental to transfer of property

18-108

An assignment of a right to litigate is good if it is incidental and subsidiary to a transfer of property.⁶⁵¹ The question is whether the subject matter of the assignment is property with an incidental remedy for its recovery, or a bare right of action.⁶⁵² Thus a conveyance of property by a vendor who has previously conveyed that property to another by a deed voidable in equity is good, as the vendor retained an interest which he could dispose of and which carried with it a right of action to have the earlier deed set aside.⁶⁵³ In *Williams v Protheroe*⁶⁵⁴ the vendor and purchaser of an estate agreed that the purchaser, bearing the expense of certain suits which had been commenced by the vendor against an occupier for bygone rent, should have any rent recovered and also any sum that might be recovered for dilapidations, and that the purchaser might at his own expense use the name of the vendor in any action he might think fit to commence against the occupier for arrears of rent or dilapidations. It was held that this agreement was not illegal as amounting to champerty. In *Ellis v Torrington*⁶⁵⁵ the plaintiff took an assignment of the benefit of certain covenants to repair contained in an expired underlease, having already purchased the fee simple of the property from another person. This assignment was held free from objection on the ground of champerty, the right of action on the covenants being so connected with the enjoyment of property as to be more than a bare right to litigate. It was held to be immaterial that the assignment was made later than the purchase of the property, and by a person other than the vendor. Again, in *Performing Rights Society Ltd v Thompson*⁶⁵⁶ the plaintiff society had been formed as a company to protect the copyright interests of its members, who assigned their copyrights to the society and by its rules shared in all damages recovered by the society. This was held to be a legitimate business arrangement and not champertous. In *Camdex International Ltd v Bank of Zambia*,⁶⁵⁷ the court held that the assignment of a debt in accordance with s.136 of the Law of Property Act 1925, in circumstances where it was contemplated that an action would be necessary in order to obtain payment, did not constitute maintenance. Also, such an assignment would not be contrary to public policy even if the assignor maintained some interest in the debt.

Assignment to person beneficially entitled to right

- 18-109 Where before the *Judicature Act 1873* equity would have compelled A to exercise his rights against a contract breaker or tortfeasor for the benefit of B, those rights can validly be assigned by A to B and, subject to due compliance with s.136 of the Law of Property Act 1925, can be enforced by B in his own name at law.⁶⁵⁸ Therefore an underwriter, who has indemnified his insured under a policy of insurance and has in consequence been legally assigned the insured's rights of action against third parties, may sue those third parties in his own name to enforce those rights of action.⁶⁵⁹

Assignment by trustee in bankruptcy and liquidator

- 18-110

Rights of action which are the property of a bankrupt and pass to his trustee in bankruptcy may be assigned by the trustee, even though they may be only bare rights of action. These are treated as saleable as being part of the assets for the benefit of creditors.⁶⁶⁰ And an agreement between some of the creditors of a bankrupt and the trustee that an action of the bankrupt should be carried on at their private expense, on the terms of receiving a larger share of the fruits of the action, was held not to offend against the law of champerty.⁶⁶¹ It has also been held that an assignment of a cause of action can be made by a liquidator.⁶⁶² It is normally not possible for a company to obtain legal aid but it may be awarded in exceptional circumstances.⁶⁶³ The combined effect of these rules has serious consequences for a company that goes into liquidation since it will often find it difficult to fund litigation unless the creditors are willing to put it in funds. To circumvent these rules, the question arises as to whether it is possible for the liquidator to assign a cause of action of the company to an individual with an interest in the litigation, for example, a director or the majority shareholder. The reason for such assignment is that the individual, unlike the company, is entitled to legal aid and not subject to a security for costs order. *Norglen Ltd (In Liquidation) v Reeds Rains Prudential Ltd*⁶⁶⁴ involved such an assignment which, inter alia, provided that the fruits of the action would be first used to pay the company's creditors and any balance divided equally between the company and the assignee. The assignment was made under the liquidator's powers to sell the company's property which includes choses in action.⁶⁶⁵ The court held that the assignment was valid and on established principles was not subject to the rules relating to maintenance and champerty. It has been held that the rules relating to maintenance and champerty apply to the assignment of the fruits of an action (but not the cause of action itself) where the assignee agrees to fund the action.⁶⁶⁶ This decision, without expressing any definite view, has been doubted.⁶⁶⁷ It is submitted that these doubts are justified. There are no compelling reasons for placing such a gloss on the power of the liquidator to assign a cause action vested in the company. If an assignment of the fruits of an action where the assignee does not undertake to provide funding for the action is valid,⁶⁶⁸ it is difficult to see why an undertaking to provide such funding should make a difference; and similar principles apply to an assignment of a bankrupt's cause of action by the trustee in bankruptcy.⁶⁶⁹

Assignments of rights to solicitors

- 18-111 A solicitor cannot lawfully purchase anything in litigation of which he has had the management,
U ⁶⁷⁰
- U nor can he purchase fruits of such litigation before judgment
⁶⁷¹

U; but an assignment of an action to a solicitor preceding his employment as such is good unless it would have been unenforceable as between strangers.

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U A solicitor may lawfully take from his client a security upon property which is the subject matter of an action for advances already incurred in the action,

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U and he may take security from his client for his costs to be ascertained by taxation or otherwise.

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U

Other agreements “savouring of champerty”

18-112 An agreement merely to communicate information to a person in consideration of receiving a share of property to be recovered thereby is unobjectionable, provided there is no suit pending and no stipulation that one shall be commenced.⁶⁷⁵ But if it is a term of the agreement that the person giving the information and who is to share in what may be recovered shall himself recover the property or actively assist in its recovery by procuring evidence or otherwise, the agreement is unenforceable as “savouring of champerty”,⁶⁷⁶ and will be set aside in equity,⁶⁷⁷ though it may be on terms.⁶⁷⁸

Effect of champerty

18-113 A champertous agreement is treated as unenforceable as between the parties

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U even in the light of the “factors-based” approach adopted by the Supreme Court in *Patel v Mirza*

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U; there has not been a change of policy in respect of champertous agreements.

681

U In respect of any loss sustained in connection with a champertous agreement, a solicitor cannot maintain a claim on a policy of indemnity.

682

U The champertous support of the plaintiff in an action is probably not a defence to the action and probably affords no ground for a stay of proceedings.

683

U Where a champertous agreement is entered into, a solicitor who provides services under it cannot recover on the grounds of quantum meruit or any other basis for the services that he has rendered. Moreover, the client may recover any sums that have been paid under a conditional fee agreement that does not meet the conditions of s.58 of the Courts and Legal Services Act 1990, even in the absence of a normal ground for restitution such as a total failure of consideration.

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Footnotes

506 Maintenance: *Pechell v Watson (1841) 8 M. & W. 691*; *Neville v London Express Newspaper Ltd [1919] A.C. 368*, 383, 386, indicating need to prove want of reasonable or probable cause: champerty; *Re Trepca Mines Ltd (No.2) [1963] Ch. 199*, 224; *Master v Miller (1791) 4 T.R. 320*, 340.

507 See Criminal Law Act 1967 Sch.4.

508 s.13(1)(a).

509 s.13(1)(b) and Sch.4.

510 s.14(1).

511 See below, paras 18-094—18-098.

512 See below, paras 18-099—18-113.

513 [1982] A.C. 679, 702. See also the views of Lord Denning MR in the Court of Appeal that by striking down both the tort and crime of maintenance the Criminal Law Act 1967 also “struck down our old cases as to what constitutes maintenance, including champerty in so far as they were based on an outdated policy”: [1980] 1 Q.B. 629, 653. Lord Denning considered that modern public policy could be found in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 K.B. 1006*; *Martell v Consett Iron Co Ltd [1955] Ch. 363*; and *Hill v Archbold [1968] 1 Q.B. 686*.

514 See *Giles v Thompson [1993] 3 All E.R. 321*, 348, CA, per Bingham MR; “the law on maintenance and champerty has not stood still, but has accommodated itself to changing times”, per Lord Mustill in the House of Lords at [1994] 1 A.C. 142, 164. See also *Thai Trading Co v Taylor [1998] 3 All E.R. 65* (this case was disapproved of in *Awwad v Geraghty & Co (A Firm) [2000] 1 All E.R. 608*. See *Walters (2000) 116 L.Q.R. 371*); *Bevan Ashford v Geoff Yeandle (Contractors) Ltd [1999] Ch. 239*. This decision involved the use of conditional fee arrangements with respect to alternative dispute resolution procedures and in this context it is now expressly recognised by the new s.58A of the Courts and Legal Services Act 1990 (introduced by s.27 of the Access to Justice Act 1999) that conditional

fee arrangements apply to “any sort of proceedings for resolving disputes” (s.58A(4)); the Damages-Based Agreements Regulations 2013 (SI 2013/609). *Camdex International Ltd v Bank of Zambia [1996] C.L.C. 1477, 1481*: “The modern approach is not to extend the types of involvement in litigation that are considered objectionable. There is a tendency to recognise less specific interests as justifying the support of the litigation of another”.

515 These reforms are set out in the judgment of Steyn LJ in *Giles v Thompson [1993] 3 All E.R. 321*. See also below, para.18-101.

516 [2004] UKPC 30, [2004] All E.R. (D) 286 (Jun).

517 [2004] UKPC 30 at [21].

518 [2011] EWCA Civ 25, [2011] 1 W.L.R. 2111.

519 [2011] EWCA Civ 25 at [36].

520 [2011] EWCA Civ 25 at [37].

521 See *Farrar and Candey v Miller [2022] EWCA Civ 295* at [23] and [48].

522 [2011] EWCA Civ 25 at [51].

523 *Hill v Archbold [1968] 1 Q.B. 686; Trendtex Trading Corp v Credit Suisse [1980] 1 Q.B. 629, 663*. See *Winfield (1919) 35 L.Q.R. 50* on the history of maintenance. See also *Walters (1996) 112 L.Q.R. 560*.

524 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 K.B. 1006, 1012; Hill v Archbold [1968] 1 Q.B. 686, 697; Giles v Thompson [1994] 1 A.C. 142, 164*.

525 See below, para.18-095.

526 See *Re Trepca Mines Ltd (No.2) [1963] Ch. 199*; cf. *Moore v Usher (1835) 7 Sim. 383, 388*; cf. *Pickering v Sogex Services (UK) Ltd (1982) 262 E.G. 770*.

527 *Flight v Leman (1843) 4 Q.B. 883*.

528 *Flight v Leman (1843) 4 Q.B. 883; Greig v National Amalgamated Union of Shop Assistants (1906) 22 T.L.R. 274*.

529 *Neville v London Express Newspaper Ltd [1919] A.C. 368*.

530 *Casehub Ltd v Wolf Cola Ltd [2017] EWHC 1169 (Ch)*.

531 *Farrar and Candey Ltd v Miller [2021] EWHC 1950 (Ch)*, affd [2022] EWCA Civ 295.

532 [2021] EWHC 1950 (Ch).

533 [2021] EWHC 1950 (Ch) at [6] and [10]–[12]. The assignment was undated but the court found that terms of the assignment indicated that this was the date.

534 *Martell v Consett Iron Co Ltd [1955] Ch. 363, 375; Giles v Thompson [1994] 1 A.C. 142, 164*.

535 *Trendtex Trading Corp v Credit Suisse [1980] 1 Q.B. 629, 663*; see also [1982] A.C. 679, 702.

536 *Bradlaugh v Newdegate (1883) 11 Q.B.D. 1, 7*; and see *Ellis v Torrington [1920] 1 K.B. 399, 412*.

537 *Hill v Archbold [1968] 1 Q.B. 686, 694, 697; Trendtex Trading Corp v Credit Suisse [1982] A.C. 679, 702*; see also the Law Commission, Proposals for the Reform of the Law Relating to Maintenance and Champerty (1966), pp.3–4; *Giles v Thompson [1993] 3 All E.R. 321, 330, CA*.

- 538 [1955] Ch. 363.
- 539 *Hill v Archbold* [1969] 1 Q.B. 686, 694, 700; *Trendtex Trading Corp v Credit Suisse* [1982] A.C. 679, 702.
- 540 *Martell v Consett Iron Co Ltd* [1955] Ch. 363, 387.
- 541 *Martell v Consett Iron Co Ltd* [1955] Ch. 363, 389, 420, 430.
- 542 *Hill v Archbold* [1968] 1 Q.B. 686, 694–695.
- 543 *Hill v Archbold* [1968] 1 Q.B. 686; *Bourne v Colodense Ltd* [1985] I.C.R. 291. Note that procedure has been introduced for the making of a group litigation order. This is designed to enable parties to bring a group action where their interests are sufficiently similar that a finding with respect to one of them or a set of them will be dispositive of the whole group action: CPR Pt 19 (Parties and Group Litigation). Rule 19.6(1) refers to situations “(i) Where more than one person has the same interest in a claim ...”. An example of such a claim is *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) where, inter alia, a group of approximately 550 claimants who were sub-postmasters brought a group action against the Post Office. See also *Various Claimants v Barking Housing & Redbridge University Hospitals NHS Trust* Unreported 21 May 2014.
- 544 *Scott v National Society for the Prevention of Cruelty to Children* (1909) 25 T.L.R. 789; *Hill v Archbold* [1968] 1 Q.B. 686, where the Court of Appeal stated that *Oram v Hutt* [1914] 1 Ch. 98, CA and *Baker v Jones* [1854] 1 W.L.R. 1005 (Lynskey J) would not now be decided as they were; contrast *Martell v Consett Iron Co Ltd* [1955] Ch. 363, 389, 414–419, 425.
- 545 *Harris v Brisco* (1886) 17 Q.B.D. 504; *Holden v Thompson* [1907] 2 K.B. 489; cf. *Cole v Booker* (1913) 29 T.L.R. 295. In *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] Q.B. 640 at [23] the court considered *Holden v Thompson* to be “expressly based on an exception to the general law of maintenance in respect of charitable support and is not ... authority of any broader proposition”.
- 546 *Wiggins v Lavy* (1928) 44 T.L.R. 721, but that was before legal aid.
- 547 *Ladd v London Road Car Co, The Times*, 14 March 1900.
- 548 *Rothewel v Pewer* (1431) Y.B. 9 Hen. 6, 64, pl.713; *Pomeroy v Abbot Buckfast* (1443) Y.B. 22 Hen. 6; (1442) Y.B. 21 Hen. 6, 15, pl.30; and see *Harris v Brisco* (1886) 17 Q.B.D. 504, 512–513; 1 Hawkins P.C., 8th edn, p.488; cf. *Hutley v Hutley* (1873) L.R. 8 Q.B. 112.
- 549 [1980] 1 Q.B. 629, 668. This view was implicitly endorsed in the House of Lords. There Lord Roskill was willing to hold that a genuine commercial interest was sufficient to enable an assignee of a cause of action to enforce it and on this reasoning the views of Oliver LJ on what constitutes a sufficient justification for maintaining an action were implicitly adopted; see [1982] A.C. 679, 703; see also *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All E.R. 499; below, para.22-050.
- 550 *Giles v Thompson* [1994] 1 A.C. 142, 163, HL.
- 551 [1982] Ch. 204 (shareholder had no standing to bring action where wrong to the company allegedly reduced the value of his shares) (cf. *Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 B.C.L.C. 260; *Johnson v Gore Wood* [2002] 2 A.C. 1).
- 552 *Circuit Systems Ltd & Basten v Zucken Redac (UK) Ltd* (1995) 11 Const. L.J. 201, 209 (on appeal this point did not have to be decided: [1996] 3 All E.R. 748).

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Chapelgate Credit Opportunity Master Fund Ltd v Money [2020] EWCA Civ 246, [2020] 1 W.L.R. 1751 at [23].

- ⑤54 [2020] EWHC 1616 (Ch), [2020] Costs L.R. 881. In that case the funder was to be compensated by a share of the proceeds received by the claimant disregarding, inter alia, “any netting, set-off or other reduction including ... by reason of a counterclaim...”. The question was whether a sum deducted because of contributory negligence of the claimant should be added to the recoverable proceeds when computing their value. The court held that they did not have to be added as the funding agreement did not by its terms so provide, it was a simple matter of construction of the agreement.

⑤55 [2020] EWHC 1616 (Ch) at [14]–[15].

⑤56 [2020] EWHC 1616 (Ch) at [15].

⑤57 [2005] EWCA Civ 655, [2005] 1 W.L.R. 3055 at [44]. See also *Singularis Holdings Ltd (In Official Liquidation v Chapel Credit Opportunity Master Fund Ltd [2020] EWHC 1616 (Ch)* at [14]–[16].

⑤58 [2005] EWCA Civ 655 at [40].

⑤59 [2020] EWCA Civ 246.

⑤60 [2020] EWCA Civ 246 at [44].

⑤61 [2020] EWCA Civ 246 at [44].

⑤62 Jackson LJ, Third Party Funding on Litigation Funding, Sixth Lecture in the Civil Litigation Costs Review Implementation Programme, the Royal Courts of Justice, 23 November 2011. The 2018 version of the Code can be accessed at <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>.

563 *Cole v Booker (1913) 29 T.L.R. 295, 297*; Lord Coleridge CJ’s obiter dictum to the contrary in *Bradlaugh v Newdegate (1883) 11 Q.B.D. 1*, 4 cannot be taken to represent the law.

564 *Martell v Consett Iron Co Ltd [1955] Ch. 363*.

565 *Abraham v Thompson [1997] 4 All E.R. 362*. It is considered that *Grovewood Holdings Plc v James Capel & Co Ltd [1995] Ch. 80* (dealing with a champertous agreement) is no longer good law: see note (1998) 114 L.Q.R. 207.

566 *Abraham v Thompson [1997] 4 All E.R. 362*. See also *Murphy v Young & Co’s Brewery Plc [1997] 1 Lloyd’s Rep. 236*. It is submitted that *McFarlane v E.E. Caledonia Ltd (No.2) [1995] 1 W.L.R. 366* is no longer good law. The proper way to proceed is to seek an order against the maintainer under s.51 of the Senior Courts Act 1981. The court could make an order under s.51 against a shareholder of a company as a shareholder who funded or controlled a

company's litigation in order to protect his own financial interests: see *CIBC Mellon Trust Co v Stolzenberg* [2005] EWCA Civ 628, [2005] 2 B.C.L.C. 618.

567 *Giles v Thompson* [1993] 3 All E.R. 321, 328, CA.

568 *Trendtex Trading Corp v Credit Suisse* [1980] 1 Q.B. 629, 663; *Re Trepca Mines Ltd (No.2)* [1963] Ch. 199, 219; *Haseldine v Hosken* [1933] 1 K.B. 822, 831; and see *Anderson v Radcliffe* (1858) El. Bl. & El. 806, 819, 825. Champerty only relates to legal proceedings: *Pickering v Sogex Services (UK) Ltd* (1982) 262 E.G. 770.

569 *Re Trepca Mines Ltd (No.2)* [1963] Ch. 199, 224; *Master v Miller* (1791) 4 T.R. 320, 340.

570 *Giles v Thompson* [1994] 1 A.C. 142, 161.

571 *Thai Trading Co v Taylor* [1998] 3 All E.R. 65, 69. This case was disapproved of in *Awwad v Geraghty & Co (A Firm)* [2000] 1 All E.R. 608 but this does not affect this aspect of the judgment.

572 *[2011] EWCA Civ 25*, *[2011] 1 W.L.R. 2111*. On whether such an arrangement might amount to unlicensed insurance see *Edwards v Slater & Gordon UK Ltd* [2021] 9 WLUK 147.

573 *[2011] 1 W.L.R. 2111* at [43].

574 *[2011] 1 W.L.R. 2111* at [43].

575 See above, para.18-097.

576 *[1994] 1 A.C. 142*.

577 *Giles v Thompson* [1994] 1 A.C. 142, 153–154.

578 See below, para.18-101.

579 *Hutley v Hutley* (1873) L.R. 8 Q.B. 112; cf. above, para.18-096.

580 *[1997] 4 All E.R. 362*; see above, para.18-098.

581 See above, para.18-096. As to assignments of rights to solicitors, see below, para.18-111.

582 See above, para.18-096.

583 *Re Masters* (1835) 4 Dowl. 18; *Strange v Brennan* (1846) 15 Sim. 346; *Hilton v Woods* (1867) L.R. 4 Eq. 432; *Earle v Hopwood* (1861) 9 C.B.(N.S.) 566; *Hutley v Hutley* (1873) L.R. 8 Q.B. 112; *Re A Solicitor* [1912] 1 K.B. 302; *Re A Solicitor* (1913) 29 T.L.R. 354; *Wiggins v Lavy* (1928) 44 T.L.R. 721. See also *Westlaw Services Ltd v Boddy* [2010] EWCA Civ 929 (an agreement to pay a percentage of the fees received by a solicitor from the Legal Services Commission for help provided by non-solicitors who acted as “legal consultants” was void and unenforceable and there could be no quantum meruit award for any of the services rendered. The Solicitors Regulatory Authority intervened as an interested party and argued against the enforceability of the agreement). See now, SRA Code of Conduct 2019: 5.1–5.3 “Referrals, introductions and separate businesses”.

584 *Grell v Levy* (1864) 16 C.B.(N.S.) 73.

585 *[1975] Q.B. 373*.

586 Lord Denning was prepared to allow a “contingency fee” in such circumstances. See also *Trendtex Trading Corp v Credit Suisse* [1980] 1 Q.B. 629, 654, 663.

587 *[2000] 1 All E.R. 608*.

- 588 The court declined to follow *Thai Trading Co (A Firm) v Taylor [1998] Q.B. 781* where such an agreement was upheld.
- 589 This amended s.58 of the Courts and Legal Services Act 1990. See Current Law Statutes where the Lord Chancellor is reported as stating: “Section 58 is intended to bring into effect the judgment of the Court of Appeal in *Thai Trading* into Statute Law” (Hansard, HL Vol.596, cols 956–965).
- 590 Courts and Legal Services Act 1990 s.58. A fee splitting agreement may be in breach of the Law Society Rules and unenforceable because it is accordingly illegal: see *Mohamed v Alaga Co [1998] 2 All E.R. 720*.
- 591 *Wild v Simpson [1919] 2 K.B. 544*.
- 592 *Re Trepca Mines Ltd (No.2) [1963] Ch. 199*.
- 593 *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 220–221*.
- 594 *Wild v Simpson [1919] 2 K.B. 544, 565*, disapproving *Grell v Levy (1864) 16 C.B.(N.S.) 73*; and see *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 222*.
- ⑤595 [2021] EWHC 1950 (Ch); affd [2022] EWCA Civ 295.
- ⑤596 See [2022] EWCA Civ 295 at [44].
- ⑤597 [2021] EWHC 1950 (Ch) at [26].
- ⑤598 [2021] EWHC 1950 (Ch) at [22], [35].
- ⑤599 [2021] EWHC 1950 (Ch) at [45], [41] sets out the detail.
- ⑤600 [2021] EWHC 1950 (Ch) at [54(i)].
- ⑤601 [2021] EWHC 1950 (Ch) at [54(i)(a)].
- ⑤602 [2021] EWHC 1950 (Ch) at [54(i)(b)].
- ⑤603 [2021] EWHC 1950 (Ch) at [54(i)(e)].
- ⑤604 [2022] EWCA Civ 295 at [51].
- ⑤605 *Pittman v Prudential Deposit Bank Ltd (1896) 13 T.L.R. 110*; see below, para.18-111.
- ⑤606 *Awwad v Geraghty & Co (A Firm) [2000] 1 All E.R. 608* (above, para.18-100) and *Rees v Gateley Wareing (A Firm) [2014] EWCA Civ 1351, [2015] 1 W.L.R. 2179*.
- ⑤607 Court and Legal Services Act 1990 s.58(2)(a). For techniques available to the court to regulate costs in an action involving a conditional fee agreement: see *King v Telegraph Group Ltd [2004] EWCA Civ 613, [2005] 1 W.L.R. 2282; Farrar and Candey Ltd v Miller [2022]*

EWCA Civ 295 at [27]–[43]; *Diag Human SE v Volterra Fietta (a firm)* [2022] EWHC 2054 (QB) at [13]–[17].

①608 Court and Legal Services Act 1990 s.58(2)(b); see also [s.58AA](#) and Damages-Based Agreements Regulations 2013 (SI 2013/609).

①609 s.58(3). Various statutory instruments have been made with respect to conditional fee orders: see *Sharratt v London Central Bus Co Ltd* [2003] EWCA Civ 718, [2003] 4 All E.R. 590 where the law is fully analysed.

①610 Court and Legal Services Act 1990 s.58(4)(c). The agreement must also state this amount: s.58(4)(b).

①611 s.58(1). It may be possible to save a non-complying agreement if it can be rendered compliant by severing a particular term: *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16, [2021] 1 W.L.R. 2729 at [7]–[8] (but the point was not argued fully: see at [48]–[49]), applying *Egon Zehnder Ltd v Tillman* [2019] UKSC 32, [2020] A.C. 154 (see below, paras 18-254—18-257), but only if severance would not change the nature of the agreement; *Escalate Law Ltd v Kennedy* [2021] EWHC 2232 (Ch) at [27]; *Diag Human SE v Volterra Fietta (a firm)* [2022] EWHC 2054 (QB) at [82]–[84] (distinguishing (at [86]) *Garnat Trading and Shipping (Singapore) Pte v Thomas Cooper (a firm)* [2016] EWHC 18 (Ch), which involved two separable work streams, whereas in the *Diag* case the whole of the work to be done was on a conditional fee basis). There is no prohibition on a solicitor charging costs and expenses if the client exercises a contractual right to terminate the agreement: *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16, see *Diag Human SE v Volterra Fietta (a firm)* [2022] EWHC 2054 (QB) at [100]–[101].

①612 *Jennings v Johnson* (1873) L.R. 8 C.P. 425. Such an agreement precludes the recovery of costs by the client from the other party to the litigation, as costs are given by way of indemnity: *Gundry v Sainsbury* [1910] 1 K.B. 645.

①613 Solicitors Act 1974 ss.59–63 (contentious business); cf. s.57 (non-contentious business) (certain aspects of ss.57, 59, 60 and 61 of the 1974 Act have been amended by s.98 of the Courts and Legal Services Act 1990). See also para.18-111; *Electrical Trades Union v Tarlo* [1964] Ch. 720.

①614 Solicitors Act 1974 s.59(1); and see *Electrical Trades Union v Tarlo* [1964] Ch. 720.

①615 *Burstein v Times Newspapers Ltd* [2002] EWCA Civ 1739, [2002] All E.R. (D) 442 (Nov).

①616 *R. (on the application of Factortame) v Secretary of State for Transport, Environment and the Regions (No.2)* [2002] EWCA Civ 932, [2002] 3 W.L.R. 1104.

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R. (on the application of Factortame) v Secretary of State for Transport, Environment and the Regions (No.2) [2002] 3 W.L.R. 1104; Mansell v Robinson [2007] EWHC 101 (QB), [2007] All E.R. (D) 279 (Jan).

618 *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No.2) [2002] EWHC 2130 (Comm), [2002] Lloyd's L.R. 692.*

619 *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No.2) [2002] 2 Lloyd's Rep. 692.*

620 *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No.2) [2002] 2 Lloyd's Rep. 692.* See also *Dal-Sterling Group Plc v W.S.P. South & West Ltd Unreported 18 August 2001.*

621 [1980] Q.B. 629, CA; [1982] A.C. 679; *Kaukomarkkinat O/Y v "Elbe" Transport-Union GmbH (The "Kelo")* [1985] 2 Lloyd's Rep. 85; 24 *Seven Utility Services Ltd v Rosekey Ltd [2003] EWHC 3415 (QB), [2004] All E.R. (D) 288 (Feb).*

622 The Criminal Law Act 1967 s.14(2), has a bearing on this issue. As s.14(2) only applies to “cases in which a contract is to be treated as contrary to public policy or otherwise illegal”, it may therefore be argued that completed assignments, which operate as transfers of property and not as contracts, are no longer to be avoided on grounds of public policy. It is submitted that such an argument would fail. Even before the passing of the Criminal Law Act 1967 such assignments were neither crimes nor tort but, being analogised with maintenance and champerty, were on the grounds of public policy simply treated as ineffective. These grounds of public policy remain unaffected by the Criminal Law Act 1967. See above, para.18-093.

623 *Trendtex Trading Corp v Credit Suisse [1980] 1 Q.B. 629, 658.*

624 [1980] Q.B. 629, 670.

625 [1980] Q.B. 629, 656–657. See also Oliver LJ at 674: “For my part, I would be prepared to hold that where a cause of action arises out of a right which was itself assignable, the cause of action equally remains assignable”.

626 *Trendtex Trading Corp v Credit Suisse [1980] Q.B. 629, 657 and 674* (referred to by Oliver LJ as “personal and non-assignable” contracts). Lord Denning also considered that the right to sue with respect to certain torts to property would also be assignable, but not with respect to personal torts (656–657). See, e.g. *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 K.B. 1006*. See also para.18-104.

627 *Trendtex Trading Corp v Credit Suisse [1980] Q.B. 629, 675*, per Oliver LJ, citing *Grell v Levy (1864) 16 C.B.(N.S.) 73; Simpson v Norfolk & Norwich University Hospital NHS Trust [2011] EWCA Civ 1149* at [21] (“Stricter rules … continue to apply to agreements entered into by those conducting the litigation or providing advocacy services”).

628 *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679, 703.*

629 *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679.*

630 *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679.*

631 *Giles v Thompson [1994] 1 A.C. 142, 153* (a bare right of action is not assignable); *Simpson v Norfolk & Norwich University Hospital NHS Trust [2011] EWCA Civ 1149* at [24]:

- “assignment of a bare cause of action for personal injury remains unlawful and void”; *Farrar and Candey Ltd v Miller* [2022] EWCA Civ 295 at [22].
- 632 One of the features of the assignment was that the plaintiffs assigned all rights even if the assignee recovered more than the debt owing from the plaintiff to the defendant. Lord Roskill considered this to be an agreement to divide the “spoils” between the defendant and the third party: *Trendtex Trading Corp v Credit Suisse* [1982] A.C. 679, 779. Quaere what the position would have been if recovery beyond the debt was repayable to the plaintiff.
- 633 [1985] 3 All E.R. 499.
- 634 *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All E.R. 499, 509, per Lloyd LJ.
- 635 *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All E.R. 499, 505, per Sir John Megaw.
- 636 Lloyd LJ left open the question as to whether any profit would be returnable by the assignee to the assignor ([1985] 3 All E.R. 499, 509). If the assignment is out and out and not by way of security it is difficult to see why this should be so.
- 637 *Advanced Technology Structures Ltd v Cray Valley Products Ltd* [1993] B.C.L.C. 723, 733–734.
- 638 *Ellis v Torrington* [1920] 1 K.B. 399; *Defries v Milne* [1913] 1 Ch. 98.
- 639 *Fitzroy v Cave* [1905] 2 K.B. 364 (see the observations on this case in *Trendtex* [1980] Q.B. 629, 671, 674). Similarly a person may acquire shares in a company for the express purpose of challenging acts of the directors in litigation: *Bloxham v Metropolitan Ry* (1868) L.R. 3 Ch. App. 337, 353.
- 640 *Glegg v Bromley* [1912] 3 K.B. 474. See also (fraudulent claims relating to part of a claim under insurance policy vitiating whole claim), *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd’s Rep. I.R. 209.
- 641 *Dawson v Great Northern & City Ry* [1905] 1 K.B. 260.
- 642 *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 Q.B. 101.
- 643 [1985] 3 All E.R. 499, 509.
- 644 See above, para.18-102.
- 645 See below paras 22-056—22-057.
- 646 It has been held that this prohibition is not an unlawful interference with the holder’s property right contrary to art.1 of Protocol 1 of the European Convention on Human Rights, as it constitutes a “delimitation” rather than a “deprivation”: see *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] Q.B. 640 at [25]–[27].
- 647 *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] Q.B. 640 at [8]. See also para.22-057.
- 648 *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2012] Q.B. 640.
- 649 *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2012] Q.B. 640 at [7].
- 650 *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2012] Q.B. 640 at [9].
- 651 *Williams v Protheroe* (1829) 3 Y. & J. 129.
- 652 *Glegg v Bromley* [1912] 3 K.B. 474, 490; *Technotrade Ltd v Larkstore Ltd* [2007] 1 All E.R. (Comm) 104.
- 653 *Dickinson v Burrell* (1866) L.R. 1 Eq. 337.
- 654 (1829) 3 Y. & J. 129.

- 655 [1920] 1 K.B. 399; and see *County Hotel & Wine Co Ltd v London & N.W. Ry Co* [1918] 2 K.B. 251 (*affirmed on other grounds* [1921] 1 A.C. 85).
- 656 (1918) 34 T.L.R. 351.
- 657 [1998] Q.B. 22.
- 658 *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 Q.B. 101, 121.
- 659 *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 Q.B. 101; and see Vol.II, para.44-116.
- 660 See *ear v Lawson* (1880) 15 Ch. D. 426; Insolvency Act 1986 s.314(1); *Weddell v J. A. Pearce & Major* [1988] Ch. 26; *Farmer v Moseley (Holdings) Ltd* [2001] 2 B.C.L.C. 572. See further below, para.23-020.
- 661 *Guy v Churchill* (1888) 40 Ch. D. 481.
- 662 *Freightex Ltd v International Express Co Ltd* Unreported 15 April 1980, CA. The assignment in this case was made to the managing director of the company who arguably had an interest, but the court considered that the language of the legislation, s.242(2)(a) of the Companies Act 1948, absolved the actions of the liquidator from the taint of maintenance or champerty. See now, Insolvency Act 1986 ss.166, 167, 436 and Sch.4.
- 663 Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.31, Sch.3 (this is to deal with human rights litigation).
- 664 [1999] 2 A.C. 1.
- 665 In so far as the assignees were eligible for legal aid and the company was not, the House of Lords considered that this was a matter for the Legal Aid Board. Regulations have now been passed to deal with this: see *Norglen Ltd (In Liquidation) v Reeds Rains Prudential Ltd* [1997] 3 W.L.R. 1177, 1187.
- 666 *Grovewood Holdings Plc v James Capel & Co Ltd* [1995] Ch. 80. This case was not followed in *Re Movitor Pty Ltd* (1996) 19 A.C.S.R. 440.
- 667 *Re Oasis Merchandising Services Ltd* [1998] Ch. 170, 179–180. This case held that the liquidator could not assign a cause of action under s.214 of the Insolvency Act 1986 (wrongful trading) as such a cause of action was not property vested in the company. See also *Farmer v Moseley (Holdings) Ltd* [2001] 2 B.C.L.C. 572, [2001] B.P.I.R. 473. It has also been held that the liquidator could not assign his “discretionary power” to prosecute proceedings that were granted to him in his personal capacity: *Rawnsley v Weatherall Green & Smith North Ltd* [2010] 1 B.C.L.C. 658.
- 668 *Glegg v Bromley* [1912] 3 K.B. 474. A liquidator can assign the fruits of an action vested in the company but cannot assign his discretionary power to prosecute proceedings: see *Rawnsley v Weatherall Green & Smith North Ltd* [2010] 1. B.C.L.C. 658 at [76].
- 669 *Stein v Blake* [1996] 1 A.C. 243.
- 670 *Hall v Hallet* (1784) 1 Cox 134; *Simpson v Lamb* (1856) 7 El. & Bl. 84; cf. *Strachan v Brander* (1759) 1 Eden 303.
- 671 *Wood v Downes* (1811) 18 Ves. Jr. 120; *Simpson v Lamb* (1856) 7 El. & Bl. 84; *Pittman v Prudential Deposit Bank Ltd* (1896) 13 T.L.R. 110; *Farrar and Candey Ltd v Miller* [2022] EWCA Civ 295 at [23]. This rule is designed to prevent a conflict of interest and does not

depend on whether the assignment is champertous: *[2022] EWCA Civ 295* at [28]. There is also a dictum to the effect that public policy in this area may be more strict where solicitors are involved: *Trendtex Trading Corp v Credit Suisse* [1980] Q.B. 629, 674–675; above, para.18-102; *Giles v Thompson* [1994] 1 A.C. 142.

⑥72 *Davis v Freethy* (1890) 24 Q.B.D. 519.

⑥73 *Anderson v Radcliffe* (1858) El. Bl. & El. 806, 819. cf. Turner LJ in *Knight v Bowyer* (1858) 2 De G. & J. 421, 445.

⑥74 Solicitors Act 1974 s.65(1) (contentious business); s.56(6) (non-contentious business), as amended by Legal Services Act 2007 s.177; see also SI 2009/1931.

675 *Sprye v Porter* (1856) 7 E. & B. 58; *Rees v De Bernardy* [1896] 2 Ch. 437.

676 *Stanley v Jones* (1831) 7 Bing. 369, 377; *Rees v De Bernardy* [1896] 2 Ch. 437; *Wedgerfield v De Bernardy* (1908) 25 T.L.R. 21.

677 Above, para.18-102.

678 *Strachan v Brander* (1759) 1 Eden 303.

⑥79 *Hutley v Hutley* (1873) L.R. 8 Q.B. 112; see also *James v Kerr* (1888) 40 Ch. D. 449. For a summary of the law see *Farrar and Candey Ltd v Miller* [2022] EWCA Civ 295 at [27]–[43].

⑥80 [2016] UKSC 42, [2017] A.C. 467; see above, para.18-005.

⑥81 *Farrar and Candey Ltd v Miller* [2022] EWCA Civ 295 at [27]–[38] and [52]; *Diag Human SE v Volterra Fietta (a firm)* [2022] EWHC 2054 (QB) at [87] (in the context of severance) and [122] (in the context of recovery of sums paid by the client).

⑥82 *Haseldine v Hosken* [1933] 1 K.B. 822.

⑥83 cf. above, para.18-099.

⑥84 *Diag Human SE v Volterra Fietta (a firm)* [2022] EWHC 2054 (QB) at [108]–[111], refusing to follow *Aratra Potato Co Ltd v Taylor Joynson Garrett* [1995] 4 All E.R. 695 (also disapproved of in *Thai Trading Co v Taylor* [1998] 3 All E.R. 65) but it is submitted that this aspect of the judgment remains good law. In *Farjab v Symth* [1998] 8 WLUC 226, CA the court held that the fact that a claimant had made a champertous arrangement with third persons did not itself constitute a ground for staying proceedings; *Stocznia Gdanska SA v Laftrers Inc* [2001] 2 B.C.L.C. 116 is to the same effect.

(i) - Immorality

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Cohabitation ⁶⁸⁵

18-114 Agreements by unmarried persons to cohabit obviously raise important questions of public policy as these agreements could be treated as being contra bonos mores⁶⁸⁶ and therefore unenforceable. At the outset it must be emphasised that this is an area which has been subject to considerable change.⁶⁸⁷ In a number of earlier authorities the courts adopted this position. Agreements in consideration of future illicit cohabitation, even though made under seal, have been held to be unenforceable.⁶⁸⁸ But a promise given in consideration of past illicit cohabitation is good as a voluntary promise, and can be enforced if made under deed,⁶⁸⁹ or supported by some other consideration, but not otherwise.⁶⁹⁰ A bond given for such consideration is not invalidated by the mere fact that the illicit cohabitation continues after its execution⁶⁹¹; nor that the parties contemplated its continuance, provided their intention forms no part of the consideration for the bond.⁶⁹² An agreement by a man to pay a woman with whom he was cohabiting a sum down and an annuity for life if they should separate and she should continue single and not cohabit with one D.G. or anyone else, has also been held good as being a gift on condition that she remained sole and chaste⁶⁹³; and so was an agreement by a reputed father of an illegitimate child to pay the mother an annuity if she would maintain the child and keep their connection secret, the maintenance of the child being a sufficient consideration for the contract.⁶⁹⁴

- 18-115 Extra-marital cohabitation is obviously an area where values change⁶⁹⁵ and the older authorities clearly reflect a marriage morality which is out of tune with contemporary mores. Recently the courts have been obliged to deal with legal problems arising out of unmarried persons setting up relatively stable domestic arrangements and when these problems have arisen the issue of illegality does not appear to have been argued. For example, in *Tanner v Tanner*⁶⁹⁶ a married man had twins by his mistress and he provided the mistress and the twins with a house. When the man subsequently attempted to evict the mistress, the court held that there was an implied contract between the parties that the mistress could live in the house, the consideration given by the mistress being her relinquishment of a rent-controlled flat. Although the contract undoubtedly involved sexual relations outside of marriage, no question of illegality was raised and there is little doubt that the court would have been unsympathetic to such a plea.⁶⁹⁷ One way of reconciling *Tanner v Tanner* with previous authority is that:

“... an agreement for an immoral consideration is to be treated as enforceable, if there be any other, lawful consideration to support it.”⁶⁹⁸

From this it would follow that contractual arrangements involving unmarried parties to a relatively stable domestic arrangement will be enforceable and the older authorities will only apply to relationships which are wholly related to the provision of sexual services.⁶⁹⁹

Prostitution

- 18-116 An action is not maintainable to recover the rent of lodgings knowingly let for the purpose of prostitution⁷⁰⁰ or to a man's mistress for the purposes of the liaison.⁷⁰¹ And where the landlord, although not aware of the true facts at the time of the letting, permitted the tenant to remain after discovering that she was using the lodgings for prostitution, it was held that he could not recover from her the rent which accrued after this had come to his knowledge and he had failed to take steps to evict her.⁷⁰² All covenants in an assignment of a lease of premises which the assignor knows the assignee intends to use as a brothel are similarly unenforceable.⁷⁰³ But although the tenant of an apartment may be a prostitute, and the landlord is aware of her character, he may recover his rent if she does not use his premises for immoral purposes⁷⁰⁴; and, in the absence of evidence specifically to connect the contract with the prostitution,⁷⁰⁵ a contract to sell clothes to a prostitute,⁷⁰⁶ or to wash for her,⁷⁰⁷ is good. Where a contract of employment requires the employee to procure prostitutes, this would be a contract entered into for an immoral purpose and would be illegal and unenforceable.⁷⁰⁸

Footnotes

- 685 See Cretney and Masson, *Principles of Family Law*, 8th edn (2008) at pp.188–189, 236–238.
- 686 “In this branch of the law the word ‘immoral’ connotes only sexual immorality”: *Coral Leisure Group Ltd v Barnett [1981] I.C.R. 503, 506*.
- 687 See e.g. Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, CM 7182 (Law Com. No.307) at para.1.4.
- 688 *Benyon v Nettlefold (1850) 3 Mac. & G. 94*; *Ayerst v Jenkins (1873) L.R. 16 Eq. 275*.
- 689 per Lord Selborne L.C. in *Ayerst v Jenkins (1873) L.R. 16 Eq. 275, 282*; and see *Annandale, Marchioness of v Harris (1728) 1 Bro. P.C. 250*; *2 P. Wms. 432*; *Turner v Vaughan (1767) 2 Wils. K.B. 339*; *Gray v Mathias (1800) 5 Ves. 286*; *Nye v Moseley (1826) 6 B. & C. 133*.
- 690 *Beaumont v Reeve (1846) 8 Q.B. 483*. There is no public policy against enforcing such promises as they do not promote immorality and all that is needed is consideration to make the contract binding.
- 691 *Hall v Palmer (1844) 3 Hare 532*; *Re Vallance (1884) 26 Ch. D. 353*.
- 692 *Re Wootten Isaacson (1904) 21 T.L.R. 89*; cf. *Friend v Harrison (1827) 2 Car. & P. 584*.
- 693 *Gibson v Dickie (1815) 3 M. & S. 463*.
- 694 *Jennings v Brown (1842) 9 M. & W. 496*; see also *Hicks v Gregory (1849) 8 C.B. 378*; *Smith v Roche (1859) 6 C.B.(N.S.) 223*; *Ward v Byham [1956] 1 W.L.R. 496*; *Horrocks v Foray [1976] 1 W.L.R. 230, 299*.
- 695 See above, para.18-008.
- 696 *[1975] 1 W.L.R. 1346*; see also *Chandler v Kerley [1978] 1 W.L.R. 693*; *Bernard v Josephs [1982] Ch. 391*. cf. *Horrocks v Foray [1976] 1 W.L.R. 230* (the court found that there was no contract between a man and his mistress, but the issue of illegality was not raised). See also on changing values as regards sexual mores; *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180, 188*; *Fitzpatrick v Sterling Housing Association Ltd [1998] Ch. 304, 308*; *[2001] 1 A.C. 27*; *Mendoza v Ghaidan [2002] EWCA Civ 1533, [2003] 1 F.L.R. 468*.
- 697 See, e.g. *Cook v Head [1972] 1 W.L.R. 518*; *Eves v Eves [1975] 1 W.L.R. 1338*.
- 698 *Barton (1976) 92 L.Q.R. 168, 169*. See also *Eves v Eves [1975] 1 W.L.R. 1338* at 1345C; *Paul v Constance [1977] 1 W.L.R. 527*.
- 699 See, e.g. *Marvin v Marvin (1976) 557 P.2d. 104*; *Bernard v Josephs [1982] Ch. 391*; *Heglibiston Establishment v Heyman (1977) 36 P. & C.R. 351, 360–362*; *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180, 188* (“Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this”). See generally Cretney, *Family Law in the Twentieth Century: A History* (2003), pp.516–527.
- 700 *Girardy v Richardson (1793) 1 Esp. 13*. Similarly a seller cannot recover the price of clothes furnished specifically to enable the purchaser to carry on her trade as a prostitute, the seller expecting to be paid from the profits thereof: *Bowry v Bennet (1808) 1 Camp. 348*; and see *Pearce v Brooks (1866) L.R. 1 Ex. 213*, paras 18-017—18-020, above. Contrast *Lloyd v Johnson (1798) 1 B. & P. 340* (a contract for the cleaning of a prostitute’s clothes, in which

it was said that the use to be made of the clothes was irrelevant at least where the clothes were of such a nature that the prostitute would need them anyhow). Generally, cf. *Shaw v DPP [1962] A.C. 220*.

- 701 *Upfill v Wright [1911] 1 K.B. 506* (in *Heglibiston Establishment v Heyman (1977) 36 P. & C.R. 351, 360–362* it was doubted if this case would today be decided the same way on its facts). cf. para.21-055.
- 702 *Jennings v Throgmorton (1825) R. & M. 251.*
- 703 *Smith v White (1866) L.R. 1 Eq. 626.*
- 704 *Appleton v Campbell (1826) 2 Car. & P. 347.*
- 705 *Appleton v Campbell (1862) 2 Car. & P. 347.*
- 706 *Bowry v Bennet (1808) 1 Camp. 348.*
- 707 *Lloyd v Johnson (1798) 1 B. & P. 340.*
- 708 *Coral Leisure Group Ltd v Barnet [1981] I.C.R. 503.*

(ii) - Interference with Marriage

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Promise of marriage by married person

A promise by a married man to marry one who knew him to be already married was unenforceable as against public policy and as tending to immorality.⁷¹⁰ No action lay for breach of such a promise even after the death of the wife.⁷¹¹ So also with a similar promise by a married woman to marry after the death of her husband⁷¹² or divorce.⁷¹³ A promise of marriage made by a married man in the interval between decree nisi and decree absolute was actionable if broken—since after the decree nisi the normal obligations and conditions of marriage have disappeared and consortium has come to an end.⁷¹⁴ Actions for breach of promise of marriage were abolished by [s.1 of the Law Reform \(Miscellaneous Provisions\) Act 1970](#), so that the cases just discussed are, strictly speaking, obsolete. However, [s.2 of the Act](#) provides that “where an agreement to marry is terminated” the formerly engaged couple are to be treated for the purpose of certain rights in and disputes about property as if they had been married; and these provisions can obviously give rise to difficulty where a man has both a wife and an ex-fiancée. It may be that the difficulty can be mitigated by holding that an “agreement” in [s.2](#) must not be contrary to public policy in the sense of the old law. But the analogy is not perfect, and the courts may take the view that, so long as the interests of the wife (or former wife) are protected, an ex-fiancée may sometimes be allowed to take the benefit of [s.2](#) even though she could not before the Act have claimed damages. However, the Act is of very limited effect because, apart from the right to claim a share or enlarged share in a partner’s

property by having spent money on improvements to that property,⁷¹⁵ property rights between spouses are determined in accordance with the principles of property and trusts law.⁷¹⁶

Marriage brokerage contract

A marriage brokerage contract, that is, an undertaking for reward to produce a marriage between two parties, is against public policy.⁷¹⁷ It has, however, been observed that “it is hard to see what is wrong with these [contracts] in modern times”⁷¹⁸ as many are made by quite respectable marriage bureaux. It may be that this is an area where the public policy embodied in the old cases is in need of reappraisal.

Contracts in restraint of marriage

- 18-119 A contract, the object of which is to restrain or prevent a party from marrying⁷¹⁹ or which is a deterrent to marriage in so far as it makes any person uncertain whether he may marry or not,⁷²⁰ is against public policy. There appears to be no authority on contracts in partial restraint of marriage. Should such a contract come before the courts, the authorities concerning testamentary conditions in partial restraint of marriage would probably be applied.⁷²¹

Contract not to revoke will

- 18-120 A man may validly bind himself or his estate to make certain dispositions by his will.⁷²² And a contract not to revoke a will or not to alter its contents is not necessarily against public policy. But probably no action could be brought upon its breach by reason of the covenantor’s subsequent marriage, for the will is on that event revoked by operation of law⁷²³ and to that extent the covenant is bad as being in restraint of marriage and against public policy; but it is divisible and will be construed as a covenant against revocation by any other mode of revocation.⁷²⁴

Parental responsibility

- 18-121 The [Children Act 1989](#) confers automatic parental responsibility on parents of a child who are married to each other and on a child’s unmarried mother.⁷²⁵ The Act stipulates that:

“... a person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.”⁷²⁶

An unmarried father may also acquire parental responsibility by agreement with the child’s mother made in prescribed form and recorded in the Principal Registry of the Family Division.⁷²⁷ The inherent jurisdiction of the court to make appropriate orders concerning the upbringing of children cannot be ousted by agreement between the parties.⁷²⁸ Surrogacy agreements have been expressly declared to be unenforceable.⁷²⁹ Although the courts have power to treat a financial settlement agreed between divorcing couples as final, this does not apply with respect to agreements regarding the maintenance of children.⁷³⁰ An “absent parent” may be required to pay child support maintenance to a “qualifying child” under the **Child Support Act 1991** irrespective of the terms of an existing agreement between the child’s parents covering the matter.

Contracts fettering individual’s autonomy

- 18-122 It is against public policy to enforce an agreement which would deprive a party to the contract of their sole means of support.⁷³¹ And an agreement by which a moneylender imposed restrictions on the liberty of a borrower, reducing him to a position little better than that of a slave, was held void as contrary to public policy.⁷³² But where a father and son entered into an agreement for the payment of an annuity to the son upon conditions fettering the son’s liberty, the father’s object being to save him from moral and financial ruin, the agreement was held good.⁷³³ Again, a contract to use undue influence, e.g. to procure a legacy, will be set aside in equity as contrary to public policy⁷³⁴; but a contract between expectant legatees to divide benefits after the death of a testator and meanwhile to abstain from using influence is good.⁷³⁵

Footnotes

- 709 As to the invalidity of agreements between husband and wife providing for their future separation, see *Brodie v Brodie* [1917] P. 271.
- 710 *Wilson v Carnley* [1908] 1 K.B. 729; *Spiers v Hunt* [1908] 1 K.B. 720; *Siveyer v Allison* [1935] 2 K.B. 403.
- 711 *Wilson v Carnley* [1908] 1 K.B. 729 (the promisee knew that he was married).
- 712 *Spiers v Hunt* [1908] 1 K.B. 720.
- 713 *Prevost v Wood* (1905) 21 T.L.R. 684.

- 714 *Fender v Mildmay* [1938] A.C. 1; *Psaltis v Schultz* (1948) 76 C.L.R. 547.
- 715 Matrimonial Proceedings and Property Act 1970 s.37.
- 716 *Pettitt v Pettitt* [1970] A.C. 777; *Mossop v Mossop* [1989] Fam. 77.
- 717 *Hermann v Charlesworth* [1905] 2 K.B. 123. See also para.18-249.
- 718 Atiyah, The Law of Contract, 5th edn (1995), p.323 (this passage is not repeated in the 6th edition).
- 719 *Lowe v Peers* (1768) 4 Burr. 2225; affirmed Wilmot 364; and see *Baker v White* (1690) 2 Vern. 215; *Cock v Richards* (1805) 10 Ves. 429, 437; *Hartley v Rice* (1808) 10 East 22.
- 720 *Re Fentem* [1950] 2 All E.R. 1073. In *Cartwright v Cartwright* (1853) 3 De G.M. & G. 982 it was held that a condition in an ante-nuptial agreement that the wife would forfeit her interest if she and her husband separated was against public policy since it contemplated the separation of husband and wife.
- 721 See Theobald on Wills, 18th edn (2016), at paras 27-034 et seq.
- 722 *Dufour v Pereira* (1769) Dick. 419; *Hammersley v Baron De Biel* (1845) 12 Cl. & F. 45; *Re Brookman's Trusts* (1869) L.R. 5 Ch. App. 182.
- 723 Wills Act 1837 s.18 (as substituted by the Administration of Justice Act 1982 s.18); cf. *Re Marsland* [1939] Ch. 820. (In this case the covenant not to revoke was only held to apply to revocation under s.20 of the Wills Act 1837, and not to revocation by operation of s.18. Thus the issue of public policy was not directly faced and the court did not feel obliged to express any opinion on it.)
- 724 *Robinson v Ommayne* (1883) 23 Ch. D. 285; Theobald on Wills, 18th edn (2016), Ch.8. As to the effects of an actionable breach, see *Synges v Synges* [1894] 1 Q.B. 466; *Central Trusts & Safe Deposit Co v Snider* [1916] 1 A.C. 266.
- 725 Children Act 1989 s.2(1), (2).
- 726 s.2(9).
- 727 s.4(1)(b); Parental Responsibility Agreement Regulations 1991 (SI 1991/1478) (as amended). Agreements relating to the upbringing and welfare of children are heavily regulated and specialist texts need to be consulted: see Bainham & Gilmore, Children: The Modern Law, 4th edn (2013) at 507–510 for a brief outline.
- 728 *A. v C.* [1985] F.L.R. 4451.
- 729 Human Fertilisation and Embryology Act 1990 s.36.
- 730 *Minton v Minton* [1979] A.C. 593, 609.
- 731 *King v Michael Faraday & Partners* [1939] 2 K.B. 753.
- 732 *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 K.B. 305; cf. *A. Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308.
- 733 *Denny's Trustee v Denny* [1916] 1 K.B. 583.
- 734 *Debenham v Ox* (1749) 1 Ves. Sen. 276; *Higgins v Hill* (1887) 56 L.T. 426.
- 735 *Higgins v Hill* (1887) 56 L.T. 426; and so is a contract to sell an expected devise: *Cook v Field* (1850) 15 Q.B. 460.

(d) - Contracts in Restraint of Trade

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Replace footnote 731 with: See Heydon, The Restraint of Trade Doctrine 4th edn (2019); Kamerling and Osman, Restrictive Covenants under Common and Competition Law, 6th edn (2010); and, for a critical analysis of recent cases in the Supreme Court, Day [2021] L.C.M.L.Q. 134.

Footnotes

736 See Heydon, The Restraint of Trade Doctrine 4th edn (2019); Kamerling and Osman, Restrictive Covenants under Common and Competition Law, 6th edn (2010).

(i) - Scope of the Doctrine

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(i) - Scope of the Doctrine

General rule

18-123 All covenants ⁷³⁷ in restraint of trade ⁷³⁸ are *prima facie* unenforceable at common law ⁷³⁹ and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public. Although contracts in restraint of trade are against public policy and in a sense illegal, it has been held that it is “preferable … to treat the law of the enforceability of contracts in restraint of trade as being separate from, albeit similar to, the law on the enforceability of contracts”. ⁷⁴⁰ Unless the reasonable term can be severed from the rest of the contract to protect the contract from failing as a whole or the objectional parts of the clause can be severed from the rest of the clause, the entire contract is unenforceable. ⁷⁴¹ A covenant in restraint of trade (if unreasonable) is void in the sense that courts will not enforce it, but if the parties wish to implement it they would not be acting illegally and the courts would not intervene to prevent them from doing so. ⁷⁴² It has been held that “a covenant which is unenforceable ab initio should simply be disregarded unless and until it is subsequently and explicitly re-agreed”. ⁷⁴³ A general acknowledgement that the previous terms of an agreement, which is being re-adopted by the parties, remain unchanged cannot be construed as reinstating a void term, the intention of the parties to do so must be unequivocally stated. ⁷⁴⁴ It also follows from this that where A and B enter into a contract which contains an unreasonable restraint and they deposit money with T for the purposes of the contract then neither could prevent T from dealing with the money on the terms set out in the contract. ⁷⁴⁵ The doctrine

of restraint of trade is probably one of the oldest applications of the doctrine of public policy; cases go back to the second half of the sixteenth century⁷⁴⁶ and as early as 1711 it was laid down in *Mitchel v Reynolds*⁷⁴⁷ that a bond to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good, though if it be upon no reasonable consideration or to restrain a man from trading at all, it is void. The validity of a covenant in restraint of trade is assessed at the date when the contract is entered into.⁷⁴⁸

Competition law

18-124

U This section concentrates on the common law. However, the prohibitions on anti-competitive agreements, decisions of undertakings and concerted practices contained in [s.2 of the Competition Act 1998](#) (known as the “Ch.I prohibition”) and, if they were entered into before 31 December 2020 and had an effect on trade between Member States, art.101(1) TFEU,⁷⁴⁹ may be applicable to contracts in restraint of trade between two or more parties that each carry on an economic activity⁷⁵⁰ and which have the object or effect of restricting competition. This will particularly be the case for horizontal or vertical agreements relating to the production, supply or acquisition of goods, non-competition and non-solicitation covenants between the vendor and purchaser of a business, and the rules of associations of businesses. The application of the Ch.I prohibition and art.101(1) TFEU is considered in Vol.II of this work.⁷⁵¹ In *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd*,⁷⁵² the High Court held that the common law doctrine of restraint of trade could not be applied to render unenforceable an agreement that it considered was in restraint of trade but was lawful under art.101(1), having neither the object nor the effect of restricting competition. However, following the United Kingdom’s withdrawal from the European Union, this principle no longer has effect after 31 December 2020; therefore, from this date, the restraint of trade doctrine could be applied to an agreement that does not infringe the Ch.I prohibition or, if it does, benefits from exemption under [ss.6 to 10 of the Competition Act](#). In *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*, the claimant shopping centre owner had, at first instance, abandoned a claim that a covenant in a lease with the defendant (a retailer of textiles, provisions and groceries and the “anchor tenant” in the centre) that prevented the claimant from letting another unit in the shopping centre to a retailer selling such goods infringed the Ch.I prohibition and relied only on a claim (which was unsuccessful⁷⁵³

U) that the covenant was in unreasonable restraint of trade; it did so after the defendant served expert evidence, which apparently showed that the agreement did not have an appreciable effect on competition and thus did not infringe the Ch.I prohibition.⁷⁵⁴

Types of contract that are in restraint of trade

- 18-125 The definition of a covenant in restraint of trade presents peculiar conceptual difficulty and has been described as “uncertain and porous”.

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U The reason for this is that to some extent all contracts are in restraint of trade by at least preventing the parties to them from trading with others, but there has been no suggestion that all contracts are or should be subject to the doctrine.

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U The courts historically were reluctant to attempt to define what constituted a restraint of trade. The courts have recognised that at “the heart of the doctrine lies a tension between two freedoms, on the one hand freedom to contract and on the other freedom to trade”.

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U Typical of this reluctance were the judgments of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*

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U where Lord Reid stated

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U that he “would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade”, a view echoed by Lord Wilberforce

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U who stated that “[No] exhaustive test can be stated—probably no precise non-exhaustive test” for determining what constitutes a restraint of trade. An attempt was made to clarify the various types of restraint in *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*

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U and in the course of doing so Lord Wilson, with whom the other JJSC agreed, analysed and disapproved of what had hitherto been the leading case on the matter, *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*

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U involving a restraint on land. In *Peninsula Securities* a property developer who was developing a rental site had entered into a covenant with one of the tenants not to lease property to potential competitors of the tenant. The issue before the court was whether the restrictive covenant was subject to the restraint of trade doctrine and, if so, whether it was unreasonable and therefore

unenforceable. Lord Wilson found that there were three distinct criteria that had been put forward in the case:

(i) the pre-existing freedom test:

this test, favoured by Lord Reid, applies “where someone fetters his future by parting with a freedom which he possesses.”

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U This was the opposite of *Esso Petroleum*, where the garage had acquired property already subject to an existing constraint. The pre-existing freedom test has been justifiably criticised

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U as based on form rather than on substance as the following hypothetical illustrates

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U:

“... if X, who owns two shops, sells one to A and A and X essentially covenant that neither shop shall be used as a butcher shop, the restraint of trade doctrine will apply to X’s obligations but not to A’s; X’s may be held unenforceable but not A’s ... The majority test thus leads to gross anomalies.”

(ii) the sterilisation of capacities test:

The test was formulated by Lord Pearce as follows when referring to the restraint of trade doctrine:

“The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that the prevention of work outside the contract viewed as a whole is directed towards the absorption of the parties’ services and not their sterilisation.”

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(iii) the trading society test:

This test, favoured by Lord Wilberforce, was one which involved:

“... provisions of contracts which reflected the accepted and normal currency of commercial relations had come to fall outside the scope of the doctrine because moulded under the pressure of negotiations, competition and public opinion, they had assumed a form which satisfied the test of public policy as understood at that time.”

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In evaluating the different tests, Lord Wilson considered that, as the foundation of the doctrine of restraint of trade was based on public policy, there is no satisfactory explanation as to why the doctrine was engaged where “the covenantor enjoyed a pre-existing freedom” but an identical restraint would not do so if an existing freedom was not so curtailed.

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U At first glance, the trading society test appeared to be open to objection that “the law follows where many expect the law to lead”; as Lord Wilson colourfully put it, “[Is] the law (one might ask) to be determined as if by a weathercock which answers only to the direction of the wind?”⁷⁶⁹

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U He considered that this was not the case: the common law had developed pragmatically by adding, discarding, enlarging, diluting and strengthening various doctrines and the trading society test reflected the process. The court concluded “that, unlike the pre-existing freedom test, the trading society test is consistent with the doctrine”,⁷⁷⁰

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U that is, the restraint of trade doctrine. The court considered that it should “depart from the test favoured by the majority in the *Esso* case”,⁷⁷¹

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U on the grounds that it had no principled place within the restraint of trade doctrine and has been consistently criticised and “although in some parties loyally applied, the reasoning behind it has … scarcely been defended….”⁷⁷²

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U The trading society raises questions, however, of how private parties can “prove whether a contractual restriction is or is not ‘acceptable and necessary as part of the structure of a trading society’”.⁷⁷³

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U This issue also arises as regards the requirement that a covenant in restraint of trade must be reasonable in the interests of the public.⁷⁷⁴

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Criteria for application of doctrine

- 18-126 The following general principles have, with varying degrees of certainty, been laid down



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- 18-127 (1) It has now long been established that there is no distinction in principle between partial and total restraints.⁷⁷⁶
- 18-128 (2) The doctrine is not confined to a limited number of kinds of contracts,⁷⁷⁷ it is “not confined to immutable boundaries of rigid categorisation”,⁷⁷⁸ and there are no “clear limits to the scope of the doctrine and no precise or comprehensive test can be stated” as to its scope.⁷⁷⁹ However, there are certain categories of covenants to which the doctrine traditionally applies,⁷⁸⁰ in particular those by which an employee undertakes not to compete with his employer after leaving the employer’s service⁷⁸¹ and those by which a trader who has sold his business agrees not thereafter to compete with the purchaser of the business⁷⁸²; and those categories will always be subjected, under the doctrine, to the test of reasonableness.
- 18-129 (3) The doctrine is capable of applying where the restraint relates to the use of a particular piece of property as well as where it relates to the activities of an individual.⁷⁸³ Thus restraints in mortgages and leases are subject to the doctrine.⁷⁸⁴ The application of the doctrine to *Tulk v Moxhay*⁷⁸⁵ covenants is not, however, without difficulties and this will be dealt with later.
- 18-130 (4) There is strong authority for the proposition that contracts of a kind which have gained general commercial acceptance and have not been traditionally subject to the doctrine will generally not be subjected to it so as to impose upon a plaintiff the burden of justifying as reasonable their terms, though special features may bring particular contracts of that kind within the ambit of the doctrine.⁷⁸⁶ However, public policy is not immutable and no guarantee of absolute immunity for any restraint is possible. As was stated by Lord Wilberforce in *Esso*, “absolute exemption for any restriction or regulation is never obtained”.⁷⁸⁷ Thus, for example, a covenant whereby an employee on the termination of his employment agrees not to recruit former fellow employees would be subject to the restraint of trade doctrine.⁷⁸⁸
- 18-131 (5) The doctrine applies to restraints which operate during the continuance of the contract. This is well illustrated by *A. Schroeder Music Publishing Co Ltd v Macaulay*.⁷⁸⁹ There the plaintiff, a young songwriter, agreed to work as such exclusively for the defendants, who were music publishers, for five years. He assigned to them full copyright of his existing works and in future works composed during the five years. The five years was extended to 10 years if the plaintiff’s royalties exceeded £5,000. The defendants could determine the agreement at any time on one month’s notice and could assign the benefit of it. Although the plaintiff’s royalties depended upon whether the defendants exploited his compositions, there was no obligation on the defendants to exploit any composition of the plaintiff, and if the defendants failed to do so, the plaintiff could not do so even after the determination of the contract.

Lord Reid held that the contract was unduly restrictive, it was not a commercially acceptable one “made freely by parties bargaining on equal terms”,⁷⁹⁰ “or moulded under the pressures of negotiation, competition and public opinion”.⁷⁹¹ Lord Diplock, however, asked simply what was the relative bargaining power between the songwriter and publisher at the time of contracting and whether the publisher had used his superior bargaining power to exact from the songwriter promises that were unfairly onerous to him, i.e. “was the bargain fair?” There might be a presumption of fairness in cases of conventional commercial contracts established by long usage between equal bargaining partners, but this was not such a case. Where the restraint operates to protect the legitimate interests of the employer and was not as one sided as that in the *Schroeder* decision, it will normally be upheld. However, the absence of reciprocal obligation may be a factor in determining whether a restraint is reasonable.⁷⁹² The restraint can apply to “pre and post-determination” events and the fact that a restraint is “limited to the period of the contract may be a factor in favour of excluding the doctrine” or at least supporting an argument in favour of its justification.⁷⁹³

- 18-132 (6) Prior to the decision in *Peninsula Securities* there was authority for the proposition that it is not possible to invoke the doctrine where the restraint relates to the use or disposition of property acquired by the covenantor under the very agreement under which he accepted the restraint. This proposition found favour with Lord Reid in the *Esso* case:

“Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had. A person buying or leasing land had no previous right to be there at all, let alone to trade there, and when he takes possession of that land subject to a negative restrictive covenant he gives up no right or freedom which he previously had.”⁷⁹⁴

The test was not free from difficulties; (i) it could be easily evaded, A could lease land to B which B could lease back to A the lease containing a restraint of trade covenant and (ii) the test was one of form rather than substance.⁷⁹⁵ However the test has now been relegated to history.

- 18-133 (7) Whether a particular provision operates in restraint of trade is to be determined not by the form the stipulation takes but by its effect in practice.⁷⁹⁶ Thus a covenant to share profits, or a levy/remission scheme of the traditional cartel type, may in certain circumstances of the case constitute restraint. Likewise, a provision that a salesman who had left his employment would forfeit the commission due to him if he obtained employment with a competitor of his ex-employer was held to be a restraint.⁷⁹⁷ In other words, what does or does not operate as a restraint is a matter of substance. It is also important to note that it is *trade* which must be restrained. While the courts have not given an exhaustive definition of what constitutes a trade, it is clear that it extends to a man’s profession or calling.⁷⁹⁸

- 18-133A (7)(a) The burden is on the promisee to establish that the restraint is reasonable as between the parties.⁷⁹⁹ This requires the promisee to show firstly that the covenant protects their legitimate interests and secondly goes no further than is reasonably necessary to protect their interests.

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- 18-134 (8)The courts have held that interchangability of products is not required for a finding that businesses are competitive and it “suffices if the products are ‘similar’ ... or ‘sufficiently comparable’”.⁸⁰¹
- 18-134A (9)The level of compensation in an employment contract is a factor relevant to the question of reasonableness.⁸⁰²
- 18-134B (10)The duration of the restraint is a “factor of great importance” in determining the justifiability of a restraint.⁸⁰³
- 18-134C (11)A range of factors should be taken into consideration⁸⁰⁴:
- “a)The relevance of the consideration for the restraint;
 - b)Inequality of bargaining power⁸⁰⁵
 - ;
 - c)Standard forms of contract;
 - d)Whether the restraints operate during or post-contract;
 - e)The surrounding circumstances, including the factual and contractual background.”

Time of application

- 18-135 Most authorities favour as the time for testing the validity of a restriction the date when the restriction was imposed.⁸⁰⁶
- Thus there is no requirement that the “Claimant have a continuing business interest at the time of trial in order to be able to enforce a restrictive covenant”.⁸⁰⁷ It has also been held that an enforceable restriction may become temporarily unenforceable where it operates unfairly in changed circumstances⁸⁰⁸; this is generally considered not to be correct.

Covenants by deed

- 18-136 A covenant in restraint of trade which is contained in a deed requires justification no less than such a covenant contained in a simple contract.⁸⁰⁹

Adequacy of consideration

- 18-137 Subject to the test of reasonableness of the restraint, the courts will not inquire into the adequacy of the consideration.⁸¹⁰

Covenants against competition abroad

- 18-138 Doubts have been expressed whether the rule against covenants in restraint of trade applies to covenants against competition outside the United Kingdom.⁸¹¹ But these doubts appear to be unfounded; the question was fully argued before the Court of Appeal in *Commercial Plastics Ltd v Vincent*⁸¹² where a covenant was struck down inter alia on the ground that it was worldwide, whereas on the facts the plaintiffs did not require protection outside the United Kingdom. Although that decision related to a restraint on an ex-employee taking employment abroad, it is submitted that the same principle applies to covenants between traders since the courts ought to have the power to strike down unreasonable restraints on the British export trade.

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The test of reasonableness

- 18-139 While all restraints of trade to which the doctrine applies are *prima facie* unenforceable,⁸¹⁴ all, whether partial or total,⁸¹⁵ are enforceable if reasonable. As was said by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*⁸¹⁶:

“It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned

and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.”

In determining reasonableness the court “*is* entitled to consider whether or not a covenant of a narrower nature would have sufficed for the covenantee’s protection”. ⁸¹⁷

Even if the restraint is unlimited in time ⁸¹⁸ or in space ⁸¹⁹ it will be upheld if it is reasonable, ⁸²⁰ although the absence of such a limit “is a remarkable feature *prima facie* needing justification”. ⁸²¹ Worldwide restrictions have passed muster in the courts, but only where the restrictions to be reasonably effectual had to be worldwide. ⁸²²

Legitimate interests of the parties

- 18-140 In the case of the traditional categories of covenant to which the doctrine relates, the expression “the interest of the covenantee” connotes the proprietary or quasi-proprietary interest of an employer in his trade secrets and trade connections and of a purchaser of a business in the goodwill of the enterprise he has acquired. It is the protection of such interests which furnishes the sole justification for a restraint ⁸²³ and the restraint must therefore be no *more* than is reasonably necessary for that protection. Similarly, where an otherwise unreasonable restraint is contained in a mortgage, it can be justified by reference to the mortgage only if reasonably necessary to protect the mortgagee’s interest in his security. ⁸²⁴ But with the recognition that the doctrine of restraint of trade applies generally and not only to the traditional categories of covenant, it is clear that a proprietary or quasi-proprietary interest is not in every case necessary to support a covenant and the statement that the covenant must be reasonable in the interests of the parties must be taken to mean that the restraint must be reasonable from their point of view. Thus too, while the well-known phrase that a man is not entitled to protect himself against competition *per se* may be helpful in the context of the traditional categories of covenant, where the justification for the covenant is to be found, if at all, in the protection of the covenantee’s “interest”, the phrase cannot usefully be applied to other kinds of restrictive covenant. ⁸²⁵ For example, agreements to restrict the production or supply of goods or to fix prices might be justified if, by protecting themselves from competition, the parties are not only acting reasonably from their own point of view but are not injuring ⁸²⁶ or are even benefiting ⁸²⁷ the public, so that there is no ground of public policy for refusing to enforce the agreement. However, agreements to fix prices or to restrict the production or distribution of goods constitute serious infringements of both UK and EU competition law ([Ch.I of the Competition Act 1998](#) and art.101(1) TFEU), are unlikely to meet the requirements for exemption from the prohibitions on anti-competitive agreements and practices, as they are unlikely to have benefits for consumers, ⁸²⁸ and therefore will be void and unenforceable. ⁸²⁹

18-141 Indeed, with the recognition that a “legitimate interest” in the sense of a proprietary or quasi-proprietary interest is not necessary in all cases, it could be argued that such an interest is not necessary even in the traditional categories of restraint; e.g. if a worker agreed for a million pounds not to work for the rest of his life it is difficult to see why such an agreement is not “reasonable” between the parties (as distinct from in the public interest) simply because the employer is protecting himself from competition simpliciter and not protecting some trade secret or customer connection.⁸³⁰ Conversely, on present authority, once a “legitimate interest” is shown by the covenantee, the covenant is generally treated as reasonable; but the existence of such an interest need not be a sufficient condition for establishing reasonableness between the parties, since the covenant may in such a case be reasonable from the covenantee’s point of view but impose undue hardship upon the covenantor. In recent cases the court has recognised the problem created by elaborate conceptualism in the past, and is tending to insist that the restraint be both reasonably necessary for protection of the legitimate interests of the promisee and also commensurate with the benefits secured to the promisor under the contract.⁸³¹ It has been held in an employment contract that, where the employer specifically states the interest to be protected, he is not entitled to “seek to justify the contract by reference to some separate and additional interest that has not been specified”.⁸³² The justification for this is that the employee may have sought legal advice and his legal advisers would be entitled to give him that advice on the basis of the stated purpose of the covenant. This reasoning would apply equally to other types of contracts.

“Non-contractual” intentions

18-141A In applying the covenant in restraint of trade it is necessary to determine what constitutes the interests of the parties. Is it confined strictly to the terms of the contract to be determined “almost entirely through the lens of the contractual provisions”,⁸³³

U or can it also embrace the non-contractual intentions of the parties or what the parties contemplated as a consequence of entering into the contract? In *Harcus Sinclair LLP v Your Lawyers Ltd* the court held that provided the enquiry is restricted to the parties’ intentions it was acceptable in determining the “legitimate interests” of the parties⁸³⁴ “... to take into account what the parties (objectively) intended or contemplated, consequent on the contract, at the time the contract was made as well as the contract terms”. The covenant could protect the “legitimate interests” of the covenantee and not merely the “legally protected interests”.⁸³⁵

Public interest and burden of proof⁸³⁶

18-142 The onus of establishing that a covenant is no more than reasonable in the interests of the parties is on the person who seeks to rely on it⁸³⁷; if he establishes that it is no more than reasonable in the interests of the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it.⁸³⁸ At least where the restraint relates to the traditional categories of employer-employee or vendor-purchaser restraints, this onus will not be a light one.⁸³⁹ But once an agreement is before the court it is open to the scrutiny of the court in all its surrounding circumstances as a question of law⁸⁴⁰ and a determination of the issue whether the covenant should be enforced requires, as a matter of public policy, that a balance should be struck between freedom of trade and freedom of contract.⁸⁴¹ For long, attention was concentrated predominantly on the question of reasonableness in the interests of the parties so that, for example, in 1913 the Privy Council stated that⁸⁴²:

“... their Lordships are not aware of any case in which a restraint, though reasonable in the interests of the parties, has been held unenforceable because it involved some injury to the public.”

But especially in cases falling outside the traditional categories of covenant to which most of the earlier authorities relate, the emphasis may well now have shifted from the interests of the parties to those of the public on the basis⁸⁴³ that the doctrine is part of the wider doctrine of public policy and that, at any rate where the contract was freely entered into between traders, they are usually the best judges of their own interest.⁸⁴⁴ But what is meant in this context by the public interest?⁸⁴⁵ It could be taken to mean “the public welfare” or “general utility” to the public, a meaning which, though compelling the court to secure a difficult balance between this objective of public benefit and the other one of fairness to the individual trader, would be the modern equivalent of the “pernicious monopoly” of ancient times and would harmonise well with modern statutory philosophy against anti-competitive practices that are inconsistent with the objective of maximising consumer welfare through competitive markets.⁸⁴⁶

18-143 There is, however, now considerable authority for an alternate theory. Thus according to Ungoed-Thomas J in *Texaco Ltd v Mulberry Filling Station Ltd*,⁸⁴⁷ reasonableness with reference to the interests of the public “is part of the doctrine of restraint of trade which is based on and directed to securing the liberty of the subject and not the utmost economic advantage” and the:

“... question which such reasonableness raises would thus not be whether the restraint might be less in a different organisation of industry or society, or whether the abolition of the restraint might lead to a different organisation of industry or society and thus, on balance of many considerations, to the economic or social advantage of the country, but whether the restraint is, in our industry and society as at present organised and with reference to which our law operates, unreasonable in the public interest as recognised and formulated in such principle or proposition of law. For my part, I prefer to decide that the restraints relied on in our case are reasonable in the interests of the public, not on balance of existing or possible economic advantages and disadvantages to the public but because there is, in conditions as they are, no unreasonable limitation of liberty to trade.”⁸⁴⁸

The difficulty with this view is that the requirement of public interest adds nothing to the requirement that the restraint be reasonable in the interests of the parties. Thus, if it is reasonable in their interest, then there is no undue interference with individual liberty and the public interest is satisfied; if it is not reasonable it must be because the liberty of one of the parties is unduly restricted and the agreement is ipso facto contrary to the public interest.⁸⁴⁹ The two limbs of the traditional formula for assessing restraints are then simply tautologous. There may, however, be arguments of policy in favour of this alternate view: the court is dependent on the parties and their advisers to present the economic evidence on the question of the impact of the restraint upon general welfare; it might be thought that such a wide-ranging inquiry of fact should be subject rather to presentation by a representative of the public or to investigation by a public administrative authority,⁸⁵⁰ although the American practice of “Brandeis briefs”, if accepted by the English courts in this context, might meet the objection. It has been argued that a common law court is not an appropriate forum for assessing complex economic evidence, making predictions upon it and balancing the interest of conflicting groups in society,⁸⁵¹ and the time and expense of litigation may make it an inappropriate method for providing an answer to economic issues which may have to be decided expeditiously. As an alternative to litigation, an expert public authority, for example, the Competition and Markets Authority,⁸⁵² can have the primary responsibility for making economic decisions with an appeal to an expert tribunal, such as the Competition Appeal Tribunal.⁸⁵³ Nevertheless, private litigation is increasingly an increasingly common means of determining such issues and in more recent years, the courts, as well as the Tribunal, have determined numerous claims and defences based upon competition law. Many of these have involved complex expert witness evidence on economic issues, including whether agreements have benefits for consumers, which the Supreme Court has held requires a complex, empirical assessment to be made of the likely negative and positive effects of the agreement, based on robust and cogent evidence.

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U Accordingly, the courts and the Tribunal, have determined many claims and defences based upon competition law, including in relation to franchise agreements,⁸⁵⁵ beer supply agreements,⁸⁵⁶ the provision of banking services,⁸⁵⁷ the sale of fish,⁸⁵⁸ the terms of property

leases.⁸⁵⁹ agreements for the distribution of gas in cylinders⁸⁶⁰ and photocopiers,⁸⁶¹ the rules of professional⁸⁶² and sporting⁸⁶³ bodies, agreements for the establishment of an online real estate advertising portal,⁸⁶⁴ agreements governing access to bus stations,⁸⁶⁵ agreements for the sale of broadcasting rights to football matches⁸⁶⁶ and horseracing,⁸⁶⁷ rules for access to railway infrastructure,⁸⁶⁸ and conference agreements between liner shipping companies.⁸⁶⁹

Construction

- 18-144 In construing a covenant in restraint of trade, the same principles of construction apply as to the construction of any other written term.⁸⁷⁰ For the purpose of “resolving the reasonableness of the covenant” the factual matrix is admissible.⁸⁷¹ Covenants in restraint of trade must be clear and definite.⁸⁷² In construing a covenant in restraint of trade between partners it has been held that:

“(1) … the question of construction should be approached in the first instance without regard to the question of legality or illegality; (2) that the clause should be construed with reference to the object sought to be obtained; (3) that in a restraint of trade case the object is the protection of one of the partners against rivalry in trade; [and] (4) the clause should be construed in its context and in the light of the factual matrix when the agreement was made.”⁸⁷³

The courts will attempt to construe a covenant so as to achieve the parties’ intention where there has been a “mere want of accuracy of expression” with the consequence that the covenant will be upheld as not being too wide.⁸⁷⁴ However, for this principle to apply it must be clear from the contract and the surrounding circumstances what exactly are the terms of the more limited covenant.⁸⁷⁵ Reasonableness is a question of law,⁸⁷⁶ that is, a question of the application by the court of a legal standard to the facts of the particular case. Therefore, although evidence of surrounding circumstances at the time the contract was made, such as the character of the business to be protected by the covenant, is admissible in the consideration of the requirements of that business,⁸⁷⁷ evidence of the views, about reasonableness, of persons in the particular trade is inadmissible.⁸⁷⁸ In construing covenants the courts have criticised arguments from “merely theoretical or fanciful possibilities”.⁸⁷⁹

Factors determining unreasonableness

- 18-145

The considerations which arise in determining the reasonableness of a covenant in restraint of trade differ according to the nature of the contract in which the covenant occurs.⁸⁸⁰ It is therefore convenient to consider separately the question of the validity of such covenants in a number of different situations, although since the doctrine is of general application⁸⁸¹ and the categories of restraint of trade are not closed,⁸⁸² such situations are not exhaustive.⁸⁸³

Covenant assignable

- 18-146 The benefit of a covenant in restraint of trade is assignable, unless it is clear from the terms of the covenant that it is intended to be personal to the covenantee.⁸⁸⁴ Thus the purchaser of the goodwill of a business is entitled to enforce covenants entered into for the protection of that business.⁸⁸⁵

Repudiation of contract

- 18-147 If the party in whose favour a covenant in restraint of trade is entered into wrongfully repudiates the agreement in which the covenant is contained, the covenantor is thereby discharged from his obligation. Wrongful dismissal, therefore, puts an end to any restrictive covenant in a contract of employment.⁸⁸⁶ But payment of wages in lieu of notice is not a wrongful dismissal amounting to a repudiation of the contract which frees the employee from such a restraint, unless the contract of employment is one which obliges the employer to provide work for the employee.⁸⁸⁷ In *Experience Hendrix LLC v PPX Enterprises*⁸⁸⁸ the Court of Appeal considered that “any possibility of an account of profits in any restraint of trade case may require reconsideration in a future case.” In *One Step (Support) Ltd v Morris Garner*,⁸⁸⁹ where the matter was considered, the Supreme Court stated that it would not:

“award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure or performance.”⁸⁹⁰

Restraints after repudiation by employer

- 18-148 In a number of cases the courts have held that a restraint in an employment contract, which applied no matter how the contract was terminated, was unreasonable in that it could apply even where the employer unlawfully terminated the contract.⁸⁹¹ The Court of Appeal held that these

cases were misconceived. In *Rock Refrigeration Ltd v Jones*⁸⁹² it held, applying the reasoning in *General Billposting Co Ltd v Atkinson*,⁸⁹³ that the effect of the acceptance by an employee of the repudiatory breach by the employer was to terminate the contract and with it the restraint clause. There therefore could be no question of construing the restraint to determine its reasonableness since it ceased to be binding on the employee. Phillips LJ doubted whether the *General Billposting* case, decided in 1909, now reflected the law on the effect of repudiatory breach in the light of developments since that date. It is now clear that some clauses can survive the acceptance of a repudiatory breach and regulate the rights of the parties and he considered that in certain circumstances there was no good reason why this could not apply to a restraint of trade clause. Whether this is indeed the case will need to be decided in the future. What is clear, however, contrary to what Phillips LJ considered,⁸⁹⁴ is that the survival of such restraints is not necessary to protect the proprietary interests of the employer as these will be protected by normal common law doctrines.⁸⁹⁵

Injunctions

- 18-149 If a covenant in restraint of trade is valid, a breach of it may be restrained by injunction, even though the contract in which the covenant is contained provides an alternative remedy⁸⁹⁶; but the plaintiff must elect which of the two remedies he will enforce.⁸⁹⁷ The court, however, will normally not grant an injunction which would have the effect of a decree of specific performance of a contract for personal service⁸⁹⁸ although the court will enforce negative covenants, e.g. not to perform services elsewhere,⁸⁹⁹ but not one which would deprive the defendant of his means of livelihood.⁹⁰⁰ A restrictive covenant may be enforceable by injunction even though the covenantor is a minor⁹⁰¹ or the covenant is contained in a deed of apprenticeship.⁹⁰² No injunction will be granted to a plaintiff who is unable or unwilling to fulfil his obligations under the contract.⁹⁰³ In deciding whether or not to grant an injunction the court is sensitive to the fact that a failure to grant such a remedy to a claimant who was entitled to it would be “to permit the defendant to buy himself out of his contractual obligations”.⁹⁰⁴ An injunction may also be refused if there has been unreasonable delay in seeking an order.⁹⁰⁵

Interlocutory injunction

- 18-150 There are no special rules relating to the granting of an interlocutory injunction in connection with covenants in restraint of trade.

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U This can give rise to problems particularly with respect to restraints in employment contracts. Since to be valid the restraint will inevitably be of limited duration, the granting of an interlocutory injunction may have the effect of disposing of the matter in that the delays associated with litigation will entail that a reasonable time will have expired by the time the matter comes on for trial on the merits. To deal with this, the courts have held that matters involving restraint of trade in employment contracts are “singularly appropriate for a speedy trial”.

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U Where this is not possible, it is then proper for the judge to go on to consider the chances of the plaintiff succeeding in the action.

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U An example of where this was not practically possible is provided by the facts in *P14 Medical Ltd v Mahon*.

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U In that case the claimant company sought an order of restraining the defendant from breaching restrictive covenants in his contract of employment and restraining him from disclosing any confidential information belonging to the claimant. The duration of the covenant was six months and it was estimated that, with a hearing involving disputed witness statements and the likely reservation of the judgment, five of the six months restriction period would have elapsed. On these facts the grant or refusal of the interlocutory injunction would have had the practical effect of putting an end to the litigation. In these circumstances the court was entitled to examine the merits of the case. After considering another range of matters the court granted the injunctive relief sought. A somewhat similar situation arose in *Delivery Group Ltd v Yeo*.

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U It was agreed by the parties and accepted by the court that a non-dealing covenant would “either have expired, or will probably only have a few weeks to run” even after an expedited trial.

911

U The court had jurisdiction to grant an injunction on limited terms, for example, that an employee on “garden leave” may not accept employment with a named firm.

912

U The court can also grant an injunction to “prevent the defendants from taking unfair advantage of the springboard which … they must have built up by their misuse” of the confidential information.

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U This is referred to as “springboard” relief. Such relief is not confined to cases of abuse of confidential information and extends to former staff members taking unfair advantage or gaining an unfair start by serious breaches of their contract of employment.

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The unfair advantage must still exist at the time the injunction is sought.

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Footnotes

- 736 See Heydon, *The Restraint of Trade Doctrine* 4th edn (2019); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 6th edn (2010).
- 737 As to the rules of trade associations and kindred bodies, see below, paras 18-179—18-180; cf. paras 18-176—18-180.
- 738 If the contract is to be performed in England, the fact that its proper law is foreign will not prevent the application of the English rules of public policy: *Rousillon v Rousillon (1880) 14 Ch. D. 351*. As to covenants against competition abroad, see para.18-138.
- 739 An agreement in restraint of trade is generally not unlawful at common law if the parties choose to abide by it; it is only unenforceable if a party chooses not to abide by it: *Mogul S.S. Co Ltd v McGregor, Gow & Co [1892] A.C. 25*; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 297*; *Brekkes Ltd v Cattel [1972] Ch. 105*; cf. *Cooke v Football Association [1972] C.L.Y. 516*; *Boddington v Lawton [1994] I.C.R. 478*. But a third party injured by the operation of an agreement in restraint of trade may, it appears, obtain a declaration (*Eastham v Newcastle United F.C. Ltd [1964] Ch. 413*; *Greig v Insole [1978] 1 W.L.R. 302*) or an injunction (*Nagle v Feilden [1966] 2 Q.B. 633*).
- 740 *Harcus Sinclair LLP v Your Lawyers Ltd [2021] UKSC 32, [2021] 3 W.L.R. 598* at [45].
- 741 e.g. see *Goldsoll v Goldman [1914] 2 Ch. 603, [1915] 1 Ch. 292*. See below, para.18-246.
- 742 *Boddington v Lawton [1994] I.C.R. 478*.
- 743 *Pat Systems Ltd v Neilly [2012] EWHC 2609 (QB), [2012] I.R.L.R. 979* at [39].
- 744 *[2012] EWHC 2609 (QB)* at [36].
- 745 *Boddington v Lawton [1994] I.C.R. 478*.
- 746 Holdsworth, *History of English Law*, Vol.III, pp.56, 57; Wilberforce, Campbell and Elles, *The Law of Restrictive Trade Practices and Monopolies*, 2nd edn (1966), paras 130, 135, 141–144.
- 747 *(1711) 1 P. Wms. 181*.
- 748 *Ashcourt Rowan Financial Planning Ltd v Hall [2013] EWHC 1185 (QB), [2013] I.R.L.R. 637* at [12].
- 749 With the end of the transitional period contained in the UK/EU Withdrawal Agreement on 31 December 2020, arts.101 and 102 TFEU ceased to be applicable in the United Kingdom from that date, but remain applicable to infringements committed before that date: see Vol.II, paras 45-004 and 45-005.
- 750 As an employee does not carry on an economic activity independently of that of their employer, art.101(1) and the Ch.I prohibition do not apply to a restrictive covenant entered into between an employer and an employee: see Vol.II, para.45-022.

- 751 See Vol.II, Ch.45. See also Whish and Bailey, Competition Law, 9th edn (2018) and Bailey and John (eds), Bellamy and Child, European Union Law of Competition 8th edn (2018), Chs 2–7.
- 752 [2004] EWHC 44 (Comm), at [263]–[266]. See Vol.II, para.45-001.
- ①753 [2020] UKSC 44, [2021] A.C. 1014. See below, paras 18–125 et seq.
- 754 [2017] NIQB 59 at [7], [2018] NICA 7 at [25] and [2020] UKSC 36 at [11]. At first instance, the High Court of Northern Ireland did not address the parties' arguments on the applicability of the principle in *Days Medical Devices v Pihsiang Manufacturing* to an agreement to which art.101(1) did not apply due to an absence of an effect on trade between Member States, but which did affect trade within the UK, such that it was within the scope of the Ch.I prohibition; this issue was also not considered by the Northern Ireland Court of Appeal and it was not argued before the Supreme Court.
- ①755 *Proactive Sports Management Ltd v Rooney* [2010] EWHC 1807 (QB) at [55] per Arden LJ.
- ①756 See, e.g. *British Motor Trade Association v Gray* (1951) S.C. 586.
- ①757 *Quantum Actuarial LLP v Quantum Advisory Ltd* [2021] EWCA Civ 227 at [57] (hereafter *Quantum*).
- ①758 [1968] A.C. 269 (hereafter *Esso Petroleum*).
- ①759 [1968] A.C. 269, 298.
- ①760 [1968] A.C. 269 at 332.
- ①761 [2020] UKSC 36, [2021] A.C. 1014 (hereafter *Peninsula Securities*). See Day [2021] L.C.M.L.Q. 134.
- ①762 [1968] A.C. 269, [2021] 1 All E.R. 1 (hereafter *Esso Petroleum*).
- ①763 *Esso Petroleum* at [1968] A.C. 269, 309, cited in *Peninsula Securities* [2020] UKSC 36 at [24].
- ①764 See *Peninsula Securities* [2020] UKSC 36 at [31] for the major criticism.
- ①765 *Peninsula Securities* [2020] UKSC 36 at [31].
- ①766 *Esso Petroleum* [1968] A.C. 269, 321; *Peninsula Securities* [2020] UKSC 36 at [24].
- ①767 *Peninsula Securities* [2020] UKSC 36 at [26]. See also *Quantum* [2021] EWCA Civ 227 at [60(v)].

- ①768 *Peninsula Securities* at [44].
- ①769 *Peninsula Securities* [2020] UKSC 36 at [45].
- ①770 *Peninsula Securities* [2020] UKSC 36 at [47].
- ①771 *Peninsula Securities* [2020] UKSC 36 at [50].
- ①772 *Peninsula Securities* [2020] UKSC 36 at [50].
- ①773 *Quantum* [2021] EWCA Civ 227 at [48]. See also *Peninsula Securities* [2020] UKSC 36 at [28] where Lord Wilson notes that Lord Wilberforce held that the trading society test was not satisfied even though 35,000 out of the 36,000 filling stations in the UK were subject to a solus agreement. For an explanation why Lord Wilberforce considered the test not to be satisfied see *Peninsula Securities* [2020] UKSC 36 at [60].
- ①774 See para.18-123 and paras 18-142—18-143.
- ①775 See *Cavendish Square Holdings BV v Makdessi* [2012] EWHC 3582 (Comm), [2013] 1 All E.R. 787 (Comm) at [15], where the court sets out “a list of Propositions of law with regard to restraint of trade” (there were eight propositions) which succinctly summarise the law. The case was reversed on other grounds [2013] EWCA Civ 1539 and again [2015] UKSC 67 (see below, paras 29-203 et seq.). See also *Merlin Financial Consultants Ltd v Cooper* [2014] EWHC 1196, [2014] I.R.L.R. 610 at [60]–[61].
- 776 See above, para.18-123.
- 777 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] A.C. 535; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 295, 306, 337; *Bridge v Deacons* [1984] A.C. 705.
- 778 *Quantum* [2021] EWCA Civ 227 at [60(i)].
- 779 [2021] EWCA Civ 227 at [60(ii)].
- 780 [2021] EWCA Civ 227 at [60(iii)].
- 781 See below, para.18-150.
- 782 See below, para.18-165.
- 783 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269 where the principle was established in the case of land; and it would seem that similar considerations apply to other kinds of property.
- 784 See *Peninsula Securities* [2020] UKSC 36.
- 785 (1848) 2 Ph. 774.
- 786 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, per Lord Wilberforce at 332–333, to some extent supported by Lord Reid at 295 and by Lord Pearce at 328. There is some authority for the alternative approach under which contracts if they contain restrictive elements are always subject to the doctrine but some are “prima facie”

reasonable. See per Diplock LJ in *Petrofina (Great Britain) Ltd v Martin* [1966] Ch. 146, 185.

787 [1968] A.C. 269, 333.

788 *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] I.R.L.R. 214 (employment agency could protect pool of temporary secretaries); Sales (1988) 104 L.Q.R. 600.

789 [1974] 1 W.L.R. 1308; see also *Clifford Davis Ltd v W.E.A. Records Ltd* [1975] 1 W.L.R. 61; Cartwright, *Unequal Bargaining* (1991), pp.205–206; *Watson v Prager* [1991] 1 W.L.R. 726 (restraint of trade doctrine applied to contract between a boxer and manager and held to be against public policy because of the unreasonable imbalance between the rights and duties of the parties).

790 per Lord Pearce in the *Esso case* [1968] A.C. 269, 323.

791 per Lord Wilberforce in the *Esso case* [1968] A.C. 269, 332–333.

792 *Societa Explosivi Industriali SpA v Ordnance Technologies (UK) Ltd* [2004] EWHC 48 (Ch), [2004] 1 All E.R. (Comm) 619.

793 *Quantum* [2021] EWCA Civ 227 at [60(vii)].

794 [1968] A.C. 269, 298. See also at 309 (Lord Morris) and at 325 (Lord Pearce) for somewhat similar views. This principle was adopted in *Cleveland Petroleum Co Ltd v Dartstone* [1969] 1 W.L.R. 116; see also *Stephens v Gulf Oil Canada Ltd* (1976) 11 O.L.R. (2d) 229; *Re Ravenseft Properties Ltd's Application* [1978] Q.B. 52, 67. A similar type of reasoning has been applied to a contract settling a dispute for infringement of an intellectual property right. Before the restraint of trade doctrine can apply, the restrainee must show that the restraint overreaches the extent of the intellectual property right concerned: *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2002] EWCA Civ 196, [2002] F.S.R. 32.

795 For examples given by counsel in the *Esso* case, see [1968] A.C. 269, 289–290.

796 *Stenhouse Australia Ltd v Phillips* [1974] A.C. 391; *McIntyre v Cleveland Petrol Co Ltd* (1967) S.L.T. 95, 100.

797 *Sadler v Imperial Life Insurance Co of Canada Ltd* [1988] I.R.L.R. 388.

798 *Hepworth Manufacturing Co Ltd v Ryott* [1920] Ch. 1, 29.

799 *Harcus v Sinclair* [2021] UKSC 32, [2021] 3 W.L.R. 598 at [48].

800 [800] *Harcus v Sinclair* [2021] UKSC 32 at [48]. In both employment and business cases the party seeking to enforce the covenant to show that it protects a legitimate interest: see *Credico Marketing Ltd v Lambert* [2022] EWCA Civ 864 at [37].

801 *Argus Media Ltd v Halim* [2019] EWHC 215 (QB) at [91].

802 *Quantum* [2021] EWCA Civ 227 at [65(ix)].

803 *Quantum* [2021] EWCA Civ 227 at [65(viii)].

804 *Quantum* [2021] EWCA Civ 227 at [65(vii)].

805 [805] See further *Credico Marketing Ltd v Lambert* [2022] EWCA Civ 864 at [46]; *Dwyer (UK Franchising) Ltd v Fredbar Ltd* [2022] EWCA Civ 889 at [73]–[75].

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Gledhow Autoparts Ltd v Delaney [1965] 1 W.L.R. 1366, 1377; *Home Counties Dairies Ltd v Skilton* [1970] 1 W.L.R. 526, 533, 536; *Commercial Plastics Ltd v Vincent* [1965] 1 Q.B. 623, 644; *A. Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308, 1309; *Watson v Prager* [1991] 1 W.L.R. 726, 738 (“The question of whether the ... agreement is unenforceable on restraint of trade grounds must be tested by reference to the state of affairs at the date of the agreement”); *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, [2021] A.C. 1014. *Quantum* [2021] EWCA Civ 227 at [65(ii)].

- 807 *Towry EJ Ltd v Bennett* [2012] EWHC 224 (QB) at [412].
- 808 *Shell (UK) Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1198 (this was a minority view of Lord Denning MR).
- 809 *Mallan v May* (1843) 11 M. & W. 653, 655; cf. *Homer v Ashford* (1825) 3 Bing. 322.
- 810 *Hitchcock v Coker* (1837) 6 A. & E. 438; *Gravely v Barnard* (1874) L.R. 18 Eq. 518; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] A.C. 535, 565; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 W.L.R. 173, 179. cf. *A. Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308.
- 811 See *Leather Cloth Co v Lorsont* (1869) L.R. 9 Eq. 345, 351; *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch. 639, 651, [1894] A.C. 535, 554, 574; contrast *Dowden and Pook Ltd v Pook* [1904] 1 K.B. 45; and see *Lamson Pneumatic Tube Co v Phillips* (1904) 91 L.T. 363 where the Court of Appeal’s judgments suggested that the matter was still open; cf. *Goldsoll v Goldman* [1915] 1 Ch. 292 where the plaintiff was able to succeed without taking the point; and dicta in *Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] A.C. 181, 191, which were obiter since the covenant in question was, it would seem, unreasonable in so far as it related to the whole of Canada, where it had been made so that its worldwide application was irrelevant. See also *Cooke v Football Association* [1972] C.L.Y. 516.
- 812 [1965] 1 Q.B. 623, 630–631, 645. See also the decision of the New Zealand Court of Appeal in *Blackler v New Zealand Rugby Football League (Incorporated)* [1968] N.Z.L.R. 547, 569, per McCarthy J expressing the views of the majority: “My view of the law ... is that any restraint on employment, wheresoever, whether it is intended to operate in New Zealand, or only overseas, or both, is *prima facie* void”.
- 813 cf. *Bull v Pitney-Bowes Ltd* [1967] 1 W.L.R. 273, 276–277. If it produced effects in other Member States of the EU, then it might be subject to art.101 of the Treaty on the Functioning of the European Union: see Vol.II, paras 45-004 et seq.

- 814 But see also above, para.18-125.
- 815 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] A.C. 535, 565; *Mason v Provident Clothing & Supply Co* [1913] A.C. 724; these authorities abolished the old distinction between total and partial restraints to be found in, e.g. *Mills v Dunham* [1891] 1 Ch. 576, 586; *Haynes v Doman* [1899] 2 Ch. 13, 30.
- 816 [1894] A.C. 535, 565; and see *Esso case* [1968] A.C. 269, 299. Restraints normally operate as to time, area, and activity, and must be reasonable with respect to these factors. The onus is on the claimant to establish the reasonableness of the restraint and in the case of a “vendor-purchaser covenant ... such onus is not a heavy one”, see *Cavendish Square Holdings BV*

- v *Makdessi* [2012] EWHC 3582, [2013] 1 All E.R. (Comm) 787 at [16] (reversed on other grounds [2013] EWCA Civ 1539, [2014] 2 All E.R. (Comm) 125).
- 817 *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] I.R.L.R. 214, 220 (emphasis in the original, a master and servant case).
- 818 *Hitchcock v Coker* (1837) 6 A. & E. 438; *Haynes v Doman* [1899] 2 Ch. 13; *Fitch v Dewes* [1921] 2 A.C. 158.
- 819 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] A.C. 535; *Lamson Pneumatic Tube Co v Phillips* (1904) 91 L.T. 363; *Caribonum Co Ltd v Le Couch* (1913) 109 L.T. 385, 587.
- 820 *Peters American Delicacy Co Ltd v Patricia's Chocolates & Candies Pty Ltd* (1947) 77 C.L.R. 574.
- 821 *Commercial Plastics Ltd v Vincent* [1965] 1 Q.B. 623, 644. In *Bridge v Deacons* [1984] A.C. 705, 717E-F (dealing with a restraint of five years' duration which was upheld) the court stated that "there appears to be no reported case where a restriction which was otherwise reasonable has been held to be unreasonable solely because of its duration"; see, however, *Scully (UK) Ltd v Lee* [1998] I.R.L.R. 259 where the court held that a non-solicitation clause of two years in an employment contract was unreasonable because of excessive duration. cf. Heydon, The Restraint of Trade Doctrine, 2nd edn (1999) at pp.164–166.
- 822 *Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] A.C. 181, 191.
- 823 See *British Concrete Co Ltd v Schelff* [1921] 2 Ch. 563, 574–575; *Countryside Assured Financial Services Ltd v Deanne Smart* [2004] EWHC 1214.
- 824 See below, para.18-180.
- 825 See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 301, 329; *McEllistrim v Ballymacelligott Co-operative Agriculture and Dairy Society Ltd* [1919] A.C. 548, 563–564; *Daunay Day & Co Ltd v D'Alphen* [1997] T.L.R. 334.
- 826 cf. *Att-Gen of Commonwealth of Australia v Adelaide Steamship Co* [1913] A.C. 781.
- 827 cf. Vol.II, paras 45-152 et seq.
- 828 See Vol.II, Ch.45, in particular paras 45-055 and 45-056. Heavy fines may be imposed on undertakings that are party to such agreements: see Vol.II, paras 45-138 and 45-218. Individuals participating in such agreements may commit a criminal offence under s.188 of the Enterprise Act 2002: see Vol.II, para.45-227.
- 829 See Vol.II, paras 45-119—45-120 and 45-167—45-170.
- 830 cf. *Higgs v Olivier* [1952] Ch. 311; *Wyatt v Kreglinger and Fernau* [1933] 1 K.B. 793.
- 831 *A. Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308.
- 832 *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] I.R.L.R. 214, 219 (where the contract does not state the interest to be protected, the employer is entitled to look to the contract and the surrounding circumstances for the purpose of ascertaining the purpose which is to be protected).
- 833 *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at [64]. The case is discussed by Day [2021] L.C.M.L.Q. 134.
- 834 [2021] UKSC 32 at [70].
- 835 [2021] UKSC 32 at [70(ii)].

- 836 See above, paras 18-126 et seq.
- 837 *Morris Ltd v Saxelby* [1916] 1 A.C. 688, 700, 706; *Attwood v Lamont* [1920] 3 K.B. 571, 587, 588; *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch. 108.
- 838 *Morris v Saxelby* [1916] 1 A.C. 688, 700, 707.
- 839 *Att-Gen of Commonwealth of Australia v Adelaide S.S. Co Ltd* [1913] A.C. 781, 797. See, however, *Sherk v Horwitz* [1972] 2 O.R. 451; affirmed [1973] 1 O.R. 160.
- 840 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 318, per Lord Hodson; see below, para.18-155.
- 841 *Morris v Saxelby* [1916] 1 A.C. 688, 716; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 304–305.
- 842 *Att-Gen of Commonwealth of Australia v Adelaide S.S. Co* [1913] A.C. 781, 785.
- 843 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269; *Bull v Pitney-Bowes Ltd* [1967] 1 W.L.R. 273.
- 844 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269; and see *North Western Salt Co v Electrolytic Alkali Co* [1914] A.C. 461, 471; *English Hop Growers v Dering* [1928] 2 K.B. 174, 180.
- 845 In *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1985] 1 W.L.R. 173, 191E. Waller LJ considered it to be in the public interest to save a firm from bankruptcy.
- 846 e.g. Competition Act 1998 and Enterprise Act 2002 Pts 1–9; arts 101 and 102 TFEU. See Vol.II, Ch.45.
- 847 [1972] 1 W.L.R. 814, 827, 828.
- 848 cf. *Dickson v Pharmaceutical Society of Great Britain* [1970] A.C. 403, 441, per Lord Wilberforce: “I would ... hold [that the restraints do not survive the test] on the simple ground, which I think is the relevant ground in this connection, that there is nothing here to displace the normal proposition that the public has in the absence of countervailing considerations an interest in men being able to trade freely in the goods which they judge the public wants and that these restraints clearly, severely and arbitrarily restrict this freedom. More special arguments to the effect that the restraints might cause a reduction in the number of pharmacies I would regard as less secure: before I could accept them I should require persuasion, first, that this type of consideration may properly be taken into account in relation to the common law doctrine of restraint of trade (as contrasted with proceedings in the Restrictive Practices Court).” See also *A. Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308, 1315, per Lord Diplock.
- 849 It is not inconceivable that an extremely onerous restraint contractually imposed upon an individual might secure enormous utility to the public. But, on the above theory, the restraint must be contrary to the “public interest”; sed quaere.
- 850 cf. the Competition and Markets Authority under the Competition Act 1998 and the European Commission under arts 101 and 102 TFEU. See *Texaco v Mulberry Filling Station Ltd* [1972] 1 W.L.R. 814, 826.
- 851 See Stevens and Yamey, The Restrictive Practices Court: A Study of the Judicial Process and Economic Policy (1965), Ch.3 and *Texaco v Mulberry Filling Station Ltd* [1972] 1 W.L.R. 814, 827.
- 852 See Vol.II, para.45-232.

- 853 See Vol.II, para.45-233.
- ⑧54 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC, Mastercard Inc* [2020] UKSC 24, [2020] Bus. L.R. 1196.
- 855 e.g. *Pirtek (UK) Ltd v Joinplace Ltd* [2010] EWHC 1641(Ch); *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch).
- 856 e.g. *Crehan v Inntrepreneur Pub Co* [2003] EWHC 1510 (Ch), [2004] E.C.C. 8, upheld by the House of Lords, [2006] UKHL 38, [2007] 1 A.C. 333; *P+S Amusements v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch); *Unique Pub Properties v Roddy* [2018] EWHC 4019 (Ch).
- 857 *Dahabshiil Transfer Services Ltd v Barclays Bank Plc* [2013] EWHC 3379 (Ch).
- 858 *Seafood Holdings Ltd v My Fish Co Ltd* [2017] EWHC 766 (Ch).
- 859 *Martin Retail Group Ltd v Crawley BC* [2014] L. & T.R. 17 (Central London County Court).
- 860 *Calor Gas Ltd v Express Fuels (Scotland) Ltd* [2008] CSOH 13.
- 861 *Jones v Ricoh UK Ltd* [2010] EWHC 1743 (Ch).
- 862 *Socrates Training Ltd v The Law Society of England and Wales* [2017] CAT 10.
- 863 e.g. *Adidas-Salomon AG v Draper* [2006] EWHC 1318 (Ch); *Hendry v The World Professional Billiards and Snooker Association Ltd* [2002] E.C.C. 9 (Ch).
- 864 *Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)* [2017] CAT 15, appeal dismissed in *Gascoigne Halman Ltd v Agent's Mutual Ltd* [2019] EWCA Civ 24.
- 865 *Arriva The Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch), [2014] U.K.C.L.R. 313.
- 866 *Re Televising Premier League Football Matches* [2000] E.M.L.R. 78 (RPC) (decided under the Restrictive Trade Practices Act 1976).
- 867 *Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), [2009] U.K.C.L.R. 547; *Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd (No.2)* [2008] EWHC 2688 (Ch), [2009] E.C.C. 13, appeal dismissed [2009] EWCA Civ 750, [2009] U.K.C.L.R. 863. See also *Attheraces Ltd v The British Horseracing Board* [2005] EWHC 3015 (Ch), [2006] E.C.C. 24, appeal allowed [2007] EWCA Civ 38, [2007] E.C.C. 7, concerning the licensing of data rights relating to horseracing.
- 868 *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20, appeal dismissed in *Network Rail Infrastructure Ltd v Achilles Information Ltd* [2020] EWCA Civ 323, [2020] 4 C.M.L.R. 21.
- 869 *Arkin v Borchard Lines Ltd* [2003] EWHC 687, [2003] 2 Lloyd's Rep. 225.
- 870 *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] I.R.L.R. 793 at [11].
- 871 *Cavendish Square Holdings Ltd v Madessi* [2012] EWHC 3582, [2013] 1 All E.R. (Comm) 787 at [10] (reversed on other grounds [2013] EWCA Civ 1539, [2014] 2 All E.R. (Comm) 125); *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at [70(iv)].
- 872 *Davies v Davies* (1887) 36 Ch. D. 359, where a covenant to retire from business "so far as the law allows" was held to be too vague to be enforceable. cf. *Express Dairy Co v Jackson* (1930) 99 L.J. K.B. 181.

- 873 *Clarke v Newland* [1991] 1 All E.R. 397, 402. These principles were put forward in connection with a restraint in the contract of a salaried partner, a status that can often be equated with that of an employee: see Lindley & Banks on Partnership, 20th edn (2017), pp.118 et seq. However, in the light of the courts' disfavour of restraints in employment contracts, these principles will be applied in that context with greater rigour.
- 874 The phrase is that of Lindley MR in *Haynes v Dorman* [1899] 2 Ch. 13, 26. For recent examples of this, see *Business Seating (Renovations) Ltd v Broad* [1989] I.C.R. 729; *Clarke v Newland* [1991] 1 All E.R. 397; *Hollis & Co v Stokes* [2000] I.R.L.R. 712.
- 875 *Mont v Mills* [1993] I.R.L.R. 172. It has been suggested that there is a difference of approach by the Court of Appeal in this case to that of the Court of Appeal in *Littlewoods Organisation Ltd v Harris* [1978] 1 W.L.R. 1472: see *Hanover Insurance Brokers Ltd v Schapiro* [1994] I.R.L.R. 82; *Advantage Business Systems Ltd v Hopley* [2007] EWHC 1783 (QB), [2007] All E.R. (D) 339 (Jul).
- 876 *Dowden & Pook Ltd v Pook* [1904] 1 K.B. 45; *Mason v Provident Clothing Co Ltd* [1913] A.C. 724, 732; *Stenhouse Australia Ltd v Phillips* [1974] A.C. 391, 402.
- 877 *Routh v Jones* [1947] 1 All E.R. 758; *Jenkins v Reid* [1948] 1 All E.R. 471; *Lyne-Pirkis v Jones* [1969] 1 W.L.R. 1293; *Peyton v Mindham* [1972] 1 W.L.R. 8. cf. *Rogers v Maddocks* [1892] 3 Ch. 346.
- 878 *Haynes v Dorman* [1899] 2 Ch. 13; *North Western Salt Co v Electrolytic Alkali Co* [1914] A.C. 461, 471; *Mason v Provident Clothing Co* [1913] A.C. 724, 732.
- 879 *Coppage v Safety Net Security Ltd* [2013] EWCA Civ 1176, [2013] I.R.L.R. 970 at [23]. The court was critical of the judgment in *Arbuthnot Fund Managers Ltd v Rawlings* [2003] EWCA Civ 518, which Sir Stanley Burnton considered should be confined "to the particular facts of that case" (at [38]).
- 880 *Jenkins v Reid* [1948] 1 All E.R. 471.
- 881 See above, para.18-126.
- 882 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269; *Petrofina (Great Britain) Ltd v Martin* [1966] Ch. 146, 169.
- 883 e.g. see above, para.18-013 (note).
- 884 As in *Davies v Davies* (1887) 36 Ch. D. 359; see also *Berlitz School of Languages Ltd v Duchêne* (1903) 6 F. 181.
- 885 *Elves v Crofts* (1850) 10 C.B. 241; *Jacoby v Whitmore* (1883) 49 L.T. 335; *Townsend v Jarman* [1900] 2 Ch. 698; *Welstead v Hadley* (1904) 21 T.L.R. 165; *Automobile Carriage Builders Ltd v Sayers* (1909) 101 L.T. 419.
- 886 *General Billposting Co Ltd v Atkinson* [1909] A.C. 118; *Measures Bros v Measures* [1910] 2 Ch. 248; *S. W. Strange Ltd v Mann* [1965] 1 W.L.R. 629, 637; *Briggs v Oates* [1991] 1 W.L.R. 407.
- 887 *Konski v Peet* [1915] 1 Ch. 530, distinguishing *General Billposting Co Ltd v Atkinson* [1909] A.C. 118. See also para.18-148; *Rock Refrigeration Ltd v Jones* [1997] 1 All E.R. 1 (noted 1997) 113 L.Q.R. 377.
- 888 [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 at [32]. See *Birks* [1987] L.M.C.L.Q. 421; cf. Gurry on Breach of Confidence, 2nd edn (2012), Ch.20.
- 889 [2019] A.C. 649.

- 890 [2019] A.C. 649 at [35].
- 891 See, e.g. *D. v M.* [1996] I.R.L.R. 192.
- 892 [1997] 1 All E.R. 1 (noted (1997) 113 L.Q.R. 377).
- 893 [1909] A.C. 118.
- 894 *Rock Refrigeration Ltd v Jones* [1997] 1 All E.R. 1, 20.
- 895 *Rock Refrigeration Ltd v Jones* [1997] 1 All E.R. 1, 14, per Morritt LJ.
- 896 *National Provincial Bank v Marshall* (1888) 40 Ch. D. 112; *Texaco Ltd v Mulberry Filling Station* [1972] 1 W.L.R. 814.
- 897 *General Accident Assurance Corp v Noel* [1902] 1 K.B. 377. This was a claim for both an injunction and liquidated damages. Where, however, the damages relate to past breaches there is no reason in principle why the plaintiff should not obtain both damages and an injunction as they clearly relate to different heads of loss.
- 898 See *Whitwood Chemical Co v Hardman* [1891] 2 Ch. 416; *Ehrman v Bartholomew* [1898] 1 Ch. 671; *Rely-a-Bell Burglar and Fire Alarm Co Ltd v Eisler* [1926] Ch. 609; cf. *Irani v Southampton and S.W. Hampshire Area Health Authority* [1985] I.C.R. 590; *Evening Standard Co Ltd v Henderson* [1987] I.C.R. 588 where injunctions were granted to prevent breach of employment contracts. See further below, paras 30-075 and 30-078—30-080. *Brazier v Bramwell Scaffolding Ltd* [2001] UKPC 59; *Beckett Financial Services v Atkinson Unreported 6 November 2001* (court would not grant an injunction where credible undertaking to comply with a covenant in restraint of trade was given); *Ace London Services Ltd v Charman Unreported 1 October 2001* (injunctions granted where no undertakings were given).
- 899 *Catt v Tourle* (1869) L.R. 4 Ch. App. 654; *Warner Bros v Nelson* [1937] 1 K.B. 209; *Rely-a-Bell Burglar and Fire Alarm Co v Eisler* [1926] Ch. 609. cf. *Lumley v Wagner* (1852) 1 De G.M. & G. 604, 619; *Page One Records Ltd v Britton* [1968] 1 W.L.R. 157; *Evening Standard Co Ltd v Henderson* [1987] I.C.R. 588; *Warren v Mendy* [1989] 1 W.L.R. 853.
- 900 *Palace Theatre Ltd v Clensy* (1909) 26 T.L.R. 28 (interim injunction).
- 901 *Bromley v Smith* [1909] 2 K.B. 235; *Trevor André v Bashford* [1965] C.L.Y. 1984; provided, of course, that the contract is beneficial to the minor; cf. *Corn v Matthews* [1893] 1 Q.B. 310, 314.
- 902 *Gadd v Thompson* [1911] 1 K.B. 304.
- 903 *Measures Bros Ltd v Measures* [1910] 2 Ch. 248.
- 904 *deVere Group Ltd GmbH v Pearce* [2011] EWHC 1240 (QB) at [38].
- 905 *Legends Live Ltd v Harrison* [2016] EWHC 1938 (QB), [2017] I.R.L.R. 59.
- 906 *Lawrence David Ltd v Ashton* [1991] 1 All E.R. 385 (it appears that the profession did consider that the *American Cyanamid* principles did not apply to restraint of trade covenants in employment contracts: 392).
- 907 *Lawrence David Ltd v Ashton* [1991] 1 All E.R. 385, 395. An interlocutory injunction may be refused if the proceedings have not been sought promptly, the covenant has only a short time left to run and most of the damage will have occurred already: *Planon Ltd v Gilligan* [2022] EWCA Civ 642, [2002] I.R.L.R. 684 at [99].

- ①908 *Lawrence David Ltd v Ashton* [1991] 1 All E.R. 385, 396; *Lansing Linde Ltd v Kerr* [1991] 1 All E.R. 418; *Business Seating (Reservations) Ltd v Broad* [1987] I.C.R. 729 (in both cases merits were considered and an interlocutory injunction refused); *Egon Zehnder Ltd v Tillman* [2017] EWHC 1278 (Ch), [2017] I.R.L.R. 828 (point not discussed in the SC, [2019] UKSC 32, [2020] A.C. 154).
- ①909 [2020] EWHC 1823 (QB).
- ①910 [2021] EWHC 1834 (QB).
- ①911 [2021] EWHC 1834 (QB) at [4]. The judge considered that the covenants would have expired.
- ①912 *Symbian Ltd v Christensen* [2001] I.R.L.R. 77; *SG&R Valuation Service Co LLC v Boudrais* [2008] EWHC 1340 (QB).
- ①913 *Roger Bullivant Ltd v Ellis* [1987] I.R.L.R. 491, 496.
- ①914 *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] EWHC 1974 (QB), [2008] I.R.L.R. 965 at [4].
- ①915 [2008] EWHC 1974 (QB) at [4].

(ii) - Employer and Employee

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Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 4. - Contracts Contrary to Public Policy Though Not Involving a Legal Wrong

(d) - Contracts in Restraint of Trade ⁷³⁶

(ii) - Employer and Employee

Employee's activities after determination of employment

- 18-151 The doctrine of restraint of trade has always been applied to covenants contained in contracts of employment
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-  which limit the freedom of the employee to work after the termination of the employment.
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-  An employer is entitled to protect the “general goodwill of the business including potential clients”,
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-  as the prospect of obtaining new clients from recommendations is an intrinsic part of a business.
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-  Post-termination restraints if reasonable are enforceable.
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U In some situations it will be difficult to categorise a restraint as relating to an employment contract as opposed to a contract between a vendor and purchaser of business, and what appears to be an employment contract may in substance be a vendor and purchaser contract. For example, where a company bought out its “sales associates” practices the court held that the covenant in the contract of sale was to be “tested by the principles applicable as between vendor and purchaser” since the covenant had been:

“... taken for the protection of the goodwill of the business sold to the plaintiffs by the defendant, rather than for the protection of the plaintiffs’ present and future business as employer.”

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Covenants in employment contracts are viewed by the courts much more jealously than the other of the principal traditional categories of covenant to which the doctrine applies, namely, covenants between the vendor and purchaser of a business.

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U The courts, however, clearly accept the enforceability of such covenants provided they satisfy the test of reasonableness and more recent authorities indicate that they will not adopt extravagant interpretations to render them void:

“If a clause is valid in all ordinary circumstances which can have been contemplated by the parties, it is equally valid notwithstanding that it might cover circumstances which are so ‘extravagant,’ ‘fantastical,’ ‘unlikely or improbable’ that they must have been entirely outside the contemplation of the parties.”

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Where a covenant is capable of two constructions, one of which would lead it to being held unreasonable and the alternative producing the opposite result, the latter construction should be adopted:

“... on the basis that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest.”

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The alternative construction must however be a “realistic” one.

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U Thus in *Home Counties Dairies Ltd v Skilton*

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U the defendant employee, a milkman, entered into a covenant whereby he agreed that for a period of one year from the termination of his employment that he would not serve or sell “milk or dairy produce” to any customer of his ex-employer. It was argued that the restraint relating to dairy produce resulted in the covenant being too wide, as it would preclude the employee from working for a grocery shop selling butter and cheese where there was a likelihood that the shop might be patronised by his ex-employer’s customers. The Court of Appeal, reversing the trial judge, rejected this interpretation as being commercially unreasonable. From the obvious intentions of the parties, it was clear that the restraint was

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U “intended to restrict the employee’s activities only when engaged in the same type of business as the employer’s”. On this interpretation the clause was valid as being reasonable to protect the customer-connection of the employer. Whether a particular contractual provision operates in restraint of trade is “to be determined not by the form the stipulation wears but … by its effect in practice”.

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U What is reasonable in one type of relationship may not be reasonable in another.

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U Thus a provision which provides that an employee will be deprived of a pension if, on the cessation of his employment, he competed with his ex-employer will not be viewed as merely setting out the terms of his entitlement to the pension but will be treated as a provision designed to restrict competition and therefore subject to the restraint of trade doctrine.

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U Also, it is on this basis that a covenant restraining an ex-employee from approaching other members of the employer’s workforce would be subject to the restraint of trade doctrine.

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Non-dealing covenant

18-151A A relatively common form of restraint in a contract of employment is a non-dealing covenant which prohibits an employee from dealing with a customer for a restricted period of time. An

employment contract could be more specifically focused and, for example, make provision for non-disclosure and non-solicitation covenants. In *Delivery Group Ltd v Yeo*⁹³²

U the court upheld the validity of the more broadly framed non-dealing covenant because of the difficulties “in policing confidentiality clauses, and non-solicitation clauses”; it considered these difficulties “are one of the reasons why the court will uphold more stringent non-dealing clauses (or even non-compete clauses)”.⁹³³ The court also considered that the “specialism in the marketplace, and the fragility of the relationship with clients”⁹³⁴ was another factor regarding such clauses.

Relevant time

- 18-152 In determining reasonableness, the court does not only look “at the actual position as at the date the payment started” as to do so would result in few covenants being valid since “the employee will not have engaged fully enough with the business to justify it”.⁹³⁵
- U** The court has to go further and “look at what was in contemplation of both parties”.⁹³⁶
- 18-153 Where an employer seeks to enforce an employee’s negative covenant, the starting point is “that the ordinary remedy is an injunction and proof of damage to the claimant is not required”.⁹³⁷ It is for the employer who seeks to enforce such a covenant against an employee to show that it is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest owned by the employer for which the restraint is reasonably necessary.⁹³⁸ The court will not interpret a covenant which is too broad so as “to save an employer who has stipulated for unduly wide protection”.⁹³⁹ It has been said that the restraint must be reasonable not only in the interests of the covenantee but in the interests of both the contracting parties.⁹⁴⁰ But provided that the covenant affords adequate, and no more than adequate, protection to the covenantee,⁹⁴¹ it seems that the requirement that the restraint must be reasonable in the interests of the parties is satisfied, for the court will not now inquire into the adequacy of the consideration for the covenant.⁹⁴² Yet a restraint which is reasonably necessary for the protection of the employer may be oppressive and fatal to the chance of the employee earning his living in this country. Probably the true view is that such a restraint, whether or not it be reasonable in the interests of the parties, is unreasonable in the interests of the public, which require that a man shall not be prevented from supporting himself by disposing of his labour in this country⁹⁴³ and that the national economy should not be deprived of the services of experienced men.⁹⁴⁴ Thus, in *Wyatt v Kreglinger & Fernau*⁹⁴⁵ a retired employee was granted a pension on condition that

after retirement from the employment he should be at liberty to engage in any other trade than the wool trade, otherwise the pension would cease. There was no covenant by the employee not to engage in the wool trade nor any limit of time or space. The Court of Appeal rejected the former employee's claim for arrears of the pension, holding that, assuming a contractual relationship was established, the contract was in restraint of trade and therefore void. The decision has been criticised⁹⁴⁶ and is explicable, if at all, only on the ground that an otherwise gratuitous promise is not made enforceable by adding to it a condition, the substance of which is such that, had the promisee covenanted to comply with it, the promisor could not, on the ground of the covenant's unreasonable restraint of trade, have held him to it. The courts will grant, as a matter of independent relief, a declaration that such a condition is void.⁹⁴⁷ A restraint otherwise unreasonable does not become reasonable merely because provision is made that the consent of the employer shall not be unreasonably withheld.⁹⁴⁸ The court will not imply a term in order to save a covenant restraining an employee's post-employment conduct.⁹⁴⁹ Nor will the court rewrite a covenant in restraint of trade where the contract provides that the covenant, if unenforceable, should be rewritten with such minimum amendment as renders it enforceable.⁹⁵⁰ A provision that the restraint should apply "for as long as permitted by law" was too uncertain to have effect.⁹⁵¹

Competition

- 18-154 Whether the restraint sought to be enforced in a particular case affords more than adequate protection to the business of the employer depends to some extent upon the requirements of that business.⁹⁵² Certain principles of general application, however, may be laid down. An employer is not entitled to protect himself against mere competition on the part of a former employee.⁹⁵³ In the course of his employment the employee may have acquired additional skill in and knowledge of the trade or profession in which he has been engaged, so as to be a more formidable competitor upon the termination of a service; but that additional skill and knowledge belong to him and their exercise cannot lawfully be restrained by the employer.⁹⁵⁴ So, where a film actor in the course of his employment acquired a reputation under a pseudonym it was held that a term of his contract of service restraining him from using the pseudonym after the termination of his employment was invalid as a partial restraint of trade.⁹⁵⁵ Similarly, an employer cannot enforce a covenant requiring an ex-employee to disclose and assign inventions discovered after he has ceased to be an employee.⁹⁵⁶ An anti-solicitation restraint in an employment contract which extended to dealing with anyone in the district where the employee has operated was considered "an anti-competition rather than a non-solicitation clause".⁹⁵⁷

Protection by general law and by covenant

- 18-155 The general law relating to breach of confidence⁹⁵⁸ prohibits ex-employees from using information which:

“... can fairly be regarded as a separate part of the employee’s stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with.”⁹⁵⁹

It is also impermissible for any employee to copy customer lists or deliberately memorise such information even though it may be in the public domain as he would be saved the expense and effort of bringing the information together.⁹⁶⁰ An employer can only protect by means of a covenant, information that constitutes a trade secret and cannot protect information that is merely confidential and which the employee would be precluded by his duty of fidelity⁹⁶¹ from disclosing during his employment.⁹⁶² Thus there is considerable overlap between the protection afforded by the general law and that which can be acquired by a restraint of trade covenant. However, there is no basis for holding that the duty of confidentiality should be “trumped” by the public policy which underlies the law relating to covenants in restraint of trade.⁹⁶³ However, a covenant can afford wider protection than the general law in a number of respects. First, the use of a covenant is evidence of the attitude of the employer that the information is a trade secret. While an employer cannot turn confidential information into a protectable trade secret merely by characterising it as a trade secret, the attitude of an employer towards the information is a factor relevant to the court’s determination of whether it is a trade secret.⁹⁶⁴ Secondly, even where the employer’s interest, for the protection of which a covenant is taken, is in trade secrets, a covenant relieves the employer of the need to prove that the employee subjectively appreciated the confidentiality of the information in question, or that the information was separable from the employee’s general stock of trade knowledge or indeed that the employee has actually used the information, it being sufficient to frame the covenant to cover, to a reasonable degree, clearly defined activities in which the employee would be likely to use the information.⁹⁶⁵ Thirdly, the courts may be reluctant to imply a term as the employee will have had no opportunity of rejecting it⁹⁶⁶ and this may have the effect of making the protection afforded by the law slightly narrower than that which can be acquired by covenant. Fourthly, the protection provided by the law will normally be unlimited as to time whereas that under a covenant is more likely than not to be limited as to time.⁹⁶⁷ Lastly, a carefully drafted covenant will make it easier for an employer to obtain injunctive relief since it will facilitate the framing of an order in “sufficient detail to enable the [employee] to know exactly what information he is not free to use on behalf of his new employer”.⁹⁶⁸ A covenant in a contract of service whereby an employee agreed that, on the termination of his service, he could not for a period of 12 months deal with a company with which his employer had negotiated was

not void for uncertainty.⁹⁶⁹ An employer can protect his interests by a non-solicitation clause but, in many situations, a non-competition clause provides a more secure protection for the employer, as has been accepted by the courts. A non-competition clause is easier to apply and it avoids difficulties of what constitutes confidential information as to who was the employer's client.⁹⁷⁰

As was stated by the court in the *Halim* decision⁹⁷¹ “non-competition restrictions are commonly used, and upheld, in scenarios where lesser forms of restriction (such as confidentiality clauses or prohibitions on solicitation or dealing) would be inadequate or difficult to police”. It may be that a person possesses a particular status and this precludes competition by that person. For example, a director must act in the best interests of the company and must not enter into a transaction in which his interests conflict with those of the company. Where these duties are applicable, thus restricting the competitive activities of the director against the company, the rules of public policy as to restraint of trade do not “trump” these duties.⁹⁷²

Trade secrets and connection with customers

- 18-156 An employer can by covenant lawfully prohibit an employee from accepting, after determination of his employment, a position in which he would be likely to utilise information as to secret processes or other trade secrets which have been acquired in the course of his employment.⁹⁷³ Depending on the nature of the employment⁹⁷⁴ he may also be able by covenant lawfully to prohibit the employee: (i) from setting up on his own, or accepting a position with one of the employer's competitors,⁹⁷⁵ so as to be likely to destroy the employer's trade connection by a misuse of his acquaintance with the employer's customers or clients⁹⁷⁶; or (ii) at least from soliciting the former employer's customers⁹⁷⁷:

“In fact the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary.”⁹⁷⁸

In determining whether a particular item of information is capable of protection, the court will take into consideration such matters as the nature of the employment and the information and whether the “employer impressed on the employee the confidentiality of the information”.⁹⁷⁹ Another factor of importance is the “separability” of the information from other non-confidential information that the employee possesses, although this is not “conclusive”.⁹⁸⁰ Where there are difficulties in identifying what constitutes confidential information, “a non-competition clause may be the satisfactory form of restraint, provided it is reasonable in time and space”.⁹⁸¹ It is important to re-emphasise that it is not all confidential information that an employer can protect but only that which amounts to a “trade secret” or which prevents “some personal influence over

customers being abused in order to entice them away".⁹⁸² In *Faccenda Chicken Ltd v Fowler*⁹⁸³ it was held that the duty of fidelity which an employee owes to an employer during the continuance of the employment obliges an employee to maintain confidential information which could not be made the subject of a valid restraint on the termination of the employment relationship.⁹⁸⁴ At first glance this appears anomalous as the restraint of trade doctrine applies equally during the continuance of the contract as on its termination, and one would have expected that what was protectible during the contract would also be protectible on its termination. It may be that an employee's duty of fidelity is designed to produce a harmonious working relationship and this may be the justification for a wider restraint as long as the employee remains in employment.⁹⁸⁵

- 18-157 The limitations on the permissible scope of a post-employment restrictive covenant with respect to confidential information put forward in *Faccenda Chicken* were considered "improbable as being the law" by Harman J in *Systems Reliability Holdings v Smith*.⁹⁸⁶ Although *Faccenda Chicken* is a judgment of the Court of Appeal, there is much to commend the judgment of Harman J. As a matter of public policy it is difficult to see why an employer should not be free by agreement to restrain the disclosure of confidential information. The principle in *Faccenda Chicken* will have a very limited scope if the definition of "trade secret" is extended to include information which might in "common parlance" not be considered trade secrets. Thus if the names of customers and the goods that they buy or other non-technical information are classified as trade secrets,⁹⁸⁷ post-employment restraints could validly embrace a wide category of confidential information. A matter on which the law is undecided is whether an employer is entitled to protection where an employee is not seeking to earn his living but is "selling to a third party information which he acquired in confidence in the course of his former employment".⁹⁸⁸ Given that the principal justification for the restraint of trade doctrine as applied to employment contracts is to enable an employee to earn his livelihood, there is much to be said for not permitting an employee to sell confidential information unconnected with the need for him to earn a living.

Nature of connection with customers

- 18-158 The validity of restrictive covenants by employees frequently depends upon the question whether their employment is of a confidential nature, so that, for example, the necessity of protecting the employer's trade connection has caused restrictive covenants by canvassers and travellers generally to be upheld.⁹⁸⁹ Each case must be decided upon its own facts.⁹⁹⁰ The courts have considered the reasonableness of restraints relating to solicitors and legal executives,⁹⁹¹ medical and dental practitioners,⁹⁹² actors,⁹⁹³ commercial managers and agents,⁹⁹⁴ canvassers and travellers,⁹⁹⁵ shop assistants and salesmen,⁹⁹⁶ bookmaker's assistants,⁹⁹⁷ estate agents,⁹⁹⁸ designers⁹⁹⁹ and technicians.¹⁰⁰⁰

Limits on scope of restraint

- 18-159 A covenant not to solicit¹⁰⁰¹ customers is valid even if it extends to people who, although customers at the beginning of the employee's employment, ceased to be so before its determination,¹⁰⁰² though not if it extends to those who become customers after the determination of the employment.¹⁰⁰³ It is no objection to a covenant restraining dealings with customers of the employer that the identity of all the employer's customers may not be known to the covenantor, for the court would not grant an injunction against him or commit him for contempt for the breach of any injunction already granted if he could show that what he had done he had done inadvertently and would not be repeated.¹⁰⁰⁴ Similarly a covenant ought not to be held invalid because hypothetical cases can be suggested when it might be unreasonable to apply it, if those circumstances were outside the contemplation of the parties to such an extent that they are to be excluded from its operation.¹⁰⁰⁵ It is no objection to the enforcement of a non-solicitation covenant with respect to a particular customer that that customer has no intention of doing any further business with the employer: this is:

“... the very class of case against which the covenant is designed to give protection ... the plaintiff does not need protection against customers who are faithful to him.”¹⁰⁰⁶

Type of business in which employee was engaged

- 18-160 The employer is not entitled to protect by a restrictive covenant of any description any business except the business in which he employed the covenantor¹⁰⁰⁷ (though a covenant which might appear unduly wide with regard to the business to be protected may, on its proper construction, be subject to an implied limitation as a result of which it is valid¹⁰⁰⁸). Thus a covenant by a tailor's assistant not to carry on any business within certain limits of space and time is therefore invalid, even though it would be valid were it confined to the business of a tailor.¹⁰⁰⁹ So, too, a covenant by an employee of a company intended to protect not merely the business of that company but also the business of associated or subsidiary companies in which he does not serve is an unreasonable restraint.¹⁰¹⁰ It has been held that a covenant that extends to new services introduced by an employer is enforceable provided it is otherwise enforceable as regards time and territorial scope.¹⁰¹¹

Limits of space and time

- 18-161 In considering whether or not a restraint is reasonable, limitations of space or time imposed upon it are usually of the greatest relevance.¹⁰¹² The longer the duration of restriction and the greater the area over which it operates, the more difficult it is to prove that the restriction is reasonable.¹⁰¹³ Area restraints “will always be approached with caution by the courts since such restraints amount to a covenant against competition”.¹⁰¹⁴ It has been said that:

“... to preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification”¹⁰¹⁵;

a fortiori where the restraint is worldwide.¹⁰¹⁶ In determining the validity of an area restraint the court is entitled to consider (a) whether or not a covenant of a narrower nature would have protected the covenantee’s interests¹⁰¹⁷ and (b) that in defining the restricted area there is “a real functional correspondence between the prescribed area and the area in which the claimant operates”.¹⁰¹⁸ It has been held reasonable to impose a worldwide restraint on disclosing confidential information on an employee employed in the United Kingdom, the reasoning of the court being that business has become global and that national boundaries did not constrain the dissemination of confidential information.¹⁰¹⁹ On the other hand, covenants against solicitation, especially if taken from canvassers and travellers, are generally not invalidated by reason of the absence of any limit of space¹⁰²⁰ or even, it would seem, of any limit of space or time.¹⁰²¹ But where the employer’s business is exclusively for credit, the customer not dealing directly with an employee, it will often be difficult to establish the reasonableness of any area restriction since a mere covenant not to deal with customers on the books of the employer is likely to be sufficient.¹⁰²² In considering whether a particular restraint is reasonable in point of time the limit of space imposed shall be considered, and vice versa.¹⁰²³ In reckoning a spatial limitation the distance will be measured on the map (as the crow flies)¹⁰²⁴ unless the parties have adopted some other measurement. The courts have recognised that because of the difficulties of recognising what is and what is not confidential, or who may or may not have been a customer of the employer, an anti-competition covenant which is reasonable as to space and time may be the “most satisfactory form of restraint”.¹⁰²⁵

Breach

- 18-162

In considering whether a particular act constitutes a breach of such a restrictive covenant, it is important to note the exact terms in which the covenant is framed, and this is a question of construction. Thus, a covenant not to practise as a solicitor in a defined area is not broken by writing letters to persons resident in that area,¹⁰²⁶ though a covenant not to do acts usually done by a solicitor is.¹⁰²⁷ A covenant by a doctor not to practise within an area is broken by attendance on patients in that area, even though he does not solicit such patients,¹⁰²⁸ but he does not “set up in practice”, though he does “practise”, by attending a few patients within the prohibited area at their own request, he having no residence or premises within the area¹⁰²⁹; a similar covenant by a house agent is broken by letting houses in the area, though his office is outside.¹⁰³⁰ Nor was a covenant not to carry on business as an auctioneer and estate agent broken by the employee, after the employment had terminated, setting up in business as an “Estate Agent, A.A.I.” (Associate of the Auctioneers’ Institute). He held himself out as an estate agent only and the addition of “A.A.I.” did not mean that he held himself out as an auctioneer.¹⁰³¹ An employee has been held to be concerned in¹⁰³² and engaged in the business which he serves¹⁰³³ but not to carry it on or be concerned in carrying it on.¹⁰³⁴ The creditor of a business is not concerned or interested in it.¹⁰³⁵ An “interest” in a business means a pecuniary or proprietary interest. A covenant by a man not to carry on or be in anywise interested in a business does not prevent the business being carried on by his wife as a separate trader and in which he takes no part,¹⁰³⁶ but he will not be allowed to evade his covenant by the device of carrying on business under a title,¹⁰³⁷ or by means of the formation of a limited company,¹⁰³⁸ which is a mere cloak for his own activities. A covenant not to practise as a solicitor is not broken by acting as managing clerk to a solicitor, the test being whether in the work he does the relationship of solicitor and client is constituted between himself and the person for whom he acts.¹⁰³⁹ Generally, however, to act as assistant to a professional man such as a surgeon¹⁰⁴⁰ or an architect¹⁰⁴¹ amounts to carrying on that profession. Covenants often preclude an employee from “soliciting” the customers of his ex-employer. This prohibition obviously covers direct approaches and probably also extends to advertisements by the employee designed to bring his availability for business to the notice of the customers of his ex-employer.¹⁰⁴² This would be so even where the customers are a sub-group of a larger group of potential customers to whom the advertisement is directed.¹⁰⁴³ There is, however, a distinction between soliciting and doing business, and an anti-solicitation clause would not preclude the employee from doing business with customers of his ex-employer who unprompted seek out his services.

- 18-163 The position of a subordinate in a commercial house is very different; and it has therefore been held that a salaried manager to a rag merchant does not carry on that business¹⁰⁴⁴ nor is a salaried assistant to a jeweller interested either directly or indirectly in the jewellery business.¹⁰⁴⁵ A manufacturer of margarine, who sells the margarine which he manufactures, does not carry on the business of provision merchant.¹⁰⁴⁶ A covenant not to solicit the customers of a particular shop does not extend to the customers of the same business at a different shop.¹⁰⁴⁷

Restraints during currency of employment

- 18-164 It now appears probable that even restraints which operate only during the currency of employment are subject to the doctrine of restraint of trade, at any rate if they have as their objects the sterilising rather than the absorption of a man's capacity for work,¹⁰⁴⁸ or perhaps are such that one of the parties is so unilaterally fettered that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade.¹⁰⁴⁹ The doctrine was also applied during the currency of the contract in *Proactive Sports Management Ltd v Rooney*.¹⁰⁵⁰ In that case a football player ("WR") entered into a contract whereby the other party had exclusive control of the exploitation of what were referred to as his "image rights" (the use of his name in connection with sponsorship and other off-field promotional activities).¹⁰⁵¹ There were a range of factors that led the court to apply the restraint of trade doctrine to strike down the restraint: (a) the relative youth of WR (he was only 17 when the contract was entered into), (b) the duration of the contract, which was for eight years only terminable for material breach, a duration which the court found to be "unique"¹⁰⁵² and which would probably cover half of WR's playing career,¹⁰⁵³ (c) payment was to be by way of 20 per cent of WR's earnings from the exploitation of his image rights irrespective of their size and there was no provision for tapering, and (d) WR had received no independent legal advice, the contract being "effectively dictated" to him.¹⁰⁵⁴ It is also clear that a restraint of trade which applies when an employee is on garden leave is subject to the public policy in connection with restraints applying on termination.¹⁰⁵⁵ When a contract ties the parties only during the continuance of the contract and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims even though those ties exclude all dealings with others, there is probably no restraint of trade within the meaning of the doctrine and no question of reasonableness arises¹⁰⁵⁶; indeed in appropriate circumstances the courts will even imply a restraint, for example that employees, engaged in skilled work and having knowledge of their employers' manufacturing data, shall not in their spare time carry out similar work for competitors.¹⁰⁵⁷

Footnotes

- 736 See Heydon, *The Restraint of Trade Doctrine* 4th edn (2019); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 6th edn (2010).
- ⑨16 As to contracts between employers as to whom they will employ and on what terms, see below, paras 18-180 et seq. Although agreements "in gross" cannot be justified as reasonable, the doctrine applies in the ordinary way to contracts made on the determination of the

employee's employment if the contract was related to a subsisting contract of employment: *Stenhouse Australia Ltd v Phillips* [1974] A.C. 391.

- ①917 As to contracts which tie the employee only during the continuance of his employment, see below, para.18-164.

- ①918 *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2016] I.R.L.R. 435 at [32].

- ①919 *Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] I.R.L.R. 60 at [26].

- ①920 *Leeds Rugby Ltd v Harris* [2005] EWHC 1591 (QB), [2005] All E.R. (D) 286 (Jul). Thus it is not right to ask simply whether the restriction prevents the ex-employee from working for the period of the restraint: *Planon Ltd v Gilligan* [2022] EWCA Civ 642, [2002] I.R.L.R. 684 at [91].

- ①921 *Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] I.R.L.R. 60, 64. See also *Systems Reliability Holdings Plc v Smith* [1990] I.R.L.R. 377.

- ①922 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] A.C. 535, 566; *Morris Ltd v Saxelby* [1916] 1 A.C. 688, 701; *Attwood v Lamont* [1920] 3 K.B. 571, 586, 587.

- ①923 *Home Counties Dairies Ltd v Skilton* [1970] 1 W.L.R. 526, 536, per Salmon LJ. See also 537, per Cross LJ "the validity of a covenant is not to be tried by the improbabilities that might fall within its wording": *Edwards v Worboys* [1984] A.C. 724, 727H, per Dillon LJ; *Scully (UK) Ltd v Lee* [1998] I.R.L.R. 259. See also below, para.18-162.

- ①924 *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB) at [43], cited with approval in *Egon Zehnder Ltd v Tillman* [2017] EWHC 1278 (Ch), [2017] I.R.L.R. 828 at [33] (reversed [2017] EWCA Civ 1054, [2017] I.R.L.R. 906; further appeal allowed [2019] UKSC 32, [2020] A.C. 154).

- ①925 *Egon Zehnder Ltd v Tillman* [2019] UKSC 32, [2020] A.C. 154 at [42].

- ①926 [1970] 1 W.L.R. 526; *Scully (UK) Ltd v Lee* [1998] I.R.L.R. 259; see also *Business Seating (Renovations) Ltd v Broad* [1989] I.R.L.R. 729.

- ①927 [1970] 1 W.L.R. 526, 535. In adopting this approach to the construction of the restraint the court followed Lord Lindley MR in *Haynes v Dorman* [1899] 2 Ch. 13, 24–25. See also *Littlewoods Organisation Ltd v Harris* [1977] 1 W.L.R. 1472 in which Lord Denning MR criticised the literalist approach of the court in *Commercial Plastics Ltd v Vincent* [1965] 1 Q.B. 623. For authorities which would probably not be adhered to in light of the *Skilton* and *Littlewood* cases see Heydon, The Restraint of Trade Doctrine (1971), pp.129–131.

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Stenhouse Australia Ltd v Phillips [1974] A.C. 391, 402.

⑨29 *Allan Janes LLP v Jahal* [2006] EWHC 286 (Ch), [2006] I.C.R. 742 (a covenant unreasonable for a milk roundsman may not be unreasonable for a solicitor).

⑨30 *Bull v Pitney-Bowes Ltd* [1967] 1 W.L.R. 273; *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] I.R.L.R. 388 (commission payable to an agent after the termination of his employment ceased to be payable if he competed with his ex-employer held to be an unlawful restraint of trade).

⑨31 See generally, *Sales* (1988) 104 L.Q.R. 600.

⑨32 See *Delivery Group Ltd v Yeo* [2021] EWHC 1834 (QB) at [14]. In *Eville and Jones (Group Ltd v Aldiss* [2022] EWHC 269 (QB) the employee had access to all the confidential matters relating to the claimant's business; a non-competition clause was justified (at [29]).

933 [2021] EWHC 1834 (QB) at [32].

934 [2021] EWHC 1834 (QB) at [31].

⑨35 *Egon Zehnder Ltd v Tillman* [2017] EWHC 1278 (Ch) at [27] (issue not discussed in the SC, [2019] UKSC 32, [2020] A.C. 154).

936 [2017] EWHC 1278 (Ch) at [27] where the court held that such contemplation could include promotion.

937 *Argus Media Ltd v Halim* [2019] EWHC 42 (QB) at [215].

938 *Attwood v Lamont* [1920] 3 K.B. 57; [1916] 1 A.C. 688, 710; *Jenkins v Reid* [1948] 1 All E.R. 471; *Eastham v Newcastle United F.C. Ltd* [1964] Ch. 413, 431; *Greig v Insole* [1978] 1 W.L.R. 302.

939 *Basic Solutions Ltd v Sands* [2008] EWHC 1388 (QB) at [22].

940 *Attwood v Lamont* [1920] 3 K.B. 571, 589.

941 *Morris v Saxelby* [1916] 1 A.C. 688, 707.

942 *Morris v Saxelby* [1916] 1 A.C. 688.

943 per Neville J in *Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch. 189, 194.

944 *Bull v Pitney-Bowes Ltd* [1967] 1 W.L.R. 273, 277; *Mont v Mills* [1993] I.R.L.R. 173, 177 ("public policy clearly has regard too to the public interest in competition and in the proper use of an employee's skills"). It is on this basis that so-called "garden leave" arrangements can be challenged. These are arrangements whereby an employee is given paid leave normally ending in the termination of the employment relationship and in this way the employer can protect his interests against the disclosure of confidential information, as during the period of paid leave the employee would be under a contractual duty not to disclose any confidential information relating to his employer's business.

945 [1933] 1 K.B. 793; applied in *Bull v Pitney-Bowes Ltd* [1967] 1 W.L.R. 273. See also *Howard F. Hudson Pty Ltd v Ronayne* (1971) 46 A.L.J.R. 173.

946 See (1933) 49 L.Q.R. 465.

- 947 *Bull v Pitney-Bowes Ltd* [1967] 1 W.L.R. 273. cf. *Howard F. Hudson Pty Ltd v Ronayne* (1971) 46 A.L.J.R. 173.
- 948 *Chafer Ltd v Lilley* [1947] L.J.R. 231.
- 949 *Townends Group Ltd v Cobb* [2004] All E.R. (D) 421 (Nov).
- 950 *Townends Group Ltd v Cobb* [2004] All E.R. (D) 421 (Nov).
- 951 *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 (Comm), [2004] 4 All E.R. (Comm) 95.
- 952 See *Mason v Provident Clothing Co* [1913] A.C. 724, 732; *Wincanton Ltd v Cranny* [2000] I.R.L.R. 716; *Dranez Anstalt v Hayek* [2002] EWCA Civ 1729, [2003] 1 B.C.L.C. 278.
- 953 *Bowler v Lovegrove* [1921] 1 Ch. 642; *Attwood v Lamont* [1920] 3 K.B. 571, 589; *Axiom Business Computers Ltd v Jeannie Frederick* Unreported 20 November 2003, Ct of Session at [9] where the authorities are collected.
- 954 *Leng & Co v Andrews* [1909] 1 Ch. 763, 773; *Mason v Provident Clothing Co* [1913] A.C. 724; *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 T.L.R. 101; *Axiom Business Computers Ltd v Jeannie Frederick* Unreported 20 November 2003, Ct of Session.
- 955 *Hepworth Manufacturing Co v Ryott* [1920] 1 Ch. 1.
- 956 *Electric Transmission Ltd v Dannenberg* (1949) 66 R.P.C. 183.
- 957 *Coppage v Safety Net Security Ltd* [2013] EWCA Civ 1176, [2013] I.R.L.R. 970 at [13].
- 958 *North* [1968] J.B.L. 32; *Jones* (1970) 86 L.Q.R. 463; Gurry on Breach of Confidence, 2nd edn (2102).
- 959 *Printers & Finishers Ltd v Holloway* [1965] 1 W.L.R. 1, 5; *Under Water Welders & Repairers Ltd v Street and Longthorne* [1968] R.P.C. 498, 507; *Roger Bullivant Ltd v Ellis* [1987] I.C.R. 464. cf. *Schering Chemicals Ltd v Falkman Ltd* [1982] 2 Q.B. 1; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch. 227; *Brooks v Olyslager Oms (UK) Ltd* [1998] I.R.L.R. 590 (information in the public domain not confidential); *CWS Dolphin Ltd v Simonet* [2001] 2 B.C.L.C. 704; *MVF3 APS (formerly Vestegaard Frandsen A/S) v Bestnet Europe Ltd* [2011] EWCA Civ 424.
- 960 *Robb v Green* [1985] 2 Q.B. 1; *Crowson Fabrics Ltd v Rider* [2007] EWHC 2942 (Ch), [2008] I.R.L.R. 288.
- 961 This duty of fidelity ("good faith and loyalty") must be distinguished from a "fiduciary duty" which an employee does not necessarily owe because of his status: see *Customs Systems Plc v Ranson* [2011] EWHC 3304 (QB).
- 962 *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117 (this case will be analysed in greater detail below, para.18-157). On when information ceases to be confidential by publication, see *Speed Seal Products Ltd v Paddington* [1985] 1 W.L.R. 1327; and on the measure of damages see *Dawson & Mason Ltd v Potter* [1986] 1 W.L.R. 1419; *Capita Plc v Darch* [2017] EWHC 1248 (Ch), [2017] I.R.L.R. 718.
- 963 *Shepherds Investments Ltd v Walters* [2006] EWHC 866 (Ch), [2007] 2 B.C.L.C. 202 at [107].
- 964 *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117, 138.
- 965 cf. *Printers & Finishers Ltd v Holloway* [1965] 1 W.L.R. 1; *Littlewoods Organisation Ltd v Harris* [1977] 1 W.L.R. 1472.
- 966 *Balston Ltd v Headline Filters Ltd* (1987) F.S.R. 330, 352.

- 967 *Balston Ltd v Headline Filters Ltd* (1987) 13 F.S.R. 330, 347–348.
- 968 *Lock International Plc v Beswick* [1989] 1 W.L.R. 1268, 1274 (grounds on which an *Anton Piller* order was sought not sufficiently particularised).
- 969 *International Consulting Services (UK) Ltd v Hart* [2000] I.R.L.R. 277.
- 970 *Thomas v Farr Plc* [2007] EWCA Civ 118, [2007] I.R.L.R. 419; see also *Extec Screens & Crushers Ltd v Rice* [2007] EWHC 1043 (QB).
- 971 *Argus Media Ltd v Halim* [2019] EWHC 42 (QB) at [124].
- 972 *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch), [2006] All E.R. (D) 213 (Apr).
- 973 *Haynes v Doman* [1899] 2 Ch. 13; *Caribonum Co v Le Couch* (1913) 109 L.T. 385; *Clark v Electronic Applications (Commercial) Ltd* [1963] R.P.C. 234; *Brunning Group v Bentley* [1966] C.L.Y. 4489; *Littlewoods Organisation Ltd v Harris* [1977] 1 W.L.R. 1472; *Voaden v Voaden* Unreported 21 February 1997, Lindsay J; *Polymasc Pharmaceutical Plc v Stephen Alexander Charles* [1999] F.S.R. 711. On what constitutes a trade secret see: *Pennwell Publishing (UK) Ltd v Ornstein* [2007] EWHC 1570 (QB), [2008] 2 B.C.L.C. 246.
- 974 See below, para.18-158 and see *S. W. Strange Ltd v Mann* [1965] 1 W.L.R. 629.
- 975 *Commercial Plastics Ltd v Vincent* [1965] 1 Q.B. 623, 640. The presence of an enforceable non-solicitation clause diminishes the need for a wider clause against doing business or, at least, increases the burden of justifying the wider clause: *Stenhouse Australia Ltd v Phillips* [1974] A.C. 391. But if a non-solicitation clause would clearly suffice it may be as hard to justify a clause against doing business that stands alone as it would be to justify a clause against doing business that stands alongside a non-solicitation clause. See also *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] I.R.L.R. 214; *Brake Bros Ltd v Ungless* [2004] EWHC 2799 (QB), [2004] All E.R. (D) 686 (Jul); *Kynixa v Hynes* [2008] EWHC 1495 (QB); *Ashcourt Rowan Financial Planning Ltd v Hall* [2013] EWHC 1185 (QB), [2013] I.R.L.R. 637.
- 976 *Baines v Geary* (1887) 35 Ch. D. 154; *Ropeways v Hoyle* (1919) 88 L.J. Ch. 446; *Fitch v Dewes* [1921] 2 A.C. 158; *Marion White Ltd v Francis* [1972] 1 W.L.R. 1423. Contrast *Lucas & Co Ltd v Mitchell* [1974] Ch. 129 (anti-solicitation covenant was severable from a trading covenant and enforceable).
- 977 *S.W. Strange Ltd v Mann* [1965] 1 W.L.R. 629; *Lucas & Co Ltd v Mitchell* [1974] Ch. 129. Contrast *Spafax (1965) Ltd v Dommett* (1972) 116 S.J. 711 (where the word “customers” was said to be impossibly vague); *S.B.J. Stephenson Ltd v Mandy* [2000] I.R.L.R. 233.
- 978 *Morris v Saxelby* [1916] A.C. 688, 710; *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117, 137; *Fibrenetix Storage Ltd v Davis* [2004] EWHC 1359 (QB), [2004] All E.R. (D) 99 (Jun) (protection of pricing policies). A covenant restraining a senior employee such as a managing director from dealing with his employer’s customers with whom he has not dealt may be valid: see *Landmark Brickwork Ltd v Sutcliffe* [2011] EWHC 1239 (QB), [2011] I.R.L.R. 976.
- 979 *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117, 137–138.
- 980 *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117.
- 981 *Thomas v Farr Plc* [2007] EWCA Civ 118, [2007] I.R.L.R. 419 at [42].
- 982 *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117, 137; *Poly Lina Ltd v Finch* [1996] F.L.R. 75; *A.T. Poeton (Gloucester) Plating Ltd v Horton* [2001] I.C.R. 1208; *Dranez Anstalt v Hayek* [2002] 1 B.C.L.C. 693.

- 983 [1987] Ch. 117.
- 984 *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117.
- 985 *Mont v Mills* [1993] I.R.L.R. 172, 177 (“[o]nce the employment relationship ceases, there is no continuing occasion for loyalty” per Simon Brown LJ).
- 986 [1990] I.R.L.R. 377, 384. Harman J considered that the dictum was obiter in that in *Faccenda Chicken* [1987] Ch. 117 the court was dealing with implied covenants. His own observation was also strictly obiter since he found that the restraint before him related to the sale of a business. See also *Balston Ltd v Headline Filters Ltd* [1987] F.S.R. 330, 347–348 (Scott J had reservations about the judgment of Neill LJ in the *Faccenda Chicken* case). See also *Lock International Plc v Beswick* [1989] 1 W.L.R. 1268; *Dranez Anstalt v Hayek* [2002] 1 B.C.L.C. 693. *Faccenda Chicken* was followed in *Roger Bullivant Ltd v Ellis* [1987] I.C.R. 464 and *Mainmet Holdings Plc v Austin* [1991] F.S.R. 538.
- 987 As two judges were willing to do in *Lansing Linde Ltd v Kerr* [1991] 1 W.L.R. 251, 260 (Staughton LJ), 270 (Butler-Sloss LJ). See also *TSB Bank Plc v Connell* (1997) S.L.T. 1254, 1260; *FSS Travel and Leisure Systems Ltd v Johnson* [1998] I.R.L.R. 382. See also *WRH Ltd v Ayris* [2008] EWHC 1080 (QB) (business cards ordered to be handed back pursuant to provision in contract of employment that “documents” belonging to employer be returned by ex-employee).
- 988 *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117, 139.
- 989 Absence of control, by professional rules, over an unqualified employee may go to support the maintenance of a restraint: *Scorer v Seymour Jones* [1966] 1 W.L.R. 1419.
- 990 What is acceptable for a senior manager may be held to be unenforceable against a more junior employee: see *Ginsberg v Parker* [1988] I.R.L.R. 483.
- 991 *Whittaker v Howe* (1841) 3 Beav. 383; sed quaere; contrast *S. Nevanas Ltd v Walker and Foreman* [1914] 1 Ch. 413, 425; see above, para.18-156; *Dendy v Henderson* (1855) 11 Ex. 194; *May v O'Neill* (1875) 44 L.J. Ch. 660; but see the *Nordenfelt case* [1894] A.C. 535, 563–564, 572–573; *Fitch v Dewes* [1921] 2 A.C. 158, 167 and the comments thereon in *S.W. Strange Ltd v Mann* [1965] 1 W.L.R. 629, 640.
- 992 *Horner v Graves* (1831) 7 Bing. 735; *Mallan v May* (1843) 11 M. & W. 653; *Ballachulish Slate Quarries Co Ltd v Grant* (1903) 5 F. 1105; *Eastes v Russ* [1914] 1 Ch. 468 (pathologist); *Whitehill v Bradford* [1952] Ch. 236; *Macfarlane v Kent* [1965] 1 W.L.R. 1019; *Lyne-Pirkis v Jones* [1969] 1 W.L.R. 1293; *Peyton v Mindham* [1972] 1 W.L.R. 8.
- 993 *Tivoli (Manchester) Ltd v Colley* (1904) 20 T.L.R. 437.
- 994 *Lamson Pneumatic Tube Co v Phillips* (1904) 91 L.T. 363; *Millers Ltd v Steadman* (1915) 84 L.J. K.B. 2057; *S. Nevanas Ltd v Walker and Foreman* [1914] 1 Ch. 413.
- 995 *Rousillon v Rousillon* (1880) 14 Ch. D. 351 (champagne trade); *Rogers v Maddocks* [1892] 3 Ch. 346 (malt liquors and, if required by his employer, aerated waters); *Underwood & Son v Barker* [1899] 1 Ch. 300 (hay and straw merchants); *Haynes v Dorman* [1899] 2 Ch. 13; *Barr v Craven* (1904) 89 L.T. 574 (insurance agency); *Continental Tyre Co v Heath* (1913) 29 T.L.R. 308; *Mason v Provident Clothing Co Ltd* [1913] A.C. 724.
- 996 *S. Nevanas Ltd v Walker and Foreman* [1914] 1 Ch. 413; *Pearks Ltd v Cullen* (1912) 28 T.L.R. 371; cf. *Perls v Saalfeld* [1892] 2 Ch. 149; *Great Western and Metropolitan Dairies Ltd v Gibbs* (1918) 34 T.L.R. 344; *Whitmore v King* (1918) 87 L.J. Ch. 647; *Vincents of*

- Reading v Fogden* (1932) 48 T.L.R. 613; *Attwood v Lamont* [1920] 3 K.B. 571; *Putsman v Taylor* [1927] 1 K.B. 741; *Home Counties Dairies Ltd v Skilton* [1970] 1 W.L.R. 526; *Lucas & Co Ltd v Mitchell* [1974] Ch. 129; *Spafax (1965) Ltd v Dommett* (1972) 116 S.J. 711; *Dairy Crest Ltd v Pigott* [1989] I.C.R. 92.
- 997 *S.W. Strange Ltd v Mann* [1965] 1 W.L.R. 629.
- 998 *Scorer v Seymour Jones* [1966] 1 W.L.R. 1419.
- 999 *John Michael Design Plc v Cooke* [1987] 2 All E.R. 332.
- 1000 *Commercial Plastics Ltd v Vincent* [1965] 1 Q.B. 623.
- 1001 As to the meaning of solicitation see *Cullard v Taylor* (1887) 3 T.L.R. 698; cf. *Horton v Mead* [1913] 1 K.B. 154 and cases cited in argument.
- 1002 *Plowman & Son Ltd v Ash* [1964] 1 W.L.R. 568; *Home Counties Dairies Ltd v Skilton* [1970] 1 W.L.R. 526.
- 1003 *Konski v Peet* [1915] 1 Ch. 530; *Express Dairy Co v Jackson* (1930) 99 L.J. K.B. 181; *Rayner v Pegler* (1964) 189 E.G. 967; *Gledhow Autoparts Ltd v Delaney* [1965] 1 W.L.R. 1366; *Business Seating (Renovations) Ltd v Broad* [1989] I.C.R. 79; *Austin Knight (UK) v Hinds* [1994] F.S.R. 52; *Anamark Plc v Sommerville* (1995) S.L.T. 749.
- 1004 *Gilford Motor Co v Horne* [1933] Ch. 935, 964; *Plowman & Son Ltd v Ash* [1964] 1 W.L.R. 568.
- 1005 *Clark v Electronic Applications (Commercial) Ltd* [1963] R.P.C. 234, 237; *Commercial Plastics Ltd v Vincent* [1965] 1 Q.B. 623, 644; above, para.18-151.
- 1006 *John Michael Design Plc v Cooke* [1987] 2 All E.R. 332, 334 (the unwillingness of the customer to deal with the employer is something that goes to damages).
- 1007 *Bromley v Smith* [1909] 2 K.B. 235; *Vandervell Products Ltd v McLeod* [1957] R.P.C. 185; *Rayner v Pegler* (1964) 189 E.G. 967; *Commercial Plastics Ltd v Vincent* [1965] 1 Q.B. 623, 640. On *Commercial Plastics Ltd v Vincent* see *Littlewoods Organisation Ltd v Harris* [1977] 1 W.L.R. 1472, 1480–1482, 1488–1489; above, para.18-151.
- 1008 *Plowman & Son Ltd v Ash* [1964] 1 W.L.R. 568; *Home Counties Dairies Ltd v Skilton* [1970] 1 W.L.R. 526. See above, para.18-151.
- 1009 *Baker v Hedgecock* (1888) 39 Ch. D. 520; *Perls v Saalfeld* [1892] 2 Ch. 149; *Ehrman v Bartholomew* [1898] 1 Ch. 671; cf. *Mills v Dunham* [1891] 1 Ch. 576.
- 1010 *Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch. 322; *Business Seating (Renovations) Ltd v Broad* [1989] I.C.R. 729. Contrast *Stenhouse Australia Ltd v Phillips* [1974] A.C. 391 where the employer's business was to some extent transacted for it by its subsidiaries as its agencies or instrumentalities and a covenant which protected the business so transacted for it was held to be reasonable.
- 1011 *PSG Franchising Ltd v Lydia Darby Ltd* [2012] EWHC 3707 (QB) at [45].
- 1012 See above, para.18-139.
- 1013 *Herbert Morris Ltd v Saxelby* [1916] 1 A.C. 688, 715; *M. & S. Drapers v Reynolds* [1957] 1 W.L.R. 9; *Lucas & Co Ltd v Mitchell* [1974] Ch. 129; *Financial Collection Agencies (UK) Ltd v Batey* (1973) 117 S.J. 416; *Luck v Davenport-Smith* (1977) 242 E.G. 455.
- 1014 *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] I.R.L.R. 214, 221. A frequently advanced justification for area constraints is that breaches of non-solicitation or non-dealing

- restraints are difficult to detect: see *Landmark Brickwork Ltd v Sutcliffe* [2011] EWHC 1239 (QB) at [36].
- 1015 *S. Nevanas Ltd v Walker and Foreman* [1914] 1 Ch. 413, 425; *Spencer v Marchington* [1988] I.R.L.R. 372. cf. *George Silverman v Silverman Ltd* (1969) 113 S.J. 563.
- 1016 See above, para.18-154.
- 1017 *Office Angels v Rainer-Thomas* [1991] I.R.L.R. 214 at [50]; *Landmark Brickwork Ltd v Sutcliffe* [2011] EWHC 1239 (QB) at [35].
- 1018 *Office Angels v Rainer-Thomas* [1991] I.R.L.R. 214 at [59]; *Landmark Brickwork Ltd v Sutcliffe* [2011] EWHC 1239 (QB) at [35].
- 1019 *Scully (UK) Ltd v Lee* [1998] I.R.L.R. 259.
- 1020 *Plowman & Son Ltd v Ash* [1964] 1 W.L.R. 568, 572; *Home Counties Dairies Ltd v Skilton* [1970] 1 W.L.R. 526: cf. *Marley Tiles Ltd v Johnson*, *The Times*, 16 October 1981 (area restraint held to be unreasonable).
- 1021 *Dubowski v Goldstein* [1896] 1 Q.B. 478; *Mason v Provident Clothing Co* [1913] A.C. 724, 734, 741.
- 1022 *S.W. Strange Ltd v Mann* [1965] 1 W.L.R. 629; cf. *Macfarlane v Kent* [1965] 1 W.L.R. 1019, 1024; *Scorer v Seymour Jones* [1966] 1 W.L.R. 1419; *Lucas & Co Ltd v Mitchell* [1974] Ch. 129.
- 1023 *Fitch v Dewes* [1921] 2 A.C. 158, 163, 168.
- 1024 *Mouflet v Cole* (1872) L.R. 8 Ex. 32. See *Atkyns v Kinnier* (1850) 4 Ex. 776 for a case where the parties adopted their own unit of measurement.
- 1025 *Turner v Commonwealth & British Minerals Ltd* [2000] I.R.L.R. 14, 117. Although the courts have also cautioned that an area constraint may be wider than is needed and that “focussed covenants”, that is, anti-solicitation and confidentiality covenants, might be more appropriate: *Russ v Robertson* [2011] EWHC 3470 (Civ).
- 1026 *Woodbridge & Sons v Bellamy* [1911] 1 Ch. 326; *Freeman v Fox* (1911) 55 S.J. 650.
- 1027 *Edmundson v Render* [1905] 2 Ch. 320.
- 1028 *Rogers v Drury* (1887) 57 L.J. Ch. 504.
- 1029 *Robertson v Buchanan* (1904) 73 L.J. Ch. 408.
- 1030 *Hadsley v Dayer-Smith* [1914] A.C. 979.
- 1031 *Bowler v Lovegrove* [1921] 1 Ch. 642.
- 1032 *Hill & Co v Hill* (1886) 55 L.T. 769.
- 1033 *Pearks Ltd v Cullen* (1912) 28 T.L.R. 371.
- 1034 *Ramoneur & Co Ltd v Brixey* (1911) 104 L.T. 809.
- 1035 *Cory & Son v Harrison* [1906] A.C. 274.
- 1036 *Smith v Hancock* [1894] 2 Ch. 377; cf. *Scheckter v Kolbe*, 1955 (3) S.A. 109.
- 1037 *Smith v Hancock* [1894] 2 Ch. 377, cf. *Scheckter v Kolbe*, 1955 (3) S.A. 109.
- 1038 *Gilford Motor Co Ltd v Horne* [1933] Ch. 935; *Prest v Petrodel Resources Ltd* [2013] 2 A.C. 415; *Rush Hair Ltd v Gibson-Forbes* [2016] EWHC 2589 (QB), [2017] I.R.L.R. 48.
- 1039 *Way v Bishop* [1928] Ch. 647.
- 1040 *Palmer v Mallet* (1887) 36 Ch. D. 411.
- 1041 *Robertson v Willmott* (1909) 25 T.L.R. 681.
- 1042 *Sweeney v Astle* [1923] N.Z.L.R. 1198, 1204–1205.

- 1043 *Sweeney v Astle* [1923] N.Z.L.R. 1198.
- 1044 *Allen v Taylor* (1871) 39 L.J. Ch. 627.
- 1045 *Gophir Diamond Co v Wood* [1902] 1 Ch. 950; cf. *Scheckter v Kolbe* (1955) 3 S.A. 109.
- 1046 *Lovell and Christmas Ltd v Wall* (1911) 104 L.T. 85; cf. *Automobile Carriage Builders Ltd v Sayers* (1909) 101 L.T. 419.
- 1047 *Marshall & Murray Ltd v Jones* (1913) 29 T.L.R. 351.
- 1048 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 328, 336; *Young v Timmins* (1831) 1 Cr. & J. 331. See also *Lido-Savoy Pty Ltd v Paredes* [1972] V.R. 297, distinguishing *Warner Bros Pictures Inc v Nelson* [1937] 1 K.B. 209. See also above, paras 18-126 et seq.
- 1049 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 328; *A. Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308 and *Clifford Davies Ltd v W.E.A. Records Ltd* [1975] 1 W.L.R. 61; *Greig v Insole* [1978] 1 W.L.R. 302, 325-327. In the light of these cases it is submitted that *Warner Bros Pictures Inc v Nelson* [1937] 1 K.B. 209, where onerous restrictions upon a film actress were considered not to be within the doctrine since they related to her period of employment, can no longer be relied upon.
- 1050 [2010] EWHC 1807 (QB).
- 1051 The contract was entered into with a company WR had formed to exploit his image rights but as the restraint related to WR's activities it was the impact on WR's freedom to trade that had to be assessed.
- 1052 [2010] EWHC 1807 (QB) at [650].
- 1053 [2010] EWHC 1807 (QB) at [647].
- 1054 [2010] EWHC 1807 (QB) at [649]. The court also held that *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269 did not constitute authority for the proposition that a contract which imposes "exclusivity obligations on one party during the subsistence of the agreement cannot, as a matter of principle, come within the scope of the doctrine of restraint of trade" (at [653]).
- 1055 *Symbian v Christensen* [2001] I.R.L.R. 77; *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB), [2005] I.R.L.R. 246.
- 1056 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 307, 328, 336, contrast at 317.
- 1057 *Hivac Ltd v Park Royal Instruments Ltd* [1946] Ch. 169.

(iii) - Vendor and Purchaser of Business

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(iii) - Vendor and Purchaser of Business

Vendor and purchaser

18-165 Restrictive covenants between vendor and purchaser are looked on with less disfavour by the court.

 However, this is an area in which UK competition law, under Ch.I of the Competition Act 1998¹⁰⁵⁸ and, for the period before 31 December 2020, EU competition law, under art.101 TFEU,¹⁰⁵⁹ are of equal, if not greater, importance and this body of law must also be considered when dealing with these types of restraint.¹⁰⁶⁰ As well as the doctrine of restraint of trade, such covenants must, if they are entered into between parties who carry on an economic activity, also comply with EU and UK competition law, if they are to be enforceable.

¹⁰⁶¹

 “I think it is now generally conceded”, said Lord Watson in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*¹⁰⁶²:

“... that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly it has been determined judicially, that in cases where

the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced.”

In the vendor and purchaser situation the covenant is as important for the *vendor* as it is for the purchaser: if the vendor could not enter into a valid covenant in restraint of trade then he could not sell his goodwill as the purchaser would have no assurance that the vendor would not compete against him at some time in the future. In other words, an enforceable covenant is necessary to create a property right (a “vendible asset”) in the vendor which he can sell.¹⁰⁶³ Also, there may be a disparity of bargaining power between employers and employees which is not present in vendor and purchaser situations, although the extent to which this is presently the case in light of contemporary industrial relations practices is open to question. Deciding whether a covenant is taken to protect goodwill attached to the sale of a business is a matter of substance and not form. Thus where an employer allowed its retiring sales staff to capitalise the value of the contacts they had built up with customers and to be paid a lump sum for it on the cessation of their employment, this was held to be the sale of goodwill (despite appearances to the contrary) and the restraint had to be evaluated accordingly.¹⁰⁶⁴ The court went on to hold that a two-year anti-competition covenant was enforceable even though such a covenant in the employee-employer context would not have been valid.

- 18-166 The more benign attitude¹⁰⁶⁵ of the courts towards restraints in vendor and purchaser contracts is illustrated by *Nordenfelt* itself: in that case the court held that a covenant by a patentee and manufacturer of guns and ammunition with the purchasers of the goodwill of his business not to engage in the business of a manufacturer of guns and ammunition for 25 years was not too wide to be a valid restraint. The covenant must, however, have been taken in connection with a genuine sale of a business.¹⁰⁶⁶ A naked covenant in restraint of trade is void.¹⁰⁶⁷ Where the business sold was that of dealing in imitation jewellery in London, it was held that an agreement covering real jewellery and extending to a number of European countries was too wide.¹⁰⁶⁸ Where the lease and goodwill of a hairdresser and tobacconist were sold, the vendor covenanting not to carry on such a business in a particular town during his life, the covenant was held to be unreasonable and void.¹⁰⁶⁹ Where the sale of a goodwill is concerned, if the restriction as to space is considered to be reasonable, it is seldom that the restriction can be held to be unreasonable because there is no limit as to time.¹⁰⁷⁰ The business sold is the only legitimate subject of protection; the purchaser cannot take a covenant protecting other businesses controlled by him.¹⁰⁷¹ Thus where a vendor sold business A, a gentlemen’s hairdresser, he could not enforce against the purchaser a non-competition covenant protecting business B, a ladies’ hairdressing business.¹⁰⁷² On the sale of a business with a covenant that the vendor:

“... would not within ten years ... directly or indirectly carry on or assist in carrying on or be engaged, concerned, interested or employed in the business of a quarry within seventy-five miles of”

the quarry sold, it was held to be a breach of this covenant that the vendor had advanced money to his sons to start a similar business within the prohibited area and had given them advice as to how to manage the new business.¹⁰⁷³ On the sale of a company, its directors may agree not to compete with the purchaser.

Sale of goodwill without express restraint

- 18-167 Where the goodwill of a business is sold, there being no express agreement as to the vendor's refraining from future competition, the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser.¹⁰⁷⁴ The ground of this may be either that a man may not derogate from his own grant, or that the vendor had impliedly contracted not to solicit his former customers, or that it would be fraudulent to do so. “It is not right”, observed Lord Macnaghten:

“... to profess to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own.”¹⁰⁷⁵

For the same reason the vendor of a business may not represent that he is carrying on business in continuance of, or in succession to, the business carried on by his former firm.¹⁰⁷⁶ The principle of *Trego v Hunt*¹⁰⁷⁷ extends to the executors of a vendor who are executing a contract for the sale of the goodwill. No such covenant can be implied, however, on the part of a bankrupt where the business is sold by the trustee in bankruptcy, because the alienation is compulsory¹⁰⁷⁸; this is the case even though the bankrupt agreed to aid in realising the business.¹⁰⁷⁹ A purchaser of a business and goodwill of a bankrupt has therefore no right to restrain the bankrupt from setting up a fresh business or from soliciting customers of the old business, and this even though the bankrupt has joined in the conveyance to the purchaser. This rule applies also to the sale of a debtor's business by a trustee of a deed of arrangement for creditors. This is also regarded as a compulsory alienation.¹⁰⁸⁰

Footnotes

- 736 See Heydon, *The Restraint of Trade Doctrine* 4th edn (2019); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 6th edn (2010).
- 1058 See Vol.II, paras 45-152 et seq.
- 1059 See Vol.II, paras 45-069 et seq.
- 1060 On the relationship between the restraint of trade doctrine and competition law, see above, para.18-124 and Vol.II, para.45-001. In *Days Medical Aids Ltd v Pihsiang Machinery Co Ltd [2004] EWHC 44 (Comm)*, the court held that an agreement that did not infringe art.101(1) TFEU could not be subject to the common law restraint of trade doctrine. See also *Pirtek (UK) Ltd v Joinplace Ltd [2010] EWHC 1641(Ch)* and *Jones v Ricoh UK Ltd [2010] EWHC 1743 (Ch)*. However, with the expiry on 31 December 2020 of the transition period under the Withdrawal Agreement 2020 following the United Kingdom's withdrawal from the European Union, the principle in *Days Medical Aids* does not have any application from that date: see above, para.18-124 and Vol.II, para.45-001.
- ① 1061 See Vol.II, paras 45-174—45-178. A restrictive covenant (whether a non-compete obligation or a non-solicitation obligation) which is ancillary to a legitimate transaction such as the sale of business with its associated goodwill (but not a sale of bare assets or intellectual property rights) and which is appropriately limited in subject matter, geographical scope and time, does not infringe either art.101(1) TFEU or the Ch.I prohibition: see *Remia BV v Commission (42/84) [1985] E.C.R. 2545, EU:C:1985:327*. In general, a non-compete obligation of no more than three years' duration (if goodwill and know-how are transferred) or two years' duration (if goodwill only is transferred) will constitute an “ancillary restraint” and not infringe art.101(1) or the Ch.I prohibition: see Commission Notice on restrictions directly related and necessary to concentrations [2005] O.J. C56/24 and CMA, Mergers: Guidance on the CMA's Jurisdiction and Procedure (CMA2 revised, January 2022), Annex C. Agreements meeting these requirements are excluded from the scope of the Ch.I prohibition: *Competition Act 1998 Sch.1*. However, an agreement entered into between two partners in a joint venture not to compete with each other upon termination of the joint venture that is not limited to the products and services of the joint venture will constitute a restriction of competition by object and infringe art.101(1) and the Ch.I prohibition: *Portugal Telecom SGPS, SA v Commission (T-208/13) EU:T:2013:368* and *Telefónica, SA v Commission (T-216/13) EU:T:2013:369* (appeal dismissed in *Telefónica, SA v Commission (C-487/16P) EU:C:2017:961*). A vendor or exiting shareholder in a joint venture may be subject to an obligation of indefinite duration not to disclose confidential business information or technological know-how of the joint venture, but any obligation not to use such information or know-how must be limited to a maximum period of three years: *Areva and Siemens (39.736, 18 June 2012)*.
- 1062 [1894] A.C. 535, 552.

- 1063 *Blake* (1960) 73 *Harvard Law Review* 625 at 646–648; *Attwood v Lamont* [1920] 3 *K.B.* 571; *Ronbar Enterprises Ltd v Green* [1954] 1 *W.L.R.* 815, 820–821. A failure by a solicitor to advise the purchaser of a business that the agreement did not contain a restraint against competition has been held to constitute negligence: see *Luffeorm Ltd v Kitsons LLP* [2015] *P.N.L.R.* 30, *QB*.
- 1064 *Allied Dunbar (Frank Weisinger) Ltd v Frank Weisinger* [1988] *I.R.L.R.* 60.
- 1065 In *Cavendish Square Holdings BV v Makdessi* [2012] *EWHC* 3582 (*Comm*), [2013] *All E.R.* (*Comm*) 787 at [15] the court considered that there was “more freedom of contract between buyer and seller than between master and servant”.
- 1066 The vendor of shares in a business may, in certain circumstances, be in the same position as the vendor of the business itself: *Connors Bros Ltd v Connors* [1940] 4 *All E.R.* 179; *Greening Industries Ltd v Penny* (1965) 53 *D.L.R.* (2d) 643; *Systems Reliability Holdings Plc v Smith* [1990] *I.R.L.R.* 377; above, para.18-164.
- 1067 *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] *A.C.* 181, below, para.18-177. cf. above, para.18-142. As to agreements between co-operative societies delimiting their trading areas, see *Bellshill and Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd* [1960] *A.C.* 832, especially 842; cf. *Re Doncaster Co-operative Society Ltd's and Retford Co-operative Society Ltd's Agreement* [1960] 1 *W.L.R.* 1186.
- 1068 *Goldsoll v Goldman* [1915] 1 *Ch.* 292. A covenant limited to the sale of imitation jewellery in the United Kingdom and Isle of Man was held to be severable and valid. See above, para.18-142; below, paras 18-252 et seq.
- 1069 *Pellow v Ivy* (1933) 49 *T.L.R.* 422.
- 1070 *Connors Bros Ltd v Connors* [1940] 4 *All E.R.* 179, 195.
- 1071 *British Reinforced Concrete Engineering Co Ltd v Schelff* [1921] 2 *Ch.* 563; *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] *A.C.* 181.
- 1072 *Giblin v Murdoch* (1979) *S.L.T.* 5.
- 1073 *Batts Combe Quarry Ltd v Ford* [1943] *Ch.* 51.
- 1074 *Trego v Hunt* [1896] *A.C.* 7, approving *Labouchere v Dawson* (1872) *L.R.* 13 *Eq.* 322. See also *Jennings v Jennings* [1898] 1 *Ch.* 378. Even if goodwill is not expressly mentioned, its sale is implied on the sale of a business: *Shipwright v Clements* (1871) 19 *W.R.* 599.
- 1075 *Trego v Hunt* [1896] *A.C.* 7, 25.
- 1076 *Churton v Douglas* (1859) *Johns.* 174.
- 1077 [1896] *A.C.* 7.
- 1078 *Cruttwell v Lye* (1810) 17 *Ves. Jr.* 335; *Walker v Mottram* (1881) 19 *Ch. D.* 355. This is because, unlike the situation where there is a voluntary alienation, there is no personal covenant when the alienation is compulsory.
- 1079 *Farey v Cooper* [1927] 2 *K.B.* 384.
- 1080 *Green & Sons (Northampton) Ltd v Morris* [1914] 1 *Ch.* 562; followed in *Farey v Cooper* [1927] 2 *K.B.* 384, 398, per Atkin LJ.

(iv) - Partners

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Covenants on dissolution of partnership

- 18-168 Upon similar principles, including that of *Trego v Hunt* just referred to, restrictive covenants which operate upon the dissolution of a partnership are valid,¹⁰⁸¹ if they impose no wider restraint than the circumstances reasonably require.¹⁰⁸² In *Bridge v Deacons*¹⁰⁸³ it was considered inappropriate to attempt to categorise covenants in partnership agreements as either falling within the vendor-purchaser or employer-employee categories; the court in such cases simply had to determine whether the covenant was no more than was necessary to protect the interests of the covenantee. A fortiori, such restrictive covenants are generally valid during the continuance of the partnership¹⁰⁸⁴; thus, an agreement by one of the proprietors of a theatre not to write plays for any other theatre is good.¹⁰⁸⁵ In the absence of any express covenant an ex-partner (who has been paid the value of his share including his interest in the goodwill) on dissolution of the partnership may carry on a similar and competing business in his own name and may deal with customers of his former firm and he may advertise himself as having been connected with the business sold.¹⁰⁸⁶ He may not directly or indirectly canvass them or persuade them to deal with himself and not with the old firm,¹⁰⁸⁷ nor may he carry on his business in the name of the old firm or represent his business as still being that of the old firm.¹⁰⁸⁸ In *Ideal Standard International SA v Herbert*¹⁰⁸⁹ Sir Ross Cranston (sitting as a Judge of the High Court) considered that “[n]on-compete clauses for the vendor of a partnership will generally be enforced as reasonable and enforceable” and the

court recognised the accepted position that such clauses will be more “strictly enforced than in the ordinary employee context”.¹⁰⁹⁰

Open-ended nature of agreements subject to the doctrine

18-169 It is well established that the categories involving the restraint of trade doctrine are neither rigid not exclusive.¹⁰⁹¹ The traditional categories for applying the restraint of trade principles are vendor and purchaser and employment contracts. This obviously is a small sub-set of commercial relationships. In *Kall-Kwik (UK) Ltd v Rush*¹⁰⁹² the court had to deal with the application of the restraint of trade doctrine to a franchise agreement whereby on the termination of the franchise, the franchisee was restrained from competing with the franchisor. The court held that such a restraint was more akin to a restraint in a vendor and purchaser situation. The franchisee had an obligation to transfer the “goodwill” attached to the franchise at the end of the franchise period and this was analogous to the situation where the vendor of property enters into a restraint in order to protect any goodwill transferred to the purchaser. The interest which a franchisor has in restraining a former franchisee from competing with the franchised business in the territory in which the former franchisee operated is the impact that such competition would have on the business of the franchisee who has replaced the ex-franchisee.¹⁰⁹³ Where a majority shareholder sells his shares and enters into a contract of service with the company which contains a covenant in restraint of trade, this could also be categorised as a vendor and purchaser covenant and not one relating to employment.¹⁰⁹⁴ In *Convenience Co Ltd v Roberts*¹⁰⁹⁵ the court held that the principles applicable to a franchise agreement were not identical to those applied to employee and employer or vendor and purchaser and cited with approval the dictum of Neuberger J in *Dymond Plc v Reeve*¹⁰⁹⁶ that a franchise agreement is closer to the vendor and purchaser agreement. Such a covenant can be seen as being necessary to protect the goodwill of the business.¹⁰⁹⁷ In *Buchanan v Alba Diagnostics Ltd*¹⁰⁹⁸ Lord Hoffmann upheld as valid a perpetual restraint in the assignment of a patent entitling the assignee to the rights of any improvement in the patent. He considered that it was in the public interest for inventors to be able to borrow money on the security of future rights,¹⁰⁹⁹ and a clear implication of his reasoning is that the agreement was treated as being analogous to the sale of the goodwill of a business. But where there is inequality of bargaining power, a franchise agreement maybe more akin to a contract of employment than to a contract for the sale of a business.¹¹⁰⁰

1101 And a post-termination restriction that might be reasonable when the franchise has run for some time may be unreasonable if it also applies if the franchise is terminated after a short period.



Footnotes

- 736 See Heydon, *The Restraint of Trade Doctrine* 4th edn (2019); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 6th edn (2010).
- 1081 As to consideration, see *Leighton v Wales (1838) 3 M. & W. 545*. See generally Lindley & Banks on Partnership, 20th edn (2017) at paras 10-60 et seq. Restrictive covenants in partnership agreements are also subject to art.101 of the Treaty on the Functioning of the European Union: see Lindley & Banks on Partnership, 20th edn (2017), paras 10-275—10-277 et seq.
- 1082 See *Whitehill v Bradford [1952] Ch. 236*; the *National Health Service Act 1977* (as amended) has not altered the position with regard to medical partnerships; *Kerr v Morris [1987] Ch. 90*. See also *Macfarlane v Kent [1965] 1 W.L.R. 1019*; *Ronbar Enterprises v Green [1954] 1 W.L.R. 815*; *Lyne- Pirkis v Jones [1969] 1 W.L.R. 1293*; *Peyton v Mindham [1972] 1 W.L.R. 8*. See also *Nella v Nella, Independent, 1 November 1999*, as to the meaning of “carry on business” in a restraint of trade covenant in a partnership agreement which the court held required some form of continuous trading activity and not merely preparatory steps.
- 1083 *[1984] A.C. 705, PC*. The court also held that a covenant otherwise reasonable was not against public policy because it prohibited a solicitor from soliciting clients of the firm: see also *Oswald Hickson Collier & Co v Carter-Ruck [1984] A.C. 720*; *Edwards v Worboys [1984] A.C. 724*. cf. *Geraghty v Minter (1979–80) 142 C.L.R. 177*; *Thurston Hoskin & Partners v Jewell Hill & Bennett [2002] EWCA Civ 249*.
- 1084 See above, para.18-131.
- 1085 *Morris v Colman (1812) 18 Ves. Jr. 437*.
- 1086 Lindley & Banks on Partnership, 20th edn (2017) at paras 10-250 et seq.
- 1087 *Churton v Douglas (1859) Johns. 174*; *Macfarlane v Kent [1965] 1 W.L.R. 1019*.
- 1088 *Labouchere v Dawson (1872) L.R. 13 Eq. 322*; *Trego v Hunt [1896] A.C. 7*; cf. *Curl Bros Ltd v Webster [1904] 1 Ch. 685*. The executors of a deceased partner will be restrained from soliciting the customers of the old firm: *Boorne v Wicker [1927] 1 Ch. 667*.
- 1089 *[2018] EWHC 3326 (Comm), [2019] I.R.L.R. 431* at [28].
- 1090 *[2018] EWHC 3326 (Comm)* at [27]. See above para.18-151.
- 1091 *Dawnay Day & Co v D'Alphen [1997] T.L.R. 334* (a joint venturer had a sufficient interest to enforce an anti-competition covenant).
- 1092 *[1996] F.S.R. 114*.
- 1093 *Pearl Stevenson Associates v Holland [2008] EWHC 1868 (QB)*. It had been held that if the parties continue to operate a franchise after its expiry, the terms of the original franchise may continue to regulate the parties relationship but not the restrictive covenant, but this was disapproved of in *PSG Franchising Ltd v Lydia Darby Ltd [2012] EWHC 3707 (QB)*, where the authorities are analysed.

- 1094 *Alliance Paper Group Plc v Prestwich* [1996] I.R.L.R. 25. A term in a shareholders' agreement that the parties to it will not disclose confidential information is enforceable: see *Giles v Rhind Unreported 9 February 2000, [2000] All E.R. (D) 153.*
- 1095 [2001] F.S.R. 625.
- 1096 [1999] F.S.R. 148, 153. See also *Chipsaway International Ltd v Kerr* [2009] EWCA Civ 320.
- 1097 *TSC Europe Ltd v Massey* [1999] I.R.L.R. 22 (however, the restraint in this case, an anti-solicitation covenant, was held to be unreasonable in that it applied to all employees no matter how junior, and to employees who joined the company after the covenantor had ceased his employment).
- 1098 [2004] UKHL 5, (2004) S.C.(H.L.) 9.
- 1099 *Buchanan v Alba Diagnostics Ltd* (2004) S.C.(H.L.) 9 at [29].
- ① 1100 *Dwyer (UK Franchising) Ltd v Fredbar Ltd* [2022] EWCA Civ 889 at [77] (where there is inequality of bargaining power the interest of franchisor and franchisee may not be aligned) and [90].
- ① 1101 *Dwyer (UK Franchising) Ltd v Fredbar Ltd* [2022] EWCA Civ 889 at [85]–[87] and [90].

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(v) - Supply and Acquisition of Goods: Restraints in Vertical Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 4. - Contracts Contrary to Public Policy Though Not Involving a Legal Wrong

(d) - Contracts in Restraint of Trade ⁷³⁶

(v) - Supply and Acquisition of Goods: Restraints in Vertical Agreements

Application of doctrine

- 18-170 The treatment of restraints in vertical agreements dealt with in this part (i.e. paras 18-170—18-175) will concentrate on English common law. However, this is an area in which EU, under Ch.I of the Competition Act 1998¹¹⁰² and, for the period before 31 December 2020, EU competition law, under art.101 TFEU,¹¹⁰³ and UK competition law are of equal if not greater importance and this body of law must also be considered when dealing with these types of restraint.¹¹⁰⁴ Agreements between a supplier of goods¹¹⁰⁵ and one to whom he supplies them may be described as “vertical” agreements. Such agreements can usefully be treated separately from agreements between suppliers inter se and acquirers inter se, which may be termed “horizontal” agreements. Although the doctrine of restraint of trade is capable of applying to vertical agreements, they are, for various reasons, less likely to be rendered unenforceable by the doctrine than are horizontal agreements. A further distinction¹¹⁰⁶ has perhaps to be drawn between:
- (a) restrictions which relate exclusively to the goods supplied under vertical agreements, e.g. that the goods shall not be resold for more or less than a certain price or to certain persons or classes of person or outside a certain area; and

(b) restrictions which relate to goods other than those supplied under the agreement, e.g. absolutely or conditionally that the seller shall not supply similar goods to others or that the buyer shall not acquire similar goods from others.

Agreements which contain restrictions relating only to the goods supplied thereunder may might well fall outside the scope of the common law doctrine of restraint of trade since before making the agreement the person acquiring the goods had no right to deal with them at all and in making the agreement he therefore gave up no right but, rather, acquired a limited right¹¹⁰⁷; but this may require reconsideration in the light of the decision of the Supreme Court in *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*.

¹¹⁰⁸

U The doctrine is certainly capable of applying to agreements which contain restrictions relating to goods other than those supplied under the agreement,¹¹⁰⁹ though it would seem that unless the agreement contains special, oppressive features, the doctrine will not be applied where the inclusion of such a restriction in such a transaction has gained general commercial acceptance¹¹¹⁰ as perhaps, for example, where a wholesaler agrees to purchase his requirements of a particular class of goods exclusively from a manufacturer.¹¹¹¹

Exclusive purchasing¹¹¹² : solus petrol agreements

- 18-171 An important application of the doctrine has been to solus petrol agreements, i.e. agreements between petrol companies and the operators of petrol filling stations under which the latter are bound to acquire all their requirements of petrol, whether for resale at a particular station¹¹¹³ or generally, from the petrol company. So in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*¹¹¹⁴ the defendants had undertaken to purchase from the plaintiffs for the following four years and five months the plaintiffs' petrol at wholesale schedule prices for all the requirements of a station which the defendants operated and, if they sold the station during that time, to procure the buyer to enter into a similar solus agreement with the plaintiffs; the defendants had further undertaken to keep the garage open at all reasonable hours. The evidence relating to the reasonableness or otherwise of the length of the tie was meagre but in the circumstances, and influenced perhaps by the report of the Monopolies Commission on the Supply of Petrol to Retailers in the UK, which had recommended that solus agreements should be limited to a maximum of five years,¹¹¹⁵ the House of Lords held that the tie, being for less than five years, was reasonable and that the agreement should therefore be upheld. But in the same case the House of Lords held unenforceable restrictions of a similar nature contained in a mortgage relating to another station of the defendants, since the restrictions were for 21 years. This further illustrates that where a covenant in restraint of trade, which would be invalid if contained in a simple contract, is incorporated in a mortgage,¹¹¹⁶ it does not thereby become enforceable, unless, as it was in the *Esso* case, the covenant is no more than reasonable to protect the mortgagee's interest in the value

of the land as security for his loan.¹¹¹⁷ There is the possibility of solus agreements being subject to a market investigation reference by the Competition and Markets Authority (CMA) under Pt 4 of the Enterprise Act 2002, in particular, where competition is restricted due to a network of vertical agreements.¹¹¹⁸ Exclusive purchasing and supply obligations may infringe the Ch.I prohibition if they appreciably restrict competition and have an effect on trade within the United Kingdom or, before 31 December 2020, may have infringed art.101(1) if they appreciably restricted competition and had an appreciable impact on trade between Member States.¹¹¹⁹

Reasonableness in circumstances

18-172 In determining whether a solus agreement is enforceable or not at common law, no simple rule can be applied since the court will have regard to all the terms of the agreement and the surrounding circumstances.¹¹²⁰ The importance of evaluating the restraint in the light of all the surrounding circumstances is illustrated by *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*¹¹²¹ in which the Court of Appeal upheld as reasonable a tie for 21 years. Previous to this it had been thought that, as a result of the *Esso* decision, a tie for longer than five years would not be valid unless perhaps the petrol company produced evidence of economic necessity justifying a longer period, something which the petrol company failed to do in *Alec Lobb*. In that case the plaintiff garage company, which was in financial difficulties, renegotiated its solus agreement with the defendant, its petrol supplier. The outcome was a lease and lease-back arrangement whereby the plaintiff company for a premium of £35,000 leased its garage to the defendant for 51 years at a peppercorn rent and the defendant leased it back for 21 years to the principal shareholders in the plaintiff company. The plaintiff company sought to have the lease set aside on a number of grounds, one of which was that the tie constituted an unreasonable restraint of trade. Despite the fact that the defendant produced no evidence of economic necessity, the Court of Appeal upheld the validity of the restraint. Dillon LJ found that the company had as a matter of substance received £35,000 for the tie, something which was undoubtedly beneficial. In addition there were a number of other factors which rendered the tie unobjectionable:

- (a)for planning reasons the site could only be used as a garage and it made little difference to the public whether the petrol sold on it came from the defendant or some other company;
- (b)the plaintiff company could terminate the tie after seven years under a break clause;
- (c)the premises had been subject to a tie for four years before the 21-year tie had been entered into.

Dunn and Waller LJJ were also influenced by the fact that to uphold the validity of the tie would encourage the rescue of firms on the verge of bankruptcy. The implication of this is that the more perilous a firm's financial condition, the longer the tie that can be extracted as a price of rescue. Where a tie is unreasonable, the remainder of the agreement may also be unenforceable if the deletion of the tie would alter the nature of the agreement.¹¹²²

Tied public houses ¹¹²³

- 18-173 Another and much older class of exclusive purchasing agreements comprises agreements under which breweries (or other owners of public houses which have large estates of public houses) lease public houses, or provide a favourable loan to the owner, on the terms that the publican shall buy his beer exclusively from the brewery (or other owner of the public house). Such agreements have long been enforced at common law ¹¹²⁴ and would seem still to lie outside the common law doctrine of restraint of trade, either because of the general commercial acceptance which they have long enjoyed ¹¹²⁵ or because the publican accepts the restrictions under the very agreement by which they acquire their interest in the public house. ¹¹²⁶ However, agreements under which the tenant of a public house is required to purchase beer, and potentially other products, exclusively from the landlord, whether or not a brewery, may, as part of a network of similar agreements, have an appreciable effect on competition and thereby infringe art.101(1) TFEU (until 31 December 2020) or the Ch.I prohibition of the Competition Act 1998. ¹¹²⁷ Many such agreements will, however, if for a period of no more than five years' duration, benefit from block exemption under Regulation 330/2010 ¹¹²⁸ or s.10 of the Act. ¹¹²⁹

Implied obligations and limits to rights of supplier

- 18-174 In considering whether an exclusive purchasing agreement is of a class which has gained general commercial acceptance and therefore falls outside the common law doctrine of restraint of trade, ¹¹³⁰ or whether the agreement, though within the doctrine, is reasonable, it is probably relevant to consider the implied obligations of the supplier. Thus a covenant by a lessee of a public house to take beer only from a particular brewery is subject to an implied condition that good and wholesome beer shall be supplied. ¹¹³¹ It has been said that this rule applies even though there is no specific agreement by the brewer to supply the publican with beer, apparently on the ground that the existence of the tying covenant amounts to an implied guarantee by the covenantee that he will at times supply liquor of good quality at reasonable prices in requisite quantities. An injunction against the publican will be granted only for so long a time as the brewers are prepared to supply him with beers of a reasonable quality at a reasonable price. ¹¹³²

Exclusive selling agreements and co-operative marketing schemes ¹¹³³

18-175



Subject to the consideration that it may be more onerous to require a buyer to take his whole supply from one source than to require a seller to sell his whole output to one buyer,¹¹³⁴ exclusive selling agreements are, it would seem, to be treated in the same way as exclusive buying agreements.¹¹³⁵ Thus an obligation imposed on a farmer to sell all his milk to an agricultural co-operative, with no power on the part of the farmer to terminate his obligation, has been held in restraint of trade and unreasonable¹¹³⁶ because in the circumstances it was an unusual and excessive fetter on the farmer's personal liberty.¹¹³⁷ Where such an obligation was imposed under a marketing scheme which had been accepted by the great majority of producers and contained no unusual features it was, in the circumstances, held to be reasonable and enforceable.¹¹³⁸ Exclusive supply agreements and agreements relating to co-operatives may also be subject to UK or EU competition law where they have an appreciable effect on competition,¹¹³⁹ although many agreements concerning agricultural products are excluded from both the Ch.I prohibition in the Competition Act 1998 and (when it applied) art.101 TFEU.¹¹⁴⁰

Footnotes

⁷³⁶ See Heydon, The Restraint of Trade Doctrine 4th edn (2019); Kamerling and Osman, Restrictive Covenants under Common and Competition Law, 6th edn (2010).

¹¹⁰² See Vol.II, paras 45-152 et seq.

¹¹⁰³ See Vol.II, paras 45-069 et seq.

¹¹⁰⁴ On the relationship between the restraint of trade doctrine and competition law, see above, para.18-124 and Vol.II, para.45-001. In *Days Medical Aids Ltd v Pihsiang Machinery Co Ltd [2004] EWHC 44 (Comm)*, the court held that an agreement that did not infringe art.101(1) TFEU could not be subject to the common law restraint of trade doctrine. See also *Pirtek (UK) Ltd v Joinplace Ltd [2010] EWHC 1641 (Ch)* and *Jones v Ricoh UK Ltd [2010] EWHC 1743 (Ch)*. However, with the expiry on 31 December 2020 of the transition period under the Withdrawal Agreement 2020 following the United Kingdom's withdrawal from the European Union, the principle in *Days Medical Aids* does not have any application from that date: see above, para.18-124 and Vol.II, para.45-001.

¹¹⁰⁵ As to certain special rules relating to patented articles, see below, para.18-178.

¹¹⁰⁶ TFEU art.101(1) prohibits agreements that restrict competition by object or effect, including vertical agreements, unless they satisfy the criteria for exemption set out in art.101(3): see generally Vol.II, paras 45-020 et seq. and, in relation to vertical agreements, paras 45-069 et seq. Regulation 330/2010 on the application of art.101(3) to categories of vertical agreements and concerted practices [2010] O.J. L102/1 grants block exemption to vertical agreements provided that neither party exceeds a market share cap of 30 per cent and does not contain any "hardcore" restrictions: see Vol.II, paras 45-088 et seq. The Commission has published Guidelines on Vertical Restraints ([2010] O.J. C130/1), which set out its approach on the application of art.101 and Regulation 330/2010 to vertical agreements.). The Competition Act 1998 entered into force on 1 March 2000. It contains the Ch.I and II prohibitions which

are closely modelled on arts 101 and 102 TFEU: see Vol.II, paras 45-141 et seq. Although vertical agreements, except for those fixing resale prices were, until 1 May 2005 excluded from the Ch.I, but not Ch.II, prohibition; since that date the Ch.I prohibition has applied to all vertical agreements: see Vol.II, para.45-193. However, until 31 December 2020 vertical agreements benefitted from a parallel exemption by virtue of s.10 of the Competition Act, if they satisfied the requirements of Regulation 330/2010 and since that date benefit from a retained exemption under s.10, pursuant to the retained vertical block exemption regulation: see Vol.II, paras 45-199 and 45-200.

1107 cf. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269* (below, para.18-177), where such reasoning is applied in the case of restrictions relating to the use of land; and see *Elliman, Sons & Co v Carrington & Son Ltd [1901] 2 Ch. 275*; but contrast *British Motor Trade Association v Gilbert [1951] 2 All E.R. 641*, where, however, the plaintiffs had not supplied the goods.

①1108 [2020] UKSC 36, [2021] A.C. 1014; see above, para.18-125.

1109 See *Palmolive Co (of England) Ltd v Freedman [1928] Ch. 264*.

1110 Above, para.18-130.

1111 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*, 328, 336, 963; cf. *Petrofina (Great Britain) Ltd v Martin [1966] 1 Ch. 146*, 184–185. See also *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308* and *Clifford Davis Ltd v W.E.A. Records Ltd [1975] 1 W.L.R. 61*.

1112 As to cases decided before 1967 relating to exclusive purchasing, see generally the cases referred to in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*. It is important to note that all exclusive purchasing agreements may fall within the scope of art.101(1) TFEU and the Ch.I prohibition of the Competition Act 1998 where they have, whether by object or effect, an appreciable effect on competition: see Vol.II, paras 45-069 et seq. On when an agreement will have an “appreciable” effect on competition, including as part of a network of similar agreements, see Vol.II, paras 45-039—45-042. However, they may be eligible, under art.101(3), for block exemption under Regulation 330/2010 (see Vol.II, paras 45-088 et seq) or, the Ch.I prohibition to a parallel exemption (until 31 December 2020, the date on which the transition (or implementation) period under the EU/UK Withdrawal Agreement expired: see above, para.1-021 above) or a retained exemption (after that date), under s.10 of the Competition Act 1998 (see Vol.II, paras 45-199 and 45-200), provided that, unless the purchaser operates from premises owned by the supplier, any obligation on the purchaser to obtain more than 80 per cent of its requirements from the supplier is for no longer than five years, or is not of indefinite duration. In relation to agreements concerning specifically the supply of petrol, see e.g. *Neste Markkinointi Oy v Yötuuli Ky (C-214/99) [2000] E.C.R. I-11121*, EU:C:2000:679; *Hegelstad v Hydro Texaco (E-7/01) [2002] EFTA Ct. Rep. 310* (decided under art.53(1) EEA); *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; and *Pedro IV Servicios v Total España (C-260/07) [2009] E.C.R. I-2437*, EU:C:2009:215. In *Western Isles Road Fuels* (24 June 2014), the CMA accepted, under s.31A of the Competition Act, binding commitments from Certas

- Energy UK Ltd and DCC Plc to limit to a maximum of two years exclusive purchasing obligations in contracts with operators of petrol stations in the Western Isles.
- 1113 As to where the station is owned by the petrol company when the agreement was made, see below, para.[18-176](#). Other than where the purchaser operates from premises owned or leased by the supplier, a supply agreement under which the purchaser obtains more than 80 per cent of its requirements from the supplier may benefit from exemption under Regulation 330/2010 or a retained exemption, pursuant to [s.10 of the Competition Act 1998](#), under the retained vertical restraints block exemption, provided that the duration of the contract does not exceed five years or is not of indefinite duration: see Regulation 330/2010 arts 5(1)(a) and 5(2). See Vol.II, para.[45-093](#)).
- 1114 [1968] A.C. 269, and see (1966) 82 L.Q.R. 307; (1966) 29 M.L.R. 541; [1967] Camb. L.J. 104; *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 W.L.R. 814; *Amoco Australia Pty Ltd v Rocca Bros Co Engineering Pty Ltd* [1975] A.C. 561; *Cleveland Petroleum Ltd v Dartstone Ltd* [1969] 1 W.L.R. 116; *Esso Petroleum Ltd v Niad Ltd* [2001] All E.R. (D) 324 (the court granted recovery of profits rather than damages for breach by the promisor of a solus type agreement).
- 1115 Monopolies Commission, Petrol: A Report on the Supply of Petrol to Retailers in the United Kingdom HCP (1964–65) No.264; see below, para.[18-172](#).
- 1116 Restraints contained in mortgages may also be enforceable after redemption as invalid clogs on the equity of redemption: see Bridge, Cooke and Dixon (eds), Megarry and Wade, The Law of Real Property, 9th edn (2019), paras 24-085 and 24-096—24-098.
- 1117 [1968] A.C. 269 and see [1967] 2 Q.B. 514, 555, 578.
- 1118 Vol.II, paras [45-228](#)—[45-231](#). Neither the CMA, nor its predecessor, the Office of Fair Trading, have made a market investigation reference into the supply of petrol and diesel since Pt 4 of the Enterprise Act 2002 entered into force on 20 June 2003, although on 30 January 2013 the OFT did publish a report in which it considered that there were no grounds for it to open a market study under [s.5 of the Act](#) as a precursor to making a possible reference under [s.131 of the Act](#): OFT, UK petrol and diesel sector (OFT1475, January 2013).
- 1119 See Vol.II, paras [45-073](#) and [45-074](#). However, many such agreements will benefit from a parallel (or, from 31 December 2020) a retained exemption from the Ch.I prohibition under [s.10 of the Competition Act 1998](#) (see Vol.II, paras [45-199](#) and [45-200](#)) and may also have benefitted from block exemption under art.101(3) under Regulation 330/2010 (see Vol.II, para.[45-088](#) et seq.).
- 1120 cf. below, para.[18-175](#), and above, para.[18-142](#).
- 1121 [1985] 1 W.L.R. 173 (noted (1985) 101 L.Q.R. 306).
- 1122 *Crehan v Courage Ltd (No.1)* [1999] Eu. L.R. 834.
- 1123 See Vol.II, paras [45-052](#) et seq.
- 1124 *Hartley v Pehall* (1792) Peake 178; *Catt v Tourle* (1869) L.R. 4 Ch. App. 654; *Clegg v Hands* (1890) 44 Ch. D. 503; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269 especially 333, 334. See also *Cutsforth v Mansfield Inns Ltd* [1986] 1 W.L.R. 536. But see below, para.[18-175](#).
- 1125 See above, para.[18-130](#); and see *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269.

- 1126 As to covenants contained in conveyances and leases generally, see below, para.18-177.
- 1127 See Vol.II, paras 45-073 and 45-074. On when an agreement will have an “appreciable” effect on competition, see Vol.II, paras 45-039—45-042. The EU courts have upheld Commission decisions that although beer ties included in the standard public house leases of major breweries infringed art.101(1) they benefitted from individual exemption under art.101(3): *Joynson v Commission* (C-204/02P) [2003] E.C.R. I-14763, EU:C:2003:660 and *Shaw v Commission* (T-131/99) [2002] E.C.R. II-2023, EU:T:2002:83. In *Roberts and Roberts v Commission* (T 25/99) [2001] E.C.R. II-1181, EU:T:2001:177, the General Court dismissed a challenge to a Commission decision that a beer tie imposed by Greene King, then a regional brewer with a market share of 1 per cent, of an average duration of nine years, did not appreciably restrict competition. In *Inntrepreneur/Spring* [2000] O.J. L195/49, the Commission determined that ties imposed by a pub company (which was not a brewer) that owned several thousand public houses did not infringe art.101(1) as it purchased beer from several different breweries, whose contracts were subject to regular competitive tendering. See also *Crehan v Inntrepreneur Pub Co (CPC)* [2003] EWHC 1510 (Ch), [2003] Eu. L.R. 663, in which it was held that a beer tie imposed by a pub company did not appreciably restrict competition; this finding was upheld in *Inntrepreneur Pub Co (CPC) v Crehan* [2006] UKHL 38, [2007] 1 A.C. 333. In *Unique Pub Properties Ltd v Roddy* [2018] EWHC 4019 (Ch) the High Court, in imposing an interim injunction on the defendants requiring them to comply with an exclusive purchasing obligation contained in the lease of a public house, considered that their defence that the obligation infringed the Ch.I prohibition was unlikely to succeed at trial.
- 1128 See Vol.II, paras 45-088 et seq.
- 1129 See Vol.II, paras 45-199 and 45-200.
- 1130 *Thornton v Sherratt* (1818) 8 Taunt. 529.
- 1131 *Courage & Co v Carpenter* [1910] 1 Ch. 262.
- 1132 *Catt v Tourle* (1869) L.R. 4 Ch. App. 654.
- 1133 See Vol.II, para.45-039.
- 1134 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, per Lord Reid at 298.
- 1135 See above, paras 18-171—18-172.
- 1136 *McEllistrim v Ballymacelligott Co-operative Society Ltd* [1919] A.C. 548; *Joseph Evans & Co Ltd v Heathcote* [1918] 1 K.B. 418, where, however, since the association was a “trade union”, the agreement fell within the *Trade Union Acts 1871* and *1876* and was therefore sufficient to support an account stated, on which the plaintiffs were able to recover.
- 1137 See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269.
- 1138 *English Hop Growers Ltd v Dering* [1928] 2 K.B. 174; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269.
- 1139 See Vol.II, paras 45-072—45-074.
- 1140 See Vol.II, para.45-191.

(vi) - Restraints on the Use of Land or Chattels

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Restraint affecting commercial use of land

- 18-176 Where a restraint affecting the commercial use of land is accepted by one who enjoyed his interest in the land before the making of the arrangement under which the restraint was imposed, it is clearly established that the doctrine of restraint of trade applies to the same extent as it otherwise would. ¹¹⁴¹

Restraint contained in conveyance or lease or use of chattels

- 18-177 Restraints may limit the use of a particular piece of land, e.g. that the land shall not be used for the purposes of trade generally or of particular trades or that all the goods of some kind sold from the land shall be bought from a specified source, is imposed in a conveyance or lease of the land in question; presumably since *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* ¹¹⁴²

U such restraints are exempt because of the “trading society” test rather than because they do not limit an existing freedom.¹¹⁴³ On similar reasoning, restraints on the use of a chattel which are imposed upon a party by the contract under which they acquire the chattel may well fall outside the common law doctrine of restraint of trade.¹¹⁴⁴ Where the restraint relates to chattels not acquired under the contract which imposes the restraint, the doctrine ought in principle to apply. And while in *United Shoe Machinery Co of Canada v Bruner*¹¹⁴⁵ the Privy Council upheld a condition in a demise of machines that no other machines of a like kind should be used by the lessee during the continuance of the contract, the reasons given for the decision are unsatisfactory.¹¹⁴⁶

Patented articles and patent licences

- 18-178 Section 44 of the Patents Act 1977 contained provisions designed to prevent the owner of a patent or an interest in a patent using his patent to extend his patent monopoly beyond the terms of the patent, e.g. by requiring purchasers of the patented goods to acquire only from him or his nominees other goods or by prohibiting licensees of the patent from using articles, whether patented or not, which are not supplied by him or his nominees. Section 44 was repealed by s.70 of the Competition Act 1998. The practices proscribed by s.44, and other terms in licences of intellectual property rights might infringe the Ch.I prohibition in the Competition Act or, before 31 December 2020, art.101(1) TFEU.¹¹⁴⁷ However, many licences for patents, utility models, design rights, semi-conductor topographies, supplementary protection certificates, plant breeder’s certificates, software copyrights and know-how enjoy block exemption by virtue of Regulation 316/2014¹¹⁴⁸ or a “parallel exemption” (before that date) or “retained exemption” (after that date) under s.10 of the Competition Act.¹¹⁴⁹

Footnotes

736 See Heydon, The Restraint of Trade Doctrine 4th edn (2019); Kamerling and Osman, Restrictive Covenants under Common and Competition Law, 6th edn (2010).

1141 *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd [1968] A.C. 269*. Such agreements may also be subject to s.2 of the Competition Act 1998 and, until 31 December 2020 may also have been subject to art.101(1) TFEU: see Vol.II, para.45-194.

1142 [2020] UKSC 36, [2021] A.C. 1014 (hereafter *Peninsula Securities*).

1143 See above, para.18-125.

1144 See above, para.18-176.

1145 [1909] A.C. 330. This type of arrangement would now be subject to the Ch.I prohibition in s.2 of the Competition Act 1998 and art.101 TFEU and in the light of the size of the fines that

may be imposed for breach of these provisions, as well as the voidness and unenforceability of any restraint that infringes these provisions, the common law has a limited role to play in this area in cases where it can be shown that the restraint has an appreciable effect on competition. On the relationship between the restraint of trade doctrine and competition law, see above, para.[18-124](#) and Vol.II, para.[45-001](#).

1146 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 297.*

1147 See Vol.II, paras [45-096](#)—[45-099](#).

1148 Regulation (EU) 316/2014 on the application of art.101(3) TFEU to categories of technology transfer agreements [2014] O.J. L93/7; see Vol.II, para.[45-099](#).

1149 See Vol.II, para.[45-117](#).

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(vii) - Supply and Acquisition of Goods: Restraints in Horizontal Agreements

Horizontal agreements classified

- 18-179 The treatment of restraints in horizontal agreements dealt with in this part (i.e. paras 18-179 —18-182) will concentrate on English common law. However, this is an area in which UK competition law, under Ch.I of the Competition Act 1998¹¹⁵⁰ and, for the period before 31 December 2020, EU competition law, under art.101 TFEU,¹¹⁵¹ are of equal, if not greater, importance and this body of law must also be considered when dealing with these types of restraint.¹¹⁵² The two most common classes of restrictive agreements between producers or suppliers of goods inter se are those between vendor and purchaser of a business under which the vendor accepts restrictions for the protection of the goodwill sold and agreements whereby two or more producers or suppliers accept restrictions as to the prices at which or terms on which they will sell, or as to the quantities or descriptions of goods they will produce or sell or as to the persons to whom or areas in which they will sell.¹¹⁵³ Agreements between vendors and purchasers have already been discussed¹¹⁵⁴; and may also be subject to competition law, although will generally be enforceable if they are “ancillary” to the sale and purchase transaction¹¹⁵⁵; where the restraint is reasonably required for the protection of the goodwill sold, the restrictive covenant is usually enforceable, otherwise not. Thus where, on “the sale of the goodwill of a licence” to make

beer, which in fact the seller had never made, the seller undertook not to make beer for 15 years thereafter, the undertaking was held unenforceable as a bare covenant against competition.¹¹⁵⁶

Employer's association

18-180 Section 128 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that the purpose of an unincorporated employers' association and, in so far as they relate to the regulation of relations between employers and workers or trade unions, the purposes of an employers' association which is a body corporate, shall not, by reason only that they are in restraint of trade, be unlawful so as, inter alia, to make any agreement or trust void or voidable. This provision replaces earlier ones¹¹⁵⁷ and makes clear that such an association is not illegal as it might otherwise be at common law. The expression "employers' association" is defined by s.122 of the 1992 Act to include any organisation (whether permanent or temporary) which consists wholly or mainly of employers or individual proprietors of one or more descriptions and is an organisation whose principal purposes include the regulation of relations between employers of that description or those descriptions and workers or trade unions.¹¹⁵⁸ The principal purposes of such an organisation may also include cartel purposes but, if they do so, then, applying the reasoning adopted in *Faramus v Film Artistes Association*,¹¹⁵⁹ it would seem that s.128 of the 1992 Act legalises only such agreements as are relevant or directed to the purposes of the organisation by virtue of which the organisation is an employers' association and not agreements which are relevant or directed only to other of the organisation's purposes, so a cartel arrangement fixing prices and quantities may fall outside the Act. In any event, in *Joseph Evans & Co v Heathcote*¹¹⁶⁰ the Court of Appeal held that an agreement between employers fixing prices and quantities was in restraint of trade and so not lawful at common law,¹¹⁶¹ and that the predecessors of s.128, ss.3 and 4 of the Trade Union Act 1871, did not have the effect that the agreement could be enforced; but the court allowed a party who had been subjected to the restraint to recover the amount that was due to it under the agreement, which the court considered to be permitted at common law¹¹⁶² and compatible with the Act. So even where "legalised" under s.128 of the 1992 Act, such agreements are not thereby rendered enforceable in the courts save so far as they are at common law.

Price-fixing agreements

18-181 Agreements between suppliers of goods as to the price at which they will sell their goods are subject to the common law doctrine of restraint of trade. This matter would now in all likelihood be dealt with under competition law, whether s.2 of the Competition Act 1998, when it applied, or art.101(1) TFEU; it is difficult to imagine parties wanting to litigate about the validity at common law of

a price-fixing arrangement,¹¹⁶³ which constitutes a serious infringement of competition law¹¹⁶⁴ that will be punished by heavy fines by the European Commission¹¹⁶⁵ or the Competition and Markets Authority¹¹⁶⁶ and, for the individuals involved in making the arrangement, constitutes a criminal offence¹¹⁶⁷ and also conduct that may render them liable to disqualification as a company director.¹¹⁶⁸

Auction rings

- 18-182 An agreement by which the parties agree not to bid against each other at an auction and to divide the goods purchased, i.e. to establish a ring, has been held valid at common law as neither fraudulent nor in restraint of trade¹¹⁶⁹ but if made by a dealer it is a criminal offence¹¹⁷⁰ and therefore unenforceable.

Footnotes

736 See Heydon, *The Restraint of Trade Doctrine* 4th edn (2019); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 6th edn (2010).

1150 See Vol.II, paras 45-152 et seq.

1151 See Vol.II, paras 45-069 et seq.

1152 On the relationship between the restraint of trade doctrine and competition law, see above, para.18-124 and Vol.II, para.45-001. In *Days Medical Aids Ltd v Pihsiang Machinery Co Ltd [2004] EWHC 44 (Comm)*, the court held that an agreement that did not infringe art.101(1) TFEU could not be subject to the common law restraint of trade doctrine. See also *Pirtek (UK) Ltd v Joinplace Ltd [2010] EWHC 1641(Ch)* and *Jones v Ricoh UK Ltd [2010] EWHC 1743 (Ch)*. However, with the expiry on 31 December 2020 of the transition period under the Withdrawal Agreement 2020 following the United Kingdom's withdrawal from the European Union, the principle in *Days Medical Aids* does not have any application from that date: see above, para.18-124 and Vol.II, para.45-001.

1153 There are many horizontal agreements where the anti-competitive effect of the restrictions is outweighed by its beneficial effects on technical progress or improved distribution, for example, agreements providing for co-operation on research and development.

1154 Above, paras 18-165—18-167.

1155 See Vol.II, para.45-067.

1156 *Vancouver Malt and Sake Brewing Co v Vancouver Breweries [1934] A.C. 181*. As to co-operative marketing schemes see above, para.18-175.

1157 See the *Trade Union Acts 1871 to 1906*, particularly ss.3 and 4 of the *Trade Union Act 1871*, repealed and replaced by the *Industrial Relations Act 1971*, particularly ss.35 and 61; *Trade Union and Labour Relations Act 1974* s.3(5).

1158 See *Greig v Insole [1978] 1 W.L.R. 302*, 356–362.

1159 [1964] A.C. 925.

1160 [1918] 1 K.B. 418.

1161 It would also be a serious infringement of competition law: see Vol.II, paras 45-065 and 45-066.

1162 Citing *Cocking v Ward (1845) 1 C.B. 858*, 135 E.R. 781, a case where a contract for land was unenforceable under the statute of frauds.

1163 For a common law example, see *Att-Gen of Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] A.C. 781*; and see *Cade & Sons Ltd v Daly Co Ltd [1910] 1 I.R. 306*; contrast *Urmston v Whitelegg Bros (1890) 63 L.T. 455* (10-year worldwide price-fixing cartel held unreasonable). See further above, paras 18-170 et seq.

1164 See Vol.II, para.45-055.

1165 See Vol.II, para.45-138.

1166 See Vol.II, para.45-218.

1167 See Vol.II, para.45-227.

1168 See Vol.II, para.45-222.

1169 *Rawlings v General Trading Co [1921] 1 K.B. 635*; and see *Cohen v Roche [1927] 1 K.B. 169*.

1170 The *Auctions (Bidding Agreements) Act 1927* s.1 as amended by the *Auctions (Bidding Agreements) Act 1969* ss.1, 2 and the *Criminal Law Act 1977* Sch.13; s.3 of the 1969 Act entitles the vendor to avoid the contract of sale or alternatively to recover damages.

(viii) - Labour and Services: Restraints in Horizontal Agreements

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(d) - Contracts in Restraint of Trade ⁷³⁶

(viii) - Labour and Services: Restraints in Horizontal Agreements ¹¹⁷¹

Labour

- 18-183 Section 11 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that the purposes of any trade union shall not, by reason only that they are in restraint of trade, be unlawful so as, inter alia, to make any agreement or trust void or voidable. This provision is intended to make clear that the purposes of such an association are not illegal (as they might be at common law), and it does not render agreements made by such an association enforceable ¹¹⁷²; whether the agreement is enforceable still depends on the application of the common law rules relating to restraint of trade discussed below. The expression “trade union” is defined by s.1 of the 1992 Act to include any organisation (whether permanent or temporary) which consists wholly or mainly of workers of one or more descriptions and is an organisation whose principal purposes include the regulation of relations between workers of the description or those descriptions and employers or employers’ associations. The wording of s.11 of the Act makes it clear that *none* of the *rules* of trade unions is affected by the doctrine of restraint of trade. ¹¹⁷³
- 18-184 An agreement between traders to regulate the wages and hours of employment of their workers for one year in accordance with the decision of the majority has been held to be against public policy and unenforceable at common law. ¹¹⁷⁴ Similarly a rule of a trade protection society that no member

should employ an employee who had left the service of another member without the consent in writing of his previous employer till after the expiration of two years was held invalid at common law.¹¹⁷⁵ Also, an arrangement between the organisers of a professional sport which restricts the way in which the participants in that sport may earn their livelihood may be invalidated if it constitutes an unreasonable restraint¹¹⁷⁶ and is likely also to infringe competition law unless they are objectively necessary to protect legitimate and non-economic sporting objectives.¹¹⁷⁷ Indeed the validity of a contract of that nature may have to be judged by the same strict standards as would an individual covenant by an employee with his employer directed to the same end¹¹⁷⁸; moreover while there may be very good reasons for the agreement from the employer's point of view, it may be against the public interest to interfere in such a way with the freedom of employees.¹¹⁷⁹ An employee who is injured by the operation of such an agreement between employers or by rules to such an effect of an association of employers, whether or not the terms of that agreement or of those rules are incorporated into the employee's contract of employment, may be granted a declaration against the employers or their association that the agreement or rules, as the case may be, are in unreasonable restraint of trade and therefore unenforceable,¹¹⁸⁰ and perhaps an injunction restraining the parties enforcing or purporting to enforce them.¹¹⁸¹

Supply of services: common law

- 18-185** Restrictive agreements relating to the supply of services are at common law subject to the doctrine of restraint of trade¹¹⁸² upon the same principles as are restrictive agreements relating to the supply of goods.¹¹⁸³ Thus where a group of master stevedores agreed to divide among themselves the work at a particular port, it was held that a provision that a member who on the request of a customer did work which was allotted to another member should pay that other member an equivalent was valid at common law, but not a provision which in certain circumstances prevented a particular job from being accepted by any member.¹¹⁸⁴ Such an agreement would also infringe s.2 of the Competition Act 1998 and (when it applied) art.101(1) TFEU, as competition law applies to all economic activities, including the supply of services.¹¹⁸⁵

Supply of professional services

- 18-186** The regulation of professional services is as much subject to the common law doctrine of restraint of trade¹¹⁸⁶ as the regulation of other services,¹¹⁸⁷ at any rate where the profession engages in trade.¹¹⁸⁸ It is also subject to competition law.¹¹⁸⁹ Public policy may invalidate rules of a body such as the Stewards of the Jockey Club which prevent a class of people, such as women, from

exercising a calling over which the body has control¹¹⁹⁰ or rules of professional conduct laid down for a profession whether or not those rules are intended to be binding.¹¹⁹¹

Supply of labour: common law

- 18-187 Agreements between workers binding them to regulate their work in accordance with the decision of some outside body or otherwise curtailing the free right to dispose of labour are at common law subject to the doctrine of restraint of trade¹¹⁹² upon the same principles as agreements between employers to regulate the acquisition of labour.¹¹⁹³ Such contracts have generally been held to be in unreasonable restraint of trade and therefore unenforceable at common law.¹¹⁹⁴ Where a union's rules impose unjustifiable restraints on members, others of its rules, e.g. for the payment to members of superannuation benefits, have been held also to be unenforceable.¹¹⁹⁵ Where the rules of a union imposed no restrictive obligations on the members, a rule which provided for the payment of strike pay to those who took part in an authorised strike was held to be enforceable at common law as no more than an insurance of the members against the consequences of a strike.¹¹⁹⁶

Footnotes

- 736 See Heydon, *The Restraint of Trade Doctrine* 4th edn (2019); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 6th edn (2010).
- 1171 As to restrictions imposed by an employer on his employees, see above, paras 18-151 et seq.
- 1172 See above, para.18-180.
- 1173 This was designed to nullify the effect of *Edwards v Society of Graphic and Allied Trades* [1971] Ch. 365. See also *Greig v Insole* [1978] 1 W.L.R. 302, 365; *Associated Newspaper Group Ltd v Wade* [1979] 1 W.L.R. 697, 710 (restraint of trade does not mean interference with business).
- 1174 *Hilton v Eckersley* (1856) 6 E. & B. 47; and see *Mogul Steamship Co v McGregor, Gow & Co* [1892] A.C. 25, 42; (1889) 23 Q.B.D. 598, 619.
- 1175 *Mineral Water Bottle, etc., Society v Booth* (1887) 36 Ch. D. 465 (the members of the association could protect any confidential information); *Davies v Thomas* [1920] 2 Ch. 189, 195.
- 1176 *Eastham v Newcastle United F.C. Ltd* [1964] Ch. 413; *Greig v Insole* [1978] 1 W.L.R. 302; *Buckley v Tuttey* (1971) 125 C.L.R. 353.
- 1177 See Vol.II, paras 45-065 and 45-066.
- 1178 *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch. 108. See also above, para.18-151.
- 1179 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 300, 301.

- 1180 *Eastham v Newcastle United F.C. Ltd* [1964] Ch. 413; *Cooke v Football Association* [1972] C.L.Y. 516; *Greig v Insole* [1978] 1 W.L.R. 302.
- 1181 See *Nagle v Feilden* [1966] 2 Q.B. 633. See also *Cooke v Football Association* [1972] C.L.Y. 516 where a claim for damages for loss of wages was rejected as having no ground in contract or tort.
- 1182 *Collins v Locke* (1879) 4 App. Cas. 674; *Budget Rent-a-Car International Inc v Mamos Slough Ltd* (1977) 121 S.J. 374.
- 1183 See above, para.18-181.
- 1184 *Collins v Locke* (1879) 4 App. Cas. 674.
- 1185 See Vol.II, paras 45-022 and 45-157—45-159.
- 1186 See below, para.18-188 for statutory provisions.
- 1187 *Dickson v Pharmaceutical Society of Great Britain* [1970] A.C. 403.
- 1188 *Dickson v Pharmaceutical Society of Great Britain* [1970] A.C. 403, 455 but it is to be noted that the traditional categories of covenant in restraint of trade include covenants by doctors, dentists, solicitors, etc., who probably do not engage in trade.
- 1189 See Vol.II, paras 45-022, 45-036 and 45-192.
- 1190 *Nagle v Feilden* [1966] 2 Q.B. 633.
- 1191 *Dickson v Pharmaceutical Society of Great Britain* [1970] A.C. 403. The professional services sector is mainly controlled under the Fair Trading Act 1973.
- 1192 *Hornby v Close* (1867) L.R. 2 Q.B. 153; *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] A.C. 25, 59, 60; *Cullen v Elwin* (1904) 90 L.T. 840; *Boddington v Lawton, The Times*, 4 February 1994.
- 1193 See above, paras 18-183—18-184.
- 1194 *Russell v Amalgamated Society of Carpenters and Joiners* [1912] A.C. 421; and see Citrine's Trade Union Law, 3rd edn, pp.44–45; Grunfeld, Modern Trade Union Law (1966), pp.64–71; *Boddington v Lawton* [1994] I.C.R. 478.
- 1195 *Miller v Amalgamated Engineering Union* [1938] Ch. 669.
- 1196 *Gozney v Bristol Trade and Provident Society* [1909] 1 K.B. 901.

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Anti-competitive agreements and practices

- 18-188 Many agreements and practices which are in restraint of trade, or which are designed to stifle competition, may, if they concern undertakings that carry on an economic activity, infringe competition law, in particular the [Competition Act 1998](#), the [Enterprise Act 2002](#), and provisions of EU law, in particular arts 101 and 102 TFEU, and therefore be void and unenforceable. These are dealt with in Vol.II, [Ch.45](#).

Footnotes

⁷³⁶ See Heydon, *The Restraint of Trade Doctrine* 4th edn (2019); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 6th edn (2010).

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Section 5. - Contracts Unenforceable by Statute

(a) - General Principles

Unenforceability by statute and common law distinguished

- 18-189 The illegality which renders a contract unenforceable at common law may arise by statute.¹¹⁹⁷ Unenforceability by statute, on the other hand, arises where a statute itself on its true construction deprives one or both of the parties of their civil remedies under the contract in addition to, or instead of, imposing a penalty upon them. If the statute does so, it is irrelevant whether the parties meant to break the law or not. A significant distinction between cases of contracts which are unenforceable at common law because they were entered into with the object of committing an act illegal by statute and of contracts which are rendered illegal by statute is that in the former case one has to look to see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, then that contract may be unenforceable. In the latter case one has to consider, not what acts the statute prohibits, but what contracts it prohibits; but one is not concerned at all with the intent of the parties¹¹⁹⁸; if the parties enter into a prohibited contract that contract is unenforceable¹¹⁹⁹ and ignorance by the parties of the law does not make it the less so.¹²⁰⁰

The distinction illustrated

- 18-190 The distinction between contracts prohibited by statute and those prohibited at common law is well brought out in *Dungate v Lee*,¹²⁰¹ where the existence of a partnership of a betting office

was called in issue. One of the parties denied the existence of the partnership, contending that the bookmaker's permit required by statute was held by him alone and that any partnership would have been contrary to the provisions of the [Betting and Gaming Act 1960](#). It was held that even if, in the course of the partnership, the unlicensed partner committed offences against the Act, the Act did not render the partnership itself illegal as all it required was that one partner be suitably qualified. Nor was the partnership agreement illegal at common law since it did not, by its terms, require the unlicensed partner to act illegally as a bookmaker in the conduct of the business and it was not entered into with an intention on the part of the partners that the unlicensed partner should so act.

Express voidness by statute

- 18-191 Statutes often provide expressly for the civil consequences of breach of their provisions and this is by far the preferable solution.¹²⁰² A contract may, by statute, be void without being illegal, the only penalty being that a contract made in contravention of the statute is entirely ineffective to create rights, as was the case of a contract made in contravention of the [Gaming Acts 1845](#) and [1892](#), or again a contract may be unenforceable without being either illegal or void, in which case it is effective to alter the rights of the parties, although the altered rights are not enforceable by them.¹²⁰³ However, if a contract is illegal, the effect is “to avoid the contract ab initio ... if the making of the contract is expressly or impliedly prohibited by statute”.¹²⁰⁴ The contract may be unenforceable by one party.¹²⁰⁵

Statute expressly not affecting validity

- 18-192 A statutory prohibition to which a criminal sanction is attached may also provide that it does not render any contract entered into in breach of its terms void or unenforceable.¹²⁰⁶ Whether such a provision has no effect whatsoever on the parties' contractual rights and obligations will depend upon the language used and the statutory purpose underlying the legislation. Thus, although the statute may provide that breach of its prohibition does not render a contract void or unenforceable, the court may nevertheless refuse to enforce the contract because this would be assisting in the furtherance of something that is illegal.¹²⁰⁷

Relevance of the factors-based approach

- 18-193 In *Patel v Mirza*¹²⁰⁸ the Supreme Court was addressing illegality in the narrower sense identified earlier, viz contracts that somehow involve a legal wrong. The decision does not affect directly the

question of statutory illegality. Lord Toulson, speaking for the majority, said that the court “must abide by the terms of any statute”,¹²⁰⁹ but the court in construing the statute could:

“... have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in the denial of the relief claimed.”¹²¹⁰

Thus the factors will be used as interpretative aids. The following paragraphs should be read in that light.

Statute silent as to civil rights

- 18-194 But where the statute is silent as to the civil rights of the parties but penalises the making or performance of the contract, the courts consider whether the Act, on its true construction,¹²¹¹ is intended to avoid contracts of the class to which the particular contract belongs or whether it merely prohibits the doing of some particular act.¹²¹² In the following paragraphs certain tests which have been applied by the courts are considered. However, it is important to note that where a contract or its performance is implicated with breach of a statute this does not entail that the contract is avoided. Where the Act does not expressly deprive the plaintiff of his civil remedies under the contract the appropriate question to ask is whether, having regard to the Act and the evils against which it was intended to guard and the circumstances in which the contract was made and to be performed, it would in fact be against public policy to enforce it.¹²¹³

Aids to statutory interpretation

- 18-195 Where a statute imposes a penalty on one or both of the parties to a contract, as a result of their entering into the contract or of their manner of performing it, the court will consider whether on the construction and purpose of the statute the doing of the particular act is forbidden as illegal or whether there is merely a charge imposed upon it. If the latter, it is clear that the contract itself is not prohibited. Thus where a tobacco manufacturer sued for the price of tobacco he had sold to the defendant, the fact that he was not licensed to sell tobacco and that his name was not painted on his place of business as required by statute did not prevent him from recovering since there was nothing in the Act to prohibit every sale and its only effect was to impose a penalty for the purpose of the Revenue, on the carrying on of the trade without complying with its requirements.¹²¹⁴ If, on the true construction of the statute:

“... *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in mind the protection of the revenue or any other object. The sole question is whether the statute *means to prohibit the contract.*”¹²¹⁵

If, on the other hand, the object of the statute is the protection of the public from possible injury¹²¹⁶ or fraud, or is the promotion of some object of public policy, the inference is that contracts made in contravention of its provisions are prohibited.¹²¹⁷ Thus where by statute it was not lawful:

“... to sell, or to supply ... a motor-vehicle ... for delivery in such a condition that the use thereof on a road in that condition would be unlawful,”

such a sale was held illegal and a cheque given for the price could not be sued on.¹²¹⁸ Similarly, it was by statute illegal to contract as a moneylender without registration; accordingly a moneylender’s failure to register invalidated contracts made and securities taken by him the course of his business, since the whole purpose of the Act was the protection of the public.

¹²¹⁹

 It has also been suggested¹²²⁰ that:

“... not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed as often as the act is done. If it be the latter, then the act is a prohibited act.”

- 18-196 The courts have also been reluctant to find contracts unenforceable because the illegality doctrine operates in an all or nothing way and there is no proportionality between the loss ensuing from non-enforcement and the breach of statute. This is to be contrasted with fines for criminal acts where some proportionality does pertain. This aspect of the matter caused concern to Devlin J in *St John Shipping Corp v Joseph Rank Ltd.*¹²²¹ In that case the illegality involved the plaintiff overloading its ship and the defendants wished to hold back merely that portion of the freight which was earned by the overloading. But as Devlin J pointed out the principle of illegality:

“... cares not at all for the element of deliberation, or for the gravity of the infraction, and *does not adjust the penalty to the profits unjustifiably earned.*”¹²²²

Thus, were the doctrine to have applied in that case, it would have entitled the defendants to hold back the full freight which was 40 times the maximum fine for the offence of overloading.¹²²³ Coupled with this, non-enforcement may have the effect of punishing the offender twice where the statute contains its own penalty for breach.

- 18-197 The courts have also been sensitive to the fact that non-enforcement may also result in unjust enrichment to the party to the contract who has not performed his part of the bargain but who has benefited from the performance by the other party. As was stated by Devlin J, in the *St John Shipping* case, non-enforcement of the contract may result in the forfeiting of a sum which:

“... will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it.”¹²²⁴

- 18-198 The courts have also appreciated that the growth in statutory law (including delegated legislation) can result in the unwitting and quite innocent breach of the statute. In *Shaw v Groom*¹²²⁵ the court held that failure to comply with the provision of the Rent Act requiring a landlord to provide a tenant with a rent book did not result in the landlord being unable to obtain the payment of rental arrears. One of the factors obviously influencing the court in reaching this conclusion was the growth in the volume of legislation which could easily result in the innocent transgression of some statutory prohibition.¹²²⁶

- 18-199 Although the courts have recognised “the desirability of (their) ... assisting to enforce a statute”,¹²²⁷ the consequence of this in driving from the seat of judgment sometimes innocent supplicants has also to be weighed in the balance.¹²²⁸

- 18-200 None of the above factors constitutes a litmus test which produces fore-ordained results. Obviously it would be preferable if the legislature were specifically to provide for the consequences of breach of the statute. Experience indicates that such legislative foresight is not always displayed, and where it is not the court must answer this question—Does the:

“... ambit and intent of the particular statute in the light of any other legislation affecting the subject matter ... preclude the plaintiff recovering on the contract if he had committed the offence?”¹²²⁹

Illegality through manner of performance

- 18-201 The question of statutory illegality in a contract generally arises in connection with its formation, but it may also arise in connection with its performance,¹²³⁰ since the effect of the statute may

be to deprive one or both parties of their rights unless the contract is performed in a particular manner, or, to put the matter another way, the manner in which a contract is performed may turn it into the sort of contract that is prohibited by statute.¹²³¹ Thus, the seller of agricultural fertiliser, who omitted to give to the purchaser an invoice showing the composition of the fertiliser, was held unable to recover its price since the seller had not performed the contract in the only way in which the statute allowed it to be performed.¹²³² In another case¹²³³ statutory regulations required that the seller of utility goods should furnish to the buyer an invoice containing certain particulars. The plaintiff made a contract of sale for non-utility goods, to which the regulations did not apply; but he purported to perform it by delivering to the buyer, without objection, utility garments to which the regulations did apply; and he did not furnish the invoice. The Court of Appeal held that this contract was no less unenforceable than would have been a contract the initial terms of which provided for the sale of utility garments, and which could only have been lawfully performed by the delivery of the requisite invoice.

Unlicensed transactions

- 18-202 Where a statute or statutory instrument prohibits the doing of work otherwise than under a licence,¹²³⁴ a contract under which unlicensed work is carried out will generally be unenforceable.¹²³⁵ If there is in existence some licence, the illegality only extends to the excess by which the work exceeds the amount of the licence, unless there is an unseverable agreement to exceed the amount licensed.¹²³⁶

Unlicensed consumer credit business

- 18-203 Contracts made in contravention of the licensing provisions of the Moneylenders Acts were illegal and would not be enforced.¹²³⁷ The latter were replaced by the **Consumer Credit Act 1974**, under s.40(1) of which a regulated agreement with a person who carries on consumer credit business while unlicensed was not illegal but was unenforceable against the debtor unless the Office of Fair Trading ordered otherwise. **Section 40** was in turn replaced by the **Financial Services and Markets Act 2000**, ss.23–28A.¹²³⁸ Undertaking regulated activities in the consumer credit context whilst not an authorised or exempt person and thus breaching the “general prohibition”¹²³⁹ is a criminal offence.¹²⁴⁰ Agreements made by a person in contravention of the general prohibition are unenforceable and voidable by the counterparty, although the Financial Conduct Authority has power to order otherwise if satisfied that this is “just and equitable”.¹²⁴¹

Omission to register according to statute

- 18-204 Where a statute imposes an obligation to register contracts of a particular kind and provides penalties for failure to register, the non-registration of such a contract has been held not to render the contract itself unenforceable.¹²⁴² Such contracts may be expressly avoided by the statute. Thus, the [Companies Act 2006](#)¹²⁴³

U expressly avoids as against the liquidator and any creditor of a limited company mortgages and charges created by the company which have not been registered in accordance with the provisions of the Act.¹²⁴⁴

Illegal performance of legal contracts

- 18-205 The cases cited above might appear to support the proposition that an initially legal contract will be unenforceable on the basis that an illegality was committed in its performance. There is authority that in fact they were decided:

“... on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by statute.”¹²⁴⁵

This would also be in keeping with the general principle that the mere fact that there is an illegality associated with the performance of the contract¹²⁴⁶ does not render it illegal and unenforceable. Thus in *St John Shipping Corp v Joseph Rank Ltd*¹²⁴⁷ cargo owners resisted a claim for freight on the ground that the carriers had so overloaded their ship with the cargo in respect of which the freight was claimed as to submerge the ship below the load line. Devlin J held that although this amounted to a statutory offence, the legality of the contract was unaffected, since the statute in question was to be construed as prohibiting merely the act and not the contract under which it was done.

Statute: one party only affected

- 18-206

Statutes which prohibit certain contracts often impliedly recognise, for example by punishing only one of the parties, that the parties are not equally at fault, and therefore on their true construction only one of the parties to the contract is prevented from suing upon it. Accordingly, when:

“... the policy of the Act in question is to protect the general public or class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties.”¹²⁴⁸

The other party to the contract is not deprived of his civil remedies because of the criminal default of the guilty party.¹²⁴⁹

Statute affecting both parties

- 18-207 In certain cases a statute may be construed to prohibit both parties from suing on a contract of the sort in question, e.g. since it makes them both guilty of a criminal offence in entering into the contract. In such cases, no matter how much more culpable one party is than the other, both are equally unable to sue upon the contract; and this is so even though the party who seeks to sue on the contract was at the time it was made ignorant of the facts which brought the contract within the statutory prohibition.¹²⁵⁰ Thus in *Re Mahmoud and Ispahani*¹²⁵¹ the plaintiff agreed to sell and the defendant to buy 150 tons of linseed oil. By a statutory order then in force it was illegal “to buy or sell or otherwise deal in” linseed oil unless both parties had a licence. The defendant did not have a licence. Irrespective of the parties’ state of knowledge about the existence of licences the contract was illegal and unenforceable by either, since both were prohibited from making it and the prohibition was for the benefit of the public.¹²⁵² Since in this case the plaintiff had a licence and had been told by the defendant, albeit falsely, that he also had one, the plaintiff’s failure to recover on the contract may seem rather inequitable. Similarly in *Yin v Sam*,¹²⁵³ Malayan Rubber Regulations provided that “no person shall purchase ... rubber ... unless he shall have been duly licensed”. A sold rubber to B, who, unknown to A, did not hold a licence. The Privy Council, purporting to apply *Re Mahmoud and Ispahani*¹²⁵⁴ held that A could not recover the price. But the decision is to be questioned since, whereas in *Re Mahmoud and Ispahani*¹²⁵⁵ the regulations made it illegal “to buy or sell”, in *Yin v Sam*¹²⁵⁶ the regulations apparently made it an offence only “to buy”; A was therefore not the subject of a direct statutory prohibition¹²⁵⁷ nor himself guilty of a criminal offence¹²⁵⁸ and ought therefore not to have been held to be statutorily deprived of his rights; nor should he have been barred at common law since he had no knowledge that the performance of the contract would necessarily involve the commission of a criminal offence.

by B.¹²⁵⁹ It is not possible, however, to go so far as to state that an innocent party to a contract rendered illegal by statute will invariably be entitled to enforce the contract.¹²⁶⁰

Alternative cause of action

- 18-208 Even where a statute deprives a party of a civil remedy under a contract, he may, if in fact innocent of turpitude, be able to sue upon a collateral warranty or implied term that the requirements of the law had been complied with, or for the deceit, or perhaps the negligence, of the other in misrepresenting that fact. This will be dealt with in para.[18-232](#).

Alteration of law pending action

- 18-209 Where the law is altered by statute while an action is pending, the rights of the parties will be decided according to the law as it existed at the time the action was commenced, unless the statute shows a clear intention to vary such rights by making its action retrospective.¹²⁶¹

Footnotes

1197 See above, para.[18-013](#).

1198 But the parties' knowledge may not be entirely irrelevant, since only one party may be expressly penalised by the statute and therefore the statute will normally deprive only him of his civil rights under it (see below, para.[18-206](#)). But if the other has knowledge of the illegality he may become an aider and abettor and accordingly find himself penalised and disabled from suing on the contract: *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 385, 393; Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828*.

1199 See *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267, 283*. In any given situation it may not be easy to determine whether a statute prohibits acts as opposed to contracts.

1200 *Kiriri Cotton Co Ltd v Dewani [1960] A.C. 192*.

1201 *[1969] 1 Ch. 545*; cf. *Langton v Hughes (1813) 1 M. & S. 593*.

1202 See, e.g. Trade Descriptions Act 1968 s.35; Human Rights Act 1998 s.6 (it is unlawful for a public authority to act in a manner incompatible with convention rights), see above, para.[18-189](#).

1203 *Eastern Distributors v Goldring [1957] 2 Q.B. 600, 614*.

- 1204 per Devlin J, *Archbolds (Freightage) Ltd v Spanglett Ltd* [1961] 1 Q.B. 374, 388. See also *D.R. Insurance Co v Central National Insurance Co of Omaha* [1996] C.L.C. 64, 68; *Royal Boskalis Westminster NV v Mountain* [1997] C.L.C. 816.
- 1205 See above, para.18-022.
- 1206 This was the language used in s.8(3) of the Companies Securities (Insider Dealing) Act 1985 which has now been repealed but it is repeated in the replacement legislation: see Criminal Justice Act 1993 s.63(2).
- 1207 *Chase Manhattan Equities Ltd v Goodman* [1991] B.C.L.C. 897, 931–934. See also *S.C.F. Finance Co Ltd v Masri (No.2)* [1987] Q.B. 1002, 1026.
- 1208 [2017] A.C. 467. See paras 18-028 et seq. where the case is dealt with.
- 1209 [2017] A.C. 467 at [109].
- 1210 [2017] A.C. 467 at [109].
- 1211 The natural meaning of a penal statute is not to be extended by reasoning based on the substance of the transaction under scrutiny: *Re H.P.C. Productions Ltd* [1962] Ch. 466. See *Archbolds (Freightage) Ltd v S. Spanglett Ltd* [1961] 1 Q.B. 374, 389–390.
- 1212 *Shaw v Groom* [1970] 2 Q.B. 504; *Ailion v Spiekermann* [1976] Ch. 158; *Geismar v Sun Alliance and London Insurance Ltd* [1978] Q.B. 383.
- 1213 *Smith v Mawhood* (1845) 14 M. & W. 452; *Johnson v Hudson* (1809) 11 East 180. *Cope v Rowlands* (1836) 2 M. & W. 149, 157; *Smith v Mawhood* (1845) 14 M. & W. 452, 463; and see *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] A.C. 277, 293; *Yin v Sam* [1962] A.C. 304. See below, paras 18-197, 18-202, 18-207 as to the extent of the unenforceability of the contract.
- 1214 *Vinall v Howard* [1953] 1 W.L.R. 987. And see Road Traffic Act 1988 s.18(4) and Sch.1, which makes it an offence to sell motor-cyclists' protective helmets which do not comply with specifications. Such statutes sometimes create statutory duties enforceable at the suit of the injured party, e.g. see Consumer Protection Act 1987 and regulations made thereunder: Vol.II, paras 46-457 et seq.
- 1215 *Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch. 624; *Little v Poole* (1829) 9 B. & C. 192; *Cope v Rowlands* (1836) 2 M. & W. 149; *Taylor v Crowland Gas & Coke Co* (1854) 10 Ex. 293. See, however, *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267.
- 1216 *Vinall v Howard* [1953] 1 W.L.R. 987, applying Road Traffic Act 1934 s.8 (reversed on the facts [1954] 1 Q.B. 375); by s.75(7) of the Road Traffic Act 1988 it is now expressly provided that the statutory prohibition of the sale of unroadworthy vehicles contained in that section shall not affect the validity of contracts or rights arising under contracts.
- 1217 *Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch. 624. See now the Consumer Credit Act 1974 ss.21, 40(1) and Pt III (as amended): *Menaka v Lum Kum Chum* [1977] 1 W.L.R. 267. It may be, however, that even though the statute is designed to protect the public, precluding a member of the public from being able to sue on it will cause him prejudice. This was the essence of the problem in the reinsurance cases: see *Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil* [1985] Q.B. 966; *Stewart v Oriental Fire and Marine Ins. Co Ltd* [1985] 1 Q.B. 988; *Phoenix General Insurance*

- Co of Greece SA v Administration Asigurarilor, etc.* [1988] Q.B. 216. It is submitted that the proper policy is to allow the contract to be enforced by the innocent party: but see *Financial Services and Markets Act 2000* s.27, which only allows the innocent party to recover money or property he has transferred under the agreement and compensation for any loss sustained by him as a result of having parted with it. See also *Estate of Anandh v Barnet Primary Health Care Trust* [2004] EWCA Civ 5, [2004] All E.R. (D) 242 (Jan).
- 1220 *Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch. 624, 630.
- 1221 [1957] 1 Q.B. 267.
- 1222 [1957] 1 Q.B. 267, 281 (emphasis added). cf. *Archer v Brown* [1985] Q.B. 401, 423F-H.
- 1223 Treitel in Tapper (ed.), “Contract and Crime”, *Crime, Proof and Punishment*, p.95.
- 1224 [1957] 1 Q.B. 267, 288.
- 1225 [1970] 2 Q.B. 504. cf. *Anderson Ltd v Daniel* [1924] 1 K.B. 138.
- 1226 *Shaw v Groom* [1970] 2 Q.B. 504, 521–522.
- 1227 *Shaw v Groom* [1970] 2 Q.B. 504, 521.
- 1228 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267, 288.
- 1229 *Shaw v Groom* [1970] 2 Q.B. 504, 520, per Sachs LJ; see also Harman LJ at 516. See also *Yango Pastoral Co Ltd v First Chicago Australia Ltd* (1978) 139 C.L.R. 410; *Fire and All Risk Ins. v Powell* [1966] V.R. 513; *Pavey & Mathews Pty Ltd v Paul* (1986-87) 162 C.L.R. 221 (allowing a quantum meruit claim by a builder with respect to work performed under an oral contract which by statute was made unenforceable by the builder unless it was in writing). See the very helpful guidance for determining whether breach of the statute renders a contract illegal and unenforceable: *Nelson v Nelson* (1995) 132 A.L.R. 133, 192–193.
- 1230 *Anderson Ltd v Daniel* [1924] 1 K.B. 138, 149; *Ashmore, Benson Pease & Co Ltd v A.V. Dawson Ltd* [1973] 1 W.L.R. 828.
- 1231 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267, 284.
- 1232 *Anderson Ltd v Daniel* [1924] 1 K.B. 138; overruled by the Fertilisers and Feeding Stuffs Act 1926 s.1(2); *Marles v Philip Trant & Sons Ltd* [1954] 1 Q.B. 29, but see now Agriculture (Miscellaneous Provisions) Act 1954 s.12(1).
- 1233 *B. & B. Viennese Fashions v Losane* [1952] 1 All E.R. 909.
- 1234 cf. *Re Mahmoud and Ispahani* [1921] 2 K.B. 716; see also below, paras 18-206—18-207.
- 1235 *Bostel Bros Ltd v Hurlock* [1949] 1 K.B. 74; *Jackson Stansfield & Sons v Butterworth* [1948] 2 All E.R. 558; *Woolfe v Wexler* [1951] 2 K.B. 154; *Howell v Falmouth Boat Construction Co Ltd* [1951] A.C. 837; *Smith & Son (Bognor Regis) Ltd v Walker* [1952] 2 Q.B. 319; *Young v Buckles* [1952] 1 K.B. 220.
- 1236 *Dennis & Co Ltd v Munn* [1949] 2 K.B. 327; *Frank W. Clifford Ltd v Garth* [1956] 1 W.L.R. 570. See also below, para.18-253.
- 1237 See Vol.II, para.46-027.
- 1238 See Vol. II, para.41-066.
- 1239 See Vol.II, para.41-063.

- 1240 Financial Services and Markets Act 2000 (FSMA), s.23(1). Unlicensed trading was also a criminal offence under (the now repealed) CCA 1974 ss.39(1), 167 and Sch.1.
- 1241 FSMA 2000 ss.26, 28A. The position was similar under the CCA 1974 (see the now repealed s.40) but with the OFT having the power to “validate” agreements made by unlicensed traders. In other, non “credit-related activities”, an application needs to be made to the court to uphold the agreements: FSMA 2000 s.28.
- 1242 *Wright v Horton* (1887) 12 App. Cas. 371.
- 1243 Companies Act 2006 Pt 25 Ch.A1. See above, para.12-046.
- 1244 As to the effects of failure to furnish particulars of agreements which are subject to registration under the Competition Act 1998, see paras 43-116, 45-126.
- 1245 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267, 284.
- 1246 *Coral Leisure Group Ltd v Barnett* [1981] I.C.R. 503, 508; see also above, para.18-194.
- 1247 [1959] 1 Q.B. 267; and see *Dungate v Lee* [1969] 1 Ch. 545; *Shaw v Groom* [1970] 2 Q.B. 504.
- 1248 *Anderson v Daniel* [1924] 1 K.B. 138, 147. In *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297 EU:C:2001:465, the Court of Justice held that national law could not prevent a party to a contract that infringed art.101(1) TFEU from recovering damages from the other party for losses caused as a result of that contract, where he did not bear significant responsibility for the infringement, due to being in a significantly weaker economic position; see Vol.II, paras 45-123, 45-126, 45-171 and 45-225. The claimant in *Crehan* was not significantly responsible for any distortion of competition and thus was entitled to bring his claim for damages against his co-contractor. See also *Sainsbury's Supermarkets Ltd v MasterCard Incorporated* [2016] CAT 11 and Vol.II, para.45-172.
- 1249 *Marles v Philip Trant & Sons Ltd* [1953] 1 All E.R. 645 (there was no appeal from this party of Llynskey J’s judgment with which Denning LJ expressed his agreement [1954] 1 Q.B. 29, 36); *Ailion v Spiekermann* [1976] Ch. 158; see also cases on reinsurance cited in para.18-195 (note), above.
- 1250 *Re Mahmoud and Ispahani* [1921] 2 K.B. 716. See also *Wilson, Smithett & Cope Ltd v Terruzzi* [1976] Q.B. 683; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] A.C. 168, 188–190.
- 1251 [1921] 2 K.B. 716.
- 1252 *Re Mahmoud and Ispahani* [1921] 2 K.B. 716, 729. At 730 Scrutton LJ left open the question of whether the plaintiff would have had a remedy for deceit: on this, see below, para.18-232.
- 1253 [1962] A.C. 304.
- 1254 [1921] 2 K.B. 716.
- 1255 [1921] 2 K.B. 716.
- 1256 [1962] A.C. 304.
- 1257 cf. *Re Mahmoud and Ispahani* [1921] 2 K.B. 716, 731–732 where Atkin LJ expressed the view that a direct statutory prohibition sufficed even if the party prohibited could not be prosecuted because he lacked mens rea.

- 1258 See *Sayce v Coupe [1953] 1 Q.B. 1*.
- 1259 See *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374* (above, para.18-194), which was not cited.
- 1260 *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd [1988] Q.B. 216*, “Illegal Transactions: The Effect of Illegality On Contracts And Torts” (Law Com., Consultation Paper No.154, 1999).
- 1261 *Hitchcock v Way (1837) 6 A. & E. 943*; *Lauri v Renard [1892] 3 Ch. 402, 421*; *Re Athlumney [1898] 2 Q.B. 547, 551*; *Beadling v Goll (1922) 39 T.L.R. 128*; *Ward v British Oak Insurance Co Ltd [1932] 1 K.B. 392, 397*; *Croxford v Universal Insurance Co Ltd [1936] 2 K.B. 253*; *Re Nautilus Shipping Co Ltd [1936] Ch. 17, 28*; *Craxfords (Ramsgate) Ltd v Williams and Steer Manufacturing Co Ltd [1954] 1 W.L.R. 1130*; and see *York Estates v Wareham (1950) 1 S.A. 125*.

(b) - Statutory Regulation of Trading with the Enemy

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 5. - Contracts Unenforceable by Statute

(b) - Statutory Regulation of Trading with the Enemy

Trading with the Enemy Act 1939

18-210 Trading with the enemy is regulated and prohibited by the [Trading with the Enemy Act 1939](#). By s.1 of the Act,¹²⁶² a person trading with or attempting to trade with the enemy is liable to a fine or imprisonment. By s.1(2), a person shall be deemed to have traded with the enemy:

“(a)... if he has had any commercial, financial or other intercourse with or of the benefit of an enemy, and, in particular, if he has

(i)supplied any goods to or for the benefit of an enemy, or obtained any goods from an enemy or traded in or caused any goods consigned to or from an enemy or destined for or coming from enemy territory, or

(ii)paid or transmitted any money, negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory, or

(iii)performed any obligation to or discharged any obligation of any enemy whether the obligation was undertaken before or after the commencement of the Act, or

(b)if he has done anything which, by virtue of the provisions of the Act, is to be treated as trading with the enemy.”

Anything done under the authority of a Secretary of State, the Treasury or the Department of Trade does not fall within the Act; nor does the receipt of a payment from an enemy of a sum due in respect of a transaction under which all obligations on the part of the person receiving payment

had already been performed when the payment was received and had been performed at a time when the person from whom payment was received was not an enemy.¹²⁶³

18-211 By s.2(1) of the Act¹²⁶⁴ an enemy means:

“(a)... any state, or sovereign of a state, at war with Her Majesty;

(b)any individual resident in enemy territory¹²⁶⁵;

(c)any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under section 2 of the Act, is an enemy;

(d)any body of persons constituted or incorporated in, or under the laws of, a state at war with Her Majesty; and

(e)as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business; but the expression does not include any individual by reason only that he is an enemy subject.”

By s.15(1) of the Act, enemy territory means any area which is under the sovereignty of, or in the occupation of, a Power with whom Her Majesty is at war, not being an area in the occupation of Her Majesty or of a Power allied with Her Majesty.¹²⁶⁶

Footnotes

1262 As amended by the Emergency Laws (Miscellaneous Provisions) Act 1953 s.2 and Sch.II para.2.

1263 See *R. & A. Kohnstamm Ltd v Ludwig Kumm (London) Ltd* [1940] 2 K.B. 359.

1264 As amended by the Emergency Laws (Miscellaneous Provisions) Act 1953 s.2 and Sch.II para.3.

1265 Resident means de facto resident: *Re Hatch* [1948] Ch. 592, distinguishing *Vandyke v Adams* [1942] Ch. 155, where it was held that a British prisoner of war is not resident in enemy territory for the purposes of the Act; and see *The Atlantic Scout* [1950] P. 266; *Vamvakas v Custodian of Enemy Property* [1952] 2 Q.B. 183.

1266 See also s.15(1A), added by the Emergency Laws (Miscellaneous Provisions) Act 1953 s.2 and Sch.II para.8.

Section 6. - Attribution of Acts to a Company

Chitty on Contracts 34th Ed.

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Volume I - General Principles

Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 6. - Attribution of Acts to a Company

Attribution and the law of illegality

18-212

- Many claims that might fall foul of the *ex turpi causa* principle involve companies. Before examining its application to companies, it is first necessary to examine the principle of attribution. As a body corporate can only act through human agents, the application of the *ex turpi causa* principle to a body corporate necessitates identifying the relevant corporate actor whose mental act can be attributed to the company. In *Bilta (UK) Ltd*¹²⁶⁷

U Lord Sumption considered that the “question of what persons are to be so far identified with a company that their state of mind will be attributed to it does not admit of a single answer”.¹²⁶⁸ In *Bilta (UK) Ltd* the Supreme Court had to address the principle of attribution whereby the criminal or wrongful acts of directors could be attributed to the company. A company through its liquidators brought an action against its directors and other parties for losses caused by a carousel fraud carried out by the company as a consequence of which it was placed in liquidation on the petition of HMRC for non-payment of VAT. The company claimed successfully that the defendants were accountable as constructive trustees for their knowing assistance in the diversion of the VAT. The defendants had sought to strike out the company’s claim on the grounds that it was bound to fail because the directors’ dishonest and criminal conduct was to be attributed to the company and the doctrine of *ex turpi causa* precluded the company from relying on its own illegality. The Chancellor dismissed the application to strike out, this was upheld by the Court of Appeal which in turn was upheld by the Supreme Court. Although all of the Justices were in agreement as to outcome, it is very difficult to extract a ratio from this case as there was a division between its members on a number of central issues, as was pointed out by Lord Neuberger.¹²⁶⁹ All agreed that where the company

was a victim of fraud or wrongdoing by its directors or of which directors had knowledge the acts or knowledge would not be attributed to the company as a defence in an action against directors. This “breach of duty” exception to the principle of attribution is not limited to fraud but can apply to knowledge of a breach that falls short of dishonesty.¹²⁷⁰ There was, however, disagreement as to the legal basis on which this outcome was based.

“Rules of attribution”

- 18-213 The fundamental question is “whose act or knowledge or state of mind is *for the purpose* of the relevant rule to count as the act, knowledge or state of mind of the company?”¹²⁷¹ *Meridian Global Funds Management Asia Ltd v Securities Commission*¹²⁷² has been described as the leading modern case on the issue of attribution.¹²⁷³ Lord Hoffmann formulated a tripartite classification of the “rules of attribution”. These were: (i) the primary rules of attribution derived from company’s constitution typically its articles, (ii) general rules of attribution which are equally available to natural persons, the rules of agency, and (iii) exceptional cases when a rule of law, either expressly or by implication excludes attribution on the basis of the general principles or vicarious liability.¹²⁷⁴ The most common situation where a special rule is needed is where in the case of a statute the legislature has not spelled out any rule of attribution and the court has to fill the lacuna¹²⁷⁵ or is dealing not with some statutory provision but with, for example, the general maxim *ex turpi causa non oritur action*.¹²⁷⁶

No question of piercing the corporate veil

- 18-214 Lord Sumption stated that it “cannot be emphasised too strongly” that attribution in both the civil and criminal context does not involve piercing the corporate veil; “the law treats the company as thinking through its agents just as it acts through them”.¹²⁷⁷ It is difficult to understand why the principle of piercing was at all relevant as in piercing the corporate veil the individual is made liable whereas in attribution the individual’s acts are attributed to the company, it is the company that is liable.¹²⁷⁸

Attribution context-specific

18-215



It is important to note the significance of the fact that the rules of attribution are context specific. The courts have to determine whose “state of mind is *for the purpose* of the relevant rule” to be attributed to the company.¹²⁷⁹ Normally attribution involves senior management or the directors but it is dependent on the context and the courts have imputed the conduct of an ordinary employee to a company, the conduct of an assistant transport manager and his assistant where the context was considered to require it.¹²⁸⁰ The “directing organ” of the company may have delegated the entire conduct of the company’s affairs to a particular agent or delegated a particular function.¹²⁸¹ The importance of context and purpose is central to the reasoning of the court in *Bilta (UK) Ltd*. It involved an action by the company against the wrong-doing directors and the court reasoned that in this situation it is “self-evidently impossible that the officer should be able to argue that the company either committed or knew about the breach”¹²⁸² simply because he knew about it. An agent is not “entitled to attribute his own dishonesty to the company for the purpose of giving himself immunity from the ordinary consequences of his breach of duty.”¹²⁸³

U The court also disapproved the reasoning of the Court of Appeal in *Safeway Stores Ltd v Twigger*¹²⁸⁴ but considered there may be public policy justifying the decision, though expressing no views on its merits.¹²⁸⁵ In an action against the director for loss or liability in transactions with a third party it must be possible for the company to invoke the principle of attribution, “attribution can be disclaimed for one purpose but invoked for another”.¹²⁸⁶

The Stone & Rolls case ¹²⁸⁷

18-216 In *Moore Stephens (a firm) v Stone & Rolls Ltd*¹²⁸⁸ the House of Lords in a three-to-two majority held that the ex turpi causa principle is applicable to companies and prevented a claim for damages for negligence by a company against its auditors: the fraud of the dominant director and shareholder should be attributed to the company so that the company itself was fraudulent and therefore deprived by the ex turpi principle of a contractual remedy. This raises the question of how the necessary wrongful intent, is necessary for the operation of the ex turpi causa principle, can be formed by the company. This is done by the doctrine of attribution which was the central issue in *Stone & Rolls*. It is difficult to state the precise ratio of *Stone & Rolls*, “commentators and practitioners have found the case difficult”.¹²⁸⁹ In *Bilta (UK) Ltd* Lord Mance said that he did “not propose to say very much about the case”.¹²⁹⁰ He considered that the court must have regarded that the context has some relevance to attribution and noted that Lord Walker had “now explicitly withdrawn from the position that attribution operates independently of context”.¹²⁹¹ The reference to Lord Walker is to his judgment in *Moulin Global Eyecare Trading Ltd v The Commissioner of Inland Revenue*¹²⁹² where he considered that the statement in *Stone & Rolls* that the:

“... fraud exception as being of general application, regardless of the nature of the proceedings as being wrong as the exception had a more limited scope.”¹²⁹³

Lord Mance also agreed with Lord Neuberger that he could not endorse Lord Sumption’s suggestion¹²⁹⁴ that *Stone & Rolls* established “an apparently general and context unspecific distinction between personal and vicarious liability as central to the application of the illegality defence”.¹²⁹⁵ He also disagreed with Lord Sumption that “the illegality defence is only available to a company where it is “directly as opposed to vicariously responsible for the illegality”.¹²⁹⁶ Lords Toulson and Hodge considered *Stone & Rolls* “a much debated and criticised case”, in which “the judges were divided three to two, and different reasons were given by the majority”.¹²⁹⁷ After analysing the judgments in *Stone & Rolls* at length, Lords Toulson and Hodge stated¹²⁹⁸:

“We conclude that *Stone & Rolls* should be regarded as a case which has no majority ratio decidendi. It stands as authority for the point which it decided, namely that on the facts of that case no claim lay against the auditors, but nothing more.”

This endorses the view of the Law Commission that “It is difficult to anticipate what precedent, if any, *Stone & Rolls* will set regarding the illegality defence”.¹²⁹⁹

- 18-217 Lord Neuberger considered it difficult to derive a “reliable principle” from *Stone & Rolls* and gave by way of example the decision in *Bilta (UK) Ltd* where “Lord Sumption and Lords Toulson and Hodge have reached rather different conclusions as to the effect of the majority judgments”.¹³⁰⁰ He cited Lord Denning¹³⁰¹ to the effect that the judgment should be “put on one side ... marked” not to be looked at again”.¹³⁰² Lord Neuberger could not agree with Lord Sumption:

“... that the illegality defence is only available where the company is directly, as opposed to vicariously, responsible for the illegality can be derived from *Stone & Rolls* (whether or not the proposition is correct in law, which I would leave entirely open, although I see its attraction).”¹³⁰³

The principles of attribution are not affected by the judgment in *Patel v Mirza*¹³⁰⁴ as there will still need to be a determination of whether the wrongful act should be attributed to the company.

Attribution and the “one-man” company¹³⁰⁵

- 18-218

The issue of whether there was a special rule with respect to the doctrine of attribution in the context of the one-man company was addressed in *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd*.¹³⁰⁶ Singularis was a Cayman registered company. AS was its sole shareholder, a director, its chairman, president and treasurer. There were six directors who played a passive role in the management of the company. It was argued that “Singularis was effectively a one-man company” and AS “its controlling mind and will ...”.¹³⁰⁷ Daiwa provided loan financing to Singularis to purchase shares. The shares were sold, the loan was repaid and Daiwa left holding a sum in excess of US\$200 for Singularis. AS, who was authorised to do so, arranged for Singularis to instruct Daiwa to make various payments which the court found constituted a misappropriation of Singularis’ funds. Before the lower courts a number of issues arose¹³⁰⁸ but on appeal there were only two issues: (i) could the actions of AS be attributed to the company and (ii), if so attributable, was the claim defeated by the defence of illegality. On the facts in *Singularis v Daiwa* the court at first instance¹³⁰⁹ had found that “Singularis was not a one-man company in the sense that the phrase was used in *Stone & Rolls*¹³¹⁰ and *Bilta*¹³¹¹”.¹³¹² However, even if it had been a one-man company the court considered “that there is no principle that in any proceedings where the company is suing a third party for breach of duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man”.¹³¹³ Whether such conduct is attributable “is always to be found in consideration of the context and the purpose for which attribution is relevant”.¹³¹⁴ With this as the “guiding principle” the court considered that “*Stone & Rolls* can finally be laid to rest”.¹³¹⁵ The Supreme Court also agreed with the trial judge that even if AS’s actions were attributable to the company, the company’s claim should not fail because of illegality: to deny it would not enhance the purposes of the prohibitions of breach of fiduciary obligations and making false statements, would not be in the public interest and would be an unfair and disproportionate response.¹³¹⁶

Footnotes

1267 [2015] UKSC 23, [2016] A.C. 1 at [67].

1268 [2015] UKSC 23 at [67].

1269 [2015] UKSC 23 at [12].

1270 [2015] UKSC 23 at [71].

1271 [2015] UKSC 23 at [41] (italics in original).

1272 [1995] 2 A.C. 500 (hereafter *Meridian*).

1273 *Bilta (UK) Ltd* [2015] UKSC 23 at [67]. See also Lord Walker in *Moulin Global Eyecare Trading Ltd v The Commissioner of Inland Revenue* [2014] HKPCA 22 at 77 who considered that “*Meridian* is now rightly regarded as the leading case on the topic of attribution in company law”, (hereafter *Global Eyecare*); *Singularis Holdings Ltd v Daiwa Capital Markets Ltd* [2017] EWHC 257 (Ch) at [208]–[215].

1274 [1995] 2 A.C. 500 at 508.

- 1275 *Global Eyecare* [2014] HKPCA 22 at [78].
1276 [2014] HKPCA 22 at [78]. The court gave as an example *Stone & Rolls Ltd v Moore Stephens (a firm)* [2009] 1 A.C. 1391.
1277 *Bilta (UK) Ltd* [2015] UKSC 23 at [65].
1278 There may of course be an action for breach of warranty of authority by the individual acting for the company.
1279 *Bilta (UK) Ltd* [2015] UKSC 23 at [4].
1280 *Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd* [1973] 1 W.L.R. 828; *Bilta (UK) Ltd* [2016] A.C. 1 at [46].
1281 *Bilta (UK) Ltd* [2015] UKSC 23 at [67].
1282 *Bilta (UK) Ltd* [2015] UKSC 23 at [42].
1283 *Bilta (UK) Ltd* [2015] UKSC 23 at [64]. See also *Crown Prosecution Service v Aquila Advisory Ltd* [2021] UKSC 49, [2021] 1 W.L.R. 5666 (a case involving a proprietary claim by the company to profits made by the directors) at [59]; it makes no difference that the company was intended to or did make a profit from the directors' breaches (at [71]–[75]. Thus the company was not acting illegally and the illegality defence does not apply; the *Bilta* decision remains good law after *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 (at [60] and [78]–[79]).
- 1284 [2010] EWCA Civ 1472, [2011] 2 All E.R. 841.
1285 *Bilta (UK) Ltd* [2015] UKSC 23 at [162].
1286 *Bilta (UK) Ltd* [2015] UKSC 23 at [43].
1287 But see para.18-218 for the Supreme Court's view that “*Stone & Rolls* can finally be laid to rest”: *Singularis Holdings (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2019] 3 W.L.R. 997 at [34].
1288 [2009] UKHL 39, [2009] 1 A.C. 39 (hereafter *Stone & Rolls*).
1289 *Bilta (UK) Ltd* [2015] UKSC 23 at [15].
1290 *Bilta (UK) Ltd* [2015] UKSC 23 at [46].
1291 *Bilta (UK) Ltd* [2015] UKSC 23 at [46].
1292 [2014] HKCFA 22.
1293 [2014] HKFCA 22 at [101].
1294 *Bilta (UK) Ltd* [2015] UKSC 23 at [46]. Lord Sumption's suggestion can be found at [79] and [80].
1295 *Bilta (UK) Ltd* [2015] UKSC 23 at [48].
1296 *Bilta (UK) Ltd* [2015] UKSC 23 at [50].
1297 *Bilta (UK) Ltd* [2015] UKSC 23 at [134].
1298 *Bilta (UK) Ltd* [2015] UKSC 23 at [154].
1299 *Bilta (UK) Ltd* [2015] UKSC 23 at [153].
1300 *Bilta (UK) Ltd* [2015] UKSC 23 at [23].
1301 *Bilta (UK) Ltd* [2015] UKSC 23 at [29].
1302 *Re King* [1963] Ch. 459 at 483 (this was in another context).
1303 *Bilta (UK) Ltd* [2015] UKSC 23 at [29].
1304 [2016] UKSC 42, [2017] A.C. 467. See above, paras 18-025 et seq.

- 1305 “It has become the fashion to call companies of this class ‘one-man companies’. This
is a taking nickname but it does not help one much in the way of argument”: per Lord
Macnaghten in *Salomon v Salomon & Co Ltd [1897] A.C. 22*, 53.
- 1306 [2019] UKSC 50, [2019] 3 W.L.R. 997. Baroness Hale gave the judgment of the court.
- 1307 [2019] UKSC 50 at [26].
- 1308 [2019] UKSC 50 at [7]–[9].
- 1309 [2017] EWHC 257 (Ch), [2017] 1 B.C.L.C. 625.
- 1310 *Moore Stephens (a firm) v Stone & Rolls Ltd [2009] UKHL 39, [2009] 1 A.C. 39*; see
above, para.18-216.
- 1311 *Jetivia SA v Bilta (UK) Ltd (reported sub nom. Bilta (UK) Ltd v Nazir (No.2)) [2015]*
UKSC 23, [2016] A.C. 1; see above, para.18-212.
- 1312 [2019] UKSC 50 at [33].
- 1313 [2019] UKSC 50 at [34].
- 1314 [2019] UKSC 50 at [34], citing *Bilta (UK) Ltd (In Liquidation) v Nazir (No.2) [2015]*
UKSC 23, [2016] A.C. 1.
- 1315 [2019] UKSC 50 at [34].
- 1316 [2019] UKSC 50 at [16]–[21].

(a) - The Maxim Ex Turpi Causa Non Oritur Actio and Related Rules

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Volume I - General Principles

Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 7. - Enforcement of Collateral, Proprietary and Restitutionary Rights ¹³¹⁷

(a) - The Maxim Ex Turpi Causa Non Oritur Actio and Related Rules

Ex turpi causa

- 18-219 Contracts will in many situations be associated with illegal acts, for example, a loan contract where the parties had agreed that one of them would use the borrowed money to trade in shares on the basis of inside information, something which was illegal.

¹³¹⁸

- U Where this occurs, the contract as such is not illegal but is associated with a transaction that is. The illegality principle also applies to claims in retribution and tort. ¹³¹⁹

Ex turpi causa and criminal acts

- 18-220 As was noted by Lord Toulson in his judgment in *Patel v Mirza*,
¹³²⁰

U in *Gray v Thames Trains Ltd*

1321

U Lord Hoffmann considered that there was a wider and narrower version of the ex turpi maxim. Its narrower form is:

“... that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully enforced on you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage.”

Its wider form is that a person “cannot recover compensation for loss which [he] have suffered in consequence of his own criminal act”.

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U Lord Hoffmann favoured the wider form.

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U In that case, the plaintiff, who as a result of a railway accident suffered post-traumatic shock stress disorder which led him to kill someone, as part of his claim for negligence against the train operator, sought to recover damages for his loss of earnings arising from his detention in prison and in a hospital for the mentally ill. The narrower version would prevent him from so doing. He also claimed damages for feelings of guilt and remorse consequent on the killing and sought an indemnity against any claims which might be brought against him by dependants of the man he had killed. These further claims were not the consequence of the imprisonment but nonetheless they were rejected on the wider principle.

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U The ex turpi causa principle would also preclude a wrongdoer from enforcing an indemnity agreement to recover fines and costs imposed for breach of the law.

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U This, however, would not extend to the costs of a wrongdoer defending himself against a criminal charge, for example, a lorry driver defending himself against a charge of dangerous driving.

1326

U *Gray v Thames Trains Ltd*

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U was an action in tort, but: (i) it was cited as authority in *Patel v Mirza*

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U in connection with a claim in restitution; and (ii) the court in *Henderson v Dorset Healthcare University NHS Foundation Trust*

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U considered that:

“*Patel* concerned a claim in unjust enrichment, but there is little doubt that it was intended to provide guidance as to the proper approach to the common law illegality defence across civil law more generally.”

Tainting

- 18-221 The maxim ex turpi causa non oritur actio is also applied to the case of an apparently innocent contract which is nevertheless vitiated by the illegality of another contract to which it is merely collateral—the illegality of the latter tainting the former.¹³³⁰ Thus in *Spector v Ageda*¹³³¹ the plaintiff loaned money to the defendant to repay a loan which had been made by a third party to the defendant and which was an illegal moneylending transaction. The plaintiff knew that her loan was to be used to pay off the illegal loan and the issue which squarely faced the court was, Megarry J stated¹³³²:

“... whether a loan knowingly¹³³³ made in order to discharge an existing loan that was wholly or partially illegal was itself tainted with illegality.”

He answered the question in the affirmative; the second transaction was tainted by the illegality of the first and was accordingly unenforceable. A bribe will taint a contract and make it unenforceable.¹³³⁴ It is not necessary to show an actual bribe and “an attempted civil law bribe” will suffice; bribery involves serious moral turpitude and the “moral turpitude involved on the part of the briber is much the same in the case of an attempted bribe as it is in the case of an actual bribe”.¹³³⁵

- 18-222 Analogous to the principle of tainting is the situation where an illegal contract involves a statutory entitlement which would apply to the contract had it been legal. The following are examples of this: (a) the claimant, a foreign national, who is not entitled to work in the United Kingdom, uses forged documents to obtain employment and alleges racial discrimination against his employer¹³³⁶; (b) an employee employed under an illegal contract (no tax or NIC deducted) alleges sexual discrimination¹³³⁷; and (c) the claimant hires a motorcycle for courier work by presenting false documentation and is injured because of the negligent failure to maintain the motorcycle in a roadworthy condition.¹³³⁸ As a matter of principle, unless the concurrent action, e.g. the statutory claim or the claim in tort, directly relies upon and seeks to enforce the illegal contract, there is no reason why the claimant’s rights should not be enforceable. Where the cause of action is not

causally linked with the contract, the illegality of the contract will not constitute a bar to the transaction.¹³³⁹ A contract is not necessarily illegal because one of the parties to it is also a party to an illegal contract which is remotely connected to the first. Thus a policy for insurance on goods will not be illegal because in the course of acquiring the goods the insured had committed a violation of foreign revenue law.¹³⁴⁰

Limits to the maxim

18-223 The limits of the ex turpi causa maxim were set out in case law that pre-dated *Patel v Mirza*¹³⁴¹ but it would not be affected by that decision as there are examples of situations where it was held that the illegality doctrine did not apply and there is nothing in *Patel v Mirza* that could be taken to extend the illegality doctrine. It is not sufficient, in order to bring the claimant within the maxim, that he should merely be obliged to give evidence of an illegal contract as part of his case, as for instance where the illegal purpose has not been carried out; for the rule normally applies only where the action is founded upon the illegal contract, and is brought to enforce it.¹³⁴² Thus a claimant is entitled to be compensated for his loss of earnings even though he had in the past failed to disclose them to the Inland Revenue.¹³⁴³ In *Euro-Diam Ltd v Bathurst*,¹³⁴⁴ Kerr LJ held that the ex turpi causa defence must be “approached pragmatically and with caution”. He considered that the defence would not succeed where “some reprehensible conduct on [the claimant’s] part is disclosed in the course of the proceedings” but the claimant does not have to found his claim on any illegal act.¹³⁴⁵ In *Houna v Allen*¹³⁴⁶ an illegal immigrant who could not legally work in the UK brought proceedings before the employment tribunal for unlawful discrimination in connection with her dismissal from employment.¹³⁴⁷ Such discrimination is a statutory tort.¹³⁴⁸ An appeal against the Court of Appeal’s reversal of the Tribunal’s decision in her favour on the grounds of the illegality of the contract of employment was allowed by the Supreme Court. The Court of Appeal considered that the illegality of the contract of employment formed a material part of the claimant’s case and therefore to enforce it would condone the illegality. Lord Wilson, with whom two of the Justices agreed, considered that if the test applicable to the defence of illegality in the case was that of an inextricable link and stated that “I, for one, albeit conscious of the inherent subjectivity in ... so saying, would hold the link to be absent”, referring to the illegality of her entry to the UK as “no more than background facts”.¹³⁴⁹ He also considered that there were no public policy grounds for applying the illegality defence, in fact quite the opposite, to apply the defence could encourage employers to enter into illegal contracts in the belief that they could discriminate with impunity. Lord Wilson considered that before the principle of illegality applied to “bar a civil claim, and particularly one in tort, there must be a sufficiently close connection between the illegality and the claim made”¹³⁵⁰ and this connection was not present.¹³⁵¹ Where property has passed to a party,¹³⁵² his proprietary rights therein will be recognised and enforced notwithstanding that his purpose in taking the transfer was objectionable,¹³⁵³ or that the transfer was otherwise made in pursuance of a contract which on grounds of public policy could not have

been enforced.¹³⁵⁴ There is authority which suggests that “merely committing an offence of strict liability is not enough to engage the ex turpi causa rule”.¹³⁵⁵ Although dishonesty is not required, what matters is the claimant’s knowledge of the nature of the offence at the relevant time.¹³⁵⁶

Benefits resulting from crime

- 18-224 Closely akin to the maxim ex turpi causa non oritur actio is the rule that neither a party nor his representative is permitted to found rights upon his deliberate commission of a crime:

“It is clear ... that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.”¹³⁵⁷

The rule only makes unenforceable rights to money or property to which, but for the crime, the plaintiff would have had no right or title¹³⁵⁸; it does not apply where the right on which the plaintiff relies would no less have come into existence when it did, even had the plaintiff committed no crime.¹³⁵⁹ And it has been said that:

“... in these days there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems, afford no moral justification to a court to apply the maxim¹³⁶⁰.”

“... in each case it is not the label which the law applies to the crime ... but the nature of the crime itself which in the end will dictate whether public policy demands the court to drive the applicant from the seat of justice.”¹³⁶¹

The court has held that there may be exceptional cases where criminal or quasi criminal acts will not constitute turpitude for the purpose of the illegality defence.¹³⁶² Such a case would be where the offence in question is too trivial to engage the defence.¹³⁶³

Rights resulting from victim’s death

- 18-225 Where a husband insured his life for the benefit of his wife, and his wife was convicted of murdering him, neither the wife nor her assigns could recover the insurance money. It was held,

however, that there was a resulting trust in favour of the murdered husband's estate, inasmuch as between his representatives and the insurers no question of public policy arose, and their rights were unaffected by the wife's crime.¹³⁶⁴ Similarly when a man insured the life of another for his own benefit and then murdered him for the sake of the insurance money, the murderer's representatives could not recover on the policy.¹³⁶⁵ The rule would also apply to a conviction for manslaughter.¹³⁶⁶ However, a special verdict that the accused is "not guilty by reason of insanity" is, for this purpose, equivalent to a simple acquittal.¹³⁶⁷

The Forfeiture Act 1982

¹⁸⁻²²⁶ The **Forfeiture Act 1982**,¹³⁶⁸ which started life as a private member's Bill, is intended to modify the public policy in cases such as *R. v Chief National Insurance Commissioner*¹³⁶⁹ where the court held that a wife who had killed her husband forfeited statutory entitlements accruing because of his death despite the fact that in the circumstances there was little moral blame attached to the wife's conduct. This Act vests in the court a discretion to modify the "forfeiture rule" which is defined in s.1(1) as:

"… the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of that killing."

Thus it only applies to benefits acquired by the person who does the killing and not to a situation where the estate of the deceased benefits.¹³⁷⁰ The court can modify the forfeiture rule in whole or in part¹³⁷¹ but only where it is satisfied that:

"… having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effects of the rule to be so modified in that case."¹³⁷²

The power to modify the forfeiture rule does not however apply "in the case of a person who stands convicted of murder".¹³⁷³ In circumstances where a person "stands convicted of an offence of which unlawful killing is an element" the Act contains its own limitation period and an order can only be made where proceedings are commenced within a period of three months commencing with the conviction. In the first reported case applying the Act¹³⁷⁴ a widow who had for many years been subjected to violent and unprovoked attacks by her husband accidentally shot him with his shotgun in circumstances where she feared another attack. She was convicted of manslaughter and given a non-custodial sentence. In these circumstances, given the relative lack of moral culpability on the part of the widow, Vinelott J held that the forfeiture rule should not operate and his decision was upheld on appeal. The Court of Appeal considered it appropriate for the court in exercising

its discretion under s.2(2) to take into consideration the widow's loyalty as a wife, the widow's mental distress at the time the accident occurred, the deceased's behaviour, and the deceased's own assessment of how the wife should be treated on his death.¹³⁷⁵ The Court of Appeal has also held that in exercising its discretion under s.2(2), it was wrong for the court to consider that it had to do justice as between the parties, rather it had to take into consideration all aspects of the case.¹³⁷⁶

Life insurance and suicide

- 18-227 Until 1961 one who committed suicide when sane was guilty of a crime, committing as it were murder on himself, and a claim by his personal representatives on a life policy effected by him could not be enforced since it was treated as equivalent to a claim by a murderer or his representative on a policy effected by the murderer on the life of the person murdered.¹³⁷⁷ Even before 1961, public policy was no bar to a claim on such a policy,¹³⁷⁸ by assignees for value, at any rate to the extent of their actual interest,¹³⁷⁹ or by the representatives of the deceased if he was insane at the time of his suicide. Section 1 of the Suicide Act 1961 abrogated the rule of law whereby it was a crime for a person to commit suicide and it is thought that public policy is no longer a bar to any claim resulting from the suicide of the assured. But there may still be a distinction between suicide when sane and when insane. In the case of insane suicide, in the absence of any special condition that the policy is to be avoided by suicide, the policy continues to be enforceable as under the old law. In the case of sane suicide, in the absence of any special condition, express or implied, that the policy shall not be avoided by suicide, policy moneys may still be irrecoverable by reason of the presumption¹³⁸⁰ that the promise to pay on the happening of a specified event does not apply where that event was deliberately caused by the assured.¹³⁸¹ Where, however, the policy contains a promise, express or implied, to pay in the event of suicide, there is no room for that presumption to operate.

Assured suffering death at the hands of the law

- 18-228 In *Amicable Society v Bolland*¹³⁸² where the assured was hanged for forgery, it was held that his assignees could not recover the sum for which his life was insured. The essential feature of the decision was that the court would not allow a claim in contract to be based on the contracting party's crime as a necessary constituent of the cause of action, even though an interval of time and circumstance separated the crime from the resulting death.¹³⁸³

Indemnity against liability resulting from commission of crime

18-229 An indemnity¹³⁸⁴ against civil¹³⁸⁵ or criminal,¹³⁸⁶ liability resulting from the deliberate commission of a crime by the person to be indemnified generally cannot be enforced by the criminal or his representatives, the reason being that, on grounds of public policy, either the indemnity is subject to an implied exclusion which operates against the criminal and his representatives or they are under a personal disability or ban which prevents their suing on it.¹³⁸⁷ Thus, in *Askey v Golden Wine Co Ltd*¹³⁸⁸ a wholesaler, through his own gross negligence, incurred a fine and costs as a result of breaches of the Food and Drugs Act and had to refund money to his retailers. Denning J held that it would be against public policy to permit him to recover his loss, by way of damages for conspiracy, from those responsible for the management of the company which supplied him with the goods and it is clear from the judgment that the learned judge would have held a claim against the company for damages for breach of contract in respect of such loss to be equally unenforceable. And in *Moore Stephens (a firm) v Stone & Rolls Ltd (In Liquidation)*¹³⁸⁹ the House of Lords held that a company which had been involved in obtaining payments under letters of credit by presenting to banks false documents in relation to fictitious commodity trading would not be entitled to recover damages from its auditors even if (which was not decided) the auditors were in breach of contract in failing to detect the frauds. But probably, as in the case of the closely related rule that a man may not benefit from his own crime, this rule does not apply to every breach of the criminal law¹³⁹⁰; indeed, it has been said that the courts' refusal to permit a person who has committed an anti-social act to assert a resultant right depends not only on the nature of the anti-social act but also on the nature of the right asserted.¹³⁹¹ Thus, for example, the rule does not apply to every breach of the criminal law. It does not apply, for example, to the innocent commission of an offence of strict liability.¹³⁹² It is also clear that policies of insurance relating to motor accidents are enforceable, so that a motorist who has to pay damages for negligence can recover an indemnity from his insurers; and this is so even though the negligence was so gross¹³⁹³ as to amount to manslaughter.¹³⁹⁴ Perhaps this is to be explained on the ground that here the act to be indemnified is one intended by the law that people should insure against,¹³⁹⁵ or that the social harm which would be caused by not enforcing such insurance rights outweighs the gravity of the anti-social act committed and the extent to which such acts will be encouraged by the enforcement of such rights.¹³⁹⁶ With these cases should be contrasted *Gray v Barr*¹³⁹⁷; a husband shot and killed his wife's lover; it was held by the Court of Appeal that the husband could not recover under an insurance policy (even if it covered the occurrence) the damages which he had had to pay to the lover's estate. The husband had caused the victim's death in the course of deliberately committing an unlawful and dangerous act (threatening the lover with a loaded shotgun) which in the opinion of the Court of Appeal amounted to the crime of manslaughter, and to allow persons to enforce indemnities against the consequences of their own acts of armed violence would clearly be contrary to public policy. There was no evidence in this case whether the husband could satisfy the judgment without obtaining payment from the insurance company. The failure of the court to

advert to this would indicate that it was not a relevant factor although the effect of the judgment might be to deprive an innocent party of compensation.

- 18-230 In *Cooke v Routledge*¹³⁹⁸ the Northern Ireland Court of Appeal held that a driver could recover under his insurance policy the cost of a replacement vehicle in circumstances where he had crashed his car while driving with an excess of alcohol in his blood for which he was not convicted. The insurance company argued that as a matter of public policy no such recovery should be permitted. The court rejected this argument on the grounds¹³⁹⁹:

“Insurance companies and insured persons need to be able to ascertain their respective rights with some degree of certainty. It would be impossible for either to know in what circumstances cover would be afforded under a motor policy. As [counsel for the appellant] asked rhetorically in his argument on behalf of the appellant, what level of consumption of alcohol would prevent recovery? What degree of reckless driving would lead to an exclusion of liability? If excessive speed were to disentitle an insured from enforcing the policy, what degree of excess over the permitted limit would do so? And what if the repair of the vehicle had been grossly neglected by the insured?”

The court considered it was of importance that cases, such as *Gray v Barr*,¹⁴⁰⁰ where a criminal act by the insured had precluded recovery, “concerned branches of insurance other than motor insurance”.¹⁴⁰¹

Indemnity against liability resulting from commission of tort

- 18-231 Where the act to be indemnified is not only a tort but also a crime, the position is that set out in the preceding paragraph. Where the act is a mere tort, the enforceability of an agreement to indemnify against liability resulting from its commission depends upon the nature of the act and the circumstances of its commission.¹⁴⁰² Thus a contract to indemnify a person against liability for an act which constitutes the tort of deceit is unenforceable.¹⁴⁰³ So also an agreement to indemnify a person against liability for the publication of what he knows to be a libel is unenforceable.¹⁴⁰⁴ But an indemnity against innocent publication of a libel is enforceable by virtue of the provisions of s.11 of the Defamation Act 1952 which enacts that an agreement for indemnifying any person against civil liability for libel in respect of the publication of any matter shall not be unlawful unless at the time of publication that person knows that the matter is defamatory, and does not reasonably believe that there is a good defence to any action brought upon it. And at common law, where, as a natural consequence of a breach of contract by one party, the other incurs liability for defamation, there is no rule of public policy which prevents the recovery by way of damages of

the loss suffered by the first party as a result of his tort, at any rate where the commission of the tort was not deliberate.¹⁴⁰⁵

Footnotes

1317 See *Williams* (1942) 8 *Camb. L.J.* 51; *Coote* (1972) 35 *M.L.R.* 38; *Merkin* (1981) 97 *L.Q.R.* 420.

1318 *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467.

1319 para.18-001 above.

1320 [2016] UKSC 42, [2017] A.C. 467 at [29].

1321 [2009] UKHL 33, [2009] 1 A.C. 1339.

1322 [2009] UKHL 33 at [29].

1323 [2009] UKHL 33 at [55].

1324 See also Lord Phillips at [7] and [19], Lord Scott at [56], Lord Rodger at [84] and Lord Brown at [103].

1325 *Coulson v News Group Newspapers Ltd* [2012] EWCA Civ 1547, [2013] I.R.L.R. 116.

1326 [2012] EWCA Civ 1547, [2013] I.R.L.R. 116 at [43]. Another example given was that of a journalist defending himself against a criminal charge arising out of the publication of allegedly obscene material. In *Cojanu v Essex Partnership University NHS Trust* [2022] EWHC 197 (QB) the crime for which the claimant had been imprisoned on remand was not linked to his claim for clinical negligence in failing to treat him while in prison.

1327 [2009] UKHL 33.

1328 [2016] UKSC 42, [2017] A.C. 467.

1329 [2020] UKSC 43, [2021] A.C. 563 at [76].

1330 *Fisher v Bridges* (1854) 3 El. & Bl. 642; *Geere v Mare* (1863) 2 Hurl. & C. 339; *Clay v Ray* (1864) 17 C.B.(N.S.) 188; *Taylor v Chester* (1869) L.R. 4 Q.B. 309; *Bigos v Bousted* [1951] 1 All E.R. 92; *Hall v Woolston Hall Leisure Ltd* [1998] I.C.R. 651. See also below, paras 18-252 et seq. on severance.

- 1331 [1973] Ch. 30; see also *Heald v O'Connor* [1971] 1 W.L.R. 497 involving the Companies Act 1948 s.54 (now replaced by Companies Act 2006 Pt 18 Ch.2); *Swan v Bank of Scotland* (1836) 10 Bli. (N.S.) 627; *Pye Ltd v B. G. Transport Service Ltd* [1966] 2 Lloyd's Rep. 300; *Geismar v Sun Alliance and London Insurance Ltd* [1978] Q.B. 383; *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1; *Saunders v Edwards* [1987] 1 W.L.R. 1116; *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch. 32, 53.
- 1332 *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch. 32, 44.
- 1333 From Megarry J's judgment it would appear that the party to the second transaction must actually know of the illegality or deliberately shut their eyes, and the mere fact that they ought to have known is not enough *Spector v Ageda* [1973] Ch. 30.
- 1334 *Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 (QB).
- 1335 *Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 at [92].
- 1336 *V v Addey & Stanhope School* [2004] EWCA Civ 1065, [2004] 4 All E.R. 1056 where the Court of Appeal (Civil Division) upheld the decision of the Employment Appeal Tribunal that illegality precluded the claimant from pursuing his racial discrimination claim. See also *Wheeler v Quality Deep Ltd* [2004] EWCA Civ 1085 where the lack of English and limited knowledge of tax and national insurance provisions were considered relevant in determining the extent to which the employee participated in an illegality.
- 1337 *Hall v Woolston Hall Leisure Ltd* [2001] 1 W.L.R. 225 (claimant could pursue claim as she was protected by a statutory tort and did not have to rely on the contract); *Hunt v Power Resources Ltd* [2004] All E.R. (D) 23 (Apr).
- 1338 *Flavis v Pauley* [2002] All E.R. (D) 436 (Oct) (matter referred to trial to determine whether defence of illegality was available). See also *Delaney v Pickett and Tradewise Insurance Services Ltd* [2011] EWCA Civ 1532 (a car passenger could sue a driver in tort where the car was being used in a joint venture to transport illegal drugs).
- 1339 *Hall v Woolston Hall Leisure Ltd* [2001] 1 W.L.R. 225; *Leighton v Michael* [1996] 1 I.R.L.R. 67; *Sweetman v Nathan* [2003] EWCA Civ 1115; *Sutton v Hutchinson* [2005] EWCA Civ 1773.
- 1340 *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1. See Treitel on The Law of Contract, 15th edn (2020) at 11-107.
- 1341 [2016] UKSC 42, [2017] A.C. 467.
- 1342 *Taylor v Bowers* (1876) 1 Q.B.D. 291, 295, 300; *Bowmakers Ltd v Barnet Instruments Ltd* [1945] K.B. 65; *Belvoir Finance Co Ltd v Stapleton* [1971] 1 Q.B. 210; *Euro-Diam Ltd v Bathurst* [1990] Q.B. 1. It may be, however, that the wrongful conduct is of such a nature (e.g. benefiting by means of a collateral transaction from a crime) that the court will refuse to enforce the tainted transaction: *Geismar v Sun Alliance and London Insurance Ltd* [1978] Q.B. 383; *Hall v Woolston Hall Leisure Ltd* [2001] 1 W.L.R. 225. This case dealt with the application of the maxim to a claimant seeking a remedy for the statutory tort under the Sex Discrimination Act 1975 but the contract cases are discussed. See also The Illegality Defence In Tort (Law Commission, Consultation Paper No.160); *Hewison v Meridian Shipping Pte* [2002] EWCA Civ 1821, [2002] All

- E.R. (D) 146; *Soutzos v Asombang* [2011] EWHC 1582 (Ch); *Lilly Icos LLC v 8pm Chemists Ltd* [2009] EWHC 1905 (Ch).
- 1343 *Hewison v Meridian Shipping Services Pte Ltd* [2002] EWCA Civ 1821, [2003] I.C.R. 766 at [36].
- 1344 [1990] 1 Q.B. 1. Although the “affront to the public conscience” test adopted by Kerr LJ in *Euro-Diam Ltd v Bathurst* for determining the effect of illegality was rejected by the House of Lords in *Tinsley v Milligan* [1994] 1 A.C. 340, it is submitted that this aspect of his judgment remains good law. See below, paras 18-226, 18-232.
- 1345 *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1, 35–36.
- 1346 See also *R. (on the application of Best) v Chief Land Registrar* [2015] EWCA Civ 17 [2014] 1 W.L.R. 2889.
- 1347 [2014] UKSC 47, [2014] 1 W.L.R. 2889. The discrimination was allegedly contrary to Race Relations Act 1976 s.4(2) and is a statutory tort: see [2014] 1 W.L.R. 2889 at [25].
- 1348 [2014] 1 W.L.R. 2889 at [25].
- 1349 *Hounga v Allen* [2014] 1 W.L.R. 2889 at [40]. Two other justices agreed with him, Lord Kerr and Baroness Hale.
- 1350 *Hounga v Allen* [2014] 1 W.L.R. 2889 at [55].
- 1351 *Hounga v Allen* [2014] 1 W.L.R. 2889 at [59].
- 1352 See below, para.18-234.
- 1353 *Feret v Hill* (1854) 15 C.B. 207; *Ayerst v Jenkins* (1873) L.R. 16 Eq. 275, 283, 284; *Alexander v Rayson* [1936] 1 K.B. 169, 184; *Edler v Auerbach* [1950] 1 K.B. 359, 373; cf. *Greenwood v Bishop of London* (1814) 5 Taunt. 727, 746; *Mason v Clarke* [1954] 1 Q.B. 460 (reversed on the facts on this point [1955] A.C. 778).
- 1354 See below, para.18-234.
- 1355 *Les Laboratoires Servier v Apotex Inc* [2011] EWHC 730 (Pat) at [81].
- 1356 *Les Laboratoires Servier v Apotex Inc* [2011] EWHC 730 (Pat) at [81].
- 1357 *In the Estate of Crippen* [1911] P. 108, 112; *Re Giles* [1972] Ch. 544; *Geismar v Sun Alliance and London Insurance Ltd* [1978] Q.B. 383. cf. *Gray v Barr* [1971] 2 Q.B. 554; *Pitts v Hunt* [1991] 1 Q.B. 24; *Charlton v Fisher* [2001] EWCA Civ 112, [2001] 1 All E.R. (Comm) 769; *Dubai Aluminium Co Ltd v Salaam* [2000] 3 W.L.R. 910.
- 1358 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267, 292. It also applies where a person who is injured by his accomplice in crime sues the accomplice or his estate in tort: *Pitts v Hunt* [1991] 1 Q.B. 24. See also *Thorne v Silverleaf* [1994] 1 B.C.L.C. 637, 645.
- 1359 *Marles v Philip Trant & Sons Ltd* [1954] 1 Q.B. 29.
- 1360 per Lord Wright MR in *Beresford v Royal Insurance Co Ltd* [1937] 2 K.B. 197, 220 (*affirmed* [1938] A.C. 586); *Marles v Philip Trant Sons Ltd* [1954] 1 Q.B. 29, 37; cf. *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267, 292.
- 1361 *R. v Chief National Insurance Commissioner* [1981] Q.B. 758, 765. See also *Thorne v Silverleaf* [1994] 1 B.C.L.C. 637.
- 1362 *Les Laboratoires Servier v Apotex* [2014] UKSC 55, [2015] A.C. 430 at [29].
- 1363 [2014] UKSC 55 at [29].

- 1364 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, per Fry LJ at 159 (making it clear, however, that the murderer should never benefit). Where the deceased and the killer held property as joint tenants, the forfeiture rule in all probability operates to “sever the joint tenancy in the proceeds of sale and in the rent and profits until sale” a result which can be achieved by treating the “beneficial interests as vesting in the deceased and survivors as tenants in common”: per Vinelott J in *Re K. (Deceased)* [1985] Ch. 85, 100H (the judgment of Vinelott J was upheld on appeal [1986] Ch. 180). *Prince of Wales, etc., Association Co v Palmer* (1858) 25 Beav. 605.
- 1365 *In the Estate of Hall* [1914] P. 1; *Re Giles* [1972] Ch. 544 (manslaughter by reason of diminished responsibility); cf. above, para.18-224 (note); *R. v Chief National Insurance Commissioner* [1981] Q.B. 758 (wife convicted of manslaughter not entitled to widow’s allowance under s.24(1) of the Social Security Act 1975. This Act was repealed by the Social Security (Consequential Provisions) Act 1992).
- 1366 *Re Houghton* [1915] 2 Ch. 173, relating to the old verdict of “guilty, but insane” under s.2 of the Trial of Lunatics Act 1883, which is now repealed by s.1 of the Criminal Procedure (Insanity) Act 1964.
- 1367 See (1983) 46 M.L.R. 62; *Cretney* (1990) 10 O.J.L.S. 289.
- 1368 *[1981] Q.B. 758.*
- 1369 See, e.g. *Beresford v Royal Insurance Co Ltd* [1937] 2 K.B. 197, CA.
- 1370 Forfeiture Act 1982 s.5.
- 1371 s.2(2).
- 1372 s.5.
- 1373 *Re K* [1985] Ch. 85, [1986] Ch. 180, CA. See also *Re Royse* [1985] Ch. 22; *Re S. (Deceased)* [1996] 1 W.L.R. 235; *Dunbar v Plant* [1997] 4 All E.R. 289 (in this case Phillips LJ disapproved of the approach of the judge in *Re S.* [1996] 1 W.L.R. 235, 387). The court’s discretion was not to be limited by the principles of the Inheritance (Provision for Family and Dependents) Act 1975.
- 1374 *Dunbar v Plant* [1997] 4 All E.R. 289, 302–303, 312–313.
- 1375 *Horn v Anglo-Australian, etc., Life Assurance Co* (1861) 30 L.J. Ch. 511; *Beresford v Royal Insurance Co Ltd* [1937] 2 K.B. 197, [1938] A.C. 586.
- 1376 As to the possibility of a claim by the deceased’s personal representatives for return of the premiums, see *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267, 293. *Beresford v Royal Insurance Co Ltd* [1938] A.C. 586, 600; *Moore v Woolsey* (1854) 4 E. & B. 243.
- 1377 See MacGillivray on Insurance Law, 13th edn (2015), para.14-036.
- 1378 Thus under the old law, though claims by assignees for value were not barred by public policy, enforcement of such claims depended upon the insurance policy containing a promise to pay, either generally, or to assignees for value (*White v British Empire Mutual Life Insurance Co of New York* (1868) L.R. 7 Eq. 394; *Rowett Leakey & Co v Scottish Provident Institution* [1927] 1 Ch. 55; *Royal London Mutual Insurance Society Ltd v Barrett* [1928] Ch. 411), in the event of sane suicide. (1830) 2 Dow. & Cl. 1, where, however, the assignees were volunteers.
- 1379 *Beresford v Royal Insurance Co* [1937] 2 K.B. 197, 213; affirmed [1938] A.C. 586.

- 1384 As to the right of contribution as between joint tortfeasors, see *Civil Liability Contribution Act 1978*. See also para.18-234.
- 1385 *Haseldine v Hosken [1933] 1 K.B. 822* (indemnity against solicitor's civil liability for champerty held unenforceable): but see now below, para.18-231.
- 1386 *Colburn v Patmore (1834) 1 Cr. M. & R. 73*; *Fitzgerald v Leonard (1893) 32 L.R.Ir. 675*. cf. *Geismar v Sun Alliance and London Insurance Ltd [1978] Q.B. 838*.
- 1387 *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 760, 765*; *Charlton v Fisher [2001] EWCA Civ 112, [2001] 1 All E.R. (Comm) 769*.
- 1388 [1948] 2 All E.R. 35.
- 1389 [2009] UKHL 39, [2009] 1 A.C. 1391. It was held that the acts of the sole owner of the company were attributable to it: see above, paras 18-017—18-020, 18-212—18-213. cf. *R. v Chief National Insurance Commissioner [1981] Q.B. 758, 765*, per Lord Lane CJ.
- 1391 *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 767–768*.
- 1392 *Gregory v Ford [1951] 1 All E.R. 121*; *Osman v J. Ralph Moss Ltd [1970] 1 Lloyd's Rep. 313*.
- 1393 As to the distinction between negligence and intention in such cases, see *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745*. The *Hardy* case was approved by the House of Lords in *Gardner v Moore [1984] A.C. 548* where an uninsured driver had deliberately driven his car at the plaintiff for which he was convicted.
- 1394 *Tinline v White Cross Insurance Association Ltd [1921] 3 K.B. 327*; *James v British & General Insurance Co Ltd [1972] 2 K.B. 311*; compare *Crage v Fry (1903) 67 J.P. 240*; *Cointat v Mynham & Son [1913] 2 K.B. 220*; reversed on a different point (1914) 30 T.L.R. 282; *R. Leslie Ltd v Reliable Advertising, etc., Agency Ltd [1915] 1 K.B. 652*; *Simon v Pawsons & Leaf's Ltd (1932) 38 Com. Cas. 151*, with *Fitzgerald v Leonard (1893) 32 L.R.Ir. 675* and *Askey v Golden Wine Co Ltd [1948] 2 All E.R. 35*.
- 1395 per Greer LJ in *Haseldine v Hosken [1933] 1 K.B. 822, 838*; and see the difference of opinion between Denning and Hodson LJJ in *Marles v Philip Trant & Sons Ltd [1954] 1 Q.B. 29, 39–40* and 44.
- 1396 *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 768*. In *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 769*, Diplock LJ considered that an assured who had discharged his liability to the victim would not be able to enforce his contractual right to indemnity against the insurance company where the damages were connected with an intentional criminal act; cf. the case of insurance by employers which covers liability for breach of the Factories Act, where under the law before the *Employers' Liability (Compulsory Insurance) Act 1969* the explanation put forward in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*, would not have applied but which had never been suggested to be unenforceable, however gross the employer's negligence.
- 1397 [1971] 2 Q.B. 554.
- 1398 [1998] N.I.L.R. 174.
- 1399 *Cooke v Routledge [1998] N.I.L.R. 174, 185f–g*, per Carswell LCJ.
- 1400 [1971] 2 Q.B. 554.

- 1401 *Cooke v Routledge [1998] N.I.L.R. 174, 186h–g.*
- 1402 See the dicta in *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 767–770*. cf. *Adamson v Jarvis (1827) 4 Bing. 66; Betts & Drewe v Gibbins (1834) 2 A. & E. 57; Lister v Romford Ice & Cold Storage Co Ltd [1957] A.C. 555*; in all of which indemnities have been enforced.
- 1403 *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 Q.B. 621.*
- 1404 *Smith v Clinton (1908) 99 L.T. 840.*
- 1405 *Bradstreets British Ltd v Mitchell and Carapanayoti & Co Ltd [1933] Ch. 190; Daily Mirror Newspapers Ltd v Exclusive News Agency (1937) 81 S.J. 924; K. v P. [1993] Ch. 140* (in an action against the defendant for conspiracy to defraud, the ex turpi causa maxim did not preclude the defendant from serving a contribution notice on a third party).

(b) - Collateral Transactions

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Chapter 18 - Illegality and Public Policy

Section 7. - Enforcement of Collateral, Proprietary and Restitutionary Rights ¹³¹⁷

(b) - Collateral Transactions

Alternative cause of action

- 18-232 Although the ex turpi causa principle precludes a plaintiff from being able directly to enforce an illegal contract, it does not prevent him from enforcing causes of action which are collateral to the contract. By this means the courts have to some extent mitigated the severity of the illegality doctrine. In *Strongman Ltd v Sincock*¹⁴⁰⁶ the plaintiff carried out building work for which it did not possess the appropriate licence and thus was unable to bring an action on the contract for the work done. However, the defendant (an architect) had assured the plaintiff that he would obtain the necessary licence and the court held that this gave rise to a collateral contract on which the plaintiff could maintain an action. An action may also lie in fraud as occurred in *Shelley v Paddock*¹⁴⁰⁷ where the plaintiff was induced to enter into an illegal contract for the sale of a house in Spain by the fraud of the defendant. Also, where the circumstances are appropriate, there is no reason why a plaintiff should not recover damages for negligent misrepresentation. It was once thought that it was essential for the plaintiff to show that he was ignorant of the illegality.¹⁴⁰⁸ This was a point emphasised in both *Strongman Ltd v Sincock*¹⁴⁰⁹ and *Shelley v Paddock*.¹⁴¹⁰ However, in *Saunders v Edwards*¹⁴¹¹ the court allowed a plaintiff, who was a knowing party to an illegal contract, to recover damages for the fraud of the defendant. The plaintiff had purchased a flat from the defendant. The purchase price contained an inflated figure for fixtures and fittings which reduced the stamp duty payable by the plaintiff. Despite the fact that the court found that the plaintiff's conduct was tainted by the illegality connected with the evasion of stamp duty, the court allowed the plaintiff to recover damages for the fraud of the defendant in misrepresenting the

extent of the property being sold. The court held that the “relative moral culpability” of the parties could be taken into consideration in deciding whether the plaintiff should be given a remedy which did not involve the enforcement of the contract.¹⁴¹² As the moral culpability of the defendant greatly outweighed that of the plaintiff in the *Saunders* case, the court allowed the plaintiff to recover. In the light of the House of Lords disapproval in *Tinsley v Milligan*¹⁴¹³ of the approach of the court in the *Saunders* case, it is no longer proper to carry out a balancing exercise as to the relative culpability of the parties. However, the decision in *Saunders v Edwards*¹⁴¹⁴ can possibly be explained on the grounds that the plaintiff had “an unassailable claim for damages for fraud which did not involve any reliance on the contract of sale itself”.¹⁴¹⁵ Also, where services are rendered under a contract which is intended to be performed in an illegal manner, or which is illegal at its inception, a quantum meruit claim will not lie.¹⁴¹⁶ Such a claim would circumvent the public policy underlying the making of a contract illegal. Assets transferred for a specific purpose so as to give rise to a *Quistclose* trust¹⁴¹⁷ which arose out of a transfer connected with an illegal contract would also not be recoverable.¹⁴¹⁸

Footnotes

1317 See *Williams* (1942) 8 Camb. L.J. 51; *Coote* (1972) 35 M.L.R. 38; *Merkin* (1981) 97 L.Q.R. 420.

1406 [1955] 2 Q.B. 525.

1407 [1980] Q.B. 348 (Brandon LJ, had serious doubts but he reluctantly agreed with the majority). It is also important to note that in *Shelley v Paddock* the fraud did not relate to the legality of the transaction, that is, the sale of the house: see (1978) 94 L.Q.R. 484. See also *Burrows v Rhodes* [1899] 1 Q.B. 816; *Dott v Brickwell* (1906) 23 T.L.R. 61; *Archbolds (Freightage) Ltd v S. Spanglett Ltd* [1961] 1 Q.B. 374, 392–393; *Southern Industrial Trust Ltd v Brooke House Motors Ltd* (1968) 112 S.J. 798.

1408 It was considered that if the plaintiff had knowledge of the illegality he would be in pari delicto with the defendant and thus unable to obtain the assistance of the court.

1409 [1955] 2 Q.B. 525, 536–537. Denning LJ in that case also thought it important that the plaintiff was not negligent with respect to determining the existence of the illegality. cf. the degree of knowledge required where a contract is allegedly tainted with the illegality of some other transaction: above, para.18-221 (note).

1410 [1980] Q.B. 348, 357.

1411 [1987] 1 W.L.R. 1116; see also *Mitsubishi Corp v Alafouzos* [1988] 1 F.T.L.R. 47; *Hughes v Clewley (The “Siben”) (No.2)* [1996] 1 Lloyd’s Rep. 35.

1412 It was on this basis that the court distinguished *Alexander v Rayson* [1936] 1 K.B. 169. The court left open the issue of what would have happened had the defendant refused to complete and the plaintiff had sued for specific performance or damages (at 1125C). The court also considered that the dictum of Lindley LJ in *Scott v Brown, Doering*,

McNab & Co [1892] 2 Q.B. 724, 729 could not be applied literally in every situation (at 1127).

1413 [1994] 1 A.C. 340, [1993] 3 W.L.R. 126.

1414 [1987] 1 W.L.R. 1116.

¹⁴¹⁵ *Tinsley v Milligan [1994] 1 A.C. 340, 360*. On this reasoning, the point left open by the judge would be answered in the negative.

1416 *Taylor v Bhail* [1996] C.L.C. 377 (cost of repairs inflated to defraud insurers). In *AL Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402 at [11], the reasoning in *Taylor v Bhail* was considered to apply to cases where the contract was illegal as formed but not to a case where there was illegality in the performance of the contract unless the contract was made for the purpose of doing an unlawful act.

¹⁴¹⁷ *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567.*

¹⁴¹⁸ *Patel v Mirza [2013] EWHC 1892 (Ch).*

(c) - Recovery of Property Transferred for Illegal Purpose or Under Illegal Contracts

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(c) - Recovery of Property Transferred for Illegal Purpose or Under Illegal Contracts ¹⁴¹⁹

Restitution of property transferred for an illegal purpose

- 18-233 The decision in *Patel v Mirza* ¹⁴²⁰ has changed the law governing the recovery of property that was transferred for an illegal purpose or under a contract that is unenforceable because of illegality in a fundamental way. ¹⁴²¹

Transfer of property under illegal transactions ¹⁴²²

- 18-234 When property has been delivered in pursuance of an illegal agreement ¹⁴²³ and there is subsequently a dispute about the property between the transferor and the transferee, the question often arises whether the court should give effect to the transferee's interest ¹⁴²⁴ or disregard it and enforce the transferor's original rights. The fact that by reason of illegality the transferee could not have enforced the agreement under which the transfer was made does not necessarily mean that delivery to him of property thereunder will not pass to him the property or the interest in question. Thus where goods are delivered in pursuance of an illegal contract of sale, the property in them passes to the purchaser who will be entitled to damages against anyone, including the vendor, who

thereafter wrongfully deprives him of those goods.¹⁴²⁵ Where a person takes a lease of property intending to use it for an immoral purpose, he acquires an interest under the executed lease despite the intention to use the property for an immoral purpose.¹⁴²⁶ It is now clear that property may pass under an illegal sale, although the goods have not been delivered to the buyer,¹⁴²⁷ so that the buyer may obtain rights against a *third* person. But it would not appear that a buyer to whom property in goods has passed under an illegal contract can claim them, or damages for their conversion, from a *seller* who has never delivered them at all. Such a claim would not differ in substance from a claim for the delivery, or for damages for the non-delivery, of the goods under the illegal contract and its success would defeat the policy of the rule against the enforcement of such a contract.¹⁴²⁸ However, once property or an interest in property passes to an illegal transferee “he has all the remedies available to him as a valid holder of that property interest” and this “applies both in relation to the illegal transferor and to third parties”.¹⁴²⁹ Statutes may avoid not only the agreement in pursuance of which a transfer is made¹⁴³⁰ but also the transfer itself so that the transferor can rely on his original title and recover the property from the transferee to whom, because of the statute, no property passed and who therefore cannot set up any interest in the property by way of defence to the claim.¹⁴³¹

Determination of limited interests created by illegal transactions

- 18-235 Where the interest created by an illegal transaction was by the provisions of the transaction limited for a term, after the expiry of that term the transferor can probably recover the property. Thus, the owner of a house let to a prostitute could no doubt recover possession by ejectment at the end of the term, though he would be precluded from recovering rent if he knew the purpose to which it was intended to put the premises.¹⁴³² Whether an owner could recover possession for non-payment of rent (assuming the lease provides for this) where, for example, he knowingly rents premises for the purposes of prostitution is more problematical. It is difficult to see how the owner could recover without relying on the lease and accordingly he would be denied the assistance of the court. It has been argued that as the lease is illegal neither party can rely on it so that the tenant is a tenant at will and the owner can thereupon take steps to terminate the lease.¹⁴³³ Although creative as a solution to the problem, it ignores the fact that illegal contracts can operate to transfer title and presumably any other proprietary interest. Accordingly, the tenant would acquire a limited interest under the lease and it would appear that the owner would therefore be unable to recover possession until the limited property interest of the tenant comes to an end.¹⁴³⁴ On the other hand, money or property may be paid or transferred by way of security for the performance of an illegal act which is not performed; in such cases it was thought that a claim to recover the money or property, on the ground of the non-performance of the act for which payment was made, would fail. For had the money or property been paid or transferred outright by way of payment a claim based on a total failure of consideration would have failed.¹⁴³⁵ Great difficulties arise however in the case where the property has been bailed under a contract which is illegal by common law or statute.

- 18-236 In *Bowmakers Ltd v Barnet Instruments Ltd*¹⁴³⁶ the Court of Appeal formulated the rule to be applied in cases of bailment of chattels thus:

“In our opinion a man’s right to possess his own chattels will as a general rule be enforced as against one who, without any claim or right, is detaining them or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels came into the defendant’s possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek and is not forced either to found his claim on the illegal contract or to plead its illegality in order to support his claim.”

In that case, illegal bailments of machinery under hire-purchase agreements were assumed to have been terminated, in some cases by the sale of the machinery by the bailees, and, in one other case, by their refusal to deliver the machinery up to the plaintiffs on demand. The bailments having been terminated, the plaintiffs were held entitled to rely on their proprietary interests in the machinery, and accordingly recovered damages for conversion.¹⁴³⁷ The principal difficulty in the case arises with regard to the implicit finding that the latter bailment was terminated by the defendant bailees’ refusal to deliver up the machinery on demand. If it were always possible for a bailor to terminate an illegal bailment on breach of its terms by the bailee, merely by demanding the return of the property bailed, little would be left of the general rule of non-recovery so far as bailments are concerned.¹⁴³⁸ It has been argued that the hire-purchase agreement in *Bowmakers Ltd v Barnet Instruments Ltd* probably contained a cesser clause making the agreement determine on the failure of the hirer to pay instalments and thus the owner was entitled to recover the machinery which was still in the possession of the defendants.¹⁴³⁹ There may also be special cases where a person is not entitled to recover property although his title to it is clear. An example of this type of case was given by Du Parcq LJ, in *Bowmakers Ltd v Barnet Instruments Ltd*¹⁴⁴⁰ as occurring where the owner of obscene books attempts to recover them, and a similar result has been suggested where the owner of a weapon to be used to commit a serious crime tries to recover it.¹⁴⁴¹

Equitable interests

- 18-237 In *Patel v Mirza* the Supreme Court rejected the reasoning in *Tinsley v Milligan* which had formulated the “reliance principle” as the basis for determining the effect of illegal contracts. In *Tinsley v Milligan*¹⁴⁴² the plaintiff and the defendant contributed to the purchase of a house which was placed in the sole name of the plaintiff for the purpose of enabling the defendant to make fraudulent claims on the Department of Social Security. The plaintiff and defendant

quarrelled and the plaintiff, having moved out of the house, commenced proceedings asserting ownership of the whole of the house. The defendant successfully counterclaimed for, inter alia, an order that the plaintiff held the house on trust in equal shares for the defendant and plaintiff. The House of Lords reasoned that the fact that the arrangement involved an illegality did not prevent an equitable interest from arising¹⁴⁴³ and, since the fusion of law and equity, the principle in *Bowmakers* extended to equitable interests. As all that the defendant was seeking was recovery of an equitable proprietary interest which arose under a resulting trust, she could recover it without having to rely on the illegality. The majority of the House in *Tinsley v Milligan*¹⁴⁴⁴ also rejected the argument that the “clean hands” maxim in equity precluded the plaintiff from recovering on the grounds of title. Although collateral rights, as in *Tinsley v Milligan*,¹⁴⁴⁵ may arise out of an illegal contract, a collateral right normally involves a proprietary right and does not include a right of action on the contract itself.¹⁴⁴⁶ The reasoning in *Tinsley v Milligan*¹⁴⁴⁷ was applied in *O'Kelly v Davies*¹⁴⁴⁸ where title to the family home was transferred solely to the female partner to enable her to claim benefits as though she was a single woman living alone. The Court of Appeal upheld the decision of the trial judge that the male partner could establish a proprietary interest by the parties’ course of dealing in relation the property, including respective contributions to the purchase by means of mortgage repayments,¹⁴⁴⁹ and there was accordingly no need to have recourse to the unlawful purpose of the arrangement. *Tinsley v Milligan*¹⁴⁵⁰ has been held to be an authority for the proposition that if “title could be asserted without reliance on the illegality, the defendant could not rely on the illegality to defeat the title”.

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U It is important to note that *Tinsley v Milligan*¹⁴⁵² is exclusively about title and not the enforcement of illegal contracts, and does not “endorse … a claim to title, where the title is dependent upon the enforceability of the illegal transaction”.¹⁴⁵³ Title can also pass under an illegal contract.¹⁴⁵⁴

18-238 The approach in *Tinsley v Milligan*, depending as it does on proprietary concepts, was not followed in the important decision of the High Court of Australia, *Nelson v Nelson*.¹⁴⁵⁵ It is not possible to do justice to the subtlety and scholarship of this judgment. *Nelson v Nelson* involved a contract designed to acquire for the transferor of property under the contract a statutory benefit to which she would not have been entitled had the transfer not been effected. Thus it was a situation on all fours with *Tinsley v Milligan*. Rather than adopt the proprietary based reasoning of *Tinsley v Milligan*, the approach of the High Court was to determine whether the statutory rule which rendered the contract illegal precluded relief and the court held that it did not. The court cited with approval the views of an American author to the effect:

“… if illegality consists of the violation of a statute, courts will give or refuse relief depending upon the fundamental purpose of the statute.”¹⁴⁵⁶

The majority also held that in granting relief the court could do it on terms; such a power enables the harshness of the illegality doctrine to be tempered in appropriate circumstances.

- 18-239 The *Bowmakers* principle can, as with the illegality doctrine in general, operate in a capricious way. The capriciousness of its operation was trenchantly criticised in the Australian Higher Court decision, *Nelson v Nelson*¹⁴⁵⁷:

“The *Bowmakers* rule has no regard to the legal and equitable rights of the parties, the merits of the case, the effect of the transaction in undermining the policy of the relevant legislation or the question whether the sanctions imposed by the legislation sufficiently protect the purpose of the legislation. Regard is had only to the procedural issue; and it is that issue and not the policy of the legislation or the merits of the parties which determines the outcome. Basing the grant of legal remedies on an essentially procedural criterion which has nothing to do with the equitable positions of the parties or the policy of the legislation is unsatisfactory, particularly when implementing a doctrine that is founded on public policy.”

Rejection of the reliance principle

- 18-240 As explained earlier,¹⁴⁵⁸ in *Patel v Mirza*¹⁴⁵⁹ the majority rejected the reliance principle as the basis of illegality. Nonetheless their Lordships were unanimous that on the facts of *Tinsley v Milligan*, the claimant should be permitted to enforce her equitable interest. Lord Neuberger considered that:

“... it would have been disproportionate to have refused to enforce Miss Milligan’s equitable interest in the relevant property on grounds of the illegal activity.”

Lord Toulson agreed; he considered that it:

“... would have been disproportionate to have prevented her from enforcing her equitable interest in the property and conversely to have left Miss Tinsley unjustly enriched.”¹⁴⁶⁰

Also, as Lord Mance pointed out, as the court in *Tinsley v Milligan* was reversing rather than enforcing the illegal transaction it could therefore “take into account both the objective fact of joint contributions and the parties’ actual and by itself, legal purpose of joint ownership”.¹⁴⁶¹

Footnotes

- 1317 See *Williams* (1942) 8 *Camb. L.J.* 51; *Coote* (1972) 35 *M.L.R.* 38; *Merkin* (1981) 97 *L.Q.R.* 420.
- 1419 The approach in this section follows that of Peel (ed.), Treitel on The Law of Contract, 12th edn (2007), pp.541–565. See also Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), Ch.25; Burrows, The Law of Restitution, 3rd edn (2010), pp.595–598.
- 1420 [2016] UKSC 42. See Strauss, “*The Diminishing Power of the Defendant: Illegality After Patel v Mirza*” [2016] R.L.R. 145; Burrows, A New Dawn for the Law of Illegality, Oxford Legal Studies Research Paper No.42 (2017). See above, paras 18-028 —18-029.
- 1421 See paras 18-043 et seq. where this case is analysed.
- 1422 See *Higgins* (1962) 25 *M.L.R.* 149; *Grodecki* (1955) 71 *L.Q.R.* 254.
- 1423 cf. below, para.18-235.
- 1424 The transferor cannot claim to have retained the beneficial interest where, in order to establish the trust in his favour, he must rely on the illegal purpose of the transfer: *Palaniappa Chettiar v Aranasalam Chettiar* [1962] A.C. 294.
- 1425 *Singh v Ali* [1960] A.C. 167. And see *Taylor v Chester* (1869) L.R. 4 Q.B. 309; *Tinsley v Milligan* [1994] 1 A.C. 340, 374, per Lord Browne-Wilkinson: “the effect of illegality is not to prevent a proprietary interest in equity from arising or to produce a forfeiture of such right: the effect is to render the equitable interest unenforceable in certain circumstances”. The court will not enforce a claim by a person claiming funds held by a person in the position of trustee (in this case a solicitor) where the claimant has to rely on his fraud: see *Halley v Law Society* [2003] EWCA Civ 97.
- 1426 *Feret v Hill* (1854) 15 C.B. 207.
- 1427 *Belvoir Finance Co Ltd v Stapleton* [1971] 1 Q.B. 210; cf. *Kingsley v Sterling Industrial Securities* [1967] 2 Q.B. 747, 783.
- 1428 Peel (ed.), Treitel on The Law of Contract, 14th edn (2015), pp.623–624.
- 1429 *Stoffel & Co v Grondona* [2018] EWCA Civ 2031 at [33].
- 1430 See above, para.18-207.
- 1431 *Amar Singh v Kulubya* [1964] A.C. 142.
- 1432 *Jajbhay v Cassim* (1939) A.D. 537, 557 (S. Africa); *Alexander v Rayson* [1936] 1 K.B. 169, 186–187.
- 1433 *Munro v Morrison* [1980] V.R. 83.
- 1434 See *Jajbhay v Cassim* (1939) A.D. 537.
- 1435 Contrast *Milner v Staffordshire Congregational Union Inc* [1956] Ch. 275, where the contract was statutorily unlawful only in the sense of being void and a deposit was therefore recoverable. And see *South Western Mineral Water Co Ltd v Ashmore* [1967] 1 W.L.R. 1110; below, para.18-248.

- 1436 [1945] K.B. 65, 71; applied in *Singh v Ali* [1960] A.C. 167 and also in *Belvoir Finance Co Ltd v Harold G. Cole & Co Ltd* [1969] 1 W.L.R. 1877; *Tinsley v Milligan* [1993] 3 W.L.R. 126.
- 1437 But if the action for conversion is statute-barred and the only cause of action is under the illegal bailment, the action will fail: *Thomas Brown & Sons v Fazal Deen* (1962) 108 C.L.R. 391 (Australia).
- 1438 Contrast *Bigos v Bousted* [1951] 1 All E.R. 92; *Archbolds (Freightage) Ltd v S. Spanglett Ltd* [1961] 1 Q.B. 374, 384. And see *Hamson* (1949) 10 Camb. L.J. 249; Paton, *Bailment in the Common Law* (1972), pp.34–36; *Coote* (1972) 35 M.L.R. 38.
- 1439 See Peel (ed.), *Treitel on The Law of Contract*, 14th edn (2015), pp.617–618.
- 1440 [1945] K.B. 65, 72.
- 1441 *Treitel* at p.623. See, however, Lord Goff's terrorist example in *Tinsley v Milligan* [1994] 1 A.C. 340, 362. See also *Webb v Chief Constable of Merseyside Police* [2000] 1 All E.R. 209, 22 (person could not recover, on the basis of title, controlled drugs seized by the police); *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 3 All E.R. 150.
- 1442 [1994] 1 A.C. 340. See also *Sansom v Gardner* [2009] EWHC 3369 (QB).
- 1443 *Tinsley v Milligan* [1994] 1 A.C. 340, 373–374.
- 1444 [1994] 1 A.C. 340 (Lord Keith and Lord Goff dissenting). All of the law lords disapproved of the approach of the courts in *Thackwell v Barclays Bank Plc* [1986] 1 All E.R. 676; *Saunders v Edwards* [1987] 1 W.L.R. 1116; and *Euro-Diam Ltd v Bathurst* [1990] Q.B. 1 which had been followed by the majority of the Court of Appeal in *Tinsley v Milligan*. See also *Davies v O'Kelly* [2015] 1 W.L.R. 2725 at [20].
- 1445 [1994] 1 A.C. 340.
- 1446 *Mahonia Ltd v JP Morgan Chase Bank* [2003] 2 Lloyd's Rep. 911 at [27]. See also *Mahonia Ltd v West LB AG* [2004] EWHC 1938 (Comm).
- 1447 [1994] 1 A.C. 340.
- 1448 [2015] 1 W.L.R. 2725.
- 1449 [2015] 1 W.L.R. 2725 at [29].
- 1450 [1994] 1 A.C. 340.
- 1451 *Bilta (UK) Ltd* [2015] UKSC 23, [2016] A.C. 1 at [138].
- 1452 [1994] 1 A.C. 340.
- 1453 *Shah v Greening* [2016] EWHC 548 (Ch) at [61].
- 1454 [2015] UKSC 23 at [138].
- 1455 (1995) 132 A.L.R. 133.
- 1456 *Nelson v Nelson* (1995) 132 A.L.R. 133, 149.
- 1457 (1995) 132 A.L.R. 133, 190.
- 1458 See above, paras 18-030 et seq.
- 1459 [2016] UKSC 42 at [181].
- 1460 [2016] UKSC 42 at [112]. See also Lord Neuberger [2016] UKSC 42 at [164]: decision in “*Tinsley* ... is generally thought to be unsatisfactory”, Lord Neuberger endorsed the judgment of Lord Toulson: [2016] UKSC 42 at [181].

1461 [2016] *UKSC* 42 at [201].

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(d) - Claims for Restitution of Benefits Transferred Under Illegal Contract

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Volume I - General Principles

Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 7. - Enforcement of Collateral, Proprietary and Restitutionary Rights ¹³¹⁷

(d) - Claims for Restitution of Benefits Transferred Under Illegal Contract

- 18-241 The decision in *Patel v Mirza*¹⁴⁶² has changed the law governing the restitution of benefits conferred under a contract that is unenforceable because of illegality in a fundamental way. It would normally permit the recovery of any money or restitution in respect of other benefits transferred under the contract. As Lord Toulson stated¹⁴⁶³:

“... 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.”

Lord Toulson, speaking for the majority, was here applying the factors-based approach¹⁴⁶⁴; but the minority also considered that restitution should be available, as explained earlier.¹⁴⁶⁵ In this section we consider claims for restitution; the recovery of property was considered in the previous section.

Quantum meruit

- 18-242



It seems that the restitutionary remedies available may include a quantum meruit for services rendered under the unenforceable contract. In *Patel v Mirza*¹⁴⁶⁶ Lord Toulson pointed out that the courts in *Hounga v Allen*¹⁴⁶⁷ did not consider whether the claimant was “entitled to be paid for the services she rendered on a quantum meruit”. Such a claim would be independent of the illegality and a strong argument can be made that it should be available. Lord Sumption, citing *Hounga v Allen*¹⁴⁶⁸ was of the opinion that “a claim for a quantum meruit for services performed” may well have been successful.

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Class-protecting statutes

18-243 Quite apart from the decision in *Patel v Mirza*,

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U which opens the way in most cases for the recovery of benefits conferred under a contract that is unenforceable because of illegality,

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U the action for money had and received would also lie where it is clear from the statute which prohibits the making of the contract or the doing of the act in question that the parties are not to be treated as in pari delicto. Thus, as Lord Mansfield said in *Browning v Morris*

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“But where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.”

The court will normally grant him relief without putting him on terms, as to impose terms as a condition precedent to the granting of relief would be virtually tantamount to enforcing the illegal contract.

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For example, the Rent Act 1977 contains provisions

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U entitling a tenant to recover money which he could not lawfully have been required to pay; and in a case decided under an earlier Act it was held that he could recover an illegal premium even though he was a willing party to a fraudulent scheme to evade the Act.

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U It used to be thought that the prevalence of such provisions had made the old class-protecting rules obsolete,

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U until their reaffirmation by the Privy Council in *Kiriri Cotton Co Ltd v Dewani*

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U : a tenant paid his landlord a premium for a flat; by accepting the premium, the landlord committed an offence under a Rent Restriction Ordinance which did not expressly say that such premiums could be recovered. Nonetheless the tenant was allowed to recover the premium under the old rules relating to class-protecting statutes.

Oppression and fraud

18-244

U Even before the decision in *Patel v Mirza*¹⁴⁷⁸ a person could recover money paid or property transferred under an illegal contract if he was forced by the other party to enter into the illegal contract. “Oppression” is here used in a somewhat broad sense. Thus in *Atkinson v Denby*¹⁴⁷⁹ the plaintiff was insolvent and offered to pay his creditors a dividend of 5s. in the pound. All the creditors were willing to accept the dividend in full settlement of their claims, except the defendants, who said he would only accept it if the plaintiff first paid him £50. The plaintiff did so, but was later allowed to recover the £50 on the ground that he had been forced to agree to defraud the other creditors.¹⁴⁸⁰ Similarly, recovery is possible if the party entered into the contract as a result of the other party’s fraudulent misrepresentation that the contract was lawful. Thus in *Hughes v Liverpool Victoria Legal Friendly Society*¹⁴⁸¹ the plaintiff effected a policy of insurance with the defendants on the life of a person in which he had no insurable interest. The contract was illegal,¹⁴⁸² but the plaintiff was able to recover the premiums he had paid as he had been induced to make the contract by the fraudulent representation of the defendants’ agent that the policy was valid. The decisive factor in these cases is the fraud of the defendant and not the innocence of the plaintiff, although if the plaintiff is not innocent there can be no recovery.¹⁴⁸³ The plaintiff would have failed if the representation that the policy was valid had been innocently made¹⁴⁸⁴; if, however, the misrepresentation is one of *fact* rather than law, and no bar to rescission has arisen, then the person who has been induced to enter the contract after the misrepresentation has been made, even *innocently*, would seem to have the right to rescind it and so recover his money or property.

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U However, as the result of *Patel v Mirza* this approach to the question of restitution appears to have been superseded. For example, in *Parkinson v College of Ambulance Ltd*¹⁴⁸⁶ the plaintiff had brought an unsuccessful action to recover money from a charity to which he had made a donation on the undertaking by the charity to secure a knighthood for the plaintiff. As Lord Toulson pointed out in *Patel v Mirza*, where the bribe had been made to a public body such as a political party or the holder of a public office, it might be regarded “as more repugnant to the public interest that the recipient should keep it than that it should be returned”.¹⁴⁸⁷ Lord Neuberger stated that he considered that, on the availability of a restitutive remedy, *Parkinson v College of Ambulance Ltd*¹⁴⁸⁸ had been “wrongly decided”.¹⁴⁸⁹

Mistake ¹⁴⁹⁰

18-245 Although in the light of *Patel v Mirza*¹⁴⁹¹ it may seldom be necessary to rely on it, there is some authority for the view that money can be recovered if it was paid under an excusable mistake of *fact* affecting the legality of the contract. In *Oom v Bruce*¹⁴⁹² the plaintiff as agent for the Russian owner of goods in Russia took out a policy of insurance with the defendant. Neither party knew (or could have known) that Russia had declared war on this country before the contract was made. It was held that the plaintiff could recover his premium as he was not guilty of any fault or blame in entering the illegal contract.

Locus poenitentiae: general

18-246 Another exception to the general rule of non-recovery of money paid or property transferred under an illegal contract arises out of the parties’ right to resile from such a contract while it is still executory and to recover anything already paid or transferred under the contract. But:

- (1)if the illegal purpose has been wholly or substantially effected; or
- (2)if the parties have merely been frustrated in their illegal purpose,

the law allows no locus poenitentiae. It would also appear that where the contract involves gross moral turpitude or criminality then this doctrine will not apply. There was much learning on the operation of this principle. There were two requirements of importance. The first requirement was that the principle would only apply where the illegal contract had not been substantially performed.¹⁴⁹³ The second requirement was that the reason for the plaintiff’s repudiation must be voluntary; the plaintiff must genuinely repent not merely seek recovery because the illegal purpose of the contract had been frustrated.¹⁴⁹⁴

Locus poenitentiae: transaction not carried into effect

18-247 In *Tribe v Tribe*,¹⁴⁹⁵ a father transferred to his son shares in a company in order to protect them against the possible claims of his creditors, the shares to be held by his son on trust for him until he had settled the claims. Eventually, he settled with his creditors and sought to recover the shares from his son who refused to re-transfer them. In *Tinsley v Milligan*¹⁴⁹⁶ the House of Lords had considered that its reasoning that the plaintiff could recover because she need not rely on the illegality would not apply to a situation where there was a presumption of advancement between the plaintiff and the defendant¹⁴⁹⁷ (in that the presumption would negative the resulting trust). On the facts of *Tribe v Tribe* this would have prevented the father's recovery but the court held that the father could recover his shares on a different ground. The court reasoned that provided the "illegal purpose has not been carried into effect in any way",¹⁴⁹⁸ the father could recover his shares on the grounds that he did not intend to confer the beneficial interest on the son and therefore the presumption of advancement would be successfully rebutted. On the facts of the case the court held that as the illegal purpose had not been carried into effect since no deception had been practised on the father's creditors, the father could recover the shares. This decision extends, in a way that is unacceptable, the principles on the right of withdrawal with respect to illegal contracts, in that it enables the transferor of property to recover it where the illegal purpose for which it was transferred in the first place is no longer needed to protect the transferor's interests.¹⁴⁹⁹ Millett LJ considered that the policy underlying the locus poenitentiae was the discouragement of fraud and therefore it necessarily also encouraged "withdrawal from a proposed fraud before it is implemented".¹⁵⁰⁰ However, Millett LJ recognised that in *Tribe v Tribe* recovery by the father would not be necessary to encourage withdrawal since the reason for the withdrawal was not a change of mind but simply that it was no longer needed.¹⁵⁰¹ This, rather than discouraging illegal contracts, produces the opposite effect since the transferor of property has nothing to lose and everything to gain by entering into the illegal transaction. The decision of the Supreme Court in *Patel v Mirza* that, where a contract is unenforceable because of illegality, restitution should normally be available, at least where the contract has not been fully executed, appears to endorse the outcome in *Tribe v Tribe*.

Locus poenitentiae: the new approach

18-248 Lord Toulson stated in *Patel v Mirza*¹⁵⁰² that it was "not necessary to discuss the question of locus poenitentiae" as the court was permitting the claimant to recover his consideration. He added that the principle had "only acquired importance because of the strictness of the basic rule" on the effect of illegality on the enforcement of contracts, and the fact that the courts had adopted the "wrong approach" to the effect of illegality on contracts.¹⁵⁰³ Lord Mance disagreed with the

view of Lord Toulson “that it is unnecessary to consider the scope of locus poenitentiae”.¹⁵⁰⁴ For Lord Mance¹⁵⁰⁵.

“The underlying concept behind locus poenitentiae is restitutionary. It recognises that neither an admission of nor reliance on illegality is a bar to relief involving a reversal of an illegal transaction. In the full restitutionary sense I have discussed, the concept must be seen as part of the overall principle governing illegality, and as the corollary of McLachlin’s¹⁵⁰⁶ limited rationalisation of the principle.”

Lord Sumption considered that the “notion of penitence” or “the voluntary character of the plaintiff’s withdrawal” were irrelevant when dealing with the consequences of an unenforceable illegal contract as the right of restitution follows from the “legal ineffectiveness of the contract”.¹⁵⁰⁷ Although the minority did not set out a definitive view on the principle of locus poenitentiae it is clear that money or property transferred under an illegal contract is recoverable provided such recovery is not against public policy.¹⁵⁰⁸

Marriage brokerage contracts

- 18-249 For historical reasons the general rule of non-recovery after substantial performance does not apply to marriage brokerage contracts. In such cases, equity had always allowed relief to the party dealing with the marriage broker owing to the jealousy with which contracts relating to marriage were regarded; and the common law courts adopted this equitable exception. In *Hermann v Charlesworth*,¹⁵⁰⁹ therefore, although the defendant had taken steps and incurred expense towards carrying out his part of a marriage brokerage contract, the plaintiff was allowed to recover back money she had paid thereunder.

Principal and agent

- 18-250 A principal can recover from his agent money which he has paid to the agent, albeit for a legally objectionable purpose, provided that he instructs the agent to return it to him before the agent has paid it over under the contract,¹⁵¹⁰ at any rate if the purpose was not grossly criminal or turpitudinous or if the principal still enjoyed a locus poenitentiae.¹⁵¹¹ Where money is received by an agent for his principal from a third party under an illegal contract it would seem that the principal may recover the money from the agent in an action for money had and received.¹⁵¹² Where the receipt of the money is itself illegal and part of an illegal transaction in which both the principal and the agent are concerned,¹⁵¹³ or the agency itself is otherwise illegal,¹⁵¹⁴ the

principal cannot recover the money from the agent; similarly in such a case in the absence of a locus poenitentiae,¹⁵¹⁵ the principal cannot recover from the agent money which he has paid to the agent for the purposes of the contract and which the agent has wrongfully appropriated to his own use.¹⁵¹⁶ Nor can a principal sue his agent for failure to perform a transaction which is, by common law or statute, void or otherwise unenforceable at the principal's suit.¹⁵¹⁷

Trustees and other fiduciaries

18-251

A trustee who misapplies trust funds for an illegal purpose would, on the principles stated above, be unable to recover the funds thus advanced. The cestuis que trust, however, where they do not know of, or acquiesce in, the illegal transaction effected by their trustee, appear to be in a better position than he is to recover the trust property which has been illegally advanced and is traceable in the hands of third parties who would, in the absence of illegality, be bound to restore such property. It is submitted that there is no reason of policy why the beneficiary, if innocent of any illegal purpose, should be precluded from recovering in a proprietary action, provided, of course, a proprietary base to the claim can be shown. In any case it is clear that an innocent beneficiary may bring an action in personam against the trustee claiming damages for breach of trust, notwithstanding the latter's unlawful purpose. Thus in *Selangor United Rubber Estates Ltd v Cradock (No.3)*¹⁵¹⁸ the plaintiff company, through its directors, lent money to various persons for the purpose of purchasing shares in itself, contrary to s.54 of the Companies Act 1948.

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U It was held that the company could claim damages¹⁵²⁰ against its directors for breach of their fiduciary duty to the company to apply its funds for authorised purposes only, and against its bankers both for breach of their duty as constructive trustees of the company's accounts and also in contract for negligence in the running of its financial affairs.

Footnotes

1317 See *Williams* (1942) 8 Camb. L.J. 51; *Coote* (1972) 35 M.L.R. 38; *Merkin* (1981) 97 L.Q.R. 420.

1462 [2016] UKSC 42. See *Strauss*, "The Diminishing Power of the Defendant: Illegality After *Patel v Mirza*" [2016] R.L.R. 145; *Burrows*, A New Dawn for the Law of Illegality, Oxford Legal Studies Research Paper No.42 (2017). See above, paras 18-028 —18-029.

1463 [2016] UKSC 42, [2017] A.C. 467 at [116].

1464 See above, para.18-029.

- 1465 See above, paras 18-040—18-042.
- 1466 [2016] UKSC 42, [2017] A.C. 467 at [74].
- 1467 [2014] UKSC 47, [2014] 1 W.L.R. 2889. Lord Neuberger considered that there was real room for debate that the principle was applicable: [2016] UKSC 42 at [180].
- 1468 [2014] UKSC 47, [2014] 1 W.L.R. 2889 at [243]. See paras 18-017—18-020 for analysis of *Hounga v Allen*.
- 1469 [2016] UKSC 42, [2017] A.C. 467 at [243].
- 1470 [2016] UKSC 42, [2017] A.C. 467.
- 1471 See above, para.18-233.
- 1472 (1778) 2 Cowp. 790; *Barclay v Pearson* [1893] 2 Ch. 154; *Bonnard v Dott* [1906] 1 Ch. 740. In *Lodge v National Union Investment Co* [1907] 1 Ch. 300 it was held that the borrower could not recover his securities unless he repaid the money lent to him; but this decision has been distinguished out of existence: *Chapman v Michaelson* [1908] 2 Ch. 612; [1909] 1 Ch. 238; *Cohen v J. Lester Ltd* [1939] 1 K.B. 504; *Kasumu v Baba-Egbe* [1956] A.C. 539; cf. *Barclay v Prospect Mortgages Ltd* [1974] 1 W.L.R. 837. See also now Financial Services and Markets Act 2000 ss.26–28A.
- 1473 *Kasumu v Baba-Egbe* [1956] A.C. 539.
- 1474 e.g. Rent Act 1977 ss.119–125; see, e.g. *Steele v McMahon* [1990] 44 E.G. 65; *Saleh v Robinson* [1988] 36 E.G. 180. See also Housing Act 1980 s.79; *Ailion v Spiekermann* [1976] Ch. 158 (illegal premium on assignment); *Farrell v Alexander* [1977] A.C. 59.
- 1475 *Gray v Southouse* [1949] 2 All E.R. 1019.
- 1476 See *Green v Portsmouth Stadium* [1953] 2 Q.B. 190; where the ratio now appears to be that the statute in question was passed, not to protect bookmakers, but to regulate racecourses.
- 1477 [1960] A.C. 192.
- 1478 [2016] UKSC 42, [2016] 1 W.L.R. 399; see above, para.18-233.
- 1479 (1862) 7 Hurl. & N. 934; cf. *Smith v Cuff* (1817) 6 M. & S. 169; *Davies v London & Provincial Marine Insurance Co* (1878) 8 Ch. D. 469; *Erwin v Snelgrove* [1927] 4 D.L.R. 1028.
- 1480 For a case where the “oppression” was caused by factors other than the other party’s conduct see *Kiriri Cotton Co Ltd v Dewani* [1960] A.C. 190, 205, per Lord Denning; contrast *Bigos v Bousted* [1951] 1 All E.R. 92 (illness of daughter not sufficient to excuse party in making unlawful foreign exchange transaction).
- 1481 [1916] 2 K.B. 482; *Reynell v Sprye* (1852) 1 De G.M. & G. 660.

- 1482 Life Assurance Act 1774 s.1.
- 1483 *Parkinson v College of Ambulance Ltd* [1925] 2 K.B. 1. In *Patel v Mirza* [2016] UKSC 42 at [150] Lord Neuberger stated: “I consider that this case was wrongly decided”.
- 1484 *Harse v Pearl Life Assurance Co* [1904] 1 K.B. 558.
- 1485 This was assumed in *Edler v Auerbach* [1950] 1 K.B. 359 where, however, a bar to rescission had arisen. See now Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.11-097.
- 1486 [1925] 2 K.B. 1.
- 1487 [2016] UKSC 42 at [118]; see also at [228].
- 1488 [1925] 2 K.B. 1.
- 1489 [2016] UKSC 42 at [150].
- 1490 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.11-098. On mistake of law see below, paras 32-049 et seq.
- 1491 [2016] UKSC 42, [2016] 1 W.L.R. 399; see above, para.18-233.
- 1492 (1810) 12 East 225.
- 1493 *Taylor v Bowers* (1876) 1 Q.B.D. 291; *Symes v Hughes* (1870) L.R. 9 Eq. 475; *Tribe v Tribe* [1996] Ch. 107.
- 1494 *Bigos v Bousted* [1951] 1 All E.R. 92; *Tribe v Tribe* [1996] Ch. 107. See also *Merkin* (1981) 97 L.Q.R. 420, 428–431.
- 1495 [1996] Ch. 107; *Collier v Collier* [2002] EWCA Civ 1095, [2002] B.P.I.R. 1057. “It is ... now accepted on all sides that, if *Collier v Collier* [2002] BPIR 1057 came before the courts today it would be decided differently”: *Patel v Mirza* [2016] UKSC 42 at [221], per Lord Clarke. This was not accepted by Lord Sumption who considered that if “*Collier v Collier* were to come before the courts today, the result should be the same ...”: *Patel v Mirza* [2016] UKSC 42 at [238]. See *Enonchong* [1996] R.L.R. 78.
- 1496 [1994] 1 A.C. 340. See *Enonchong* (1994) 14 O.J.L.S. 295.
- 1497 [1994] 1 A.C. 340, 372.
- 1498 *Tribe v Tribe* [1996] Ch. 107, 121, per Nourse LJ; see also 135, per Millett LJ.
- 1499 See *Rose* (1996) 112 L.Q.R. 386.
- 1500 *Tribe v Tribe* [1996] Ch. 107, 134.
- 1501 [1996] Ch. 107, 135.
- 1502 [2016] UKSC 42 at [116]. See also Lord Neuberger at [193].
- 1503 [2016] UKSC 42 at [116].
- 1504 [2016] UKSC 42 at [202].
- 1505 [2016] UKSC 42 at [202].
- 1506 This is a judgment of Chief Justice McLachlin in *Hall v Herbert* [1993] 2 S.C.R. 159: see [2016] UKSC 42 at [55]–[61].
- 1507 [2016] UKSC 42 at [252].
- 1508 See [2016] UKSC 42 at [110] where Lord Toulson considered it appropriate to refuse assistance where this would “assist the claimant in a drug trafficking operation”.
- 1509 [1905] 2 K.B. 123; and see *Roberts v Roberts* (1730) 3 P. Wms. 66, 75, 76; *Cole v Gibson* (1750) 1 Ves. Sen. 503. See also para.18-125.

- 1510 *Hampden v Walsh* (1876) 1 Q.B.D. 189; *Hastelow v Jackson* (1828) 8 B. & C. 221, 226; *Burge v Ashley & Smith Ltd* [1900] 1 Q.B. 744.
- 1511 *Bone v Eckless* (1860) 5 Hurl. & N. 925; *Tenant v Elliott* (1791) 1 Bos. & P. 3; *Farmer v Russell* (1798) 1 B. & P. 296. As to locus poenitentiae, see above, para.18-246.
- 1512 See *Sykes v Beadon* (1879) 11 Ch. D. 170, 194–195; and see *Bridger v Savage* (1885) 15 Q.B.D. 363; *De Mattos v Benjamin* (1894) 63 L.J. Q.B. 248; cf. *Rawlings v General Trading Corp* [1921] 1 K.B. 635, 642; *Hill v William Hill (Park Lane) Ltd* [1949] A.C. 530.
- 1513 *Nicholson v Gooch* (1856) 5 El. & Bl. 999, 1016; cf. *Jubilee Cotton Mills Ltd v Lewis* [1924] A.C. 958, 978.
- 1514 See *Harry Parker Ltd v Mason* [1940] 2 K.B. 590; *Kabel v Ronald Lyon Espanola SA* (1968) 208 E.G. 269. For criticisms of this requirement, see *Merkin* (1981) 97 L.Q.R. 420, 437–439.
- 1515 See above, para.18-246.
- 1516 Above paras 18-236, 18-237.
- 1517 *Cohen v Kittell* (1889) 22 Q.B.D. 680.
- 1518 *[1968] 1 W.L.R. 1555, 1652–1659.*
- 1519 The Companies Act 1948 s.54 was repealed by the Companies Act 1981 Sch.4. On the provision of financial assistance by a company for the purchase or subscription of its shares see *Companies Act 2006 Pt 18 Ch.2*. Subsequent to *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 W.L.R. 1555 the courts interpreted the Companies Act 1948 s.54, as being for the protection of the company, despite the fact that criminal sanctions can be imposed on the company for breach of the section (s.54(2)), and thus the company could bring an action to recover any money or property transferred under the section. See above, para.12-038; *Belmont Finance Ltd v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393; *Armour Hick Northern Ltd v Whitehouse* [1980] 1 W.L.R. 1520. See also *International Sales and Agencies Ltd v Marcus* [1982] 2 C.M.L.R. 46, 55.
- 1520 Breach of s.54 (see now *Companies Act 2006 Pt 18 Ch.2*) would give rise to an action for breach of trust against the directors and any person who assisted in that breach: *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 W.L.R. 1555; *Belmont Finance Corp Ltd v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393.

Section 8. - Severance

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume I - General Principles

Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 8. - Severance

Introductory

- 18-252 Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract¹⁵²¹ are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable. The question then arises whether the unobjectionable may be enforced and the objectionable disregarded or “severed”.¹⁵²² The same question arises in relation to bonds where the condition is partly against the law.¹⁵²³

Partial statutory invalidity

- 18-253 It was laid down in some of the older cases that there is a distinction between a deed or condition which is void in part by statute and one which is void in part at common law.¹⁵²⁴ This distinction must now be understood to apply only to cases where as a matter of construction the statute enacts that an agreement or deed made in violation of its provisions shall be wholly void.¹⁵²⁵ Unless that is so, then provided the good part is separable from and not dependent on the bad, that part only will be void which contravenes the provisions of the statute. The general rule is that:

“... where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.”¹⁵²⁶

Thus, a covenant in a lease that the tenant should pay “all parliamentary taxes”, only included such as he might lawfully pay, and a separate covenant to pay the landlord’s property tax, which it was illegal for a tenant to contract to pay, although void, did not affect the validity of the instrument.¹⁵²⁷ In some situations where there is a statutory requirement to obtain a licence for work above a stipulated financial limit but up to that limit no licence is required, the courts will enforce a contract up to that limit.¹⁵²⁸ There is some doubt whether this applies to a lump sum contract “for a single and indivisible work”.¹⁵²⁹ Even in this situation if the cost element can be divided into its legal and illegal components, the courts will enforce the former but not the latter.¹⁵³⁰

General principles

¹⁸⁻²⁵⁴ Prior to the Supreme Court decision in *Egon Zehnder Ltd v Tillman*

¹⁵³¹

U there was great difficulty in reconciling authorities on the application of the doctrine of severance, but some order has now been given in the *Tillman* decision to the principles on which severance will be ordered. In *Tillman* the employee Ms Tillman entered into a non-competition covenant whereby she agreed that she would not “directly or indirectly engage or be concerned or interested in any business” carried on by her employer company or group company. The court was willing to sever the words “or interested” and thus validate the remainder of the contract.

¹⁵³²

U As regards severance in employment contracts Lord Wilson, delivering the judgment of the Supreme Court, considered that the “courts must continue to adopt a cautious approach to the severance of post-employment restraints”.

¹⁵³³

U After an exhaustive review of the cases dealing with severance, the court considered it necessary to analyse three criteria for severance previously endorsed in *Beckett Investment Management Group Ltd v Hall*.

¹⁵³⁴

U It is proposed to deal with these principles in order.

The blue pencil test

¹⁸⁻²⁵⁵

U

The first requirement for severance to operate is that “the unenforceable provision is capable of being removed without the necessity of adding or modifying the wording of what remains”.¹⁵³⁵ As the court pointed out in *Tillman*, this “blue-pencil” test can work capriciously, as was pointed out by Bailhache J in *Attwood v Lamont*¹⁵³⁶:

“... a covenant ‘not to carry on business in Birmingham or within 100 miles’ may be severed so as to reduce the area to Birmingham, but a covenant ‘not to carry on business within 100 miles of Birmingham’ will not be severed so as to read ‘will not carry on business in Birmingham’. The distinction seems to be artificial, but I think settled.”

Lord Wilson agreed: “the distinction is indeed settled”.¹⁵³⁷

Remaining terms supported by adequate consideration

- 18-256 The second requirement for severance is that “the remaining terms continue to be supported by adequate consideration”.¹⁵³⁸ The Supreme Court pointed out that where

“... it was the claimant employee who secured severance of the unreasonable obligations cast by the contract on himself,¹⁵³⁹ the court needed to satisfy itself ... that, were his unreasonable obligation to be removed, there would nevertheless remain consideration passing from him under the contract such as would support the obligation which he was seeking to enforce.”¹⁵⁴⁰

This was different from the usual situation where it is the employer who is seeking the severance. Where it is the employer who is seeking severance the employer “is in no way proposing to diminish the consideration passing from himself under the contract” which he seeks to enforce and therefore “in the usual situation the second requirement can be ignored”.¹⁵⁴¹

Impact of removal of unenforceable provision on character of contract

- 18-257 The third requirement for severance is that “the removal of the unenforceable provision does not so change the character of the contract that it becomes ‘not the sort of contract that the parties entered into at all’”.¹⁵⁴² The court considered that this “crucial” criterion could not be equated with the requirements laid down by the majority of the Court of Appeal in the earlier case of *Attwood v Lamont*,¹⁵⁴³ that a covenant can be severed only if effect it is a combination of different covenants and that the part proposed to be removed is no more than trivial or technical, and held

that the decision in the *Atwood* case should be overruled.¹⁵⁴⁴ The court considered that the third requirement: "... would be better expressed as being whether the removal of the covenant would not generate any major change in the overall effect of all the post-employment restraints in the contract. It is for the employer to establish that its removal would not do so".¹⁵⁴⁵

Severance of a condition

- 18-258 Many covenants in restraint of trade will be in conditional form and provide that X will receive £Y on condition that he refrains from doing a particular act. Assuming that the condition is in restraint of trade, the question arises as to whether the severance of the condition is at all possible in that it will transform a conditional obligation on the part of the covenantor into an absolute one; that is, payment of the £Y will be due even though X does not perform part of the bargain. This was the issue in *Marshall v N.M. Financial Management Ltd.*¹⁵⁴⁶ The case involved a provision in a contract for the payment of commission to a self-employed sales agent after the contract's termination. Payment of the commission was conditional on the ex-agent not competing with the defendant for a period of one year. The court held that the anti-competition covenant was in restraint of trade. The question before the court was whether the plaintiff as the party "who has been freed from an invalid restraint of trade can enforce the remainder of the contract without it".¹⁵⁴⁷ The court held that he could since the "whole or substantially the whole [of the] consideration"¹⁵⁴⁸ was not the restraint but the provision of the services that earned the commission.

Where a mortgage imposed upon the mortgagor an obligation, which was in unreasonable restraint of trade, to buy certain kinds of goods only from the mortgagee for 21 years, the unenforceability of the tie was so closely linked with the provision in the mortgage that it should be irredeemable for the same period, that this provision too was held to be unenforceable, though in other respects the enforceability of the mortgage itself was unaffected.¹⁵⁴⁹

Rules of association in part objectionable

- 18-259 If the fundamental object of any association, whether it be a combination to fix prices or a trade union, is obnoxious to the law because it is an unreasonable restraint of trade, at common law the association is illegal and the agreement upon which it is founded is wholly unenforceable.¹⁵⁵⁰ So, for instance, where a society with the militant objects of a trade union combined with these the provident purposes of a friendly society and by its rules members might be expelled and their benefits forfeited for non-compliance with the decisions of committees directing the militant operations, it was held that the main object was illegal as being in restraint of trade and that as the provident rules were inseparably connected with that object, they were affected by its illegality

and were therefore unenforceable.¹⁵⁵¹ If the fundamental object of the association is not unlawful, the fact that certain of its rules are in unreasonable restraint of trade does not make the association unlawful though of course those particular rules cannot be enforced.¹⁵⁵²

Illegality of part of the consideration

- 18-260 Many of the older authorities laid down that if a contract was made on several considerations, one of which was illegal, the whole contract was unenforceable and severance was impossible.¹⁵⁵³ Such a test is unworkable¹⁵⁵⁴ and, as has been recognised in more modern decisions, the partial illegality, and hence unenforceability, is only relevant in one of two ways. First, the severance of the offending clause may so alter the scope of the whole contract as to make it a new contract. The true test under this head is therefore whether the illegal promise is substantially the whole or main consideration for the promise now sought to be enforced. If it is, then the court will not sever it, leaving only a small part of the consideration to support the promise of the defendant¹⁵⁵⁵; otherwise it may. Thus, in *Goodinson v Goodinson*,¹⁵⁵⁶ a husband promised to make regular payments to his wife if she would forbear to bring any matrimonial proceedings against him, would indemnify him against her debts and would not pledge his credit for necessaries. The agreement not to commence matrimonial proceedings was against public policy as an attempt to oust the jurisdiction of the court; but as it did not form the main part of the consideration for the promise to make the payments, the court severed that part of the agreement and enforced the rest in favour of the wife.¹⁵⁵⁷ Similarly an employee can sue for his whole wages notwithstanding that his contract of employment imposes upon him a severable covenant in restraint of trade. An alternative approach is to be found in *South Western Mineral Water Co Ltd v Ashmore*¹⁵⁵⁸; the illegal term of a contract was there severed, but the contract was thereby so altered in scope that it was held to be unenforceable; *restitutio in integrum* was therefore ordered and an order was made for the return of money paid under the contract. Such an order could not have been made but for the severance of the illegal term.¹⁵⁵⁹

Severance and public policy

- 18-261 The court will not sever the bad from the good unless this accords with public policy. For example, part of the consideration for the promise of either party may be such as so gravely to taint the whole contract that there is no ground of public policy requiring the courts to assist either party by severing the offending parts¹⁵⁶⁰: “[i]n all the cases a distinction is taken between a merely void and an illegal consideration”.¹⁵⁶¹ In this context illegal means that which amounts to a criminal offence or is *contra bonos mores*,¹⁵⁶² where, on grounds of public policy, the illegality may, though does

not invariably, preclude severance. Agreements the object of which is to defraud the Revenue,¹⁵⁶³ or which involve trading with the enemy,¹⁵⁶⁴ have been held to be incapable of severance.¹⁵⁶⁵ On the other hand, examples of mere voidness on grounds of public policy are agreements to oust the jurisdiction of the court¹⁵⁶⁶ and agreements which are merely in restraint of trade.¹⁵⁶⁷

Employer and employee covenants in restraint of trade

- 18-262 There is authority for saying that, on grounds of public policy, the courts should be reluctant to sever in favour of an employer¹⁵⁶⁸ the unreasonable clauses in a covenant in restraint of trade made between employer and employee. Thus Lord Moulton in *Mason v Provident Clothing Co Ltd*¹⁵⁶⁹ expressed the view that parts of such a covenant should only be severed:

“... in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause”;

on the ground that it would:

“... be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and, by employing their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required.”

“To hold otherwise,” it has been said,¹⁵⁷⁰ is:

“... to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenantor is unable to face litigation.”

However, more modern authorities¹⁵⁷¹ appear to be in favour of applying to covenants in restraint of trade between employer and employee the same rule as to other covenants, that is to say, the rule that where the parts of a covenant really amount to separate and independent covenants they may be severed from one another, but not otherwise.¹⁵⁷²

Footnotes

- 1521 Where one contract is collateral to another and illegal contract, the former may be “tainted” by the illegality of the latter (see the authorities cited in para.18-221); the courts thus look at the substance of the matter and treat the two transactions as forming a single and unseverable arrangement. In *Spector v Ageda [1973] Ch. 30*, Megarry J expressed the view obiter that where the original transaction is only partially illegal, e.g. by statute, then unless that partial illegality is shown to relate solely to some defined portion of the subsequent transaction, so that only that defined portion is affected, the *whole* of the subsequent transaction will be affected by the illegality. This means that the party to the subsequent transaction is put in a worse position than the party to the original illegal transaction, a view admitted by the judge to be “draconian”, but consistent with the court’s policy against devising means of preventing those who are implicated from burning their fingers more than to a limited extent. Similarly, individual covenants in a contract may be so closely connected that they stand or fall together, although the remainder of the contract may be severable: *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd [1968] A.C. 269, 314, 321*.
- 1522 See *Marsh (1948) 64 L.Q.R. 230, 347*.
- 1523 See *Baker v Hedgecock (1889) 39 Ch. D. 520; Kearney v Whitehaven Colliery Co Ltd [1893] 1 Q.B. 700; S. Nevanas & Co v Walker and Foreman [1914] 1 Ch. 413, 423; British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch. 563*.
- 1524 *Maleverer v Redshaw (1669) 1 Mod. 35*; repudiated in *Collins v Blantern (1767) 2 Wils. K.B. 341, 347, 351*.
- 1525 *Doe d. Thompson v Pitcher (1815) 6 Taunt. 359, 369*.
- 1526 *Pickering v Ilfracombe Ry (1868) L.R. 3 C.P. 235, 250; Payne v Brecon Corp (1858) 3 Hurl. & N. 572; Pallister v Gravesend Corp (1850) 9 C.B. 774; Royal Exchange Assurance Corp v Sjorforsakrings Aktiebolaget Vega [1901] 2 K.B. 567, 573; Chemidus Wavin Ltd v Société Pour La Transformation Et L’Exploitation Des Resines Industrielles SA [1978] 3 C.M.L.R. 514*. cf. *Electrical Trades Union v Tarlo [1984] Ch. 720, 731*.
- 1527 *Gaskell v King (1809) 11 East 165*; and see *Wigg v Shuttleworth (1810) 13 East 87; Howe v Syng (1812) 15 East 440; Greenwood v Bishop of London (1814) 5 Taunt. 727*; as to personal covenants in deeds where the real security is by statute void see *Mouys v Leake (1799) 8 T.R. 411; Gibbons v Hooper (1831) 2 B. & Ad. 734*.
- 1528 *Frank W. Clifford Ltd v Garth [1956] 1 W.L.R. 570*.
- 1529 *Frank W. Clifford Ltd v Garth [1956] 1 W.L.R. 570, 572*.
- 1530 *United City Merchants (Investments) Ltd v Royal Bank of Canada [1982] Q.B. 208, on appeal [1983] 1 A.C. 168*. See also above, para.18-197.
- 1531 *[2019] UKSC 32, [2019] 3 W.L.R. 245*; see Day [2021] L.C.M.L.Q. 134.

- 1532 [2019] UKSC 32 at [53] and [88].
- 1533 [2019] UKSC 32 at [82].
- 1534 [2007] EWCA Civ 613. The tests in *Beckett* are identical with those formulated in *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] I.R.L.R. 388, 392.
- 1535 [2019] UKSC 32 at [85].
- 1536 [1920] 2 K.B. 146, 155 on appeal [1920] 3 K.B. 571.
- 1537 [2019] UKSC 32 at [85].
- 1538 [2019] UKSC 32 at [86].
- 1539 As in *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] I.R.L.R. 388 and *Marshall v N.M. Financial Management Ltd* [1997] 1 W.L.R. 1527.
- 1540 [2019] UKSC 32 at [86].
- 1541 [2019] UKSC 32 at [86].
- 1542 [2019] UKSC 32 at [86].
- 1543 [1920] 3 K.B. 571.
- 1544 [2019] UKSC 32 at [91].
- 1545 [2019] UKSC 32 at [87].
- 1546 [1997] 1 W.L.R. 1527.
- 1547 *Marshall v N.M. Financial Management Ltd* [1997] 1 W.L.R. 1527, 1531.
- 1548 Citing Denning LJ, *Bennett v Bennett* [1952] 1 K.B. 249, 261.
- 1549 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 314, 321. cf. *Petrofina (Gt. Britain) Ltd v Martin* [1966] Ch. 146 where there was no mortgage and the unreasonable restraints were so pervasive as to vitiate the entire contract.
- 1550 *Hilton v Eckersley* (1856) 6 E. & B. 47. See above, paras 18-180—18-184 as to statutory position of such associations.
- 1551 *Russell v Amalgamated Society of Carpenters* [1912] A.C. 421; cf. *Swaine v Wilson* (1889) 24 Q.B.D. 252; *Finch v Oake* [1896] 1 Ch. 409.
- 1552 *Collins v Locke* (1879) 4 App. Cas. 674; *Osborne v Amalgamated Society of Ry Servants* [1911] 1 Ch. 540, 553.
- 1553 *Shackell v Rosier* (1836) 3 Scott 59; *Lound v Grimwade* (1888) 39 Ch. D. 605; *Jones v Merionethshire Permanent Benefit Building Society* [1891] 2 Ch. 587; [1892] 1 Ch. 173.
- 1554 Williston, Contracts, 9th edn, s.7–79; *Marsh* (1948) 64 L.Q.R. 230, 242.
- 1555 *Bennett v Bennett* [1952] 1 K.B. 249; see also *Putsman v Taylor* [1927] 1 K.B. 637, 639, affirmed [1927] 1 K.B. 741; *Chemidus Wavin Ltd v Société Pour La Transformation Et L'Exploitation Des Resines Industrielles SA* [1978] 3 C.M.L.R. 514, CA. [1954] 2 Q.B. 118; see now Matrimonial Causes Act 1973 s.34.
- 1557 And see *Kearney v Whitehaven Colliery Co* [1893] 1 Q.B. 700; *Furlong v Burns & Co* (1964) 43 D.L.R. (2d) 689; *Ailion v Spiekermann* [1976] Ch. 158.
- 1558 [1967] 1 W.L.R. 1110. This case involved the application of Companies Act 1948 s.54, on which see above, para.18-250 (note).

- 1559 See above, paras 18-233, 18-235 et seq.
- 1560 *Kuenigl v Donnersmarck* [1955] 1 Q.B. 515, 537 (in this case the conditions for severance were not satisfied).
- 1561 *Shackell v Rosier* (1836) 3 Scott 59, 74.
- 1562 *Bennett v Bennett* [1952] 1 K.B. 249, 253–254; *Goodinson v Goodinson* [1954] 2 Q.B. 118, 120.
- 1563 *Miller v Karlinski* (1945) 62 T.L.R. 85; *Napier v National Business Agency Ltd* [1951] 2 All E.R. 264. cf. *Lincoln v CB Richards Ellis Hotels Ltd* [2009] EWHC 2344 (TCC) where the court did sever a term from a contract involving tax evasion in assessing damages but the evasion was not a central purpose of the contractual arrangement.
- 1564 *Kuenigl v Donnersmarck* [1955] 1 Q.B. 515.
- 1565 This passage was cited with approval in *Hyland v J. H. Barker (North West) Ltd* [1985] I.C.R. 861, 863–864 where the court held that in determining the continuity of an employee's contract of employment the period during which he was paid an illegal tax-free allowance could not be taken into consideration.
- 1566 *Czarnikow v Roth, Schmidt & Co* [1922] 2 K.B. 478; *Goodinson v Goodinson* [1954] 2 Q.B. 118.
- 1567 e.g. *Ronbar Enterprises Ltd v Green* [1954] 1 W.L.R. 815; and see *Mogul S.S. Co Ltd v McGregor, Gow & Co* [1892] A.C. 25, 46–47; *R. v Stainer* (1870) L.R. 1 C.C.R. 230.
- 1568 But the employee can sever on the ordinary principles so as, e.g. to sue for his whole wages during the continuance of his employment despite the fact that he is subject to an unreasonable restraint: see above, paras 18-252 et seq.; and cf. above, para. 18-164. [1913] A.C. 724, 745.
- 1569 *Goldsoll v Goldman* [1914] 2 Ch. 603, 613; affirmed [1915] 1 Ch. 292 cited with approval in *Attwood v Lamont* [1920] 3 K.B. 571, 595.
- 1570 *Delzenne (Francis) v Klee* (1968) 112 S.J. 583; *Lucas & Co Ltd v Mitchell* [1974] Ch. 129; *Stenhouse Australia Co Ltd v Phillips* [1974] A.C. 391. cf. *Ronbar Enterprises v Green* [1954] 1 W.L.R. 815, 820.
- 1571 *S. Nevanas & Co v Walker and Foreman* [1914] 1 Ch. 413, 423 (where it was said that the remarks of Lord Moulton cited above were not intended to apply where parts of a covenant are clearly severed by the parties themselves so as to amount to separate covenants); *Putsman v Taylor* [1927] 1 K.B. 637, 641; *Spink (Bournemouth) Ltd v Spink* [1936] Ch. 544.

Section 9. - Pleading and Practice

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Volume I - General Principles

Part 6 - Illegality and Public Policy

Chapter 18 - Illegality and Public Policy

Section 9. - Pleading and Practice ¹⁵⁷³

Presumption of legality

- 18-263 The party alleging the illegality of the contract bears the legal burden of proving this fact ¹⁵⁷⁴; therefore if the contract be reasonably susceptible of two meanings or two modes of performance, one legal and the other not the legal burden of proving its illegality is undischarged and that interpretation is to be put upon the contract which will support it and give it operation. ¹⁵⁷⁵ If the contract on the face of it shows an illegal intention, an evidential burden lies upon the party supporting the contract to bring evidence reasonably capable of showing the legality of the intention. ¹⁵⁷⁶

Pleading of illegality

- 18-264 Where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; there is no “general principle that the claimant must either plead, give evidence of or rely on his own illegality”. ¹⁵⁷⁷ For the principle to apply the claim must arise out of criminal or illegal conduct of the claimant and it has been held that “arises out of” clearly denotes a causal connection with the conduct. ¹⁵⁷⁸ Illegality involves “acts which are contrary to the public law of the state and engage the public interest”, ¹⁵⁷⁹ and this is why the judge:

“... may be required to take a point on illegality of his own motion, contrary to the ordinary adversarial practice of the English courts.” ¹⁵⁸⁰

Secondly, where the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded. Thirdly, where unpleaded facts, which, taken by themselves, show an illegal object, have been put in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it. But fourthly, where the court¹⁵⁸¹ is satisfied that all the relevant facts are before it and it can clearly see from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.¹⁵⁸² It has been said that counsel is not acting improperly in inviting the court to consider the possible, though unpleaded, illegality of a transaction but that on the contrary counsel's duty is to prevent the court from enforcing illegal transactions.¹⁵⁸³

Costs

¹⁸⁻²⁶⁵ Where a defendant successfully raises a plea of illegality, the ordinary rules as to costs apply.¹⁵⁸⁴

Footnotes

- 1573 On the proper role of appellate courts in cases where the range of factors' approach is applied, see above, para.18-034.
- 1574 *Hire-Purchase Furnishing Co v Richens* (1887) 20 Q.B.D. 387, 389.
- 1575 *R. v Inhabitants of Haslingfield* (1814) 2 M. & S. 558; *Bennett v Clough* (1818) 1 B. & Ald. 461; *Lewis v Davison* (1839) 4 M. & W. 654, 657; *Mittelholzer v Fullarton* (1842) 6 Q.B. 989; *Edler v Auerbach* [1950] 1 K.B. 359, 368; *Archbolds (Freightage) Ltd v S. Spanglett Ltd* [1961] 1 Q.B. 374, 391–392.
- 1576 *Holland v Hall* (1817) 1 B. & Ald. 53.
- 1577 *Cross v Kirkby* [2000] EWCA Civ 426 at [76]; *AB (by his litigation friend CD) v Royal Devon & Exeter NHS Foundation Trust* [2016] EWHC 1024 (QB) at [81].
- 1578 [2000] EWCA Civ 426 at [76].
- 1579 *Bilta (UK) Ltd* [2015] 2 W.L.R. 1168 at [100].
- 1580 [2015] UKSC 23 at [100].
- 1581 The rule applies to appellate courts as well as to courts of first instance: *Snell v Unity Finance Ltd* [1964] 2 Q.B. 203.
- 1582 *Edler v Auerbach* [1950] 1 K.B. 359, 371. See *Holman v Johnson* (1775) 1 Cowp. 341; *Evans v Richardson* (1817) 3 Mer. 469; *Scott v Brown, Doering, McNab & Co* [1892] 2 Q.B. 724; *Gedge v Royal Exchange Assurance Corp* [1900] 2 Q.B. 214; *North Western Salt Co v Electrolytic Alkali Co Ltd* [1913] 3 K.B. 422, 424; [1914] A.C. 461, 476,

477; *Montefiore v Menday Motor Components Co Ltd* [1918] 2 K.B. 241; *Alexander v Rayson* [1936] 1 K.B. 169, 190; *Commercial Air Hire Ltd v Wrightways Ltd* [1938] 1 All E.R. 89; *Palaniappa Chettiar v Arunasalam Chettiar* [1962] A.C. 294; *Snell v Unity Finance Co Ltd* [1964] 2 Q.B. 203; *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242, 261–262, 276; *Crouch and Lees v Haridas* [1972] 1 Q.B. 158; U.C.M. v *Royal Bank of Canada* [1983] 1 A.C. 168, 169; the law is summarised in *Bank of India v Trans Continental Commodity Merchants Ltd* [1982] 1 Lloyd's Rep. 427, 429; *Birkett v Acorn Mechanics Ltd* [1999] 2 All E.R. (Comm) 429; *Pickering v JA McConville* [2003] EWCA Civ 554; *Bim Kemi AB v Blackburn Chemicals Ltd* [2004] EWHC 166 (Comm), [2004] EWCA Civ 1490 (court could take notice that agreement infringed art.101 TFEU and was thus void); *Western Power Investment Ltd v Teesside Power Ltd* Unreported 18 February 2005.

1583 *Mercantile Credit Co Ltd v Hamblin* [1964] 1 W.L.R. 423; affirmed on other grounds [1965] 2 Q.B. 242.

1584 *Sphinx Export Co Ltd v Specialist Shippers Ltd* [1954] C.L.Y. 1440.